

Edward Hasbrouck
The Identity Project
1736 Franklin Street, 9th Floor
Oakland, CA 94612

edward@hasbrouck.org
telephone 510-208-7744
cell/mobile 415-824-0214

January 5, 2011

Kimberly Walton, Special Counselor
Office of the Special Counselor
Transportation Security Administration
601 South 12th St., East Bldg., E7-121S
Arlington, VA 20598-6033

FOIA appeal and complaint of FOIA violation
Your reference number: TSA10-0179

Dear Counselor Walton:

This is an appeal under the Freedom of Information Act, 5 U.S.C. §552, and a complaint of violation of FOIA by your agency in failing to promulgate valid current FOIA regulations.

On December 18, 2009, we made a FOIA request to your agency including all TSA "Standard Operating Procedures (SOPs)" mentioned by TSA Acting Administrator Gale Rossides in Congressional testimony on December 16, 2009.

By letter dated November 17, 2010, your agency disclosed that it could find no TSA SOPs other than those 12 referred to in Acting Administrator Rossides' Congressional testimony, a list of the titles of which it disclosed. But by that letter, your agency denied, in its entirety, our request for those 12 SOPs which had been found to be responsive to our request. Copies of our request and the denial letter are attached.

We appeal the denial of our request for these documents, as the exemptions claimed were improperly invoked and/or inapplicable.

Two sections of FOIA were invoked as the basis for denial of our request:

First, the letter denying our request refers to the exemption under FOIA section b(2) of documents when they "are predominantly internal, and disclosure significantly risks circumvention of a regulation or statute." But neither of these criteria applies to all of these SOPs in their entirety.

At least substantial portions of these SOPs, including the Screening Management SOP and the Screening Checkpoint SOP, do not relate predominantly to internal TSA matters, but to TSA relations with TSA contractors, the traveling public, and other third parties. This is clearly supported by the portion of one of them, the Screening Management SOP, which was released to us in response to our request TSA08-0723 (letter to the Identity Project from Kevin J. Janet, TSA FOIA Officer, January 12, 2009, as attached to this appeal) and the complete and unredacted Screening Management SOP as was posted by the government at FedBizOps.gov (a copy of which is also available at http://www.papersplease.org/wp/wp-content/uploads/2009/12/tsa_screening_mgmt_sop.pdf).

In addition, at least some portions of these SOPs could be disclosed without “significantly risk[ing] circumvention of a regulation or statute”. No plausible claim could be made that, where the government has – for whatever reasons – posted the entirety of one of the requested documents, unredacted, on a public government website, and it remains available in the public domain from many other websites, and the TSA has disclosed portions of it in response to our prior FOIA requests, disclosure of even the slightest portion of any of the requested documents would “significantly” risk circumvention of a regulation or statute.

While your agency's letter denying our request claims that “certain portions of the requested records should be withheld from disclosure” pursuant to this section, the denial letter fails – in violation of FOIA – to indicate which portions were withheld on this basis, whether the non-exempt portions were segregable or why they were not segregable, or why the segregable non-exempt portions were not released.

Second, the letter denying our request invokes FOIA exemption b(3) as justifying the withholding from disclosure of the requested records, apparently in their entirety:

This information reveals Sensitive Security Information (SSI) and is exempt from disclosure under Exemption 3 of the FOIA. Exemption 3 permits the withholding of records specifically exempt from disclosure under another Federal statute. Section 114(r) of title 49, United States Code, exempts from disclosure SSI that "would be detrimental to the security of transportation" if disclosed. The TSA regulations implementing Section 114(r) are found in 49 CFR Part 1520.

Pursuant to Section 1520.5(b)(9)(i), the following information regarding security screening under aviation or maritime security requirements of Federal law; any procedures, including selection criteria and comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. Mail, stores, and cargo, that is conducted by the Federal agency or any other unauthorized [sic] person constitutes SSI and is exempt from disclosure under 49 C.F.R. Section 1520.15(a).

This exemption has, however, been improperly invoked to deny, in its entirety, our request for these SOPs.

FOIA Section b(3), cited as authority for this denial of our request, exempts from FOIA “matters that are ... specifically exempted from disclosure by statute (other than section 552b of this title, provided that such statute (A) requires that the matters be withheld from the public in such a matter as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”

Neither (A) nor (B) is satisfied by 49 USC 114(r), as this statute leaves discretion to the agency as to which matters are to be withheld.

While section 1149r) requires that some regulations be issued, it leaves discretion to the agency head – discretion to be exercised through the formulation of specific regulations – to define the scope and criteria for withholding. Such discretion in rulemaking renders FOIA exemption b(3), which by its explicit and unambiguous language applies only where all discretion is removed by statute (not regulation), inapplicable.

Agency discretion remains even within the implementing regulations promulgated pursuant to 49 USC 114(r). 49 CFR 1520.15 states:

(b) Disclosure under the Freedom of Information Act and the Privacy Act.

If a record contains both SSI and information that is not SSI, TSA or the Coast Guard, on a proper Freedom of Information Act or Privacy Act request, may disclose the record with the SSI redacted, provided the record is not otherwise exempt from disclosure under the Freedom of Information Act or Privacy Act....

(e) Other conditional disclosure.

TSA may authorize a conditional disclosure of specific records or information that constitute SSI upon the written determination by TSA that disclosure of such records or information, subject to such limitations and restrictions as TSA may prescribe, would not be detrimental to transportation security.

The discretion made explicit by 49 CFR 1520.15(b) and 49 CFR 1520.15(e) makes clear that 49 USC 114(r) does not satisfy the requirements of FOIA exemption b(3). We therefore appeal the improper invocation of FOIA exemption b(3) in response to our request.

We note that the address to which I was directed to send this appeal, like the address to which we were directed by your agency staff to send our original request, is not the address of record for FOIA requests or appeals as promulgated by the DHS is the current Interim Final Rule, as codified at 6 CFR 5, Appendix C (400 Seventh Street, SW., Washington, DC 20590).

Your failure to have promulgated FOIA regulations containing a valid current addresses for FOIA requests and appeals is a violation of FOIA. Requesters should be entitled to rely

exclusively on the DHS FOIA regulations as the sole definitive source of current addresses for FOIA requests and appeals. We demand that you immediately promulgate new FOIA regulations for your agency including valid addresses for FOIA requests and appeals. We also request that you (a) enter this complaint of violation of FOIA by failure to promulgate FOIA regulations containing valid current addresses for FOIA requests and appeals in your docket of complaints of FOIA violations, (b) advise us of the reference number assigned to this complaint in your docket of complaints of FOIA violations, (c) investigate and act on this complaint, and (d) advise us of your determination and of any action taken on this complaint. If yours is not the office designated to receive, investigate, and/or act on complaints of violations of FOIA by your agency, we request that you (e) forward this complaint to that office and (f) advise us of who that office is and how we may contact them to follow up on this complaint.

As the FOIA requires, we expect that you will act on this appeal and produce responsive documents within 20 working days, in addition to acting on our complaint of FOIA violation.

Sincerely,

Edward Hasbrouck
Consultant on travel-related issues
The Identity Project

788P224
5-3-0

U.S. Department of Homeland Security

Freedom of Information Act Office
Arlington, VA 20598-6020



**Transportation
Security
Administration**

NOV 17 2010

Mr. Edward Hasbrouck
The Identity Project
1736 Franklin Street, 9th Floor
Oakland, CA 94612

TSA Case Number: TSA10-0179

Dear Mr. Hasbrouck:

This letter is in response to your Freedom of Information Act (FOIA) request dated December 18, 2009, that you made to the Transportation Security Administration (TSA). In your request you stated the following: "In testimony before the Subcommittee on Transportation Security and Infrastructure Protection of the House Committee on Homeland Security on December 16, 2009, TSA Acting Administrator Gail (sic) Rossides referred to "TSA 12 other SOPs". Based upon this testimony you requested the following information pertaining to:

- The 12 TSA "Standard Operating Procedures (SOPs)" referred to by Acting Admin Rossides
- Any other TSA Standard Operating Procedures, regardless of their number
- The list and index of TSA Standard Operating Procedures

Your request was processed pursuant to the FOIA, 5 U.S.C. § 552.

A search within the Transportation Security Administration (TSA) was conducted and we located 381 pages of records in response to item 1 of your request. These documents are being withheld in their entirety under Exemptions "high" 2 and 3 of the FOIA. An explanation of each of these exemptions is outlined below.

We have interpreted Item 2 as pertaining to other passenger and baggage screening SOPs other than those referenced by Acting Administrator Rossides. In response to this item, no other SOPs were located that were not referenced in Acting Administrator Rossides' testimony. A list of these SOPs is being provided in response to Item 3 of your request.

In response to item 3 of your request we have interpreted this as a request for a list of the SOPs the Acting Administrator referenced in her testimony. We have located one responsive page which we are releasing to you in its entirety.

Exemption (b)(2)

Exemption (b) (2) of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." The courts have interpreted the exemption to encompass two distinct categories of information: (1) internal matters of a relatively trivial nature -- often referred to as "Low" 2 information; and (2) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement -- often referred to as "High" 2 information.

We have determined that certain portions of the requested records should be withheld from disclosure as "high" (b)(2) information, in that they contain sensitive materials. Sensitive materials are exempt from mandatory disclosure under "high 2" when the requested documents are predominantly internal, and disclosure significantly risks circumvention of a regulation or statute, including civil enforcement and regulatory matters.

Sensitive materials are exempt from disclosure under "high" (b)(2) when the requested document is predominantly internal, and disclosure significantly risks circumvention of a regulation or statute, including civil enforcement and regulatory matters. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under "high" (b)(2) is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

Exemption (b)(3)

This information reveals Sensitive Security Information (SSI) and is exempt from disclosure under Exemption 3 of the FOIA. Exemption 3 permits the withholding of records specifically exempted from disclosure by another Federal statute. Section 114(r) of title 49, United States Code, exempts from disclosure SSI that "would be detrimental to the security of transportation" if disclosed. The TSA regulations implementing Section 114(r) are found in 49 CFR Part 1520.

Pursuant to Section 1520.5(b)(9)(i), the following information regarding security screening under aviation or maritime transportation security requirements of Federal law: any procedures, including selection criteria and comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other unauthorized person constitutes SSI and is exempt from disclosure under 49 C.F.R. Section 1520.15(a).

Fees


The fees incurred to process your request do not exceed the minimum threshold necessary for charge and, therefore, there is no fee associated with the processing of this request.

Administrative Appeal

In the event that you may wish to appeal this determination, an administrative appeal may be made in writing to Kimberly Walton, Special Counselor, Office of the Special Counselor, Transportation Security Administration, 601 South 12th Street, East Building, E7-121S, Arlington, VA 20598-6033. Your appeal **must be submitted within 60 days** from the date of this determination. It should contain your FOIA request number and state, to the extent possible, the reasons why you believe the initial determination should be reversed. In addition, the envelope in which the appeal is mailed in should be prominently marked "FOIA Appeal." Please note that the Special Counselor's determination of the appeal will be administratively final.

If you have any questions pertaining to your request, please feel free to contact the FOIA Office at 1-866-364-2872 or locally at 571-227-2300.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard Plofker", written in a cursive style.

Howard Plofker
Acting FOIA Officer
Freedom of Information Act Office

Enclosure

Screening Checkpoint SOP

Screening Management SOP

Checked Baggage SOP

Advanced Imaging Technology (WBI)

Advanced Imaging Technology (WBI)

Playbook SOP

Colorimetric SOP

Stand Off Detection

Visible Intermodal Protection and Response

Bomb Appraisal Officer

SPOT

Edward Hasbrouck
The Identity Project
1736 Franklin Street, 9th Floor
Oakland, CA 94612

edward@hasbrouck.org
office 510-208-7744
cell/mobile 415-824-0214

December 18, 2009

Transportation Security Administration
Freedom of Information Act (FOIA) Division
TSA-20, 11th Floor, East Tower
601 South 12th Street
Arlington, VA 20598-6020

(by Express Mail and by e-mail to FOIA.TSA@dhs.gov)

FOIA REQUEST
Fee benefit requested
Fee waiver requested

Dear FOIA Officer:

This is a request pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552.

In testimony before the Subcommittee on Transportation Security and Infrastructure Protection of the House Committee on Homeland Security on December 16, 2009, TSA Acting Administrator Gail Rossides referred to "TSA's 12 other SOPs" [Standard Operating Procedures. Archived video of that testimony is available on the Committee Web site at:
<<http://homeland.house.gov/Hearings/index.asp?ID=230>>.

I request access to and copies of the most recent version of each of the following documents, including any and all appendices, attachments, enclosures, supplements, updates, change notices, revisions, interpretive or guidance notes, usage instructions, or the like, including any such supplements, updates, or revisions contained in TSA Operations Directives or Management Directives:

1. The 12 TSA "Standard Operating Procedures (SOPs)" referred to by Acting Admin. Rossides.
2. Any other TSA Standard Operating Procedures, regardless of their number.
3. The list and index of TSA Standard Operating Procedures.

As a representative of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Through this request, I am gathering information on TSA procedures that is of current interest to the public because without this information, there is no way for members of the public to know what actions by TSA employees or contractors or members of the public the TSA believes are permitted or required. This information is being sought on behalf of The

Identity Project (“IDP”). IDP provides advice, assistance, publicity, and legal defense to those who find their rights infringed or their legitimate activities curtailed by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

One of the principal activities of IDP is publication of the informational and educational Web site at <<http://www.papersPlease.org>>, where we have published documents obtained in response to our previous FOIA requests, including the excerpts from the Screening Management SOP released in response to our previous FOIA request, for dissemination to the general public. This information will also be publicized through my own Web site and blog of travel news, information, and advice.

Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities. It is self-evident that the TSA “Standard Operating Procedures” relate to the government operations and activities. There has been, and continues to be, extensive interest in TSA procedures, the posting of the Screening Management SOP at fbo.gov, and the relationship of the Screening Management SOP to other SOPs, as discussed by Acting Administrator Rossides in her Congressional testimony. The Identity Project is a nonprofit organization with no commercial interest in this information.

There are no statutes or regulations specifying these procedures. In the absence of statutes or regulations, public disclosure and availability of the requested documents is essential to any public understanding of TSA operations, of what rights and authority the TSA claim, and of TSA expectations with respect to the conduct of TSA employees and contractors and of members of the public.

This information will be made available to the public. Pursuant to 44 U.S.C. 3506(d)(4)(b), neither the TSA nor any agency may, “except where specifically authorized by statute ... restrict or regulate the use, resale, or redissemination of public information by the public.” The FOIA statute does not authorize any such restriction on the use or redissemination of information released pursuant to FOIA, and we intend to exercise fully our rights to use and public redissemination through our Web site of any records released in response to this request.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

Please respond as soon as possible to confirm your receipt of this request. I look forward to your complete reply within 20 business days, as the statute requires.

Sincerely,

Edward Hasbrouck

Consultant on travel-related issues
The Identity Project



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FROM: (PLEASE PRINT) PHONE (**415, 824-8562**)
Edward Hasbrouck
1130 Trout Ave.
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TO: (PLEASE PRINT) PHONE (**FOIA APPEAL**)
Kimberly Walton, Special Counselor
of the Special Counselor
TSA
601 South 12th St, E. Bldg., E7-1215
Arlington VA

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