

EXHIBIT “3”

December 12, 2002 APR
Memorandum

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CIO/IMS 0108-02
12 December 2002

MEMORANDUM FOR: Franz W. Boening
Foreign Broadcast Information Service, DS&T

FROM: Herbert O. Briick
Executive Secretary, Agency Release Panel

SUBJECT: Consideration of Appeal of ACMRP Decision.

1. This is in response to your request that the Agency Release Panel (ARP) consider your appeal of the decision of the Agency Classification Management Review Panel (ACMRP), the successor to the Classification Management Review Group Augmented Panel, regarding the classification of your complaint made under the Intelligence Community Whistleblowers Protection Act of 1998 (the Act).

2. Background: On 10 May 2001, you initiated a whistleblower complaint regarding a classified matter which you deemed to be an "urgent concern" that you had a right under the Act to complain about to Congress. Since the Act applies to "urgent concerns" involving classified information, Central Intelligence Agency (CIA) procedures implementing the Act, as set forth in the Attachment to AN 7-2-1, require that the appropriate CIA officials be consulted to determine whether any information contained in an employee complaint is classified. After such consultation was undertaken, it was determined that your complaint did contain classified information, and your complaint was marked so that you, and any CIA and Congressional officials involved in the review of your complaint, would be alerted to the specific portions of your complaint containing classified information.

3. After your complaint was submitted to the CIA Office of Inspector General and appropriate Congressional officials in accordance with the Act, you indicated that you wanted to publish your complaint by providing it to the National Security Archives, a nongovernmental public interest advocacy group.

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Since you further indicated that you believed your complaint was, in fact, unclassified, on 2 July 2001 you requested that your complaint be reviewed under the classification challenge provisions of Executive Order 12958 and CIA implementing regulations.

4. Upon receipt of your complaint by the predecessor Executive Secretary of the Agency Release Panel (ES/ARP) for review under the classification challenge provisions of the Executive Order and CIA implementing regulations, it was assumed, without further analysis, that your complaint met the threshold legal criteria necessary for a classification challenge to take place. Based upon this assumption, an initial review of your complaint was commenced under 32 CFR, Part 1907 and AR 70-3 by the ACMRP. After completing its review, the ACMRP determined that, with the exception of one item, the information in your complaint which had been previously identified as classified was, in fact, properly classified.

5. Upon being informed by the Executive Secretary (ES)/ARP of the decision of the ACMRP regarding your complaint, you appealed the Panel's decision to the ARP. During the pendency of your appeal, informal efforts were undertaken to assist you in revising your complaint so that it would express your personal opinions without revealing classified information. When these efforts proved unavailing, your appeal to the ARP was formally scheduled for consideration. Meanwhile, the individual serving as ES/ARP was selected for another assignment, and I was appointed as the new ES/ARP.

6. In the process of preparing for consideration of your appeal, I focused on your strongly expressed views that your complaint was not an official expression of the CIA. This, in turn, caused me to question whether a whistleblower complaint made under the Act is actually reviewable under the classification challenge provisions of the Executive Order and CIA implementing procedures. As a result of my concerns, I requested the Office of General Counsel's (OGC) legal opinion regarding whether the requisite jurisdiction exists for CIA employee complaints under the Act to be reviewed pursuant to the classification challenge provisions of Executive Order 12958 and CIA implementing regulations.

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7. In response to my request, OGC has advised the ARP that a CIA employee whistleblower complaint is a "personal record" created by the employee acting in his personal capacity, and therefore, in accordance with the classification challenge provisions of Executive Order 12958 and other relevant legal guidance, the requisite jurisdiction does not exist for CIA employee complaints under the Act to be reviewed pursuant to the classification challenge provisions of Executive Order 12958 and CIA implementing regulations (32 CFR, Part 1907, as procedurally supplemented by AR 70-3). OGC has also advised that while there is no jurisdiction to review your complaint in the context of a classification challenge, your complaint is reviewable under the AR 6-2/Employee Bulletin 0003-02 procedures that apply to any writing by a current employee about the Agency that is intended for nonofficial publication. Please note that AR 6-2i(2) prohibits CIA from denying permission to publish "solely because the statement may be embarrassing or critical of the Agency."

8. Conclusion: Based on the foregoing, since your complaint is not reviewable under the classification challenge provisions of Executive Order 12958 and CIA implementing regulations, neither the ACMRP nor the ARP has the jurisdiction to review the classification of your complaint. As a "personal record" created by you in your personal capacity, the classification of your complaint must be reviewed under the AR 6-2/Employee Bulletin 0003-02 procedures that apply to any writing by a current employee about the Agency that is intended for nonofficial publication.

9. Please accept my profound apologies for the incorrect processing of your complaint, and the time that that incorrect processing has entailed. I stand ready to help facilitate the expedited processing of the review of your complaint through your supervisory chain of command, if you desire my assistance in that regard. No further action will be taken by the ARP on this matter.



Herbert O. Briick

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