UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY SHAFFER	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	Civil Action No: 10-2119 (RMC)
DEFENSE INTELLIGENCE AGENCY et al.	*	
	*	
	*	
Defendants.	*	

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JOINT CASE MANAGEMENT REPORT

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, as amended, and Local Rule 16, as amended, the parties have conferred and submit the following Joint Case Management Report. The respective positions of the parties are set forth under each topic listed in Local Rule 16.3 as to which the parties conferred or exchanged positions.

(1) Whether the case is likely to be disposed of by dispositive motion; and whether, if a dispositive motion has already been filed, the parties should recommend to the court that discovery or other matters should await a decision on the motion.

The parties agree that the case will ultimately be fully resolved by dispositive motion.

Plaintiff's Position:

There is no dispute that the plaintiff possesses a First Amendment right to publish unclassified information and that the defendants are not permitted to legally infringe upon that right. While the plaintiff does agree that this case will ultimately be determined through the summary judgment process, it is premature for the defendants to file such a motion (or at least for the plaintiff to file his opposition/cross-motion) until certain procedural issues are resolved given that the determination will significantly impact the manner in which summary judgment will proceed.

First, the D.C. Circuit has made it clear that a plaintiff in a pre-publication review case is entitled to submit declarations to challenge the Government's classification determinations. Stillman v. CIA et al., 319 F.3d 546, 548-49 (D.C. Cir. 2003). In order to do so, especially to provide pinpoint citations and specifically challenge the alleged classified portions of the redacted manuscript, the plaintiff will need access to an unredacted copy of his own manuscript so he can detail his arguments to the Court. The Government is in possession of the document and has previously made it available, as recently as October 2012, to the plaintiff during the administrative process. To withhold it during litigation "smacks of retaliation for the assertion of First Amendment rights." Stillman v. Dep't of Defense et al., 209 F.2d 185, 224 fn. 26 (D.D.C. 2002).

Of course, because the defendants allege the redacted portions are classified the plaintiff can not address the specific text in an unclassified document, nor can he draft such a declaration on an unsecure computer system. Thus, he will need access to a secure U.S. Government computer system to type his declaration, the final version of which will necessarily be submitted to the Court *in camera* (and initially without his counsel's review) and under seal (until such time a classification review is conducted and a redacted version can be filed on the public record) through the security process set in place by the U.S. Department of Justice.

Additionally, prior to any opposition to summary judgment being submitted by the plaintiff it is necessary to seek specific relief from the Court to permit his counsel, who holds a Secret security clearance (as well as any experts assisting the plaintiff), to utilize and analyze publicly available information relating to the manuscript separate and apart from the plaintiff's *in camera* submission without fear of retaliation concerning his own security clearance. This is a similar issue to the dispute that was recently before the Court in the Guantanamo Bay *habeas* cases with

respect to Wikileak document disclosures. Otherwise plaintiff's counsel (and any expert witnesses) is being asked to unfairly assume a high-risk of retaliation by the defendants for allegedly committing security violations, as occurred in De Sousa v. Dep't of State et al., Civil Action No. 09-00896 (D.D.C.)(BAH).

Defendants' Position:

There is no dispute that the plaintiff does not possess a First Amendment right to publish properly classified information, and that this case should be resolved on cross-motions for summary judgment. Consistent with prior prepublication review cases and the Administrative Procedure Act, this case should proceed with the defendants filing a motion for summary judgment to demonstrate that, on the basis of the record compiled before the agency, any and all passages still in dispute are properly classified.[1]

To the extent the plaintiff seeks a court order requiring the Government to provide him with classified information (in the form of an unredacted version of the manuscript) or a secure Government system, so that he may use classified information to challenge the Government's classification decisions, such relief would be unprecedented and wholly inappropriate. The parties have previously submitted supplemental briefs on these issues. *See, e.g.* Dkt. Nos. 26, 28, 29. The defendants submit that, rather than decide these issues on the basis of views provided in this status report, the Court should permit further briefing on the schedule proposed below by the defendants.

[1] On January 18, 2013, the Department of Defense completed the administrative security review of the book, pursuant to a formal request submitted by the plaintiff. The final decision, including a determination as to the classification of each passage in the book, was sent to the plaintiff, and is attached as Exhibit 1.

To be clear, though, it is the defendants' view that the plaintiff's request is wholly without merit. At bottom, the plaintiff's argument is that he must have a way to provide evidence that the redacted passages are not classified because they are already in the public domain. The plaintiff has previously recognized that it is his obligation to "'demonstrate[,] at an appropriate time during prepublication review, that such information is in the public domain.'" *See* Pl.'s Br., Dkt. 26, at 16-17 (quoting *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983)). He has been given that opportunity in the administrative security review process, and the defendant's summary judgment motion will include the submissions that the plaintiff has made to the Department of Defense in support of his argument that the information at issue has been officially disclosed by the Government. Any motion by the plaintiff to compel access to classified information or a secure Government system is thus inappropriate and unnecessary, as it introduces unnecessary complexity to this case . At the very least, such a motion would be premature until the defendants have filed their dispositive motion and provided the full record to the Court for its review.

To the extent that the plaintiff believes he must access a secure government computer so that he may provide classified information to the Court, he misunderstands how prepublication review cases should proceed. There is no need to establish procedures by which the plaintiff or his "experts" may submit their opinions regarding the classified information because any declaration or submission disputing the substance of the Government's classification experts' proper determinations is due no weight. Courts have repeatedly, and necessarily, rejected the views of plaintiffs on the question of whether a particular disclosure may harm national security. *See, e.g.*, *Snepp*, 444 U.S. at 512 ("When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA – with its broader

understanding . . . could have identified as harmful."); *ACLU v. U.S. Dep't of Justice*, 548 F. Supp. 219, 223 (D.D.C. 1982) ("Nor does the Court perceive any way in which adversary proceedings in connection with plaintiff's participation in the *in camera* review could assist [the court], even if adequate security precautions could be arranged."). Instead, the only relevant information that the plaintiff can provide is citations to specific instances in which the Government has officially released the information at issue. Because he has already had that opportunity, his collateral claims are without merit.

(2) The date by which any other parties shall be joined or the pleadings amended, and whether some or all the factual and legal issues can be agreed upon or narrowed.

The parties ask that any joinder of other parties and amendments to the pleadings be required by March 1, 2013.

(3) Whether the case should be assigned to a magistrate judge for all purposes, including trial.

The parties oppose assignment of this case to a magistrate judge for any or all purposes.

(4) Whether there is a realistic possibility of settling the case.

The defendants have recently completed the administrative security review of the book, pursuant to a formal request submitted by the plaintiff in August 2012. A final decision was sent to the plaintiff on January 18, 2013, and is attached as Exhibit 1. At present the plaintiff indicates that there is no realistic possibility of settlement.

(5) Whether the case could benefit from the Court's alternative dispute resolution (ADR) procedures (or some other form or ADR) or Early Neutral Evaluation.

The parties agree that this case is not suitable for ADR procedures or Early Neutral Evaluation.

(6) Whether the case can be resolved by summary judgment or motion to dismiss; dates for filing dispositive motions and/or cross-motions, oppositions, and replies; and proposed dates for a decision on the motions.

Plaintiff's Position:

While the plaintiff agrees that ultimately summary judgment will resolve this dispute, it is premature for the defendant to file such a motion (or at least for the plaintiff to file his opposition/cross-motion) until certain procedural issues are addressed and decided by the Court. Thus, the plaintiff suggests the following proposed briefing schedule for the Court to adopt:

Plaintiff's motion on procedural issues	February 25, 2013
Defendants' opposition	March 11, 2013
Plaintiff's reply	March 22, 2013
Defendants' motion for summary judgment:	March 1, 2013
Plaintiff's opposition and cross-motion:	30 days following Court decision on procedural motion above
Defendants' opposition and reply:	21 days following filing of plaintiff's opposition/cross-motion
Plaintiff's reply:	14 days following defendants' opposition/reply

The dates for the opposition and replies may, but will not necessarily, be impacted by the discovery period suggested below.

Defendants' Position:

As outlined above, this case should be decided on cross-motions for summary judgment. The defendants propose that the parties confer to determine what, if any, issues will require resolution by the Court, and that the Court adopt the following schedule:

Defendants' motion for summary judgment:	March 1, 2013.
Plaintiff's opposition and cross-motion:	April 5, 2013.
Defendants' opposition and reply:	April 26, 2013.
Plaintiff's reply:	May 10, 2013.

If, after the defendants' motion and the record compiled during the administrative security review process have been filed with the Court, the plaintiff believes that he is entitled to access to classified information and a secure Government computer, he should be required to file a motion seeking such relief by March 15, 2013. To require briefing on procedural matters before the disputed issues have been identified and the complete record presented to the Court would be premature, as it would require the Court to decide issues (including, in the plaintiff's view, constitutional matters) that may not ultimately be necessary to the resolution of this case.

(7) Whether the parties should stipulate to dispense with the initial disclosures required by Rule 26(a)(1), F.R.Civ.P., and if not, what if any changes should be made in the scope, form or timing of those disclosures.

The parties agree that they should dispense with the initial disclosures required by Rule 26(a)(1) of the Federal Rules of Civil Procedure.

(8) ***The anticipated extent of discovery, how long discovery should take, what limits should be placed on discovery; whether a protective order is appropriate; and a date for the completion of all discovery, including answers to interrogatories, document production, requests for admissions, and depositions.***

<u>Plaintiff's Position</u>:

The plaintiff believes that limited discovery is necessary with respect to verifying that certain information the defendants now assert to be classified was officially released and/or provided to the plaintiff as unclassified and free of any dissemination restrictions. The submission of discovery, which would be written interrogatories and document production requests, with the possibility of one or two depositions, would primarily target defendant Defense Intelligence Agency ("DIA"), the plaintiff's previous employer.

For example, the defendants claim that the plaintiff's military orders to Afghanistan and his Bronze Star award narrative are classified. Both documents, however, were specifically released as unclassified to the plaintiff by defendant DIA in the course of his employment in 2003 – 2004, and have never been reclassified pursuant to the applicable Executive Order. Discovery would reveal the procedural classification history, or lack thereof, of the documents.

Additionally, the defendants have asserted that congressional testimony of the plaintiff that was submitted for classification review in 2005 and 2006 does not constitute an official release. Again, discovery would reveal details of the internal classification review process to factually demonstrate the information was reviewed and officially approved for release, notwithstanding whether the testimony was delivered or not.

Finally, discovery should be permitted to allow the plaintiff to obtain evidence from the defendants to reveal to the Court the deliberate, knowing and punitive unlawful classification determinations imposed on the plaintiff, particularly by DIA officials, in 2010 during the initial review of his manuscript that violated his First Amendment rights. The recent 2012 classification review, during which officials from the defendants professionally cooperated, revealed that much of what was asserted as classified in 2010 was not, in fact, properly classified and that DIA

officials at the time deliberately failed to cooperate with plaintiff in order to minimize the amount of text that could be published.

This is the first time the plaintiff has raised the notion of discovery in this case, a fact that should be viewed as irrelevant. In any event, (1) this is the first time the parties have had to submit a Rule 16 Report and (2) the defendant has released a new determination on January 18, 2013, that is now the subject of litigation. Discovery addresses the factual issues set forth in that letter.

The defendants attack plaintiff's request for discovery by asserting it is not permissible in prepublication review cases. This is simply untrue. In Stillman v. Dep't of Defense et al., 209 F.2d 185, 224 fn. 26 (D.D.C. 2002)(EGS), which was litigated by the plaintiff's primary attorney, discovery (in the form of interrogatories and document production requests, depositions were not sought) was permitted on the issue of determining how the defendants interpreted "need to know" decisions in granting access to classified information.

The plaintiff is prepared to submit his written discovery within fourteen (14) days of the issuance of a Scheduling Order, and suggests the defendants be permitted the customary thirty (30) day response period. Any depositions sought by the plaintiff would be noticed within fourteen (14) days of receipt of the defendants' response and all discovery should be completed within seventy-day (75) days. No protective order should be necessary.

Defendants' Position:

Discovery in this matter is inappropriate and unnecessary. The plaintiff, for the first time in this long-running litigation, seeks comprehensive discovery into the classification of Government information. (Notably, he did not seek discovery, nor did he file a Rule 56(d)

motion, after the defendants moved for summary judgment in May 2011 on the grounds that the information at issue was properly classified.)

Settled case law demonstrates that discovery into the Government's classification decisions – or any discovery at all – is inappropriate. Because the plaintiff's complaint is brought under the Administrative Procedure Act, 5 U.S.C. § 702, *see* Am. Compl. ¶ 1, "[t]he focal point for judicial review" of the agencies' action "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camps v. Pitts*, 411 U.S. 138 (1973) (per curiam). *See also Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (challengers to agency action are not ordinarily entitled to augment the agency's record with discovery).

The defendants know of no legal authority – and the plaintiff certainly cites none – that would permit comprehensive discovery into the Government's classification decisions. While prepublication review cases are limited in number, courts considering requests for discovery in the similar context of FOIA cases have repeatedly found that discovery into the Government's classification decisions is improper. Indeed, discovery is allowed only in exceptional circumstances in FOIA cases, and even then it is generally limited to the scope of the agency's search for responsive documents. While the plaintiff seeks to go much further, by seeking discovery into the "procedural classification history" of the information, discovery is inappropriate when the plaintiff seeks to inquire into the Government's rationale for withholding information, *Murphy v. FBI*, 490 F. Supp. 1134, 1136 (D.D.C. 1980). Moreover, the "classification history" of various documents is irrelevant to the present dispute. The Government reviewed the plaintiff's manuscript and found that it contained passages with classified information. The defendants will provide sworn declarations attesting to the present

classification of that information. Discovery into the classification process would not in any way advance the claims in the plaintiff's complaint.

Indeed, the plaintiff points to no case – prepublication review, FOIA, or otherwise – permitting such discovery. To the contrary, such discovery into the basis for classification decisions is inconsistent with the courts' longstanding recognition of the Executive Branch's unique expertise concerning national security information. So long as the declarations are submitted in good faith and contain "reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification," the judiciary "cannot second-guess [the Government's] judgments" with respect to classification decisions. *McGehee*, 718 F.2d at 1148-49. Courts must give "substantial weight" to government affidavits "concerning the details of the classified status" of the information in dispute, *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982), and the D.C. Circuit has emphatically "reject[ed] any attempt to artificially limit the long-recognized deference to the executive on national security issues," *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) (reviewing cases).

The impropriety of discovery is further demonstrated by the nature of the Court's review in a prepublication review case. The only factual matters the plaintiff is able to shed light on are his arguments that the information has already been officially released by the Government. The plaintiff suggests that he would seek discovery into the classification status of his Bronze Star Medal narrative and certain matters concerning a Congressional inquiry, but the only relevant information he can provide the Court on these issues is open source information demonstrating that the information has already been officially disclosed by the Government. It is the plaintiff, not the Government, who has the onus of producing public source materials containing the

officially released information. *Boening v. CIA*, 579 F. Supp. 2d 166, 170-72 (D.D.C. 2008) ("Plaintiff's discovery request attempts to shift the burden on to the CIA to prove that Plaintiff did not exclusively derive his information from publicly available sources. The Court has already held that the initial burden is on Plaintiff to provide adequate citations for the overt material upon which he claims to have relied and he has failed to meet it."). Because the plaintiff has already provided the defendants with the open source materials that he believes demonstrate official public disclosures, and the defendants will include those materials in the record submitted to the Court, discovery can serve no purpose because there is no basis to supplement the record.[2]

The plaintiff is left with his assertion that the Government's classification decisions were made in bad faith. It is clear that unsubstantiated assertions of bad faith do not warrant discovery. *Military Audit Project v. Casey*, 656 F.2d 724, 751 (D.C. Cir. 1981). In support of his claim, the plaintiff contends that certain information deemed classified by the Government in 2010 has recently been cleared for release. But that fails to show that the information "was not, in fact, properly classified" in 2010, as he says. Instead, the Government determined – and asserted in sworn declarations filed in this case in May 2011 – that the information was properly classified. It is not at all unusual that, as circumstances change, the classification status of information changes, and it was appropriate for the Government to conduct a new assessment of the information when the plaintiff formally requested a security review in August 2012. The

[2] The plaintiff's reliance on the district court's opinion in *Stillman* as a basis for discovery is misplaced. That decision was reversed by the D.C. Circuit, which overturned the district court's incorrect ruling requiring the government to provide classified information upon the plaintiff's request. *See Stillman v. Dep't of Defense*, 209 F. Supp. 2d 185 (D.D.C.), *rev'd sub nom. Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003).

plaintiff's unsubstantiated assertions of bad faith fail to provide a basis for discovery in this matter.

(9) Whether the requirement of exchange of expert witness reports and information pursuant to Rule 26(a)(2), F.R.Civ.P., should be modified, and whether and when depositions of experts should occur.

Plaintiff's Position:

Plaintiff may use an expert witness with respect to analyzing the appropriateness of the defendants' classification decisions through review of the publicly available versions of the plaintiff's manuscript. See In re United States Dep't of Defense, 848 F.2d 232 (D.C. Cir. 1988)(District Court within its discretion to appoint independent Special Master to review Government classification determinations); Colby et al. v. Halperin et al., 656 F.2d 70, 72 (4th Cir. 1981)(expert witness provided access to classified portions in preparation of trial testimony).

Defendants' Position:

The defendants believe that the use of expert witnesses, including the use described by the plaintiff above, is wholly inappropriate in this case.

(10) In class actions, appropriate procedures for dealing with Rule 23.

The parties agree that the rule regarding class actions does not apply to this case.

(11) Whether the trial and/or discovery should be bifurcated or managed in phases, and a specific proposal for such bifurcation.

The parties believe that this case can be fully resolved on dispositive motions and that no bifurcation will be necessary.

(12) The date for the pretrial conference (understanding that a trial will take place 30 to 60 days thereafter).

The parties agree that the setting of firm pre-trial dates is premature until the Court has ruled on any dispositive motions.

(13) Whether the Court should set a firm trial date at the first scheduling conference or should provide that a trial date will be set the pretrial conference from 30 to 60 days after that conference.

The parties agree that the setting of a firm trial date is premature until the Court has ruled on any dispositive motions.

DATE: January 23, 2013

Respectfully Submitted,

/s/ Mark S. Zaid (by permission)
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