

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FRANZ BOENING
Deer Mountain Estate
Harpers Ferry, WV 25425

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505

Defendant.

Civil Action No: 07-_____

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COMPLAINT

Plaintiff, and federal whistleblower, Franz Boening brings this action against defendant Central Intelligence Agency (“CIA”) for injunctive and declaratory relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, the Administrative Procedure Act, 5 U.S.C. § 701 et seq., the All Writs Act, 28 U.S.C. § 1651, the CIA’s internal regulations and the First Amendment to the Constitution of the United States.

The CIA has unlawfully imposed a prior restraint upon Franz Boening by obstructing and infringing on his right to disseminate unclassified information concerning his efforts to expose the CIA’s illegal relationship with a foreign national, for which the Agency retaliated against him. Additionally, the CIA deliberately interfered with Boening’s efforts to properly challenge the CIA’s classification actions before the Interagency Security Appeals Panel, an intra-governmental entity coordinated by the Information Security Oversight Office of the National Archives & Records Administration.

JURISDICTION

1. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 702, 28 U.S.C. § 1331 and the U.S. Constitution.

VENUE

2. Venue is appropriate in the District under 5 U.S.C. § 703 and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Franz Boening (“Boening”) was formerly employed by the Central Intelligence Agency from 1980 – 2005. After learning Arabic in the early 1980s, he spent nearly one dozen years in agent operations, primarily in the Middle East. He worked declassification issues from 1995 – 1999, and ultimately retired from the Agency after working at the Foreign Broadcast Information Service where he handled Internet exploitation and training. He has held a Top Secret/Sensitive Compartmented security clearance for nearly 25 years. He is required by virtue of a secrecy agreement to submit most personal writings for prepublication review. As a result of the matters addressed herein Boening became a whistleblower and suffered employment retaliation to include not being sent to Foreign Country “A” despite his having volunteered and possessing needed language skills.

4. Defendant Central Intelligence Agency (“CIA”) is an agency as defined by 5 U.S.C. § 701. Its actions have prevented Boening from disseminating certain written materials and from challenging unlawful agency conduct.

FACTS

5. By memorandum dated November 22, 2004, Boening submitted to the CIA’s Publication Review Board (“PRB”) four documents for classification review for the

purposes of potential public dissemination. These were: (a) May 10, 2001, Whistleblower Complaint and addendums dealing with [Individual's name]; (b) March 24, 2003, Whistleblower Complaint alleging retaliation; (c) May 20, 2004, Whistleblower Complaint alleging retaliation; and (d) January 16, 2003, Grievance Against FBIS managers. It was noted that (a) through (c) were considered classified by the CIA, and that the CIA was not permitting review of (b) or (c). Documents (b) and (c) were later declassified and are not at issue in this litigation.

6. Boeing's May 10, 2001, memorandum sought to detail perceived violations of the law committed by the CIA. It was drafted for the consumption of the Director, CIA, and numerous senior CIA officials. It specifically alleged that the:

CIA may have violated US laws during its 10+ year relationship with [NAME REDACTED](paragraph five);

CIA's professional behavior was so scandalous that it seriously damaged American prestige and credibility (paragraph six);

relationship continued because of an egregious counterintelligence failure (paragraph eight).

7. It is Boeing's contention that the CIA maintained a special relationship with a foreign individual who committed unlawful human rights violations and criminal acts with the knowledge of the CIA, and that despite other federal agencies expressing interest in seeing this person arrested the CIA preferred that such action not take place. Boeing was not permitted to reveal this individual's name, despite the fact that all of his references were taken from public, unclassified, sources. As he noted in his still partially classified memorandum of May 10, 2001:

In an effort to combat drug traffickers, CIA deluded itself into believing – despite a mountain of freely available, contrary evidence – that [NAME REDACTED] was sincerely helping to further USG policy

goals. What it didn't take into account is that men like [NAME REDACTED] if fundamentally misunderstood, can subvert whole aspects of US foreign policy. The counterintelligence failure was exacerbated and prolonged by CIA's hubris and apparent tendency towards secrecy, even with USG colleagues. **CIA's hubris, secretiveness, disinclination to accept contrary assessments and evidence, its lax management, and its desire to avoid embarrassment, all proved to be a smoldering recipe for disaster.** (emphasis original)

8. Although the entire analysis and factual recitation of the CIA's involvement with this individual that was drafted by Boening was based purely on publicly available nongovernmental (including newspaper articles) and unclassified government websites, including from FBIS, the CIA "classified" more than a dozen pages of publicly available newspaper, radio, and television information, a practice that was commonly assumed to have been discontinued by the CIA years ago. Additionally, the CIA not only deleted all references to the foreign individual's name but also Boening's personal assessment of this individual. Yet, Boening had never once read any classified CIA document pertaining to this individual.

9. Despite significant internal efforts by Boening he was unable to persuade the CIA to declassify the information of concern. Indeed, William McNair, then CIA's Information Review Officer, Directorate of Operations, told Boening in May 2002: "Look, Franz, do you think I care about [Foreign Individual's name]? This is not about 'source protection,' this is about CIA's reputation. We don't want you to have any credibility."

10. After submitting the documents to the PRB for review, Boening and the then PRB Chairman, Paul Noel Chretien, exchanged internal messages throughout Summer 2005. These led to the issuance of a letter dated in or around January 2006, from the PRB that

confirmed that the individual's name and country could be released if Boening could demonstrate the information was based on overt sources.

11. However, by letter dated June 20, 2006, the new PRB Chairman, Richard Puhl, formally notified Boening of a reversal of the CIA's decision regarding the classification of his submissions. This letter detailed thirteen pages of required changes on the basis that the information "is inappropriate for disclosure in the public domain and must be revised or deleted prior to publication". The clear implication was that the information that must be redacted was classified. The relevant information included the individual's name and country of origin that was the subject of Boening's memorandum. The PRB also noted it required Boening to include a specific disclaimer should he disseminate the documents.

12. By e-mail dated June 30, 2006, in response to Boening's inquiries, the PRB's Richard Florence clarified that:

If you rewrite your [Foreign Individual's name] story in a different format, outside the official-looking memo-type one it currently is in; and attribute those statements to open sources in the new format (as you basically have), there should be no problem with you getting your message out. The deletions noted in our letter pertain to the information as presented in the old format and not to the information itself.

13. Two of Boening's whistleblower memos that have been publicly released by the CIA were drafted in the same format that the CIA was now challenging.

14. Finally, the PRB sent a letter dated August 11, 2006, to Boening informing him that the "2001 classified annex" document he created was considered "inappropriate for disclosure in the public domain (i.e., is considered to be classified information)." This was despite the fact that the CIA acknowledged in other email messages that Boening's sources (totaling more than 80) were all overt.

15. As part of his representation of Boeing's interests before the CIA's Office of Inspector General on matters relating to the contents of the documents in question, the undersigned attorney has been provided with authorized access to most, if not all, of the relevant documents and information at issue in this litigation. This included, but was not limited to, the "classified" 24 March 2003 document and a related draft Report of Investigation prepared by the OIG.

16. In addition to pursuing these matters internally, Boeing also brought his classification challenge to the attention of the Information Security Oversight Office ("ISOO"), National Archives & Records Administration, pursuant to Section 1.9 of Executive Order 12,958 (1995), as amended to become Section 1.8 of Executive 13,292 (2003). This provision states that:

(a) Authorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information in accordance with agency procedures established under paragraph (b) of this section.

(b) In accordance with implementing directives issued pursuant to this order, an agency head or senior agency official shall establish procedures under which authorized holders of information are encouraged and expected to challenge the classification of information that they believe is improperly classified or unclassified. These procedures shall ensure that:

(1) individuals are not subject to retribution for bringing such actions;

(2) an opportunity is provided for review by an impartial official or panel; and

(3) individuals are advised of their right to appeal agency decisions to the Interagency Security Classification Appeals Panel (Panel) established by section 5.3 of this order.

17. Upon information and belief, Boeing is the only federal employee to have ever sought to challenge a classification decision under this provision since it was created in 1995.

18. This effort was ultimately unsuccessful as the CIA claimed that Boening was not an “authorized holder of information” with respect to his exercising a challenge under this provision for information pertaining to the individual foreign national. Upon information and belief, the CIA, in order to legally extricate itself from this unique classification challenge, was admitting that Boening did not possess authorized access to classified information concerning the subject matter of his documents and, therefore, the information contained therein was not classified.

19. Additionally, the CIA asserted that Boening’s documents were personal, and not official, in nature. Thus, the CIA can neither challenge the format structure nor the contents therein.

FIRST CAUSE OF ACTION
(FIRST AMENDMENT - RIGHT TO PUBLISH -
CLASSIFICATION CHALLENGE)

20. Boening repeats and realleges the allegations contained in paragraphs 1 through 19 above, inclusive.

21. Boening properly submitted, pursuant to one or more secrecy agreements, several documents for prepublication review.

22. The information within the documents submitted by Boening was compiled solely from unclassified public sources.

23. The CIA has identified alleged classification concerns in the documents and denied Boening the right to publish certain information even though it was supported by open source material.

24. At the same time the CIA has also claimed that the documents do not contain classified information but that a change in format would alleviate any problems.

25. The CIA has failed to show that Boeing's First Amendment right to publish is outweighed by the government's interest in efficiently carrying out its mission by minimizing harms that are real, not merely conjecture.

26. The CIA has failed to demonstrate the existence of substantial government interests that would enable it to prohibit the publication of certain information within Boeing's personal documents. Moreover, they have imposed unreasonable restrictions on Boeing's activities that are protected by the First Amendment.

27. The CIA's restrictions imposed upon Boeing have been unduly vague and were not narrowly confined to avoid infringement of his First Amendment rights. They have unnecessarily restricted speech that does not serve to protect any substantial government interest.

28. Most importantly, the CIA has failed to produce explanations with reasonable specificity that demonstrates a logical connection between the information to be deleted and the reasons for classification. The reasons for classification are neither rational nor plausible. Thus, they cannot support the CIA's attempt to censor Boeing's documents.

29. Because the CIA has impermissibly infringed upon Boeing's right to publish the information contained within his documents, it has violated Boeing's First Amendment rights. Thus, Boeing has suffered or may suffer actual adverse and harmful effects, including, but not limited to, possible civil or criminal penalties, a delay in being able to timely report on information of public interest, and/or lost or jeopardized present or future financial opportunities, which impairs his ability to serve the public.

SECOND CAUSE OF ACTION
(ADMINISTRATIVE PROCEDURE ACT – CHALLENGE TO FINAL AGENCY
ACTION; CONSTITUTIONAL VIOLATION)

30. Boening repeats and realleges the allegations contained in paragraphs 1 through 19 above, inclusive.

31. Boening properly submitted, pursuant to one or more secrecy agreements and all applicable regulations, on different occasions his documents for prepublication review.

32. The CIA is required to respond to prepublication reviewed within 30 days. However, it routinely fails to meet the required deadline and often, as in this case, neglects to seek or notify the submitter of any need for an extension of time.

33. Although the CIA claims it can take more than 30 days to review a document submitted for prepublication review, upon information and belief, the CIA does nothing to ensure submitters are aware of the CIA's perceived policy that it can unilaterally grant itself an extension of time. Nor does the CIA seek to inform submitters that its failure to meet the 30 day deadline does not automatically designate the information as publishable, although it is well aware that submitters believe otherwise. In fact, the CIA has done the opposite by disseminating materials that clearly state there is a 30 day deadline.

34. The CIA routinely fails to abide by the 30 day deadline, but will eventually respond just prior to the initiation or in the early stages of litigation. Thus, this is a controversy that is capable of repeating itself yet evading review thereby permitting oversight by the courts.

35. The CIA lacks lawful authority to reverse its previously issued decisions made pursuant to the prepublication review process. All previously approved information remains unclassified and available for dissemination or publication by Boening

Additionally, the CIA lacks lawful authority to require Boening to include any disclaimer if he chooses not to do so.

36. The CIA's decision to deny Boening's the ability to publish certain text within his documents constitutes final agency action.

37. The CIA, its officers and employees, committed and undertook actions that were arbitrary, capricious and/or an abuse of discretion pertaining to Boening, including, but not limited to, unreasonably delaying prepublication review decisions, requiring him to modify the format (rather than substance) of his documents and attempting to require Boening to publish a disclaimer. These acts are unwarranted by the facts, unsupported by substantial evidence, in violation of internal regulations, federal statutes, other applicable provisions of law, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, thereby causing Boening to suffer legal wrongs under the Administrative Procedure Act.

38. Because the CIA has impermissibly infringed upon Boening's right to publish the previously approved information contained within his manuscript, they have violated Boening's First Amendment rights. Thus, Boening has suffered or may suffer actual adverse and harmful effects, including, but not limited to, possible civil or criminal penalties, a delay in being able to timely report on information of public interest, and/or lost or jeopardized present or future financial opportunities, which impairs his ability to serve the public.

THIRD CAUSE OF ACTION
(ADMINISTRATIVE PROCEDURE ACT – CHALLENGE TO FINAL AGENCY
ACTION; DECLARATORY JUDGMENT)

39. Boening repeats and realleges the allegations contained in paragraphs 1 through 19 above, inclusive.

40. Boening properly challenged the CIA's classification decisions pursuant to Executive Order 12,958/13,292 and its internal regulations as set forth Title 32 of the Code of Federal Regulations.

41. The CIA arbitrarily, capriciously and erroneously determined that Boening was not a proper "authorized holder" of classified information so as to allow standing to challenge the CIA's classification decisions regarding the documents/information at issue herein before the ISOO/ISCAP.

42. Boening was, however, an "authorized holder" of classified information pursuant to the relevant regulation and no nexus was required between filing a complaint and having access to the specific information/documents.

43. Boening, in order to protect his constitutional and regulatory rights, desires to have his undersigned counsel review certain documents asserted to be classified by the CIA, but this has not been permitted.

44. Boening exhausted all required administrative remedies in pursuing his challenge.

WHEREFORE, plaintiff Franz Boening, requests that the Court award him the following relief:

(1) Order the CIA to formally authorize the release of the withheld portions of his documents;

- (2) Enjoin the CIA from initiating civil or criminal proceedings against him for past or future publication of any text within his manuscript;
- (3) Declare that his documents do not contain classified information and that he possesses a First Amendment right to publish the contents in their entirety;
- (4) Declare that the CIA cannot require non-substantive format changes of documents nor can it impose a mandatory obligation to publish its disclaimer;
- (5) Declare that he possesses a First Amendment right to communicate with his counsel to include discussions involving classified information;
- (6) Declare that he possesses the ability to reach need-to-know decisions regarding the disclosure of relevant classified information to his cleared counsel;
- (7) Declare that the CIA violated the Administrative Procedure Act and its internal regulations governing the granting of access to counsel to classified information;
- (8) Declare that his undersigned counsel possesses a need-to-know relevant classified information concerning the redacted portions of the manuscript;
- (9) Declare that the CIA violated the Administrative Procedure Act and its internal regulations governing prepublication review;
- (10) Declare that Boeing was, in fact, an authorized holder of classified information and properly brought his complaint to the attention of the Information Security Oversight Office and Interagency Security Appeals Panel;
- (11) Require the CIA to abide by the 30 day deadline for prepublication review;
- (12) Award him the costs of the action and reasonable attorney fees under the Equal Access to Justice Act or any other applicable law;
- (13) grant such other relief as the Court may deem just and proper.

Date: March 5, 2007

Respectfully submitted,

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