

U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 22202



Transportation
Security
Administration

November 17, 2006

Honorable Carolyn B. Maloney
United States House of Representatives
2331 Rayburn House Office Building
Washington, DC 20515-3214

Dear Representative Maloney:

This responds to your letter to the General Counsel of the Department of Homeland Security (Department) and the Chief Counsel of the Transportation Security Administration (TSA) of October 20, 2006, on behalf of Robert MacLean, who is a former Federal Air Marshal.


Mr. MacLean has filed a complaint against the Department with the Merits System Protections Board (MSPB), as well as a petition in the U.S. Court of Appeals for the Ninth Circuit, both of which relate to the subject matter of your concerns. In the first, *MacLean v. Dep't of Homeland Security*, No. SF-0752-06-0611-I-1 (M.S.P.B.), Mr. MacLean challenges the Department's decision to terminate his employment as a Federal Air Marshal, due to his release of Sensitive Security Information (SSI). In the second, *MacLean v. Dep't of Homeland Security*, No. 06-75112 (9th Cir.), Mr. MacLean challenges TSA's final determination that the information he released, for which his employment was terminated, constituted SSI. Under 49 U.S.C. § 46110, the U.S. Court of Appeals has exclusive jurisdiction to hear the latter challenge.

The Department takes Mr. MacLean's claims very seriously and has been proceeding in the MSPB forum accordingly. However, the Whistleblower Protection Act does not protect an employee's disclosure of information where, as here, doing so would violate his duty to protect the information under federal statute and regulation. See 49 U.S.C. § 114(s) and 49 C.F.R. Part 1520. Current information regarding the deployment and movements of the Federal Air Marshals could be of use to those who seek to do harm to the Nation's transportation system, and the public disclosure of such information creates a threat to transportation security.

On October 5, 2006, the MSPB granted Mr. MacLean's request that his complaint be voluntarily dismissed without prejudice to refiling after the Ninth Circuit rules on Mr. MacLean's petition for review of TSA's SSI determination. Mr. MacLean filed the latter petition on October 30, 2006, and the Department will respond in a timely manner. According to the briefing schedule established by the Ninth Circuit, Mr. MacLean's opening memorandum is due on January 16, 2007, and the Department's response is due on February 17, 2007. As these cases are in litigation, it would be inappropriate for the Department to comment further at this time.

Please do not hesitate to contact this office if you need further assistance with this, or any other, matter.

Sincerely,

A handwritten signature in cursive script that reads "Francine J. Kerner".

Francine J. Kerner
Chief Counsel