

COALITION OF
**JOURNALISTS FOR
OPEN GOVERNMENT**
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DEPARTMENT OF HOMELAND SECURITY
Transportation Security Administration
49 CFR Parts 1520 and 1580
[Docket No. TSA-2006-26514]
RIN 1652-AA51
Rail Transportation Security

COMMENTS OF THE
COALITION OF JOURNALISTS FOR OPEN GOVERNMENT

The Coalition of Journalists for Open Government is an alliance of journalism-related organizations concerned about the increasing secrecy at all levels of government and its impact on the democratic process. We believe unnecessary restrictions on access to public records and meetings is detrimental to sound public policy because it prevents citizens from being fully informed, discourages their involvement, and serves to heighten their distrust government.

We have reviewed the proposed regulations involving the extension of security measures to rail transportation (49 CFR, Parts 1520 and 1580) and offer the following comments:

The issuance of these regulations greatly expands a fourth level of classification that operates without the restraints imposed on the nation's highest security safeguarding. We are particularly concerned that there are no restrictions on who may declare information SSI, or what information may be included in reports automatically accepted as SSI, and that there are no time limits on how long information designated as SSI remains confidential.

In this regard, we urge TSA to provide that all audits, assessments and other security information submitted to TSA be reviewed at a senior level to determine that it falls with the guidelines for safeguarding, and that submitters be notified of any records, or portions of records, that fall below the very high standard that is set for protective handling. Further, we urge that TSA make clear in this rule that those notifications are themselves subject to Freedom of Information Act disclosure.

We are concerned that the definition of Sensitive Security Information – information that will thus be withheld from the public – is broader than necessary to

insure the security of rail systems and that, in some instances, the use of an SSI designation may permit the withholding of information that does not pose a national security issue but does involve the everyday safety of the facilities, rail passengers, employees and occupants of the areas where the facilities are located.

Traditionally, that kind of safety information has been in the public record, permitting oversight by concerned citizens and watchdog reporting by the media and creating accountability. We believe TSA should write language into these regulations making clear that records relating to the general safety of the rail and transit networks, as well as the terminals and other facilities, and records of their maintenance are not SSI and remain subject to applicable federal, state and local law and regulation that provide for the public's right to know.

The Emergency Planning and Community Right-to-Know Act of 1986 very specifically requires that information about the use and storage of hazardous materials be compiled and made available to the public. We understand the need to protect the details of shipments, but we believe the public has a right to know of the existence of hazardous materials in their community and neighborhood and, as provided by EPCRA, to be aware of safety precautions and response planning taken by shippers, receivers and emergency services.

Because of that, we believe these regulations should specifically acknowledge EPCRA and the public's right to know about hazardous materials in their communities. It should then affirm that the measures are not in conflict, and that all information required to be collected and reported by the Local Emergency Planning Committees remain in the public record.

We trust that nothing in the proposed rule will be interpreted to undo or supersede the labeling and placarding requirements in the Hazardous Materials Transportation Act as amended or in the regulations implementing it. Importantly, that act sets an expectation for public disclosure, in particular evidence and comments introduced into rulemaking dockets, and records and information described in 49 CFR Sec. 105.25. We do not read the regulations as changing these disclosure provisions but believe an affirmative statement in that regard would be useful.

We do not believe that "route analysis" information should be wholly or automatically secret. Any necessary confidentiality involving route information must be balanced by the need to disclose to cities, counties, states, Congress, and the public general information about the quantities and types of materials are being shipped through an area. People do have a right to know how much danger they are being subjected to. This information, when aggregated, does not seem to pose a security threat. Unfortunately, many municipalities already have difficulty obtaining that information.

We are concerned, too, that the implementation of an SSI regimen may result in a vast range of information about the rail and transit management and operations being incorporated under that protective cloak and withheld from a public that has traditionally had access. Whether this is done inadvertently or willfully, it will nonetheless deny the public critical oversight information on management, operations and safety matters,

records civic activists and other watchdogs have traditionally used to spotlight problems and bring about change.

Safeguarding should not be used to withhold information the public might use to bring needed safety and operational changes without federal government intervention. We are not suggesting that security concerns be sacrificed for accountability; in fact we believe effective accountability should enhance security.

TSA should consider the “tear line” approach used in the intelligence community to ensure that reports are comprehensive but that only the truly sensitive information is protected. Using this concept, general operations and maintenance information, and safety issues that provide important background, might be discussed above the line. Sensitive Security Information would then be provided below the protective line.

We would remind the TSA that in the current debate about the classification of information, there is broad agreement that less is more, that the excessive classification of data that need not be classified is actually hurting the process and putting the effective protection of information at greater risk. The protective cloak of “national security” is most effective when it covers only that information which is truly vital.

The proposed regulations allow both rail and transit operators and shippers and receivers of hazardous materials to determine what information is included in vulnerability assessments and audits submitted to TSA and treated as SSI. That opens the door to the use of these regulations to mask certain operational or maintenance information the submitter otherwise wants to keep from the public. Indeed, TSA may not even be aware of resulting instances in which the SSI designation is being invoked at the state and local level to withhold release of that same information, information that has always been public under state and local law.

TSA should do all that it can to prevent this. The first step would be to ensure that the definition of SSI is as narrow as possible and to be specific as to what is not included. Second, we urge TSA to include language advising that it will, in reviewing SSI filings, identify information that does not require safeguarding and notify the submitter, noting the notification itself will be subject to disclosure under FOIA. This would serve to dissuade any submitter who might be inclined to falsely claim “national security” as a basis for refusing to disclose otherwise public information. Third, we urge that TSA advise all submitters that it will itself notify the public of any reported non-security safety hazards left uncorrected after a reasonable time.

In so doing, TSA would be acknowledging that there are dangers other than national security, and that the citizens it serves seek protection from those other dangers as well. This would show that TSA is doing all it can to ensure that those other protections do not fall victim to the national security effort.

We also believe that TSA should make clear to all parties involved that there will ultimately be public reporting on their compliance with needed security measures, and on the agency’s performance. When might that be? There are two logical times: when the

threat reasonably no longer exists, and when the security is breached and the public demands and deserves a look at the full, unredacted record.

Finally, we believe all information and records should acquire a sunset date when designated as SSI. This might be three or more years, based on a reasonable time for security concerns to be resolved. The release of information would, as in classified information, be subject to prior review, and as with classified information, some SSI might be withheld for longer periods of time. This sunset provision would assure that much of the information will become public within a reasonable period of time, and that the public will know whether the rail operators, shippers, and material receivers had made the required security improvements and whether the TSA program has been as effective as promised.

In this way, the sunset provision would produce a little sunshine – it would create a critical element of accountability that might encourage all parties to work harder and faster for the success of this vital program.

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