UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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OPPOSITION TO DEFENDANT'S MOTION TO DISMISS UNDER RULE 12 AND MOTION FOR SUMMARY JUDGMENT UNDER RULE 56 AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT[1]

Plaintiff Franz Boening ("Boening"), a former employee of the defendant Central Intelligence Agency ("CIA") for nearly three decades,[2] internally challenged the CIA with a legal, factual and moral dilemma by calling upon it to publicly come clean about it's alleged relationship with a foreign national – **[one word deleted by CIA]** – who held

[1] This filing and its attachments were submitted to and reviewed by the CIA for classification purposes. As a result it has been approved for public filing in its present form. To the extent any information has been redacted as "classified", the filing of this document does not denote Boening's, or his counsel's, agreement with any classification decisions and he reserves the right to challenge these decisions at the appropriate time. Moreover, depending upon the extent of information redacted, this Court should review any unredacted version in order to ensure Boening receives full due process during these proceedings.

[2] Boening was employed by the CIA from 1980 – 2005. After learning Arabic in the early 1980s, he spent nearly one dozen years handling agent operations, primarily in the Middle East. He worked declassification issues from 1995 – 1999, and ultimately retired from the CIA 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 more than 25 years. Complaint at ¶3 (dated March 5, 2007).

a senior position with another Government and was revealed to be a human rights violator and criminal.[3]

This case revolves around a single document: a 25-page memorandum dated May 10, 2001 and its attachments (hereinafter referred to as the "M Complaint"). Boening's concerns about **[one word deleted by CIA]** arose not from any classified work he had performed, or as a result of classified files he had reviewed (or even heard through hallway gossip), but were entirely derived from his reading of publicly available newspaper and magazine articles that described the relationship. Based on open source information, and not knowing whether any documentation on **[one word deleted by CIA]** actually existed, he pursued a rarely used whistleblower provision and called upon the CIA to declassify any relevant classified information it might possess on this individual.

Relying upon provisions established by President Clinton in Executive Order 12,958 which encouraged government employees to challenge overclassification determinations, Boening attempted to persuade the CIA to do the right thing. Instead of rewarding Boening the CIA turned on him and retaliated.[4] It initially classified the "M Complaint" because of its misconceived notion that Boening possessed access to legitimately classified information on the topic, and shut him down completely. As a CIA employee, his options – unfortunately – were limited.

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[3] **[1 ½ lines deleted by CIA]** Defendant's Motion to Dismiss Under Rule 12 and Motion for Summary Judgment Under Rule 56 ("Def's Memo")(filed July 20, 2007), Declaration of Scott A. Koch ("Koch Decl."), Exs. "E" & "G".

[4] 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" in 2003 despite his having volunteered and possessing needed language skills. Complaint at ¶3; Declaration of Franz Boening at ¶23 (dated November 12, 2007)("Boening Decl."), attached as Exhibit "1".

Now, as a former employee, Boening is free of some of the legal restraints the CIA previously held over him. The Agency's only power now is control over properly classified information, none of which is contained within Boening's writings. As a result, the CIA continues to unlawfully impose a prior restraint upon him to obstruct his ability to disseminate the document so as to avoid embarrassment

This lawsuit represents a significant challenge to the CIA's attempt to unconstitutionally broaden the scope of its authority over its former employees and stifle their First Amendment rights. That effort, based on the law and facts established herein, should be thwarted by this Court.

FACTUAL BACKGROUND

Boening began employment with the CIA in 1980, at which time he executed a routine secrecy agreement. Koch Decl., Ex. "A". This is the only secrecy agreement ever executed by Boening. Boening Decl. at ¶3. He retired from the CIA in 2005. Id. at ¶2.

Creation Of The "M Complaint"

Beginning in or around Autumn 2000, Boening began reading publicly available newspaper and magazine articles that described the political scandals in **[one word deleted by CIA]** country **[six words deleted by CIA]**.[5] Boening had a personal interest in developmental affairs of this geographic region as well as human rights issues. Boening Decl. at ¶4. After reading the domestic and international news accounts Boening was angered, not just by the level of narco-corruption in **[one word deleted by CIA]** particular country and the hidden brutality of the regime in question, but also by the constant reminder that, according to the scores of credible published media accounts, his

[5] **[14 lines deleted by CIA]** Id. at ¶7.

employer – the CIA – had nurtured and supported **[one word deleted by CIA]** for years. Complaint at ¶4.

Boening decided to monitor, during his own personal time, the unfolding political scandal because of his strong sense of civic responsibility, which was combined with his personal irritation of the allegations.[6] If what he had read was even 50% true, he decided to take it upon himself to document what he perceived to be an apparently gargantuan intelligence failure. Boening Decl. at ¶8. Boening was livid that CIA may have been party to human rights violations and, even worse, that it seemed entirely possible that CIA had been criminally involved with **[one word deleted by CIA]**. Id. at ¶9.

Based on the articles Boeing had read, he decided to document the "perceived violations of the law committed by the CIA" with regard to an alleged "special relationship with a foreign individual who committed unlawful human rights violations and criminal acts." Complaint at ¶6. This led him to create his "M Complaint", which was a whistleblower complaint drafted pursuant to the Intelligence Community Whistleblower Protection Act of 1998 ("ICWPA"). Boening's "M Complaint" 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);

[6] During the relevant period of time in question Boening worked overtly in the Foreign Broadcast Information Service as a Mideast media analyst. He had absolutely no professional responsibility whatsoever for **[one word deleted by CIA]** geographical area nor did he have access to any type of classified, compartmented CIA operational information on either **[one word deleted by CIA]** or his region. Boening Decl. at ¶10.

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

Complaint at ¶6; Exhibit "2".[7]

Not one word of the May 10, 2001 "M Complaint" is based on any classified CIA document on or concerning **[one word deleted by CIA]**, or on any information Boening received as a result of his employment with the CIA. Indeed, in his entire life Boening has never read a single classified CIA document (apart from official responses to his complaint which classified publicly available newspaper and magazine articles) wherein **[one word deleted by CIA]** was mentioned. Every comment or conclusion expressed in the "M Complaint" is based on open source information (or officially declassified information from other federal agencies that Boening obtained via the Internet). Complaint at ¶¶7-8; Boening Decl. at ¶11.

Attempt To Internally Challenge CIA's Actions Involving The "M Complaint"

The "M Complaint" was officially submitted to the CIA's Office of Inspector General ("OIG") on May 10, 2001. The document was styled as an "urgent concern" and addressed to "Office of the Inspector General, Central Intelligence Agency," and identified as coming from "Franz Boening, Central Intelligence Agency". The OIG rejected Boening's request. Koch Decl. at ¶21. The CIA then conducted an initial classification review of the document and determined it contained classified information. Id. at ¶22. The CIA "classified" more than a dozen pages of publicly available newspaper, radio, and television information. Additionally, the CIA not only deleted all

[7] The "M Complaint" was formatted in the typical simple memo-style format one learns as a schoolchild and included "To", "From" and "Subject" headings. See Exhibit "2"

references to the foreign individual's name but also Boening's personal assessment of this individual. Complaint at ¶8.

On July 2, 2001, pursuant to Executive Order 12,958 and the CIA's implementing regulations, Boening, acting in his capacity as a CIA official, submitted the "M Complaint" to the CIA's Agency Release Panel ("ARP") for further classification review so that he could release it to a non-profit organization. Koch Decl. at ¶23. The ARP mistakenly believed that Boening had actually accessed classified information in order to create the "M Complaint", and referred the document to the "Agency Classification Management Review Panel" ("ACMRP") for further review. Id. at ¶¶23-24. The ACMRP also failed to realize that Boening's "M Complaint" was based simply on publicly available information. Id. at ¶25.

When a new Executive Secretary was appointed to the ARP he questioned whether the "M Complaint" was an "official" document. Id. at ¶26. Ultimately, by memorandum dated December 12, 2002, Boening was notified he "was not conducting or facilitating agency business" and that his "M Complaint" was a "personal record" and, therefore, not subject to review pursuant to the Executive Order. Id. at ¶27; Boening Decl. at ¶13; Exhibit "3". Thus, the CIA erroneously determined that neither the ARP nor ACMRP held jurisdiction over the document. Koch Decl. at ¶27.

During this time, in May 2002, Boening met with William McNair, then CIA's Information Review Officer, Directorate of Operations, who revealed to Boening why the "M Complaint" was considered classified. McNair stated:

> "*Look, Franz, do you think I care about [***two words deleted by CIA***]? This is not about 'source protection,' this is about CIA's reputation. We don't want you to have any credibility. The problem with the M memorandum is that what you've written is all true.*"

Complaint at ¶9; Boening Decl. at ¶16. McNair also acknowledged during the same conversation that the "M Complaint" was based solely on open source information and that it seemed to be reasonably well-sourced.

The "M Complaint" was eventually forwarded to the Information Review Officer for the Directorate of Science & Technology ("DS&T/IRO"). The DS&T/IRO was the responsible official, based on the regulations that existed at that time, to review "non-official" documents authored by current employees who worked within the DS&T as Boening did. Koch Decl. at ¶28. It took until June 24, 2003, for an unfavorable decision to be communicated to Boening. Id. at ¶29.

Attempt To Externally Challenge CIA's Actions Surrounding The "M Complaint"

Following the CIA's decision Boening sought to appeal the denial that the ARP/ACMRP lacked jurisdiction and that the document contained classified information to the Inter-Agency Security Classification Appeals Panel ("ISCAP"), which operates through the Information Security Oversight Office ("ISOO"), National Archives & Records Administration. Complaint at ¶17. Initially, ISCAP, or at least ISOO, agreed that Boening was permitted to appeal to the ISCAP and ordered CIA to deliver the document. Boening Decl. at ¶15. The CIA refused. Id.

Eventually, William Leonard, Chair, ISOO, was persuaded, based on information not fully known to Boening, that the CIA's view was correct and that he was not an "authorized holder". Id. This decision was conveyed by letter dated February 4, 2004. Koch Decl., Ex. "D".

The CIA Retaliates Against Boening For His Pursuit Of The "M Complaint"

After Boening drafted his "M Complaint" unfortunate circumstances required that he author a series of follow-up complaints alleging that the CIA had retaliated against him. These complaints included two formal whistleblower memorandums and dated March 24, 2003 and May 20, 2004, as well as two internal grievances dated January 16, 2003 and November 7, 2003. Exhibit "4". During this period Boening was forced to endure various retaliatory acts from being denied assignments, being told to keep his mouth shut, not speak to younger officers and never being promoted again. Boening Decl. at ¶23. From 1980 to 1993, Boening had been promoted on average once every 2.5-3.0 years. After he filed his first informal human rights complaint in 1994, and the series of whistleblower complaints in later years, he never once received another promotion during the time – 12 more years – he served with the CIA. Id. at ¶24.

Submission Of The "M Complaint" For Prepublication Review

By memorandum dated November 22, 2004, Boening submitted to the PRB four documents, which included the "M Complaint", for classification review for the purposes of potential public dissemination.[8] Exhibits "2" & "4"; Complaint at ¶5. The "M Complaint" was accompanied by all the source documentation. Boening Decl. at ¶¶17-22. Apparently, the PRB did little to no work on reviewing the documentation for months. Id. at ¶18. Finally, when Boening was nearing his retirement in Summer 2005, he and then PRB Chairman, Paul Noel Chrétien, exchanged internal messages about the

[8] 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. All four documents were considered classified, but (b) – (d) have since been declassified. Complaint at ¶5;Koch Decl. at 20 fn.7.

"M Complaint". In or around January 2006, the PRB acknowledged that **[one word deleted by CIA]** name and country could be released if Boening could demonstrate the information was based on overt sources. Complaint at ¶10.

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". Koch. Decl., Ex. "F". Given that by now Boening was no longer a CIA employee, the only information the CIA could legally block publication of was information that was considered classified. This included **[one word deleted by CIA]** name and country of origin. The PRB also noted it required Boening to include a specific disclaimer should he disseminate the redacted document. Id.

By e-mail dated June 30, 2006, in response to Boening's inquiries, the PRB's Richard F. 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.

Koch Decl., Ex. "G"[9]

[9] The basis for the format requirement, which is not addressed in the PRB's regulations, was never explained. It is especially questionable given that Boening's other whistleblower memos that have been publicly released by the CIA as unclassified were drafted in a similar or identical format that the CIA is challenging. See Exhibit "4".

Furthermore, by letter dated August 11, 2006, the PRB notified Boening that the "2001 classified annex"[10] document he created was also considered "inappropriate for disclosure in the public domain (i.e., is considered to be classified information)." Koch Decl., Ex. "H".

ARGUMENT

Applicable Legal Standards

The CIA has moved pursuant to Rule 12(b)(1),(6) of the Federal Rules of Civil Procedure to dismiss Boening's two APA claims, and seeks summary judgment under Rule 56 to dispose of Boening's First Amendment claims. Boening has cross-moved for summary judgment on all counts, or alternatively for discovery.

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) presents a threshold challenge to the Court's jurisdiction. Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987). The Court may resolve a Rule 12(b)(1) motion based solely on the complaint, or if necessary, may look beyond the allegations of the complaint to affidavits and other extrinsic information to determine the existence of jurisdiction. See id. at 908; Herbert v. Nat'l Acad. of Sci., 974 F.2d 192, 197 (D.C. Cir. 1992). The Court must accept as true all the factual allegations contained in the complaint, but the plaintiff bears the burden of proving jurisdiction by a preponderance of the evidence. Bennett v. Ridge, 321 F. Supp. 2d 49, 51-52 (D.D.C. 2004).

A motion filed under Rule 12(b)(6) challenges the adequacy of a complaint on its face, testing whether a plaintiff has properly stated a claim. "[A] complaint should not be

[10] Boening styled this document as a "classified annex" not because he was conceding it contained classified information, but because of all his submitted pages it was a possibility. In fact, Boening continues to challenge that this document does not contain classified information. Boening Decl. at ¶11.

dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The district court must treat the complaint's factual allegations -- including mixed questions of law and fact -- as true and draw all reasonable inferences therefrom in the plaintiff's favor. Macharia v. United States, 334 F.3d 61, 64, 67 (D.C. Cir. 2003); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003).

Summary judgment should be granted only if the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Waterhouse v. Dist. of Columbia, 298 F.3d 989, 991 (D.C. Cir. 2002). In determining whether a genuine issue of material fact exists, the Court must view all facts in the light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The nonmoving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); see Celotex Corp., 477 U.S. at 324.

Legal Standards For Prepublication First Amendment Classification Challenges

The D.C. Circuit has twice provided guidance to the district courts on how to handle prepublication classification challenges; first in McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983), and more recently in Stillman v. CIA et al., 319 F.3d 546 (D.C. Cir. 2003). As the Circuit originally stated in McGehee:

> Because the present case implicates first amendment rights, however, we feel compelled to go beyond the FOIA standard of review for cases reviewing CIA censorship pursuant to secrecy agreements. While we believe courts in securing such determinations should defer to CIA judgment as to the harmful results of publication, they must nevertheless satisfy themselves from the record, *in camera* or otherwise, that the CIA in fact had good reason to classify, and therefore censor, the materials at issue. Accordingly, the courts should require that CIA explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification. These should not rely on a "presumption of regularity" if such rational explanations are missing. We anticipate that *in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm. Moreover, unlike FOIA cases, in cases such as this both parties know the nature of the information in question. Courts should therefore strive to benefit from "criticism and illumination by [the] party with the actual interest in forcing disclosure."

719 F.2d at 1148-49 (citations omitted); Accord Stillman, 319 F.3d at 548-49.

This review will not involve the need to "second-guess CIA judgments on matters in which the judiciary lacks the requisite expertise." McGehee, 719 F.2d at 1149. There will be little, if any, substantive classification decisions in this case that this Court does not possess the requisite level of expertise to rule upon.[11] Importantly, "while the CIA's tasks include the protection of the national security and the maintenance of the secrecy of sensitive information, the judiciary's tasks include the 'protection of individual rights. Considering that 'speech concerning public affairs is more than self-expression; it is the essence of self-government,' and that the line between information threatening to foreign policy and matters of legitimate public concern is often very fine, courts must assure

[11] See New York Times Co. v. United States, 403 U.S. 713 (1971)(per curiam) (permitting publication of Pentagon Papers despite government's claim that they were "top secret"); Haig v. Agee, 453 U.S. 280, 289 (1981)(President's plenary power over foreign relations, "like every other government power, must be exercised in subordination to the applicable provisions of the Constitution."), quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

themselves that the reasons for classification are rational and plausible ones." Id. (citations omitted).[12]

> When the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

United States et al. v. National Treasury Employees Union et al., 513 U.S. 454, 475 (1995).[13]

I. BOENING HAS BEEN DEPRIVED OF HIS PROTECTED FIRST AMENDMENT RIGHT TO PUBLISH UNCLASSIFIED INFORMATION

The CIA argues that Boening's First Amendment claim should be dismissed due to the lack of a First Amendment right to publish information that has been properly classified by the CIA, Def's Memo at 26; that the information contained in the "M Complaint" has been properly classified pursuant to the provisions of EO 12,958, id. at 31; and that simply because some of the information contained in the "M Complaint" has been publicly discussed does not mean that the information has not been properly classified. Id. at 37.

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[12] In the landmark "Pentagon Papers" case, Justice Brennan wrote that "[t]he entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined 'could,' or 'might,' or 'may' prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." New York Times Co. 403 U.S. at 725 (1971).

[13] "As Justice Brandeis reminded us, a 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms. 'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women...To justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practiced.'" National Treasury Employees Union, 513 U.S. at 475, quoting Whitney v. California, 274 U.S. 357, 376 (1927)(Brandeis, J., concurring).

The Supreme Court has long recognized that expression about public issues rests "on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 467 (1980). The constitutional protection for freedom of expression on public matters, which was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," Roth v. United States, 354 U.S. 476, 484 (1957), is at the very core of our constitutional and democratic system. Stromberg v. People of State of Cal., 283 U.S. 359, 369 (1931). Therefore, in addressing challenges under the First Amendment, courts must keep in mind that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

That said, Boening's ability to disseminate his writing is legitimately subject to certain limitations due to his prior affiliation with the CIA.[14] To start, Boening is neither asserting that the prepublication review process is unconstitutional or that he possesses a

[14] To some extent, however, Boening's relationship with the CIA also creates greater First Amendment significance under the circumstances. As Judge Kessler noted recently in a prepublication review case "the FBI, by its very nature, is not an open institution, and very few people are knowledgeable about its inner operations. For that very reason, the views of knowledgeable, informed, experienced 'insiders' are of particular utility." Wright v. FBI, 2006 U.S. Dist. LEXIS 52389, *23 (D.D.C. July 31, 2006). It would seem obvious that the same rationale applies equally, and in fact more, to the CIA. As Justice Jackson recognized in American Communications Assn. v. Douds, 339 U.S. 382, 442 (1950), "[t]he priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error." Id. at 443.

First Amendment right to publish *properly* classified information. See Snepp v. United States, 444 U.S. 507, 510 (1980).

Boening's secrecy agreement, however, ultimately applies only when he seeks to publish "classified information" that "has come or shall come to [his] attention by virtue of [his] connection with the Central Intelligence Agency." McGehee, 718 F.2d at 1142. As the D.C. Circuit has noted, secrecy agreements, such as the one Boening executed, do not extend to "unclassified materials or to information obtained from public sources." Id. The government may not censor such material, "contractually or otherwise." United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).[15] "The government has no legitimate interest in censoring unclassified materials. Moreover, when the information at issue derives from public sources, the agent's special relationship of trust with the government is greatly diminished if not wholly vitiated." McGehee, 718 F.2d at 1141. Accord Snepp v. United States, 444 U.S. 507, 513 n.8 (1980)("if in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned"). See also Stillman, 319 F.3d at 548 (if information not classified properly, manuscript can be published).

The CIA can not properly classify the information contained in Boening's "M Complaint" for at least three reasons: (1) at no time did Boening ever obtain access to any classified information relating to the substance of his "M Complaint" during the time of

[15] This Court recently noted that "any secrecy agreement which purports to prevent disclosure of unclassified information would contravene First Amendment rights." Stillman v. CIA et al., 2007 U.S. Dist. LEXIS 24206, *13 fn.4 (D.D.C. March 30, 2007)(EGS), citing Marchetti, 466 F.2d at 1317 ("We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights.").

his employment and the information in question was derived *exclusively* from open source materials; (2) the information addresses perceived violations of the law by the CIA in its relationship with a foreign individual who has committed "unlawful human rights violations and criminal acts" and the CIA can not classify its own violations of the law; and (3) the CIA can not demonstrate that the information is within its "control" and therefore can not properly classify the information.

By virtue of any or all of these arguments, by seeking to improperly classify information within the "M Complaint", the CIA has deprived Boening of his First Amendment right. Therefore, its' Motion should be denied and judgment entered in favor of Boening or, alternatively, it should be denied without prejudice until discovery has been completed.

The governing document concerning the CIA's classification decisions is Executive Order 13,292, 68 Fed. Reg. 15315 (2003), which President Bush issued in March 2003 (amending Executive Order 12,958 that dated back to 1995).[16] Pursuant to § 1.4 of the Order, information shall not be considered for classification unless it concerns (noting in relevant part those provisions that have been raised in this particular case): foreign government information, intelligence activities (including special activities), intelligence

[16] This case apparently presents the novel question within the realm of prepublication classification challenges of which Executive Order applies given that the document was reviewed under both EO 12,958 and EO 13,292. See Koch Decl. at 3 (noting "M Complaint" reviewed in May 2001 and May 2004, as well as on 5 other occasions). This issue, however, has been addressed by the courts before in the FOIA context, and there appears to be no reason why to make a distinction in prepublication review cases. The accepted rule is that a reviewing court will assess the propriety of FOIA Exemption 1 withholdings under the Executive Order in effect when the agency's ultimate classification decision is actually made. Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 29 (D.C. Cir. 1998) ("[A]bsent a request by the agency to reevaluate an Exemption 1 determination based on a new executive order ... the court must evaluate the agency's decision under the executive order in force at the time the classification was made.").

sources or methods, or cryptology; and foreign relations or foreign activities of the United States, including confidential sources.

EO 13,292, contains four conditions for the classification of information: (1) the information must be classified by an "original classification authority"; (2) the information must be "owned by, produced by or for, or is under the control of" the government; (3) the information must fall within one of the authorized classification categories under section 1.4 of the Order; and (4) the original classification authority must "determine [] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage." Id. at § 1.1.

A. The CIA Can Not Properly Classify The Information Contained In The "M Complaint" As It Was Exclusively Derived From Publicly Available Newspaper And Magazine Articles And Declassified Government Records Retrieved From The Internet

Let it be clear from the outset – the CIA can not honestly dispute that every withheld fact from within the "M Complaint" was derived from published newspaper and magazine articles, or declassified documents of other government agencies that were retrieved from the Internet. These openly available sources were presented to the CIA during the review process and have been attached as exhibits for the Court and the public to review for themselves (unless, of course, the CIA designates them as "classified"). Boening Decl. at Exhibits "A" – "OOOO". In fact, the Court is permitted to take judicial notice of these documents. See e.g. Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Management L.P., 435 F.3d 396, 401 n. 15 (3d Cir. 2006)(court may take judicial notice of published newspaper articles); In re Merrill Lynch & Co. Research Reports Sec. Litig., 289 F. Supp. 2d 416, 425 n. 15 (S.D.N.Y. 2003)(same).

There is no case – and the CIA has notably failed to cite any – holding that information in the public domain may be censored. Indeed, in McGehee, the D.C. Circuit specifically noted that "when the information at issue derives from public sources, the agent's special relationship of trust with the government is greatly diminished if not wholly vitiated." 718 F.2d at 1141. The Circuit relied heavily on Marchetti, which held that the government may not censor information obtained from public sources, "contractually or otherwise." 466 F.2d at 1313. See also Snepp, 444 U.S. at 513 n. 8 ("if in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned"); Wright v. FBI, 2006 U.S. Dist. LEXIS 52389, *28 (D.D.C. July 31, 2006)("Defendants' argument, even if accurate, does not explain how, regardless of how or when Wright learned of certain information, the Government could have any interest whatsoever in censoring it if it is already in the public domain").

1. *There is A Significant Legal And Factual Distinction Between Adjudicating Whether Information Has Been "Officially Acknowledged" In FOIA Cases And Whether Information Is In The Public Domain In Prepublication Classification Challenges*

The CIA's last line of defense is that the information contained in the "M Complaint" can still be properly classified despite being "publicly discussed," as there has been no official acknowledgment of the information. Def's Memo at 37, citing Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990). This argument is a red herring. The CIA relies exclusively on analysis taken from FOIA decisions that is inapplicable to the present circumstances. See e.g., id. at 765 (finding that disclosure of a CIA station's location in a Congressional report did not constitute official disclosure and that the CIA, due to national security concerns, could not be forced, pursuant to FOIA, to disclose the actual location); Public Citizen v. Dep't of State, 11 F.3d 198, 202 (D.C. Cir. 1993)(rejecting a

FOIA request for records relating to a meeting between Saddam Hussein and U.S. Ambassador April Glaspie, despite her public testimony before Congress on the meeting, on the grounds that the public testimony did not necessarily constitute official disclosure because the public information did not necessarily specifically match the requested information).

The CIA does cite to one of the first prepublication review cases ever decided (which was an outgrowth of the Marchetti case, the first such legal challenge) by the Fourth Circuit more than thirty years ago. Def's Memo at 39, citing Knopf v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975)("It is true that others may republish previously published [press] material, but such republication by strangers to it lends no additional credence to it. [Plaintiffs] are quite different, for their republication of the material would lend credence to it, and, unlike strangers referring to earlier unattributed reports, they are bound by formal agreements not to disclose such information.").

But this ignores the D.C. Circuit's clear admonition nearly a decade later rejecting the notion of that premise: "when the information at issue derives from public sources, the agent's special relationship of trust with the government is greatly diminished if not wholly vitiated". McGehee, 718 F.2d at 1141. The CIA's argument also ignores its own interpretation of what is meant by "official information" and the relationship to publicly available materials. See 57 Fed. Reg. 876 (1992)(CIA regulation defining "official

information" to exclude items meant for public consumption, such as newspapers, magazines, books, and reference materials.[17]

The D.C. Circuit court noted that "[a]n ex-agent should demonstrate, however, at an appropriate time during the prepublication review, that such information is in the public domain." Id. at 1141 n. 9. That is the only requirement in a prepublication review challenge. Not that the information has been "officially disclosed" by the federal government.

Boening has met the requirement as set forth by the law in this Circuit, Boening Decl. at ¶¶17-22, and is entitled to summary judgment as the CIA can not prevent the disclosure of the information in his "M Complaint".

B. The CIA Can Not Classify Information Concerning A Violation Of Law Or To Prevent Embarrassment

Boening submitted the "M Complaint" to the CIA IG pursuant to the ICWPA on the grounds that he believed there was evidence, based on his reading of published newspaper and magazine accounts, that the CIA had engaged in "perceived violations of the law" with regard to an alleged "special relationship with a foreign individual who committed unlawful human rights violations and criminal acts." Def's Memo at 8.

[17] The CIA does possess wide latitude to prevent current employees from publishing even personal opinions concerning publicly available newspaper articles. See 57 Fed. Reg. 54564 (1992), citing HR 6-2 (2)(h)(4)("For current employees and contractors, the Agency may also deny permission to publish statements or expressions of opinion that could reasonably be expected to impair the author's performance of duties, interfere with the authorized functions of the CIA, or have an adverse impact on the foreign relations or security of the United States.")(although from a proposed regulation, identical or similar language exists in the current regulation governing employee writings). For former employees, which is Boening's status, however, the CIA can only prevent the publication of properly classified information. See Koch Decl., Exs. "B" & "C".

The CIA may not classify information to "conceal violations of law, inefficiency, or administrative error," "prevent embarrassment to a person, organization, or agency," or "prevent or delay the release of information that does not require protection in the interest of the national security." Exec. Order 13,292, § 1.7(a)(1)-(2).

The CIA chooses to ignore this exception, instead focusing on the classification criteria that the information contained in the "M Complaint" allegedly implicates "intelligence sources and methods" or "information concerning foreign relations or foreign activities of the United States, including confidential sources,"[18] and that disclosure of the information in the Memorandum could reasonably be expected to cause damage to national security. Def's Memo at 34, citing Exec. Order 12958, as amended, § 1.4(c)-(d). The CIA's decision to classify the information in the "M Complaint", which the CIA concedes was derived from open source materials,[19] serves only to strengthen the overwhelming suspicion that violations of the law did in fact occur and that the CIA's classification decision was purely designed to prevent the emergence of embarrassing information about the CIA (just as CIA official William McNair stated, see Complaint at ¶9; Boening Decl. at ¶16). Given that the information in the "M Complaint" was derived exclusively from open source materials, and referred to a questionable unethical or even

[18] For unexplained reasons (at least in its public filings), the CIA also identified "foreign government information" as an applicable classification category. However, the very definition of the term, see EO 13,292, § 6.1 (r), demonstrates its inapplicability. All of the information contained within the "M Complaint" was derived directly from published newspaper and magazine accounts. Complaint at ¶¶7-8; Boening Decl. at ¶11.

[19] In an email from the PRB's Richard F. dated June 30, 2006, Boening was informed that the only two problems were the "official-looking" format of the Memorandum and the need to "attribute those statements to open sources in the new format (*as you basically have*)…" Complaint at ¶ 12; Koch Decl., Ex. "G" (emphasis added).

criminal relationship, the CIA's decision to attempt to classify public information should respectfully lead this Court to seriously look behind the propriety of the CIA's decision.

While not confronting the EO exception § 1.7(a)(1)-(2) directly, the CIA attempts to weaken the Court's authority by continually reminding it of the concept of judicial deference on issues of national security classifications. Def's Memo at 27-35. A thorough examination of the specific case law cited by the CIA, however, reveals a somewhat misleading argument as those cases *solely* involved FOIA disclosure lawsuits. See e.g. Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003)(concluding that the government's affidavits concerning the anticipated harm to national security that could arise from disclosure pursuant to FOIA of the names of terrorist suspects detained after the 9/11 attacks was reasonable); Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999)(finding that the court was in no position to dismiss the CIA's facially reasonable concerns regarding harm to national security that could arise from the confirmation or denial of the existence of an employment relationship with an allegedly covert employee). Not one of the cases cited pertained to a First Amendment classification challenge of a former CIA employee, which the CIA is well aware of involves completely different legal and factual considerations. Stillman, 319 F.3d at 548-49; McGehee, 719 F.2d at 1148-49 (citations omitted).[20]

[20] This is not to say that judicial deference does not play a role in prepublication review challenges. It clearly does, as this Court has itself recognized. Stillman, 2007 U.S. Dist. LEXIS 24206, *18-19 (noting "government is entitled to substantial deference in its classification decisions."). However, "[d]espite this high level of deference, the Court will not just rubber stamp the government's classification decision. To uphold the government's classification decision, the Court must satisfy itself 'from the record, *in camera* or otherwise, that the [government agencies] in fact had good reason to classify, and therefore censor, the materials at issue.'… The Court will not rely on any

While Boening does not challenge the tradition of affording a level of deference to the expertise of the Executive Branch on matters of national security, such deference is not a blank check and can not be permitted to interfere with the legal rights of individual citizens without some form of judicial oversight. "[W]hile the CIA's tasks include the protection of the national security and the maintenance of the secrecy of sensitive information, the judiciary's tasks include the protection of individual rights". Id. at 1149. In the instant matter, the Court does not need to "second-guess" the CIA's underlying classification decisions as much as factually or legally determine that the CIA is attempting to inappropriately classify publicly available information for the purpose of concealing a violation of law or to prevent embarrassment of the CIA.

C. The CIA Can Not Demonstrate That The Information Is Owned By, Produced By Or For, Or Under The Control Of The Government.

The governing Executive Order defines "information" as "any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government." Exec. Order 13,292, § 6.1(s). It also defines "control" as "the authority of the agency that originates the information … to regulate access to information." Id.[21] The

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'presumption of regularity' if rational explanations are missing." Id. at *19-20 (internal citations omitted), quoting McGehee, 718 F.2d at 1148-49.

[21] Interestingly, as part of a litigation settlement in 1991, the CIA published a new regulation entitled "Nondisclosure Obligations and Prepublication Review; Access to and Release of Official Information". 57 Fed. Reg. 876 (1992). It specifically defined the related term of "official information," to include "all information, whether classified or unclassified, that is originated, received, *or controlled* by the Agency in pursuance of law or in connection with the discharge of official duties. This definition encompasses information that concerns sources and methods, is unique to the Agency, or can be traced to the Agency. *Excluded from this definition are … items meant for public consumption, such as newspapers, magazines, books, and reference materials*. Id. (emphasis added).

CIA asserts that because the information in Boening's "M Complaint" describes the government's intelligence activities, sources or methods or impacts foreign relations that it falls within the purview of Boening's Secrecy Agreement and is therefore under the "control" of the CIA. Def's Memo at 32. It counters that Boening's "passing assertions that he did not have access to the classified information in his Memorandum while employed at the CIA, *see* Compl. ¶ 8, are insufficient to defeat the Agency's control over that information." Def's Memo at 33.

However, to supports its claim regarding control the CIA chooses to focus on the issue of whether former CIA employees who had access to classified information within the "control" of the CIA can claim that information they discovered through open source materials was not related to the classified information to which they had access, regardless of whether the employee ever actually exercised that access. The CIA's apparent view is that since Boening *possibly* had access to the allegedly classified information contained in his "M Complaint" while employed at CIA, regardless of whether he ever actually exercised that access to learn that information, Boening can not now claim that he based all of his research exclusively on open source materials. Id.

The CIA exclusively relies on two Fourth Circuit cases, neither of which is applicable to the current situation. Id. In Knopf, the Court held that a former government employee can not "be heard to say that he did not learn of information during the course of employment if the information was in the Agency and he had access to it." 509 F.2d at 1371. Several years later the Circuit noted in Colby v. Halperin, 656 F.2d 70, 72 (4th Cir. 1981), that former CIA employees "cannot disclose classified information to which they had access during their public service, even though they may have acquired such

information elsewhere"). The basis of its reasoning was that there is a substantial presumption that information to which an employee had access would have been discovered or learned during employment. Knopf, 509 F.2d at 1371.

The CIA's reliance on these cases is flawed for at least two reasons. First, the Knopf Court held that a secrecy agreement only covers information learned during or in consequence of employment, and not information gathered outside of employment. Id. Second, in both cases the Fourth Circuit chose to highlight the qualifying condition that the employee in question must have had access to the information while employed at the CIA. Id.; Halperin, 656 F.2d at 72.

In the instant case, Boening can not only prove he gathered the information exclusively outside of his employment at CIA and solely from open source materials (especially since the materials were submitted to the PRB and are now included as part of this case for judicial review), but further that at no time did he even have authorized access to the information while employed at the CIA. Complaint at ¶8; Boening Decl. at ¶11. In fact, the CIA has repeatedly conceded – particularly in order to defeat Boening's efforts to attain outside intervention – that Boening did not have authorized access to any of the "classified" information he included within his "M Complaint". Def's Memo at 22-23; Classified DiMaio Decl. ¶8; see also Koch Decl. ¶32 n.7 & Ex. D (letter from J. William Leonard)("[T]he CIA has represented that any access to classified information you gained and which you included in your original complaint was not granted in accordance with your duties at the CIA. They have further represented that you did not have a need-to-know . . . the specific classified information accessed in preparation of

your original complaint.").[22] And the CIA has characterized the "M Complaint" as a "personal record." Koch Decl. at ¶27. The CIA can not have it both ways.[23]

Moreover, the PRB has conceded that the only issues preventing publication were the "official-looking" format of the "M Complaint" and the perceived inadequacy of Boening's open source citations (an assertion challenged by Boening). Complaint at ¶12 ("If you rewrite your [Foreign Individual's name] story in a different format, outside the official-looking memo-type it is currently 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*")(emphasis added). The PRB's statement evidences the true issue for the CIA: the formatting of the "M Complaint" (which ties directly into the embarrassment factor elucidated by CIA official William McNair). This bears no relation to the classification status, or the CIA's "control" of the information contained in the "M Complaint".

Therefore, as the CIA can not demonstrate that the information was within its "control" the information can not be properly classified..

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[22] See *infra* at 43 fn. 34.

[23] The CIA tries to gloss over this fact by implying Boening perhaps inappropriately accessed classified information without CIA consent. Def's Memo at 23, n.11 ("employees with access to classified systems can obtain classified information on a wide variety of subjects"). Whether the implication that follows is true, namely that the CIA is admitting its own failure to restrict access in compliance with Executive Order 13,292, it remains to be seen and serves to fortify the need for discovery to determine the extent of Boening's access while employed at CIA and whether he actually accessed classified materials relevant to the information contained in the "M Complaint". Most likely this argument is nothing less than after-the-fact lawyering, especially since the CIA at no time, and this issue obviously dates back more than six years, ever cited Boening for a security violation or sought to revoke his security clearance (which he actually still maintains to this day). Boening Decl. at ¶12.

D. The Information Concerning [one word deleted by CIA] And The Drafting Of The "M Complaint" Occurred Outside The Scope Of Boening's Employment And Secrecy Agreement

Not far removed from the argument that the "M Complaint" was based entirely on publicly available information, Boening is also entitled to summary judgment due to the fact that he obtained the information and created the document outside of the scope of his employment and secrecy agreement.[24]

This Court recently issued a ruling in another prepublication classification challenge in Stillman wherein it noted that "the same logic that prevents current and former employees from revealing classified information *obtained by them during the course of their employment* prevents individuals who maintain a security clearance and contract with the government as either an employee or affiliate from disclosing classified information obtained while under such a contract and bound by a secrecy agreement." Stillman, 2007 U.S. Dist. LEXIS 24206, *16 (emphasis added). While there are notable distinctions between the factual and legal circumstances that led to the instant matter and that of Stillman, one conclusion in particular resonates with significant relevance.

> The Court is also persuaded by the government's *in camera* submissions that *but for* Stillman's high-level security clearances with the government and its contractors and the secrecy agreements he signed, Stillman would not have had access to or obtained the classified information that he is now attempting to disclose in his manuscript.

Stillman, 2007 U.S. Dist. LEXIS 24206, *17 fn.6 (emphasis added). This "but for" determination that was accorded significant weight in Stillman is conspicuously absent in Boening's case. Having relied *solely* upon published newspaper and magazine articles (as

[24] This argument does not eliminate Boening's obligation to submit any writings, even when created outside of the scope of employment, for prepublication review. Of course, that requirement extends into perpetuity.

well as declassified records of other federal agencies retrieved off the Internet), and never once having had access to any related classified information from the CIA's systems, Boening's relationship with the CIA had absolutely nothing to do with the contents of the "M Complaint".[25] Notwithstanding Boening's employment with the CIA, he still would have had access and obtained the information that he set forth in his "M Complaint".[26]

An analysis of the prior prepublication review cases recognizes an implicit recognition that there was a limitation as to how far the scope of employment would extend to permit an infringement upon a former employee's First Amendment rights. See e.g., Snepp, 444 U.S. at 510 n.3 (government may "protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment."); Stillman, 319 F.3d at 548 (favorably citing Snepp); Marchetti, 466 F.2d at 1317 ("Marchetti retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain); Knopf, 509 F.2d at 1371 (secrecy agreement "of course, covers only information learned by [an employee] during their employment and in consequence of it. It does not cover information gathered by them outside of their employment or after its termination."); United States v. Snepp,

[25] Indeed, the only significance of Boening's CIA relationship was that he could submit the memorandum internally. Of course, any John Q. Public could have written the same memorandum utilizing the same sources and mailed the document to the CIA Director's Office. Under the circumstances it likely would have received virtually the same treatment as did Boening's effort.

[26] Boening would submit the "but for" test appropriately relates to access and content of the document in which the classification is being challenged, not whether the memorandum overall would have been written in the first place had he not been a CIA employee.

456 F.Supp. 178, 182 (E.D.V.A. 1978)(upheld government's "system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment.").

1. *The CIA's Argument That It Has The Lawful Authority To Block Publication Of Information Obtained Outside Of The Course Of Employment Or The Scope Of Any Executed Secrecy Agreement Renders Those Agreements Unconstitutionally Broad*

The government's argument is essentially that because a secrecy agreement may be active for an individual who is handling information "A", it lawfully applies to information "B", "C" and "D" as well. As noted above, that argument renders secrecy agreements too broad and, therefore, unconstitutional. See also National Federation of Federal Employees v. United States, 659 F.Supp. 1196, 1204 (D.D.C. 1988)(requirement that certain government employees not disclose any information which is "classifiable" was excessive restriction on speech which was more than necessary to protect the substantial government interest), on remand, American Foreign Service Association v. Garfinkel, 490 U.S. 153 (1989)(per curiam).

E. If Boening Is Not Entitled To Summary Judgment Outright, Discovery Is Necessary On His First Amendment Claim Before The CIA Deserves Judgment In Its Favor

If the CIA is claiming that Boening did not exclusively derive the information within his "M Complaint" from publicly available newspaper and magazine articles, or other federal agencies' declassified documentation retrieved from the Internet, then Boening is entitled to discovery prior to the granting of summary judgment. Additionally, there exists a factual issue as to whether the U.S. Government, in light of available declassified records, has "taken affirmative measures to conceal" the relationship with **[one word deleted by CIA]**. See Rule 56 (f) Declaration of Mark S. Zaid, Esq. at ¶¶4-5 (dated November 12, 2007), attached as Exhibit "5". See Wright, 2006 U.S. Dist. LEXIS 52389, * 27-9 (D.D.C. 2006)(finding existence of dispute concerning genuine issue of material

fact where both former and current FBI Special Agent utilized newspaper accounts and various open source materials to draft manuscript criticizing FBI counterterrorism efforts and FBI claimed the information was not derived solely from open source materials but obtained by virtue of plaintiff's position within the FBI). See also Knopf, 509 F.2d at 1365 (CIA required to produce witnesses); Marchetti, 466 F.2d at 1312 (trial on merits held); Snepp, 456 F.Supp. at 179-180 (extensive discovery conducted; Court also heard testimony from CIA officials including former CIA Director Bill Colby and then-current CIA Director Admiral Stansfield Turner).

II. THE CIA'S MANDATORY DISCLAIMER IS BOTH UNCONSTITUTIONAL AND RUNS AFOUL OF THE APA

The CIA's 2005 PRB Regulations require former employees to include a disclaimer, unless waived in writing by the PRB. Koch Decl. Ex. "C". The CIA asserts that this requirement does not violate the First Amendment. Def's Memo at 23-26.

Although it is undisputed that the prepublication review process itself is not unconstitutional as long as the information sought to be censored was obtained by and through an employee's work for the government, the CIA's attempt to mandate the use of a disclaimer must fail because it has overextended its authority. The ability of the CIA to regulate or control matters surrounding the dissemination of information by its former employees is limited to protecting classified information. That authority is derived from the lawful obligation imposed by a secrecy agreement.

However, Boening's secrecy agreement contains no mention of any requirement to include a disclaimer in any published work. Compare Koch Decl., Ex. "A" (Secrecy Agreement, ¶¶4-6) to Koch Decl., Ex. "B" (1995 PRB Regulations) at ¶i.5 & Ex. "C" (2005 PRB Regulations) at ¶b.4. Moreover, the mandatory disclaimer sought to be forced upon Boening was enacted internally by the CIA four years after he submitted the "M

Complaint" to the CIA, and one year after he had submitted it to the PRB. The previous regulation, which was issued in 1995, merely encouraged, instead of required, the insertion of a disclaimer.[27] See Koch Decl. Ex.. B, ¶ 2.i.(5).

Even if it is determined that the disclaimer requirement is applicable to Boening's writing, case law does not support the CIA's contention that its disclaimer passes constitutional muster. The CIA claims that a disclaimer is less restrictive of First Amendment rights than the prepublication review process itself, and that since the prepublication review process has been found to be constitutional, then by necessity a disclaimer must also be constitutional. Def's Memo at 24-25, citing Weaver v. U.S. Information Agency, 87 F.3d 1429, 1453-54 (D.C. Cir. 1996)(Wald, J., dissenting); Snepp, 444 U.S. at 510 n.3.

As an initial matter, it goes without saying that the CIA's primary support for the contention that a disclaimer is less restrictive than the prepublication review process is based upon a dissenting opinion in the Weaver case. Def's Memo at 24. In any event, the constitutionality or restrictiveness of a disclaimer in relation to the prepublication review process was not considered in Weaver and therefore provides no support to the CIA's argument that its disclaimer is constitutionally valid.

Alternatively, the CIA claims that even if its disclaimer does violate the First Amendment, it would still be constitutional in the context of the prepublication review process. Def's Memo at 25. Its' rationale is based on the fact that it retains the authority,

[27] The 1995 Regulations required the disclaimer for current employees. Koch Decl. Ex. "B", ¶ 2.i.(5). However, while Boening was still a CIA employee when he submitted the "M Complaint", he retired on August 13, 2005, months before the PRB even responded to his submission with its initial concerns. Therefore, pursuant to the regulations, Boening would be considered a former employee.

in general, to "protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." Snepp, 444 U.S. at 510. Thus, according to the CIA, a disclaimer is constitutional because ensuring that current *and former* employees who had "access to sensitive national security information do not publish personal documents appearing to be official Agency records" qualifies as a "substantial government interest." Def's Memo at 25 (emphasis added).

The CIA's argument constitutes a considerable expansion of what the Snepp Court considered to be a "substantial government interest." 444 U.S. at 511-12. Rather than even attempt to articulate an actual substantive reason for the necessity of national security to require the disclaimer, the CIA speculates that preventing publication of documents by former employees that *could* be mistaken as official CIA records is an equivalent "substantial government interest" in such a manner as preventing the unauthorized disclosure of classified information and even to the extent of ensuring that the publication of unclassified information does not compromise classified information or sources.[28] See Def's Memo at 25 ("Hence, a reader might easily mistake the Memorandum as having been created as part of official Agency business").[29]

[28] It should be noted that the CIA's argument also attempts to expand the quoted language from Snepp to include the activities of former employees, as opposed to just current employees. Def's Memo at 25.

[29] This argument is contrary to the CIA position expressed numerous times in FOIA litigation concerning the official "worth" of a former employee's writings. Courts have repeatedly held that merely because a former employee, even if previously a high level official, states a fact that this does not constitute an official acknowledgment of anything. See e.g. Afshar v. Department of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (information reported in book by former CIA official did not constitute official acknowledgment); Phillippi v. CIA, 655 F.2d 1325, 1330-31 (D.C. Cir. 1981)(same, regarding information reported in book by former Director of Central Intelligence). It

This argument is baseless. Beyond the legal interpretation that "confusion", to the degree it would even exist, is not tantamount to a determination that the information is classified, thereby rendering the CIA's authority over the format of a document authored by former employees to be null and void, just one simple fact illustrates the absurdity. The CIA approved the release of Boening's other memoranda that were styled in a similar if not identical format to that of the "M Complaint". See Exhibit "4".

III. BOENING POSSESSES STANDING TO CHALLENGE THE CIA'S FINAL DECISION THAT HE WAS NOT AN AUTHORIZED HOLDER UNDER ITS REGULATIONS

Pursuant to Section 1.9 of EO 12,958 (now Section 1.8 in EO 13,292), Boening sought to challenge the CIA's overclassification of any documents that might exist relating to **[one word deleted by CIA]** and certainly with respect to his "M Complaint".

The CIA argues that Boening lacks standing to bring his APA claim concerning his ability to raise a classification challenge because the "M Complaint" was drafted in his personal, as opposed to official, capacity, and therefore not within the purview of Section 1.9, but also because that the CIA did not arbitrarily determine that Boening was not an "authorized holder" of the allegedly classified information contained in the "M Complaint". Def's Memo at 19, 23.

A. Boening Can Demonstrate That He Has Incurred Substantive Harm Sufficient For Purposes Of Standing

It is undisputed that mere allegations of error, untethered from any substantive harm, are insufficient to satisfy Article III for purposes of standing. See Center for Law and Educ.v. Dep't of Educ., 396 F.3d 1152, 1160 (D.C. Cir. 2005)("Appellants have failed to

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seems somewhat disingenuous then for the CIA to ascribe additional credibility to Boening simply to support its own argument when, in fact, Boening's position with the CIA added no substantive value to his "M Complaint".

show that the alleged procedural violation caused actual injury to Appellants' concrete interests such that they satisfy Article III's requirements of standing."). The CIA argues that Boening has conceded that he drafted the "M Complaint" in his personal capacity by virtue of his statement that the document consisted of Boening's "personal assessment of the individual." Def's Memo at 20. Apparently, the CIA speculates that Boening is not challenging the CIA's determination that whistleblower complaints drafted for purposes of the ICWPA are not drafted in an "official capacity" for purposes of Section 1.9 of EO 12958. Id. If that is the case, argues CIA, then even if CIA committed a procedural error by erroneously determining that Boening was not an "authorized holder," Boening has still failed to allege any substantive harm and concrete injury following from the erroneous determination and therefore lacks standing. Id.

To clarify, all Boening has conceded is that he *personally* drafted the "M Complaint". See Exhibit "6" ("I do not agree with OIM's assertion that these documents are unofficial but I am willing to submit them to your branch on the chance that they will be approved for release"). However, he submitted the "M Complaint" in his capacity as an employee of the CIA pursuant to the Executive Order and to the OIG for a determination of whether it presented an "urgent concern" that should be reported to Congress under Section 17(d)(5) of the CIA Act, 50 U.S.C. § 403q(d)(5).

1. *The CIA's Determination That Boening Pursued His Classification Challenge In His Personal Capacity Violated The APA*

The CIA argues that a whistleblower complaint is, by its nature, "a personal communication between a federal employee, the IG, and/or Congress," and that because it represents the federal employee's personal views, it can not be construed as "facilitating agency business." Koch Decl. ¶27. However, this view too narrowly

interprets the important role that whistleblowers play in contributing to the functions of government. The submission of an ICWPA whistleblower complaint is more than a mere "personal communication" and should be held to constitute facilitation of CIA business in that the ICWPA was specifically designed for current government employees to raise issues of "urgent concern" to Congress.

As an initial matter, the ability to submit ICWPA whistleblower complaints is limited to a select group of individuals – federal employees – and necessarily and logically involves topics regarding which the federal employee would be uniquely qualified to view as a potential matter of "urgent concern" due to the employee's training and experience while employed at the particular agency. To attempt to label ICWPA whistleblower complaints as "personal documents" merely because they raise awareness of issues that could expose the CIA to embarrassing questions does not serve as a justification for the CIA to denigrate their importance.

As an additional matter, although the arguments contained in the "M Complaint" do not represent the CIA's official position on this particular topic that has no bearing on the question of whether the document or the views expressed therein facilitate official CIA business. The entire purpose of the ICWPA was to provide a secure and protected line of communication between federal employees and Congress concerning matters of "urgent concern." This protection was deemed to be necessary because of the concern that federal employees would otherwise not raise such concerns without some form of protection from retaliatory action. The notion that drawing the attention of the CIA's IG and Congress to such matters does not constitute facilitation of official CIA business merely

because it is the not official CIA *position* evidences a fundamental lack of understanding by the CIA of the purpose behind the ICWPA.

Section 1.9 of EO 12,958 provides additional support to the idea that ICWPA whistleblower complaints are both drafted by "authorized holders" of information in their official capacity and that the act of drafting and submitting such complaints constitutes a facilitation of official CIA business. It notes that "[a]uthorized 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 …")(emphasis added). This is not a legislatively adopted statute. It is not an agency regulation. This language emanates directly from an order of the President of United States. One can not find higher authority for the designation of official policy as to how federal employees, such as Boening, are to act under these types of circumstances.

2. The CIA's Determination Concerning The Capacity In Which Whistleblower Complaints Are Drafted Constitutes A Violation Of The APA's Notice-And-Comment Rulemaking Provisions

The ICWPA does not address, explicitly or implicitly, whether whistleblower complaints were to be considered as "personal" or "official" documents for purposes of classification challenges under Section 1.9 of EO 12958. See Public Law No: 105-272. Under the Chevron doctrine, when a statute is silent or ambiguous as to the intended construction of a particular piece of statutory language and does not explicitly leave a gap for an agency to fill, the reviewing court must decide whether the agency's interpretation of the statute was reasonable and permissible. See Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843 (1987); Nat'l Ass'n. of Clean Air Agencies v. EPA, 489 F.3d 1221, 1228 (D.C. Cir. 2007) . If the interpretation is reasonable and permissible, it must

be upheld unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. §706(2)(A); Nat'l Ass'n. of Clean Air Agencies, 489 F.3d at 1228; Wright, 2006 U.S. Dist. LEXIS at *32.

The CIA's interpretation is unreasonable, arbitrary and "not in accordance with the law" in that the CIA failed to abide by the APA's notice-and-comment rulemaking provisions. See 5 U.S.C. §552(a); 5 U.S.C. §553(b); Tripoli Rocketry Ass'n. v. United States ATF, 337 F. Supp. 2d 1, 12 (D.D.C. 2004)(noting that the "APA requires federal agencies to publish general notice of proposed rulemaking in the Federal Register and give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments"). When the CIA chose to interpret ICWPA whistleblower complaints as being drafted in a "personal capacity" and thereby removed the ability of authorized holders to challenge the classification status of the information in such complaints, the CIA in effect prescribed a "substantive rule" and subsequently was obligated to undertake notice-and-comment rulemaking. See Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). To date, to Boening's knowledge, the CIA has not undertaken any notice-and-comment rulemaking on this issue.

Although there are three exceptions to the notice-and-comment rulemaking requirement, namely if the agency action constitutes "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice," 5 U.S.C. § 553(b)(A), the only potentially applicable exception is the "interpretative rule"

exception.[30] "Interpretative rules" are limited to "administrative construction of a statutory provision on a question of law reviewable in the courts." Air Transport Association of America, Inc. v. FAA, 291 F.3d 49, 55 (D.D.C. 2002)(holding that distinction between substantive and interpretative rules is "whether the interpretation itself carries the force and effect of law" or "rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe"); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997)("If the statute or rule to be interpreted is itself very general, using terms like "equitable" or "fair," and the "interpretation" really provides all the guidance, then the latter will more likely be a substantive regulation"); Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974)(finding that agency's action was not mere interpretation of statute's meaning but rather consisted of "self-imposed controls over the manner and circumstances in which the agency will exercise its plenary power," and had effect of law and not reviewable except for arbitrariness).

[30] The CIA's determination can not constitute a "general statement of policy," as "[a]gency action can not be a general statement of policy if it substantially affects the rights of persons subject to agency regulations." Pickus, 507 F.2d at 1112; Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997)(finding that a policy statement "merely represents an agency position with respect to how it will treat – typically enforce – the governing legal norm"). The CIA's unilateral construction of the status of ICWPA-related whistleblower complaints for purposes of classification challenges under Section 1.9 of EO 12958 substantially affects Boening's rights, as well as those of every current and former CIA employee, to raise an important classification challenge. The CIA's determination also can not constitute a "rule of agency organization, practice, or procedure," as matters relating to "practice or procedure" have not been found to include any action which goes beyond formality. Pickus, 507 F.2d at 1113 (finding that matters relating to practice or procedure do "not include formalized criteria adopted by an agency to determine whether claims for relief are meritorious"). The CIA's construction clearly went beyond mere matters of formality dealing with the operation of the agency.

Unlike an "interpretative rule," a "substantive rule" modifies or adds to a legal norm based on the agency's own authority, and since that authority flows from a Congressional delegation to engage in supplementary lawmaking, the APA requires compliance with notice and comment. See Syncor, 127 F.3d at 95 (agency rulemaking does not purport to construe language of statute or regulation but rather consistent with invocation of agency's general rulemaking authority to extend regulatory reach does not constitute "interpretative rule"). The CIA's construction of the status of ICWPA whistleblower complaints constitutes a substantive regulation, as it "interprets" the CIA's obligations in a manner that carries the "force and effect of law" and does not merely provide guidance concerning a duty "fairly encompassed" within EO 12958, as amended, or the ICWPA, as neither addresses the notion of affording authority to agencies to determine what documents are "official" for purposes of classification challenges.

Even if the CIA's construction could be considered as an "interpretative rule," it would still be subject to notice-and-comment rulemaking as it would constitute a modification of an existing rule. Air Transport Association of American, Inc., 291 F.3d at 56 (highlighting Supreme Court noted APA rulemaking required if interpretation adopts new position inconsistent with existing regulations); Tripoli Rocketry Assn, 337 F. Supp. 2d at 13 (finding ATF's changing interpretation of applicability of exemption for sport model rockets in form of two letters sent to private company in 1994 and 2000 constituted modification of existing interpretation and imposed upon ATF obligation to undertake notice and comment rulemaking before adopting new interpretation). As the CIA's Motion and supporting declarations make quite clear, prior to the appointment of a new Executive Secretary of the ARP ("ES/ARP") in 2002, the CIA had considered

whistleblower complaints as "official" documents within the jurisdiction of the ARP to consider for purposes of classification challenges. See Def's Memo at 9-10; Koch. Decl. at ¶¶23-25. Even if Boening is apparently the first, and so far only, CIA employee to have raised this issue and received the contradicting interpretations, the CIA's initial decision to view the "M Complaint" as being drafted in Boening's "official capacity" and then reversing that decision constitutes a modification of an existing interpretation and necessitates that the CIA undertake notice and comment rulemaking.

Therefore, the CIA's failure to abide by the APA's notice-and-comment rulemaking requirements constituted conduct that was arbitrary and "not in accordance with the law," and thereby demonstrates that Boening has incurred substantive harm.

3. *Boening Can Demonstrate That There Is Still Meaningful Relief He Can Obtain From The Court*

Assuming that Boening can demonstrate a concrete injury, the CIA argues that his injury is not redressable because there is no meaningful relief Boening could obtain from this Court. Def's Memo at 21. The proper remedy, asserts the CIA, would be to remand the matter to the CIA so that the ARP could adjudicate the merits of the classification challenge. Id.; Lynom v. Widnall, 222 F. Supp. 2d 1, 5 (D.D.C. 2002). Given that both the ARP and the Executive Director of the ISCAP, the entity to which ARP determinations may be appealed, has already concluded that the "M Complaint" was properly classified, any remand, according to the CIA, would be a "hollow, meaningless exercise." Def's Memo at 21-22; NLRB v. Wynam-Gordon Co., 394 U.S. 759, 766 (1969).

As an initial factual matter, the CIA never completed the process it was required to follow. As the CIA itself explains in considerable detail, on July 2, 2001, Boening

submitted the "M Complaint" to the ARP for a classification challenge. Def's Memo at 9. The ARP referred the Memorandum to the ACRMP, which, on July 25, 2001, agreed that the paragraphs marked classified (save one) were properly labeled as such. Id. The ACRMP met again on September 4, 2001, to consider specific issues identified by Boening in his July 2, 2001 letter and reaffirmed its initial determination that the "M Complaint" was properly classified. Id. at 9-10. On September 12, 2001, the ACRMP wrote to the Chair of the ARP, setting forth its decision, and Boening promptly appealed the ACRMP's decision to the ARP. Id. Although the ARP scheduled a formal appeal, it was at this point that the ES/ARP and the CIA made the decision that whistleblower complaints drafted pursuant to the ICWPA were not official CIA documents and therefore not within the jurisdiction of the ARP. Id. Because of the CIA's arbitrary decision, Boening was deprived of the administrative appeal to the ARP.

In addition, while the statements by the Executive Secretary of the ISCAP, ISOO Director William Leonard ("Leonard"), are informative[31] they are in no way authoritative or conclusive, as they do not represent a formal decision by the ISCAP. The ISCAP does not consist merely of the Executive Secretary, but rather consists of senior-level representatives from the Departments of State, Defense, and Justice, as well as the CIA, the National Archives, and the Assistant to the President for National Security Affairs. Exec. Order 12,958, as amended, § 5.3(a)(1); 32 C.F.R. § 2001.83(A)(defining the

[31] It should be noted that Mr. Leonard's letter focused solely on the issue of whether Boening was an "authorized holder" and did not address the CIA's interpretation of whistleblower complaints drafted pursuant to the ICWPA as they pertain to classification challenges. Def's Memo at 21. Furthermore, Mr. Leonard's interpretation of "authorized holder" incorrectly relied upon the ISOO definition and not the applicable CIA definition, which differed significantly in scope. Compare 32 C.F.R. § 1907.2 (CIA reg) to 32 C.F.R. § 2001.14 (ISOO reg).

membership of the ISCAP as the appointments made under Section 5.3(a) of Executive Order 12958). The regulations and the Executive Order do not, at any point, accord authority to the Executive Secretary to make a conclusive and authoritative determination outside of the established framework. Id. at § 5.3(b); 32 C.F.R. § 2001.83(E)-(F) (stipulating that the Executive Secretary must notify the senior-level representatives of the relevant agencies of the existence of the appeal, present those representatives with an appeal file, and that the ISCAP as a whole must vote to either affirm, reverse or remand the matter).

As a supplemental matter, there has been no evidence provided to demonstrate what information was provided to Mr. Leonard by the CIA prior to his determination. 32 C.F.R. § 2001.83(E)(stating that the appeal file will include "*all records pertaining to the appeal*")(emphasis added).

4. *Boening Can Demonstrate That The CIA Arbitrarily And Erroneously Determined That He Was Not An "Authorized Holder" Of The Information In The Memorandum*

The CIA counters that even if it is determined that Boening can demonstrate a concrete injury and that the injury is redressable, thereby satisfying the requirements for standing, the Court should still dismiss his claim under Rule 12(b)(6), or in the alternative award summary judgment to the CIA, because the CIA did not err in determining that Boening is not an "authorized holder" of the classified information in the "M Complaint". Def's Memo at 22.

The CIA cites to three different sources for definitions of what constitutes an "authorized holder" and what is required to permit "access to specific classified information." Id. The CIA's regulations define an "authorized holder" as one who "holds

a security clearance from or has been authorized by the Central Intelligence Agency to possess and use on official business classified information." Id. citing 32 C.F.R. § 1907.02(b).[32] ISOO's regulations contradictorily define an "authorized holder" as "any individual, including an individual external to the agency, who has been granted access to specific classified information." Id., citing 32 C.F.R. § 2001.14. Finally, the CIA points to EO 12,958, as amended, wherein it sets forth three prerequisites that must be met before a person may *access* specific classified information. Def's Memo at 22.[33]

The CIA argues that because there was never any need-to-know determination awarding Boening access to the specific "classified" information contained in the "M Complaint" then Boening does not meet the definition of an "authorized holder". Id. at 23.[34] However, this argument is flawed for the simple reason that it relies on the ISOO regulation's narrow definition of "authorized holder" rather than the CIA's own more expansive and applicable definition.

While per the ISOO regulation an individual is apparently required to have had access to the specific information that is being challenged, the CIA's regulation is simply not as narrow. A plain reason of the provision reflects that an "authorized holder" need only

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[32] A "challenge" under this provision is defined as "a request in the individual's official, not personal, capacity and in furtherance of the interests of the United States; 32 C.F.R. § 1907.02(d). The CIA fails to distinguish that a document can be written in an individual's "personal" capacity, i.e., away from the office and on his own time, but still submitted in his "official" capacity.

[33] "A person may have access to classified information provided that: (1) a favorable determination of eligibility for access has been made by an agency head or the agency's head designee; (2) the person has signed an approved nondisclosure agreement; and (3) the person has a need-to-know the information." EO 12,958 § 4.1(a).

[34] Ironically, the CIA's decision to classify information within the "M Complaint" but then later grant Boening access to the unredacted document during internal proceedings constitutes the issuance of a "need-to-know" determination.

possess a valid security clearance or otherwise be authorized by the CIA to "possess and use" classified information in general. 32 C.F.R. § 1907.01(b). Nowhere in the CIA's regulation does it indicate that the individual must have had access to the specific classified information that is being challenged. Given that Boening, as a CIA employee, indisputably possessed a valid security clearance and was authorized by the CIA to "possess and use" classified information, he met the parameters of the CIA's definition.[35]

Therefore, the CIA's determination that Boening lacked "authorized holder" status was indeed arbitrary and erroneous and is without merit.

IV. BOENING'S APA CLAIM CONCERNING THE CIA'S FAILURE TO ADJUDICATE THE PREPUBLICATION REQUEST WITHIN 30 DAYS IS NOT MOOT AND THE EXCESSIVE UNDUE DELAY IS UNCONSTITUTIONAL

The CIA argues that this Court lacks jurisdiction over Boening's APA claim concerning the CIA's failure to adjudicate Boening's prepublication request within 30 days because it is moot. Def's Memo at 16. Under Article III of the Constitution, federal courts are courts of limited jurisdiction that can only decide "'actual, ongoing controversies.'" Clarke v. United States, 915 F.2d 699, 700-01 (D.C. Cir. 1990)(en banc), quoting Honig v. Doe, 484 U.S. 305, 317 (1988). Even if an action poses a live controversy when filed, the mootness doctrine requires "a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" Clarke, 915 F.2d at 701, quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990). The test for mootness comprises two requirements: (1) there is "no reasonable expectation … that the alleged violation will recur," and (2) "interim relief or

[35] See *supra* 43 fn. 34.

events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 632 (1979).

This Court recently ruled on a similar argument set forth in Stillman and noted that the plaintiff's "APA claim is moot because there is no further relief that this Court can provide as to that claim. Stillman has already received the final classification decision that he sought from the defendant agencies. Accordingly, this Court lacks subject matter jurisdiction over Stillman's APA claim and dismisses it as moot under Rule 12(b)(1) of the Federal Rules of Civil Procedure." Stillman, 2007 U.S. Dist. LEXIS 24206, *9-10.

A. Boening's Case Demonstrates The Circumstances Surrounding The CIA's Prepublication Review Process Is Capable Of Repetition Yet Evading Review

However, Boening's case presents a slightly different set of circumstances not previously addressed in cases such as Stillman. For one thing, as discussed above, Boening's submission has not been properly reviewed through the ARP process. Additionally, Boening continues to submit writings to the CIA PRB for classification review. Boening Decl. at ¶27. Thus, this is the type of case where the injury is "capable of repetition yet evading review" and the CIA has imposed unreasonable delays in its adjudication of the prepublication request.

This exception waives the mootness doctrine when "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" and "there was a reasonable expectation that the same complaining party would be subjected to the same action again." Alliance for Democracy v. FEC, 335 F. Supp. 2d 39, 44 (D.D.C. 2004). See also Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc., 528 U.S. 167, 174 (2000)("[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case."); Boag v. MacDougall, 454 U.S. 364, 364 (1982)(transfer to

another prison did not moot prisoner's damages claim arising from his allegedly being placed in solitary confinement without notice or hearing); Jersey Cent. Power & Light Co. v. New Jersey, 772 F.2d 35, 41 (3d Cir. 1985)("The availability of damages or other monetary relief almost always avoids mootness….").

The CIA's contentions to the contrary, this case is more than appropriate to invoke the "capable of repetition yet evading review" exception. As the CIA chose not to address the first prong of the test, it must be considered waived. In any event, it would seem reasonable to presume that a 30 day period constitutes too short a period to gain meaningful judicial relief. See e.g., Burlington Northern Railroad Co. v. Surface Transportation Bd., 75 F.3d 685, 690 (D.C. Cir. 1996)(noting that agency conduct of less than two years duration will ordinarily evade review). And as stated, Boening continues to submit documents for review. Boening Decl. at ¶27.

In this case, the CIA has offered no evidence to establish a "reasonable expectation" that it will not employ the same tactics in the future. Indeed, all past evidence indicates that the PRB's excessive delays and reversals constitute a routine pattern and practice. See Zaid Decl. at ¶6. Certainly, the CIA's continuing refusal to grant permission to publish the other portions of the "M Complaint" – which it even admits are in the public domain – strongly indicates that the same violation may recur as it is ongoing now.

B. The Repeated And Continuing Excessive Undue Delays Experienced By The CIA's PRB Constitutes Unconstitutional Suppression Of Protected Speech

Alternatively, the CIA further argues that if the claim is not found to be moot the Court should nonetheless dismiss it pursuant to Rule 12(b)(6), or award summary judgment, because "there is no regulation requiring the CIA to adjudicate all prepublication requests within 30 days, and because the CIA did not unreasonably delay

action on [Boening's] submission." Def's Memo at 18. Boening's secrecy agreement states that the CIA will respond to submissions within a "reasonable time". Koch Decl., Ex. "A". What constitutes a "reasonable time" is undefined, but whatever it might be the CIA violated that period in the instant matter by taking 16 months to render a decision. Furthermore, while it is true that the CIA's regulations do not explicitly require that it abide by a thirty day deadline, this is not the policy that has been previously adopted by other courts adjudicating prepublication review challenges or, more importantly, what the PRB itself broadcasts.

Moreover, the CIA's argument that it did not unreasonably delay the processing of Boening's submission is factually flawed. The CIA seeks to muddy the waters by pointing to the "complex" process that ensued prior to Boening's submission of the Memorandum to the PRB; namely, his submission to the ARP for a classification challenge and the debate over whether Boening was an "authorized holder". Def's Memo at 19. The CIA also notes that following Boening's submission of the "M Complaint" negotiations ensued with the PRB, and that only after those negotiations failed did the PRB issue its final decision. Id.

As the 30 day deadline applies only from the date upon which Boening submitted the Memorandum to the PRB, the CIA's reference to Boening's classification challenge and submission to the ARP is completely irrelevant. Furthermore, the CIA's depiction of the delay in beginning the commencement of negotiations distorts the facts. By memorandum dated November 22, 2004, Boening submitted his "M Complaint" to the PRB for official release and approval. See Koch Decl. ¶ 33. By email dated November 25, 2005, a full year after his initial submission, Boening sought a status update from the PRB. Id. ¶ 34.

By letter dated January 5, 2006, *nearly 16 months* after Boening submitted the "M Complaint" to the PRB, the PRB Chairman responded and notified Boening that the PRB "*requires* that you rewrite you 'M Documents' outside of a government memo format stating in your own words what you desire to communicate" and that Boening include "specific, open source citations." Id.(emphasis added).

Whether or not this constitutes "negotiations" is questionable, but what remains relevant is that nearly 16 months passed without a word from the PRB concerning Boening's submission before "negotiations" commenced. Even conceding that the 30 day deadline is an "aspirational" goal, for the CIA to argue that 16 months does not constitute an unreasonable delay defies logic.

The Fourth Circuit in Marchetti held that the prepublication review process was constitutional *provided* the agency acted on, and responded to, the request quickly.

> Because we are dealing with a prior restrain upon speech, we think the CIA must act promptly to approve or disapprove any material which may be submitted to it by Marchetti. Undue delay would impair the reasonableness of the restraint, and that reasonableness is to be maintained if the restraint is to be enforced. *We should think that, in all events, the maximum period for responding after the submission of material for approval should not exceed thirty days.*

Marchetti, 466 F.2d at 1317 (emphasis added).

In fact, the PRB routinely leads submitters to believe that the 30-day deadline is, in fact, a legally binding deadline. In 2003, then PRB Chairman Paul Noel-Chrétien distributed copies of unclassified briefing slides that he used to explain the PRB process to CIA employees. See Exhibit "7". These slides very clearly acknowledge the existence of a firm 30-day deadline (including referring to court authorization). Id. Although one slide references that the PRB is increasingly finding it "difficult to meet" the 30-day deadline, nowhere is it mentioned that the CIA can take longer than the 30-days, request

an extension of time or that this "deadline" is nothing more than "administrative guidance".

Moreover, the CIA's own unclassified journal, which is publicly available on its website, unequivocally asserts that the CIA faces a 30-day deadline for compliance in reviewing a submitted publication. In an article written by then PRB Chairman John Hollister Hedley, it states:

> The courts have held that this signed agreement is a lifetime enforceable contract. The courts also have noted that the secrecy agreement is a prior restraint of First Amendment freedom. But they ruled it a legitimate restraint, provided it is limited to the deletion of classified information and so long as a review of a proposed publication is conducted and a response given to its author within 30 days.[36]

In fact, although the D.C. Circuit does note that a "time lag" does not amount to a violation of law *per se*, that conclusion pertained to whether an agency may be constitutionally required to adopt and follow a specific "pre-set time limit" for prepublication review. Weaver, 87 F.3d at 1443. Boening, however, challenges the excessive delay perpetrated by the CIA and the fact that this conduct repeats itself time and time again. See Zaid Decl. at ¶6. The Supreme Court has actually recognized that a constitutional violation may occur when the review period is unreasonable. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 228 (1990)(agency must issue "license for a First Amendment-protected business … within a reasonable period of time, *because undue delay results in the unconstitutional suppression of protected speech*.")(emphasis added); see also Weaver, 87 F.3d at 1441 ("The primary burden on employees from the

[36] The article can be retrieved online at *https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/spring98/Secret.html*. The footnote to this sentence reads "[t]The 30-day time constraint was set forth by the circuit court decision in US v. Marchetti, 466 F2d 1309, 1317 (4th Cir. 1972). It was reiterated in US v. Snepp, 595 F2d. 934 (4th Cir. 1979), and it has been adopted as the standard by the Department of Justice."

regulation is simply the delay associated with submitting to the review process prior to publication. If the prior review were extensive, of course, it might delay constitutionally protected speech to a time when its only relevance was to historians.").

For these reasons, the CIA's argument that Boening's APA claim is moot, or that it should be dismissed pursuant to Rule 12(b)(6), or alternatively be awarded summary judgment, is without merit and should be denied.

V. BOENING AND HIS CLEARED COUNSEL ARE ENTITLED TO SEE THE CLASSIFIED MATERIALS AT ISSUE IN THIS CASE

On October 15, 2007, Boening and his cleared counsel requested access to the "M Complaint" in order to substantively respond to the CIA's Motion. Exhibit "8". This request was denied, despite the fact that Boening authored the document and counsel is privy to all the "classified" information therein. Exhibit "9". This denial hampered Boening's ability to fully respond to the CIA's Motion.

Additionally, in order to allow "criticism and illumination by [the] party with the actual interest in forcing disclosure," McGehee, 719 F.2d at 1148-49, Boening and his counsel should be permitted to view the CIA's "classified" declaration and comment upon it.

Boening has contemporaneously filed a Motion to Compel Access to Classified Information for Plaintiff and His Cleared Counsel and incorporates herein the facts and arguments expressed therein.

CONCLUSION

Based on the foregoing, the defendants' Motion should be denied and summary judgment should be granted to the plaintiff instead. Alternatively, both motions should be denied without prejudice and the plaintiff should be permitted to conduct discovery.

Date: November 19, 2007

Respectfully submitted,

/s/

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