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Since the 9/11 tragedy, the discovery of security information in aviation cases has ground to a halt because of restrictions imposed by the newly formed Transportation Security Administration (TSA).

The TSA was established by Congress in 2002 to assume responsibility for airline security from the Federal Aviation Administration (FAA). The TSA issued new regulations to prevent dissemination of Sensitive Security Information, known as SSI, which includes the guidelines for screening passengers and baggage and other security-related measures and information.

In addition, a 2003 statute provided that judicial review of TSA decisions limiting production of SSI was available only by direct petition to a federal court of appeals, completely bypassing the federal district courts.[1]

'Chowdhury v. TSA'

The first petition to challenge the TSA under that statute is now pending in the U.S. Court of Appeals for the Second Circuit in *Chowdhury v. Transportation Security Administration, et al.*[2] The petitioner Chowdhury is the plaintiff in a federal court action in which he alleges that he was denied boarding from a Northwest flight because of his ethnic background. The TSA directed that documents and information sought by Mr. Chowdhury from the airline constituted SSI that could not be produced.

But the main challenge to the TSA involves the 9/11 litigation pending before Judge Alvin K. Hellerstein in the U.S. District Court for the Southern District of New York, which involves death actions brought by the survivors of the deceased airline passengers against the airlines and their security companies. The TSA has refused to date to allow production of thousands of documents in that litigation.

Moreover, there is tremendous uncertainty among litigants in the 9/11 litigation and other cases regarding what documents actually constitute SSI. This is because the TSA's regulations define SSI to include not only specific security-related matters, such as security programs, directives, circulars, assessments, inspections, training materials, but also "any information . . . that TSA determines is SSI" pursuant to its statutory authority.[4] Moreover, while SSI is required to be marked with a clear warning on its face,[5] not all SSI documents have apparently been labeled. And as revealed in a General Accountability Office report last March entitled "Clear Policies and Oversight needed for Designation of [SSI]," the TSA does not have proper criteria for determining what constitutes SSI; has no mechanism to account for and track SSI documents; and lacks needed controls over the SSI designation process.[5]

Since airlines (and others holding SSI) are required to refer requests made by litigants for SSI to the TSA — and face penalties for the unauthorized disclosure of SSI — the defendants in the 9/11 litigation have sent the TSA nearly all of the documents requested by the plaintiffs for an initial review to determine what constitutes SSI. Similarly, documents have been sent to the TSA for review in the litigation involving the November 2001 crash of American Airlines 587 — even though that case does not involve any security issues. The TSA has a huge backlog of such documents, and, to date, only a few documents sent for TSA review have been produced — and those came with substantial redactions. Nor do the plaintiffs have a complete list of the documents that are being reviewed.

Security vs. Discovery

There is an ongoing legal battle that pits the TSA's claimed need for total secrecy of SSI to guard against further terrorist attacks versus the rights of civil litigants to obtain discovery necessary to pursue their claims.

Before 9/11, the FAA generally allowed the production of SSI in airline litigation subject to strict confidentiality provisions. This FAA policy recognized the fact that SSI itself is not classified information and is viewed on a daily basis by thousands of airline and security employees who lack any security clearance. Moreover, the discovery requests typically sought only past SSI documents applicable at the time of a disaster and not the current SSI that was in effect. In addition, the SSI procedures had often been the subject of substantial public scrutiny following a security failure. As a result, the added security risk from a confidential production of the relevant SSI to counsel was acknowledged to be nil.

Depending on the nature of the SSI, the FAA allowed confidential access to select SSI materials to lawyers but not their clients. This was the situation in the death cases brought against the airline Pan Am resulting from the Lockerbie bombing disaster. The SSI there involved the FAA-mandated procedures that applied at the time of the 1988 bombing. During the 1992 trial of the Lockerbie case in the the U.S. District Court for the Eastern District of New York before Judge Thomas C. Platt, government attorneys were present, and whenever SSI was raised, the courtroom was cleared and the evidence was placed under seal.

But after 9/11 the existing balance between security and disclosure was upended. The TSA issued broad new regulations pursuant to its statutory authority to guard the

disclosure of information "detrimental to the security of transportation."[6] While this authority was practically identical to that exercised by the FAA since 1974, the TSA has advanced a broad expansion of executive power.

In the 9/11 litigation, the TSA was initially receptive to Judge Hellerstein's suggestion, in September 2002, that a limited group of plaintiffs' attorneys, subject to a background check, be allowed to view certain SSI pursuant to rigorous confidentiality provisions.

But in February 2004, the TSA announced that no documents would be released in the 9/11 litigation to the plaintiffs' attorneys. The TSA stated that only persons "with a need to know," as defined under the TSA's regulations, could view SSI. Those persons include airline personnel with security duties — and also the defense attorneys who represent air carriers in litigation involving security related issues — but not opposing plaintiffs' counsel.[7]

TSA's Power, Judicial Review

In addition, the TSA has claimed that its power to define SSI and decide who is entitled to review it is absolute and not subject to judicial review. The TSA argued in *Chowdhury* that in authorizing the TSA to enact security regulations governing SSI, Congress granted the TSA unfettered discretion and that the Second Circuit "cannot exercise jurisdiction."[8] But the statute establishing the procedure for a court of appeals to hear a petition to review a TSA order expressly provides that such a court "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order . . . ."[9]

To date, the TSA has steadfastly refused to accommodate the needs of any civil litigant to obtain security information. Indeed, on Feb. 7, 2006, the TSA issued its first final order in the 9/11 litigation, rejecting requests to permit confidential disclosure of SSI to counsel for plaintiffs, other defendants and certain fact and expert witnesses. The TSA concluded that

> in the current threat environment, extending SSI access to persons who need access to it only for civil litigation purposes cannot be justified, and it is [the TSA's] judgment that disclosure, even under controlled conditions, presents a risk to transportation security.[10]

While the TSA has not yet issued final orders barring the disclosure of specific documents, there does not appear to be any hope that the TSA will allow production of SSI in any civil litigation absent an order from a court of appeals. It is now certain that a petition challenging the TSA's Feb. 7, 2006 order (and any further orders) will be filed before a court of appeals by parties in the 9/11 litigation.

The TSA has refused to consider any relaxation of its absolute bar to production in civil litigation. The agency claimed that SSI retains its protection for an indefinite period, even after it has been replaced by new SSI. Only where a security measure itself has become "completely obsolete" will the TSA agree to allow production.[11] Nor has the TSA yet been swayed to allow confidential production of SSI that has already been reported in public, such as the breached security measures described in detail in the 9/11 Commission's report. And because there is no risk classification of SSI, the TSA's absolute bar to production applies equally to all SSI, no matter what degree of danger would result from disclosure.

The bitter irony in the 9/11 litigation is that TSA has permitted conditional disclosure of SSI to the defense lawyers in the criminal case involving the admitted terrorist Zacarias Moussaoui, who was directly involved in the 9/11 plot. The TSA has justified such production on the ground that the needs of the government to pursue the criminal case justify the disclosure, whereas in the civil context, it appears that there can be never be a justification sufficient to outweigh the TSA's need for secrecy. No matter how the TSA attempts to explain such decisions, however, the fact that the TSA gave the attorneys for the terrorist SSI while denying counsel for the victims that same right is unconscionable.

Conclusion

Secrecy is no substitute for safety. The TSA's absolute bar on production of all SSI of whatever nature and risk level in civil litigation cannot be justified. While the confidentiality of current high risk SSI is critical, the TSA should at minimum develop a plan to accommodate confidential limited production of SSI relevant in civil cases of significant public interest, such as the 9/11 litigation. As evidenced in the Pan Am litigation, SSI can be produced under sufficient restrictions to avert a risk to aviation safety. That litigation resulted in a jury verdict that a cause of the bombing was the airline's wilful misconduct in failing to apply FAA-mandated SSI procedures. Under the current TSA restrictions, the Pan Am litigation may have ended in the discovery phase.

The litigation of security issues, subject to confidentiality restrictions, provides a healthy check that leads to security awareness and improvements. Such a check is necessary, because the TSA and airlines may share the same interest to keep certain information secret — even where the disclosure of SSI presents no actual threat to aviation safety. The rules governing SSI should not be used as a means to subvert the legal process and deny a fair hearing of the issues in security-related cases.

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Endnotes:

1. 49 USC §46110(a). The petition must be filed either in the circuit where the petitioner resides (or has its principal place of business) or the U.S. Court of Appeals for the District of Columbia Circuit.

2. Chowdhury v. Transportation Security Administration, et al., No. 03-40783 (2d Cir. argued May 23, 2005).

3. 49 USC §1520.5(b)(16).

4. 49 CFR §1520.13.

5. Clear Policies and Oversight Needed, Government Accountability Office, GAO-05-677 (June 2005), online at http://www.gao.gov/new.items/d05677.pdf.

6. 49 USC §114(s)(1)(C). Prior to the formation of the TSA, the FAA was authorized to issue regulations to protect against disclosure of SSI that was "detrimental to the safety of persons traveling in air transportation." See Public Citizen, Inc. v. FAA, 988 F2d 186, 193 (D.C. Cir. 1993).

7. 49 CFR §1520.11.

8. Brief for Respondents at 23, Chowdhury, supra.

9. 49 USC §46110(c).

10. Final Order on Requests for Conditional Disclosure of SSI, Transportation Security Administration (Feb. 7, 2006).

11. Brief for Respondents at 32, Chowdhury, supra.