IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Defendants Department of Defense, Defense Intelligence Agency, and Central Intelligence Agency, through undersigned counsel, respectfully move for summary judgment on Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h). In support of this motion, Defendants refer the Court to the accompanying memorandum, statement of material facts not in dispute, and the supporting declarations and exhibits.

Dated: April 26, 2013.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ Scott Risner
SCOTT RISNER (MI Bar No. P70762)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 514-2395
Fax: (202) 616-8470
Email: scott.risner@usdoj.gov
Attorneys for Defendants

Table of Contents

Table of Authorities

Cases **Page(s)**

Other Materials **Page(s)**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Introduction

"The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam); *see also Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation."). To vindicate that interest, the Department of Defense required Plaintiff Anthony Shaffer, as a condition of employment, to sign various secrecy agreements to protect classified information. Plaintiff voluntarily and knowingly signed several such agreements, on numerous occasions, that prohibit him from disclosing classified information and require him to submit proposed writings for prepublication review. *See* Am. Compl. ¶ 3; Ex. A, Pl.'s Secrecy Agreements. Yet Plaintiff now asks this Court to find that the Department of Defense (DoD) (including its component, the Defense Intelligence Agency (DIA)) and the Central Intelligence Agency (CIA) violated his First Amendment rights when the Government determined that certain information Plaintiff seeks to publish is classified and, therefore, cannot be published.

Plaintiff's claim fails because there is no First Amendment right to publish classified information. *Snepp*, 444 U.S. at 510. Moreover, Plaintiff has no right to publish information protected under his secrecy agreements. The Government properly determined that certain portions of Plaintiff's account of his work for the Government reveal intelligence activities, sources, and methods, as well as information about military plans and the foreign activities of the United States that, if disclosed, could reasonably be expected to cause serious identifiable damage to our national security. In making this determination, the Government segregated the

information that Plaintiff cannot publish from the details of his employment that he may publish. In September 2010, a partially redacted version of the manuscript was published. In January 2013, after Plaintiff submitted a formal request for an administrative security review, the Department of Defense completed an updated assessment of the information at issue, and informed Plaintiff of its determination as to the classification of each passage. Plaintiff now appears to challenge the Government's determinations that information in 233 passages remains classified.

The Government's pertinent classification determinations fully comply with Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), which governs the classification of information. In support of these determinations, the Government is submitting both unclassified and classified declarations from various agencies. Through the unclassified submissions, the Government has included as much justification of the determinations as can be disclosed on the public record. *See Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979). A more detailed explanation in a public declaration or brief would, itself, damage national security for the same reasons that publication of Plaintiff's manuscript poses such danger. *See Ellsberg v. Mitchell*, 709 F.2d 51, 59 n.41 (D.C. Cir. 1983) ("It is one of the unfortunate features of this area of the law that open discussion of how the general principles apply to particular facts is impossible."). A detailed explanation of the agencies' decisions is therefore included in the classified declarations that are being provided to the U.S. Department of Justice's Litigation Security Group, which will make them available to the Court for its *ex parte, in camera* review.[1]

[1] These classified declarations provide highly sensitive information regarding the bases for the agencies' classification decisions with respect to Plaintiff's manuscript. Neither Plaintiff nor Plaintiff's counsel is authorized access to this classified information. Thus, national security concerns require *ex parte, in camera* review of the Government's classified declarations. *See Stillman v. CIA*, 319 F.3d 546, 549 (D.C. Cir. 2003) (national security concerns required *ex*

The agencies' determinations that certain harm could result from the disclosure of the information in Plaintiff's manuscript are entitled to utmost deference. As courts have uniformly held, there is no more compelling government interest than national security, and the judiciary lacks the necessary expertise to second-guess the Executive Branch's reasoned, articulated concerns about the harm to national security that could result from the disclosure of secret government information. Under this well-established framework, the Court should conclude, based on its review of the declarations submitted in support of this motion, that the agencies' classification of the information at issue was proper. For these reasons, and as set forth more fully below, this Court should grant Defendants' motion and dismiss Plaintiff's complaint.

Factual Background

The pertinent background that may be set forth on the public record is included in Defendants' Statement of Undisputed Material Facts, also filed today and incorporated in this motion by reference. Additional relevant facts in this case are classified, and are provided in the classified declarations that the Government is submitting for this Court's *ex parte, in camera* review.

Plaintiff Anthony Shaffer was employed by DIA from 1995 to 2006, during which time he also served as an officer in the U.S. Army Reserve assigned to DIA. Am. Compl. ¶ 3. As a

---

parte, in camera review of the government's classified declaration in prepublication review case). *See also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (national security concerns required *ex parte, in camera* review of the government's classified declaration justifying plaintiff's designation as Specially Designated Global Terrorist); *Ellsberg*, 709 F.2d at 61 (national security concerns required *ex parte, in camera* review of the government's classified declaration asserting state secrets privilege); *Hayden*, 608 F.2d at 1386 (national security concerns required *ex parte, in camera* review of the government's declaration in a FOIA case). While *ex parte, in camera* review of the declarations involves some compromise of the adversary process, such a compromise is required to ensure the protection of critical national security information. *See Stillman*, 319 F.3d at 548 (explaining that, in prepublication review cases "*in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm").

condition of employment in positions of special confidence and trust relating to the national security, and in consideration of being given access to classified information, Plaintiff voluntarily, willingly, and knowingly entered into numerous non-disclosure and secrecy agreements with the Department of Defense. *See* Scheller Decl. (Ex. A), Exs. A-G (Pl.'s Secrecy Agreements). Through those agreements, Plaintiff agreed never to disclose certain information or material obtained in the course of employment to anyone not authorized to receive it without prior written authorization. *See, e.g.*, *id.*, Ex. C, ¶ 3 ("I hereby agree that I will never divulge such information unless I have officially verified that the recipient has been properly authorized by the United States Government to receive it or I have been given prior written notice of authorization from the United States Government . . . that such disclosure is permitted."). He also agreed to submit written material to the Department for review and receive written permission from the Department before taking any steps toward public disclosure. *See id.*, Ex. A, ¶ 4; *id.*, Ex. C, ¶ 3. Accordingly, Plaintiff concedes that he "is required by virtue of a secrecy agreement to submit all of his writings for prepublication review." Am. Compl. ¶ 3. Plaintiff remains subject to the conditions of those agreements. *See, e.g.*, Scheller Decl. (Ex. A), Ex. C, ¶ 8 ("Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, *and at all times thereafter*.") (emphasis added).

Plaintiff contends that he began writing a book in or around February 2007, based largely on his experiences in Afghanistan, where he was stationed in the course of his DIA employment and assignment. Am. Compl. ¶¶ 3, 8, 11. He alleges that he hired a ghost writer and entered into a contractual agreement with a publisher, all prior to providing the contents of the manuscript to

any part of the Department of Defense. *Id.* ¶¶ 8-10. In 2009, Plaintiff submitted a draft manuscript to two officers in his Army Reserve chain-of-command, but did not submit the text to DIA, the Office of Security Review (OSR), or any other Department component. *Id.* ¶ 13.

After learning of the manuscript and obtaining a copy to review, DIA determined that it contained a significant amount of classified information. *Id.* ¶ 24. Other components of the United States Government, including the CIA, reached the same conclusion. *Id.* The Department therefore contacted Plaintiff's publisher to express its concern that publication of the manuscript would cause harm to the national security of the United States. *Id.* ¶ 30.

Based on discussions between the Government, Plaintiff, and the publisher, some modifications were made to the manuscript. *Id.* ¶ 37. The manuscript was published on September 24, 2010, under the title, *Operation Dark Heart: Spycraft and Special Ops on the Frontlines of Afghanistan and the Path to Victory*. *Id.* ¶ 41. As published, the book contained numerous redactions in the form of black boxes.

Plaintiff filed this lawsuit on December 14, 2010. Dkt. 1. On May 16, 2011, Defendants filed a motion to dismiss or, in the alternative, for summary judgment. Dkt. 18. That motion argued that Plaintiff lacked standing to raise his claim and that, if he did have standing, his claim was without merit because Defendants' classification determinations were proper. *Id.*

Pursuant to an order of this Court, Plaintiff filed an amended complaint on February 13, 2012. Dkt. 35. Defendants moved to dismiss that complaint for lack of standing, and the Court denied the motion on November 2, 2012. Dkts. 44, 45.

While the parties were briefing the motion to dismiss, on August 3, 2012, Plaintiff submitted a request to the Office of Security Review (OSR) for a formal security review of Plaintiff's book. In response, OSR coordinated an updated assessment of each of the passages

that was redacted from the manuscript in 2010. Unclassified OSR Decl. (Ex. D) ¶¶ 2, 10. OSR personnel also met with Plaintiff, and afforded him the opportunity to present open source materials in support of his contention that certain information contained in the manuscript had already been officially disclosed by the Government. *Id.* ¶ 3.[2]

By letter dated January 18, 2013, OSR informed Plaintiff of the Government's final determinations with respect to the information. *See id.* ¶ 10 & Ex. 6 (OSR letter and spreadsheet identifying passages). The letter indicated that, of the 433 passages that were redacted from the 2010 edition, the Government had determined that information contained in approximately 200 passages had been declassified, and thus was cleared for release in Plaintiff's book. *Id.*, Ex. 6 at 1-2. The remaining passages remained properly classified. *Id.* As the letter explained, the Government determined that the open source materials submitted by Plaintiff failed to show a relevant official release of information by the Government. *Id.* at 2. Those passages are the extent of the dispute now before the Court.

As the attached declarations explain, the Government has determined that 233 passages, which range from single words to full sentences, continue to contain classified information. With this motion and memorandum, the Government is providing the following documents:[3]

[2] On December 10, 2012, Plaintiff identified a series of open source materials by providing Internet links, titles of certain publications, and references to several personnel documents. *See* Unclassified OSR Decl. (Ex. D) ¶ 7. OSR responded by letter dated December 19, 2012, asking Plaintiff to provide pinpoint citations to the relevant page numbers of the sources he had submitted, and any additional evidence indicating that certain information he relied on had been officially released by the Government. *Id.* ¶ 8 & Ex. 4. Plaintiff responded on December 20, 2012, though he did not provide specific citations. *Id.* ¶ 9.

[3] Department of Justice ("DOJ") regulations require the undersigned counsel to ensure the Court's cooperation in protecting the classified materials presented for its *ex parte*, *in camera* review. *See* 28 C.F.R. § 17.17(a)(2), (c). The DOJ Litigation Security Group is available to brief Chambers *in camera* and *ex parte* as necessary for the sole purpose of providing information on the logistics of security arrangements and will remain available to provide full

Ex. A: Unclassified Declaration of Wayne R. Scheller, attaching various non-disclosure agreements signed by Plaintiff

Ex. B: Unclassified version of Plaintiff's declaration and supporting exhibits[4]

Ex. C: Classified portions of Plaintiff's declaration and Exhibits 1, 3, 4, and 8

Ex. D: Unclassified Declaration of Mark Langerman (OSR) ("Unclassified OSR Decl.")

Ex. E: Unclassified Declaration of David G. Leatherwood (DIA) ("Unclassified DIA Decl.")

Ex. F: Classified Declaration of David G. Leatherwood (DIA) ("Classified DIA Decl.")

Ex. G: Classified Declaration of Richard J. Puhl (CIA) ("Second Classified CIA Decl.") attaching and incorporating the Classified Declaration of Karen T. Pratzner (CIA) ("First Classified CIA Decl.")

Ex. H: Classified Declaration

Ex. I: Published version of *Operation Dark Heart*[5]

---

and complete information to the Court and its personnel regarding pertinent safeguarding and storage requirements for the classified materials. The classified materials will be delivered separately upon request of the Court to a secure facility in the Courthouse for this Court's *ex parte, in camera* review. The classified materials are being provided to the Litigation Security Group, pending delivery to the Court.

[4] Pursuant to this Court's Order, Plaintiff submitted a declaration and supporting exhibits to OSR on March 22, 2013. A cleared, unclassified version of the documents is being filed publicly on ECF as Exhibit B. That document includes redactions of classified information in the declaration (pages 2, 3, 13, 14, 20-24, 26, 27, 29, and 30); Exhibit 1 (page 6); Exhibit 3 (final page); Exhibit 4 (page 2); and Exhibit 8 (page 1). Unredacted versions of those portions of the documents, as they were submitted to OSR by Plaintiff, are being provided to the Court *ex parte* and *in camera* as Exhibit C. Defendants have also redacted Plaintiff's Social Security Number from the publicly filed documents. Finally, Defendants have consulted with Plaintiff regarding one portion of his Exhibit 3, which is the full contents of a book that is publicly available. Because the version submitted by Plaintiffs is difficult to read, the parties have conferred and agreed to replace that portion of the exhibit with a clearer electronic copy of the book as it is available at http://usacac.army.mil/cac2/csi/docs/DifferentKindofWar.pdf (accessed on April 26, 2013).

[5] The Government is submitting a copy of the book, as published in September 2010, and a table listing each redaction of classified information and the corresponding agency declaration that

Ex. J: Classified table of material redacted from the manuscript

Legal Standard

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Summary judgment is properly regarded "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

Argument

Plaintiff does not challenge the prepublication review requirement to which he is subject, or contend that he has a right to publish classified information. Rather, Plaintiff contends that "[l]ittle to none" of the information redacted from the manuscript is classified. Am. Compl. ¶ 37. But whether something is classified is a determination that rests solely with the Executive. In reviewing the Government's classification of national security information, district courts must give the agency sufficient opportunity to present detailed *in camera* affidavits and "accord substantial weight to [those 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); *see Stillman v. CIA*, 319 F.3d 546, 548-49 (D.C. Cir. 2003) (In prepublication review cases, "*in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm"

---

addresses the redaction, to permit the Court to more easily review the information in its context within the manuscript. Counsel for Defendants consulted with counsel for Plaintiff regarding submission of the published book, and Plaintiff requested that it be submitted under seal to protect copyright interests in the book. The Government is thus filing Exhibit I under seal along with a motion for leave asking the Court to accept the sealed filing. The classified table will be submitted *ex parte* and *in camera* as Exhibit J.

with the "appropriate degree of deference" given to the Executive Branch concerning its classification decisions.) (quoting *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983)); *Stillman v. CIA*, 517 F. Supp. 2d 32, 38 (D.D.C. 2007) (in prepublication review case on remand, granting summary judgment for the government on the basis of classified affidavits reviewed *in camera* and *ex parte*). Because of the Executive Branch's unique expertise concerning the adverse effects of the disclosure of 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.

Applying these standards, there is no genuine issue of material fact as to Plaintiff's claim for judicial review of the Government's determination that information in the manuscript is classified, and the Court should grant summary judgment for Defendants.

I. PLAINTIFF HAS NO FIRST AMENDMENT RIGHT TO PUBLISH CLASSIFIED INFORMATION

Plaintiff alleges that the Department of Defense, DIA, and CIA violated his First Amendment rights by denying him the right to publish certain information in the manuscript. *See* Am. Compl. ¶ 71. He further asserts that the Government has "failed to demonstrate the existence of substantial government interests that would enable them to prohibit the publication of" information contained in the book. *Id.* ¶ 68. Plaintiff's First Amendment claim fails for the simple reason that "[c]ourts have uniformly held that current and former government employees have no First Amendment right to publish properly classified information to which they gain access by virtue of their employment." *Stillman*, 517 F. Supp. 2d at 38. Plaintiff here is bound by secrecy agreements, the very purpose of which is to prevent the disclosure of classified

information relating to the Government's foreign relations and intelligence activities, sources, and methods. *See* Scheller Decl. (Ex. A), Exs. A-G (Pl.'s Secrecy Agreements). Plaintiff's secrecy and non-disclosure agreements – agreements he signed voluntarily and knowingly – require him to obtain written authorization from the United States Government prior to disclosing classified information to anyone not otherwise authorized to receive it, and to comply with all applicable laws and regulations governing the disclosure of classified information. *See, e.g.*, *id.*, Ex. C, ¶ 3. This allows the United States to ensure that Plaintiff's proposed writings would not disclose classified information. It is in the context of these binding secrecy agreements and the Government's compelling need to protect national security that the Court should consider Plaintiff's claim that the Government violated his right to free speech. *See, e.g.*, *Snepp*, 444 U.S. at 510.

It is well settled that a prepublication review requirement imposed by secrecy agreements such as those signed by Plaintiff passes constitutional muster, and Plaintiff does not contend otherwise in his complaint. *See id.* at 510 n.3 (prepublication review requirement imposed on government employees with access to classified information is not an unconstitutional prior restraint); *McGehee*, 718 F.2d at 1146-47 (upholding the CIA's prepublication review scheme in context of First Amendment challenge). In *Snepp*, the Supreme Court considered whether a former CIA employee's similar secrecy agreement was an improper prior restraint on free speech. Concluding that it was not, but rather that it was reasonable and enforceable, the Court recognized the Government's compelling interest in the protection of national security:

> The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.

Snepp, 444 U.S. at 510 n.3; *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (government has a compelling interest in protecting national security information). Indeed, the *Snepp* Court concluded that, even in the *absence* of an express agreement, the CIA could have imposed reasonable restrictions on employee activities to protect these compelling interests. *Snepp*, 444 U.S. at 510 n.3.

In light of the Government's compelling interest, courts uniformly have concluded that there is no First Amendment right to publish properly classified information: "[i]f the Government classified the information properly, then [plaintiff] simply has no first amendment right to publish it." *Stillman*, 319 F.3d at 548; *see also Snepp*, 444 U.S. at 510 n.3; *McGehee*, 718 F.2d at 1143 ("CIA censorship of 'secret' information contained in former agents' writings and obtained by former agents during the course of CIA employment does not violate the first amendment."); *United States v. Marchetti*, 466 F.2d 1309, 1315-16 (4th Cir. 1972) ("Although the First Amendment protects criticism of the government, nothing in the Constitution requires the government to divulge [national security] information."). Thus, the only question presented by Plaintiff's claim is whether the information identified by the Government in the manuscript properly is classified.

II. THE GOVERNMENT'S CLASSIFICATION OF INFORMATION IS ENTITLED TO UTMOST DEFERENCE

The Executive Branch's classification determinations are entitled to "utmost deference" by the judiciary. *See Taylor v. Dep't of the Army*, 684 F.2d 99, 109 (D.C. Cir. 1982) (requiring "utmost deference" to affidavits of intelligence officers) (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978)). 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).

This judicial deference to the Executive Branch in matters of national security and foreign relations is appropriate given the Executive's constitutional role:

> [I]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . . "The President is the constitutional representative of the United States with regard to foreign nations. . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch . . . ." [The President] has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319, 320 (1936) (quoting 8 U.S. Sen. Reports, Comm. on Foreign Relations, at 24 (Feb. 15, 1816)) (internal quotation marks omitted). The Executive Branch's ability to maintain secrecy with regard to foreign intelligence matters is essential. *Id.*; *see Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). In *Egan*, the Supreme Court repeated that:

> [the President's] authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

484 U.S. at 527. *See also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (permitting *ex parte* review of declarations in light of "the primacy of the Executive in controlling and exercising responsibility over access to classified information, and the Executive's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business") (internal quotation omitted).

Because of the President's constitutional role in national security matters, the Executive Branch is uniquely situated to assess the national security consequences of the disclosure of

particular information. *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) ("Mindful that courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns."); *Egan*, 484 U.S. at 529 (judgments as to harm that would result in the disclosure of certain information "must be made by those with the necessary expertise in protecting classified information"). Only the nation's intelligence community has a complete picture of which disclosures pose a danger to national security. Courts commonly refer to this as the "mosaic theory" of intelligence:

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate . . . . "The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area."

Halkin, 598 F.2d at 8-9 (quoting *Marchetti*, 466 F.2d at 1318). The Government's assessment of potential harm must be respected because "each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance itself." *Gardels v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982) (quoting *Halperin v. CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980)).

The judiciary, which lacks this necessary "broad view" of foreign intelligence matters, *see Marchetti*, 466 F.2d at 1318, is not in a position to second-guess the national security and foreign relations concerns articulated by the Executive Branch. *See Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928 ("It is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security."); *McGehee*, 718 F.2d at 1149 ("[J]udicial review of CIA classification decisions, by reasonable necessity,

cannot second-guess CIA judgments on matters in which the judiciary lacks the requisite expertise."). In short, "it is the responsibility of the [Executive], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 180 (1985). This Court should, therefore, accord substantial weight to the Government's declarations concerning the national security harms that may result from disclosure of information in Plaintiff's manuscript.[6]

Of course, the utmost deference owed to the national security judgments of the Executive Branch does not mean that courts have no role to play in the review of agency classification decisions in the prepublication review context. *See Ctr. for Nat'l Sec. Studies*, 331 F.3d at 932. The D.C. Circuit has noted that when a court conducts its *in camera* review of agency declarations, it must assure itself that the agency's explanations provide "reasonable specificity"

[6] For this same reason, Plaintiff's declaration is due no weight insofar as he disputes the substance of the Government's classification experts determinations. Plaintiff does not have the requisite "broad view" of foreign intelligence matters to assess the effect that disclosure of the disputed information could have on our national security. 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 of N.J. 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."). Views rejected by courts include those of former intelligence officers. *See Snepp*, 444 U.S. at 512; *Gardels*, 689 F.2d at 1106 & n.5 (former agent's "own views as to the lack of harm which would follow the disclosure requested by plaintiff" is insufficient to justify further inquiry beyond the Agency's "plausible and reasonable" informed position); *Halperin v. Nat'l Sec. Council*, 452 F. Supp. 47, 51 (D.D.C. 1978) (Even though plaintiff was a self-proclaimed "scholar and actor in the field of foreign policy and national security," nothing in "plaintiff's submissions justifie[d] the substitution of this Court's judgment or the informed judgment of plaintiff for that of the officials constitutionally responsible for the conduct of United States foreign policy as to the proper classification of [documents]."), *aff'd*, 612 F.2d 586 (D.C. Cir. 1980). In contrast, the Government's reasoned judgment that disclosure of the information would pose a risk to national security is entitled to substantial weight.

and "demonstrat[e] a logical connection between the deleted information and the reasons for classification." *McGehee*, 718 F.2d at 1148. Consistent with these standards, the declarations of Mr. Leatherwood, Mr. Puhl, and Ms. Pratzner – all classification experts and original classification authorities – satisfy this requirement by providing detailed explanations demonstrating that the information at issue is properly classified.

For all these reasons, courts accord deference to the Government's declarations across the entire spectrum of national security jurisprudence. In prepublication review cases such as this, the D.C. Circuit has held that courts "should defer to [agency] judgment as to the harmful results of publication" because the judiciary "cannot second-guess [agency] judgments on matters in which the judiciary lacks the requisite expertise." *McGehee*, 718 F.2d at 1148-49 (internal quotation marks and citations omitted); *see also Stillman*, 319 F.3d at 549 (observing, in the context of a prepublication review case, that there is an "appropriate degree of deference owed to the Executive Branch concerning classification decisions"); *Berntsen v. CIA*, 618 F. Supp. 2d 27, 30-31 (D.D.C. 2009). This Court should similarly accord the utmost deference to the submitted declarations concerning the classified status of the information in Plaintiff's manuscript.

III. THE INFORMATION IDENTIFIED IN THE GOVERNMENT'S DECLARATIONS IS PROPERLY CLASSIFIED PURSUANT TO EXECUTIVE ORDER 13526

As explained in the declarations submitted herewith, the Government's classification of certain information with respect to Plaintiff's manuscript meet the standards required by the Executive Order governing the classification of information by the Executive Branch, Executive Order 13526. Executive Order 13526 requires four conditions for the classification of national security information: (1) the information must be classified by an "original classification authority"; (2) the information must be "owned by, produced by or for, or [be] under the control

of" the Government; (3) the information must fall within one of the authorized classification categories listed in section 1.4 of the Executive 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." Exec. Order 13526, § 1.1. Here, the Government has met all four requirements.

A. The Information Was Classified By An Original Classification Authority

The passages redacted in the manuscript contain information that has been determined to be properly classified by an original classification authority under the Executive Order. The Executive Order defines "Original Classification Authority" as "an individual authorized in writing . . . by agency heads or other officials designated by the President, to classify information in the first instance." *Id.* § 6.1(gg). David G. Leatherwood is the Director of the DIA Directorate for Operations, and has original classification authority. Unclassified DIA Decl. (Ex. E) ¶¶ 2, 4. At the time of her declaration, Karen T. Pratzner was an Associate Information Review Officer for the National Clandestine Service of the CIA, and also had original classification authority. First Classified CIA Decl. (Ex. G) ¶¶ 1, 4. Her declaration has been updated and incorporated by reference in the declaration of Richard J. Puhl, who is the Chairman of the CIA Publications Review Board and who himself has original classification authority. Second Classified CIA Decl. (Ex. G) ¶¶ 1, 4. Those individuals have each determined that each redacted passage addressed in their declarations concerns information that is properly classified in satisfaction of the criteria of Executive Order 13526. *See also* Classified Decl. (Ex. H).

B. The Information "Is Owned By, Produced By or For, or Is Under the Control of" the Government

The information at issue is also owned by, produced by or for, or is under the control of" the Government. Here, Plaintiff voluntarily signed secrecy agreements in which he agreed not to

disclose classified and certain other government information that he obtained during the course of his employment. *See* Ex. A, Pl.'s Secrecy Agreements, Ex. C, ¶ 3. Plaintiff acknowledges in his complaint that the book was based "on his experience in Afghanistan," where he was employed by the Department of Defense. Am. Compl. ¶¶ 8, 11. *See Knopf v. Colby*, 509 F.2d 1362, 1371 (4th Cir. 1975) ("[N]either should [plaintiff] be heard to say that he did not learn of information during the course of his employment if the information was in the Agency and he had access to it."); *see also Wilson v. McConnell*, 501 F. Supp. 2d 545, 554 (S.D.N.Y. 2007) (question is whether the Government had control or ownership of the information when it was originally classified), *aff'd*, 586 F.3d 171 (2d Cir. 2009). Plaintiff also agreed that any classified information learned in the course of his DoD employment is and will remain the property of the agency the United States Government. *See* Ex. A, Pl.'s Secrecy Agreements, Ex. C, ¶ 7. As explained in Defendants' declarations, the portions of Plaintiff's manuscript that relate to the Government's classified intelligence activities, sources, and methods, its military plans and operations, its foreign activities and relations, and its technical capabilities relating to national security contain information that "is owned by, produced by or for, or is under the control of" the Government, which satisfies the second condition of the Executive Order.

C. The Information Falls Within the Classification Categories of Section 1.4 of the Governing Executive Order, and Disclosure Could Reasonably Be Expected to Cause Identifiable Harm to National Security

The information in Plaintiff's manuscript falls squarely within several of the eight classification categories under section 1.4 of the Executive Order. Of relevance here, that section provides that information shall be considered for classification if it concerns:

(a) military plans, weapons systems, or operations;
(b) foreign government information;
(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;

> (d) foreign relations or foreign activities of the United States, including confidential sources; [or]
> (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security.

Exec. Order 13526, § 1.4. As described more fully in the Government's declarations, the information at issue in Plaintiff's manuscript satisfies the remaining classification requirements because it falls within the scope of these categories and is classified at the "SECRET" or "TOP SECRET" level. *See* Unclassified DIA Decl. (Ex. E) ¶¶ 8-12; Classified DIA Decl. (Ex. F) ¶¶ 11, 13, 14; First Classified CIA Decl. (Ex. G) ¶¶ 15; Classified Declaration (Ex. H).

Executive Order 13526 provides that "SECRET" level classification "shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security[7] that the original classification authority is able to identify or describe." Exec. Order 13526, § 1.2(a)(2). The Order provides that "TOP SECRET" level classification "shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe." *Id.* § 1.2(a)(1). As Mr. Leatherwood describes in his unclassified declaration and in greater detail in his classified declaration, and as Mr. Puhl and Ms. Pratzner describe in their declarations, the disclosure of certain information contained in Plaintiff's manuscript could reasonably be expected to cause such damage to national security.

The Government's judgment that the publication of information contained in Plaintiff's manuscript could cause harm to our national security is neither vague nor speculative. Courts

[7] The Executive Order defines "damage to the national security" as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information." Exec. Order 13526, § 6.1(*l*).

have held that, in cases concerning national security, the harm alleged by the Government need not "rise to the level of certainty," but must merely be "real and serious enough to justify the classification decision." *McGehee*, 718 F.2d at 1150. As the D.C. Circuit explained:

> A court must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm rather than an actual past harm. If we were to require an actual showing that particular disclosures . . . have in the past led to identifiable concrete harm, we would be overstepping by a large measure the proper role of a court . . . .

Halperin, 629 F.2d at 149 (in FOIA context); *Klaus v. Blake*, 428 F. Supp. 37, 38 (D.D.C. 1976) ("The national security issue is necessarily speculative. Intelligence deals with possibilities. Our knowledge of the attitudes of and information held by opponents is uncertain. Determinations of what is and what is not appropriately protected in the interests of national security involves an analysis where intuition must often control in the absence of hard evidence. This intuition develops from experience quite unlike that of most Judges."). Moreover, as discussed above, "[d]ue to the mosaic-like nature of intelligence gathering, for example, what may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in context." *McGehee*, 718 F.2d at 1149.

Thus, the law simply requires that a responsible Executive Branch official make a reasoned judgment that it is in the interest of the United States to maintain the confidentiality of the information at issue given the possible harm that the disclosure of that information could cause. The declarations submitted in this case do precisely that, and they explain that disclosure of the information at issue could reasonably be expected to seriously and gravely damage national security by undermining that confidentiality. The Government's classified declarations demonstrate with reasonable specificity a logical connection between the information at issue and the reasons for classification. *Id.* at 1148-49. For the reasons set forth below and in those

declarations, serious and grave harm could be expected to result from the disclosure of certain information in Plaintiff's manuscript relating to military plans and operations; intelligence activities (including special activities), intelligence sources, methods and activities; foreign government information; the foreign relations or foreign activities of the United States, including confidential sources; and the vulnerabilities or capabilities of systems relating to the national security. *See generally* Classified DIA Decl. (Ex. F); First Classified CIA Decl. (Ex. G); Classified Decl. (Ex. H). Below, the Government offers a public discussion of each category of the Executive Order at issue in this information, with significantly greater detail provided in the Government's classified declarations. Accordingly, the Government has satisfied the third and fourth requirements of proper classification.

1. Military Plans or Operations

Section 1.4(a) of Executive Order 13526 provides for classification of information concerning "military plans, weapons systems, or operations." Releasing information about military intelligence operations defeats one of the purposes of using secret intelligence components in the first place. Classified DIA Decl. (Ex. F) ¶ 13. This category includes information concerning operations both past and future. *Am. Civil Liberties Union v. Dep't of Defense*, 752 F. Supp. 2d 361, 369-70 (S.D.N.Y. 2010). Even when operations have already taken place, the disclosure of information concerning the operations may still allow enemies to exploit that information to frustrate future military operations. *See, e.g.*, *Miller v. U.S. Dep't of Justice*, 562 F. Supp. 2d 82, 101 (D.D.C. 2008).

Here, as explained in Mr. Leatherwood's declaration, Plaintiff seeks to publish information about clandestine intelligence operations conducted in Afghanistan. Classified DIA Decl. (Ex. F) ¶ 13. The information involved, and why its disclosure could reasonably be

expected to cause serious harm to the national security, is described in greater detail in Mr. Leatherwood's classified declaration. Accordingly, the Government properly classified information concerning military plans and operations in Plaintiff's manuscript. Exec. Order 13526, § 1.4(a).

2. Foreign Government Information

Section 1.4(b) of Executive Order 13526 provides for classification of information concerning cooperative endeavors between the United States Government and foreign intelligence components. Under the Executive Order, the "unauthorized disclosure of foreign government information is presumed to cause damage to the national security." Exec. Order 13526, § 1.1(d). "It is clear that, even without the presumption of identifiable damage to the national security that is accorded foreign government information, disclosure of such cooperation with foreign agencies could not only damage the [Government's] ability to gather information but could also impair diplomatic relations." *Malizia v. U.S. Dep't of Justice*, 519 F. Supp. 338, 344 (S.D.N.Y. 1981) (internal quotation omitted).

As explained in the Government's declarations, Plaintiff's draft manuscript contains information about highly sensitive foreign government information classified at the "TOP SECRET" and "SECRET" levels. The information involved, and why its disclosure could reasonably be expected to cause serious and grave harm to the national security, is described in greater detail in the classified declarations. Accordingly, the Government properly classified the foreign government information in Plaintiff's manuscript. Exec. Order 13526, § 1.4(b).

3. Intelligence Sources, Methods, and Activities

Section 1.4(c) of Executive Order 13526 provides for classification of information concerning intelligence activities (including special activities), intelligence sources and/or

methods. As Mr. Leatherwood explains in his declaration, the continued availability of foreign intelligence sources is of critical importance to our national security, but intelligence sources can be expected to furnish information only when confident that they are protected from exposure by the absolute secrecy surrounding their relationship with the Government.

Case law is replete with examples of the types of harm that result from the disclosure of intelligence sources, methods, activities and information relating to foreign relations or foreign activities. *See, e.g.*, *Snepp*, 444 U.S. at 512 ("[T]he [government] obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the [government's] ability to guarantee the security of information that might compromise them . . ."); *Fitzgibbon v. CIA*, 911 F.2d 755, 763-64 (D.C. Cir. 1990) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and *the appearance of confidentiality* so essential to the effective operation of our foreign intelligence service." (emphasis in original; internal citations and quotation omitted)); *Salisbury*, 690 F.2d at 971-72 (upholding classification decision to protect future efficacy of an intelligence method); *Military Audit Project v. Casey*, 656 F.2d 724, 747 (D.C. Cir. 1981) (court protected dates on which certain activities were conducted because "it would seem obvious that a foreign intelligence agency would be in a better position to crack the CIA's funding system if it knew the dates on which secret actions took place").

Here, the information includes intelligence sources, methods, and activities that, if disclosed, reasonably could be expected to cause serious harm to our national security. That includes information concerning specific sources, particular intelligence gathering methods, and the identities of personnel involved in clandestine operations. The specific information involved

and the harm that could be reasonably expected to result from disclosure are described in the Government's classified declarations. The Government thus properly classified this information concerning intelligence sources, methods and activities. Exec. Order 13526, § 1.4(c).

4. Foreign Activities and Foreign Relations

Executive Order 13526 also protects information relating to the "foreign relations or foreign activities of the United States." Exec. Order 13526, § 1.4(d). The serious harm that can result from the unauthorized disclosure of information relating to our foreign activities is widely recognized. *See, e.g.*, *Snepp*, 444 U.S. at 512 ("[T]he CIA obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them."); *McGehee*, 718 F.2d at 1149-50 ("We also believe, on the basis of plausible scenarios put forward in the CIA affidavit, that the United States could suffer significant strategic and diplomatic setbacks as a result of the disclosure of the deleted information."); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 627 (S.D.N.Y. 1996) (acknowledging the disruption that could occur to foreign relations if it were disclosed that the Government operated a field installation in a foreign country), *aff'd*, 128 F.3d 788 (2d Cir. 1997).

As Mr. Leatherwood explains in his classified declaration, certain information in Plaintiff's manuscript implicates the foreign relations and/or foreign activities of the United States. If that information is disclosed through a revised edition of *Operation Dark Heart*, that disclosure will seriously harm the Government's ability to cooperate with foreign allies in intelligence operations by greatly impairing the confidence and trust our allies have in the United

States. The Government properly determined that this information is classified. Exec. Order 13526, § 1.4(d).

5. Vulnerabilities or Capabilities of Systems, Installations, Infrastructures, Projects, Plans, or Protection Services Relating to the National Security

Finally, Executive Order 13526 protects information relating to "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security." Exec. Order 13526, § 1.4(g). The Government must be able to maintain the confidentiality of such information when its disclosure could compromise the effectiveness of our intelligence collection programs. *See People for the Am. Way Found. v. Nat'l Sec. Agency*, 462 F. Supp. 2d 21, 32 (D.D.C. 2006). As explained in the Government's declarations, Plaintiff seeks to publish certain information falling within this category that is currently classified at the "TOP SECRET" level. That information cannot be further discussed in this public filing, but the nature of the information and the grave harms that would result from its disclosure by Plaintiff are addressed in the Government's classified declarations. As explained therein, the Government has properly classified that information pursuant to the requirements of the Executive Order.

* * * * *

The Government seeks to prevent the disclosure only of the classified information in Plaintiff's manuscript. As the redacted book (filed under seal) reveals, the Government has made a significant effort to segregate classified and unclassified material, as the Government originally identified 433 particular passages for redaction from the 2010 publication. *See* Ex. I (book published in September 2010). Moreover, in January 2013, Defendants completed an updated assessment of the information at issue, and notified Plaintiff that information contained

in nearly half of the redacted passages had been declassified. *See* Unclassified OSR Decl. (Ex. D), Ex. 6 (OSR letter to Plaintiff).[8] The dispute before the Court concerns the 233 passages that remain classified, all of which are addressed in Defendants' declarations.

The specific information contained in those passages meets the requirements for proper classification pursuant to Executive Order 13526 because (1) it is within the control of the Government and derived from Plaintiff's employment with the DoD, (2) it falls within the classification categories listed in the Executive Order, and (3) government officials with original classification authority have determined that disclosure of the information (4) could reasonably be expected to result in serious damage to national security.

IV. THE GOVERNMENT HAS NOT OFFICIALLY RELEASED INTO THE PUBLIC DOMAIN THE CLASSIFIED INFORMATION CONTAINED IN THE MANUSCRIPT

Plaintiff asserts that information redacted from the manuscript was "supported by open source material" or has otherwise been previously publicly disclosed. Am. Compl. ¶ 66. To the extent Plaintiff alleges that any of the information was declassified for publication or otherwise publicly released, he is incorrect on the facts and he misunderstands the law. Even assuming *arguendo* that some of the information redacted from the manuscript has been *unofficially* disclosed, that is irrelevant to the issue before this Court: whether the information is properly classified. As the Government's declarations demonstrate, the material currently at issue is properly classified, and none of it has been declassified or officially disclosed. Classified DIA Decl. (Ex. F) ¶¶ 8, 66; First Classified CIA Decl. (Ex. G) ¶ 39; Classified Decl. (Ex. H). Plaintiff cannot show otherwise, and his claim should be rejected.

[8] Additional information concerning the factual developments that led to the declassification of certain passages is set forth in Mr. Leatherwood's classified declaration. *See* Classified DIA Decl. (Ex. F) ¶¶ 53-58.

A. To Show That Information Is No Longer Classified, Plaintiff Must Demonstrate that the Specific Information at Issue Has Been Released Through an Official and Documented Disclosure

As discussed above, Plaintiff has no First Amendment right to publish classified information. Articulating a standard embraced by the D.C. Circuit, the Fourth Circuit Court of Appeals succinctly explained the line between what a former government employee may and may not disclose:

> [Plaintiff] 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.

Marchetti, 466 F.2d at 1317. In *Knopf v. Colby*, 509 F.2d at 1370, which the court described as the "sequel" to the *Marchetti* litigation, the Fourth Circuit elaborated on the meaning of "public domain" and held that classified information "was not in the public domain unless there had been official disclosure of it."

This standard has been adopted by the D.C. Circuit, which has applied it in the FOIA context to determine whether agencies properly have withheld information as classified under the Executive Order. Courts apply three criteria in analyzing whether a piece of information is in the public domain: (1) the information at issue must be as specific as the information that has been publicly disclosed; (2) the disputed information must exactly match the information publicly disclosed; *and* (3) the information sought to be released must already have been publicly released through "an official and documented disclosure." *See Fitzgibbon*, 911 F.2d at 765 (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983)); *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003) (same); *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (same). Plaintiff, not the Government, carries the burden to produce specific information

for which all three criteria have been met and thus, to establish that the information is in the public domain. *See Afshar*, 702 F.2d at 1130.

This Circuit has consistently and stringently applied the official public disclosure requirement in cases where plaintiffs seek the release of classified information. *See Pub. Citizen v. Dep't of State*, 11 F.3d 198, 202 (D.C. Cir. 1993) (cataloging cases and describing the "stringency" of the test). "Prior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure. This insistence on exactitude recognizes the Government's vital interest in information relating to national security and foreign affairs." *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007).

Plaintiff's claim that certain information in the manuscript was "supported by open source material," Am. Compl. ¶ 66, even if true, cannot satisfy these requirements. That certain information exists in the public domain does not itself mean that similar or even identical information must be unclassified. Even when the Government has made an official public release of a general discussion of a subject matter, such a release will not be deemed a basis for the declassification of more specific information, particularly where the agency determines that releasing the more detailed information would pose a threat to the national security. *See Pub. Citizen v. Dep't of State*, 787 F. Supp. 12, 14 (D.D.C. 1992), *aff'd*, 11 F.3d 198 (D.C. Cir. 1993).

Moreover, Plaintiff must identify not simply public source information or unofficial disclosures, but rather "an official and documented disclosure." *Afshar*, 702 F.2d at 1133. The courts have repeatedly emphasized the "critical difference between official and unofficial disclosures," *Fitzgibbon*, 911 F.2d at 765, and have stated that no disclosure of information will be deemed "official" for purposes of arguing that it has been publicly disclosed where the

disclosure is made by "someone other than the agency," *Frugone*, 169 F.3d at 774. *See also* Exec. Order 13526, § 1.1(c) ("Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.") Even if Plaintiff could point to similar information existing in open source documents, declassification requires that the information's public availability result from an official disclosure.

Furthermore, even limited or inadvertent disclosures by an agency itself are not deemed to be official public disclosures of information that is otherwise properly classified. For example, in *Wilson v. CIA*, the Second Circuit was presented with the purported disclosure of the classified dates of service of a former covert employee in a private letter to that employee, written on CIA letterhead and not marked "CLASSIFIED," along with the letter's subsequent publication in the Congressional Record. The court held that neither was an official and documented public disclosure of the information by the CIA. *Wilson*, 586 F.3d at 187-91. Similarly, in *Students Against Genocide v. Dep't of State*, 50 F. Supp. 2d 20, 20 (D.D.C. 1999), the plaintiffs argued that the Department of State could not protect a document that it determined would "tend to reveal [classified] sources and methods" because a government representative had previously shared the information with representatives of other nations at a meeting of the U.N. Security Council. The court found that any limited disclosure did not place the information in the public domain, and that plaintiffs "cannot simply substitute their judgment for the United States government's judgment that additional disclosure would be harmful." *Id.* at 24; *see Carlisle Tire & Rubber Co. v. U.S. Customs Serv.*, 663 F.2d 210, 219 (D.C. Cir. 1980) (deferring to determination in affidavits of U.S. Customs Service officials that "serious adverse consequences" would result from further release of document subject to "inadvertent and limited disclosure" in reading room of Customs Service).

Courts recognize that there is a critical difference between speculation about classified information by the media or general public and the release of certain classified information by an individual who foreign intelligence agents may believe to be an authority.

> As a practical matter, foreign governments can often ignore unofficial disclosures of CIA activities that might be viewed as embarrassing or harmful to their interests. They cannot, however, so easily cast a blind eye on official disclosures made by the CIA itself, and they may, in fact, feel compelled to retaliate.

Wilson, 586 F.3d at 186. As the Fourth Circuit stated in a prepublication review case involving a book by a former employee of the intelligence community:

> It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so. The reading public is accustomed to treating reports from uncertain sources as being of uncertain reliability, but it would not be inclined to discredit reports of sensitive information revealed by an official of the United States in a position to know of what he spoke.

Knopf, 509 F.2d at 1370. The *Knopf* court emphasized that former employees could not publish classified information that appeared in press accounts and elsewhere if it had not been released by the Agency in an official and documented disclosure:

> 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.

Id.

B. Plaintiff's Submissions Do Not Demonstrate That the Information at Issue Has Been Released Through an Official and Documented Disclosure

Defendants' declarations explain that none of the classified information at issue has been officially released into the public domain. *See* Classified DIA Decl. (Ex. F) ¶¶ 8, 66; First Classified CIA Decl. (Ex. G) ¶ 39; Classified Decl. (Ex. H). Plaintiff has been afforded the

opportunity to show otherwise, both during the administrative security review process and now through the affidavit and supporting exhibits he has provided to the Court. *See* Pl.'s Decl. (Ex. B) ¶¶ 54, 58. He was unable to do so. Specifically, Plaintiff has submitted a 33-page affidavit in which he offers a narrative argument for why he believes certain information in the book is unclassified.[9] *See id.* ¶¶ 65-79. He also attached to his affidavit what he calls "various public source documents," in support of his argument that the information at issue has been officially and publicly released by the Government. *See id.* ¶ 58 & Ex. 3 (documents attached to Plaintiff's declaration). Each of Plaintiff's arguments fails to satisfy the requirements of an official release.

Plaintiff addresses several categories of information, which Defendants will address in turn.[10]

[9] As explained above, Plaintiff submitted the affidavit and eight supporting exhibits to OSR for a classification review. *See supra* note 4. Defendants are providing the full submission as Exhibit B to this filing, with redactions to classified information contained in the declaration and exhibits 1, 3, 4, and 8. Unredacted versions of the full declaration and the pages of the exhibits that contain classified information, as those documents were provided by Plaintiff to the Department, are being submitted to the Court *ex parte* and *in camera* as Exhibit C.

[10] Plaintiff's declaration also attaches several exhibits that are not referenced in his declaration. Defendants have reviewed those documents, and determined that none demonstrates an official release of information contained in the redacted passages. In most cases, Plaintiff offers no evidence that the information has been the subject of an official disclosure. One document, however, is a Department of Defense study of the U.S. Army's experience in Afghanistan from 2001 to 2005. *See* U.S. Army Combined Arms Center, *A Different Kind of War: The United States Army in Operation Enduring Freedom (OEF), October 2001 – September 2005* (2010) (contained in Pl.'s Decl. *(Ex. 3)* and also available at http://usacac.army.mil/cac2/csi/docs/DifferentKindofWar.pdf (accessed on April 26, 2013)). Plaintiff did not previously provide that document during the security review, and does not refer to it in his declaration. The document is more than 400 pages long, yet Plaintiff does not identify any portion of the document that he contends shows an official release of the information at issue in this case. Without specific pincites to portions of the document, neither Defendants nor the Court can reasonably be expected to consider the impact of the document on the classification determinations in this case. *See Boening v. CIA*, 579 F. Supp. 2d 166, 171-72 (D.D.C. 2008) (finding that plaintiff in a prepublication review case had failed to meet his burden to show that

1. Bronze Star Award citation and narrative

The first category of information raised in Plaintiff's affidavit concerns his receipt of the Bronze Star Medal. Plaintiff contends that certain information is not properly classified because it is included in the citation and nomination narrative supporting his award, documents which he contends are unclassified.[11] *See* Pl.'s Decl. (Ex. B) ¶¶ 65-67, 70-72, 77. While the citation itself is unclassified, information in the one-page narrative remains properly classified. OSR has located no records indicating that the narrative has ever been officially disclosed, *see* Unclassified OSR Decl. (Ex. D) ¶ 6, and Plaintiff's declaration fails to show otherwise. As a result, he cannot meet his burden of showing an official disclosure of the narrative.

In support of his argument, Plaintiff contends that he was nominated for the award by COL Jose Olivero in 2003, and that the medal was awarded in a ceremony at Bagram Air Base Afghanistan. Pl.'s Decl. (Ex. B) ¶ 66. Plaintiff says that the award citation and narrative "was considered to be an unclassified document package," *id.*, but he does not identify who made that assessment, let alone demonstrate that such a determination was made by a competent classification authority. He proceeds to opine that COL Olivero "would further stipulate that it is *his* judgment that the BSM narrative was when he signed it in 2003, as it is today, an unclassified document." *Id.* (emphasis added). But even if Plaintiff could competently attest to COL

---

information as already in the public domain when he submitted open source materials but "provided no adequate pinpoint citations"). As explained above, OSR expressly asked Plaintiff to provide specific pinpoint citations to his submitted open source materials, to facilitate the government's review of his claims, and he failed to do so. *See* Unclassified OSR Decl. (Ex. D) ¶¶ 8-9 & Ex. 4.

[11] Plaintiff's declaration (at Exhibit B) included two copies each of the citation (Exhibit 1, page 5; Exhibit 4, page 1) and the narrative (Exhibit 1, page 6; Exhibit 4, page 2). The version of the narrative he submitted was already redacted. Defendants then determined that additional information contained in that document is classified and must also be redacted; the Government has marked those redactions with boxes.

Olivero's opinion, that opinion is also immaterial here, as it cannot overcome the reasoned assessment of an original classification authority, as set forth in Defendants' declarations, as to the classification of the information at issue.

In further support of his contention that the Government has released the information, Plaintiff claims that the citation and narrative were provided to him at a government facility in 2004. *Id.* That also does not show an official disclosure. Plaintiff was authorized to receive classified information at the time – though he is no longer – and the fact that Plaintiff was provided with a copy of the documents (in a government facility, no less) does not demonstrate that the information in the documents was or is unclassified.

All Plaintiff has claimed is that he was previously provided with a copy of the Bronze Star Medal narrative, and that one or two other individuals believe the documents were unclassified.[12] Even if that is true, Plaintiff does not identify an "official and documented disclosure" of this information. *See Fitzgibbon*, 911 F.2d at 765. The Second Circuit properly rejected a virtually identical argument in *Wilson*, in which the plaintiff contended that information concerning her employment had been officially disclosed because it was contained in a letter sent to her by an agency. The court held that the letter "did not constitute a 'disclosure," because "[t]he term 'disclosure' does not reasonably encompass [agency]

[12] Plaintiff' suggests that Defendants did not consider the narrative to be classified until the security review that was done in January 2013. *See* Pl.'s Decl. (Ex. B) ¶ 75. But the Government had not, at any prior point of this litigation, been asked to assess the classification of the narrative itself. Nor has Plaintiff indicated that he ever submitted the document to the Department for a classification review. Moreover, Defendants have been consistent in their assessment of the related information in Plaintiff's manuscript. Defendants required the redaction of this information in the 2010 review, and are not presently requiring Plaintiff to redact any additional information that was left unredacted at that time. Plaintiff is also incorrect in asserting that Defendants have required the redaction of all information contained in the narrative. *See id.* ¶ 77(d). The Government has required the redaction only of the portions of the document that are properly classified.

transmittal of classified information to a former employee who (1) already knows the information in question, and (2) is contractually obligated to maintain the confidentiality of classified and classifiable information." *Wilson*, 586 F.3d at 188. While a "disclosure" of information suggests that the information has been opened up to general knowledge, "the transmittal of a letter containing personnel information only to person referenced hardly demonstrates such a disclosure." *Id.* Moreover, such a communication is not "made public" by the agency because, as private correspondence provided only to the authorized individual, it is not made available to the general public. *Id.* The same is true here: Plaintiff contends that the narrative was provided to him by an Army warrant officer at a military facility. Pl.'s Decl. (Ex. B) ¶ 67. This does not constitute an official disclosure, and Plaintiff's argument – even if factually accurate – fails as a matter of law.

Finally, Plaintiff relies on the fact that he himself has disclosed the documents to "both U.S. and international media," along with members of Congress. *See id.* ¶ 73. According to Plaintiff, his own disclosures have caused "no damage to national security." *Id.* ¶ 72. But an individual cannot disclose information publicly without authorization, and then rely on that unauthorized disclosure to claim that the information is no longer classified. Again, the Second Circuit rejected this precise argument in *Wilson*, where it recognized that the plaintiff's "decision to permit public release of [a document] does not manifest official disclosure by the" Government. *Wilson*, 586 F.3d at 188. *See also id.* at 189 ("A former employee's public disclosure of classified information cannot be deemed an 'official' act of the Agency."). Moreover, the Court owes Plaintiff's assessment of the harms that could result from disclosure no weight. Courts repeatedly reject the views of plaintiffs on questions of whether a particular

disclosure may harm national security, *see supra* note 6 (discussing cases), and Plaintiff's view cannot overcome the reasoned assessment of Defendants' classification authorities.

2. Information identifying operational units

Second, Plaintiff challenges the classification of information identifying a Task Force with which Plaintiff allegedly was affiliated during his service. Pl.'s Decl. (Ex. B) ¶¶ 67, 70, 77(b). In his declaration, Plaintiff contends that this information was included in "the unclassified letter, 15 November 2003, Subject: Statement of Direct Support." *Id.* ¶ 70. Yet Plaintiff does not explain his contention that the letter (which Plaintiff has submitted as Exhibit 8 to his declaration) is unclassified. He indicates that the memorandum was "originally given to me while in Afghanistan, in November 2003," *id.* ¶ 67, but that demonstrates little given that Plaintiff was at that time authorized access to classified information. His mere assertion that the document is unclassified fails to satisfy any of the three requirements of an official disclosure, and the information remains properly classified.

Plaintiff also contends that the information cannot be classified because "[t]here is no possibility of damage to national security what so ever by the open discussion of an element that conducted operations in Afghanistan in 2003." Pl.'s Decl. (Ex. B) ¶ 77(b). As discussed above, Plaintiff's opinion on this matter is entitled to no weight. *See supra* note 6. Even if one accepts Plaintiff's factual assertions that the unit has been renamed and renumbered, information concerning the U.S. military's operations in Afghanistan certainly may remain properly classified several years later. Disclosing such information could allow knowledgeable adversaries to connect particular units, personnel, operations, and intelligence sources and methods. In Mr. Leatherwood's classified declaration, an original classification authority has provided further detail concerning the harms that would result from disclosure of this

information. *See* Classified DIA Decl. (Ex. F) ¶¶ 60-61. Plaintiff's burden in demonstrating a prior official and documented disclosure of the information is not lessened by his belief that disclosure now would not cause harm; he cannot meet his burden, and the information remains properly classified.

3. Congressional testimony

Third, Plaintiff contends that certain information is unclassified because it was contained in "DoD Cleared Testimony that I delivered to Congress in February of 2006." Pl.'s Decl. (Ex. B) ¶ 71. His declaration argues that "[a]ll of the information I put in Chapter 14 is contained in my written and public (open) testimony that was cleared by DoD back in February 2006." *Id.*

Plaintiff bears the burden of demonstrating that the testimony was released through an official and documented disclosure. *See Afshar*, 702 F.2d at 1130. The relevant DoD regulation in effect at the time required a form signed by the proper authority before testimony could be officially released, *see* Unclassified OSR Decl. (Ex. D) ¶ 5, and OSR has no record such a signed form, nor has Plaintiff produced one.

Moreover, Plaintiff's claim that the testimony was cleared for release by the Department is at odds with positions he has taken in prior litigation, where he has expressly alleged that the Department refused to authorize his testimony. In a prior case brought by Plaintiff against the Defense Intelligence Agency, the Court set forth the allegations in Plaintiff's complaint:

> Plaintiffs Shaffer and Smith were scheduled to testify about ABLE DANGER before the Senate Judiciary Committee in September 2005. Shaffer submitted his proposed testimony to the DoD for classification review. The DoD never responded, but Defendants claimed that all information was classified and refused to permit the testimony. On September 21, 2005, Plaintiffs' counsel testified in lieu of Plaintiffs.

Shaffer v. Def. Intelligence Agency, 601 F. Supp. 2d 16, 21 (D.D.C. 2009). *See also id.*, Case No. 06-cv-00271, First Am. Compl., Dkt. 8 (D.D.C. Feb. 27, 2006) ¶ 25 ("Shaffer submitted

proposed testimony to the DoD for classification review, but the DoD has never responded. In any event, the defendants claimed all information concerning ABLE DANGER was classified and refused to consent to allow the testimony."). As Plaintiff's declaration makes clear, the Department of Defense has repeatedly informed him that the information at issue is properly classified. *See* Pl.'s Decl. (Ex. B) ¶ 71. By letter dated January 18, 2013, OSR informed Plaintiff that, "while you did submit your prepared testimony for review prior to testifying in the ABLE DANGER hearings, the testimony was never cleared for public release." *Id.*; *see also* Unclassified OSR Decl. (Ex. D) ¶ 10 & Ex. 6 (OSR letter to Plaintiff).

Plaintiff's declaration also provides two Internet links, *see* Pl.'s Decl. (Ex. B) ¶ 71, but neither indicates that the information was officially released by the Government. Even if the information presented at those links matched the information redacted from the book, which Plaintiff has not shown with any specificity whatsoever, the fact that information is publicly available does not demonstrate that it has been the subject of an official disclosure. *See Afshar*, 702 F.2d at 1133. "[T]here can be a critical difference between official and unofficial disclosures," *Fitzgibbon*, 911 F.2d at 765, and "the fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause harm," *Wolf*, 473 F.3d at 378. This analysis does not change if it was Plaintiff himself who placed the information into the public domain because, as discussed above, Plaintiff cannot disclose information without authorization and then rely on that unauthorized disclosure to claim the information is no longer classified. *See Wilson*, 586 F.3d at 187-91.

As set forth in the Government's declarations, this information remains properly classified. Because Plaintiff cannot show that his remarks were part of an official disclosure by the Government, he cannot overcome Defendants' showing.

4. Deployment orders

Plaintiff's declaration also contends that certain information is not properly classified because it is contained in a single page of deployment orders. *See* Pl.'s Decl. (Ex. B) ¶ 78; *see also id.*, Ex. 3, final page (deployment orders). Plaintiff indicates that "the deployment orders in question were provided to me, unclassified, as a record of my deployment." *Id.* But he does not explain why his receipt of the documents makes them unclassified. He treats that as self-evident, but it is not. Personnel records may contain classified information; indeed, that is not unusual when the records are provided to individuals assigned to intelligence-related duties who are authorized to receive such information and have voluntarily undertaken the obligation to keep such information secret. *See, e.g.*, *Wilson*, 586 F.3d at 187-91. The information remains properly classified, and Plaintiff fails to show otherwise.

In sum, Plaintiff has not shown that any of the information redacted from the book has been the subject of an official and documented disclosure. Because the Government has shown that the information redacted from the book is properly classified, Plaintiff has no right to publish the information, and his First Amendment challenge fails as a matter of law. The Court should thus enter judgment for Defendants on Plaintiff's first cause of action.

V. PLAINTIFF'S REMAINING CLAIMS SHOULD BE REJECTED

The Court should also reject Plaintiff's remaining claims. In his second count, Plaintiff contends that the First Amendment guarantees him the right "to create a sworn declaration to challenge the defendants' classification decisions," and "to use a secure Government computer" to create the declaration. First Am. Compl. ¶¶ 76-77. In his third count, he claims that his First Amendment rights require the Government to somehow authorize his counsel to "review an un-redacted copy of or pages therefrom *Operation Dark Heart* that are available from non-

governmental sources." *Id.*, p. 23. Each claim fails, and judgment should be entered for Defendants.

A. Plaintiff's Claim Concerning the Submission of His Declaration Is Moot

Plaintiff's claim concerning a declaration already has been resolved by the Court. Following a status conference on February 13, 2013, the Court entered a scheduling order in which it allowed Defendants to determine whether they would provide Plaintiff with access to a secure government computer, and then required Plaintiff to submit a declaration to Defendants no later than March 13, 2013. *See* Scheduling Order (Feb. 13, 2013), Dkt. 55. Defendants subsequently informed the Court that they would not provide Plaintiff with such access, but instead facilitated alternate means of protecting the information to be included in his declaration. *See* Defs.' Status Report (Feb. 27, 2013), Dkt. 56. Plaintiff then submitted his declaration and supporting exhibits to Defendants. Following a classification review, Defendants returned a cleared version to Plaintiff. Defendants are now filing that version on the public record and submitting *ex parte* an unredacted version of the portions containing classified information.

Defendants have previously explained that Plaintiff has no right to submit classified information to the Court or to access a secure government computer in order to draft a declaration. *See* Defs.' Suppl. Br. (Oct. 28, 2011), Dkt. 28, at 10. That remains the case, but the Court need not reach those issues because Plaintiff has now submitted a declaration to the Court (which he claims that he drafted using a secure computer accessed through another agency). *See* Pl.'s Decl. (Ex. B) ¶ 2 n.1. As a result, Plaintiff's claim is moot and should be dismissed.

B. Plaintiff's Claim Concerning His Counsel's Access Is Without Merit

Finally, Plaintiff contends that the First Amendment requires that his counsel be permitted to access certain publicly-available information and to cite and discuss that

information in the briefing to be submitted in this case. First Am. Compl. ¶¶ 82-90. While this issue was briefly discussed in the status conference on February 13, 2013, the grounds for Plaintiff's claim remain unclear. Defendants have not taken any position on the materials that Plaintiff's counsel may possibly cite in a written submission filed in this case, nor do Defendants intend to do so. Specifically, Defendants will not confirm to Plaintiff's counsel – who is not authorized to access the classified information at issue in this case – whether certain publicly-available sources include that information. By refusing to facilitate Plaintiff's counsel's access to classified information, Defendants have not infringed on Plaintiff's First Amendment rights.

Moreover, to the extent Plaintiff is arguing that the Government must provide any information to his counsel at this time, his claims are premature under the D.C. Circuit's ruling in *Stillman*. (His claims are, in any event, also without merit, as the First Amendment does not require the Government to disclose classified information to his counsel.) In *Stillman*, the court held that the district court had abused its discretion by unnecessarily deciding whether an author had a First Amendment right for his attorney to receive access to classified information in order to assist the court in resolving the author's challenge to classification. 319 F.3d at 548. *Stillman* makes clear that the district court should avoid reaching such constitutional questions if it can resolve the case without doing so. *Id. See also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). Pursuant to *Stillman,* the Court should consider Plaintiff's ancillary claims only after reviewing the classification challenges at issue to see if it can resolve the merits of the case without reaching these additional issues. Because Defendants have met their burden in

showing that the redacted information is properly classified, the Court need not reach these additional issues.

Conclusion

For the reasons stated herein, Plaintiff has no First Amendment right to publish the information at issue in the manuscript. The Government has identified risks of serious and exceptionally grave harms to national security if that information is disclosed in a revised version of the book, and the Government's judgment is entitled to substantial deference. Defendants have demonstrated that the information is properly classified, and the Court should conclude that Defendants are entitled to judgment as a matter of law on Plaintiff's claims.

Dated: April 26, 2013.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ Scott Risner
SCOTT RISNER (MI Bar No. P70762)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 514-2395
Fax: (202) 616-8470
Email: scott.risner@usdoj.gov

Attorneys for Defendants