

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

ROBERT GRAY,)	
)	No. 05-2024
Petitioner,)	
)	
v.)	
)	
TRANSPORTATION SECURITY)	
ADMINISTRATION,)	
)	
Respondent.)	
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**MOTION TO FILE MATERIALS UNDER SEAL
FOR EX PARTE AND IN CAMERA REVIEW**

In accordance with Fed. R. App. P. 27, respondent, the Transportation Security Administration (“TSA”), hereby respectfully moves to file materials bearing on the petitioner’s Emergency Motion for Interim Relief Pursuant to 49 U.S.C. § 46110 under seal, for ex parte and in camera review. In support of this motion, respondent says as follows:

1. The materials in question relate to the petitioner’s status with regards to the different security watch-lists, including, without limitation, the No Fly List. Respondent is precluded by federal statute and regulation from disclosing the existence and content of any such security directive. Under 49 U.S.C. § 114(s)(1)(C), “the Under Secretary [of Transportation for Security] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security * * * if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation.” 49 U.S.C. § 114(s)(1)(C).¹ Pursuant to that

¹ Although the statute references the Under Secretary of Transportation for Security, effective August 19, 2003, the TSA amended its regulations, 49 C.F.R. chapter XII, to reflect the title change of the “Under Secretary of Transportation for Security” to the “Administrator of the Transportation Security Administration,” as part of its move from the Department of Transportation to the Department of Homeland Security. See TSA Transition to Department of Homeland Security;

authority, the Under Secretary has defined a set of information known as “SSI” or “sensitive security information” (see 49 C.F.R. § 1520.3), and has directed that such information shall not be disclosed except in certain limited circumstances not applicable here. 49 C.F.R. § 1520.9(a)(1) (“A covered person must * * * disclose * * * SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA.”).² The Under Secretary has defined SSI to include “[a]ny aircraft operator or airport operator security program” and “[a]ny Security Directive or order * * * [i]ssued by TSA.” 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i). By regulation, aircraft operators must also “[r]estrict the distribution, disclosure, and availability of information contained in the security program to persons with a need-to-know.” 49 C.F.R. § 1544.103(b)(4).

2. Accordingly, even if petitioner’s allegations about the existence and content of the alleged Security Directive were correct, respondent is prohibited by statute and regulation from openly disclosing those facts before this Court on the public record. See Gordon v. FBI, 2005 WL 1514078, at * 4 (N.D. Cal. June 23, 2004) (“The watch lists were developed and are maintained for a law enforcement purpose. Requiring the government to reveal whether a particular person is on the watch lists would enable criminal organizations to circumvent the purpose of the watch lists by determining in advance which of their members may be questioned. Plaintiffs appear to acknowledge this risk as they are no longer requesting the watch lists themselves. While such a

Technical Amendments Reflecting Organizational Changes, 68 Fed. Reg. 49718 (Aug. 19, 2003). This title has more recently changed from “Administrator of the Transportation Security Administration” to the “Assistant Secretary for TSA.” See Longmire Decl. ¶ 3.

² Sensitive security information may be disclosed if the TSA provides in writing that it is “in the interest of public safety or in furtherance of transportation security” to do so. 49 C.F.R. § 1520.5(b).

risk is not posed by plaintiffs, if the Court were to require the government to reveal such information to plaintiffs, it would have to require the government to do the same for all inquiries.”).

3. As discussed above, a federal statute and implementing regulations prohibit the disclosure of sensitive security information, and that is precisely what is alleged to be at issue here. Because such information may be necessary for this Court’s determination of petitioner’s emergency motion, the Government respectfully moves this Court to grant respondent’s motion for leave to file materials under seal, for in camera and ex parte review. That procedure will adequately safeguard any sensitive security information while permitting this Court’s independent review of the merits of plaintiff’s claims. Such a procedure has been repeatedly endorsed by the federal courts in a variety of contexts, particularly when national security or other similar interests are at stake.

a. There is no question that a federal statute and regulations prohibit the disclosure of sensitive security information. 49 U.S.C. § 114(s)(1)(C) grants the Under Secretary authority to prescribe rules prohibiting the disclosure of information if it would harm transportation security, and by regulation the Under Secretary has provided that sensitive security information or “SSI” cannot be disclosed, 49 C.F.R. § 1520.9(a)(1) (“A covered person must * * * disclose * * * SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA”). The non-disclosure requirements apply to airline operators as well. 49 C.F.R. § 1544.103(b)(4). SSI, in turn, has been defined to include “[a]ny security program” or “[a]ny Security Directive or order * * * [i]ssued by TSA,” 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i).

b. There is also no question that petitioner’s Emergency Motion directly challenges an alleged Security Directive. It follows that plaintiff’s case turns on the validity of an alleged Security Directive that, under federal statute and regulatory authority, may not be disclosed.

c. Finally, there is no question that the Government's interest in non-disclosure is compelling. By definition, the restricted information is that which the Under Secretary determines would "be detrimental to the security of transportation" if it were disclosed, 49 U.S.C. § 114(s)(1)(C), and the Government's interest in ensuring airline security is plainly significant and substantial.

4. Access by this Court to SSI, however, may be necessary for resolution of the jurisdictional and/or merits questions presented on appeal. To balance the statutory and regulatory commands of non-disclosure as well as the Government's compelling interest in airline security, with this Court's independent duty to review the questions presented in this appeal, the Government moves for leave to file SSI material under seal, for in camera and ex parte review.

WHEREFORE, the Government respectfully moves for leave to file SSI material under seal, for in camera and ex parte review.

Respectfully submitted,

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