

September 14, 2006

Department of Homeland Security Appropriations Conferees
Subcommittee on Homeland Security
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Conferees:

The undersigned organizations, including partners in OpenTheGovernment.org*, are writing to urge you, as members of the conference committee on the Department of Homeland Security Appropriations Act (H.R. 5441), to help correct the misuse of the Sensitive Security Information (SSI) control marking by adopting Section 525 of the House version of H.R. 5441. House Section 525 would limit the overuse of the SSI designation, particularly by the Transportation Security Administration, while preserving authority to properly designate real sensitive information and keep it out of the hands of terrorists. We do not believe that the Senate's language would achieve the desired goal of reforming the use of the Sensitive Security Information marking by TSA.

The SSI control marking has been abused to cover up both embarrassing information about government activity—particularly at the Transportation Security Administration (TSA)—and innocuous information which is widely known. Indeed, in 2004, the TSA and the FBI were found by Judge Charles R. Breyer of the United States District Court for the Northern District of California to have made numerous “frivolous claims of exemption” for “innocuous” information, much of which is “common sense and widely known.” (*Gordon v. Federal Bureau of Investigation*, No. C 03-01779 CRB (N.D. Cal., June 15, 2004))

An example of widely-known information to which TSA has applied SSI, apparently in an effort to block public access, includes “the texts or even the titles of five aviation warnings given to airlines just before the 9/11 terrorist attacks, even though the titles and substance of the warnings have been published in the best-selling 9/11 Commission report,” as reported by the National Security Archive in 2004. The warnings, distributed to each of the airlines before 9/11 and publicly available both on the internet and in the FAA reading library before 9/11, described the threats to civil aviation presented by Islamist extremists and specifically named Usama bin Laden and his al-Qaeda network. Now, more than five years later after those same terrorists attacked on 9/11, the release of those warnings given to the aviation industry before 9/11 cannot possibly present a risk to the nation's transportation system. Yet they remain designated SSI by the TSA, thwarting efforts at accountability related to 9-11 and to ensure improved security.

*OpenTheGovernment.org is a coalition of consumer and good government groups, environmentalists, journalists, library groups, labor and others united to make the federal government more open in order to ensure our safety and security, strengthen public trust in government, and support our democratic principles.

The House version of the bill offers proper guidance regarding this kind of information by deeming such outdated information presumptively not SSI. The House bill would automatically make information marked SSI presumptively releasable after three years, unless it is part of a “current, active transportation security directive or security plan” or the DHS Secretary “makes a written determination that identifies a compelling reason why the information must remain SSI.”

Under the Senate version (Section 524(a)(2)(B)), even outdated and no longer sensitive information would remain marked and controlled as SSI if it is presently so designated. We read the Senate version to say that, as long as outdated and no-longer-sensitive information is "covered by a current sensitive security information application guide" it will not become releasable and will continue to be designated SSI, resulting in no change and defeating the purpose of the provision.

Other significant differences exist between the versions. In terms of standards for maintaining the secretive SSI control marking, the Senate version creates a very low “rational basis” standard in place of the House’s higher requirement of a “compelling reason.” We believe the higher standard is essential given the deference generally afforded agencies under a “rational basis” review and TSA’s history of abuse of the designation. The Senate version also contains no judicial authority to allow presumed access to SSI by parties in judicial proceedings as DHS Covered Persons; the House version offers a balanced approach by allowing for controlled access to the information, while preserving TSA’s authority to keep the information secret if necessary.

Rather than strengthening the protection of our national transportation system, the manner in which TSA presently exercises its SSI authority – which one Congressman has characterized as “willy nilly” – actually poses a risk to that system. Information that no longer needs protection, or that never needed protection in the first place, is being unjustifiably kept from the public. TSA’s unbridled use of its authority and the resulting unchecked secrecy damage the public trust so essential for a properly functioning democratic, open society. Such secrecy impedes government’s ability to inform the public about potential dangers in their communities. We are not made more secure by being kept in the dark; risks and vulnerabilities do not go away simply because they are hidden. Indeed, when they are completely concealed, we cannot know whether they are being addressed and whether our safety is, in fact, being protected. Moreover, public oversight and government accountability are constrained when authorities who do have access to such information are unable to share it as needed, or even to ask or respond to questions in public hearings.

Congress has an opportunity to make the Executive Branch more accountable—without risking real safety or exposing information that needs to be kept secure for an appropriate amount of time. We believe that the House version will do more to ensure both safety and accountability than would the Senate’s.

We urge you to support section 525 of the House version of the 2007 Department of Homeland Security Appropriations Act (H.R. 5441). Please contact Patrice McDermott, Director of OpenTheGovernment.org, at (202) 332-6736 if you have any questions or wish to discuss this matter.

Thank you.

Sincerely,

Mary Alice Baish
American Association of Law Libraries

Lynne Bradley
American Library Association

Kevin M. Goldberg
American Society of Newspaper Editors

Prue Adler
Association of Research Libraries

Chellie Pingree
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David Sobel
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Bruce Craig
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