



*To enhance mission performance, TSA is committed to promoting a culture founded on its values of Integrity, Innovation and Team Spirit.*

*NOTE: Pursuant to Section 101 of the Aviation and Transportation Security Act (49 U.S.C. 114(n)), this directive establishes Transportation Security Administration (TSA) policy regarding Whistleblower Protections for TSOs. This directive is TSA policy and must be applied accordingly.*

1. **PURPOSE:** This directive provides TSA policy and procedures for reporting, investigating, and processing whistleblower retaliation allegations raised by Transportation Security Officers (TSOs). This directive cancels and supersedes HRM Letter No. 1800-01, dated November 20, 2002.
2. **SCOPE:** This directive applies to all current TSOs, applicants for TSO positions on or after February 26, 2008, and former TSOs who were TSA TSOs on or after February 26, 2008.
3. **AUTHORITIES:**
  - A. Aviation and Transportation Security Act, Pub. L. 107-71 (ATSA)
  - B. 5 U.S.C. § 2302(b)(8)
  - C. 49 U.S.C. § 114(s)
  - D. 49 CFR part 1520
  - E. [Department of Homeland Security \(DHS\) MD 11042.1, Safeguarding Sensitive But Unclassified \(For Official Use Only\) Information](#)
  - F. Memorandum of Understanding (MOU) between TSA and the U.S. Office of Special Counsel (OSC), Regarding Whistleblower Protections for TSOs, dated May 28, 2002.
  - G. Memorandum of Agreement (MOA) between TSA and the Merit Systems Protection Board (MSPB), regarding Individual Right of Action Appeals filed by TSOs or applicants for TSO positions, dated February 26, 2008.
4. **DEFINITIONS:**
  - A. Alternative Dispute Resolution (ADR) Unit: This OSC unit offers mediation in selected cases which have been referred for investigation, when it is determined that mediation might be appropriate. Participation in the OSC mediation program is completely voluntary for both the complainant and TSA. If both parties agree to mediate their dispute, an OSC mediator will facilitate a discussion between the parties to reach a mutually agreeable resolution to the complaint.
  - B. Appellant: A TSO, an applicant for a TSO position on or after February 26, 2008, or a former TSO, who was a TSA TSO on or after February 26, 2008, who has filed an Individual Right of Action Appeal or related action with MSPB on or after February 26, 2008.

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- C. Case Liaison: An individual designated by TSA to coordinate with OSC examiners, investigators, and attorneys on case processing issues. The Case Liaison will have sufficient authority to require other agency employees to comply with requests for documents in a timely manner and will have direct access to a TSA official with authority to settle cases. The Case Liaison will be neutral, and will not represent any individual agency official in connection with OSC investigations. The Case Liaison will receive training by OSC staff on OSC policies and procedures related to initial intake, investigation, and case resolution policies and procedures.
- D. Classified Information: Official information or material that requires protection in the interest of national security and is classified for such purpose by an appropriate classification authority in accordance with the provisions of Executive Order 12958, Classified National Security Information.
- E. Complainant: A TSO, an applicant for a TSO position on or after February 26, 2008, or a former TSO, who was a TSA TSO on or after February 26, 2008, who has filed a whistleblower retaliation complaint with OSC.
- F. Complaints Examining Unit (CEU): An OSC division that receives complaints filed with OSC and initially analyzes all allegations of whistleblower retaliation.
- G. Corrective Action: Generally, the placement of an employee, as nearly as possible, into the position he or she would have held had the alleged whistleblower retaliation not occurred. These corrective actions will include back pay and related benefits, medical costs incurred, travel expenses and any other reasonable and foreseeable consequential damages, as well as attorney's fees, in accordance with TSA policy. Damages for emotional distress, i.e., pain and suffering, are not included.
- H. Former TSO: An individual who was a TSA TSO on or after February 26, 2008, but who has since left employment with TSA or is a TSA employee, but no longer a TSO.
- I. Individual Right of Action (IRA) Appeal: An appeal to MSPB relating to whistleblower retaliation, submitted by a TSO, a former TSO, or TSO applicant, after a case is closed by OSC or when a case has been with OSC for over 120 days without final action.
- J. Investigation and Prosecution Division (IPD): This OSC division conducts investigations to review pertinent records, and interviews complainants and witnesses with knowledge of the matters alleged. Matters not resolved during the investigative phase undergo legal review and analysis to determine whether the IPD inquiry has established there are reasonable grounds to believe retaliation has occurred, and whether the matter warrants corrective action, disciplinary action, or both.
- K. Mediation: Mediation is an informal process in which a neutral third party, the mediator, assists the opposing parties in reaching a voluntary, negotiated resolution of a complaint. Mediation is different from other forms of dispute resolution in that the parties participate voluntarily, and the mediator has no authority to make a decision.

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- L. Mediation Appeals Program (MAP): This MSPB program provides parties with an additional means for resolving their appeal. Under MAP procedures, the regional office notifies the parties of the availability of mediation soon after the appeal is docketed and acknowledged. If the parties share a mutual interest in participating in mediation, the case is placed in a suspense status and assigned to an MSPB trained mediator from one of its headquarters or regional offices. If the mediation results in a settlement of the appeal, the agreement is reduced to writing and submitted to the regional office for review and preparation of a decision dismissing the petition for appeal as settled. If an agreement is not reached within a reasonable period of time, the appeal is removed from its suspense status and returned to the adjudication track.
- M. Merit Systems Protection Board (MSPB): The MSPB is an independent Executive branch Federal agency that has agreed to adjudicate IRA appeals filed by current TSOs, former TSOs, and applicants for TSO positions.
- N. Personnel Action: A personnel action means an appointment; a promotion; an adverse action (a suspension of any length, including an indefinite suspension, a removal, or a reduction in pay band or rate of pay), or other disciplinary action; a Letter of Counseling or Letter of Guidance and Direction; a detail; a transfer; a reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation; a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described within 5 U.S.C. § 2302(a)(2); a decision to order psychiatric testing or examination, and any other significant change in duties, responsibilities, or working conditions.
- O. Project Liaison: The primary TSA contact with OSC on issues related to policy, procedures, training, reports, press releases and any other issues, as necessary.
- P. Related Appeals: Appeals related to or arising from IRA appeals, specifically, petitions for enforcement of MSPB decisions on TSO IRAs, petitions for attorney's fees, and requests for a stay of agency action pending the processing of the IRA appeal and claims for consequential damages.
- Q. Sensitive Security Information (SSI): SSI is a category of sensitive but unclassified (SBU) information that is governed by the provisions of 49 CFR part 1520. SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would be detrimental to transportation security. Please see the [Appendix](#) for detailed information on SSI as it relates to the OSC complaint and MSPB appeals process.
- R. TSOs: All TSA employees subject to the provisions of 49 U.S.C. § 44935.
- S. U.S. Office of Special Counsel (OSC): OSC is an independent federal investigative and prosecutorial agency that has agreed to process whistleblower retaliation complaints filed by TSOs, former TSOs, and applicants for TSO positions.
- T. Whistleblowing: The disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to

public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive Order to be kept secret in the interest of national defense, security, or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency or an employee designated by the head of the TSA or DHS to receive it.

**5. RESPONSIBILITIES:**

- A. The Assistant Secretary or Deputy Assistant Secretary is responsible for determining when a suspension, removal, or other personnel action involving a TSO, former TSO or applicant for a TSO position is necessary because of compelling national security concerns.
  
- B. The Office of Human Capital (OHC) is responsible for:
  - (1) Promulgating guidance on whistleblower retaliation complaints and appeals filed by TSOs, former TSOs and applicants for TSO positions.
  - (2) Ensuring that materials providing training on whistleblower protection and procedures are included in the orientation materials distributed to all TSOs. This will also include information about whistleblower disclosure procedures.
  - (3) Updating and modifying the information on whistleblower protections, as necessary, and ensuring its timely distribution to the TSO workforce.
  - (4) Coordinating the implementation of OSC recommended corrective actions, if any, and MSPB decisions.
  
- C. The Office of Chief Counsel (OCC) is responsible for:
  - (1) Working with OHC and TSA managers and supervisors when TSOs file whistleblower retaliation complaints.
  - (2) Appointing a Case Liaison.
  - (3) Assigning an attorney to represent TSA before MSPB.
  
- D. The Office of Security Operations (OSO) is responsible for:
  - (1) Ensuring that appropriate corrective and/or disciplinary action is implemented in a timely manner.
  - (2) Ensuring cooperation with the Case Liaison, OCC, and OHC personnel during the whistleblower retaliation complaint process.
  
- E. The Chief Financial Officer is responsible for coordinating payments associated with corrective actions, as appropriate.
  
- F. TSA managers and supervisors are responsible for:

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- (1) Preventing retaliation for whistleblowing and ensuring that employees are informed of their rights and complaint procedures.
- (2) Making employees available to provide statements and/or testify as needed.
- (3) Coordinating with the Case Liaison and/or OCC attorney to provide all pertinent information to OSC and MSPB, if applicable.
- (4) Disallowing an appellant's chosen representative if TSA determines that the representation creates a conflict of interest or the representative, if a TSA employee, cannot be spared because of critical TSA work. If this occurs, the appellant should provide the name of a new representative as soon as possible, usually within 48 hours. Additional information concerning employee representation may be found in [TSA MD 1100.63-3, \*Employee Representation\*](#).

G. Employees are responsible for:

- (1) Following the procedures in this directive when filing a whistleblower retaliation complaint.
- (2) Providing information and cooperating fully with the Case Liaison and/or OCC, relating to an OSC investigation or MSPB proceeding.
- (3) Following the procedures for whistleblower retaliation complaints and MSPB appeals as outlined in this directive.

H. OSC is responsible for:

- (1) Receiving and reviewing complaints of alleged whistleblower retaliation.
- (2) Recommending corrective action to TSA for whistleblower retaliation where appropriate.

I. MSPB is responsible for:

- (1) Adjudicating IRAs based on alleged whistleblower retaliation complaints and appeals submitted by TSOs, former TSOs, or applicants for TSO positions. The following types of actions are covered:
  - (a) IRA appeals of personnel actions;
  - (b) Requests for stays of personnel actions allegedly based on whistleblower retaliation, pursuant to 5 CFR part 1209.8 – 1209.11;
  - (c) Petitions for enforcement of MSPB orders determining the outcome of IRA appeals, pursuant to 5 CFR part 1201.181 – 1201.183;
  - (d) Orders of appropriate relief, including attorneys' fees and consequential damages, in accordance with TSA policies.

- (2) Applying existing Board precedent in TSO IRA appeals and related appeals except to the extent that such precedent conflicts with applicable TSA directives, policies, and rules.
- (3) Adjudicating TSO IRAs and related appeals consistent with 5 CFR parts 1201 and 1209, except as modified herein.

**6. POLICY:**

- A. An employee who has authority to take, direct others to take, recommend, or approve any personnel action may not, with respect to such authority, take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of:
- (1) Any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences:
    - (a) A violation of any law, rule, or regulation; or
    - (b) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.
  - (2) Any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences:
    - (a) A violation of any law, rule, or regulation; or
    - (b) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
- B. TSA will adhere to the whistleblower protection policies as outlined in the MOU with OSC that track the provisions of 5 U.S.C. § 2302(b)(8). OSC will use applicable case law in processing complaints alleging violations of 5 U.S.C. § 2302(b)(8) when assessing complaints under the provisions of the MOU with TSA.
- C. Disclosures of classified or Sensitive Security Information (SSI) may be made ONLY to persons authorized to receive such information. This may include authorized employees in the Office of Inspector General (OIG) or the OSC. Disclosures of classified or SSI material to persons unauthorized to receive such information are NOT protected. See the [Appendix](#) for additional information concerning SSI.
- D. TSA will take corrective and/or disciplinary action when MSPB determines that retaliation for protected whistleblowing occurred.

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- E. The Assistant Secretary or Deputy Assistant Secretary of TSA may determine that a suspension, removal, or other personnel action was necessary because of compelling national security concerns. This determination must be made by the Assistant Secretary or Deputy Assistant Secretary, without further redelegation. Examples of compelling national security concerns include, but are not limited to:
- (1) A complainant or appellant is found to have intentionally or willfully aided or abetted an act, or potential act of terrorism.
  - (2) A complainant or appellant is found to have intentionally or willfully allowed the improper transportation or importation of illegal weapons (including but not limited to weapons of mass destruction) or materials to be used for the purpose of committing or contributing to a terrorist act.
  - (3) A complainant or appellant cannot be returned to TSA employment because of information indicating that the individual is a threat to national security.
- F. TSA employees will cooperate fully with OSC investigations or MSPB adjudications. Failure by any TSA employee to cooperate may result in disciplinary action, up to and including removal.

**7. PROCEDURES:**

- A. TSOs who believe they have been subject to whistleblower retaliation must first file a complaint with the OSC.
- (1) All TSO complaints must be submitted by the TSO to OSC on a completed Form OSC-11, *Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity*.
    - (a) Form OSC-11 may be printed directly from the OSC web site at [www.osc.gov](http://www.osc.gov) (see Forms and Publications). To receive a mailed copy of Form OSC-11, TSOs may contact OSC at (800) 872-9855 or (202) 653-7188.
    - (b) Completed OSC complaint forms should be sent to:

U.S. Office of Special Counsel  
Complaints Examining Unit (CEU)  
1730 M Street, NW, Suite 218  
Washington, DC 20036-4505
  - (2) Complainants may request that OSC seek a stay of a personnel action pending an investigation. If the available evidence indicates there are reasonable grounds to believe that a violation of this directive has occurred, OSC may ask the TSA Case Liaison to delay the personnel action.
    - (a) Informal requests for stays will be communicated in the first instance by OSC to the TSA Case Liaison. If the Case Liaison informs OSC that the request for an informal stay has been denied, OSC may then make a formal written request to the Deputy

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Assistant Secretary of TSA or his/her designee. That official will inform OSC within five calendar days whether the formal stay request will be granted in full, partially granted (i.e., by temporarily assigning the TSO to non-TSO duties), or denied. If a stay or partial stay is granted, the investigation will receive priority treatment consistent with OSC policy.

- (b) An initial request for a stay will be for 45 calendar days. If a stay is granted and the investigation is not complete at the end of the 45-day period, and reasonable grounds continue to exist for believing that a violation occurred, OSC will discuss the progress of the investigation and legal review with the TSA Case Liaison, and request an extension of the stay. TSA has the sole, non-reviewable, discretion to grant or deny a request by OSC for any extension of the initial 45-day period.
- (3) If OSC makes a determination, following an investigation, that there are reasonable grounds to believe there has been a violation warranting corrective or disciplinary action, OSC may attempt to resolve the issues. If informal resolution is not possible, OSC will transmit a Report of Findings and Recommendations to the Assistant Secretary of TSA which sets forth the facts and legal analysis that support the determination and any recommendations with respect to appropriate corrective or disciplinary action.
  - (a) TSA will have 30 calendar days to consider the recommended corrective or disciplinary action and work with OSC. If OSC determines that corrective action is warranted, the investigator or attorney will contact the complainant and TSA to discuss settlement of the complaint. In some instances it is not possible to restore the complainant to the same position he or she would have held had the retaliation not occurred, or the complainant may not want to be placed in that position.
  - (b) If resolution is not possible, the Assistant Secretary, or his/her designee, will respond to the OSC Report of Findings and Recommendations, informing OSC what action, if any, TSA will take. This response period may be extended upon agreement between TSA and OSC. In any case where a complaint by a TSO involves alleged retaliation by a TSA official at the level of the Deputy Assistant Secretary or above, a decision by the Assistant Secretary not to follow OSC's recommended corrective or disciplinary action in the particular matter will be referred to the Secretary of DHS for further consideration.

**B. If OSC closes a complaint at any time without resolving the issues, or if it holds the complaint without final action for more than 120 calendar days, the complainant may then file an IRA with MSPB.**

- (1) **If OSC closes a complaint, the complainant must file the IRA within 60 calendar days of the date the complaint is closed.**
- (2) Complainants will find the MSPB Form 185, *Merit Systems Protection Board Appeal Form* and instructions at [www.mspb.gov](http://www.mspb.gov). Generally, individuals may file an IRA appeal using the MSPB's e-Appeal online filing system or by using the procedures set forth in 5 CFR part 1201.22 (d). The MSPB e-Appeal online filing system may not be used to file any document that contains SSI. A complainant may, however, file a "hybrid" pleading

pursuant to 5 CFR part 1201.14 (h), in which part of the pleading is submitted electronically, and part of the pleading is submitted by non-electronic means. Any document that contains SSI, and which is filed with the MSPB by facsimile transmission, must comply with the provisions of Section D (4) of the Appendix.

**NOTE:** If a complainant files an IRA electronically, SSI must be protected. Please refer to the [Appendix](#) for additional information concerning SSI.

- (3) An appellant generally has the right to a hearing if the MSPB has jurisdiction over the appeal and the appeal is timely filed or if the appellant demonstrates good cause for an untimely filed appeal. However, when the administrative judge finds that material facts are not in genuine dispute, he or she must issue an initial decision without conducting a hearing, as appropriate. The appellant must submit any request for a hearing with the appeal, or within any other time period the administrative judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived. There is no right to a hearing in corrective action cases.
- (4) The Board and the administrative judge must disallow an appellant's chosen representative if TSA determines that the representation creates a conflict of interest or position. The representative, if a TSA employee, can also be disallowed if he/she cannot be spared because of critical TSA work. If the appellant's representative is disallowed, the appellant should provide the name of a new representative as soon as possible, usually within 48 hours. Please refer to [TSA MD 1100.63-3, Employee Representation](#), for more information.
- (5) The appellant and the representative, if a TSA employee, will be allowed a reasonable amount of official time to prepare and present the appeal. Costs associated with the representation, including any travel expenses, will be the responsibility of the appellant.
- (6) Any party may file for a summary judgment if the party believes that material facts are not in genuine dispute and that the party may be entitled to judgment as a matter of law.
  - (a) Each motion for summary judgment shall be accompanied by a statement separately listing all material facts as to which the moving party contends there is no genuine dispute. The statement shall include references to those parts of the record, including any affidavits, declarations under penalty of perjury, or other evidence attached to the motion, relied on to support the statement.
  - (b) An opposition to a motion for summary judgment shall be accompanied by a statement separately listing all material facts as to which the party contends there exists a genuine dispute for hearing. The statement in opposition shall include references to those parts of the record, including any affidavits, declarations under penalty of perjury or other evidence attached to the opposition, relied on to support the statement. The party opposing a motion for summary judgment may not rest on the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine dispute for hearing.

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- (c) Any party may file a motion for summary judgment no later than 15 calendar days after the time limit for the completion of discovery set in the MSPB's acknowledgment order, or other time limit set by the administrative judge. An opposition to a motion for summary judgment shall be filed within 15 calendar days of service of the motion, or at the time specified by the administrative judge.
  - (d) If the administrative judge determines on his or her own initiative that material facts may not be in genuine dispute, he or she may, after giving the parties written notice and at least 15 calendar days to respond in writing, find that material facts are not in genuine dispute. The written notice to the parties shall include a statement separately listing all material facts as to which the administrative judge believes there is no genuine dispute.
  - (e) If, after considering the parties' submissions, the administrative judge finds that material facts are not in genuine dispute, he or she must grant summary judgment without conducting a hearing.
- (7) Hearings shall be closed to the public absent good cause shown for holding hearings open to the public. Where the appellant requests a hearing and summary judgment is not appropriate, generally the parties, the witnesses, and the administrative judge shall attend hearings in person. However, the administrative judge, in his or her discretion, may hold the hearing in whole or in part by telephone, videoconference, or in person at the MSPB's regional or field office or at a designated hearing site listed in Appendix III to 5 CFR part 1201. Among the factors that the administrative judge will consider in deciding whether to hold a hearing in whole or in part by videoconference or telephone are:
- (a) Whether the Agency Representative is able to secure use of video conferencing equipment and the distance that the appellant and/or the appellant's representative must travel to access video conferencing equipment;
  - (b) A comparison of the total costs of holding an in-person, video, or telephonic hearing;
  - (c) The distance the parties and their witnesses would have to travel to appear in person; and
  - (d) Whether appearance by videoconference or telephone of the appellant or his or her witnesses would unduly prejudice the appellant.
- (8) The MSPB will not adjudicate any class actions pursuant to this directive.
- (9) TSA shall have the right to file a motion seeking reconsideration of an MSPB order imposing corrective or disciplinary action in any case where TSA believes that compliance with the MSPB order will have a significant negative impact on TSA's performance of its duties related to public safety or national security. This motion must be filed within 15 calendar days of the date the decision is issued. The filing of a motion for reconsideration shall automatically stay the underlying MSPB order until the MSPB issues a decision on the motion.

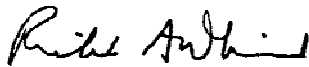
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- (a) The appellant shall have 15 calendar days to file an opposition to TSA's motion to reconsider.
  - (b) The MSPB shall issue a written decision addressing the request for reconsideration. If the MSPB determines that substantial evidence supports TSA's claim of a significant negative impact on TSA's performance of its duties related to public safety or national security, the MSPB shall reconsider the actions ordered and order appropriate corrective and disciplinary action that will not have a significant negative impact on TSA's performance of its duties related to public safety or national security.
- (10) The parties' rights to appeal from an initial decision of an administrative judge shall be limited to filing a petition for review with the Board, under the provisions of 5 CFR part 1201.114-118. No judicial review is permitted.

- D. National Security Exception: When the Assistant Secretary or Deputy Assistant Secretary issues a finding that a suspension, removal, or other personnel action was taken for compelling national security reasons (see [Section 6E](#)), TSA will issue a notice to MSPB. MSPB, upon receipt of the notice, will dismiss the appeal and so notify the appellant. There is no further appeal from this dismissal.
- E. Sensitive Security Information (SSI): See the [Appendix](#) for information on access to SSI for TSOs and their representatives engaged in the OSC and MSPB process. Unauthorized disclosure of SSI is grounds for civil penalties and other enforcement or corrective actions including disciplinary actions and/or monetary fines.

**8. EFFECTIVE DATE AND IMPLEMENTATION:** This policy is effective immediately upon signature.

**APPROVAL**



9-10-08

\_\_\_\_\_  
Richard A. Whitford, Assistant Administrator  
for Human Capital

\_\_\_\_\_  
Date

Filing Instructions: File 200.1.1

Effective Date: 9-10-08

Review Date: 9-10-10

Distribution: Assistant Secretary/Administrator, Deputy Administrator, Associate Administrator, Assistant Administrators, Area Directors, Federal Security Directors, all Transportation Security Officers

Point-of-Contact: Office of Human Capital Policy, [TSA-OHC-Policy@dhs.gov](mailto:TSA-OHC-Policy@dhs.gov)

APPENDIX

**SENSITIVE SECURITY INFORMATION (SSI)**

**A. General.**

- (1) SSI is a category of sensitive but unclassified (SBU) information that is governed by the provisions of 49 Code of Federal Regulations (CFR) part 1520 and [Department of Homeland Security \(DHS\) Management Directive \(MD\) 11056.1, Sensitive Security Information](#) and [DHS MD 11042.1 Safeguarding Sensitive But Unclassified Information](#). As defined in 49 CFR part 1520.5, SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would, if disclosed, be detrimental to the security of transportation.
- (2) Requirements related to the possession, safeguarding, transmission, marking, disclosure, use, and destruction of SSI are set forth in 49 CFR part 1520 and [DHS MD 11056.1 Sensitive Security Information](#). Unauthorized disclosure of SSI is grounds for civil penalties and other enforcement or corrective actions including disciplinary actions and/or monetary fines.

**B. Access to SSI for appellants and their representatives engaged in the U.S. Office of Special Counsel (OSC) and Merit Systems Protection Board (MSPB) processes.**

- (1) Individuals identified as “covered persons” under 49 CFR part 1520.7 may have access to or create records containing SSI if they have a need to know the information. Federal employees, including employees of the OSC and MSPB, are covered persons. 49 CFR part 1520.11(b)(1). Current and former TSA employees and their designated representatives are covered persons under 49 CFR parts 1520.7(k)-(j) and 1520.11(a)(5). In addition, covered persons include court reporters who are under contract to a covered person and who sign a DHS Non-Disclosure Agreement provided by the agency representative. Paralegals and other support staff assisting appellant’s representative are not covered persons and may not be given access to SSI.
- (2) As used in this Appendix, a covered person has a “need to know” SSI as defined in 49 CFR part 1520.11. Generally, a covered person has a need to know specific SSI when he or she requires access to the information in the performance of his or her official duties or when he or she requires access to that same specific SSI in order to represent a covered person in connection with an OSC or MSPB proceeding. Covered persons may only have access to SSI if he or she has a need to know as defined by 49 CFR part 1520.11. A covered person does not have a right to access SSI for which he or she does not have a need to know.
- (3) If, at any time, TSA determines that a covered person possesses SSI for which the appellant did not have a “need to know” as defined by 49 CFR part 1520.11, TSA may require the return of, redactions to, or destruction of said SSI. Covered persons immediately shall comply with TSA’s direction regarding such SSI.

**C. Notice concerning relevant SSI.** As soon as either the complainant, appellant, or TSA determines that SSI is relevant to the matters at issue in a complaint filed with OSC or in an MSPB appeal

covered by this directive, that party must notify the OSC or the MSPB administrative judge and the opposing party that SSI is relevant to the matter.

**D. Protecting SSI.**

- (1) Generally: All covered persons who possess records containing SSI are responsible for ensuring that those records are safeguarded at all times to prevent disclosure to unauthorized persons. When unattended, SSI must be secured in a locked container or in a room or area that has sufficient physical access control measures to afford adequate protection and prevent unauthorized access by members of the public, visitors, or other persons without a need to know, such as a locked room, or an authorized area where access is controlled by a guard, cipher lock, or card reader. When SSI is removed from an authorized storage location and persons without a need to know are present, or where casual observation would reveal SSI to unauthorized persons, measures such as an unmarked folder, envelope, or SSI cover sheet shall be used to prevent unauthorized or inadvertent disclosure.
- (2) Electronic Files: Any electronic file containing SSI must be password-protected. All passwords must be of eight character minimum length, have at least one letter capitalized, contain at least one number, and not be a word in the dictionary. At no time may a TSA employee share a standard TSA developed password with a non-employee, even with his or her representative in an OSC or MSPB proceeding.
- (3) Email: A record containing SSI may be transmitted to an authorized person via email if that record is password-protected. No SSI may be placed in the body of an email; it must be transmitted as a password-protected attachment. The same password may be applied to multiple documents. The sender of an email containing SSI may transmit the password either in person, by telephone, or in an email sent separately from the SSI record it is protecting.
- (4) Facsimile: Before sending a fax containing SSI, the sender must confirm that the fax number of the covered person is current and valid, and that the recipient is available at the receiving location to promptly retrieve the information. Faxed SSI must have a cover sheet that clearly identifies the sender's name and telephone number, and it should contain the following warnings:

***This facsimile is intended for the recipient only. If this is received by someone other than the intended recipient, the person receiving the message should immediately contact the sender for further instructions.***

***The protective marking SENSITIVE SECURITY INFORMATION and/or the distribution limitation statement on this document are canceled when the attachments containing SSI are removed.***

- (5) Mail: SSI may be transmitted by the U.S. Postal Service first class mail or regular parcel post, or by other delivery services (e.g., Federal Express, UPS). SSI sent by mail or by a delivery service must be wrapped in an opaque envelope, wrapping or carton to prevent inadvertent visual disclosure. The package must be addressed with an attention line containing the name and office of the recipient to help ensure the SSI material is received and opened only by authorized personnel.

- (6) E-filing: The MSPB e-Appeal online filing system may not be used to file any document that contains SSI. Parties may, however, file “hybrid” pleadings, pursuant to 5 CFR part 1201.14(h), in which part of the pleading is submitted electronically, and part of the pleading is submitted by non-electronic means. Any document that contains SSI, and which is filed with the MSPB by facsimile transmission or mail delivery, shall comply with the provisions of Sections D(4) and D(5) of this Appendix, respectively. Should the MSPB discover, or receive notice from either party, that non-password-protected SSI is present on an MSPB electronic filing system, it shall immediately remove any such material.

**E. Marking SSI.**

- (1) A person who creates a record containing SSI, including a pleading, motion, notice or exhibit, must, in accordance 49 CFR part 1520.13, include a protective marking and distribution limitation statement that clearly identifies the record as containing SSI.
- (a) Protective Marking: The protective marking must be applied to all records that contain SSI. It must be typed or stamped in a plain style bold type. The protective marking is: **“SENSITIVE SECURITY INFORMATION.”**
- (b) Distribution Limitation Statement: The distribution limitation statement must be applied to all records that contain SSI. It must be typed or stamped in a plain style bold type. The distribution limitation statement is:

***Warning: This record contains Sensitive Security Information that is controlled under 49 CFR parts 15 and 1520. No part of this record may be disclosed to persons without a “need to know”, as defined by 49 CFR parts 15 and 1520, except with the written permission of the Administrator of the Transportation Security Administration or the Secretary of Transportation. Unauthorized release may result in civil penalty or other action. For U.S. government agencies, public disclosure is governed by 5 U.S.C. 552 and 49 CFR parts 15 and 1520.***

**F. Document Handling in OSC and MSPB Proceedings.**

- (1) When producing any record containing SSI, a covered person must protect such record in accordance with section D of this Appendix and ensure that it is marked in accordance with section E of this Appendix.
- (2) If TSA produces records containing SSI to a covered person in an OSC or MSPB proceeding, the covered person must protect such records in accordance with section D of this Appendix.

**G. Depositions in MSPB Proceedings.**

- (1) If an appellant believes that, during a deposition, SSI will be discussed or produced in an exhibit, the appellant must provide notice to TSA no later than ten days prior to such deposition. Prior to the start of a deposition at which SSI will be discussed or produced in an exhibit, the court reporter must sign a DHS Non-Disclosure Agreement, which TSA will provide.

- (2) All exhibits containing SSI introduced during depositions must be protected and marked in accordance with sections D and E of this Appendix.
- (3) When it is reasonable to believe that SSI may be discussed during a deposition, only covered persons with a need to know may be present in the deposition room. Covered persons must comply with a TSA attorney's determination that the room must be cleared in order to safeguard SSI.
- (4) If, during a deposition, a covered person solicits from a deponent the disclosure of SSI for which the appellant did not have a need to know, as defined by 49 CFR part 1520.11, the TSA attorney present shall instruct the deponent not to answer.

**H. Filings in MSPB Proceedings.** Covered persons must file under seal any pleadings, motions or exhibits containing SSI. All such filings must be marked and protected in accordance with sections D and E of this Appendix.

**I. Closed MSPB Hearings.**

- (1) MSPB hearings shall be closed to the public, absent good cause shown for opening hearings or portions thereof. Hearings, or portions thereof, in which SSI may be disclosed, always shall be closed to the public. Transcripts, including video or audio, of hearings containing SSI shall be protected in accordance with Sections D and E of this Appendix.
- (2) At any MSPB hearing held by videoconference or telephone, the MSPB Administrative Judge shall require each participant to certify that he/she is in a location providing privacy, i.e., away from the public where there is no risk of being overheard.
- (3) In all MSPB hearings, covered persons shall fully cooperate with efforts to avoid the disclosure of SSI during open portions of MSPB hearings.

**J. Protecting SSI contained in the Record and in MSPB Decisions.**

- (1) A covered person in possession of the record of an OSC and/or MSPB proceeding, decision, or appendix to a decision containing SSI must protect such SSI in accordance with section D of this Appendix.
- (2) Release to parties: MSPB decisions, including appendices, that discuss or reveal SSI will be marked in accordance with 49 CFR part 1520.13 and will be served on the parties in a manner consistent with section D of this Appendix.
- (3) Redaction by TSA SSI Office prior to publication or release to non-parties: In any case where an MSPB decision discusses or reveals SSI, the MSPB, prior to publishing its decision or releasing its decision to any non-party, shall submit a copy of the decision, and any appendices that may include SSI, to the TSA SSI Office for redaction of SSI. No change to an MSPB decision or appendix, other than redaction of SSI, is allowed under this provision.
- (4) Release to non-parties: Redacted decisions and appendices may be published and released to non-parties. Where a decision addresses all SSI matters in an appendix, the decision, but

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only a redacted SSI appendix, may be published or released to non-parties. A decision or appendix containing SSI may not be published or released to third parties, except in accordance with 49 CFR part 1520.

- (5) Records of MSPB cases: In any case where an MSPB record discusses or reveals SSI, the MSPB record must be sealed. Prior to opening any MSPB record containing SSI to the public, the MSPB shall submit a copy of the record to the TSA SSI Office for redaction of SSI. No change to an MSPB record, other than redaction of SSI, is allowed under this provision. Redacted records may be made available to the public.
- (a) At the end of OSC and/or MSPB proceedings, including all appeals, covered persons must promptly return and/or destroy any and all records (including electronic records) containing SSI in their possession to TSA, except that the MSPB may maintain SSI in any permanent record required by the Federal Records Act. Destruction of records must be accomplished by any method that will destroy the record so completely so as to preclude recognition or reconstruction of the information.
- (b) At the end of the OSC and/or MSPB proceedings, including all appeals, covered persons must certify in writing to TSA that they have returned and/or destroyed any and all records containing SSI. This certification is not required as to SSI contained in any permanent record required by the Federal Records Act.