

TRANSPARENCY AT TSA

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

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CONTENTS

Hearing held on March 2, 2017	Page 1
WITNESSES	
Huban A. Gowadia, Ph.D., Acting Administrator, Transportation Security Administration	
Oral Statement	6
Written Statement	8
The Hon. John Roth, Inspector General, U.S. Department of Homeland Security	
Oral Statement	17
Written Statement	19
The Hon. Carolyn Lerner, Special Counsel, U.S. Office of Special Counsel	
Oral Statement	29
Written Statement	31
APPENDIX	
March 1, 2017, Letter from TSA to Chairman Chaffetz, submitted by Mr. Chaffetz	62

TRANSPARENCY AT TSA

Thursday, March 2, 2017

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The committee met, pursuant to call, at 10:00 a.m., in Room 2154, Rayburn House Office Building, Hon. Jason Chaffetz [chairman of the committee] presiding.

Present: Representatives Chaffetz, Duncan, Amash, Gosar, Meadows, Blum, Hice, Grothman, Palmer, Comer, Mitchell, Cummings, Norton, Connolly, Kelly, Lawrence, Watson Coleman, Plaskett, Demings, Welch, DeSaulnier, and Sarbanes.

Chairman CHAFFETZ. The Committee on Oversight and Government Reform will come to order. And without objection, the chair is authorized to declare a recess at any time.

I appreciate you being here on this important topic, Transparency at the TSA. Today, the committee will explore the lack of transparency at the Transportation Security Administration. We will hear testimony from the Office of Special Counsel, often known as the OSC, and the Department of Homeland Security's inspector general about problems they are having with the TSA.

Congress created the Office of Special Counsel to investigate and prosecute violations of prohibited personnel practices, especially whistleblowing. In order for the OSC to complete its mission, agencies are required to produce complete and unredacted documents to the Office of Special Counsel.

Unfortunately, the TSA is not fulfilling their legal obligation to produce documents, frustrating OSC's investigative efforts. And I can tell you with a passion on both sides of this aisle, it is not acceptable to withhold information. It is something we have both committed to, on both sides of the aisle, to help protect and ensure that whistleblowers are protected.

You have a right in this government, as a government employee, to blow the whistle. But when the TSA withholds documents and does not allow the OSC to do its job, that's wholly unacceptable.

Former TSA Administrator Peter Neffenger testified before the committee last May that the TSA would base its response to allegations of whistleblower retaliation on OSC's findings. But now, TSA is withholding the documents OSC needs to complete its investigation. So on one hand you have the TSA administrator saying: Oh, we're going to base our conclusions on the findings of OSC, but the TSA won't give all the information to the OSC.

Today, I do not want to hear about how voluminous the documents are. I don't want to hear about how many you've given them.

There is but one metric that is important to me, and that is the percentage. If you dare go to the place to tell us about how many documents you turned over, every time you do so, we will ask you what percentage of the documents did you actually turn over.

TSA is one of the agencies in most need of the OSC's work. Since 2012, the OSC received approximately 243 cases from TSA employees alleging retaliation for blowing the whistle. A lot happens, very few blow the whistle, but when they blow the whistle, to have 243 people say that there was retaliation is a number that is a flashing red light and scares us.

The committee is constantly hearing how complaints from TSA employees about how the agency is a hostile work environment for whistleblowers. It has been almost a year since our last hearing on mismanagement at the agency. It's disheartening that we find ourselves here again. It's frustrating, and it shouldn't happen.

TSA selectively withholds information from OSC by asserting a common law attorney-client privilege that does not apply to inter-agency disputes. TSA's chief counsel, Francine Kerner, the agency's chief counsel since the agency's inception more than 15 years ago, could not identify the client holding the privilege. When pressed, Kerner informed the staff that, quote, TSA has no legal obligation to turn over documents to the OSC, end quote. Kerner's inability as chief counsel to articulate who she represents and her withholding of information shows a fundamental misunderstanding and antagonism towards the OSC's function.

Interestingly, the TSA later sent the committee a letter stating, quote, TSA recognizes its legal obligation to provide documents to the OSC and does so regularly, end quote. In fact, I'd ask unanimous consent to enter that letter into the record. It was sent to us on March first.

Without objection, so ordered.

The CHAIRMAN. It was sent to us March 1, 2017.

It's not about doing it regularly. It's about doing it always, and that is something that drives us here today.

The OSC gets to see all of it, 100 percent of it, not a portion of it, not some of it, not just the parts you want them to see. The OSC gets to see all of it. That means 100 percent.

Furthermore, it should not take a congressional hearing for the TSA to acknowledge an existing legal obligation. Similar to the agency's noncooperation with the OSC, the committee has long criticized the agency's use of sensitive security information, an SSI designation to withhold information.

In a 2014—in 2014, the committee issued a bipartisan report, bipartisan, finding that the agency inconsistently and improperly designated certain information as SSI simply to prevent embarrassing information from being made public, but these problems persist. According to the Department of Homeland Security's inspector general, quote, TSA is abusing its stewardship of the SSI program. None of these redactions will make us safer, and simply highlight the inconsistent and arbitrary nature of decisions that TSA cannot be trusted to administer the program in a reasonable manner, end quote. That's about as damning as it gets. That is as direct as it can possibly be.

In a recent transcribed interview with the committee, former TSA Deputy Administrator Mark Hatfield told the committee, and I quote, you could mark a Chinese carryout menu SSI” end quote. Talk about an abuse of the system, a Chinese menu. That was his example.

The issues with the transparency at TSA tend to have one thing in common, and that’s Francine Kerner, in the office of chief counsel. She seems to be the conduit and the person that we continually bump into. Kerner has a checkered history and the duty—and has a duty to share information. As a lawyer for the Treasury Department in the early 1990s, she was the subject of an investigation for improperly disclosing confidential information to the White House. Now she’s advocating for the TSA to withhold information on alleged whistleblower retaliation from the agency charged to investigate it. There’s something fundamentally totally wrong and backwards about that.

The committee will not tolerate these impediments, especially when it comes to protecting whistleblowers and ensuring transparency. The acting administrator is here today. We’re requesting today you right this wrong and immediately turn over all information withheld from the OSC and put an end to the practice. We’re going to give you a very short timeline to do so, and we will follow up.

So I’ll recognize the ranking member Mr. Cummings of Maryland.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

And last week, our committee conducted an extraordinary interview at my request with Mark Hatfield who served as the deputy administrator of the TSA and worked at the agency for some 13 years. He explained to the committee that TSA employees lack some of the most basic safeguards to protect them against retaliation when they highlight security concerns.

The deputy described an agency where, in the absence of normal Federal employee safeguards, a culture of retribution and arbitrary personnel actions evolved that made employees reluctant to raise security concerns. I will highlight some of the statements made by the deputy during his interview and ask unanimous consent to include longer excerpts in the hearing record.

Mr. CUMMINGS. With respect to the subject of today’s hearing, the deputy explained, quote, there was very little transparency. There was a lot of distrust. There was a sense of, you know, in favor and out of favor employees, end of quote.

He explained, quote, so many things were governed by self-direction at TSA. It bred misbehavior, end of quote. He said: The lack of protections for employees, quote, gave people the opportunity to do things that were typically not against the rules because the rules were so flexible but very questionable when you looked at it from a moral or ethical point of view, end of quote.

During the deputy’s interview, our staff asked him if the absence of normal Federal employee safeguards contributed to an environment in which employees did not want to come forward with information about security. In response, he said, and again I quote, Oh, yeah. I mean, it didn’t take long for you to know enough of your compatriots had, you know, taken an arrow in the back, and, you

know, were either wounded or dead, and you had a decision to make depending on how loud you wanted to be or how far you wanted to go, end of quote.

The deputy also warned, and I quote, people learned that if you spoke too loudly or if you questioned whether the emperor was actually wearing clothes or not, that you could do it at, you know, personal consequence, end of quote.

When Congress created the TSA in 2001, it did not provide the agency's employees with all of the due process protections given to other Federal employees under Title 5. The deputy said that although some flexibility might have been appropriate, that TSA was first rated—the agency, and I quote, should have started converting some of these practices to make them more standardized in Federal Government practices, end of quote.

He explained, quote, The structure that gave it the flexibility and the facility and the power to make extraordinary moves it did when it was created should have evolved, and unfortunately, some of them have just led to toxicity rather than a healthy agency, end of quote.

One tactic reportedly used against TSA employees was, quote, directed reassignments, end of quote, or forcing employees to move entirely to new entirely—to entirely new locations as punishment for raising concerns.

I've got to tell you, this is something that really bothered me because—and I'm sure it did the chairman—because we have people who were being divided from their families going—one person going maybe to Connecticut and the other one going to Florida. Give me a break. And it was punishment, punishment.

For example, the deputy explained that the former assistant administrator in charge of agency security operations ran a, quote, very dictatorial department, end of quote. Rather than focusing on improving security, he was, quote, using the directed reassignment process to manipulate positions in the field and to both help people that were in favor and to punish people that were out of favor, end of quote.

The deputy confirmed, during his interview, that one TSA whistleblower, Jay Brainard, who testified before this committee on April 27, 2016, received a directed reassignment after being, quote, very outspoken, end of quote, about security concerns.

According to Deputy Brainard, quote, would often raise issues, end of quote, about security, including, quote, the extraordinary emphasis on speed over quality of screening, end of quote.

The deputy said that this whistleblower highlighted, quote, what many felt was unreasonable reliance on a metric system that was oftentimes beautiful in full-color presentation on slide decks, but was very detached from the reality of the frontline where the actions were taking place, end of quote.

The deputy also confirmed what we have heard many times before that TSA has abused the SSI designation to cover up information. He joked that in the early years of the agency, quote, you could mark—and I think the chairman referred to this—you could mark a Chinese carryout menu SSI, end of quote. He had a, quote, a brochure or something that was clearly public, a consumable ma-

terial information you could get on the internet or in the library and they would, you know, stamp it SSI, end of quote.

Now, from everything we have seen, TSA operations have improved over the last 2 years under the most recent administrator, Vice Admiral Peter Neffenger. But the deputy's interview last week makes crystal clear that TSA employees need the same protections as other Federal employees so they can speak up about the security of the American people without being retaliated against and Congress can consider these reforms.

And let me say to the chairman: I thank you again. And I thank all of our members for standing up for whistleblowers.

Ladies and gentlemen, if we don't stand up for whistleblowers, we don't need to be here. We need to go and get another job because, as far as I'm concerned, it would be legislative and congressional malpractice not to do so.

Some of the best information that we have gotten was from whistleblowers, and we must do everything in our power at all times to protect them. And on the other hand, for anyone who thinks Congress should receive Title 5 protection for employees at other Federal agencies, TSA is a case study demonstrating why this would be a terrible idea.

And with that, Mr. Chairman, I yield back. I also noticed that Congressman Sarbanes just came in, and he's one of our newest members. Thank you.

Chairman CHAFFETZ. Welcome. Thank you. Glad you're here.

Members are advised that we do anticipate votes on the floor. We're going to get through the—hopefully, get through all the opening statements, but at the appropriate time we will break. The intention is to allow the votes on the floor, and then we'll come back and finish up the hearing.

We'll hold the record open for 5 legislative days for any members who would like to submit a written statement, but let's now recognize our panel.

We're pleased to welcome Ms. Gowadia. She's the acting administrator for the Transportation Security Administration; the Honorable John Roth, Inspector General for the United States Department of Homeland Security; and the Honorable Carolyn Lerner, special counsel for the Office of Special Counsel—special counsel for the United States Office of Special Counsel.

We welcome you all. Pursuant to committee rules, you are to be sworn before you testify, so if you will please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Thank you. Please be seated. And let the record reflect that all the witnesses answered in the affirmative.

We would appreciate it if you would limit your oral testimony to 5 minutes. We'll give you a little bit of latitude, but of course your entire written statement will be made part of the record. We'll now recognize the acting administrator for 5 minutes.

But by the way, you have to straighten it up and get that microphone right up in there. It's a little uncomfortable, but bring it up close. Thank you.

WITNESS STATEMENTS**STATEMENT OF HUBAN A. GOWADIA, PH.D.**

Ms. GOWADIA. Good morning, Chairman Chaffetz, Ranking Member Cummings, and distinguished members of the committee. Thank you for affording me the opportunity and privilege to speak to you today about information transparency of the Transportation Security Administration. I am indeed fortunate to represent a tremendous workforce that is responsible for executing a critical security mission, to protect the Nation's transportation systems.

Vital to that mission success is how we share information with our many transportation security partners. The dynamic and increasingly complex threat environment in which we operate demands that TSA and our partners share information in a timely and secure manner. To that end, we work closely across the spectrum of transportation modes to exchange information, solicit feedback, and develop policy and guidelines.

Indeed, our recent cooperative initiatives with industry stakeholders have yielded significant improvements to our security operations. For instance, we collaborated with airports and air carriers to address the surge in passenger volumes last spring and summer, and in the process, we established our airport operation center as a permanent and direct communication channel. Leveraging the center, TSA continues to hold daily calls with airlines and airports to track screening operations.

We also communicate regularly with the traveling public through a variety of outreach efforts, press releases, and social media. TSA Cares and Ask TSA are two of our most popular and successful models of passenger engagement, but the transportation security system does not stop at our borders. It is undeniably global in nature. That is why TSA works alongside partners and plays a leading role in a number of regional and international organizations with a common vision for transportation security.

Across all our interactions, TSA strives to be transparent and forthright. In point of fact, doing so, it serves our interest, as a free and frequent exchange of information to and from partners helps us make better informed decisions and build lasting trust.

However, we also must remain absolutely vigilant in safeguarding against the release of sensitive information which could cause harm if disclosed to our adversaries. We must balance the transparent flow of information with our serious responsibility to prevent that information from falling into the wrong hands.

For that reason, we ensure that the information requiring protection is properly marked, handled, and distributed. Sensitive security information, or SSI, is one category of protected information that is defined by statute. Governing departmental and TSA management directives mandate that such information be released to the maximum extent possible without compromising transportation security.

And because we count on our greatest resource, our people, to enforce these protections, we have updated SSI training and made it an annual requirement for all TSA employees and contractors. In addition, we have developed a comprehensive SSI policies and procedures handbook, as well as improved reference guides.

Keeping with the spirit of transparency and preserving the public's access to appropriate information, TSA also follows established procedures for adjudicating challenges to SSI designations. Taken together, these measures enhance the SSI program and contribute to TSA's overall growth as a true learning organization.

We must also continue to learn from each other. I encourage my TSA colleagues to feel empowered in voicing their thoughts, suggestions, and concerns that can lead to improvements in our workplace environment and how we do business. That means creating and sustaining an organizational culture which values responsible challenges to conventional thinking and invites opportunities to get better. And those opportunities can come from a number of sources, be it an audit conducted by the inspector general or an employee calling attention to an agency impropriety.

I want to take this opportunity to thank Mr. Roth and Ms. Lerner for the efforts of their offices. With their help, I do believe we will continue to improve.

Let me stress that no matter where the challenge comes from, TSA has zero tolerance for prohibited personnel practices, such as retaliation against whistleblowers. TSA is fortunate to have employees and stakeholders with a shared passion for mission success and integrity. We will continue to work hard to exceed their expectations.

In conclusion, I would like to emphasize that each side of the coin, sharing information transparently and protecting information when it is required is indispensable to our national security mission. I have every confidence that the proud men and women of TSA today are more than up to both tasks. Thank you.

[Prepared statement of Ms. Gowadia follows:]

Statement of Dr. Huban A. Gowadia
Acting Administrator
Transportation Security Administration
U.S. Department of Homeland Security
before the
U.S. House of Representatives
Committee on Oversight and Government Reform
March 2, 2017

Good morning, Chairman Chaffetz, Ranking Member Cummings, and distinguished Members of the Committee. Thank you for the opportunity to appear before you today to discuss the Transportation Security Administration's (TSA) approach to information security as we execute our mission to protect the Nation's transportation systems. I appreciate the Committee's interest in ensuring TSA operates transparently, collaborates, and shares information with its partners and stakeholders, and appropriately protects against the release of sensitive information which could cause harm in the hands of our adversaries.

TSA's mission is to protect the nation's transportation systems to ensure freedom of movement for people and commerce. Our agency faces a persistent and evolving threat from terrorist groups around the world, exacerbated by homegrown violent extremists inspired by messages of hatred to do harm to the American people. To mitigate this threat, TSA works collaboratively with a wide range of partners, from aviation and surface transportation industry stakeholders and international counterparts to intelligence and law enforcement community professionals. On the frontlines, more than 44,000 Transportation Security Officers screen over

2 million passengers, 1.3 million checked items, and 4.9 million carry-on items at more than 430 airports every day. More than 700 Transportation Security Inspectors ensure regulatory compliance, and more than 900 canine teams support security missions, while Federal Air Marshals (FAMs) last year flew more than a billion miles on international and domestic flights, including thousands of special mission coverage flights, providing professional counterterrorism law enforcement protection to the nation. TSA's Visible Intermodal Prevention and Response teams collaborated with more than 750 law enforcement and transportation stakeholder organizations nationwide to conduct more than 8,500 operations at hundreds of locations across all modes of transportation. TSA also inspects nearly 300 international airports with direct flights into the United States, regulates foreign and domestic repair stations, and works with its surface stakeholders to secure roadways, railroad tracks, bridges, tunnels, pipelines, and transit systems. Successfully securing the Nation's transportation system in a challenging, dynamic threat environment requires constant communication with a variety of audiences. We must communicate reliable information with the travelling public, provide intelligence and operational information to TSA's workforce in the field, and foster close collaboration with our transportation security partners.

Information Sharing with Transportation Security Partners

TSA participates actively in a number of collaborative organizations at local, national, and international levels to share information with transportation security partners, develop policy recommendations, and solicit feedback. As codified by the *Aviation Security Stakeholder Participation Act of 2014* (Public Law 113-238), TSA has established the Aviation Security Advisory Committee (ASAC), comprising representatives of air carriers, airport operators, labor

organizations, security technology companies, law enforcement and security experts, as well as many other important stakeholders. The ASAC holds regular meetings and advises TSA on the development, refinement, and implementation of policies, programs, rulemaking, and security directives pertaining to aviation security, including through established subcommittees pertaining to specific aviation security issues. From the current two-year term ending in April 2017, ASAC presented 45 recommendations, of which 33 are complete and 12 are in the process of being implemented.

In the surface mode, TSA consults with stakeholders through Sector and Government Coordinating Councils, as well as through the DHS-led Critical Infrastructure Partnership Advisory Council (CIPAC) and other industry-centric organizations such as the Mass Transit Policing and Security Peer Advisory Group. TSA also works closely with our counterparts at the Department of Transportation to integrate safety and security priorities.

Internationally, in coordination with the Department of State, TSA Representatives and International Industry Representatives stationed overseas liaise with foreign governments and airport stakeholders and facilitate coordination with foreign and domestic air carriers overseas. Additionally, TSA is a leader in a number of regional and international organizations concerned with transportation security, such as the International Civil Aviation Organization and the Quadrilateral Working Group. TSA also partners with key industry trade associations such as the International Air Transport Association to help drive industry security policy and critical aviation issues.

Further, TSA conducts outreach with civil rights, disability-related, and multicultural interest groups to understand concerns and solicit feedback on TSA's policies and programs. Groups such as the Sikh Coalition, the National Center for Transgender Equality, the American

Diabetes Association, and the Helen Keller School for the Blind participate in TSA's Disability and Multicultural Coalitions and have partnered with TSA to provide training for the workforce. TSA communicates openly with the public and press via public outreach, websites, social media, and media relations. TSA conducts more than 300 media events per year and responds to approximately 10,000 media inquiries, and TSA operates the AskTSA program to answer customer questions and provide helpful services in real-time 365 days a year via Twitter and Facebook Messenger platforms.

Taken together, TSA's engagement efforts provide avenues for daily interaction and information sharing with stakeholders of all varieties, including the sharing of classified intelligence products and Sensitive Security Information (SSI) as appropriate.

Over the past year, TSA has increased our efforts to communicate and collaborate with industry stakeholders, resulting in significant improvements to our security operations. Partnership with airports and air carriers was crucial to addressing large passenger volumes last spring and summer, as industry partners across the country assisted TSA by carrying out functions such as: enforcing 1+1 carry-on baggage regulations, providing staffing support to conduct non-security related duties, providing volume projections to inform staffing, promoting TSA Pre✓®, and reminding passengers to arrive early. TSA established an Airport Operations Center (AOC) at TSA Headquarters, which holds daily calls with industry partners to ensure clear, timely communication. Using nationally-accepted incident management concepts, the AOC continues to closely track daily screening operations and shift officers, canine resources, the National Deployment Force, and other security resources to meet mission demands in advance of predicted passenger volume.

Last year, we also deployed a team of TSA experts in staffing, scheduling, and screening operations to partner with industry at the 21 largest airports for optimization insights. During these visits, TSA worked closely with air carrier and airport industry partners to review airline schedules, passenger volumes, and queue design, as well as checkpoint and baggage screening areas for improvement opportunities. These visits produced an action plan for each airport's Federal Security Director (FSD) to implement prior to the summer travel season. Fulfilling a mandate of the *FAA Extension, Safety, and Security Act of 2016* (Public Law 114-190), TSA has built on this model to establish quarterly stakeholder meetings at each airport through which FSDs engage on a regular basis with stakeholders to exchange information regarding airport security operations. These efforts have improved our ability to deploy the resources we have in the most efficient and effective manner possible to screen the record numbers of passengers transiting through our Nation's airports.

Sensitive Security Information (SSI)

Given TSA's need to share information with a wide range of security partners and stakeholders, we take seriously our responsibility to protect information that, if publically released, would be detrimental to transportation security. TSA works to ensure that sensitive information is properly marked, handled, and distributed in accordance with the SSI regulation to protect this information from unauthorized disclosure. TSA also recognizes the need for transparency and public access to information not deemed security sensitive.

Sensitive Security Information, or SSI, is one of the few types of sensitive but unclassified information required by statute. Congress authorized the Federal Aviation Administration to designate SSI in the 1970s, and the FAA promulgated regulations to

implement the congressional mandate. When TSA was created, Congress also authorized TSA to designate information as SSI, as codified at 49 U.S.C. § 114(r). TSA regulations promulgated to implement this mandate are found at 49 C.F.R. Part 1520. When it provided TSA with SSI designation authority, Congress also empowered the Administrator of TSA to make final determinations regarding SSI.

Within DHS and TSA, the SSI Program Office is charged with the day-to-day management, consistent application, identification, safeguarding, and redaction of SSI. Housed within the Office of Law Enforcement/Federal Air Marshal Service, which is charged with managing TSA's classified information program, the SSI Program Office is staffed by career professionals with significant experience and a comprehensive understanding of SSI and its role in transportation security. The SSI Program Office works closely with subject matter experts throughout TSA to understand and identify information that could be used by our adversaries to carry out attacks on the transportation network.

The DHS and TSA Management Directives (MDs) and associated guidance, which govern the SSI Program, provide direction for ensuring that SSI is treated in a manner consistent with the SSI statute and regulation. These directives require the release of as much information as possible without compromising transportation security, while taking into consideration the information's operational use to adversaries, level of detail, the public availability of the information, and the age of the record. TSA's goal is to redact as little information as possible while still protecting the SSI.

Over the past several years, TSA has significantly enhanced the SSI Program's policies, training, and management of SSI. TSA has updated SSI training and mandated it for all TSA employees and contractors on an annual basis; refined the redaction process; developed a

comprehensive Policies and Procedures Handbook to eliminate gaps in previous guidance; defined specific roles and responsibilities for the safeguarding of SSI; improved reference guides for DHS employees and contractors; leveraged available technologies to improve operations; and, per a recommendation from this Committee, standardized the process through which the Administrator may revoke the SSI designation for specific information.

We recognize that effective training is integral to our management of the SSI Program. Annual SSI training required of all TSA personnel includes reviewing principles of identifying, marking, safeguarding, disclosing, and destroying SSI. Additionally, every TSA office and field location is required to maintain at least two persons who have completed the Advanced SSI Training and Certification Course. These individuals have participated in detailed SSI training, passed the SSI Certification Examination, and continue to maintain a high level of proficiency through annual participation in Continuing Education in SSI. In accordance with DHS and TSA MDs, this SSI Coordinator network is required to complete an annual self-inspection to validate program compliance. The SSI Program Office has also conducted targeted SSI advanced training and awareness activities for key TSA stakeholders, DHS components, and other federal agencies.

In 2015, TSA updated the *SSI Policies & Procedures Handbook*, which provides a single, comprehensive resource for personnel to consult regarding their responsibilities concerning SSI. The Handbook replaced a previously issued series of discrete, independent, and less detailed SSI policies. It was extensively coordinated, provides guidance and assistance in a user friendly format organized by subject matter, and covers SSI topics including identifying, marking, safeguarding, disclosing and destroying SSI, along with overviews of SSI training and awareness of programs and instructions for the reporting and adjudication of SSI that is lost, stolen, or

subject to unauthorized disclosure. The Handbook is readily available to all TSA personnel on the TSA intranet, increasing TSA's ability to ensure consistency in SSI designations and protections.

In addition to all of these recent efforts to improve TSA's stewardship of SSI, there are well established DHS and TSA procedures to address challenges to SSI designations. These processes are regularly deployed when, for example, the Government Accountability Office and the DHS Office of Inspector General conduct oversight, draft reports of their findings, and submit those draft reports to TSA for sensitivity reviews. We encourage the use of these procedures to resolve reasonable differences of opinion and maximize transparency, while also protecting sensitive information developed by TSA and our security partners from falling into the hands of those who would do us harm.

TSA understands the importance of the SSI designation while recognizing the value of transparency and the need for the public to have access to as much information as possible. We will continue to seek out opportunities to further improve how SSI is identified, managed, redacted, and safeguarded.

Collaboration with the Government Accountability Office (GAO), the DHS Office of Inspector General (OIG), and the U.S. Office of Special Counsel (OSC)

TSA appreciates the value of the audit and investigative work accomplished by the Government Accountability Office (GAO), the DHS Office of Inspector General (OIG), and the U.S. Office of Special Counsel (OSC). We endeavor to provide GAO, OIG, and OSC experts with information they require in a timely and comprehensive manner and with appropriate markings and classifications.

As the Committee is aware, the OIG is in the midst of an inspection of TSA's SSI Program, policies, and processes, and we look forward to receiving and reviewing their recommendations. In the meantime, we continue to cooperate with all OIG audits, inspections, and investigations and implement recommendations from past reports.

TSA also provides information upon request to the OSC regarding whistleblower retaliation complaints and other applicable prohibited personnel practice allegations, and we value their endeavors to bring to light any instances of impropriety against our employees. Under my leadership, TSA will not tolerate retaliation against whistleblowers, and we will continue to encourage employees to voice their views through a variety of available tools and services and to provide opportunities for redress and due process. I strongly support and encourage employees to disclose any perceived violations of law, rule, or regulation, gross mismanagement or waste of funds, abuse of authority, or substantial and specific danger to public health or safety to the DHS OIG, the U.S. Office of Special Counsel, or any other appropriate person or entity.

Conclusion

TSA is tasked with a complex, critical security mission that can only be accomplished through close collaboration with stakeholders and partners. We attempt to share information as openly as possible while accounting for the constantly evolving threat posed by enemies who wish to do us harm. We will continue to develop and refine our practices to ensure we meet the highest standards of transparency possible. Thank you for the opportunity to appear before you today and for the Committee's support of TSA's important mission.

Chairman CHAFFETZ. Thank you. I appreciate that.

Before we recognize the inspector general, members are advised we have a vote on the floor, so I'm going to put us into recess, and we will reconvene no sooner than 11:00 a.m.

So you're free to go to the cafeteria, do whatever you want to do, we'll be no sooner than 11:00, but if you'd please be back here just before 11:00. And as soon as the votes are done on the floor, we'll reconvene.

The committee stands in recess.

[Recess.]

Chairman CHAFFETZ. The Committee on Oversight and Government Reform will come back to order.

We appreciate it. We were delayed for a moment, more than a moment, because of votes on the floor, but I believe now we were going to hear testimony from Inspector General Roth. You are now recognized for 5 minutes.

STATEMENT OF JOHN ROTH

Mr. ROTH. Thank you. Chairman Chaffetz, Ranking Member Cummings, and members of the committee, thank you for inviting me here today to testify regarding issues relating to TSA.

Inspector general oversight of TSA's programs and operations fosters positive change and makes government better. However, the effectiveness of our oversight depends on our ability to make—to issue detailed, balanced, and public reports that accurately describe our findings and include recommendations to resolve them.

The Inspector General Act requires that we inform the DHS Secretary, Congress, and the public about any problems and deficiencies we identify through our work. Public scrutiny of what we find is key to accomplishing our mission.

We have found that TSA has a history of taking an aggressive approach to restricting information from being made public, especially with respect to a category of information known as sensitive security information, commonly known by its acronym as SSI. This problem is well documented.

I first encountered the issue in 2015 when TSA insisted on applying the SSI designation to information in an audit report concerning the IT operations at JFK airport in New York. Similar information had been previously published in two prior OIG reports. I appealed the issue directly to the TSA administrator, but it was not resolved to my satisfaction. And sure enough, it was repeated in our latest report on TSA IT systems that was published in December of last year. In that report, TSA again demanded redaction of information that had previously been freely published without objection and in which my IT security experts have told me poses no threat to aviation security.

Entities outside the OIG have made similar findings, and I believe that the problem is deeply rooted and systemic. For instance, as far back as 2005, GAO issued a report finding that TSA did not have adequate policies and procedures to determine what constitutes SSI or who is authorized to make the designation. GAO found that the TSA's lack of internal controls left TSA unable to be ensured that they were applying the designation properly.

Nearly 10 years later, this committee reached a similar conclusion in a bipartisan staff report it issued in 2014. Two years after that, in 2016, the chairman of the House Committee on Homeland Security, Subcommittee on Transportation Security objected to TSA's management and use of the SSI designation, noting that the improper invocation of SSI, and I quote, "raised the specter we've heard again and again about TSA conveniently using the security classifications to avoid having public discussions about certain things that may be unpleasant for them to discuss in public," end quote.

In addition to these inconsistent SSI designations, we have encountered instances in which TSA redacted information so widely known that redaction bordered on absurd. For example, TSA redacted, claiming SSI, a statement in one of our draft reports related to expedited screening process. Here's the quote: "Passengers are not required to remove shoes, belts, laptops, liquids, or gels," end quote.

We showed TSA that this information is on their publicly available website, and pretty much every traveler who goes through the precheck lane understands this to be the case. And ultimately, TSA agreed that the information was not in fact SSI and should not have been redacted. While this was appropriately resolved, it takes time away from the audit process and causes unnecessary delay.

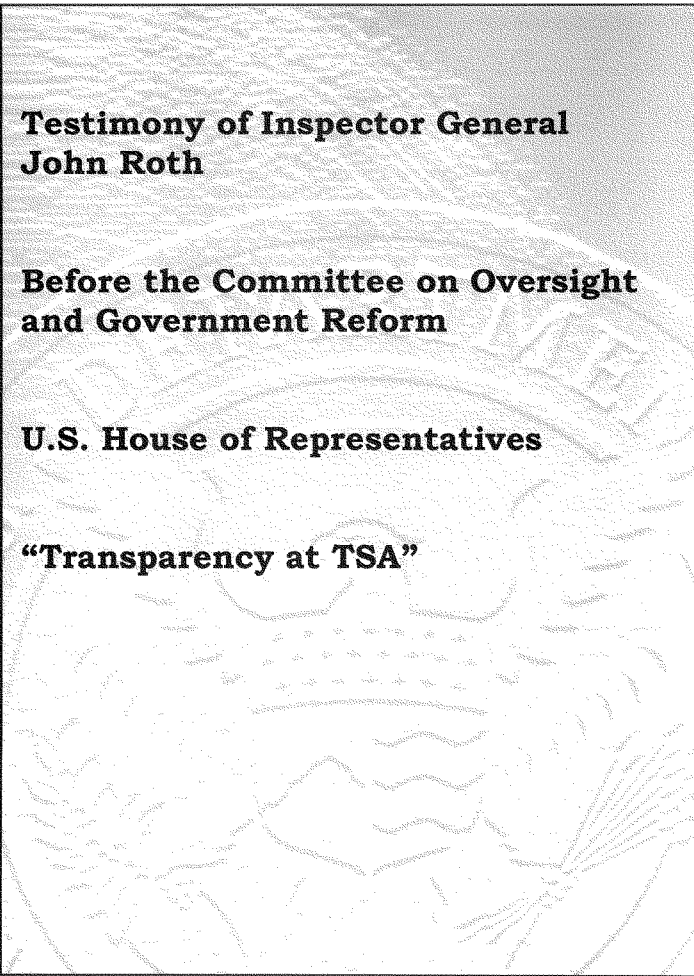
Likewise, we have other instances in which TSA has attempted to restrict information that we found on their own website. These examples highlight what I believe is the incoherent and inconsistent nature of the program and raise serious concerns, in my mind, as to whether TSA can be trusted to make reasonable, appropriate, and consistent SSI designations.

Under DHS policy, any authorized holder of SSI who believes that a designation is improper may challenge the marking. Unfortunately, as I discovered, this appeals process is structured to ratify TSA's SSI designations and prevent the review of such designations by independent external entities. The appeals process is foreordained and fails to properly balance the public's right to information against nonspeculative threats to aviation security and is vulnerable to abuse.

We are currently in the fieldwork stage of a comprehensive review of TSA's management of its SSI program and its use of the SSI designation. We expect to have a final report by July 2017, and will provide a copy of this report prior to its publication to this committee. Additionally, we will continue to review and publish public reports on TSA's programs and operations. To the extent that we continue to observe the abuse of SSI designation, we will continue to highlight it.

Mr. Chairman, this concludes my testimony. I'm happy to answer any questions you or other members of the committee may have.

[Prepared statement of Mr. Roth follows:]



OFFICE OF INSPECTOR GENERAL

**Testimony of Inspector General
John Roth**

**Before the Committee on Oversight
and Government Reform**

U.S. House of Representatives

“Transparency at TSA”



Homeland
Security

**March 2, 2017
10:00 AM**



OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Chairman Chaffetz, Ranking Member Cummings, and Members of the Committee, thank you for inviting me here today to discuss issues relating to transparency at the Transportation Security Administration (TSA).

The Importance of Transparency to the Work of the Office of the Inspector General (OIG)

The Value of Independent Oversight in Improving Government Operations

Oversight fosters positive change and makes government better. The critical and skeptical review of programs and operations, both by the Inspectors General and by congressional oversight committees, conducted in full view of the public, acts as the “disinfectant of sunlight” to ensure improved transparency, accountability, and efficiency in government. It also facilitates the efforts of Inspectors General to keep Congress fully and currently informed about problems and deficiencies within government programs and operations, in compliance with their obligations under the *Inspector General Act*.

TSA is an excellent example of an agency that has had to confront the necessity of changing the manner in which it does business. Our covert testing program, which revealed dramatic and troubling shortfalls, as well as other OIG reports about deficiencies in TSA’s judgment of risk in relation to expedited screening, vetting airport employees, and managing the access badge program, all served as important catalysts for change.¹ It was only through our public oversight, and public oversight by this and other congressional committees, and TSA’s then-new leadership strongly embracing the message, that TSA at last acknowledged the need for change and started the long road to becoming a more effective organization.

The OIG Policy Regarding Transparency in our Reports

However, the effectiveness of our oversight depends on our ability to issue detailed, balanced and public reports that accurately describe our findings and include recommendations to resolve them. The *Inspector General Act* requires that we inform the DHS Secretary, Congress, and the public about any problems and deficiencies we identify through our work.

¹ *Vulnerabilities Exist in TSA’s Checked Baggage Screening Operations*, OIG-14-142 (September 2014); *Security Enhancements Needed to the TSA PreCheck Initiative*, OIG-15-29 (January 2015); *TSA Can Improve Aviation Worker Vetting*, OIG-15-98 (June 2015); *Use of Risk Assessment within Secure Flight*, OIG-14-153 (June 2015); *Covert Testing of TSA’s Passenger Screening Technologies and Processes at Airport Security Checkpoints*, OIG-15-150 (September 2015); *TWIC Background Checks Not as Reliable as They Could Be*, OIG-16-128 (September 2016); *TSA Could Improve Its Oversight of Airport Controls over Access Media Badges*, OIG-17-04 (October 2016).
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In 2014, I became concerned that the Department's procedures for redacting OIG reports during component reviews reflected neither the letter nor the spirit of the *Inspector General Act* and significantly impeded the OIG's effectiveness. I found that, during sensitivity reviews, components often requested redactions based solely on the fact that reports were marked "For Official Use Only" or "Law Enforcement Sensitive." Component officials requesting these redactions appeared not to have the background or context needed to balance speculative sensitivity concerns against the very real need to inform Congress and the public about important government programs.

Accordingly, I instituted a new policy in June 2014 that limited redactions except in three narrow circumstances: (1) disclosure of the information is specifically prohibited by law; (2) an Executive Order specifically requires the information to be protected from disclosure in the interest of national defense, national security, or in the conduct of foreign affairs; and (3) the information is part of an ongoing criminal investigation. The new policy leaves open the possibility for other discretionary redactions — *e.g.*, in the event disclosure could cause significant harm to DHS programs and operations — but rested that discretion solely with the OIG. When considering whether to approve discretionary redactions, I require a component seeking the redactions to articulate the *specific, actual* harm that could result from disclosure.

Concerns About the TSA Sensitive Security Information System

TSA has a history of taking an aggressive approach to applying redactions, particularly with respect to a category of information known as Sensitive Security Information, commonly known by its acronym, SSI. This problem is well-documented. For instance, in our latest report on airport-based IT systems, published in December 2016, TSA demanded redaction of information that previously had been freely published without objection, and which my IT security experts believe poses no threat to aviation security.² We encountered a similar issue in 2015, when TSA insisted on applying the SSI designation to information in an audit report concerning the IT operations at John F. Kennedy airport that previously had been published in two prior OIG reports.³

Entities outside the OIG have made similar findings, and I believe that the problem is deeply rooted and systemic. For instance, as far back as 2005, GAO issued a report finding that TSA did not have adequate policies and procedures to determine what constitutes SSI or who was authorized to make the

² Summary Report on Audits of Security Controls for TSA Information Technology Systems at Airports, OIG-17-14 (December 2016).

³ Audit of Security Controls for DHS Information Systems at John F. Kennedy International Airport, OIG 15-18 (January 2015).

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Department of Homeland Security

designation.⁴ GAO found that TSA's lack of internal controls left TSA unable to provide reasonable assurance that those within TSA making SSI designations were applying the designation properly.⁵ Nearly 10 years later, this Committee reached a similar conclusion in a bipartisan staff report it issued in 2014.⁶ And in 2016, the House Committee on Homeland Security, Subcommittee on Transportation Security, objected to TSA's management and use of the SSI designation, noting that the improper invocation of SSI "raised the specter that we've heard again and again about TSA conveniently using the security classifications to avoid having public discussions about certain things that may be unpleasant for them to discuss in public."⁷

Impact of Misapplication of SSI on Whistleblowing

TSA's misapplication of the SSI designation can have far-reaching consequences. For instance, SSI designations have been used as a basis for challenging the disclosure of information by whistleblowers, which may have a chilling effect on future whistleblowers. The various categories of SSI are vague in nature, inviting differing interpretations about what qualifies as SSI and making it difficult for whistleblowers to determine whether the information may properly be disclosed. Moreover, TSA has designated information as SSI years after a disclosure to punish whistleblowers who, at the time of disclosure, had no reason to believe the information was SSI.

Illustrations of the Misapplication of SSI

The issues we have encountered with TSA's inconsistent or improper application of SSI can be easily illustrated. For instance, in our report discussing physical security issues in TSA's space at JFK airport, TSA's SSI Program Office marked much of the information as SSI:⁸

⁴ Clear Policies and Oversight Needed for Designation of Sensitive Security Information, GAO-05-677 (June 2005).

⁵ *Id.*

⁶ Joint Staff Report, Committee on Oversight and Government Reform, Pseudo-Classification of Executive Branch Documents: Problems with the Transportation Security Administration's Use of the Sensitive Security Information (SSI) Designation, May 29, 2014. (Retrieved from <https://oversight.house.gov/wp-content/uploads/2014/05/Pseudo-Classification-Report-FINAL-5-28-2014-5.pdf>).

⁷ Hearing, How Pervasive is Misconduct at TSA: Examining Findings from a Joint Subcommittee Investigation, July 7, 2016.

⁸ Audit of Security Controls for DHS Information Systems at John F. Kennedy International Airport, OIG 15-18 (January 2015).
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Department of Homeland Security

Physical Security

Adequate access controls have not been established limiting access to TSA sensitive equipment in JFK terminals. For example, [REDACTED] located [REDACTED] contained DHS locked equipment cabinets located [REDACTED] with non-DHS IT equipment. According to TSA staff, technical representatives did not know the total number of non-DHS personnel that had access to [REDACTED]. In addition, [REDACTED] contained unsecured TSA equipment and were accessible to non-DHS individuals. Specifically, as shown in figure 2, a TSA [REDACTED] cabinet was located [REDACTED] airport. The doors between the two areas did not lock, and airport employees walked through the area. [REDACTED]

However, we published similar information about security measures and potential vulnerabilities identified at Dallas-Fort Worth airport without redaction:⁹

Physical Security

Visitor sign-in sheets were not present in seven of nine STIP Explosive Detection System (EDS) server rooms. Additionally, TSA had not adequately secured several server rooms and communications closets containing STIP assets. For example, airline employees were using two rooms containing STIP EDS servers as break rooms. Both rooms contained non-DHS refrigerators, microwaves, and TVs. The server racks were being used to store blankets and provide electrical power. Additionally, the door lock for one room was disabled with duct tape. Figures 1a through 1f show deficiencies observed at these locations.

Similarly, TSA redacted information about patch management issues at JFK in one of our reports, but did not redact similar wording used in two previously published reports regarding other airports:¹⁰

⁹ Audit of Security Controls for DHS Information Technology Systems at Dallas/Ft. Worth International Airport, OIG-13-132 (September 2014)

¹⁰ Audit of Security Controls for DHS Information Systems at John F. Kennedy International Airport, OIG 15-18 (January 2015); Audit of Security Controls for DHS Information Technology Systems at Dallas/Ft. Worth International Airport, OIG-13-132 (September 2014); Technical Security Evaluation of DHS Activities at Hartsfield Jackson Atlanta International Airport, OIG-13-104 (July 2013).
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Department of Homeland Security

JFK Airport Report (pg. 21)

Technical Controls

CBP's implementation of technical controls for systems operating at JFK did not conform fully to DHS policies. For example, identified vulnerabilities on CBP servers were not being resolved in a timely manner.

Patch Management

In February 2014, we observed CBP staff perform vulnerability scans on the three servers located at JFK. [REDACTED]

[REDACTED] Table 3 provides the number of vulnerabilities identified by server.

Table 3- Critical, High, and Medium Vulnerabilities

CBP Server Name	Total Number of Critical Vulnerabilities	Total Number of High Vulnerabilities	Total Number of Medium Vulnerabilities
1			
2			
3			
Total			

Dallas-Fort Worth Airport Report (pg. 10)

Patch Management

In December 2013, we observed TSA staff scanning two FAMSNet and six ICS servers located at DFW for vulnerabilities. These technical scans detected high vulnerabilities on the eight servers. Additionally, four of the servers had a critical vulnerability. In addition, patch information for some vulnerabilities was published more than one year before the scans were performed. Further, TSA had provided vulnerability assessment reports to DHS for only five of the eight servers identified at DFW. Table 2 provides the number of vulnerabilities by server.

Table 2. Critical and High Vulnerabilities by Common Vulnerabilities and Exposures (CVE)

TSA Server Name	Total Number of Critical Vulnerabilities	Total Number of Unique High Vulnerabilities ²	Total Number of High or Critical CVEs ³	Date of Last Vulnerability Scan Report to DHS
Server 1	0	2	1	12/19/2013
Server 2	1	10	15	12/19/2013
Server 3	1	6	3	12/19/2013
Server 4	0	2	1	Not Reported
Server 5	1	9	14	Not Reported
Server 6	1	6	3	Not Reported
Server 7	0	2	2	12/19/2013
Server 8	0	1	1	12/19/2013

According to DHS 4300A Sensitive Systems Handbook:



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Department of Homeland Security

Atlanta Airport Report (Pg. 10)

Patch Management

We scanned CBP's three servers at ATL for vulnerabilities in November 2012. This technical scan identified 13 high vulnerabilities on the three servers. (See table 1 for details.) Additionally, patch information for three vulnerabilities was published more than 6 months before the scans were performed.

Table 1. Total Number of High and Critical Vulnerabilities and Instances by Common Vulnerabilities and Exposures (CVEs) and Vulnerability Name

CBP Server Name	Total Number of CVEs ^a	Total Number of Unique Vulnerabilities ^b	Date of Last Vulnerability Scan Report to DHS ^c
Server 1	9	3	06/2012
Server 2	31	5	06/2012
Server 3	31	5	Not reported.
Total:	71	13	

In addition to these inconsistent SSI designations, we have encountered instances in which TSA redacted information so widely known that redaction bordered on the absurd. For instance, TSA redacted the following statement in one of our draft reports relating to expedited screening procedures because it claimed it contained SSI: "Passengers are not required to remove shoes, belts, laptops, liquids, or gels." After showing TSA that this information is publicly available on its website, TSA agreed that the information was not SSI and should not be redacted.

Similarly, TSA asked that we redact from another draft report the bolded language in the statement below:

The program compares **self-reported** traveler information **provided to TSA from air carrier reservations, such as name, date of birth, and gender**, to lists of low risk travelers, the Terrorist Screening Database (TSDB) and Selectee Lists, as well as to other intelligence-based data systems maintained by TSA and other Federal Government Agencies.

The bolded information, however, was obtained by the OIG from the *Privacy Impact Assessment Update for Secure Flight*, dated September 4, 2013, which the Department makes publicly available.¹¹ The specter of TSA attempting to block the OIG from publishing information that TSA itself has made public is troubling and highlights the incoherent nature of the program.

¹¹ Privacy Impact Assessment Updated for Secure Flight, DHS/TSA/PIA-18(f) (September 2013).
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These examples raise serious concerns about whether TSA can be trusted to make reasonable, appropriate, and consistent SSI designations.

TSA's Delays in Resolving Redaction Issues

We issue draft reports to the DHS components we review, including TSA, to allow for component comment prior to the publication of a final report. We find that this iterative process improves the final work product by ensuring that component concerns are considered and, if appropriate, addressed in advance of publication. For this process to succeed, however, we rely on timely responses from the components.

We often find ourselves questioning TSA's purported SSI redactions during the sensitivity review process. In such cases, we typically request that the Administrator of TSA review the SSI designations, which are made in the first instance by TSA's SSI Program Office, and make an independent assessment as to whether the designations are appropriate. The length of time it takes to get a resolution from TSA is troubling. In many cases, while awaiting resolution, we have been compelled to publish redacted reports containing SSI markings with which we disagree to meet our reporting requirements.

Our audit report concerning the information technology operations at John F. Kennedy airport is illustrative. It took nearly 6 months to get a response from TSA, as reflected in the timeline below:

- **July 22, 2014:** OIG provides draft report to the Department's Chief Information Officer with a response date of August 22, 2014.
- **August 22, 2014:** No response.
- **August 27, 2014:** DHS Chief of Staff requests an extension; extension granted until September 17, 2014.
- **September 17, 2014:** No response.
- **October 20, 2014:** TSA returns a draft of the report with several passages marked as SSI.
- **November 19, 2014:** OIG sends a formal challenge memo to TSA Administrator John Pistole contesting the SSI markings.
- **December 16, 2014:** Having received no response, the Inspector General writes to Administrator Pistole a second time to request that TSA remove the SSI designations in the report; the OIG never receives a response.



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Department of Homeland Security

- **January 13, 2015:** The TSA SSI Program Office, which made the original SSI designations in the draft report, contacts the OIG and refuses to remove the markings, in essence affirming its own designations.

We encountered other issues with TSA more recently in connection with our airport IT capping report:

- **September 16, 2016:** OIG provides draft report to the Department's Chief Information Officer requesting agency comments, including a sensitivity review, by October 17, 2016.
- **October 11, 2016:** TSA sends its request for redactions.
- **October 14, 2016:** TSA requests an extension until October 21, 2016, to provide management comments to the draft report.
- **October 17, 2016:** OIG notifies TSA that certain of the proposed redactions relate to information that has been published in prior OIG reports; TSA responds that information regarding deficiencies over 3 years old need not be redacted.
- **October 18, 2016:** OIG sends TSA a detailed analysis of the requested redactions and requests that TSA reconsider its request for all redactions of information previously published in OIG reports (*i.e.*, not just redactions relating to deficiencies greater than 3 years old).
- **October 25, 2016:** TSA provides management comments to the draft report, which do not mention the requested redactions.
- **October 27, 2016:** TSA sends revised redactions, eliminating some, but not all, of the redactions pertaining to information previously published in OIG reports.

TSA's refusal to remove unsupportable SSI designations — including designations pertaining to previously published information — raises serious questions about its stewardship of the SSI program. None of these redactions will make us safer, and they serve to highlight the inconsistent and often arbitrary nature of TSA's SSI designations. Furthermore, improperly applied SSI designations impede my ability to keep Congress and the public "fully and currently informed," which is required under the *Inspector General Act* and key to accomplishing the OIG's critical mission.



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Department of Homeland Security

TSA Appeals Process

Under DHS policy, any authorized holder of SSI who believes an SSI designation is improper or erroneous is encouraged to challenge the marking. Challenges can be made informally or formally. An informal challenge is made directly to the person that applied the SSI marking, who is supposed to reevaluate the SSI markings against certain criteria.¹² A formal challenge must be made in writing to the person who applied the SSI marking, or to the TSA SSI Office. Further appeals must be made first to the Director of the TSA SSI Office, and then to the TSA Assistant Secretary, whose decision is final.¹³

This appeals process is structured to ratify TSA's SSI designations and prevent review of such designations by independent, external entities. The appeals process is foreordained and fails to properly balance the public's right to information against non-speculative threats to aviation security, and it is vulnerable to abuse.

OIG Upcoming Work

We are currently in the fieldwork stage of a comprehensive review of TSA's management of its SSI program and its use of the SSI designation. . We expect to issue a final report by July 2017 and will provide a copy of the report to this Committee when it is published.

Additionally, we will continue to review and publish public reports on TSA's programs and operations. To the extent we continue to observe the abuse of the SSI designation, we will continue to highlight it.

Mr. Chairman, this concludes my testimony. I am happy to answer any questions you or other members of the committee may have.

¹² Sensitive Security Information (SSI), MD Number 11065.1 (issued 11/03/2006).

¹³ *Id.*

Chairman CHAFFETZ. Thank you.
 I'll now go to Ms. Lerner. You're now recognized for 5 minutes.
 Bring that microphone up nice and close. There you go. Thank you.
 Ms. LERNER. Got it.
 Chairman CHAFFETZ. Thank you.

STATEMENT OF CAROLYN LERNER

Ms. LERNER. Chairman Chaffetz, Ranking Member Cummings, and members of the committee, thank you for the opportunity to testify today about the U.S. Office of Special Counsel and our investigations of whistleblower retaliation at the Transportation Security Administration. I appreciate the committee's commitment to oversight, including strengthening OSC's ability to carry out our good government mission.

I want to take the opportunity to thank this committee for your leadership in passing the Thoroughly Investigating Retaliation Against Whistleblowers Act, H.R. 69, during the opening week of this Congress. That legislation will help OSC conduct our investigations at TSA and other agencies.

During our investigations, it is standard to issue document requests and interview witnesses. A full and complete investigation requires access to all relevant information. Although agencies generally cooperate with OSC's requests, some do not. Some withhold documents and other information by asserting common law privileges, and in particular, the attorney-client privilege. As the committee knows, the attorney-client privilege protects certain communications between a lawyer and client. The privilege allows the client to disclose confidential communications in order to promote frank and candid discussions.

As someone who spent two decades practicing law in the private sector, I understand the importance of the privilege, and of course, it helped me to represent my clients. In government, the privilege is certainly important in certain contexts, such as in litigation with third parties. Having said that, there is simply no basis for Federal agencies to assert the attorney-client privilege during an OSC investigation. This is not litigation. This is an internal administrative investigation that OSC is conducting for the government.

Indeed, no court has ever held that the attorney-client privilege can be used during an administrative investigation between two government agencies. This makes sense. We all work for the same government. Congress and this committee, in particular, have made clear that there is a strong public interest in exposing government wrongdoing and upholding merit system principles.

Federal agencies may not use privileges to conceal evidence from the agency that Congress is charged with investigating them. Unfortunately, the TSA has been somewhat of an outlier in its aggressive use of attorney-client privilege in several cases.

In 2012, Congress extended whistleblower protections to TSA employees through the Whistleblower Protection Enhancement Act. Since then, OSC has received more than 350 retaliation cases from the TSA employees. Two pairs of companion cases illustrate the challenges OSC faces in getting needed information from the TSA. The complainants are TSA officials who experienced involuntary

geographical reassignments, a demotion, and a removal, all allegedly in retaliation for their protected whistleblower disclosures.

In these cases, TSA withheld information from its document productions, asserting claims of attorney-client privilege. OSC has asked TSA to withdraw the claims of privilege, but both TSA and DHS rejected these requests. There are several problems with TSA's assertions of privilege.

First, as discussed above, shielding information from OSC conflicts with our statutory mandate to investigate the legality of personnel practices. When TSA doesn't disclose the reasons why they took an action against the whistleblower, we can't investigate whether it's retaliation.

In addition, TSA's attorney-client privilege review causes significant delays in investigations. In these four cases, OSC has spent months waiting for documents while TSA was reviewing responses for privilege.

OSC is a tiny agency. We only have about 40 attorneys to investigate hundreds of retaliation cases. Our lawyers are spending too much time negotiating for documents, time that could be much better spent advancing the investigation.

These delays also directly impact complainants who are waiting for relief, often when they are facing devastating situations at work. Despite the challenges created by TSA's privilege claims, OSC is committed to completing thorough investigations and protecting TSA employees.

Thank you for the opportunity to testify today. We appreciate the committee's interest in these challenges we're facing. I look forward to answering your questions.

[Prepared statement of Ms. Lerner follows:]

**Testimony of Special Counsel Carolyn N. Lerner
U.S. Office of Special Counsel

U.S. House of Representatives
Committee on Oversight and Government Reform**

“Transparency at TSA”

March 2, 2017, 10:00 AM

Chairman Chaffetz, Ranking Member Cummings, and Members of the Committee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC), and our efforts to investigate allegations of whistleblower retaliation at the Transportation Security Administration. I greatly appreciate the Committee’s commitment to oversight and to strengthening OSC’s ability to carry out our good government mission. Let me also take this opportunity to thank the Committee, and in particular Representatives Blum, Meadows, Cummings, and Connolly for your leadership in passing the Thoroughly Investigating Retaliation Against Whistleblowers Act (H.R. 69) during the opening week of this Congress. Making whistleblowers a first-week issue highlights their critical importance to effective oversight. We look forward to continuing to work with you and your Senate counterparts as the legislation moves forward. The clarified authority in that legislation will assist OSC in our efforts to conduct timely and complete investigations on behalf of whistleblowers at TSA and other federal agencies.

I. OSC’s Critical Mission

OSC is an independent investigative and prosecutorial federal agency that promotes accountability, integrity, and fairness in the federal workplace. We provide a safe and secure channel for government whistleblowers to report waste, fraud, abuse, and threats to public health and safety. And we protect federal employees from prohibited personnel practices, most notably whistleblower retaliation. OSC also protects veterans and service members from job discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA). And finally, we enforce the Hatch Act, which keeps partisan political activity out of the federal workplace. In all of these areas, OSC prioritizes outreach and education to federal employees and managers to prevent potential violations before they occur.

Although OSC has limited resources, we are fulfilling our critical mission more effectively now than ever before. Through our whistleblower disclosure process, we have worked with whistleblowers to improve care for veterans across the country, put a stop to millions of dollars of waste in government overtime programs, and identified and corrected significant threats to aviation security. These are significant victories for employees who risked their careers to promote more honest, accountable, safe and efficient government.

U.S. Office of Special Counsel

March 2, 2017

Page 2 of 5

As noted, a critical part of OSC's mission is to protect those whistleblowers. In fiscal year 2016 alone, we secured 276 favorable actions for whistleblowers and other victims of prohibited personnel practices. These actions include reinstatement or relief for whistleblowers who have been fired, demoted, or reassigned, as well as back pay and other remedies. In appropriate cases, we also seek disciplinary action against the agency officials who engaged in the wrongdoing. The number of victories on behalf of whistleblowers and other employees reflects a 233 percent increase since my tenure began in FY 2011.

II. To Fulfill its Mandate, OSC Needs Broad Access to Agency Information

Congress has given OSC a broad mandate to investigate potentially unlawful personnel practices, including whistleblower retaliation. OSC's authorizing statutes empower OSC to issue subpoenas, administer oaths, examine witnesses, take depositions, and receive evidence. 5 U.S.C. §§ 1212(b)(1), 1214(a)(1)(A), 1214(a)(5), 1216(a), 1303. Moreover, Office of Personnel Management (OPM) regulation 5 C.F.R. § 5.4, specifically directs agencies to comply with OSC requests, stating: "agencies shall make available . . . employees to testify in regard to matters inquired of . . . [and] shall give . . . OSC . . . all information, testimony, documents, and material . . . the disclosure of which is not otherwise prohibited by law or regulation."

OSC uses its investigatory authority extensively. In particular, OSC investigations depend on the routine issuance of document requests and the ability to interview witnesses. Although agencies generally work with OSC to fulfill OSC's document requests, some agencies do not provide timely and complete responses. The failure to provide such responses can significantly delay and impede OSC's investigation. In addition, agencies sometimes withhold documents and other information responsive to OSC requests by asserting the attorney-client privilege. In these cases, OSC often must engage in prolonged disputes over access to information, or attempt to complete our investigation without the benefit of highly relevant communications. This undermines the effectiveness of whistleblower laws, wastes precious resources, and prolongs OSC investigations.

Neither OSC's governing statutes, nor applicable OPM regulations authorize an agency to withhold information from OSC based on an assertion of attorney-client privilege by a government attorney acting on behalf of a government agency. And no court has ever held that the attorney-client privilege can be asserted during intra-governmental administrative investigations. The purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). But invoking the privilege in the context of an OSC investigation is inconsistent with this historical understanding of the privilege for several reasons.

First, Congress has made clear that there is a strong public interest in exposing government wrongdoing and upholding merit system principles. To uphold this public interest, OSC must review communications between management officials and agency counsel to determine whether an agency acted with a legitimate or unlawful basis in taking action against a whistleblower. Federal agencies have no legitimate basis to use privileges to conceal evidence of prohibited practices from the agency that Congress charged with investigating them. See *In re Lindsey*,

U.S. Office of Special Counsel

March 2, 2017

Page 3 of 5

158 F.3d 1263, 1266-67 (D.C. Cir. 1998) (citing the “obligation of a government lawyer to uphold the public trust” in rejecting the assertion of attorney-client privilege for White House lawyers in Whitewater litigation). It simply makes no sense to create an intra-executive branch investigative process to determine if prohibited conduct occurred, and then allow agencies to frustrate that process by withholding information.

Second, review by OSC does not deter frank and candid communications between government managers and lawyers. In fact, agencies routinely provide OSC with these communications to demonstrate that a personnel action against an employee was lawful and motivated by non-retaliatory, valid performance or misconduct-based reasons. When management engages in this type of communication with government lawyers, and provides evidence of these consultations to OSC, it facilitates prompt review by OSC and benefits the government as an employer.

Third, there is no precedent to support agency concerns that disclosure to OSC would constitute a waiver of the privilege in another forum or in third party litigation. OSC’s information requests are not akin to discovery requests made by a third party in litigation. OSC is an internal investigator for the U.S. Government, and our requests are made to other U.S. Government entities, not third parties. If Congress wished to allow agencies to shield information within this process, it would have crafted a limitation on OSC’s investigatory mandate and authority. For example, the exceptions included in the Freedom of Information Act pertaining to public release of privileged documents show that Congress does so when it chooses.

Although we believe Congress has already expressed its intent in this area, to provide additional clarity, OSC recommends that Congress establish explicit statutory authority for the Special Counsel to obtain information, similar to section 3 of the House-passed Thoroughly Investigating Retaliation Against Whistleblowers Act (H.R. 69). We urge Congress to amend this provision prior to final passage to expressly clarify OSC’s existing right to request and receive information that assertions of common-law privileges may protect in other contexts. This statutory provision would be similar to the authorities Congress has provided to Inspectors General, and clarified recently by the Inspector General Empowerment Act of 2016, and to the Government Accountability Office.

A statutory provision clarifying OSC’s access to information in whistleblower investigations should be broad enough to make clear that it applies to all OSC investigations, including whistleblower disclosure, Hatch Act, and USERRA cases. This will help OSC fulfill its statutory mandates and avoid unnecessary and duplicative investigations. Clear statutory authority to access agency information will help us resolve disputes over documents more quickly, resulting in faster case resolutions and better enabling OSC to respond to the increased demand and case levels.

III. OSC’s Challenges in Obtaining Information from TSA

I will now turn to OSC’s investigations of whistleblower retaliation complaints at TSA. In December 2012, Congress extended statutory whistleblower protections to TSA employees through the Whistleblower Protection Enhancement Act. Since then, OSC has received more

U.S. Office of Special Counsel

March 2, 2017

Page 4 of 5

than 350 whistleblower retaliation cases from TSA employees (under 5 U.S.C. § 2302(b)(8) and (b)(9)).

To illustrate for the Committee the challenges OSC has faced in acquiring the information needed from TSA to complete our investigations, I will focus on two pairs of companion cases. The complainants in these cases are TSA officials who experienced involuntary geographical reassignments, a demotion, and a removal, all of which were allegedly in retaliation for protected whistleblower disclosures.

In these four cases, TSA withheld information from its document productions, asserting claims of attorney-client privilege. OSC asked TSA to withdraw the claims of privilege, and it elevated this request to TSA's parent agency, the Department of Homeland Security (DHS). Both TSA and DHS rejected OSC's requests, and refused to release the documents.

Several critical problems exist with TSA's assertions of privilege. As discussed above, shielding information from OSC through privilege is inconsistent with OSC's statutory mandate and regulatory authority to investigate the legality of certain personnel practices. TSA appears to be withholding information directly related to the decision-making process for the personnel actions it took against the complainants. Understanding the motivation behind these actions is essential to OSC's investigation. OSC requires access to all information relevant to potentially unlawful personnel practices, even if that information might be privileged in other contexts. When TSA refuses to disclose why it takes an action, it is impossible for OSC to investigate whether there was retaliation.

Additionally, in the two cases for which TSA has completed its document production, TSA stated it was unable to provide a privilege log describing the information withheld. The lack of a privilege log is particularly problematic because OSC has concerns that TSA may be withholding information more extensively than even a robust attorney-client privilege would allow. Without documentation of the information withheld—a basic requirement whenever the attorney-client privilege is asserted—it is difficult to evaluate the extent to which this is true.

The attached exhibit provides a particularly striking example (OSC Exhibit, March 2, 2017). TSA redacted every word of the document, including the date, author, and recipient. Based on our review of other information and testimony, OSC believes this exhibit may reflect a key witness's factual summary of a pivotal meeting about the personnel actions at issue in the relevant investigation. We understand that no attorneys were present at the meeting and it does not appear legal advice was discussed. It is not clear why the summary was determined to be privileged, and we cannot assess or challenge any improper privilege determinations, because TSA will not provide the information that would be necessary to do so.

TSA similarly redacted the names of email attachments, and other portions of documents with no apparent connection to an attorney or to any legal advice. Extensive redaction hinders OSC's ability to properly investigate, identify witnesses, and prepare for interviews.

Moreover, TSA's attorney-client privilege review causes significant delays in these investigations. OSC requested that TSA produce documents in the first two companion cases

U.S. Office of Special Counsel

March 2, 2017

Page 5 of 5

within 30 days, which is consistent with the discovery deadline under the Federal Rules of Civil Procedure. It took TSA nearly five months after the requested deadline to complete its production of documents. TSA has stated that its privilege review accounts for much of the delay. OSC attorneys and investigators have spent considerable time negotiating about the document production that could have been spent advancing the investigation.

Despite the challenges created by TSA's attorney-client privilege claims, OSC continues investigate these and other TSA cases as expeditiously as possible. OSC has reviewed hundreds of documents in connection to these matters and interviewed approximately 18 witnesses. OSC is committed to completing a thorough investigation of these cases and protecting TSA whistleblowers where appropriate.

We appreciate the Committee's interest in the challenges we are facing, and we hope that your engagement might facilitate some progress in addressing them. I thank you for the opportunity to testify today, and I look forward to answering your questions.

* * * * *

Special Counsel Carolyn N. Lerner

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights.

Ms. Lerner earned her undergraduate degree from the Honors College at the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.

[illegible]

Chairman CHAFFETZ. Thank you. I appreciate it.

We'll now recognize the gentleman from Alabama, Mr. Palmer, for 5 minutes.

Mr. PALMER. Thank you, Mr. Chairman.

I believe we have a slide. Ms. Lerner, can you give an example of the kinds of redactions that TSA has provided your office with?

Ms. LERNER. Yes.

Mr. PALMER. Put the slide back up.

Ms. LERNER. So this is an example. This is one of the attachments to our written submitted testimony. This is an example of the type of document production that we're getting from TSA, and it's a real problem because this document, we believe, would go directly to the issues that we're trying to investigate in the case.

Was there a disclosure by the employee? Were they whistleblowing? And what were the reasons that the agency had for taking the action against the whistleblower after they blew the whistle? And when we get a document that's 100 percent redacted, there's no way we can get to the bottom of the information that we really need.

Mr. PALMER. Does it appear to you, at least, that the use of the redaction is selective and inconsistent to the point that it might raise suspicion that it's being used to cover up problems at TSA? Would that be fair?

Ms. LERNER. I can't get to what's motivating them and their reasons for—

Mr. PALMER. I'm just asking appearances.

Ms. LERNER. —redacting, but it does raise concerns.

Mr. PALMER. Thank you.

Dr. Gowadia, is that how you pronounce that?

Ms. GOWADIA. Yes, sir.

Mr. PALMER. Thank you. Ms. Lerner provided examples of overly broad redactions by TSA. Were you aware that TSA withheld information from the Office of Special Counsel in this manner?

Ms. GOWADIA. Yes, sir. I am aware that we do assert attorney-client privilege in some instances.

Mr. PALMER. Can you explain why the documents Ms. Lerner has provided today were redacted?

Ms. GOWADIA. Sir, I do not know the exact specifics of the case that you put up.

Mr. PALMER. You couldn't from reading that slide.

Ms. GOWADIA. Certainly. And we would have to go back into the log and determine the exact nature.

Mr. PALMER. Ms. Lerner stated in her testimony that even the date, author, the recipient of the document were redacted. Can you explain how that information would be privileged?

Ms. GOWADIA. Sir, I—again, I don't know the context in which this particular document—

Mr. PALMER. I'm not talking about that particular document. There are other documents. Why would you—why would you be redacting the date and the author and the recipient? Can you give an explanation to that?

Ms. GOWADIA. Sir, I believe it might be on a case-by-case basis, those particular issues.

Mr. PALMER. Selective?

Ms. GOWADIA. It would not be selective.

Mr. PALMER. Inconsistent?

Ms. GOWADIA. I would say case by case.

Mr. PALMER. Well, it appears to be selective and inconsistent. I mean, why—again, why would you redact the date?

Ms. GOWADIA. Again, sir, I have no ability to opine on the document put up or in the generalities. It would have to be answered on a case-by-case basis.

Mr. PALMER. You know, you talked about attorney-client privilege. If there were no attorneys present at the meeting, how could TSA possibly invoke attorney-client privilege with respect to the document?

Ms. GOWADIA. Sir, again, I have—I do not have insight into the particular document you're talking about.

Mr. PALMER. I'm not talking about that—just that document, but this has gone on with other instances where in one case the attorney couldn't even identify the client, yet claimed attorney-client privilege.

Ms. GOWADIA. Sir, let me go back to the question you asked previously about if the attorney is not in the meeting. It might be that an employee is asking for attorney's advice on something. But again, it's speculative, because I don't know.

Mr. PALMER. What if the attorney can't identify the client?

Ms. GOWADIA. I'm not sure where that reference is coming from, sir.

Mr. PALMER. I think we'll get into that later.

Ms. Lerner, would you like to comment on that?

Ms. LERNER. Sir, I think really what this boils down to is we don't believe that the attorney-client privilege applies in any document for any document request. We are acting in the agency's shoes. This is an interagency intergovernment investigation that Congress has asked us to conduct.

It's not appropriate for any agency to claim attorney-client privilege when they're producing documents to OSC. It would be the same thing with an IG or GAO, an agency would never claim attorney-client privilege during an IG investigation. It's not appropriate to claim it during an OSC investigation either.

Mr. PALMER. That's part of my problem with this is, as I said, selective use of redaction, the inconsistent use of it, claiming attorney-client privilege, it—you know, with all due respect, it appears that TSA is trying to cover up problems.

Mr. Roth, do you have any comment on that?

Mr. ROTH. We've been very fortunate that DHS has taken the policy, since I've been there, that the attorney-client privilege does not apply to anything that we receive. Of course, they're a little more restrictive on publication because they don't want to breach the attorney-client privilege for a number of reasons, and that's obviously their decision whether or not to do so. But they have taken the position that attorney-client does not bar us from access to information.

Mr. PALMER. Well, I appreciate your answer.

Mr. Chairman, I yield back.

Chairman CHAFFETZ. I thank the gentleman.

We'll now go to Mrs. Demings of Florida for 5 minutes.

Mrs. DEMINGS. Thank you so much, Mr. Chairman. And thank you to all of our witnesses who are here before us today. We do understand and know how important transparency is but also how important whistleblower protections are to the overall process.

I'm pleased today to hear from both sides of the aisle to speak out in support of whistleblowers and the important work done by the Office of Special Counsel. But despite the talk that we've heard, congressional Republicans have failed to provide OSC with the funding that you so desperately need to carry out the work.

President Obama's congressional budget justification of the Office of Special Counsel for fiscal year 2017 requested additional funding for the agency, noting a record number of whistleblower disclosures up 74 percent over the prior 2 years.

Ms. Lerner, is that correct, and has OSC seen an increase in its caseload over the past several years, and do you currently have a backlog in handling whistleblower complaints?

Ms. LERNER. Thank you so much for the question. Yes, our caseload has about doubled during the time that I've been special counsel. We got about over 6,000 complaints last year over all four of our program areas, which is a really big increase. Our lawyers are beyond, you know, the ability to work cases the way they need to be working them.

We do appreciate that the House and the House's bill, they fully funded us at the President's number. The Senate bill kept us level as at last year's levels. We really do need an increase in funds pretty desperately in order for us to fulfill our good government mission and to do the kinds of things that Congress has asked us to do to be effective. We need appropriate staff, and we don't have it right now.

Mrs. DEMINGS. I understand that according to the fiscal year 2017 budget justification, that you requested 15 new full-time employees to meet its caseload. Is that correct?

Ms. LERNER. That's correct.

Mrs. DEMINGS. And even though this increase received bipartisan support in the House, the Republican-led Congress failed to pass the appropriations bill last year, so OSC did not receive the increase in staffing as requested. Is that correct?

Ms. LERNER. That is correct. And also, in the Senate bill, they kept us at the same level as last year. They did not follow the House's lead in terms of giving us the number that the President requested.

Mrs. DEMINGS. Okay. And President Trump was instrumental in pressuring Congress to delay action on these spending bills, meaning that current spending levels will remain in place until at least April.

Ms. Lerner, have budget constraints affected your ability to enforce whistleblower protections, and if so, in what way?

Ms. LERNER. I think our lawyers are doing an amazing job with the resources that they have. As you noted, we did request additional funds so that we could hire at least 15 more lawyers. As I mentioned in my opening statement, we have about 40 attorneys right now assigned to do the investigation and prosecution of the hundreds of retaliation cases that are coming into our agency.

It creates frustration for complainants. It creates delays in terms of getting people the relief that they need, and frankly, our staff is frustrated because they would like to be able to spend appropriate time on the cases. So it would be very, very helpful if our agency were fully funded.

Mrs. DEMINGS. I think you stated in 2012 that you received more than 350 whistleblower retaliation cases from TSA employees. Would you say that that's correct?

Ms. LERNER. Yes, that's right.

Mrs. DEMINGS. And how many did you receive last year, roughly?

Ms. LERNER. I don't know the exact number, but it's about—it's about the same level.

Mrs. DEMINGS. And do OCS's resource constraints affect how quickly you can resolve the open cases, the extreme high number of open cases that you currently have?

Ms. LERNER. Yeah. Let me give you an example. When I first started as special counsel in 2011, our complaints examining unit had about 25, maybe 30 cases per complaint examiner. Now they are up to 60, sometimes 70 cases per examiner. That's double tripling of the caseloads. That means it takes us much longer to determine whether a case should be fully investigated. It takes us longer to get relief for complainants at a time in their life when they're really under terrible, you know, workplace situations, someone who, you know, may need immediate relief. We may not always be able to get to their case as quickly as we ought to. It's taking around 90 days, on average, for cases to get through our complaints examining unit. When I first started, it was an average of closer to 30 days.

Mrs. DEMINGS. Thank you so much.

Mr. Chair, I yield back.

Chairman CHAFFETZ. The gentlewoman yields back.

I now recognize myself.

Ms. Gowadia, you said that TSA has zero tolerance on those that are applying retaliation to whistleblowers, correct?

Ms. GOWADIA. Yes, sir.

Chairman CHAFFETZ. Do you believe that the TSA—so if an employee believes that they have been retaliated against, who is the—or what organization is the one that comes in to figure out whether or not there has been retaliation?

Ms. GOWADIA. So, sir, employees at TSA are afforded all protections from the Whistleblower Act, all TSA employees are, so they can go up any number of channels. They can go up to the EEOC line, the MSPB line, or the OSC line. They can even—

Chairman CHAFFETZ. Okay. So let's take the OSC, for example.

Ms. GOWADIA. Certainly.

Chairman CHAFFETZ. The whistleblower says I've been retaliated against. The TSA says, no, they haven't. There's a dispute. OSC is one of the organizations, I think the primary organization, to resolve that dispute, correct?

Ms. GOWADIA. Certainly.

Chairman CHAFFETZ. You agree with that?

Ms. GOWADIA. Yes, sir.

Chairman CHAFFETZ. So what percentage of the information should the OSC be able to review in order to figure out the right conclusion?

Ms. GOWADIA. Sir, the OSC should have all the information they need to figure it out.

Chairman CHAFFETZ. Define all of the information.

Ms. GOWADIA. Sir, I appreciate where you're headed with your question on the information we redact for attorney-client privilege issues. In that regard, I have to say we follow departmental guidance.

Chairman CHAFFETZ. Wait, wait, wait, wait. There's the law and then there's departmental guidance. You said you believed that the OSC should get all of the information. What percentage is all?

Ms. GOWADIA. Sir, I said—

Chairman CHAFFETZ. No, no, no. It's a simple question.

Ms. GOWADIA. I hear you. I just want—

Chairman CHAFFETZ. No, no. I want to be clear in what I'm asking. If she is to get all of the information, which you said—

Ms. GOWADIA. Well, actually—

Chairman CHAFFETZ. —what percentage—what percentage is all?

Ms. GOWADIA. All would be, mathematically, 100 percent, but my sentence was all the appropriate information.

Chairman CHAFFETZ. Appropriate. What—so what do you believe the OSC should not see?

Ms. GOWADIA. Sir, the attorney-client privileged information is presently redacted. I know you don't want to hear numbers, so I'm not going to give you numbers, but it is a very small fraction.

Chairman CHAFFETZ. The only number I want to hear from you is that we give the OSC 100 percent of the information. That's what I want to hear you say. You said you give them all, that they should have all.

How are they supposed to come to a proper conclusion when you only give them something short of 100 percent?

Ms. GOWADIA. Sir, in this regard, again, I have to stress that TSA is not an agency independent. We belong to a department. We follow guidance that the Department gives us.

Now, as a part of this hearing, we have—your concern has been raised. I can assure you that we will follow up with this at the department level, make guidance in writing if we have to, make it so that we are—

Chairman CHAFFETZ. Okay. So you said it's department guidance. When will you provide this committee that department guidance that says that the attorney-client privilege prohibits you from giving the information to the OSC? When will I have that on my desk?

Ms. GOWADIA. Sir, I have already raised the matter with the department's general counsel, and I will work with them to get you—

Chairman CHAFFETZ. No, I want a date certain.

Ms. GOWADIA. Unfortunately, sir, this is not up to me. I am not the—

Chairman CHAFFETZ. You're the acting administrator of the TSA. You've got 50-plus thousand employees. You don't have the—you're

relying on guidance from the Department, and you're going to withhold that information from Congress?

Ms. GOWADIA. Sir, to my—to my best of my knowledge, the guidance is not in writing. We are working to get——

Chairman CHAFFETZ. Well, wait a second.

Ms. GOWADIA. —the practice——

Chairman CHAFFETZ. You don't have—you just made this up? It's not in writing?

Ms. GOWADIA. Sir, it is a standard practice——

Chairman CHAFFETZ. No, it's not.

Mr. Roth—or Ms. Lerner, is this a standard practice?

Ms. LERNER. No, it's not. There is no attorney-client privilege when one government agency is investigating another government agency. It's very much akin to what the IG's doing with——

Chairman CHAFFETZ. Do you see this with any—do you see this with any other department or agency or whatever you want to call it?

Ms. LERNER. From time to time, but not to the extent that we're seeing it with TSA.

Chairman CHAFFETZ. Mr. Roth, what's your experience with this?

Mr. ROTH. We are part of the Department of Homeland Security, so we get everything, whether it's attorney-client or not.

Chairman CHAFFETZ. Ms. Gowadia, I want you to provide the guidance to this office next Friday. Is that fair? A week from tomorrow.

Ms. GOWADIA. Sir, I will work with the Department to get you something by next Friday.

Chairman CHAFFETZ. What—let me ask you this: What do you think Congress has the right to see? If I ask for all the information, what percentage of the documentation will you give us?

Ms. GOWADIA. So, again, when it comes to attorney-client privilege, I am not in a position to opine.

Chairman CHAFFETZ. Yes, you are. You're the acting administrator. I'm asking you right now to provide the information that the OSC has asked for. I want you to provide it to this committee.

Ms. GOWADIA. Sir, may I offer something? Yesterday, we came to visit with Mr. Meadows, and as a part of getting ready for this hearing, this concern has come to my attention in a very strong way. I went back and I asked my staff to do a quick look and see, have we ever had any concern expressed by the OSC to us in the information we have redacted? Has that kept them from proceeding on a case?

We found two instances. I believe Ms. Lerner has four in her statement. I have—as of yesterday, if we ever redact a piece of information from the OSC, we will always accompany it with a privileged log, and that will allow OSC to have more information on the information that has been redacted as a starting point.

Chairman CHAFFETZ. Okay. So when will you provide the OSC the privileged log? When will you do that?

Ms. LERNER. If I may, that would not be sufficient.

Chairman CHAFFETZ. Oh, I'm not saying that's an endpoint.

Ms. LERNER. Sir, no. A privileged log suggests that there actually is a privilege. It's our position that there is no attorney-client privilege. It would not be appropriate.

Chairman CHAFFETZ. But I would like—your point is well taken, and I concur with it. But I would be interested to see all the different times that the TSA is taking this so-called privilege, which we don't buy into.

When will you provide that to the OSC and to the Committee on Oversight and Government Reform? When will I have that on my desk?

Ms. GOWADIA. The privileged logs?

Chairman CHAFFETZ. Yes.

Ms. GOWADIA. With every document that we issue henceforth, we will issue—

Chairman CHAFFETZ. No, no, no. Not in the future. I want to know all the ones in the past.

Ms. GOWADIA. Sir, I am not familiar with how many—how many records—

Chairman CHAFFETZ. It doesn't matter how many. I want to know when I'm going to have all of them.

Ms. GOWADIA. Well, sir—

Chairman CHAFFETZ. A week from—you have a week from Friday. Okay? A week from Friday, or I'll issue a subpoena. And guess what? I don't need a committee vote. I don't need to go ask a judge. I can do it myself. And I'm telling you here on national television, you will get a subpoena for that information. You should provide it voluntarily. We do not buy into this whole notion that there is any such privilege.

Secondly, the information that the OSC is asking for where they don't have 100 percent of the documents, when will we as a committee have that?

Ms. GOWADIA. So, again, I will have to take that question for the record, because this is a departmental position that I am not unilaterally allowed to circumvent.

Chairman CHAFFETZ. Who—tell me who at the Department of Homeland Security is holding you back.

Ms. GOWADIA. Sir, I have to work with the Office of General Counsel.

Chairman CHAFFETZ. Give me some names. I want to know who to call up here.

Ms. GOWADIA. The Office of General Counsel.

Chairman CHAFFETZ. No, no.

Ms. GOWADIA. The general counsel to the secretary.

Chairman CHAFFETZ. Give me a specific name. That's a big office. There's lots of attorneys. Tell me the attorneys that are telling you not to provide this information to Congress, and tell me the names of the attorneys that are telling you not to provide this to the OSC. I want names.

Ms. GOWADIA. Sir, it—I will follow up with your—with you and your staff right after—

Chairman CHAFFETZ. No, I want you right now. You've had notice of this hearing. I need specific names. You have staff sitting there.

How many staffs are with the TSA?

Ms. GOWADIA. Sir—

Chairman CHAFFETZ. How—how many staff are with the TSA are in this audience right now?

Please, raise your hands. Who's paid by the TSA? How many people?

Wait a second. One, two, three—hold them up. One, two, three, four, five, six, seven. One of these seven people has got to get on the phone, get your butt up out of this committee, and go get that information before this hearing is done. I want to have names, and we're going to call them up there.

There is no way—we're going to go to the ends of the earth to protect whistleblowers. And we have an independent—we have this OSC—Ms. Lerner has testified time and time again, we believe in her and her organization. She needs 100 percent of the information, not some of it, not some that you don't want us to have, not the embarrassing. She needs all of it. And I want names of who at the Homeland Security is prohibiting people from giving that information to the OSC.

Ms. GOWADIA. Mr. Chaffetz, I have asked my staff to step out and obtain permission from the Department to give you a name before the hearing is done.

Chairman CHAFFETZ. Thank you. And I need to know what information—let me ask you this, one conceptual question, and I'll turn the time to Mr.—to the gentleman.

What information do you believe should be withheld from Congress?

Ms. GOWADIA. Sir, I don't believe information should be withheld from Congress unless there are certain provisions, such as the attorney-client privilege, which, again, my hands are tied by departmental policy. I cannot take unilateral action, because there are ripple effects across the Department.

That having been said, I will tell you that when it comes to SSI information, all of this is—we are completely transparent, not with—just with you but with the IG, with your staff. They have full privilege to all the information when it comes to SSI and things like that. But when it comes to the attorney-client privilege element, sir, I—it's something—

Chairman CHAFFETZ. I think we've established here that that is so bogus. You're making it up. That may be what the attorneys are telling you. You're a very talented, smart person. I appreciate the work that you do on behalf of the United States of America. But we've got whistleblowers who think they're getting retaliated against, and I want you to stop hiding behind some legalese and throwing attorneys into meetings so you don't have to provide documents.

We don't see this problem of this magnitude anywhere else except the TSA, and that's why we're going to get to the bottom of it.

I've gone well past my time. We're going to recognize Mrs. Lawrence of Michigan for 5 minutes, and some more if she needs it.

Mrs. LAWRENCE. Thank you, Mr. Chairman.

Dr. Gowadia, transportation security officers are frontline employees, who protect our airports and our skies, are not covered by many of the civil service protections available to most Federal employees. What kind of rights do TSOs have when they are subjected to adverse employment actions?

Ms. GOWADIA. Ma'am, they have full whistleblower protection rights, and they have the ability to bring their concerns before an appellate board to raise some of their concerns.

Mrs. LAWRENCE. Who's on the appellate board?

Ms. GOWADIA. Other TSA employees.

Mrs. LAWRENCE. What prevents a TSO from being a subject to an arbitrary personnel action, one taken, perhaps, because an employee has fallen out of favor with the manager? What protects them?

Ms. GOWADIA. Ma'am, the entire system protects them. This is all about leadership. We have to make it so that our leadership is well educated, well trained, and well able to make decisions that do not adversely affect an employee on a—

Mrs. LAWRENCE. I understand that, but what—what prevents an employee from getting arbitrary personnel action?

Ms. GOWADIA. They have the ability to appeal their situation before the appellate board.

Mrs. LAWRENCE. Do you agree that fairness and consistency in due process are important components of the personnel system for Federal employees?

Ms. GOWADIA. Absolutely.

Mrs. LAWRENCE. Inspector Roth, do arbitrary personnel practices deter whistleblowers from speaking out about security deficiencies?

Mr. ROTH. I believe that it's got a chilling effect. Any time there is the threat of some sort of improper personnel practice as a result of making a protective disclosure, for example, of a safety situation or other kind of misconduct on the part of the agency, that there is always that fear that there is a chilling effect that something will happen to that person.

Mrs. LAWRENCE. So if TSA employees are reluctant to raise these deficiencies they observe, couldn't this put aviation security at risk?

Mr. ROTH. Well, that's absolutely the case. And we get, at DHS, something like 20,000 complaints a year from various DHS employees raising exactly those issues. But we do worry, of course, as Ms. Lerner does, that those folks can be retaliated against if, in fact, the word of their cooperation gets out.

Mrs. LAWRENCE. I'm going to make a statement now. TSA's arbitrary and inconsistent personnel actions against its employees not only affect morale, but they also create serious risk to aviation security. Every Member of Congress is, you know, intimately aware of the securities and the responsibilities that are placed on our TSA, and we trust them, because we, in our jobs, must fly back and forth on a regular basis.

In TSA, we have a test case of what happens when an agency's employees are excluded from due process protection of Title IV. The results are a disaster, and they should never be repeated at any Federal agency. To correct what we have seen at TSA, Congress should act now to ensure full civil service protection under Title IV are available to all TSA employees, including TSA officers.

And, also, to my Republican colleagues, when we talk about rolling back Federal civil service protections, understand, as we have made a commitment here on this committee to ensure that we protect whistleblowers, when we draw back, as Mr. Roth has said,

these protections, it has a chilling effect. Because if I'm not going to be protected, I'm not going to come forward.

With that, I yield back my time.

Chairman CHAFFETZ. Thank you.

I now recognize the ranking member, Mr. Cummings.

Mr. CUMMINGS. Thank you very much. Last week, the committee conducted an interview of former deputy administrator of TSA, Mark Hatfield, and he totally committed that TSA was, quote, governed by self-direction, end of quote, which, quote, bred misbehavior, quote, and led to toxicity rather than a healthy agency, end of quote.

Mr. ROTH, you testified before the committee in November of 2015 about security failures that you uncovered at the time that Mr. Hatfield was serving as deputy administrator. You said that an in-depth round of covert testing at TSA found results that you characterized as, quote, disappointing and troubling, end of quote.

Do you think that the toxic environment in which self-direction bred misbehavior, as the former deputy administrator described, contributed to the security deficiencies you identified?

Mr. ROTH. Certainly, what we found—and I think TSA leadership will testify to this as well or has testified to this as well—there was a push to move people through the line and ignore sort of the security aspects of what they were doing. So, culturally, there was enormous pressure on the rank and file to just keep the lines moving and not worry as much about security.

So I think the answer to your question is, yes, we found that through culture there that disregarded aviation security.

Mr. CUMMINGS. And so I take it that you found that to be a major problem?

Mr. ROTH. That's correct, yes.

Mr. CUMMINGS. Considering the mission of TSA?

Mr. ROTH. Correct.

Mr. CUMMINGS. So they were probably missing a lot of—missing things they should have caught?

Mr. ROTH. Right. I mean, we have issues with TSA across the entire spectrum of what they do, not only at the checkpoint, but how it is that they deal with their own employees, how they deal with airport workers, how it is that they guard the perimeter. The challenges that TSA faces are just enormous. I think it is probably the most difficult job in DHS, which is really saying something, to try to screen 2 million passengers a day, 900,000 different airport employees, with a staff of—and then pay attention to a staff of something like 60,000 people. It is an enormous job, and—

Mr. CUMMINGS. And dealing with the public, trying to get to where they got to go, and I guess many people feeling like they're going through too many changes sometimes?

Mr. ROTH. Two million passengers a day. So just in a course of a 10-minute hearing, that's hundreds and hundreds of people.

Mr. CUMMINGS. Yeah. Back in 2015, you testified that the most critical task facing TSA was, quote, creating a culture of change within TSA and giving the TSA workforce the ability to identify and address risks without fear of retribution, end of quote. What retribution did you observe at TSA, and why did you believe that

the most critical task facing the agency was giving the workforce the ability to identify risks without fear of retribution?

Mr. ROTH. We had seen—and some of this is simply in the public sphere, public media, about instances, for example, as this committee has highlighted with regard to the forced transfers, for example, and the arbitrary nature of demotions and those kinds of things. We had seen that.

In talking to TSOs and people within TSA, we had gotten a sense that there was a culture of fear and intimidation. I will have to say with Admiral Neffenger's approach, it was a breath of fresh air that he came in with a different kind of an attitude, not only towards oversight, but how it is that he treated his rank and file.

The question I have, of course, is how far down that goes into what is an immense organization and whether that will continue with new leadership.

Mr. CUMMINGS. This assignment—what do you call it when they assign people to different places?

Mr. ROTH. Directed reassignment, I believe.

Mr. CUMMINGS. Where is that now? I mean, what's happening with that? I think he suspended it, right? Is that right?

Ms. GOWADIA. Sir, the practice has been discontinued. The only time we ask for reassignments is if it is in the interest of security, and we certainly only go to it at the very, very last opportune moment to move people across the country that way. We have put in controls so that these decisions cannot be made unilaterally. Our Office of Human Capital must get into the loop in making the decision. And if a member of the executive service has to be moved, it comes to my desk for signature. And we will definitely look for as many options as possible and only ask an employee to move if it is absolutely in the interest of security.

Mr. CUMMINGS. And so I take it, so that there have been a substantial reduction in—just based on what you just said—

Ms. GOWADIA. Yes, indeed.

Mr. CUMMINGS. —in that type of action?

Can you tell us what—I mean, where we went? Did we go from 300 to 5? I mean, what? Can you give me an idea of the reduction?

Ms. GOWADIA. Sir, I apologize. I do not have exact numbers. But what I can tell you is it has not happened since my tenure at—

Mr. CUMMINGS. Because you agree that that's a very cold thing to do?

Ms. GOWADIA. Absolutely.

Mr. CUMMINGS. Life is short.

Ms. GOWADIA. To move people for no reason that is not fully focused to the mission reason, I do not think that is an appropriate practice, and we do not do that at TSA anymore.

Mr. CUMMINGS. Okay.

Let me go to you, Doctor. The former deputy administrator said employees got arrows in their backs and were subjected to, you know, retribution with regard to personnel practices that made them fearful of bringing up security issues. Does that sound like an environment in which employees are free to identify risks without fear of retribution?

Ms. GOWADIA. Mr. Cummings, may I—may I please give you one sentence before I go to your—the practices Mr. Hatfield is dis-

cussing is well before my time. And he's discussing practices even before Administrator Neffenger was in place.

I want very much for the workforce at TSA to know the things that ailed them in the past, their leadership today stands behind them and will not—not tolerate any retaliation for prohibited personnel practices. That is so important, because a tone has to be set here. And you asked IG Roth how far it goes down. I make the rounds from the airport level all the way through offices, through cubicles, working very hard to make it so that people see the support they get from their leadership.

Also, we are working on leadership training. We want to make it so that the notion of leadership begins on the frontline to the TSOs all the way up to leadership, which will help that culture change that you were asking.

Mr. CUMMINGS. Yeah, the culture change. But what I'm concerned about is I—you know, I understand what you're trying to do, but how do we put policies in place so that when you leave—you know, this—you know, you may be gone. I don't know when. But my point is, how do you put the things in so that they stay in place?

Ms. GOWADIA. Absolutely, sir. So I will tell you, we have had outside—the Department has come in and looked at our personnel practices and our policies to make it so that we are now more in concert with the Department. We have put in checks and balances.

But, Congressman, you—the thing that I—I hope—I hope you see is you cannot legislate, you cannot mandate, you cannot make by—you cannot change that by virtue of a piece of paper. It changes by changing the culture. People have to be—people have to feel appreciated. People have to feel supported. And I give you my word, that as long as I'm at TSA, that is my quest.

Mr. CUMMINGS. Well, can you apply Title IV?

Ms. GOWADIA. Sir, we will certainly work on the Title IV notions with you, but I would like very much to undertake a study to see what it would take.

But all the privileges afforded by Title IV that our staff tell us they want when it comes to in-grade pay increases, et cetera, we can work on that by virtue of policy. And I am working very hard to make it so that we can afford our staff, by virtue of policy, everything that they want.

Mr. CUMMINGS. Ms. Lerner, you described a practice by TSA withholding information that TSA considers attorney-client privilege. You said, and I quote, When TSA refuses to disclose why it takes an action, it is impossible for us to investigate whether there was retaliation.

Do you believe that TSA's refusal to provide the information you need hinders the agency's ability to create an environment in which employees are free to identify a risk without fear of retribution?

Ms. LERNER. Sure. I mean, you need robust enforcement of the law, and the law has no meaning unless it's enforced, and it really hinders our ability to make findings when we're not getting full information from the agency.

Mr. CUMMINGS. Now, Doctor, TSA can have it one way or the other but not both. Have you asked the Department of Homeland

Security about this so-called attorney-client privilege and provide to the OSC all of the information it has requested?

Ms. GOWADIA. Yes, sir, we have discussed the matter with general counsel.

Mr. CUMMINGS. And what did you come up with?

Ms. GOWADIA. That it is Department policy to exert attorney-client privilege in certain instances, a very, very small percentage of the information.

Mr. CUMMINGS. When the chairman was asking you about who we need to talk to, can you tell me who that was? The person you just talked about.

Ms. GOWADIA. Sir, I did—actually, my staff has been able to get us permission to—

Mr. CUMMINGS. Why don't you give it to us now.

Ms. GOWADIA. Joe Maher, Joseph Maher, acting general—

Mr. CUMMINGS. Can you spell that, please?

Ms. GOWADIA. J-o-s-e-p-h M-a-h-e-r. He's our acting general counsel.

Mr. CUMMINGS. And so he would be the one that we would talk to to try to figure out what the roadblock is and why they are withholding information?

Ms. GOWADIA. Yes, sir.

Mr. CUMMINGS. Tell me something. You've known for weeks that this was a deep concern for the committee, and I—and you came here, and it seemed like you were unprepared to answer the questions. Help me with that.

I mean, you knew—you knew we were going to be asking about this. Right? I mean, hello. And you know it's a bipartisan effort. And you know we don't want to be hindered with regard to information. I was just wondering why.

Ms. GOWADIA. So perhaps I miscommunicated. I was not—I fully knew that this was your concern. I just was not aware that Ms. Lerner's staff had had any concerns in being able to come to a resolution in any particular case.

Mr. CUMMINGS. Okay. Well, you all need to talk then.

Ms. Lerner, y'all need to talk. Huh? We can pull Mr. Roth out, y'all can come together. I mean, come on now. We shouldn't have to bring you all over here just so all you can talk.

You have telephones? Email?

Ms. GOWADIA. Sir, we've already decided we're going to start that partnership.

Mr. CUMMINGS. Good. Good, good.

I yield back.

Chairman CHAFFETZ. Thank you.

I'm going to recognize myself, and then we'll go to Mr. Comer. Let's talk about that relationship with the OSC. What do you believe is your legal obligation to provide documents to the OSC? What is your legal obligation?

Ms. GOWADIA. Sir, we have a legal obligation to provide documents to OSC.

Chairman CHAFFETZ. I find that curious, because who is Francine Kerner?

Ms. GOWADIA. She's chief counsel at TSA.

Chairman CHAFFETZ. And how long has she been in that role?

Ms. GOWADIA. I do believe Ms. Kerner's been there since the start of TSA.

Chairman CHAFFETZ. So she was quote—this is a quote. This is February 21st, okay, of this year. Here's what her quote was when she visited with us: "TSA has no legal obligation to turn over documents to OSC," end quote.

How is it that she says there's no legal obligation, and you gave this committee a letter yesterday that says, quote, "TSA recognizes its legal obligation to provide documents to the Office of Special Counsel and does so regularly," end quote? How do you rectify?

Ms. GOWADIA. Sir, I was not in the meeting in which Ms. Kerner is alleged to have said that. It is my understanding that she was using that phrase in context to the attorney-client privilege actions, not in the generality.

Chairman CHAFFETZ. Not in the generality. No legal obligation. You say there is a legal obligation.

Well, how would you describe your relationship with the OSC?

Ms. GOWADIA. My personal relationship with the OSC has only just begun, and I—I can promise you that I will extend to Ms. Lerner an arm of partnership to make it so that if there are differences, they can be resolved.

Chairman CHAFFETZ. And how would you—that's your personal one. How would you describe the overall TSA relationship with the OSC?

Ms. GOWADIA. Sir, it is my understanding that lawyer to lawyer, they do have a very good working relationship. At least that is, certainly, our side of—our side of it. My lawyers have never said that they've had any issue working with OSC.

Chairman CHAFFETZ. Who is Steve Colon?

Ms. GOWADIA. I do believe Steve Colon is presently acting in a different capacity, but he used to be in the Office of Chief Counsel.

Chairman CHAFFETZ. He was the assistant chief counsel under Francine Kerner, correct?

Ms. GOWADIA. Yes.

Chairman CHAFFETZ. And he was detailed to head—and this is what's absolutely stunning. He was detailed to head the TSA Office of Professional Responsibility. Correct?

Ms. GOWADIA. Yes, sir.

Chairman CHAFFETZ. Let me put up an email that he wrote. I'll read this to you: "Jeff, if you can join us, I'd appreciate it." Sorry. "I'm done being conciliatory with the OSC. They have been a nightmare to deal with for the employment advice folks. If they want war, they got one. Unless the evidence stinks."

You can go ahead and put that down.

Does that sound like a responsive TSA to the OSC?

Ms. GOWADIA. No, sir, it does not.

Chairman CHAFFETZ. Did you fire him?

Ms. GOWADIA. Oh, no, sir.

Chairman CHAFFETZ. Are you going to fire his butt?

Ms. GOWADIA. No, sir.

Chairman CHAFFETZ. I would. I'd fire that guy. And you know what, until you clean house with the legal folks in your agency, you're going to have a lot of problems. That is not the kind of attitude. "We're going to go to war with the OSC"? Are you familiar

with the law? Are you familiar with the code that comes out of the OPM regulations?

You can tell me it's all rosy, but when your chief legal counsel, who has been there since the inception, is saying there's no legal obligation, she is not abiding by the law.

Ms. GOWADIA. Mr. Chaffetz, please let me leave you with no doubt to the matter. That is unacceptable.

Chairman CHAFFETZ. Then what are you going to do about it?

Ms. GOWADIA. He will—he has, I do believe already, been disciplined, but we will look into it.

Chairman CHAFFETZ. And you're going to tell us what that discipline is?

Ms. GOWADIA. Yes. Please understand, sir, that the counselors that work for us also report to the Department, so I have to work this out with the Department.

Chairman CHAFFETZ. And you know what, you talked about the culture. We get culture reports, and DHS routinely is at the bottom of the heap. I mean, they—they take the 320 agencies out there and guess who's at the bottom of the bottom? Homeland Security. TSA, Secret Service, we deal with it. There's a common denominator. Okay? The common denominator is Homeland Security.

In order to enrich the culture, you have to have confidence that when something goes awry, there is a fair and honest hearing of that information. And if you have a whistleblower who believes they've been retaliated against, we need a fair arbiter to come in and look at the facts, all of the facts. You're not providing those facts to the OSC, and every employee knows it. They know the deck is stacked against them, and they don't get a fair reading.

And you know what, if you want to change that culture, people have to be confident that whether you're at the top of the food chain or the new employee who's just going to work at the TSA, if something goes awry, you're going to get a fair hearing. It doesn't mean we presuppose the conclusion, but when the OSC, the fair, independent arbiter here, doesn't get all the information, guess what? They can—you can't look anybody in the eye and tell them that they had their case heard out.

Of all those things I just said, what would you disagree with?

Ms. GOWADIA. Sir, I would not disagree with you that a fair and a robust investigation into a person's allegations should be conducted. Just as the whistleblowers have rights, the allegations are made against another employee, and they have rights too. So the due process must go through. We must follow through on the process. I agree with you on that.

Chairman CHAFFETZ. Ms. Lerner, your perspective on that?

Ms. LERNER. You know, when we talk about changing the culture, there are a lot of things that an agency can do. But, you know, by cooperating with OSC, by providing these documents, that could really help. You know, I think that there's just some misinformation that may be going on, and we can, hopefully, clear that up. But, you know, whistleblower protections are key.

Other things could help too. I think the full protections of Title IV applying to TSA would be very helpful so that there's a—more of a feeling of fairness in employment actions so that hiring deci-

sions and promotion decisions are perceived as fair. But I think the first place to start is where the protections already lie as with—

Chairman CHAFFETZ. I want to recognize Mr. Comer, but I've got to go through this—in fact, let me do that, and then go through this list of things that I need you all to provide.

Let's—I'll yield back.

And let's now recognize Mr. Comer of Kentucky.

Mr. COMER. Thank you, Mr. Chairman. Thank you, Mr. Chairman.

These questions are for Dr. Gowadia. On May 12, 2016, when TSA's administrator at the time testified before the committee, he was questioned in detail on how he would respond to whistleblower allegations of retaliation, including the improper use of directed reassignments. I will read you several of the statements he made, and I think we may have a slide.

Slide one: "I will await the Office of Special Counsel. I think it's important that we look for an independent review of that to determine whether or not there was improper use." And he's talking about of directed reassignments.

Slide two: "I'm very interested in the results of the Office of Special Counsel investigation into the existing cases with the individuals who appeared before you. Depending on those findings, I will take immediate action against that."

And slide three, and, again, he said: "Depending on what they find, it may point to an appropriate discipline."

And my first question: How can TSA tell Congress it will base its responses on OSC's investigations and then refuse to give OSC the documents necessary to complete those investigations?

Ms. GOWADIA. Sir, it is—in listening to Ms. Lerner, I am—I am beginning to appreciate that she may need more information, which is why we were—we offered to give her the privileged log.

Now, I will tell you that, to date, we have not received any information that says—at least to the best of my knowledge, information that says the information that has been redacted has interfered with OSC's ability to render a verdict on—I believe it's 46 cases that they have so far taken up for TSA.

Mr. COMER. My second question: Do you agree with the administrator that it's important for OSC to complete an independent review of whistleblower allegations against TSA?

Ms. GOWADIA. Absolutely.

Mr. COMER. Okay. Next question: Is there a conflict of interest for Francine Kerner and the Office of Chief Counsel to withhold documents from OSC investigations when multiple whistleblowers who reported retaliation to OSC alleged Kerner was involved in the misconduct against them?

Ms. GOWADIA. So when it comes to the attorney-client privilege information, again, we are bound by that through the Department's guidance. So I—I—we are not in a position to unilaterally waive that privilege.

Mr. COMER. One statement here of observation. I'm new. I'm a freshman, and campaigning for the past year, people talk about the swamp, and they're frustrated, frustrated with Congress, but—their frustrated with bureaucracies that just aren't accountable. And it seems like, you know, this committee's been trying for a

long time to determine and fix some problems and get some transparency, and in my opinion, it doesn't look like we have that. And I'm looking forward to getting some results and finding out what—what's going on over there and how we can fix the problem.

I yield back my time, Mr. Chairman.

Chairman CHAFFETZ. Thank you.

I now recognize the ranking member, Mr. Cummings.

Mr. CUMMINGS. I just want to get to the bottom line. Obviously, you're not getting all the information. You—the problem—it sounds like somebody or bodies has not been getting you the information, because if Ms. Lerner needs information to do what she has to do, it sounds like there's some block here somewhere. And I think you need to get to the people in your agency—I mean, just as—I'm just sitting here listening—and figure out who's not giving you information. I'm just—now, maybe I'm assuming too much.

Ms. GOWADIA. Mr. Cummings, please let me leave you with no doubt in this matter—

Mr. CUMMINGS. Whoa, whoa, whoa. Before you say anything, it's either you or them.

Ms. GOWADIA. It's me.

Mr. CUMMINGS. Okay. Then you need to explain that.

Ms. GOWADIA. Yes, sir.

Mr. CUMMINGS. So now you need to tell the chairman why you're blocking it. Now I'm putting it on you. I tried to give you an out, but you didn't take it, so—

Ms. GOWADIA. Absolutely not, sir. The buck definitely stops at my desk.

Mr. CUMMINGS. Okay. Okay.

Ms. GOWADIA. I take responsibility for decisions made at TSA. Now, when it comes to the attorney-client privilege issue, again, we are not independent—

Mr. CUMMINGS. Right. You've got lawyers to advise you.

Ms. GOWADIA. I have to follow the Department's guidance and response.

Mr. CUMMINGS. Right. I got that. Okay.

Ms. GOWADIA. But I have—

Mr. CUMMINGS. It sounds like you didn't know Ms. Lerner—the extent of Ms. Lerner's concerns. That's what I'm getting to. It seems like you didn't—I'm just listening to you. It sounds like you did not know the extent of her concerns.

Ms. GOWADIA. This is true. I did not. Can I—

Mr. CUMMINGS. Whoa, whoa, whoa. I know you want the buck to stop with you. I'm trying to get to whoever is not getting the information to you now.

So you just said you didn't know the extent of the problem, but then you said the buck stops with you. Well, what I'm saying is, something is happening before it even gets to you, if you don't know the extent of the problem. Does that make sense?

Ms. GOWADIA. Certainly, sir. But what I can do is I can ask more questions, and I will.

Mr. CUMMINGS. Right. You need to.

Ms. GOWADIA. And I will.

Mr. CUMMINGS. And what I'm trying to tell you, I'm trying to help you.

Ms. GOWADIA. Indeed, sir.

Mr. CUMMINGS. What I'm trying to tell you is that somebody is not giving you the information that you need, period, or you would not have—this wouldn't be an issue. I would be—if I were in your shoes, and my staff, and I didn't have the information I needed, and I had to walk into a hearing like this and have somebody tell me they have not gotten the information, and I—and I don't know it, there's a problem, major problem. You follow me?

Ms. GOWADIA. Yes, sir.

Mr. CUMMINGS. So I don't—I just—like I said, I'm just trying to get to the bottom line. Because, you know, we're just trying to get this stuff resolved and move along. We've got a lot of issues we deal with here, and hopefully, we'll be able to get it resolved. When you get back to the office, maybe you can kind of cut through all that. All right.

Thank you, all. I'm finished.

Ms. GOWADIA. Thank you, sir.

Chairman CHAFFETZ. Thank you.

I'll recognize myself, and then we'll recognize Mr. Meadows of North Carolina.

Ms. Lerner, does our committee have the full list of concerns or outstanding cases that you need more information from? Do we have that list?

Ms. LERNER. I'm not sure if you have the list, but if you'd like it, we can certainly get it to you.

Chairman CHAFFETZ. Let's just confirm that we have the full list of where you have concerns.

Ms. Gowadia, I just want to clarify that we do expect the TSA to turn over all information that's been withheld from the OSC, and we expect that to be done by March 10. That's a week from Friday. Okay?

That information should be given to both the OSC as well as the Committee on Oversight and Government Reform. So if you're choosing to withhold documents, you're making an election to withhold documents from the OSC, but you're also withholding documents from Congress. And I'm just being really crystal clear here with you. You don't withhold these documents from Homeland—from the inspector general. So you're being very selective in your application of, quote/unquote, "attorney-client privilege," which we don't recognize.

If you don't provide those by March 10, I will issue a subpoena, and we'll—then you'll be on the clock. And then if you don't comply with that subpoena, you will be in contempt, and we will pursue that. And I'm just trying to be crystal clear on the process. It's your—you said the buck stops with you, but we're going to call in the attorneys. And you can blame it on Homeland, but you are the acting director, and that's the tough spot you take when you're the top of the food chain.

You also have confirmed to the committee that you will provide logs of the information that's been withheld from the OSC. Again, not recognizing that you have that right, but you're going to provide that information to the OSC as well as this committee also by March 10. Correct?

Ms. GOWADIA. Sir, I—I—we will start providing on a rolling basis immediately——

Chairman CHAFFETZ. No, no, no, no.

Ms. GOWADIA. Sir, I cannot promise you——

Chairman CHAFFETZ. How many people—how many people work for you?

Ms. GOWADIA. 60,000.

Chairman CHAFFETZ. You're going to provide that.

Ms. GOWADIA. So 45,000 of them are out on the field. We have to appreciate that this may take some time. I do not want to leave you with the fact that I'm trying to stonewall you. I hope that my people back in the shop have already started working production. But I can promise——

Chairman CHAFFETZ. It's a log. It's a log. You have tens of thousands of employees at your disposal.

I'm just telling you, that's what this committee is going to ask you to do. We've been asking for this for a long time. It should be no surprise. You said you have a log. It shouldn't be that hard to provide it.

Ms. GOWADIA. So I did not say we have a log. The offer I made was, moving forward, we will always provide a log. You are asking me to go back to, again, a number you don't want to hear, but 50,000 pages to figure out what percentage of that was redacted and from that develop a log. We will make our best effort to get it to you by Friday, but if we don't make the full—full log available for the retroactive instances, we will start producing it on a rolling basis, which is something we do with the OSC and something we certainly do with you.

Chairman CHAFFETZ. You put anybody that you need on top of that, prioritize the safety of the public, but we're also here to protect the safety of the employees. And so that's the timeline, and that's what I expect from you.

I also need the names of any other individuals at Homeland Security who have advised the TSA to withhold or apply the privilege. Agreed?

Ms. GOWADIA. Yes, sir.

Chairman CHAFFETZ. And that too by March 10.

You also have agreed to provide the discipline of Mr. Colon. And that too you can provide by March 10?

Ms. GOWADIA. If the discipline has already taken place. I—we will have—I'll have to look at it. I don't know——

Chairman CHAFFETZ. I thought you said he was disciplined?

Ms. GOWADIA. No, I said he may be in the process of being disciplined. I don't know that he has.

Chairman CHAFFETZ. You'll give us an update regarding this?

Ms. GOWADIA. I will give you an update.

Chairman CHAFFETZ. Fair enough. And then you're going to provide the government guidance or advice regarding withholding information from OSC, correct?

Ms. GOWADIA. I'm sorry. Would you say that again.

Chairman CHAFFETZ. Provide the departmental guidance or advice regarding withholding information from the OSC.

Ms. GOWADIA. I will work with the Department to get you something on that.

Chairman CHAFFETZ. Again, we expect that information by March 10.

Let's now recognize the gentleman from North Carolina, Mr. Meadows.

Mr. MEADOWS. Thank you, Mr. Chairman.

I thank each of you. My apologies. I had four or five things going on.

So, Dr. Gowadia, I want to come to you. And thank you for the meeting yesterday. And, obviously, we've got counsel here. I thank her as well.

And I guess I'm a little confused, because yesterday, we talked about a reset. We talked about going forward and really working this. But my staff informed me, and that's why I came back, that we're, again, trying to insert an attorney-client privilege and keep things from OSC. And I didn't leave with that impression yesterday from our private meeting. Am I misinformed?

Ms. GOWADIA. Mr. Meadows, I—I—I apologize if I left you with the notion that I could do something without the Department's guidance. I still have to follow Department's guidance. What I offered to you—

Mr. MEADOWS. So are you saying that the Secretary of DHS concurs with that? Because I'll call him.

Ms. GOWADIA. No, sir, I am not speaking for the Secretary at all.

Mr. MEADOWS. So then what is—I was very clear yesterday. In fact, in ways I was a little bit more blunt than I wanted to be, and acknowledged that to your counsel that was there, and yet I thought the agreements that we had yesterday coming out of that meeting, and it sounds like you're walking back now, Dr. Gowadia. Are you not?

Ms. GOWADIA. No, sir, I don't believe I am. I believe you mentioned that you did not think it was appropriate—

Mr. MEADOWS. Well, and you agreed that you would give the documents to OSC unredacted.

Ms. GOWADIA. No, sir, I do not believe I did that. And if I left you with that impression, I deeply apologize.

Mr. MEADOWS. Well, I should have had a stenographer there then. I mean, you know—Dr. Gowadia, let me just tell you, I told you I would give you grace. And I'm willing to. I'm willing to say that there's been a lot of mistakes that have been made here. But what I will not do is have a premeeting that went really well, and then have you, after you went back and apparently talked to somebody, and come in here today and suggest that it's not okay.

Ms. GOWADIA. Mr. Meadows, again, I sincerely apologize if I left you with the impression that I could give away the attorney-client—

Mr. MEADOWS. Who can?

Ms. GOWADIA. It has to come to us for guidance through the Department, general counsel at the Department.

Mr. MEADOWS. All right. So I asked you yesterday for what statute. You said there wasn't a statute. All right? So I asked you for what rules or regs, and you said it was Department guidance.

Ms. GOWADIA. Uh-huh.

Mr. MEADOWS. I understand that you don't have that written. Is that correct?

Ms. GOWADIA. Not to my knowledge, sir.

Mr. MEADOWS. All right. So if you don't have written guidance, who the heck gave it to you?

Ms. GOWADIA. So the attorneys—

Mr. MEADOWS. Who told you that you have guidance?

Ms. GOWADIA. The general counsel, the acting general counsel.

Mr. MEADOWS. All right. So the very person that I've had concerns with, that I expressed to you yesterday—general counsel for who?

Ms. GOWADIA. General counsel for the Department, sir.

Mr. MEADOWS. For the Department of Homeland Security or TSA?

Ms. GOWADIA. Yes, sir. Department of Homeland Security.

Mr. MEADOWS. So the general counsel, between yesterday and today—

Ms. GOWADIA. No, not between yesterday and today. Again, going back to yesterday—

Mr. MEADOWS. So when did you talk to the general counsel about this guidance?

Ms. GOWADIA. So before—well before our meeting yesterday, which is why I am a little shocked that I left you—

Mr. MEADOWS. Okay. So maybe I misunderstood you. So let me ask you this: How can we believe the general guidance of verbal communication from your general counsel—how—how can Congress look at that? Do you not see a problem with that?

Ms. GOWADIA. I do, sir, and this is why I am committed to working with the Department to get you something.

Mr. MEADOWS. All right. So let me just tell you: If you will comply—I don't recognize the attorney-client privilege, and you know that I don't.

Ms. GOWADIA. Yes, sir, that was clear yesterday.

Mr. MEADOWS. That was clear. The other part of that, the chairman doesn't recognize it, and neither does the ranking member recognize it.

Ms. GOWADIA. Yes, sir, that is clear.

Mr. MEADOWS. All we want is to make sure that Ms. Lerner can get her job done and not be stonewalled. And I told you yesterday that I was willing to have a reset, but today's testimony is very, very troubling, because it sounds like that we had a nice kumbaya kind of meeting, and then all of a sudden, we're here today with entrenched rhetoric coming from the general counsel. Is that not it?

Ms. GOWADIA. No, Mr. Meadows. Again, I deeply appreciate the time you took to visit with me yesterday.

Mr. MEADOWS. No, I appreciate your time. Let me just say this, it needs to be productive time, though.

Ms. GOWADIA. Absolutely. And one of the promises that I made to you yesterday was I would reach out to Ms. Kerner—

Mr. MEADOWS. Okay. But you're saying that the things you retracted won't interfere with her investigation.

Ms. GOWADIA. And I went back—

Mr. MEADOWS. That's your sworn testimony.

Ms. GOWADIA. I went back—in fact, as part of my testimony, I recounted something I said to you yesterday. It was, to the best of my knowledge at that point, that nothing had—

Mr. MEADOWS. You used the qualifier, to the best of your knowledge.

Ms. GOWADIA. And so when I went back from our meeting, I asked my staff to go through all their emails and determine if that was factual. When they came back with two——

Mr. MEADOWS. Okay. Right.

Ms. GOWADIA. —at that moment I said to them, from now on, policy is if you ever redact anything, you will provide the OSC with the privilege log.

Mr. MEADOWS. All right. So let me ask you this: Has the OSC ever disclosed things that were not appropriate to your knowledge?

Ms. GOWADIA. No, sir, not to my knowledge.

Mr. MEADOWS. Well, then why do you redact it then? If they've never had a problem, why do you redact it?

Ms. GOWADIA. So there are multiple parties, as we discussed, in an ongoing case.

Mr. MEADOWS. But if they've never released any of that, why are you concerned?

Let me tell you why you're concerned. You're trying to cover up for something that may or may not have been done. And I told you I would reset. But at the same time, if you're not going to reset and give her what she needs, we will look at this—with the chairman's indulgence, we will look at this. We will ask for subpoenas. We will make sure that we get the information. I am not going to be stonewalled.

Ms. GOWADIA. Sir, it is absolutely not my intent to stonewall you. And I do appreciate that we have a reset and our ability to share information and be absolutely transparent, but I do appreciate that there are certain attorney-client privileged issues——

Mr. MEADOWS. No, I don't appreciate that.

Ms. GOWADIA. I do. I have to work with the Department.

Mr. MEADOWS. Okay.

Ms. GOWADIA. I promise you, I will take it back——

Mr. MEADOWS. So should I call General Kelly?

Ms. GOWADIA. Please don't do that until I've——

Mr. MEADOWS. Well, let me just tell you, you've got a short fuse. Because I can't imagine that General Kelly would like to cover up anything.

Ms. GOWADIA. Sir, please. I hope you can—you cannot imagine that I would want to cover up anything.

Mr. MEADOWS. Well, that's how it appears, Dr. Gowadia. That's what I'm saying, just get Ms. Lerner what she needs. Okay?

I yield back.

Chairman CHAFFETZ. I thank the gentleman.

I—what—Ms. Gowadia, if the Homeland Security guidance violates Federal law, which one are you going to follow?

Ms. GOWADIA. The Federal law, sir.

Chairman CHAFFETZ. Mr. Roth, what information is TSA not providing you?

Mr. ROTH. Nothing. They're completely cooperative.

Chairman CHAFFETZ. Do you give everything to Homeland Security's inspector general?

Ms. GOWADIA. Yes, sir, we do.

Chairman CHAFFETZ. Do you give everything to the OSC?

Ms. GOWADIA. Other than the attorney-client privileged redacted information, yes, sir, we do.

Chairman CHAFFETZ. So why don't you recognize the—your so-called made up attorney-client privilege? Why isn't that true with the inspector general?

Ms. GOWADIA. Sir, they are part of the Department. The guidance applies external to the Department.

Chairman CHAFFETZ. External to the Department.

You're part of the United States Government, correct?

Ms. GOWADIA. We all are, sir.

Chairman CHAFFETZ. Who do you work for?

Ms. GOWADIA. The American public.

Chairman CHAFFETZ. That's right. That's right. That's who's paying. And part of what we did is we set up a statute, law, Federal law, that you said you were going to abide by that allows the Office of Special Counsel to dive into these issues.

So you do treat the inspector general different than you do the OSC?

Ms. GOWADIA. In this instance, yes, we do.

Chairman CHAFFETZ. Do we have any problems with that, Ms. Lerner?

Ms. LERNER. Yeah. Let me just say, we do get SSI information. We get sensitive security information from TSA. We've never had a problem getting that. We handle it appropriately. They can mark it as sensitive.

I'm confused about why they don't provide us with what they consider to be attorney-client. We can—we can handle that information the same way we handle the SSI information. If they want to mark something as privileged, we'll make sure it's handled in a confidential way. We're not going to release it without talking to them. I can address any—

Chairman CHAFFETZ. You have a solid reputation. You don't have to convince us that you have the reputation. And we've set it up so that you could be the one to be the independent arbiter here.

Ms. Gowadia, is the White House external to the Department?

Ms. GOWADIA. I—yes, I imagine—yes, they are, sir, but I don't know—I—if the next question is do you share it with the White House, I don't know the answer to that. I'll have to take that for the record.

Chairman CHAFFETZ. Yeah. It's just the logic here, it just doesn't make sense. It's just kind of comical, and that's the problem. And you're unique. You're an outlier. And—

Ms. GOWADIA. The Department, sir. This guidance applies not just to TSA but all departments.

Chairman CHAFFETZ. No. I think you're—I think you're a very nice person. You have a host of issues that you have to deal with. I think the guidance here that you're getting is wrong. I think it's—violates Federal law. I think it's unacceptable and it's something that now has the full attention of this committee, I assure. And we are going to go to the ends of the earth to—and, really, at the ultimate, what we're trying to do, both sides of the aisle, we're trying to protect whistleblowers so they get a fair hearing.

But you know what, they can't get a fair hearing if the OSC only gets a portion of the documentation. Even though the law says they

get all of the information, and they are set up to do this, they are authorized by Congress, they do work for the American people. We do appropriate money, even though some would like more money. That's the problem and the challenge.

And there is a conflict when that attorney may or may not have been involved in some of those decisions in covering that up. I think you do have a cultural problem with the attorneys as well, both at TSA and at Homeland Security, as was demonstrated by the email. And I am very curious to see what the discipline was for that sort of attitude and approach. And I find it wholly unacceptable.

I do appreciate everybody who is here and sharing testimony today. We look forward to following it up. And the committee now stands adjourned.

[Whereupon, at 12:38 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 20398



Transportation
Security
Administration

MAR - 1 2017

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Chaffetz:

We received your February 27, 2017, invitation for Transportation Security Administration (TSA) Chief Counsel Francine Kerner to testify before the Committee on Oversight and Government Reform on March 2, 2017. Regrettably, we are unable to make Ms. Kerner available to testify on short notice. As the Acting Administrator, I look forward to addressing the Committee's concerns during the hearing.

TSA recognizes its legal obligation to provide documents to the Office of Special Counsel (OSC) and does so regularly.

Thank you for your continued support of the men and women of TSA and our national security mission. An identical copy of this letter is also being provided to Ranking Member Elijah Cummings. If you have questions or wish to discuss this matter further, please do not hesitate to contact me personally or the Office of Legislative Affairs at (571) 227-2717.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Huban A. Gowadia", is written above the typed name.

Huban A. Gowadia, Ph.D.
Acting Administrator