

# **Project On Government Oversight**

## **Breaking the Sound Barrier:**

Experiences of Air Marshals Confirm Need for  
Reform at the OSC

November 25, 2008

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## EXECUTIVE SUMMARY

The Project On Government Oversight (POGO) has long been concerned about the operations of the Office of Special Counsel (OSC), the agency to which whistleblowers in the federal government must turn for help. Even with former Special Counsel Scott Bloch gone, POGO and many others in the whistleblower community have no confidence that the OSC can perform its functions. The tenure of Bloch has significantly weakened the agency: there has been an exodus of experienced staff from the OSC and a shift away from the OSC programs and policies that directly benefit federal employees. OSC's own annual reports show that the number of favorable actions the OSC has taken that directly benefit whistleblowers, such as reinstatement and back pay, has dropped 60 percent during Bloch's tenure.

POGO wanted to look more systemically at how the OSC has been working, to see where changes will need to be made, regardless of the new appointee at the top. POGO focused on the OSC's handling of federal air marshal cases for its investigative report for two reasons: President Bush has pointed to the critical role in homeland security played by air marshals, and Bloch himself has touted his work with air marshals as evidence of the success of his tenure.

Despite contacting almost a dozen current and former air marshals who blew the whistle, POGO could not identify one instance in which the OSC upheld its responsibility to provide a secure whistleblower disclosure channel for the resolution of workplace improprieties, to protect whistleblowers from retaliation, and to hold accountable those responsible for whistleblower retaliation.

It is especially problematic that the OSC did not provide the needed channel to resolve federal air marshals' safety and security concerns given the critical role they play in homeland security. However, despite the OSC failures, due to air marshals' persistence on their own and the validity of the concerns they raised, we understand that the Federal Air Marshal Service (FAMS) has recently addressed many of the problems raised by whistleblowers.

This investigative report seeks not only to set the record straight on former Special Counsel Bloch's *actual* accomplishments, but also to provide lessons-learned for the next Special Counsel. Through this review, POGO uncovered a number of policies and practices implemented during the tenure of Bloch that have seriously debilitated the OSC:

- The OSC leadership was unwilling to hold the offending agency's feet to the fire, a practice which had previously been very effective in pressuring agencies to properly remedy significant wrongdoing.
- OSC's Complaints Examining Unit is less active in communicating and working with complainants in recent years; this communication system is a key step in the process to ensure whistleblowers have clearly made their cases to the OSC.
- Due to an attitude within the OSC that it should not even bother going to the Merit Systems Protection Board (MSPB) because of the assumption that the MSPB will not

rule in favor of the whistleblower, the OSC does not utilize its full range of options to help whistleblowers.

- Neglect and under-investment in the OSC's certification and outreach programs to federal agencies have caused missed opportunities to prevent whistleblowing retaliation.

There are also a number of systemic and structural problems at the OSC that date back to its founding.

- The OSC lacks the independence it needs to truly be successful: it is a small, weak institution located in the executive branch; its head is a presidential appointee that is expected to carry out the President's agenda. It may be impossible for an executive branch agency to effectively extend justice to whistleblowers who have been retaliated against by their executive branch agencies' management.
- The OSC faces the challenge of having to rely on an MSPB with a track record of 2 decisions for and 53 decisions against whistleblowers.

With new leadership at the OSC it is a good time to critically examine whether the model of the OSC and MSPB is in fact the most effective, responsive, and efficient way to serve the whistleblowers who take great professional and personal risks to sound the alarm about fraud, waste, and abuse in our federal government.

Also, with new leadership at FAMS, an organizational culture can now be created where employees are not only encouraged to bring forward concerns and reform ideas, but are also protected when they do so. This includes rehiring those federal air marshals who lost their jobs after disclosing incidents of workplace wrongdoing but who still would like to come back and continue to support FAMS' mission.

### **Recommendation Highlights**

- The next President should immediately appoint a Special Counsel who ideally has a background in working constructively with whistleblowers and federal employees.
- The new Special Counsel should make a number of immediate changes to the OSC, including:
  - Make clear that the OSC exists to advocate on behalf of federal employees, especially whistleblowers.
  - Set a tone of trust and ethics among his or her staff.
  - Actively reach out to federal agencies.
  - Make more assertive goals for seeking corrective action before the MSPB.

- Implement a system for complaints to be prioritized for evaluation and investigation based on the severity of retaliation and the seriousness of the whistleblower allegations. This requires shifting the focus away from evaluating complaints only by the order in which they are received. This also requires making a note when numerous complaints come from the same agency, and consider setting up a task force to investigate systemic issues.
  - Require a staff interview and communication with the whistleblower complainant before closing a case.
  - Not closing a disclosure case without considering the whistleblower's response to the agency's investigation, including requiring the agency to respond explicitly and reasonably to all elements of a whistleblower disclosure.
  - Establish a system for staff to jointly evaluate complaints before they are closed, so that more than one person determines the fate of whistleblowers. This review panel should be comprised of a rotating group of three people.
  - Incorporate into the performance criterion of staff the number of favorable actions they seek on behalf of whistleblowers.
  - Increase the budget request to increase the number of qualified investigators and prosecutors on staff at the OSC.
- The new Special Counsel should advocate for legislation to fix the federal whistleblower protection system.
  - Congress should make participation in OSC's 2302(c) Certification Program mandatory for federal agencies, and the OSC should have the capacity, including at least two staff positions, to hold agencies accountable for their participation and performance.
  - Congress should commission a Government Accountability Office or Congressional Research Service study on the overall performance of the OSC, something that has not been done since the mid-1990s.
  - FAMS Director Robert Bray should create an organizational culture where employees are not only encouraged to bring forward concerns and reform ideas, but are also protected when they do so. Bray should rehire those federal air marshals who lost their jobs after disclosing incidents of workplace wrongdoing but who still would like to come back and continue to support FAMS' mission.
  - Congress should pass legislation that prohibits executive agencies such as the Transportation Security Administration from retroactively marking or labeling information with the unclassified information designations Sensitive Security Information, Law Enforcement Sensitive, or For Official Use Only. Information that has been labeled or marked should also be re-evaluated after a certain time.

## INTRODUCTION

The Office of Special Counsel (OSC) is the primary agency to which whistleblowers in the federal government must turn for help. Whistleblowers and concerned insiders who disclose information about wrongdoing are often the only way for the executive branch, Congress, watchdogs, and the news media to know about executive branch corruption, misconduct, and waste. Whistleblowers and concerned insiders take great professional and personal risks to sound the alarm, and the OSC exists to reduce some of that risk and to create a deterrent for those who retaliate against whistleblowers. Among its responsibilities, the OSC is charged with providing a safe channel through which federal employees can make whistleblower disclosures “about various workplace improprieties, including a violation of law, rule or regulation, gross mismanagement and waste of funds, abuse of authority, or a substantial danger to public health or safety,” and investigating and prosecuting whistleblowing reprisal complaints from federal government employees.<sup>1</sup>

It is important that the next President and Congress devote attention to appointing and confirming a Special Counsel who can return integrity to the OSC. The tenure of former Special Counsel Scott Bloch, who the President has placed on administrative leave until the end of Bloch’s term on December 12, 2008, has significantly weakened the agency.<sup>2</sup> Since taking office in January 2004, Bloch repeatedly demonstrated a fundamental lack of understanding about whistleblowers, proper investigative procedures, employee free speech laws, and his responsibilities as a government manager. Additionally, Bloch has been heavily scrutinized by Congress, federal law enforcement agencies, the media, and public interest groups for obstruction of justice, and whistleblower retaliation.<sup>3</sup> As a result of Bloch’s tenure, there was an

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<sup>1</sup> Office of Special Counsel, “Introduction to the OSC,” <http://www.osc.gov/intro.htm> (Downloaded October 21, 2008)

<sup>2</sup> While Bloch is technically still Special Counsel, he is on administrative leave until the end of his term. The White House designated William E. Reukauf, a long-time OSC career civil servant who had been serving as Associate Special Counsel, to be Acting Special Counsel. See: The White House, “Memorandum For William E. Reukauf,” October 23, 2008. <http://www.osc.gov/documents/press/2008/Announcement.PDF> (Downloaded November 18, 2008); Bloch submitted his letter of resignation effective January 5, 2009, even though his term actually ends in December 2008. See: Office of Special Counsel, “Letter to the President 10-20-08,” <http://www.osc.gov/documents/press/2008/Letter%20to%20the%20President%2010-20-08.pdf> (Downloaded November 18, 2008)

<sup>3</sup> “Staff Purge at Office of Special Counsel: Whistleblower Staff Claiming Retaliation, Forced Moves to New Midwest Field Office,” Press release from POGO, Government Accountability Project (GAP), and Public Employees for Environmental Responsibility (PEER), January 10, 2005. <http://www.pogo.org/pogo-files/alerts/whistleblower-issues/wi-osc-20050110.html> (Downloaded November 18, 2008); Also: “Complaint of Prohibited Personnel Practices Against Special Counsel Scott Bloch, March 3, 2005,” Filed on behalf of Anonymous Career Employees of U.S. Office of Special Counsel, GAP, PEER, POGO, and Human Rights Campaign (HRC). <http://pogoarchives.org/m/gp/gp-OSCcomplaint-03032005.pdf> (Downloaded November 18, 2008); Also: Elizabeth Williamson, “Special Counsel Accused Of Intimidation in Probe: Contact with Investigators Controlled, Employees Say,” *The Washington Post*, February 16, 2007. <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/15/AR2007021501725.html> (Downloaded November 18, 2008); House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Postal Service, and the District of Columbia, “Ensuring a Merit-Based Employment System: An Examination of the Merit Systems Protection Board



exodus of experienced staff from the OSC, and a shift away from the OSC programs and policies that directly benefit federal employees.

To illustrate the current problems with the OSC, as well as its untapped potential for providing tangible support to federal employees, the Project On Government Oversight (POGO) examined the OSC's handling of whistleblower disclosures and whistleblowing reprisal complaints from federal air marshals. Federal air marshals are the Department of Homeland Security's (DHS) undercover armed law enforcement officers who provide counter-terrorism support at airports and aboard airplanes.<sup>4</sup> (Appendix A)

POGO selected federal air marshals as a case study not only because they are key players in our nation's defense against terrorism, but also because Bloch routinely pointed to his handling of their cases brought to the OSC by federal air marshals as an indication of his successful protection of federal whistleblowers. Bloch touted the OSC's work on behalf of federal air marshals in a *Federal Times* op-ed: "Productivity of OSC remains high. . . . We continue to slash processing times and produce great results, substantiating compromise of federal air marshal anonymity."<sup>5</sup> Additionally, following an article critical of the OSC, Bloch wrote in a September 23, 2006, letter to *The Washington Post*:

While *The Post* was occupied with trivial dress tips, the OSC was occupied with life-or-death implications of Federal Air Marshal Service dress guidelines that might have compromised anonymity and thus national security, though we sought no coverage.<sup>6</sup>

This investigation is also a follow up on our 2005 investigation into the whistleblower protection system, which resulted in the report *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*. That report found that few whistleblowers get the kind of assistance and support from the OSC that was originally envisioned by Congress.<sup>7</sup> Since that report, POGO has continued to receive complaints about the OSC from federal employees. To discover the true extent of the problems, POGO has taken another hard look at how the OSC—"the watchdog of the watchdogs"—does its work.<sup>8</sup>

Despite contacting more than a dozen current and former air marshals who blew the whistle, POGO could not identify one instance where the OSC upheld its responsibility to provide a

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and the Office of Special Counsel," Congressional Hearing, July 12, 2007.

<http://federalworkforce.oversight.house.gov/story.asp?ID=1366>

<sup>4</sup> Department of Homeland Security, "Organizational Chart."

[http://www.dhs.gov/xabout/structure/editorial\\_0644.shtm](http://www.dhs.gov/xabout/structure/editorial_0644.shtm) (Downloaded November 14, 2008)

<sup>5</sup> Scott Bloch, "Critics can't refute the OSC's record of success," *Federal Times*, October 8, 2007.

[http://www.whistleblower.org/content/press\\_detail.cfm?press\\_id=1199](http://www.whistleblower.org/content/press_detail.cfm?press_id=1199). (Downloaded November 18, 2008)

<sup>6</sup> Scott Bloch, "Protecting Whistle-Blowers and the Public," *The Washington Post*, September 23, 2006.

<http://www.washingtonpost.com/wp-dyn/content/article/2006/09/22/AR2006092201464.html>. (Downloaded November 18, 2008)

<sup>7</sup> Project On Government Oversight, *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, April 28, 2005. <http://www.pogo.org/pogo-files/reports/whistleblower-issues/the-unfinished-agenda>. (Downloaded November 13, 2008)

<sup>8</sup> Scott Bloch, "Letter to the Editor: Keeping Tabs on the FAA," *The Washington Post*, April 14, 2008.

<http://www.washingtonpost.com/wp-dyn/content/article/2008/04/13/AR2008041302001.html> (Downloaded November 18, 2008)

secure whistleblower disclosure channel for the resolution of workplace improprieties, to protect whistleblowers from retaliation, and to hold accountable those responsible for whistleblowing retaliation.<sup>9</sup> The OSC has apparently failed to serve the very segment of the federal workforce that Bloch has held up as its beneficiary. Given the critical role they play in homeland security, it is especially disturbing that the OSC did not provide the needed channel to resolve federal air marshals' safety and security concerns.

This investigative report not only sets the record straight on Bloch's actual performance handling federal air marshal cases, but also provides lessons-learned for the next Special Counsel and Congress.<sup>10</sup> Some of OSC's failures are a result of recent policy changes within the agency. But our investigation, which included reviewing almost 30 years of OSC's annual reports<sup>11</sup> and interviewing both current and former OSC staffers, also uncovered an organizational culture—nurtured by its leadership—that does not prioritize the carrying out of OSC's mission to “safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.”<sup>12</sup> There is an urgent need for both Congress and President-elect Obama to address these issues.

## **THE OFFICE OF SPECIAL COUNSEL: MISSION UNACCOMPLISHED**

Established by the Civil Service Reform Act of 1978, the OSC was designed to perform an essential housekeeping function for the federal government. It was part of Congress's intent that the OSC “encourage employees to give the government the first crack at cleaning its own house before igniting the glare of publicity to force correction.”<sup>13</sup> Congress gave the OSC two duties to serve whistleblowers: to provide federal workers a secure channel through which they could bring whistleblower disclosures about workplace improprieties, and the authority to investigate and prosecute whistleblowing reprisal complaints from federal employees.<sup>14</sup>

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<sup>9</sup> Despite numerous requests to the OSC, including an open May 2008 Freedom of Information Act request, POGO was not able to determine the total number of federal air marshal cases that the OSC received from 2002 to 2008.

<sup>10</sup> Additional recommendations for reform of the OSC can be found in Elaine Kaplan and Tim Hannapel's “Reinvigorating the U.S Office of Special Counsel: Suggestions for the Next Administration,” *American Constitution Society*, October 16, 2008. <http://www.acslaw.org/files/Kaplan%20FINAL.pdf> (Downloaded November 24, 2008)

<sup>11</sup> Project On Government Oversight, “OSC Annual Reports to Congress.” <http://www.pogo.org/pogo-files/reports/homeland-security/breaking-the-sound-barrier/osc-annual-reports-to-congress.html>. (Downloaded November 13, 2008)

<sup>12</sup> Office of Special Counsel, “Introduction to the OSC,” <http://www.osc.gov/intro.htm> (Downloaded October 21, 2008)

<sup>13</sup> Reprinted in 124 Congressional Record S14302-03 (daily edition August 24, 1978).

<sup>14</sup> Office of Special Counsel, “Office of Special Counsel Organizational Chart.” <http://www.osc.gov/orgchart.htm>. (November 14, 2008)

Whistleblower Disclosure Form (OSC-12, Disclosure of Information). See: 5 U.S.C. § 1213. <http://www.osc.gov/documents/forms/osc12.htm>; Complaint Form (OSC-11, Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity). See: 5 U.S.C. § 1214. <http://www.osc.gov/documents/forms/osc11.htm> (Downloaded November 18, 2008)

Reprisal for whistleblowing is one of 12 types of prohibited personnel practices (PPPs) that the OSC is charged with investigating on behalf of federal employees.<sup>15</sup> When it finds that reprisal has occurred, the OSC can work with the federal agency to discipline those who engaged in retaliation, and then seek back pay, reinstatement, and other remedies for the whistleblower. In addition, the OSC has the power to prosecute a manager alleged to have committed reprisal by taking the whistleblower's case to the Merit Systems Protection Board (MSPB), an independent, quasi-judicial agency in the executive branch that was also established under the Civil Service Reform Act of 1978.<sup>16</sup>

Congress envisioned that the OSC would help ensure that employees were safeguarded against whistleblower retaliation, and that it would be a "vigorous protector ... responsible for safeguarding the effective operation of the merit system principles in practice."<sup>17</sup> In the past, the OSC has even made recommendations for legislation to enhance and clarify whistleblower protections. However, under Bloch's tenure, the OSC has fallen silent on such matters as proposed reforms to the Whistleblower Protection Act (WPA).<sup>18</sup>

Given the important role the OSC has to play, it is of great concern that the agency has failed to deliver relief to the vast majority of federal whistleblowers who have come to it for help in recent years.<sup>19</sup> Even a federal employee who was nominated by the OSC to receive its "Public Servant of the Year Award" publicly criticized the agency.<sup>20</sup>

The failures of the OSC are multi-faceted, but result in part due to structural and external problems:

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<sup>15</sup> Some of the 12 types of PPPs include: discrimination against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation; nepotism; and to deceive or willfully obstruct anyone from competing for employment. See: Office of Special Counsel, "Prohibited Personnel Practices." <http://www.osc.gov/ppp.htm>. (Downloaded November 18, 2008)

<sup>16</sup> United States Merits Systems Protection Board, "About the MSPB." <http://www.mspb.gov/sites/mspb/pages/About%20MSPB.aspx>. (Downloaded November 13, 2008)

<sup>17</sup> Senate Report No. 969, 95<sup>th</sup> Congress, 2<sup>nd</sup> Session 3, pp. 39-40.

<sup>18</sup> Unlike in previous years, none of OSC's Annual Reports to Congress during Bloch's tenure, from 2004 to 2007, contain a section on "Legislation."

<sup>19</sup> In its annual Customer Survey, an overwhelming majority of respondents reported being "dissatisfied" or "very dissatisfied" with the results they received from the OSC. See: OSC Annual Reports to Congress from 1996 to 2007.

<sup>20</sup> "The conduct of the OSC also bears some examination. In my case, while OSC proceeded with my disclosure, it dismissed my complaint of retaliation. ... With respect to my disclosure, once OSC transmitted my disclosure to the Attorney General, the Justice Department response was, by law, due within 60 days. In my case, OSC gave the Justice Department nearly a year and a half, from December 2004 until April 2006, before OSC decided that the Justice Department response was inadequate. Throughout this process, an OSC deputy, Matthew Glover, was a source of support. Unfortunately, Mr. Glover has resigned in OSC, I sadly suspect, in frustration. More importantly, however, OSC has rejected disclosures and complaints from my colleagues..." See: Leroy Smith, "Beacon of False Hope: Remarks by Leroy Smith Upon Receiving Public Servant Award for 2006," September 7, 2006.

[http://www.peer.org/docs/osc/06\\_7\\_9\\_lsmith\\_stmt.pdf](http://www.peer.org/docs/osc/06_7_9_lsmith_stmt.pdf) (Downloaded November 18, 2008); Mr. Smith was never able to give his speech at OSC's presentation; the OSC had cancelled the event after it learned Mr. Smith planned to be critical of its performance.

The OSC lacks the independence it needs to truly be successful: it is a small, weak institution located in the executive branch and its head is a presidential appointee that is expected to carry out the President's agenda.

- It may be impossible for an executive branch agency to effectively extend justice to whistleblowers who have been retaliated against by their executive branch agencies' management. Currently, the OSC must rely on Department of Justice (DOJ) lawyers to represent the whistleblowers case in federal court, yet the DOJ also represents the retaliating agencies.<sup>21</sup>
- The OSC relies on the MSPB to carry out some of OSC's actions. This is problematic because the MSPB has a track record of bias against whistleblowers.<sup>22</sup> Under the current Chair of the MSPB, the record of final rulings that favor whistleblowers is 2 out of 53.

Compounding the OSC's problems posed by inherent, organizational weaknesses is the leadership of Bloch, who took office in January 2004. The results can be seen by examining OSC's recent record of investigating whistleblowing reprisal complaints.

There are a number of types of "favorable action" that the OSC can take to directly benefit a whistleblower who files a whistleblowing reprisal complaint. One type of favorable action is called a "stay," in which the OSC seeks to delay an adverse personnel action.<sup>23</sup> For example, a stay may prevent termination or the placement of an employee on unpaid administrative leave during the investigation. The OSC can negotiate a stay with the agency, but if the agency denies the stay, the OSC may seek a stay from the MSPB. From 2002 to 2006, the OSC obtained only one stay each year from the MSPB, and only three in 2007, though it received an average of nearly 2,000 federal employee PPP complaints each year.<sup>24</sup> It is unclear if these low numbers should be attributed to the OSC or to the MSPB because the OSC has not published the number of times it actually *sought* a stay from the MSPB since the early 1980s. (Appendix B)

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<sup>21</sup> Elaine Kaplan and Tim Hannapel, "Reinvigorating the U.S Office of Special Counsel: Suggestions for the Next Administration," *American Constitution Society*, October 16, 2008.

<http://www.acslaw.org/files/Kaplan%20FINAL.pdf>

<sup>22</sup> A letter from public interest group documented the track record of MSPB's bias against whistleblowers: "In just the first three months of this year, since both chambers passed their versions of the [whistleblower protection] legislation, whistleblowers have a 2-49 win-loss record in initial decisions from administrative hearings at the Merit Systems Protection Board (MSPB). For final rulings by the MSPB, the record is 2-53 under the current Chair," See: "112 Public Interest Organizations Support Swift Action to Restore Strong, Comprehensive Whistleblower Rights," June 4, 2008. <http://www.whistleblower.org/doc/2008/CoalitionLetterJune4.pdf> (Downloaded November 18, 2008); Also see: James Sandler, "The War on Whistle-blowers," *Salon* and the Center for Investigative Reporting, November 1, 2007. <http://www.salon.com/news/feature/2007/11/01/whistleblowers/> (Downloaded November 18, 2008)

<sup>23</sup> Starting with the 2003 *Report to Congress*, Bloch has made tracking OSC's record even more difficult by not providing the number of whistleblowing reprisal complaints it receives. The number of prohibited personnel practices complaints, of which reprisal for whistleblowing is included, has stayed roughly the same during the period of 2002 to 2006. During this same time, the number of favorable actions the OSC has obtained for reprisal for whistleblowing complaints has dropped from 120 in 1995 to only 40 in 2006.

<sup>24</sup> Office of Special Counsel, *Report to Congress*, Fiscal Years 2002 to 2007.

Not only does OSC's pursuit of a stay have the chance to help an individual employee escape possible retaliation, but it also gives the OSC the opportunity to develop legal precedent at the MSPB that could have a positive impact on all reprisal cases. For example, the OSC attorneys could use the stay to clarify what constitutes a personnel action (such as termination or transfer) before the MSPB, which would improve how the law applies to other employees' cases that come before the MSPB. Some within the OSC believe that the agency has failed to take a strategic approach to developing case law to both benefit and protect whistleblowers, and provide more guidance to federal managers, and thus reduce the number of cases the MSPB needs to hear.<sup>25</sup> As a result, most of the case law at the MSPB is created by attorneys representing management or by whistleblowers' private attorneys, who unlike OSC attorneys often do not specialize in whistleblower protection law. Our sources tell us that when the OSC does not go before the MSPB for a stay, OSC staff attorneys do not gain the necessary prosecution experience to effectively protect whistleblowers. Additionally, when the OSC chooses not to take a case to the MSPB, while the whistleblower can file an Individual Right of Action at the MSPB, but he or she will incur considerable expense in hiring a private attorney.

Another favorable action the OSC can take is "disciplinary action" against a manager who has engaged in whistleblower retaliation. The OSC can either recommend or pursue disciplining the manager through the agency directly, or if that route is unsuccessful, through the MSPB. OSC's actions through the agency or through the MSPB are the only real tools it has to make management feel the consequences of their whistleblower retaliation.

It is difficult to evaluate OSC's performance statistically regarding responses to whistleblower retaliation because the OSC makes it difficult to measure how it has used this power. OSC's annual reports show a dramatic decrease in recent years of the total number of disciplinary actions negotiated with agencies for all PPP cases, from 13 in 2002 to 5 in 2007.<sup>26</sup> However, the reports do not break down how many of these disciplinary actions were for whistleblowing reprisal. Likewise, the OSC has not published the number of times it actually *sought* a disciplinary action from the MSPB since the early 1990s.

**Number of OSC Complaints Processed and Disciplinary Actions Negotiated, 2002-2007**

Fiscal Year (FY)	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Number of complaints received, processed and closed (all prohibited personnel practices)	1,704	1,732	2,039	1,774	1,930	1,953

<sup>25</sup> Some who have represented plaintiffs before the MSPB disagree that stays can be precedent-setting. Their reasoning is that the OSC usually does not engage in extensive briefing of legal issues because it is an expedited proceeding and when the MSPB decides a stay, it does not dispositively (having a binding effect of law or authoritatively) address an issue; it makes a quick decision.

<sup>26</sup> Office of Special Counsel, *Report to Congress*, Fiscal Year 2007, p 27. Office of Special Counsel, *Report to Congress*, Fiscal Year 2006, p 27.

Number of disciplinary actions negotiated with agencies (all prohibited personnel practices)	13	12	11	3	4	5
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Sources: *Report To Congress*, U.S. Office of Special Counsel, Fiscal Year 2006, p 22. *Report To Congress*, U.S. Office of Special Counsel, Fiscal Year 2007, p 21.

Another type of favorable action the OSC can take at the MSPB is to file a “corrective action,” which can make an agency remedy any harm done to the whistleblower. The OSC did not file any corrective actions for PPPs with the MSPB in 2002 or 2003, and only filed one each year from 2004 to 2007.<sup>27</sup> There is a persuasive attitude within the OSC that it should not go before the MSPB because the MSPB will not rule in favor of the whistleblower.<sup>28</sup> However, without going before the MSPB, the OSC cannot establish a track record to demonstrate the MSPB’s bias against whistleblowers.

In terms of favorable actions, the OSC has recently been doing less to benefit whistleblowers. OSC’s own annual reports show that the number of favorable actions has dropped 60 percent since Bloch took over the agency, while the number of cases received has remained relatively constant. But the reality that whistleblowers face at the OSC is even more dismal than the numbers show. The Government Accountability Project (GAP), a nonprofit whistleblower advocacy group, discovered that the OSC expanded the definition of a “favorable” action to include all requests for relief from an agency. This appears to have been a way to increase the perception that the OSC is helping whistleblowers, even when the agency does not actually provide relief to the employee.<sup>29</sup>

We suspect there are multiple explanations for the low rates of OSC assistance to whistleblowers. One possible reason is that, according to sources, the number of attorneys in the units at the OSC responsible for investigating and prosecuting whistleblower retaliation cases has significantly decreased.<sup>30</sup> Another possible explanation is that scrutiny from Congress,

<sup>27</sup> Office of Special Counsel, *Report to Congress*, Fiscal Year 2007, p 27. Office of Special Counsel, *Report to Congress*, Fiscal Year 2006, p 27.

<sup>28</sup> For example, some OSC staff say that it is difficult to obtain disciplinary action at the MSPB for whistleblowing reprisal complaints.

<sup>29</sup> According to a July 24, 2007 email to congressional staff from GAP: “In the FY2006 report (at page 27, note a) there is language that states that ‘the purpose of this breakout is to show the number of favorable actions obtained.’ But, there is no definition of what that means. This is important because for the first time in the FY2006 report, OSC counted as a ‘favorable action’ any proposed action or settlement by an agency even if that action was not taken. For example, in one of the case summaries supplied by OSC, the whistleblower did not want to return to his workplace, perhaps because it was a hostile environment. He rejected the informal proposed settlement by the agency. OSC then declined to pursue formal corrective action with MSPB and closed the case, yet counted this proposed settlement on its list of favorable actions for FY2006. ... By contrast, there is a much more detailed definition and explanation of how OSC counted the actions in the annual report for FY2002, at page 7, note 7. That footnote also explicitly states that a favorable action must be “taken” in order to be counted. The same language was used in the FY 2000, 2001, 2003 and 2004 reports. It looks like the change in definition, or lack of concrete definition of “favorable action,” occurred first in the FY 2005 report.”

<sup>30</sup> Gregg Carlstrom, “Acting special counsel seeks more funds for troubled agency,” *Federal Times*, November 11, 2008. <http://www.federaltimes.com/index.php?S=3810357> (Downloaded November 24, 2008); Also: Under Bloch’s tenure, there was a marked decrease in OSC’s investigative and legal staff, which has had an adverse effect on the

whistleblower advocates, and government watchdogs has pressured the OSC to focus on reducing the number of backlogged cases, possibly resulting in closing cases more aggressively. It takes less time to close a case than to build a strong one, especially with a decrease in staff—which may lead to the premature closing of meritorious cases.<sup>31</sup> According to POGO sources, Bloch’s political staff sat in with career disclosure staff on all meetings with congressional staffers investigating OSC’s backlog. As a result, OSC staffers could not be candid about how hastily the disclosures were closed and or report instances in which whistleblowers were not contacted.

POGO has worked with some whistleblowers who were effectively served by a number of hardworking staff at the OSC. However, those OSC staffers report that their job became more difficult under Bloch’s leadership. There has been an unprecedented level of staff turnover, with many key positions left unfilled, in large part because of a tense and chaotic work environment created by Bloch.

There are several OSC staff members who tell POGO they believe that Congress should be conducting greater oversight of the OSC, including looking into why so few cases are brought to the MSPB, questioning current staffing levels, and generally investigating whether the OSC is accomplishing its mission. Without such accountability, some OSC staff have become jaded in their positions, and according to POGO sources, have “never met a whistleblower case that they liked.” This attitude results in a number of viable whistleblowing reprisal complaints never being referred out of OSC’s intake office, the CEU, to OSC’s Investigation and Prosecution Division (IPD). For the cases that are referred to IPD, they may also encounter an apathetic staffer who chooses not to pursue one of the many types of favorable action that the OSC can take.

Beyond general statistics, however, it is important to look at specific experiences whistleblowers have with the OSC to gain insight into the operations of the agency. OSC’s treatment of Federal Air Marshal Service (FAMS) whistleblowers, contrary to Bloch’s boasts of success, provide a good example of just how far from Congress’s original vision the OSC has strayed.

## **WHISTLEBLOWER RETALIATION AT THE FEDERAL AIR MARSHAL SERVICE**

Given that Bloch has held up federal air marshals as evidence of the success of the OSC—and that the Bush Administration has referred to the FAMS as a key component in its defense against

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review and investigation of whistleblowing reprisal complaints. While POGO was unable to obtain official numbers on staffing levels, our interviews suggests that there are only eight attorneys and investigators working on whistleblower retaliation and other PPP cases in the D.C. headquarters—a vast difference from the 20-25 attorneys and investigators in this same division prior to Bloch’s tenure. This can lead to excruciatingly long waits for whistleblowers, who remain unprotected from retaliation, as well as cases with merit not being investigated.

<sup>31</sup> The GAO identified the problem of a backlog of whistleblower disclosure cases: General Accounting Office, *Report to Congressional Requesters on U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress*, GAO-04-36, March 2004. <http://www.gao.gov/new.items/d0436.pdf> (Downloaded November 18, 2008); A number of public interest groups, including POGO helped bring attention to this problem: Jenny Mandel, “Report Shows Little Progress Reducing Case Backlog at OSC,” <http://www.govexec.com/dailyfed/1106/110906m1.htm> (Downloaded November 18, 2008)

terrorism<sup>32</sup>—it is disturbing to learn how poorly the agency has handled federal air marshals’ safety and security concerns. While some significant improvements to safety and security have been made at FAMS recently, these are largely a result of the persistence of outspoken federal air marshal whistleblowers—some of whom lost their positions in the process. Most (if not all) of those air marshals were let down by the OSC. Based on concerns gathered from current and former federal air marshals, POGO has written a letter to the Director of FAMS that includes recommendations not only to protect air marshal whistleblowers, but also to rehire those who were driven out in retaliation for their whistleblowing and to hold accountable staff who engage in whistleblower retaliation.<sup>33</sup>

Established in 1985, FAMS’ purpose is to “detect, deter, and defeat hostile acts targeting U.S. air carriers, airports, passengers, and crews.”<sup>34</sup> This mission has become more challenging in recent years as FAMS has experienced significant changes. Since 2001, FAMS has been shuffled back and forth between five different agencies: the Federal Aviation Administration (FAA), the Transportation Security Administration (TSA), the Department of Transportation (DOT), DHS, and the Immigration and Customs Enforcement Agency (ICE).<sup>35</sup> These transitions, combined with the fact that there have been three different Directors of FAMS since 2006, have led to an unsteady system of management and accountability that has made it difficult to assess whether FAMS is successfully carrying out its mission.

In response to 9/11, FAMS’ ranks grew exponentially, from fifty air marshals to thousands.<sup>36</sup> Many of the air marshals who spoke to POGO said they see their job at FAMS more as a patriotic duty than just a job. Because of this sense of mission, many federal air marshals spoke up about needed reforms at the transitioning agency.

Instead of listening to its employees in the field, however, FAMS responded by trying to search out and silence the critical voices. For example:

- In 2008, TSA launched a Big Brother-esque investigation to discover which air marshals disclosed to CNN that less than one percent of the nation’s daily flights carry armed federal air marshals.<sup>37</sup> One TSA investigator suspected that former Federal Air Marshal

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<sup>32</sup> The White House, “Fact Sheet: The Seventh Anniversary of 9/11.”

<http://www.whitehouse.gov/news/releases/2008/09/20080910-5.html> (November 13, 2008)

<sup>33</sup> Project On Government Oversight, “POGO Letter to Federal Air Marshall Service (FAMS) Director Robert Bray regarding FAMS treatment of whistleblowers.” <http://www.pogo.org/pogo-files/letters/homeland-security/hs-aviation-20081125.html> (Downloaded November 25, 2008)

<sup>34</sup> Transportation Security Administration, “Federal Air Marshals.” <http://www.tsa.gov/lawenforcement/programs/fams.shtm> (November 13, 2008)

<sup>35</sup> When Congress enacted the Aviation and Transportation Security Act on November 19, 2001, the management of aviation security, including FAMS, was transferred out of FAA to the newly created TSA, which, along with FAA, was part of the DOT. ATSA; Public Law 107-71. As a result of the Homeland Security Act of 2002, TSA was moved out of the DOT to DHS. Public Law 107-296. FAMS continued under TSA until it was moved under the ICE in September 2003. Then, FAMS was moved back to TSA in October 2005.

<sup>36</sup> General Accounting Office, *Aviation Security: Federal Air Marshal Service Is Addressing Challenges Of Its Expanded Mission and Workforce, But Additional Action Is Needed*, November 2003.

<http://www.gao.gov/new.items/d04242.pdf> (Downloaded November 18, 2008)

<sup>37</sup> Drew Griffin and Kathleen Johnston, “TSA Launches Leak Investigation,” *CNN*, July 14, 2008.

<http://www.cnn.com/2008/US/07/14/air.marshal.investigation/index.html> (Downloaded November 18, 2008)



Jeffrey Denning may have known where the disclosure came from. While Denning was serving in Iraq, the TSA investigator called Denning's wife, posing as a friend of his, and asked her questions about her husband.<sup>38</sup> An air marshal from January 2004 to March 2007, Denning had resigned "due to the mismanagement of the FAM Service, and the way [he] was treated by management after voicing concerns about [his] personal safety, the safety of the passengers and crew, as well as national security."<sup>39</sup>

- After Federal Air Marshal Robert MacLean and his entire field office were given unprecedented one-on-one threat briefings regarding a suicide hijacking plot detailed in a July 26, 2003, "DHS Advisory,"<sup>40</sup> MacLean raised concerns about a FAMS cost-cutting plan to eliminate federal air marshal missions that required them to stay overnight at a hotel. After MacLean was rebuffed by his supervisors and the DHS Inspector General (IG) offices in Washington, D.C., San Diego, and Oakland, California, MacLean disclosed the plan to the media as a last resort. Immediately after the media report, which didn't name sources, TSA canceled the plan. In response to the media report, FAMS initiated an internal investigation into the source of the disclosure. After reports of FAMS managers threatening air marshals with the USA Patriot Act to find the sources of the article, Congress requested that DHS IG investigate such abuses. DHS IG later concluded that there were in fact such threats.<sup>41</sup> In 2005, after DHS IG rejected a request by then-FAMS Director Thomas Quinn to conduct a criminal investigation, Quinn did not stop his crusade and requested that the ICE Office of Professional Responsibility (OPR) conduct its own internal investigation of MacLean, who was serving as the Executive Vice President for the Federal Law Enforcement Officers Association – Federal Air Marshal agency (FLEOA-FAM), calling him one of the "strident and irresponsible anti-management voices." MacLean was fired, and four months after, FAMS retroactively labeled his July 2003 disclosure as Sensitive Security Information (SSI), an unclassified information label not designated by statute.<sup>42</sup> (Appendix C)
- Starting in October 2004, FAMS directed the DHS OPR to conduct at least four investigations into Federal Air Marshal Frank Terreri, raising allegations such as

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<sup>38</sup> Jeffrey Denning, "Controversial Email I Forwarded," July 16, 2008.

<http://jeffreydenning.blogspot.com/2008/07/controversial-email-i-forwarded.html> (Downloaded November 18, 2008)

<sup>39</sup> Jeffrey Denning email to POGO, June 19, 2008.

<sup>40</sup> Department of Homeland Security, "Advisory: Potential Al-Qaeda Hijacking Plot in the U.S. and Abroad, July 26, 2003. <http://pogoarchives.org/m/hsp/dhs-advisory-20030726.pdf> (Downloaded November 24, 2008)

<sup>41</sup> Office of the Inspector General, Department of Homeland Security, *Review of Alleged Actions by Transportation Security Administration to Discipline Federal Air Marshals for Talking to the Press, Congress, or the Public*, OIG-05-01 November 2004.

<sup>42</sup> Although FAMS sent the announcement of the plan in a text message to all Federal Air Marshals' non-secure mobile phones without Sensitive Security Information (SSI) markings, as opposed to their encrypted Personal Digital Assistants (PDAs), FAMS fired MacLean for "Unauthorized Disclosure of Sensitive Security Information;" See: Department of Homeland Security, Transportation Security Administration, "Notice of Removal," April 10, 2006. <http://www.pogoarchives.org/m/hsp/MacLean-Removal.pdf> (Downloaded November 18, 2008); Transportation Security Administration, "Final Order On Sensitive Security Information In Connection With MacLean vs. Department of Homeland Security," October 31, 2006. <http://www.pogoarchives.org/m/hsp/MacLeanFinalOrderSSI.pdf> (Downloaded November 18, 2008)

improper email to a co-worker, improper use of business cards, and association with an organization critical of FAMS. FAMS' accusations against Terreri followed a press release and several letters Terreri had written to the agency and Congress, acting as the President of FLEOA-FAM, regarding FAMS' dress code and boarding procedures policies. The DHS OPR cleared Terreri, a 16-year law enforcement officer who had never received lower than an "excellent" rating, of the allegations. (Appendix D)

- In August 2004, FAMS management initiated a seemingly retaliatory year-and-a-half-long investigation into Federal Air Marshal P. Jeffrey Black for allegedly unauthorized release of SSI.<sup>43</sup> Just before the investigation was launched, Black had testified before the House Judiciary Committee about internal FAMS policies that promoted aviation security breaches, such as professional dress code requirements, the submission of false surveillance intelligence reports, the use of a dangerous type of ammunition, and the large number of unaddressed instances in which suspicious passengers had been observed surveying passengers and crews (probing) while aboard commercial flights. The ICE OPR determined that FAMS' allegations against Black were "unfounded." (Appendix E)

Such examples of retaliation are not isolated events. After a two year investigation, the House Judiciary Committee revealed a pattern of retaliatory behavior in its 2006 report, *Plane Clothes: Lack of Anonymity at the Federal Air Marshal Service Compromises Aviation and National Security*.<sup>44</sup> Interviewing more than 30 air marshals from the Washington, Boston, Chicago, Atlanta, Los Angeles, Las Vegas, Houston, and Dallas field offices, the congressional investigators found that most of the federal air marshals:

indicated a reluctance to approach supervisors with these concerns for fear of retaliation that included being given difficult scheduling assignments and being required to wash FAMS vehicles and paint office walls. Many of those interviewed said that they initially tried to voice their concerns to FAMS supervisors but were told that there would be no changes.<sup>45</sup>

The DHS Inspector General's (IG) *Review of Alleged Actions by Transportation Security Administration to Discipline Federal Air Marshals for Talking to the Press, Congress, or the Public* identified some cases where threats may have been "excessive," explaining that:

Five air marshals, from two field offices, said they were threatened with prosecution for disclosing information to the press or public. They said their supervisors' threats included

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<sup>43</sup> Sensitive Security Information (SSI) is a form of information that is not classified national security information, but is information marked so that it is generally restricted from public disclosure.

See: Government Accountability Office, *Transportation Security Administration's Process for Designating and Releasing Sensitive Security Information*, November 30, 2007. <http://www.gao.gov/new.items/d08232r.pdf> (Downloaded November 18, 2008)

<sup>44</sup> TSA tried to classify the whole report as "Sensitive Security Information," but ended up working with the Committee to redact a few sentences. House Committee on the Judiciary, *Plane Clothes: Lack of Anonymity at the Federal Air Marshal Service Compromises Aviation and National Security*, May 25, 2006.

<sup>45</sup> Committee on the Judiciary, *Plane Clothes: Lack of Anonymity at the Federal Air Marshal Service Compromises Aviation and National Security*, May 25, 2006.

being led away in handcuffs, being arrested and prosecuted, or being subjected to polygraph exams if the leaks continued.<sup>46</sup>

However, in general, the IG report found that FAMS and TSA actions against air marshals “were appropriate under the circumstances.”<sup>47</sup>

Despite such warnings of an agency hostile to whistleblowers, the OSC did not help the whistleblowers in any meaningful way, despite a number of whistleblower disclosures and whistleblowing reprisal complaints from federal air marshals that came into its office during the same period. As a Senate report documenting OSC’s creation demonstrates, Congress expected the OSC to be proactive: “The Special Counsel should not passively await employee complaints, but rather, vigorously pursue merit systems abuses on a systematic basis.”<sup>48</sup> And even though Bloch singled out air marshals’ cases as having “life-or-death”<sup>49</sup> implications, there is no evidence that he made their cases a priority. The OSC had the capacity to do more. For example, after dozens of cases from the FAA came into the OSC in 2007 and 2008, Bloch had established a special task force to address these cases.<sup>50</sup> Such a task force should have been created for FAMS.

## **AIR MARSHALS, LIKE OTHER WHISTLEBLOWERS, TRAVEL ALONE**

The OSC suffers from some basic customer service problems. Neither OSC’s website, nor its public regulations, provide clear guidance to whistleblowers on how to file a whistleblower disclosure or a whistleblowing reprisal complaint. As a result, staff communication is essential.

According to POGO’s sources, however, OSC’s Complaints Examining Unit (CEU) decreased its communications with complainants under Bloch’s tenure. Current and former OSC staffers have told POGO that many cases that ended in success were identified only after staffers spoke with the complainant to clarify the case and walk the whistleblower through the process. During the tenure of previous Special Counsel Kathleen Day Koch the “CEU would contact complainants to ensure that the nature of and basis for the allegation is clearly understood.”<sup>51</sup> Similarly, during the tenure of Bloch’s immediate predecessor, Elaine Kaplan, the CEU staffers were required to hold a telephone conference when a whistleblower protested OSC’s closing of their complaint. This provided a safeguard against the hasty closure of cases, as well as

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<sup>46</sup> Office of the Inspector General, Department of Homeland Security, *Review of Alleged Actions by Transportation Security Administration to Discipline Federal Air Marshals for Talking to the Press, Congress, or the Public*, OIG-05-01 November 2004, p 8.

<sup>47</sup> Office of the Inspector General, Department of Homeland Security, *Review of Alleged Actions by Transportation Security Administration to Discipline Federal Air Marshals for Talking to the Press, Congress, or the Public*, OIG-05-01 November 2004, p 4.

<sup>48</sup> Senate Report No. 969, 95th Cong., 2d Sess. 3, p 39-40.

<sup>49</sup> Scott Bloch, “Protecting Whistle-Blowers and the Public,” *The Washington Post*, September 23, 2006. <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/22/AR2006092201464.html> (Downloaded November 18, 2008)

<sup>50</sup> Office of Special Counsel, “Press Release: FAA Whistleblowers Receive Special Counsel’s Public Servant Award,” June 12, 2008. [http://www.osc.gov/documents/press/2008/pr08\\_05.htm](http://www.osc.gov/documents/press/2008/pr08_05.htm) (Downloaded November 18, 2008)

<sup>51</sup> Office of Special Counsel, *Report to Congress*, Fiscal Year 1993, p 4.

providing a measure of due process to the complainants. The phone conference policy was jettisoned under Bloch in order to move cases more quickly.<sup>52</sup>

Federal Air Marshal Robert MacLean was one whistleblower who suffered from the elimination of this policy. MacLean alerted the OSC in 2006 about checkpoint and pre-boarding policies that make it clear to passengers who the air marshals are and enable potential terrorists to target the air marshals and seize their weapons. Only a few months before, the House Judiciary Committee's *Plane Clothes* report found, "more needs to be done, and it needs to be done immediately" to enable air marshals to traverse all airports discreetly.<sup>53</sup> Despite the fact that this was also an issue that Bloch publicly expressed an interest in investigating,<sup>54</sup> the OSC declined to investigate MacLean's complaint.

No one from the OSC called MacLean for more details before closing his case. If someone had, they would have learned that MacLean had a clear case of reprisal for whistleblowing. Immediately after the July 26, 2003, "DHS Advisory" was issued and the unprecedented threat briefings of a suicide hijacking plot<sup>55</sup> to exploit a consular visa screening loophole,<sup>56</sup> FAMS sent out a text message to all air marshals' non-secure mobile phones—not to their encrypted Personal Data Assistants (PDAs)—that it planned to eliminate federal air marshal missions on nonstop, long-distance flights. Alarmed by FAMS' proposed policy, especially in light of the July 26, 2003, DHS Advisory, MacLean brought his concern to his supervisors, as well as to the DHS IG offices in Washington D.C., San Diego, and Oakland, California. When these official channels did nothing to halt the plan, MacLean—who had 14 years of military and civilian

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<sup>52</sup> Such a policy is not outlined in the "OSC's Internal Organization and Functions" section of OSC's 2006 Report to Congress. Confirming this shift, a long-time OSC staffer told POGO that "in the old days, the CEU would call and almost always do a mini-investigation," but now, this "doesn't happen" in order to save time and only a few staffers make contact with complainants. In fact, in the letters the air marshals received that state that the OSC was closing their cases the CEU staffers did not even provide their telephone numbers. Recent legislation has attempted to remedy some of the problems whistleblowers face when attempting to communicate with the OSC. One piece of legislation (H. R. 3551), introduced in the House by Representative Danny Davis (D-IL) in 2007, requires that the OSC correspondence with the complainant include the name and contact information of the OSC staffer responsible for the case. The legislation also requires the OSC staffer to interview the complainant and "be available to respond to reasonable questions from the complainant regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the allegations of the complainant." Bloch also reduced the amount of time that a complainant would have to respond in writing to a preliminary determination letter, which proposes that a case be closed. Under every previous Special Counsel, the OSC gave complainants 16 days to respond, and granted extensions liberally. Bloch reduced the response time to 11 days and changed the policy to disfavor granting extensions. The OSC, the agency tasked with protecting whistleblowers, should not need to be forced to adopt the tenets of basic customer service.

<sup>53</sup> House Committee on the Judiciary, *Plane Clothes: Lack of Anonymity at the Federal Air Marshal Service Compromises Aviation and National Security*, May 25, 2006.

<sup>54</sup> Scott Bloch, "Critics can't refute the OSC's record of success," *Federal Times*, October 8, 2007.

Scott Bloch, "Protecting Whistle-Blowers and the Public," *The Washington Post*, September 23, 2006. <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/22/AR2006092201464.html> (Downloaded November 24, 2008)

<sup>55</sup> Department of Homeland Security, Office of Intelligence and Analysis, Directorate for Preparedness, Homeland Infrastructure Threat & Risk Analysis Center, "Strategic Sector Assessment: U.S. Aviation," June 16, 2006. <http://pogoarchives.org/m/hsp/hitrac-report-20060518.pdf> (Downloaded November 24, 2008)

<sup>56</sup> U.S. Department of Homeland Security, "Suspension of Transit Without Visa and ITI Programs," August 2, 2003. [http://travel.state.gov/visa/visa\\_1248.html#](http://travel.state.gov/visa/visa_1248.html#) (Downloaded November 24, 2008)

federal service experience—anonously disclosed FAMS’ plan to the media.<sup>57</sup> After a long search for the whistleblower and an investigation of MacLean, FAMS terminated MacLean in April 2006 for disclosing SSI, even though the original message did not contain SSI markings when it was sent by FAMS to non-secure mobile phones, and SSI is not even a classified designation. MacLean had no indication at the time of any obligation to protect the information.<sup>58</sup> It was only in August 2006, months after FAMS had fired MacLean,<sup>59</sup> that TSA retroactively designated the information in the text message as SSI.<sup>60</sup> During this time, both the Congressional Research Service (CRS) and the Government Accountability Office (GAO) were raising numerous concerns regarding inconsistencies and weaknesses in how TSA applied SSI.<sup>61</sup>

The OSC had the power to conduct an investigation to look for reprisal for whistleblowing,<sup>62</sup> but did not in MacLean’s case. By not pursuing his case, the OSC left MacLean to battle an angry and embarrassed agency alone. After more than two years of legal struggles, MacLean remains passionate about the mission of FAMS and desires to be rehired as a federal air marshal.<sup>63</sup>

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<sup>57</sup> TSA’s plan may not have been lawful, as the Aviation and Transportation Security Act or ATSA (Public Law 107–71), Title 49 of the United States Code Section 44917, states: “Deployment of Federal Air Marshals... [on] nonstop, long distance flights, such as those targeted on September 11, 2001, should be a priority.” See: [http://www.law.cornell.edu/uscode/html/uscode49/usc\\_sec\\_49\\_00044917----000-.html](http://www.law.cornell.edu/uscode/html/uscode49/usc_sec_49_00044917----000-.html) (Downloaded November 24, 2008)

<sup>58</sup> FAMS’ practice runs counter to policy in other sectors of the federal government where employees dealing with traditional classified information—which is typically much more sensitive than SSI—must be made aware of its status so as to protect it accordingly.

<sup>59</sup> Frank Donzanti, “Notice of Removal,” April 10, 2006. <http://www.pogoarchives.org/m/hsp/MacLean-Removal.pdf> (Downloaded November 24, 2008)

<sup>60</sup> Final Order On Sensitive Security Information In Connection With MacLean vs. Department of Homeland Security, August 30, 2006, <http://www.pogoarchives.org/m/hsp/MacLeanFinalOrderSSI.pdf> (Downloaded November 24, 2008)

<sup>61</sup> A CRS report for Congress highlighted some of the problems surrounding SSI: “The standards set for the classification and declassification of national security information are arguably higher and more specific than the standards for sensitive security information. The lack of specificity of SSI regulations has raised questions about the withholding and eventual disclosure of transportation security information.”

See: Mitchel Sollenberger, *CRS Report for Congress: Sensitive Security Information and Transportation Security: Issues and Congressional Options*, June 9, 2004, p 7. <http://www.firstamendmentcenter.org/pdf/CRS.security2.pdf>. Also: Transportation Security Administration, *Clear Policies and Oversight Needed for Designation of Sensitive Security Information*, GAO-05-677, June 29, 2005. <http://www.gao.gov/docsearch/abstract.php?rptno=GAO-05-677>. (Downloaded November 24, 2008)

<sup>62</sup> 5 USC 1206 (a)(3).

<sup>63</sup> After the OSC declined to pursue his case, MacLean filed an Individual Right of Action at the MSPB in August 2006, but the Department of Justice was able to successfully argue that the MSPB did not have the jurisdiction to rule if MacLean’s disclosure was SSI or not. In October 2006, MacLean appealed TSA’s action in the U.S. Court of Appeals. In September 2008, the Court denied MacLean’s petition. Unfortunately, this appeal process delayed the MSPB from hearing MacLean’s case for more than two years. In September 2008, the Court denied MacLean’s petition. MacLean re-filed his case before the MSPB in October 2008. Petitioner’s Opening Brief, U.S. Court of Appeals for the Ninth Circuit, *Robert J. MacLean v. Department of Homeland Security*, January 30, 2007.

<http://www.pogoarchives.org/m/hsp/MacLean-9th-01302007.pdf> (Downloaded November 24, 2008); Brief for Respondent, U.S. Court of Appeals for the Ninth Circuit, *Robert J. MacLean v. Department of Homeland Security*, April 2, 2007. <http://www.pogoarchives.org/m/gp/wp-doj-maclean-042007.pdf> (Downloaded November 24, 2008); Per Curiam Opinion, U.S. Court of Appeals for the Ninth Circuit, *Robert J. MacLean v. Department of Homeland Security*, September 16, 2008.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/E276163F5AD0C2C8882574C5008009E4/\\$file/0675112.pdf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/E276163F5AD0C2C8882574C5008009E4/$file/0675112.pdf) (Downloaded November 24, 2008)

During this time, MacLean's case gained significant media coverage,<sup>64</sup> as well as the attention of Members of Congress. Unlike the OSC, they recognized that a federal employee who attempted to correct a policy that he believed posed a significant risk to the public had certain whistleblower protections that should prevent retaliation. Representative Carolyn Maloney (D-NY) noted in 2006 that MacLean had "potential whistleblower status," and that "there are questions about the handling of this case and questions of whether the original message disclosed by Mr. MacLean was securely transmitted or appropriately marked as sensitive security information."<sup>65</sup> In October 2007, Representative Bill Pascrell (D-NJ) requested that TSA Administrator Edmund "Kip" Hawley become familiar with the "unacceptable" case of MacLean.<sup>66</sup>

In another case, in 2004, Federal Air Marshal Shawn McCullers filed a whistleblowing reprisal complaint alleging that air marshals were "being forced to work/fly schedules that are directly responsible for serious deterioration and often accelerated deterioration to their physical and physiological health and safety." Again, the OSC declined to investigate McCullers' charges, possibly because he had outlined his concerns in a reprisal complaint, when a whistleblower disclosure may have been more appropriate. No OSC staffer let him know that a reprisal complaint requires a higher burden of proof than a disclosure. In a complaint, the employee must prove both that they made a protected disclosure and that they were retaliated against—a distinction McCullers understandably did not know. Though the OSC sent a letter notifying McCullers that he had the right to file a disclosure, the OSC staff does not appear to have referred the complaint to the disclosure unit, even though that would have been the more appropriate course of action. (Appendix F)

If the OSC had taken the initiative to guide the disclosure into the proper channel and to initiate an investigation into McCullers' charges, a number of federal air marshals may have been helped. The *Washington Times* obtained a 2005 memo from a FAMS field office that confirmed that the field office was "experiencing a large amount of missed missions due to federal air marshals calling in sick and medical groundings by physicians."<sup>67</sup> Years later, several air marshals tell POGO that many of the over-scheduling problems that led to unnecessary strain on air marshals' health still have not been improved, especially for international flights.

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<sup>64</sup> Larry Margasak, "U.S. labels 2003 leaked memo 'sensitive,'" *Associated Press*, May 10, 2007. [http://www.usatoday.com/news/washington/2007-05-10-1106927580\\_x.htm](http://www.usatoday.com/news/washington/2007-05-10-1106927580_x.htm) (Downloaded November 18, 2008); Ron Marsico, "Flying Into Career Troubles," *New Jersey Star-Ledger*, October 14, 2007. Also: "Ex-air marshal to sue over 'SSI' label," *The Washington Times*, October 29, 2006. <http://washingtontimes.com/news/2006/oct/29/20061029-115609-8718r/> (Downloaded November 18, 2008)

<sup>65</sup> October 20, 2006 letter from Congresswoman Carolyn Maloney to the U.S. Department of Homeland Security and Transportation Security Administration. <http://pogoarchives.org/m/hsp/maloney-letter-20061020.pdf> (Downloaded November 24, 2008)

<sup>66</sup> Congressman Bill Pascrell (NJ) requests Edmund "Kip" Hawley, Assistant Secretary of Homeland Security, Administrator, TSA to get familiar with the "unacceptable" case of MacLean. Subcommittee on Transportation Security and Infrastructure Homeland Security, Committee on Homeland Security, House of Representatives, "Aviation Security: Are We Truly Protected?" October 16, 2007. <http://homeland.edgeboss.net/wmedia/homeland/chs/tsa/oct.wvx> (Downloaded November 24, 2008)

<sup>67</sup> "Air marshals ousted over job injuries," *The Washington Times*, September 20, 2006. <http://www.washingtontimes.com/news/2006/sep/20/20060920-123800-5262r/> (Downloaded November 24, 2008)

## LOOKING FOR EXCUSES NOT TO HELP

The OSC's processes of investigating whistleblowing reprisal complaints, as well as its criteria to evaluate the merit of a complainant's case, are opaque. As a result, it is impossible to know why cases that appear strong are closed without investigation by the OSC.

Colorado-based Federal Air Marshal Matt Hayes reported what appeared to be a solid case of reprisal for whistleblowing in a June 2006 complaint to the OSC. After Hayes spoke with coworkers about his concerns that FAMS assigned coveted international travel assignments in an unfair manner, Hayes' supervisors sent him to a counselor and placed him on administrative leave without consulting his direct supervisor or giving him a written explanation.<sup>68</sup> Hayes' forced administrative leave delayed his anticipated three percent raise. The OSC had been Hayes' last hope: he had already gone to FAMS management, the DHS IG, ICE OPR, and TSA's Ombudsman in search of a remedy. (Appendix G)

But the OSC chose not to investigate his case. Had OSC used its investigative powers to issue subpoenas, take depositions, or order responses to written interrogatories<sup>69</sup> the OSC could have discovered how overseas travel was assigned, spoken with the three air marshals willing to be witnesses, and determined why Hayes was on administrative leave. Both Congress and the DHS IG had previously raised concerns about FAMS' use of administrative leave.<sup>70</sup> The House Judiciary Committee's *Plane Clothes* report stated:

FAMS management should immediately implement a standard procedure for placing employees on administrative leave. In fact, the DHS Inspector General's Office recommended in August of 2004 that 'the Assistant Secretary of U.S. Immigration and Customs Enforcement establish a policy addressing the FAMS' use of administrative leave.' The Committee is concerned that this recommendation has yet to be implemented.<sup>71</sup>

The OSC also did not investigate the complaints of several other air marshals. According to the OSC, it received eight federal air marshal cases in 2007 but pursued none, citing a lack of evidence.<sup>72</sup> POGO could not obtain these files, so we can only wonder if the OSC did not find evidence because it did not look.

Confusion within the OSC about how to handle complaints from TSA employees, including federal air marshals, further impedes the ability of air marshals to gain assistance. In 2002, DOT Under Secretary of Transportation for Security John Magaw and then-Special Counsel Kaplan

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<sup>68</sup> It also resulted in the loss of Hayes' badge and building access, which in turn prevented him from speaking with then-FAMS Director Dana Brown and his staff when they were in Denver to visit.

<sup>69</sup> 5 USC Sec. 1212. [http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t05t08+132+0++\(\)%20%20AN](http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t05t08+132+0++()%20%20AN).

<sup>70</sup> Office of Inspector General, Department of Homeland Security, *Evaluation of the Federal Air Marshal Service* (OIG-04-32), August 2004, p 21.

<sup>71</sup> House Committee on the Judiciary, *Plane Clothes: Lack of Anonymity at the Federal Air Marshal Service Compromises Aviation and National Security*, May 25, 2006.

<sup>72</sup> Numbers provided by James Mitchell, former Chief of Staff and Director of Communications, U.S. Office of Special Counsel, to POGO, January 31, 2008.

signed a Memorandum of Understanding (MOU) between OSC and TSA that OSC is limited to investigating only whistleblowing reprisal complaints from TSA security screeners, but not the other 11 types of PPPs.<sup>73</sup> The MOU explicitly stated that it only applied to screeners, not other TSA employees, such as federal air marshals. But since then, the OSC has incorrectly cited that MOU to reject complaints from federal air marshals. For example, when Security Assistant for FAMS Richard Hoskins went to the OSC in 2007 with a whistleblower complaint regarding the PPP of nepotism and violating veteran preferences in FAMS hiring practices, the OSC incorrectly cited the 2002 MOU and said it only investigates whistleblowing reprisal complaints from TSA employees. (Appendix H)

The OSC also incorrectly cited the same MOU in January 2008, when it told Christian Klingeler—who had been an air marshal for almost six years—that it could not investigate his PPP complaints of gross mismanagement, waste of funds, and abuse of authority taking place in the Seattle FAMS field office. Klingeler had asked the OSC to investigate because his supervisors discouraged him from taking the case to the DHS IG by telling him that they had contacts in the IG office. Klingeler said he got the runaround. “DHS told me to go to OSC. OSC told me to go to DHS. OIG told me to go to EEO [Equal Employment Opportunity Commission].”<sup>74</sup> (Appendix I)

## **THE OSC DOES NOT ACT TO STOP THE RETALIATION**

In January 2007, then-Special Counsel Bloch wrote in a commentary for *Federal Times*, “I get to reward ordinary heroes who report waste, fraud and abuse.”<sup>75</sup> A few days later, however, the OSC wrote to a federal air marshal with a seemingly strong case of retaliation and whose name is withheld to protect his identity, to say that it would take no further action on his whistleblowing reprisal complaint. Far from being rewarded by the OSC, this federal air marshal only received delays and denials when he sought justice and protection from the OSC after a series of adverse personnel actions, such as delayed bonuses, administrative leaves, and proposed terminations. (Appendix J)

This federal air marshal used his time in the airport while waiting to board flights to identify indicators of potential terrorist behavior in order to “catch the bomber, not the bomb,” and then share the information with FAMS’ training division. In August 2004, he got a photograph of a suspicious individual, who then ran away and out of the airport. He believes it is because he first disclosed this incident to a TSA security agent at the airport rather than to FAMS that his FAMS supervisors were angry and began to take retaliatory actions.<sup>76</sup> In March 2005, he filed a

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<sup>73</sup> Office of Special Counsel and Transportation Security Administration, “Memorandum of Understanding Between the U.S. Office of Special Counsel and the Transportation Security Administration (TSA) Regarding Whistleblower Protections for TSA Security Screeners.” [http://www.osc.gov/documents/tsa/tsa\\_mou.htm](http://www.osc.gov/documents/tsa/tsa_mou.htm) (Downloaded November 18, 2008)

<sup>74</sup> Email to POGO from Christian Klingeler, September 6, 2008.

<sup>75</sup> Scott Bloch, “Commentary: America will always need whistleblowers,” *Federal Times*, January 29, 2007. <http://www.federaltimes.com/index.php?S=2510890> (Downloaded November 18, 2008)

<sup>76</sup> FAMS’ lack of written policies on how federal air marshals were to complete reports on incidents during their missions was a weakness that the GAO confirmed in a November 2005 review, See: Government Accountability Office, *Report to the Honorable Peter A. DeFazio on Aviation Security: Federal Air Marshal Service Could Benefit*



whistleblowing reprisal complaint with the OSC against his FAMS' supervisors for mismanagement and failing to forward the photograph of the suspicious individual to an outside agency, such as the FBI, for further investigation. The federal air marshal submitted this same letter to the OPR, as a second disclosure of wrongdoing at his agency.

During the time he waited for OSC to launch an investigation into the complaint, his work environment was so hostile that the air marshal also filed an Equal Employment Opportunity complaint. In July 2005, he received a proposed removal letter from FAMS, but the OSC did not use its power to seek a stay on the termination, one of the anticipated benefits of going through the OSC process.<sup>77</sup> On December 20, 2006, when he received another proposed removal letter from FAMS, the OSC again did not seek a stay. Ironically on December 4, the OSC investigator wrote that he had been "preparing to initiate the investigation into your matter."

In February 2007, after one year and nine months of waiting, the OSC completed its investigation into the complaint and decided not to take further action on the case. The OSC found that his disclosures were not protected, and that management had not taken retaliatory action as a result of the disclosures. The second finding is a bit incredible, given that the air marshal began suffering retaliation in the form of threats and lengthy interrogations immediately after he made the disclosures. In May 2007, after numerous threats, he was finally terminated from FAMS, which accused him of purchasing false academic credentials—he had received a diploma from a university he learned about from a U.S. government website before the university's operators were indicted and the school shut down—and for "poor conduct" during an interrogation by the TSA Special Agents after his first disclosure.

If the OSC had fought for this federal air marshal, it may have been able to protect him. Contrary to FAMS' explanation for the federal air marshal's termination, the OSC wrote in its letter closing the case that he did not misuse his credentials when applying to FAMS. Despite negating the justification for FAMS firing the air marshal, the OSC did not bring his case before the MSPB or challenge the policy of firing employees who used so-called diploma mills. If it had, the OSC might have been victorious—less than a year later, the MSPB ruled in favor of a law enforcement employee who used a diploma from a diploma mill on her federal employment application.<sup>78</sup>

## **THE OSC NOT USING ITS DISCLOSURE PROCESS TO PUSH FOR THE TRUTH**

In addition to the function of reviewing and taking action on whistleblower reprisal complaints, the WPA gives the OSC the authority to review whistleblower disclosures of waste, fraud, and abuse submitted by federal employees. If the OSC determines that there is a "substantial likelihood" that the whistleblower's disclosure has merit, the Special Counsel is required to refer

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*from Improved Planning and Controls*, GAO-06-203, November 2005. <http://www.gao.gov/new.items/d06203.pdf> (Downloaded November 18, 2008)

<sup>77</sup> 5 USC §1214.

<sup>78</sup> Susan FitzGerald, Appellant, v. Department of Homeland Security, Agency. January 29, 2008. United States of America, Merit Systems Protection Board, 2008 MSPB 17, Docket No. CB-7121-07-0014-V-1.

the disclosure to the agency, which is then required to investigate the allegations.<sup>79</sup> This process carries the risk that the agency will investigate itself with bias. For the process to be effective, the OSC must examine the agency's resulting investigative report critically, and consider the valuable feedback of the whistleblower. The case of Frank Terreri, however, shows that when the OSC does not hold the agency's feet to the fire, it misses opportunities to ensure that agencies properly remedy significant problems.

After numerous unsuccessful attempts to correct aviation security problems by bringing them to the attention of FAMS leadership and Congress, Federal Air Marshal Frank Terreri filed a whistleblower disclosure with the OSC.<sup>80</sup> Terreri disclosed that:

FAMS management has repeatedly endorsed the public release of intricate details of operational procedures and security measures employed by FAMs [federal air marshals] during missions, including, but not limited to: the type of pistol carried and that a round is loaded, the way in which the FAM presents his/her credentials to the airline gate personnel, the fact that airline personnel know the FAMs identity, the number of FAMs that fly on a mission, and how the FAM is escorted and boarded on the airplane prior to departure. These irresponsible releases violate FAMS regulations to protect Sensitive Security Information (SSI). (Appendix D)

As President of FLEOA-FAM, Terreri said his disclosure reflected the life-or-death safety and security concerns of not just himself, but approximately 1,500 other federal air marshals, and the airline passengers they are protecting. The OSC referred Terreri's allegations of serious breakdowns in aviation security to the DHS Secretary for investigation, who then called on FAMS to conduct the investigation.

Unlike the "black box" nature of OSC's whistleblower reprisal complaint investigations or IG investigations, one of the positive features of the OSC whistleblower disclosure process is that it allows the employee a window into the investigation of his or her allegations, and the ability to submit comments on the investigation.<sup>81</sup> In the past, OSC has used the whistleblower's comments to reject numerous reports from agencies as inadequate, and required them to start over.<sup>82</sup> The OSC did not afford Terreri that opportunity, however. One week before the OSC sent the FAMS/DHS report to Terreri, then-Special Counsel Bloch stated in a May 2007 interview with Federal News Radio:

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<sup>79</sup> Office of Special Counsel, "Whistleblower Disclosures." <http://www.osc.gov/wbdisc.htm> (Downloaded November 18, 2008)

<sup>80</sup> Terreri's disclosure faced formidable odds at the OSC. Out of 545 disclosures, the OSC only referred 24 to agency heads for investigation and reports in 2006. It is also worth noting that when Federal Air Marshal P. Jeffrey Black raised similar concerns to the OSC in 2004, the OSC chose not to pursue his disclosure.

<sup>81</sup> POGO, GAP and PEER, *The Art of Anonymous Activism: Serving the Public While Surviving Public Service*, 2002. [https://secure.ga6.org/08/book\\_order](https://secure.ga6.org/08/book_order) (Downloaded November 18, 2008); Also: 5 USC §1213.

<sup>82</sup> For example, the case of FAA employee Gabriel Bruno's disclosure to the OSC in 2002 shows that then-Special Counsel Elaine Kaplan asked the DOT IG to go back and investigate the case three separate times. Also, after receiving the DOT IG's investigative report into FAA employee Bogdan Dzakovic's disclosure, then-Special Counsel Kaplan asked the DOT Secretary to provide more information, including the specific actions the new TSA had taken in response to the IG's findings. See: Elaine Kaplan, "Letter to the President," March 18, 2003 [http://www.osc.gov/documents/cltr3\\_02.pdf](http://www.osc.gov/documents/cltr3_02.pdf) (Downloaded November 18, 2008)

Last August, we ordered the Department of Homeland Security to conduct an investigation into the Federal Air Marshals procedures and policies concerning use of hotels, boarding of aircraft and the anonymity of the Federal Air Marshals. And as a result of the investigation that ensued, the Federal Air Marshals have changed their policies, they have cleaned up their act, and we've become satisfied that they've done a good job.<sup>83</sup>

Bloch's exuberant confidence in the FAMS/DHS investigation was of great concern to Terreri: "His comments were made before I had seen any agency response or had a chance to comment, as required by statute, before the Special Counsel makes any determination on the investigation."<sup>84</sup> (emphasis in original) When Terreri received the FAMS/DHS report, he found it wholly inadequate. In his formal comments, he wrote, "There is no evidence that any investigation was conducted," and "the FAMS Report lists an inaccurate and grossly incomplete summary of information to be investigated."<sup>85</sup>

After a whistleblower comments on an agency's report, the Special Counsel is required to make a determination as to whether the report "reasonably" resolved the whistleblower's concerns and complied with all statutory requirements. Despite Terreri's substantive concerns, the OSC endorsed the FAMS/DHS report as a "reasonable" response to his disclosures and forwarded the report, along with Bloch's analysis and the whistleblower's comments, to the President.<sup>86</sup> The OSC did not challenge DHS for not substantiating any of Terreri's charges, even though FAMS had admitted to changing several of the policies about which Terreri had expressed concern.

The FAMS/DHS report simply stated that FAMS had resolved what Terreri, the 1,500 air marshals of FLEOA-FAM, and Congress were most concerned about—the current checkpoint bypass system and pre-boarding at the gate in front of passengers—but did not offer anything to support that statement.<sup>87</sup> Thus, how was the OSC, or the whistleblower, to know if the problems were fixed?

Without a comprehensive investigation, the OSC also could not know if any individuals within FAMS were held accountable for creating the aviation security blunders that led Terreri to file a disclosure with the OSC in the first place. There is a precedent for the OSC ensuring that this

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<sup>83</sup> Federal News Radio, "WFED: Whistleblower Week," May 14, 2007.

<http://www.federalnewsradio.com/index.php?sid=1140103&nid=250> (Downloaded November 18, 2008)

<sup>84</sup> Letter to Karen Gorman from Frank Terreri, See: Eric Fleisig-Greene, "Re: OSC File No. DI-06-1620," August 15, 2007. <http://www.osc.gov/FY2008/Scanned/08-14%20DI-06-1620/08-14%20DI-06-1620%20wb%20comments.pdf> (Downloaded November 18, 2008)

<sup>85</sup> Letter to Karen Gorman from Frank Terreri, See: Eric Fleisig-Greene, "Re: OSC File No. DI-06-1620," August 15, 2007. <http://www.osc.gov/FY2008/Scanned/08-14%20DI-06-1620/08-14%20DI-06-1620%20wb%20comments.pdf> (Downloaded November 18, 2008)

<sup>86</sup> Letter to President Bush from Scott Bloch, See: Office of Special Counsel, "Re: OSC File No. DI-06-1620," February 28, 2008. <http://www.osc.gov/FY2008/Scanned/08-14%20DI-06-1620/08-14%20DI-06-1620%20Ltr%20to%20President.pdf> (Downloaded November 18, 2008)

<sup>87</sup> In 2006, the House Judiciary Committee requested a detailed accounting of any steps taken to address the lack of anonymity at FAMS, saying that: "Ensuring the anonymity of Federal Air Marshals should be a top priority of the organization. Steps should begin immediately to ensure that policy initiatives are rapidly implemented to achieve this goal," See: House Committee on the Judiciary, *Plane Clothes: Lack of Anonymity at the Federal Air Marshal Service Compromises Aviation and National Security*, May 25, 2006, p 7.

happened: in 2003, then-Special Counsel Elaine Kaplan asked the DOT Secretary to explain what actions had been taken to hold appropriate individuals accountable for the acts of mismanagement identified in the OIG Report launched by FAA employee Bogdan Dzakovic's disclosure.<sup>88</sup>

The OSC also could have investigated and sought disciplinary action for any individuals who retaliated against Terreri by opening up a whistleblowing reprisal complaint based on information it received in Terreri's disclosure. In his whistleblower disclosure to the OSC, Terreri described how:

two FAMS supervisors arrived at my home, ordered me to turn over all issued equipment, including my badge, credentials, and duty weapon. They notified me that I had been placed on administrative leave pending resolution of the investigation and would not have access to any government email or access to the FAMS Los Angeles Field Office without proper escort.<sup>89</sup>

Terreri also noted that it was "imperative that the OSC act against this pattern and practice of retaliation, because FAMS has made [it] clear that its response to alleged security concerns is [to] deny problems exist and attack the whistleblower, rather than seek corrective action."<sup>90</sup> But OSC did not use its authority to weed out whistleblower retaliation at FAMS, so Terreri filed a whistleblowing reprisal complaint with the OSC, which has been pending since February 2007.

According to GAP, the organization representing Terreri, the OSC did not hold DHS to the law when processing his disclosure. Even Bloch himself admitted this in his February 29, 2008, letter to the White House closing the case: "the agency's reports did not adhere to all of the technical, statutory requirements of Section 1213(d) [the WPA], and that more could be done to strengthen the anonymity of Federal Air Marshals."<sup>91</sup>

The way the OSC handled Federal Air Marshal Jimmie Bacco's disclosure is another example of how the OSC did not adequately take into account the whistleblowers' comments, resulting in an inadequate agency report going unchallenged. In April 2005, the OSC gave DHS 60 days to conduct an investigation into Bacco's disclosure that FAMS official reports overstated the number of flights air marshals flew.<sup>92</sup> DHS, which tasked the DHS IG with the report, did not deliver the investigation to the OSC until March 1, 2006—300 days past its deadline. By this point, Bacco had been hospitalized for brain surgery from air marshal-related health problems.

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<sup>88</sup> Letter to President Bush from Elaine Kaplan, See: Elaine Kaplan, "Re: OSC File No. DI-02-0207," March 18, 2003. [http://www.osc.gov/documents/cltr3\\_02.pdf](http://www.osc.gov/documents/cltr3_02.pdf) (Downloaded November 18, 2008)

<sup>89</sup> Letter to Karen Gorman from Frank Terreri, See: Eric Fleisig-Greene, "Re: OSC File No. DI-06-1620," August 15, 2007. <http://www.osc.gov/FY2008/Scanned/08-14%20DI-06-1620/08-14%20DI-06-1620%20wb%20comments.pdf> (Downloaded November 18, 2008)

<sup>90</sup> Letter to Karen Gorman from Frank Terreri, See: Eric Fleisig-Greene, "Re: OSC File No. DI-06-1620," August 15, 2007. <http://www.osc.gov/FY2008/Scanned/08-14%20DI-06-1620/08-14%20DI-06-1620%20wb%20comments.pdf> (Downloaded November 18, 2008)

<sup>91</sup> Letter to President Bush from Scott Bloch, See: Office of Special Counsel, "Re: OSC File No. DI-06-1620," February 28, 2008. <http://www.osc.gov/FY2008/Scanned/08-14%20DI-06-1620/08-14%20DI-06-1620%20Ltr%20to%20President.pdf> (Downloaded November 18, 2008)

<sup>92</sup> In submitting his whistleblower disclosure to the OSC, Bacco opted to remain anonymous to the agency.

As a result, Bacco was not able to submit comments on the investigation, nor ask for an extension, before the OSC determined that the agency investigation was complete on July 20, 2006, and did not substantiate the whistleblower's disclosures.<sup>93</sup> Incredibly, despite the extraordinary delay and a lack of participation from Bacco, the OSC listed the investigation under OSC's "Successful" 2006 Case Summaries.<sup>94</sup> (Appendix K)

This case was far from "successful." Several federal air marshals, including Bacco, see several weaknesses in the DHS IG's investigation.<sup>95</sup> FAMS provided the DHS IG with a data sample from one day at San Diego International Airport (SAN)—a small satellite office with only 28 published flights. The data sample from SAN was easy to manipulate, both due to the small sample size and the limited timeframe. The OSC should have ensured that the IG looked into how the Las Vegas field office (LAS) with 134 published flights, was reporting its numbers, since that was the location the whistleblower reported in their disclosure of the alleged reporting problems. By not vigorously vetting the IG's investigation or addressing the fundamental gaps cited above, the OSC's analysis<sup>96</sup> did little to resolve the concerns that have continued to be raised by Congress and the media regarding the actual number of flights covered by air marshals.<sup>97</sup>

## **OSC PROGRAM TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS LAGS BEHIND**

POGO's investigation into federal air marshals' cases also found significant weaknesses in OSC's 2302(c) Certification Program. Initiated by former Special Counsel Kaplan in 2001, the Certification Program helps federal agencies fulfill their statutory requirements to inform employees of their whistleblower rights under the WPA.<sup>98</sup> While the program is not mandatory for federal agencies, sources at the OSC said that certification, especially the training of management, does an enormous amount to prevent retaliatory actions, and would have been helpful for federal air marshals at FAMS.

The impact of OSC's lack of attention to its certification and outreach program is evident at FAMS. FAMS offices across the country showed no evidence of the Certification Program, even

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<sup>93</sup> Letter to President Bush from Scott Bloch, See: Office of Special Counsel, " Re: OSC File No. DI-0501173," July 20, 2006. <http://www.osc.gov/FY2006/Scanned/DI-05-1173/LettertoPresident.pdf> (Downloaded November 18, 2008)

<sup>94</sup> Office of Special Counsel, "Successful Case Summaries." <http://www.osc.gov/successfulcase.htm#whistleblower06> (Downloaded November 18, 2008)

<sup>95</sup> Office of Inspector General, Department of Homeland Security, "Re: OSC File No. DI-05-1173," March 1, 2006. <http://www.osc.gov/FY2006/Scanned/DI-05-1173/AgencyReport.pdf> (Downloaded November 18, 2008)

<sup>96</sup> Office of Special Counsel, *Analysis of Disclosures, Agency Investigations and Reports, and Comments of the Special Counsel*. <http://www.osc.gov/FY2006/Scanned/DI-05-1173/Analysis.pdf> (Downloaded November 18, 2008)

<sup>97</sup> Audrey Hudson, "Flight Marshal Numbers Disputed," *Washington Times*, March 3, 2005. Also: Caitlin Webber, "Questions for TSA Chief at Budget Hearing," *Congressional Quarterly*, May 14, 2008. Also: Drew Griffin, "How Safe Are America's Airways?" *CNN: Anderson Cooper 360°*, March 25, 2008.

<sup>98</sup> Once an agency completes the program's five required steps of putting up posters, providing information about whistleblower protection laws to both current employees and to new employees during the orientation process, offering training to supervisors, and posting an OSC web-link on the agency's internal website, the OSC will issue a certificate of compliance, which is valid for three years.

though FAMS' parent agency, DHS was certified.<sup>99</sup> POGO found OSC was not closely monitoring its certified programs. In October 2008, when POGO attempted to reach the DHS contact person listed on OSC's website, not only was the phone number incorrect, but the contact person had resigned in 2006.<sup>100</sup>

Numerous former and current federal air marshals from different field offices have told POGO they had not seen any whistleblower rights education materials (posters, training, OSC web-links) in their offices. When POGO asked Robert MacLean if he knew about his whistleblower rights via the 2302(c) Certification Program he responded, "I became aware of this after I was fired."<sup>101</sup>

When asked if informational posters about the WPA protections were visible at FAMS [Appendix L], Federal Air Marshal P. Jeffrey Black answered:

NO! But in 2004-2005, I began to put up the attached FOUR posters around the office. They would last one or two days, and I would [have to] replace them. This went on for months. I would put them up, and they would be torn down. It became a joke in the office. We were sure it was management tearing them down...<sup>102</sup>

Another certification requirement not in place at FAMS was a "link from its own web site or intranet site to the OSC web site."<sup>103</sup> Screen shots of the internal FAMS website show that there is no link to the OSC website and no other resource for whistleblower rights [Appendix M].

Education and outreach were all but ignored by Bloch. Prior to his tenure, there was a staff position dedicated to certification and outreach, but Bloch did not have a staff person dedicated to this position. Instead, Bloch tasked James Mitchell, OSC's then-Chief of Staff and Director of Communications, to add this enormous task to his plate. This new duty wound up "at the bottom of [his] pile of work."<sup>104</sup> Mitchell said the OSC did not have the necessary resources to ensure that certified agencies were compliant, and that as a result, enforcement authority falls mostly under the jurisdiction of the agency heads.<sup>105</sup>

OSC's failure to follow through on its promise to instruct agencies about whistleblower rights is not limited to FAMS, and appears to be a government-wide problem. OSC's 2005 customer

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<sup>99</sup> Additionally, the 2002 OSC/TSA Memorandum of Understanding stated that: "OSC will work with TSA to develop a comprehensive outreach program to inform and train TSA staff and security screeners on whistleblower protection law, and OSC's policies and procedures." Memorandum of Understanding Between the Office of Special Counsel and the Transportation Security Administration (TSA) Regarding Whistleblower Protections for TSA Security Screeners, May 28, 2002. [http://www.osc.gov/documents/tsa/tsa\\_mou.htm](http://www.osc.gov/documents/tsa/tsa_mou.htm) (Downloaded November 24, 2008)

<sup>100</sup> Chief Human Capital Officer K. Gregg Prillaman had resigned in 2006.

<sup>101</sup> MacLean email to POGO, July 11, 2008.

<sup>102</sup> Black email to POGO, July 11, 2008.

<sup>103</sup> Office of Special Counsel, "Answers to Frequently Asked Questions about the 2302(c) Certification Program." <http://www.osc.gov/outreach.htm#link> (Downloaded November 24, 2008).

<sup>104</sup> Phone interviews: July 11 and 16, 2008.

<sup>105</sup> Soon after Bloch's departure, OSC's website listed a new contact person for the 2302(c) Certification Program.

survey results “show that only 16% of respondents can recall being informed by their agencies concerning their rights and responsibilities.”<sup>106</sup>

## CONCLUSION

Because OSC’s responses to federal air marshals’ concerns were so inadequate, numerous air marshals felt the only way to fix the security and safety problems in FAMS was to take them to the press. A multitude of critical stories in the media have undermined public confidence in the agency and its ability to keep the country secure. This is precisely what OSC’s creators sought to avoid when they envisioned an agency that encouraged “employees to give the government the first crack at cleaning its own house before igniting the glare of publicity to force correction.”<sup>107</sup>

The OSC’s failure to hold FAMS accountable, combined with federal air marshals’ experience of long waits and having their complaints rejected by the OSC, had a chilling effect at FAMS. Federal Air Marshal Spencer Pickard did not take his security concerns to the OSC after they had not been addressed internally by FAMS because of the “horror stories from everybody else.”<sup>108</sup> Instead, he turned to the media.<sup>109</sup> Former Federal Air Marshal Jeffrey Denning, “contacted OSC once, but never filed anything since I felt nothing would have ever been done.” In an email interview with POGO, Denning wrote:

There were so many things going on that were plain wrong at the Federal Air Marshal Service that I felt that if the OSC hadn’t done anything up to that point, with the complaints of some of the other FAMS [Federal Air Marshals] who I witnessed get abused and treated unfairly, that my complaint would likely not receive proper attention either.<sup>110</sup>

Persistent air marshals have pushed through—on their own—numerous reforms and changed agency policies they believed were risky and unprofessional, largely by going to the media. In July 2006, 17 federal air marshals from site offices across the country anonymously came forward “as a last resort” to speak on ABC News affiliates because their supervisors were not taking action on FAMS policies for dress code, boarding procedures, and incident reports that they felt were endangering the flying public.<sup>111</sup> Within a month of the news report, FAMS changed the dress code policies.<sup>112</sup>

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<sup>106</sup> Office of Special Counsel, *Report to Congress*, Fiscal Year 2005, p 25.

<sup>107</sup> Reprinted in 124 Congressional Record S14302-03 (daily edition August 24, 1978).

<sup>108</sup> Phone conversation with Pickard, January 2008.

<sup>109</sup> Brian Ross and Rhonda Schwartz, “Federal Air Marshal Speaks Out,” *ABC’s The Blotter*, June 13, 2007. [http://blogs.abcnews.com/theblotter/2006/05/united\\_states\\_a.html](http://blogs.abcnews.com/theblotter/2006/05/united_states_a.html).

<sup>110</sup> Denning email to POGO, April 22, 2008.

<sup>111</sup> Glen Meek, ABC 13. <http://www.youtube.com/watch?v=kRZCFAXPWkw> (Downloaded November 24, 2008); Avni Patel, “17 Air Marshals Go Public,” *ABC’s The Blotter*, July 20, 2006. [http://blogs.abcnews.com/theblotter/2006/07/17\\_air\\_marshall.html](http://blogs.abcnews.com/theblotter/2006/07/17_air_marshall.html) (Downloaded November 24, 2008)

<sup>112</sup> August 24, 2006 Memo from Dana Brown, Assistant Administrator, Director of Law Enforcement, Federal Air Marshal Service. [http://abcnews.go.com/images/WNT/fams\\_memo\\_policy\\_changes.pdf](http://abcnews.go.com/images/WNT/fams_memo_policy_changes.pdf) (Downloaded November 18, 2008)

If the OSC had performed its oversight function in the federal air marshal cases, problems within FAMS could have been resolved in less time and out of the public eye. This could have increased security and prevented the loss of public trust in FAMS.

If its treatment of air marshals is the best the OSC can do—and the OSC claims it is—this does not instill confidence in OSC’s track record with countless other federal agencies whose employees have turned to the agency for help.

The next President and Congress must ensure that the OSC fulfill its mandate to protect federal whistleblowers and concerned insiders who disclose information about wrongdoing. Until reforms are made at the OSC to fix these problems, the safety of the public will continue to be at risk.

## **RECOMMENDATIONS**

- The next President should immediately appoint a Special Counsel who ideally has a background in working constructively with whistleblowers and federal employees.
- The new Special Counsel should make a number of immediate changes to the OSC, including:
  - Make clear that the OSC exists to advocate on behalf of federal employees, especially whistleblowers.
  - Set a tone of trust and ethics among his or her staff.
  - Actively reach out to federal agencies.
  - Make more assertive goals for seeking corrective action before the MSPB.
  - Implement a system for complaints to be prioritized for evaluation and investigation based on the severity of retaliation and the seriousness of the whistleblower allegations. This requires shifting the focus away from evaluating complaints only by the order in which they are received. This also requires making a note when numerous complaints come from the same agency, and consider setting up a task force to investigate systemic issues.
  - Require a staff interview and communication with the whistleblower complainant before closing a case.
  - Not closing a disclosure case without considering the whistleblower’s response to the agency’s investigation, including requiring the agency to respond explicitly and reasonably to all elements of a whistleblower disclosure.



- Establish a system for staff to jointly evaluate complaints before they are closed, so that more than one person determines the fate of whistleblowers. This review panel should be comprised of a rotating group of three people.
- Incorporate into the performance criterion of staff the number of favorable actions they seek on behalf of whistleblowers.
- Increase the budget request to increase the number of qualified investigators and prosecutors on staff at the OSC.
- The new Special Counsel should advocate for legislation to fix the federal whistleblower protection system. This legislation should include:
  - Language that gives federal employees the option of going directly to court to challenge retaliation if the OSC fails to help the whistleblower.
  - The granting of independent litigating authority for the OSC.
  - Stronger provisions of disciplinary actions against employees who retaliate against whistleblowers.
  - Requirements that agency heads must task the agency's Inspector General with OSC whistleblower disclosure investigation referrals. This would ensure that agencies do not investigate themselves. The agency head should still be required to sign off on the IG's findings and recommendations before submitting the investigation to OSC.
- Congress should make participation in OSC's 2302(c) Certification Program mandatory for federal agencies, and the OSC should have the capacity, including at least two staff positions, to hold agencies accountable for their participation and performance.
- Congress should commission a GAO or CRS study on the overall performance of the OSC, something that has not been done since the mid-1990s. These studies should seriously consider:
  - Whether dismantling the OSC and MSPB and reallocating their budgets to a congressional agency tasked with conducting investigations into whistleblower allegations might be a more effective expenditure of funds.
  - How to improve the procedures that allow whistleblowers to legally challenge actions against them. No analysis has been done to compare the various frameworks and establish which are functioning most effectively.<sup>113</sup>

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<sup>113</sup> For example, one basis of comparison might be the process in the Department of Labor. Some statutes allow whistleblowers to file complaints with the Department of Labor and have a hearing with an Administrative Law Judge, See: Valerie J. Watnick, "Whistleblower Protections under the Sarbanes-Oxley Act: A Primer and a Critique," *beppress Legal Series, Working Paper 1822*, October 3, 2006.

- How to improve the OSC's reporting to Congress, and whether it would be more effective to make it similar to the IG reporting structure.
- FAMS Director Robert Bray should create an organizational culture where employees are not only encouraged to bring forward concerns and reform ideas, but are also protected when they do so. Bray should rehire those federal air marshals who lost their jobs after disclosing incidents of workplace wrongdoing but who still would like to come back and continue to support FAMS' mission.
- Congress should pass legislation that prohibits executive agencies such as TSA from retroactively marking or labeling information with the unclassified information designations SSI, LES, or For Official Use Only. Information that has been labeled or marked should also be re-evaluated after a certain time.

## ACRONYMS AND GLOSSARY

**CEU** – Complaints Examining Unit: the OSC office that receives and vets new complaints, makes a determination as to the merit of complaints, and either passes the cases to the appropriate office or closes it.

**Corrective Action** – A type of favorable action, sought by the OSC from either an agency or through litigation before the MSPB, that requires an agency to remedy any harm done to a whistleblower.

**CRS** – Congressional Research Service: a legislative service that provides policy and legal analysis to congressional committees and Members regardless of party affiliation.

**Disciplinary Action** – A type of favorable action in which the OSC files a complaint with the MSPB, charging an employee with committing a prohibited personnel practice, such as reprisal for whistleblowing. If the MSPB finds that an individual committed a prohibited personnel practice, the individual can face removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, or a fine of up to \$1,000.

**DHS** – Department of Homeland Security: federal organization responsible for security within and at the borders of the United States.

**DOJ** – Department of Justice: federal organization in charge of law enforcement, criminal, and civil prosecutions. Handles the legal business of the United States.

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[http://www.access.gpo.gov/uscode/title5a/5a\\_2\\_.html](http://www.access.gpo.gov/uscode/title5a/5a_2_.html) (Downloaded November 24, 2008); Also: 5 C.F.R. § 9701.704; Coverage: (b) Appeals of suspensions shorter than 15 days and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.  
<http://law.justia.com/us/cfr/title05/5-3.0.53.11.1.html#5:3.0.53.11.1.5.78.21> (Downloaded November 24, 2008)

**DOT** – Department of Transportation: federal organization in charge of all things transportation including, air, rail, and car travel.

**EEOC** – Equal Employment Opportunity Commission: the agency that enforces federal employment discrimination laws.

**FAA** – Federal Aviation Administration: primarily responsible for advancement, safety and regulation of civil aviation.

**FAMS** – Federal Air Marshal Service: a law enforcement agency, within the Transportation Security Administration, charged with protecting the civil aviation system from criminal and terrorist threats.

**Favorable Action** – Actions taken by the OSC that directly benefit the whistleblower, including reinstatement and back pay. In 2006, this definition changed to encompass any actions that the OSC proposed to benefit the whistleblower, even if the action was not taken.

**FLEOA-FAM** – Federal Law Enforcement Officers Association-Federal Air Marshals: a nonpartisan professional association that represents federal law enforcement personnel.

**GAO** – Government Accountability Office (previously the General Accounting Office): an independent, nonpartisan congressional agency that regulates how the federal government spends tax money.

**GAP** – Government Accountability Project: a nonprofit public interest group that promotes corporate and federal accountability.

**ICE** – Immigration and Customs Enforcement: agency within DHS responsible for customs enforcement at national borders.

**IPD** – Investigation and Prosecution Division: the OSC office that conducts investigations into complaints the Complaints Examining Unit has deemed credible. IPD takes legal action in cases not resolved during the investigative process.

**MSPB** – Merit Systems Protection Board: an independent, quasi-judicial agency in the executive branch that serves as the guardian of federal merit systems.

**OPR** – Office of Professional Responsibility: investigates allegations of misconduct by Department of Justice attorneys.

**OSC** – Office of Special Counsel: an independent federal agency that has a number of functions including to protect federal employees from prohibited personnel practices, especially reprisal for whistleblowing, and to provide a secure channel through its Disclosure Unit for federal workers to disclose information about various workplace improprieties.

**PDA** – Personal Data Assistant: a handheld computer often capable of connecting to the internet or use as a mobile phone.

**PPP** – Prohibited Personnel Practices: twelve actions, outlined in 5 U.S.C § 2302(b), that cannot be made against an employee of the government.

**Reprisal for Whistleblowing** (retaliation for whistleblowing) – One of the twelve PPPs. Any adverse action taken due to an employee’s whistleblower disclosure.

**SSI** – Sensitive Security Information: a control designation that the Transportation Security Administration applies to information obtained about any information regarding mode of transportation deemed sensitive. The particulars of what is covered by this designation are spelled out in 49 CFR 1520.7.

**Stay** – An action sought by the OSC to delay an adverse personnel action pending an investigation.

**TSA** – Transportation Security Administration: agency within DHS responsible for transportation security, created after the terrorist attacks of September 11, 2001.

**Whistleblower Disclosure** – Statements to the OSC regarding a violation of law, rule or regulation, mismanagement or waste of funds, abuse of authority, or a danger to public health or safety.

**WPA** – Whistleblower Protection Act: law that protects federal employees that make a disclosure evidencing waste, fraud, or abuse in government spending.