



January 31, 2005

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Re: Secure Flight Privacy/IT Working Group

Dear Ms. Dean:

On September 30, 2004, you and Mr. Oberman, Director of the Office of National Risk Assessment, made a presentation on the Secure Flight program before the Aviation Security Advisory Committee ("ASAC") (that presentation is posted on the TSA website at http://www.tsa.gov/public/interweb/assetlibrary/Secure_Flight_ASAC_Presentation.ppt). At that time, you proposed "[e]stablishment of [an] ASAC Secure Flight Privacy/IT Working Group." You indicated that the objectives of the working group would include "[p]rovid[ing] an objective and independent assessment of the technical and privacy oriented parameters that are the basis for Secure Flight design and present[ing] findings" and "[b]uild[ing] public understanding, trust, and confidence in the new system and its implementation."

We understand that the working group has, in fact, been established and is now functioning. We note, however, that the formation of the working group was not announced in the Federal Register and that neither TSA nor the Department of Homeland Security has publicly acknowledged its existence or defined its mission. We are troubled by these omissions, as it appears to us, based upon the little public information that is currently available, that the working group is subject to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 1. Among other things, FACA requires that entities such as the working group publish notices of their meetings in the Federal Register; conduct open meetings unless certain specific circumstances exist (which determinations must be published); and make their documents (including reports, transcripts and minutes) available for public inspection, subject to the exemptions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

EPIC has urged TSA, since the earliest days of its existence, to develop aviation security policies and initiatives in an open and public manner. Given the clear privacy implications of the Secure Flight program (and its predecessor, CAPPS II), and the obvious public

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concern surrounding a system that will conduct background checks on tens of millions of citizens, we believe it is critical that any assessments of Secure Flight be made in an open manner. Indeed, when it enacted FACA, Congress sought to ensure that when entities like the working group are created, "the public remain apprised of their existence, activities, and cost." *Public Citizen v. Department of Justice*, 491 U.S. 440, 446 (1989).

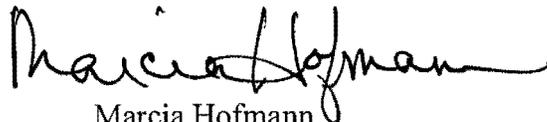
As noted, we believe that the working group is subject to the requirements of FACA. However, TSA's failure to comply with those requirements suggests that the agency does not share that opinion. We are therefore writing to request an explanation of the agency's conclusion that the Secure Flight Privacy/IT Working Group is not subject to FACA. If, as we assume, the agency maintains that FACA does not provide the public with a statutory right of access to the records of the working group, we also request that the agency advise us of its position concerning the applicability of the FOIA to those records; specifically whether the reports, transcripts, minutes and other papers of the working group constitute "agency records."

Given that the working group is already functioning and may conclude its work within a short period of time, we request a response to this inquiry within ten days. We appreciate your consideration of this request.

Sincerely,



David L. Sobel
General Counsel



Marcia Hofmann
Staff Counsel and Director,
Open Government Project