

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

_____)	
FRANZ BOENING,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 07-0430 (EGS)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

DEFENDANT’S LOCAL RULE 7(h) STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to LCvR 7(h), defendant submits this statement of material facts as to which there is no genuine issue:

1. Plaintiff Franz Boening was employed by defendant Central Intelligence Agency (“CIA” or “Agency”) from 1980 until 2005. *See* Declaration of Scott A. Koch (“Koch Decl.”) ¶¶ 7, 32; Compl. ¶ 3.

2. In 1980, plaintiff executed a Secrecy Agreement that obligates him to submit to the Agency any materials that “contain any mention of intelligence data or activities, or contain data which may be based upon information classified pursuant to Executive Order.” Koch Decl. ¶ 9 & Exh. A ¶ 5. The Agreement forbids plaintiff from taking any additional steps towards publication of such materials “without written permission to do so from the [CIA].” *Id.*

3. On May 10, 2001, plaintiff submitted a memorandum with three annexes and a bibliography (“May 10, 2001 Memorandum”) to the CIA’s Office of Inspector General for review as an “urgent concern” under section 17(d)(5) of the CIA Act, 50 U.S.C. § 403q(d)(5).

See Koch Decl. ¶¶ 19-20. The OIG determined that the May 10, 2001 Memorandum did not represent an “urgent concern.” *Id.* ¶ 21.

4. The Information Review Officer of the Directorate of Operations (“DO/IRO”), who possessed original classification authority, then reviewed the document and placed brackets around the portions he deemed classified. *See* Koch Decl. ¶ 22.

5. Plaintiff challenged the CIA’s determination that the document was classified by filing a classification challenge with the Agency Release Panel (“ARP”) under Executive Order 12958, as amended. *See* Koch Decl. ¶ 23.

6. The Agency determined that plaintiff’s Memorandum was not properly subject to a classification challenge under the Executive Order because it was a personal record, rather than official Agency document. *See* Koch Decl. ¶ 27. The ARP then forwarded the Memorandum to the Information Review Officer for the Directorate of Science and Technology (“DS&T/IRO”) for prepublication review as a nonofficial document. *Id.* ¶ 28. The DS&T/IRO concluded that the document was properly classified and could not be published in its current form. *Id.* ¶ 30.

7. Plaintiff appealed the ARP’s decision that it could not adjudicate the classification challenge to the Interagency Security Classification Appeals Panel (“ISCAP”). *See* Koch. Decl. ¶ 31. The Executive Director of the ISCAP informed plaintiff by letter dated February 4, 2004 that plaintiff could not challenge the Memorandum’s classification because he was not an “authorized holder” of the information contained therein. *Id.* ¶ 32 & Exh. D. Nevertheless, he exercised his own independent authority to consider such a classification challenge and determined that the CIA properly classified the Memorandum. *Id.*

8. On November 22, 2004, plaintiff submitted the May 10, 2001 Memorandum to the CIA for prepublication review as a nonofficial document. *See* Koch Decl. ¶ 33.

9. By letter dated January 5, 2006, the Chairman of the CIA's Publication Review Board ("PRB") notified plaintiff that if he wanted to publish his May 10, 2001 Memorandum he would have to rewrite that Memorandum "outside of the government memo format stating in [his] own words what [he] desire[s] to communicate," and that he would have to provide "specific, open source citations (author, title, source, date, page) for the statements [he] wish[es] to make." Koch Decl. ¶ 34 & Exh. E. The Chairman specifically instructed plaintiff that the citations "must be placed in the body of the text linked to specific sentences and paragraphs." *Id.*

10. When Plaintiff failed to make the necessary changes, the PRB made a final decision with respect to the Memorandum as he submitted it in November 2004. The PRB denied permission to publish the document in that form, notifying plaintiff that if he wished to publish them he would have to (1) delete specific information identified by the PRB, and (2) include a disclaimer stating that his writings constitute his own opinions and do not represent the views of the Agency or the U.S. Government. *See* Koch Decl. ¶ 35 & Exh. F.

11. Plaintiff responded to the PRB by email on June 29, 2006 stating that his May 10, 2001 Memorandum was based on open sources and challenging the PRB's assertion that the subject of that memorandum could not be mentioned by name. *See* Koch Decl. ¶ 36. Plaintiff also inquired into the PRB's review of the "Classified Annex" he submitted along with his memorandum.

12. The Chairman of the PRB responded on June 30, 2006, informing Plaintiff that he could still "get[] [his] message out" if he would rewrite his May 10, 2001 Memorandum "in a different format, outside the official-looking memo-type one it currently is in" and if he would "attribute those statements to open sources." Koch Decl. ¶ 37 & Exh. G.

13. The Chairman of the PRB wrote to plaintiff on August 11, 2006 informing him that the material contained in the “Classified Annex” was properly classified. *See* Koch Decl. ¶ 38 & Exh. H.

14. The CIA has determined that plaintiff’s Memorandum contains information that:

- (a) has been classified by officials with original classification authority, including Ralph S. DiMaio and the DO/IRO (who initially reviewed the Memorandum), *see* Unclassified DiMaio Decl. ¶ 3; Classified DiMaio Decl. ¶ 5, 13; Koch Decl. ¶ 22;
- (b) remains under the control of the CIA, *see* Unclassified DiMaio Decl. ¶ 10;
- (c) falls within at least one of three of the categories of classified information under § 1.4 of Executive Order 12958, as amended, including: (i) § 1.4(b) (foreign government information); (ii) § 1.4(c) (information concerning intelligence activities, sources, or methods; and (iii) § 1.4(d) (information concerning foreign relations or foreign activities of the United States, including confidential sources), *see* Unclassified DiMaio Decl. ¶ 11, 14; and
- (d) if disclosed, could reasonably be expected to cause serious damage to the national security, *see* Unclassified DiMaio Decl. ¶ 12; Classified DiMaio Decl. ¶ 10.

Respectfully submitted,

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