

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

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ANTHONY SHAFFER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:10-02119 (RMU)
	)	
DEFENSE INTELLIGENCE AGENCY, et	)	
al.,	)	
	)	
Defendants.	)	
	)	

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**JOINT STATUS REPORT**

Plaintiff and Defendants, through their undersigned counsel, submit the following Joint Status Report as required by the Court’s minute order of July 6, 2011. Per the Court’s order, the parties have conferred regarding the status of this litigation and submit the following statement of their respective interests.

Plaintiff served his complaint on January 31, 2011, alleging that Defendants violated his First Amendment rights by refusing to allow him to publish certain information in Operation Dark Heart: Spycraft and Special Ops on the Frontlines of Afghanistan and the Path to Victory (St. Martin’s Press, 2010). The parties agree that Plaintiff has no First Amendment right to publish classified information, pursuant to the multiple nondisclosure agreements he entered into with the U.S. Government, but the parties disagree as to whether the information at issue is properly classified.

On May 16, 2011, Defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment, in which Defendants argued that Plaintiff lacks standing to pursue his claim and that Defendants are otherwise entitled to summary judgment. In support of that motion,

Defendants submitted both unclassified and classified materials, with the classified submissions provided to the Court *ex parte* and *in camera*.

Since that filing, the parties have conferred as to the nature of Plaintiff's response, and hereby set forth their respective proposals on how this case should proceed.

In light of the positions set forth below, the parties jointly request that the Court set a status conference at its earliest convenience to determine the proper next steps, after which time further briefing may be necessary.<sup>1</sup>

#### Plaintiff's Position

On June 7, 2011, in order to properly respond to the Defendants' Motion, the Plaintiff, through counsel, requested the opportunity to use a secure computer to draft a sworn declaration to challenge the classification determinations that led to the redactions in his book. Additionally, a request was made for access, again in a secure setting, to an un-redacted version of the manuscript he created so that the specific portions of the book alleged to be classified could be directly addressed. It should be noted that at this time the Plaintiff has not requested that either he or his counsel be granted access to the Defendants' classified filings, or even that his counsel have access to the "classified" manuscript.

It is the Plaintiff's intention, and he believes his legal right, to provide information to the Court, whether classified or unclassified, that would support his position that the information redacted from his book is not properly classified. Thus, the Plaintiff intends to detail the classification discussions he had with officials employed by the Defendants when he voluntarily participated in an effort to address the Government's concerns in August/September 2010. This

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<sup>1</sup> Please note that Plaintiff's counsel will be away from July 31, 2011 to August 14, 2011.

would include producing to the Court the source materials that he submitted to the Defendants at that time.

While it is the Plaintiff's position that this information would be unclassified that is not his determination to make and he must at this stage of the proceeding take the appropriate steps to ensure the information is protected from even inadvertent disclosure (as well as ensure he does not violate any of his previously executed secrecy/non-disclosure agreements), while at the same time nevertheless protecting his own First Amendment rights. Obviously, even merely quoting the actual redacted text of the book, which would appear to be an obvious necessity given the posture of this case, involves referencing information alleged by the Defendants to be currently classified. The D.C. Circuit in *Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003), noted that the "district court should first inspect the manuscript and consider *any* pleadings and declarations filed by the Government, as well as *any* materials filed by Stillman, who describes himself an 'expert in classification and declassification.'" *Id.* at 548-49 (emphasis added). No distinction was made or limitation imposed upon the parameters of Stillman's submission.<sup>2</sup>

The Defendants, however, have refused to provide the Plaintiff with access to a secure computer or his own un-redacted manuscript. In the Plaintiff's view this is a violation of his constitutional rights, as well as case precedent. The utilization by the Defendants of the security

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<sup>2</sup> The Defendants' citation below to *Boening v. CIA*, 579 F. Supp. 2d 166, 174-75 (D.D.C. 2008), is inapposite as a review of Judge Sullivan's decision reveals his ruling was limited to specifically denying counsel's access to classified information without commenting on the author's access. Moreover, in this case, which was handled by the Plaintiff's counsel here (as well as was *Stillman*), Boening did submit his public source materials which the Central Intelligence Agency sealed as classified. Thus, the Plaintiff faces numerous risks of being accused of releasing or possessing classified information based on the whim of the Defendants, which is why allowing him the use of a secure government computer not only protects the information in question but also ensures the Plaintiff will not be arbitrarily punished under the guise of violating his secrecy/non-disclosure agreement(s).

system in this manner is primarily, if not solely, for the purpose of securing a litigation advantage rather than protecting the sanctity of classified information.

Of course, the Plaintiff's sworn declaration, which would not be accessed by his counsel, would be submitted to the Defendants for prepublication review and it can be redacted as they see fit before filing on the public record.<sup>3</sup> The un-redacted version, however, would be submitted to the Court for its *in camera* review and full consideration as part of the Plaintiff's Opposition filing.

#### Defendants' Position

With respect to Defendants' motion for summary judgment, the only issue before the Court is whether the information identified in the Government's declarations is properly classified, because Plaintiff has no First Amendment right to publish properly classified information. In a prepublication review case like this, "*in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm" with the "appropriate degree of deference" given to the Executive Branch concerning its classification decisions. *Stillman v. CIA*, 319 F.3d 546, 548-49 (D.C. Cir. 2003). Defendants' position is that this Court should consider the information at issue in this case by reviewing the materials provided by the Government, both publicly and *in camera*, as well as any unclassified materials submitted by

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<sup>3</sup> To ensure there is no misunderstanding, the Plaintiff's counsel would not review any of the portions of the Plaintiff's declaration that involves discussion of the allegedly classified information but he would logically assist the Plaintiff in preparing other portions that do not relate to the challenged classified information. Furthermore, while it is true that Plaintiff's counsel at the time of the filing of this lawsuit noted he has not had access to the full unredacted manuscript, *see* Compl. 2 n.1, there are copies publicly available from sources other than the Plaintiff including on the Internet. *Id.* ¶¶43-48. Plaintiff's counsel has not executed a secrecy/non-disclosure agreement in this matter or had authorized access to the manuscript and, therefore, does not have the same legal restrictions imposed upon him as the Plaintiff.

Plaintiff, but that it is improper and unnecessary for Plaintiff to submit classified information to the Court at this time.

Plaintiff argues in his complaint that information redacted from the manuscript was “supported by open source material” or has otherwise been previously publicly disclosed. Compl. ¶ 56. For the reasons discussed in Defendants’ motion for summary judgment, Plaintiffs’ argument misses the mark, as none of the material at issue has been declassified or officially disclosed. *See* Defs.’ Mot. [ECF 18] 29-34. But Defendants understand that Plaintiff intends to provide this Court with purported open source material and/or evidence of official disclosures, all of which he contends demonstrates the public availability of information redacted from the manuscript.

While Defendants reserve all rights and arguments as to the relevance of that information, Defendants do not oppose Plaintiff submitting an unclassified declaration and unclassified supporting materials (such as copies of, and citations to, specific official disclosures by the Government) for consideration by the Court. Plaintiff may not, however, provide classified information, both because he is prohibited from disclosing classified information and because classified information cannot logically be used to show that information has been officially disclosed by the Government.

Because his filing is limited to unclassified information, the Government is not providing Plaintiff with a secure computer to prepare his submissions. The Government does not provide such facilities to individuals merely because they are subject to a secrecy agreement or have access to classified information. Defendants will, however, ensure that Plaintiff’s proposed submissions are reviewed for classification by the Government prior to their filing. Plaintiff is required by his written secrecy agreements to submit all of his writings for review by the

Government prior to their disclosure, and has agreed never to disclose certain information or material obtained in the course of employment to anyone not authorized to receive it without prior written authorization. *See* Compl. ¶ 2; Defs.' Mot. [ECF 18] 4. These obligations are no less important in the context of his submitting what he contends to be open source material in this case, because his public disclosure of such materials could expose properly classified information contained in the book.<sup>4</sup> To ensure that Plaintiffs' contemplated filings do not inadvertently reveal classified information, as he appears to recognize, Plaintiff must submit his declaration and supporting materials to Defendants for their review prior to filing, consistent with his secrecy agreements.<sup>5</sup> If it is determined that Plaintiff's submissions do not contain classified information, then they may be filed on the public record.

Furthermore, the Government should not be required to provide Plaintiff with any classified material, including the redacted information at issue in this case. Plaintiff is not authorized access to classified information, even if Plaintiff already knows the information and even if the information was included in the redacted text of the manuscript.

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<sup>4</sup> That Plaintiff can point to certain information in the public domain does not itself mean that the information cannot be properly classified. For example, unauthorized disclosures to the public do not result in the declassification of certain information. *See generally* Defs.' Mot. 30-34.

<sup>5</sup> That requirement does not extend to Plaintiff's legal memorandum, based on Plaintiff's counsel's representations that the memorandum will be written only by counsel, that he has not "ever reviewed an unredacted version of Shaffer's book," *see* Compl. 2 n.1, and that he will not have access to the declarations or other materials prepared by Plaintiff. (The statements contained in Plaintiff's complaint speak for themselves, notwithstanding Plaintiff's re-characterization in footnote 3. By submitting this joint status report, Defendants do not adopt any factual characterizations set forth in Plaintiff's position above.) Pursuant to his secrecy agreements, Plaintiff may not provide his proposed submissions to counsel, who is not cleared for access to the information at issue in this case, unless and until the Government determines that the submissions do not contain classified information and may be filed on the public record.

Defendants' position tracks the approach followed in *Boening v. CIA*, 579 F. Supp. 2d 166 (D.D.C. 2008). There, a former CIA employee challenged the agency's prepublication review process with respect to a memorandum he authored. He claimed that the memorandum was compiled entirely from open source materials and thus was not properly classified. The plaintiff then moved to compel the Government to provide him access to the classified version of the memorandum.<sup>6</sup> The court rejected his motion, stating that "prepublication review cases can and should begin with *ex parte* and *in camera* consideration." *Id.* at 174.

In sum, Defendants' position is that Plaintiff should be permitted to file only unclassified materials in response to Defendants' motion, and that he is required by his secrecy agreements to provide those materials to the Government for classification review prior to filing. Defendants take no position on the deadline by which Plaintiff should submit his opposition. Because he is not authorized to disclose classified information, Defendants should not be required to provide him with computer facilities to prepare his submission. And the Executive Branch should not be required to disclose classified information, including the classified information at issue in this case, to Plaintiff.

Defendants are prepared to provide briefing on these issues, upon the Court's request.

Dated: July 22, 2011.

Respectfully submitted,

/s/

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Mark S. Zaid, P.C.

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Assistant Attorney General  
  
VINCENT M. GARVEY

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<sup>6</sup> Contrary to Plaintiff's statement above, the ruling in *Boening* was not limited to a request that the plaintiff's attorney be given access to classified material. The court rejected a motion by the plaintiff "to compel access for himself and for counsel." *Boening*, 579 F. Supp. 2d at 174.

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