

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY  
INFORMATION CENTER,

Petitioner,

v.

The TRANSPORTATION SECURITY  
ADMINISTRATION, PETER  
NEFFENGER, in his official capacity as  
Administrator of the Transportation  
Security Administration, the UNITED  
STATES DEPARTMENT OF  
HOMELAND SECURITY, and JEH  
JOHNSON, in his official capacity as  
Secretary of the Department of Homeland  
Security,

Respondents.

No. 16-1139 (consolidated with  
No. 16-1135)

**PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO FILE  
PORTIONS OF THE ADMINISTRATIVE RECORD *EX PARTE***

On September 19, 2016, the Transportation Safety Administration (“TSA”) moved to file four volumes of the administrative record under seal and, in the case of two of those volumes, under seal and *ex parte*. Mot. to File *Ex Parte*, ECF No. 1636511. The Electronic Privacy Information Center (“EPIC”) does not object to the filing of portions of the Administrative Record under seal pursuant to D.C. Circuit Rule 47.1(a), as this Court previously permitted. *See* Order, *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011) (No. 10-1157), ECF No. 1294351. However, EPIC opposes the *ex parte* filing of Volume 4, which constitutes a substantial part of the Administrative Record.

EPIC respectfully asks the Court to make these documents available to EPIC under seal pursuant to D.C. Cir. Rule 47.1(a) or, in the alternative, to order that these documents be made available to EPIC under the terms set out by § 525(d) of the 2007 Homeland Security Appropriations Act, Pub. L. 109–295, 120 Stat 1355 (2006).

Section 525(d) requires that a “party or party’s counsel shall be designated as a covered person under 49 CFR § 1520.7 in order to have access to the SSI” where the party “demonstrates [a] substantial need of relevant SSI in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the information by other means.” Pub. L. 109-295 § 525(d), 120 Stat 1355, 1382 (2006). The provision explicitly requires that counsel be granted access to SSI materials “in civil proceedings in the United States District Courts . . . provided that the overseeing judge enters an order that protects the SSI from unauthorized or unnecessary disclosure.” *Id.* The provision provides for specified “terms and conditions of access” and allows the TSA or DHS to conduct a routine “criminal history check and terrorist screening assessment.” *Id.* The provision also provides for review by the United States Courts of Appeals “over both the evidentiary finding and the sufficiency of the order specifying the terms and conditions of access to the SSI in question.” *Id.*

The Ninth Circuit reviewed a similar request and concluded that Congress “authorized the disclosure of ‘Sensitive Security Information’ during discovery to civil litigants who show ‘substantial need’ for the information” and complete the necessary background checks. *Ibrahim v. DHS*, 669 F.3d 983, 998 (9th Cir. 2012). Two district courts have granted counsel access to SSI material pursuant to section 525(d). See *McSwain v. United States*, No. 2:15-cv-01321, 2016 WL 4530461 at \*7 (D. Nev. Aug. 30, 2016); Stipulation and Protective Order Regarding Sensitive Security Information, *Ibrahim v. DHS*, No. C 06–545, 2013 WL 1703367 (N.D. Cal. 2013).

To the best of EPIC’s knowledge, this Court has not had occasion to rule on the application of § 525(d). But another court has found that the “substantial need” and “undue hardship” language of § 525(d) “mirrors that of Rule 26(b)(3)(A)(ii)” (“Duty to Disclose; General Provisions Governing Discovery”), which provides for discovery of documents protected by the work product doctrine. *McSwain*, 2016 WL 4530461 at \*5. This Court has ruled in the context of requests for access to litigation materials covered by the work product doctrine that “a moving party’s burden is generally met if it demonstrates that the materials are relevant to the case, the materials have a unique value apart from those already in the movant’s possession, and ‘special circumstances’ excuse the movant’s failure to obtain the

requested materials itself.” *FTC v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 155 (D.C. Cir. 2015).

The materials the TSA seeks to file *ex parte* make up a significant portion of the Administrative Record in this case and are therefore clearly relevant to the Court’s consideration of the matter. The TSA has refused to release these materials to EPIC and EPIC has no other means of accessing them. EPIC therefore has a “substantial need” to access these documents, which should qualify as “special circumstances” and justify the § 525(d) order.

To deny EPIC access to a significant part of the Administrative Record implicates matters of fundamental fairness. The D.C. Circuit has made clear that *ex parte* submissions “generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires a reasonable opportunity to know the claims of the opposing party and to meet them.” *Chekkouri v. Obama*, 158 F. Supp. 3d 4, 6 (D.D.C. 2016) (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995)). As a result, “a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions.” *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986). Exceptions to this rule are allowed “[o]nly in the most extraordinary circumstances” *Id.* Congress has authorized the TSA to designate certain

information as SSI, but nothing in that law indicates that the TSA may conceal relevant information in a judicial proceeding. *See* 49 U.S.C. § 114(r) (2012).

Congress made clear that SSI material should be made available to civil litigants. Pub. L. 109-295 § 525(d), 120 Stat 1355, 1382 (2006).

There is some dispute as to applicability of § 525(d) to the Circuit Courts. *See Corbett v. TSA*, 767 F.3d 1171, 1178 (11th Cir. 2014). Although § 525(d) refers specifically to “United States District Courts,” it should apply in this case. An appeal of a final agency order from the TSA cannot be filed in a United States District Court; any such challenge must be filed in a United States Court of Appeals. 49 U.S.C. § 46110. To effectuate the purpose of § 525(d), the provision should apply where the appeals court operates as the finder of fact. The legislative history of § 525(d) also shows Congressional intent to cover civil litigation broadly and does not distinguish between a district court and an appellate court: “The provision also contains a mechanism for SSI to be used in *civil judicial proceedings* if the judge determines that is needed.” H.R. Conf. Rep. 109-699, 2006 U.S.C.C.A.N. 884, 944–45 (2006) (emphasis added).

In defense of the TSA’s assertion that it may file SSI *ex parte*, the agency cites only *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). The court in *Jifry* denied SSI access to two non-resident, alien pilots under an earlier version of the TSA regulation. The court also made clear that “[t]his case concerns alien pilots

only.” *Id.* 1177. The court’s decision in *Jifry* turned on a provision in the TSA regulation that has since been substantially amended, and the case was decided prior to Congress’ enactment of § 525(d).

Congress decided in 2006 that counsel in civil cases against the agency “shall be designated as covered persons under 49 CFR Part 1520.7 in order to have access to SSI.” Pub. L. 109-295 § 525(d), 120 Stat 1355, 1382 (2006). The current regulation permits the TSA to “authorize a conditional disclosure of specific records or information that constitute SSI,” § 1520.15(e), and therefore designate a party as a covered person under § 1520.7(m). 49 C.F.R. §§ 1520.7, 1520.15 (2015).

The Court should not allow the TSA to rely on *ex parte* evidence in a case reviewing a public rulemaking. Fairness “can rarely be obtained by secret, one-sided determination of facts decisive of rights.” *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). The TSA may withhold certain materials under seal from the public; it may not present evidence *ex parte*.

EPIC respectfully asks the court to order that the TSA file the disputed materials under seal, pursuant to D.C. Cir. Rule 47.1(a) or, in the alternative, immediately begin the necessary process to certify EPIC’s attorneys as covered persons and, on prompt completion of that process, to release Volume 4 in un-

redacted form to EPIC under such protective measures as the Court deems necessary.

October 3, 2016

Respectfully Submitted,

/s/ Marc Rotenberg

MARC ROTENBERG

ALAN BUTLER

JERAMIE SCOTT

Electronic Privacy Information Center

1718 Connecticut Ave. NW, Suite 200

Washington, DC 20009

(202) 483-1140

*Counsel for Petitioner*

*Electronic Privacy Information Center*

**CERTIFICATE OF SERVICE**

The undersigned counsel certifies that on this 26th day of September 2016, he caused the foregoing brief to be served on counsel for all parties via the CM/ECF system.

/s/ Marc Rotenberg  
MARC ROTENBERG