

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANZ BOENING,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	1:07CV00430 (EGS)
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

**DECLARATION OF SCOTT A. KOCH
INFORMATION AND PRIVACY COORDINATOR
CENTRAL INTELLIGENCE AGENCY**

I, SCOTT A. KOCH, hereby declare and say:

1. I am the Chief, Public Information Programs Division (PIPD), Information Management Services (IMS), Office of the Chief Information Officer (CIO), Central Intelligence Agency (CIA). I also serve as the CIA Information and Privacy Coordinator (Coordinator). I have held these positions since 9 August 2004.

2. I have served with the United States Government for approximately sixteen years and, in addition to my current positions, have held other supervisory positions with the CIA in the field of information review and release. Under a written delegation of authority pursuant to section 1.3(c) of Executive Order 12958,¹ I hold original

¹ Executive Order 12958 was amended by Executive Order 13292, effective March 25, 2003. See Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All citations to Exec. Order No. 12958 are to the Order as

classification authority at the TOP SECRET level.

Therefore, I am authorized to make original classification and declassification decisions.

3. In my capacity as Chief of PIPD/IMS, I have overall supervisory responsibility for the CIA's Publications Review Board (PRB). The PRB reviews any written, oral, electronic, or other presentation intended for publication or public dissemination, whether personal or official, that mentions CIA or intelligence data or activities or material on any subject about which the author has had access to classified information in the course of his or her contact with the CIA. As part of my official duties, I have overall responsibility for ensuring that CIA administratively processes prepublication reviews in accordance with the law and as efficiently as possible with the personnel and resources available.

4. In my capacities as Chief of PIPD/IMS and Coordinator, I serve as the Executive Secretary of the Agency Release Panel (ARP), which adjudicates classification challenges filed with the CIA. The Coordinator, as Executive Secretary of the ARP, normally is

amended by Exec. Order No. 13292. See Exec. Order No. 12958, 3 C.F.R. 333 (1996), reprinted as amended in 50 U.S.C.A. § 435 note at 180 (West Supp. 2006).

the initial reception point for all classification challenges filed with the CIA.

5. Through the exercise of my official duties, I am familiar with this civil action and plaintiff's requests both through the Agency Release Panel (ARP) and the Publications Review Board (PRB) for approval to publish the memorandum that is the subject of this case. I make the following statements based upon my personal knowledge, and information made available to me in my official capacity.

6. I am submitting this declaration to explain to the Court the procedures by which plaintiff submitted his May 10, 2001, memorandum for classification review by the CIA, and the processes that followed. Parts I, II, and III of this declaration set forth plaintiff's obligations under his secrecy agreement, and the procedures for submitting official and nonofficial documents to the CIA for classification review. Part IV of this declaration describes the review processes that plaintiff's memorandum actually underwent. The May 10, 2001, memorandum was submitted twice to the CIA for classification review, once in May 2001 and again in November 2004, and was substantively reviewed at least five separate times inside the CIA, and at least once by authorities outside the CIA.

Each time it was reviewed, it was deemed properly classified.

I. PLAINTIFF'S SECRECY AGREEMENT AND OBLIGATIONS

7. As a condition of employment in a position of special confidence and trust relating to the national security, all CIA employees are required to sign a "Secrecy Agreement" that obligates them to protect such information from unauthorized disclosure. The agreement applies both during employment with the CIA and at all times thereafter. Franz Boening signed such a secrecy agreement with the CIA at the time of his employment in 1980. This agreement is Exhibit A to this declaration.

8. Specifically, Mr. Boening agreed never to disclose information or material "obtained . . . in the course of . . . employment or other service with the Central Intelligence Agency" that is classified, that he knows, or has reason to know, should be classified, or that identifies any person or organization who has or has had a relationship with the United States government that the government has taken affirmative measures to conceal. Ex. A.

9. In furtherance of the secrecy agreement's nondisclosure provision, the agreement also contains a requirement that all current and former employees submit

materials that contain any mention of intelligence data or activities, or that contain data that may be based upon information classified pursuant to Executive Order, to the CIA for review before nonofficial public disclosure of the material. Current and former employees must also receive written permission from the CIA before taking any steps toward public disclosure. The agreement provides:

As a further condition of the special confidence and trust reposed in me by the Central Intelligence Agency, I hereby agree to submit for review by the Central Intelligence Agency all information or materials . . . which contain any mention of intelligence data or activities, or contain data which may be based upon information classified pursuant to Executive Order, which I contemplate disclosing publicly or which I have actually prepared for public disclosure, either during my employment or other service with the Central Intelligence Agency or at any time thereafter prior to discussing it with or showing it to anyone who is not authorized to have access to it. I further agree that I will not take any steps toward public disclosure until I have received written permission to do so from the Central Intelligence Agency.

Id.

10. The prepublication review requirement extends, but is not limited, to books, academic journal articles, magazine articles, newspaper columns, letters to the editor, book reviews, screenplays, speeches, interviews, testimony, court filings, and other written or oral disclosures. Prior to approval for publication, such

materials and information shall not be disclosed to any other person.

11. Plaintiff's secrecy agreement notes that the purpose of the requirement is to allow the CIA to determine whether the materials intended for public disclosure contain information that the employee is required to protect. In signing the secrecy agreement, Plaintiff indicated that he understood that the CIA would respond to his requests for prepublication review within "a reasonable time."

II. CLASSIFICATION CHALLENGES FOR OFFICIAL DOCUMENTS

12. Executive Order 12958, as amended, allows "[a]uthorized holders of information who, in good faith, believe that its classification status is improper" to bring a challenge "in accordance with agency procedures." E.O. 12958, Sec. 1.8(a). Through this provision, an authorized holder may "seek a review or otherwise challenge the classified status of information to further the interests of the United States Government." 32 C.F.R. § 1907.01(b). An authorized holder means "any member of any United States executive department . . . who holds a security clearance from or has been specifically authorized by the Central Intelligence Agency to possess and use on official business classified information." 32 C.F.R.

§ 1907.02(b). A challenge is defined as "a request in the individual's official, not personal, capacity and in furtherance of the interests of the United States." 32 C.F.R. § 1907.02(d). Such a challenge is to be directed to the CIA's Agency Release Panel, which would consider the challenge and communicate its decision to the authorized holder. 32 C.F.R. §§ 1907.03, 1907.21-1907.26. An authorized holder of information has a right of appeal from the decision of the Agency Release Panel to the Interagency Security Classification Appeals Panel (ISCAP). 32 C.F.R. § 1907.31.

III. THE PRB PROCESS

13. Prior to July 2005,² when the CIA revised its internal regulations,³ all current and former Agency employees, and others obligated by contract, were required to submit for prior CIA review all materials intended for

² Mr. Boening made the submissions of the May 10, 2001 memorandum at issue here prior to the July 2005 revision of the CIA's internal regulations. He received final notification of the PRB's decision in 2006, after the July 2005 revision. Where relevant, this declaration will also discuss the regulations as set forth after the July 2005 revision occurred.

³ Attached hereto as Exhibits B and C are true and accurate copies of the CIA's internal regulations governing the Prepublication Review process. Exhibit B is dated and effective 14 March 1995 through 22 July 2005, and Exhibit C is dated and effective 22 July 2005 through 4 December 2006. The regulations have been redacted to remove protected CIA information, none of which is related to the above-captioned matter.

nonofficial publication.⁴ Ex. B at 2.b.(1). The regulation required current employees to submit "material intended for nonofficial publication through their supervisory chain of command to their Deputy Director or Head of Independent Office." Id. at 2.d.(1). Employees could also "elect first to make submissions directly to the Chair of the PRB only for determination of the necessity for any Agency review." Id. If an employee chose the former method of submission, his or her management could then submit the material to the PRB for decision on publication.

Alternatively, the employee's Deputy Director or Head of Independent Office could determine that public release of the material was authorized, approve publication of the material with deletions and/or changes, or disapprove publication altogether. Id. at 2.d.(2).

14. The Agency could deny permission for nonofficial publication of any information obtained during the course of employment with the CIA that had not "been placed in the public domain by the U.S. Government and if disclosure reasonably could be expected to harm the national security interests of the United States." Id. at 2.i.(1). It could not deny permission to publish solely because the statement

⁴ Nonofficial publication is a work by anyone who has signed a CIA secrecy agreement, who has prepared the work as a private individual, and who is not acting in an official capacity. Ex. C at 2.b.(6).

could be "embarrassing to or critical of the Agency." Id. at 2.i.(2). In addition, for a current employee, the Agency could "deny permission to publish statements or expressions of opinion that could reasonably be expected to impair the author's performance of duties, interfere with the authorized functions of the CIA, or have an adverse impact on the foreign relations or security of the United States." Id. at 2.i.(4).

15. In July 2005, the Agency revised its prepublication review guidelines. Ex. C. Under the new guidelines, the PRB itself was to review submissions of nonofficial, personal works both current and former employees wrote. The new regulation eliminated the role a current employee's managers formerly played. Id.

16. Prior to July 2005, the PRB consisted of a Chair and senior representatives from the Directorate of Operations, the Directorate of Administration, the Directorate of Science and Technology, the Directorate of Intelligence, the Office of the Associate Deputy Director for Administration/Information Services, the Office of Personnel Security, the office responsible for overseeing the cover status of Agency employees, and a legal representative. Ex. B at 2.e.(1). After the July 2005 revision, the PRB consisted of a Chair and an Executive

Secretary, as well as senior representatives from the Director of CIA Area, the Directorate of Operations (DO), the Directorate of Support, the Directorate of Science and Technology, the Directorate of Intelligence, Security Center, the office responsible for overseeing the cover status of Agency employees, and a legal representative. Ex. C at 2.c.(1).

17. The Agency adopts and implements all lawful measures to protect from unauthorized disclosure information that, if disclosed, could damage the national security, and to ensure that individuals with access to such information understand and comply with their obligation not to disclose it. Prior agency review of material intended for nonofficial publication is a key component of efforts to prevent unauthorized disclosures. The purpose of prepublication review by the PRB is twofold: to assist individuals in meeting their obligations and to ensure that they do not disclose information damaging to the national security. In conducting prepublication review, the Agency identifies information for deletion or revision only to the extent necessary to protect information the disclosure of which could harm national security.

18. In reviewing materials, the PRB prioritizes short, time-sensitive submissions, such as editorial opinions or letters to the editor, to ensure review as expeditiously as possible. Although the PRB attempts to complete review of other nonofficial publications within 30 days of receipt, lengthy or complex submissions that involve intelligence sources and methods may require a longer time period for review, as CIA internal regulations outline. CIA's regulations do not, therefore, require the completion of prepublication review within 30 days of receiving a submission.

IV. HISTORY OF PLAINTIFF'S REQUESTS

A. May 10, 2001 Submission of May 10, 2001 Memorandum.

19. On May 10, 2001, Franz Boening provided copies of his 25-page May 10, 2001 memorandum (with three addenda, one a two-page "Classified Annex") to the Office of Inspector General (OIG) Duty Officer. The memorandum was addressed to "Office of the Inspector General, Central Intelligence Agency" and it was from "Franz Boening, Central Intelligence Agency." The memorandum further indicated that Boening was providing informational copies to the Director of Central Intelligence; the Executive Director of the CIA; the Office of Congressional Relations;

the Deputy Director for Operations; the Chief, Latin America Division, Directorate of Operations; and the Counter-Narcotics Center. The memorandum included a "Bibliography," which listed fifty-five sources, but by and large did not match those sources to portions of the memorandum. The author styled the memorandum as an "urgent concern" under "the Whistleblower Provisions" "of the 1999 Intelligence Authorization Act." The classified *in camera*, *ex parte* Declaration of Ralph S. DiMaio includes a further description, as well as an unredacted copy, of this memorandum.

20. Two OIG Special Investigators initiated a review of Mr. Boening's complaint in accordance with Section 17(d)(5) of the CIA Act with respect to an "urgent concern" to the Inspector General (IG). 50 U.S.C. § 403(q)(5). That provision allows a CIA employee to report information to the IG prior to possible submission to Congress. In accordance with that provision, the IG had fourteen days from the date of the receipt of the complaint or information to determine whether the complaint or information appeared credible.

21. After reviewing Mr. Boening's complete memorandum, the accompanying package of documents submitted to OIG, as well as additional CIA information, OIG

concluded that there was no urgent concern presented by Mr. Boening's May 10, 2001, memorandum.

22. After Mr. Boening's submission to OIG, a classification review of the documents by the Directorate of Operations⁵ Information Review Officer (DO/IRO), the component whose equities were implicated by plaintiff's memorandum, was requested; prior to any possible dissemination outside the Agency. The DO/IRO, who held original classification authority, reviewed the documents and bracketed the portions that he deemed classified in accordance with the CIA National Security Classification Guide. Subsequent to the DO/IRO's identification of classified information, the appropriate Congressional oversight committees were provided with copies of the May 10, 2001, memorandum and addenda. Congress made no further requests or inquiries of the CIA on this issue.

23. Mr. Boening then indicated that he wished to further publish his complaint by providing it to the National Security Archive, a non-governmental public interest advocacy group. Because Mr. Boening believed that his memorandum was unclassified, he requested that it be reviewed under the classification challenge provisions of

⁵ The Directorate of Operations (DO) is now the National Clandestine Service (NCS).

E.O. 12958 and the CIA implementing regulations. By memorandum dated July 2, 2001, Mr. Boening submitted his complaint to the Agency Release Panel (ARP) for classification review under the procedures permitting an authorized holder to challenge the classification of an official document. Considering the document on its face, i.e., as a document submitted in an official-looking format by Franz Boening, apparently in his capacity as a CIA employee, the ARP initially assumed, without further analysis, that Mr. Boening was an authorized holder of the information.

24. On July 25, 2001, the Agency Classification Management Review Panel (ACMRP), to which the ARP referred Mr. Boening's challenge for initial determination and review (with right of appeal to the ARP), met to review Mr. Boening's challenge to the classification of his May 10, 2001 memorandum. The ACRMP reviewed the information in each paragraph that had been identified as classified, and unanimously agreed with all of the prior classification decisions except one. The ACRMP reconvened on September 4, 2001 in order to address specific points Mr. Boening made in his July 2, 2001 classification challenge. Once again, the ACRMP found that the material in question was appropriately classified.

25. In a September 12, 2001, memorandum to the Chair of the Agency Release Panel, the ACRMP set forth its decision on Mr. Boening's classification challenge. In doing so, the ACRMP also assumed that Mr. Boening's complaint met the threshold legal criteria for the classification challenge to occur, i.e., that he was an authorized holder of the information presenting a classification challenge in his official capacity. Upon receiving the results of the ACRMP's decision, Mr. Boening appealed the Panel's decision to the ARP. During the pendency of the appeal, informal efforts were undertaken in an attempt to work with Mr. Boening to assist him in revising his complaint so that it would express his personal opinions without revealing classified information. These efforts proved unavailing, and the ARP formally scheduled Mr. Boening's appeal for consideration. In the meantime, a new Executive Secretary of the ARP (ES/ARP) was appointed.

26. Upon receiving and reviewing the May 10, 2001, memorandum and the additional materials submitted with it, the new ES/ARP questioned whether that memorandum was in fact an official document related to Mr. Boening's official duties with the Agency, and thus, whether it properly was subject to a classification challenge under E.O. 12958, as

amended. In so doing, the ES/ARP focused on Mr. Boening's views that his complaint was not an official expression of the CIA, which, in turn, led the ES/ARP to question whether a whistleblower complaint was actually reviewable under the classification challenge provisions of the Executive Order and CIA implementing procedures. As a result, the Agency reexamined whether jurisdiction existed for a CIA employee complaint under the Intelligence Community Whistleblowers Protection Act of 1998 to be reviewed under the classification challenge provisions of Executive Order 12958 and CIA implementing regulations.

27. After reexamining the jurisdictional question, the CIA concluded that Mr. Boening's complaint was a "personal record" created in his personal capacity, and the CIA could not, therefore, review it pursuant to the classification challenge provisions of Exec. Order 12958 and CIA implementing regulations. Because a whistleblower complaint was, by its nature, a personal communication between a federal employee, the IG, and/or Congress, it represented the employee's personal views, not official agency views. Further, in making this type of personal communication to Congress, the employee was not conducting or facilitating agency business. In addition, Mr. Boening himself had indicated that his complaint was not an

official expression of agency views. As a result, the Agency concluded that Mr. Boening's document was a personal record that he created in his personal capacity. Consequently, the ES/ARP advised Mr. Boening that neither the ACMRP nor the ARP had jurisdiction to review the classification of his complaint, and that the classification of his complaint needed to be reviewed under the procedures that applied to any nonofficial writing by a current employee about the Agency that was intended for publication.

28. After determining that the ARP lacked jurisdiction to review Mr. Boening's complaint, the ARP forwarded the documents to the Information Review Officer for the Directorate of Science and Technology (DS&T/IRO). The DS&T was the Directorate of which the Foreign Broadcast Information Service (FBIS), where Mr. Boening worked, was a part. The DS&T/IRO was the DS&T official designated under then-current CIA internal regulations to review nonofficial documents written by current employees submitted for prepublication review.

29. To better inform his judgment, the DS&T/IRO requested, and received, an advisory opinion on the classification of Mr. Boening's document from the Agency Release Panel. The ARP concluded that Mr. Boening's

document was currently and properly classified at the SECRET level.

30. The DS&T/IRO subsequently reviewed Mr. Boening's document himself, considered the ARP's advisory opinion concerning that document, and, in his official capacity as the designated DS&T approving official for nonofficial documents intended for nonofficial publication that were authored by current DS&T employees, determined both that Mr. Boening's document was currently and properly classified, and that it could not be approved for unclassified nonofficial publication as written. Mr. Boening was provided with this decision via email dated June 24, 2003.

31. After learning of the CIA's determination that his document was not an "official document" produced in his official capacity as a CIA employee, Mr. Boening submitted his document to the Interagency Security Classification Appeals Panel (ISCAP), as contemplated in the Executive Order, which governs classification challenges by authorized holders of official documents.

32. After considering Mr. Boening's submissions, J. William Leonard, the Executive Director of the Information Security Oversight Office (ISOO), the entity that provides program and administrative support for ISCAP,

and who also serves as the Executive Director of ISCAP, told Mr. Boening, by letter dated February 4, 2004, that he had determined that Mr. Boening was not an authorized holder of the information that he had accessed in preparation of his complaint, and that Mr. Boening as a result lacked standing to make a classification challenge to ISCAP in accordance with the Executive Order.⁶ Nonetheless, Mr. Leonard exercised his independent authority to consider whether the CIA had improperly classified information contrary to provisions of the Executive Order. He determined that the CIA's classification of the information in question was appropriate. Ex. D.

B. November 2004 Submission of May 10, 2001 Memorandum.

33. By memorandum dated November 22, 2004, Mr. Boening again submitted his May 10, 2001, memorandum for processing for official release and/or approval, this time to the CIA's Publications Review Board (PRB), for

⁶ As noted in Leonard's letter, the CIA had determined that Mr. Boening did not have a need-to-know the classified information in question, and that any access to classified information that Mr. Boening had gained and used in his memorandum was not granted in accordance with his duties at the CIA.

consideration as a nonofficial document.⁷ On August 13, 2005, Mr. Boening retired from federal service.

34. By email dated November 25, 2005, Mr. Boening contacted the new Chairman of the PRB seeking information on the status of his documents. By letter dated 5 January 2006, the Chairman responded, notifying Mr. Boening that the PRB "requires that you rewrite your 'M Documents' outside of a government memo format stating in your own words what you desire to communicate. As mentioned in our previous messages, what you resubmit must include specific, open source citations (author, title, source, date, page) for the statements you wish to make. These citations must be placed in the body of the text linked to specific sentences and paragraphs." Ex. E.

35. When Mr. Boening did not revise his documents as suggested, the PRB substantively considered Mr. Boening's submissions and responded to Mr. Boening by letter dated 20 June 2006. That letter set forth the final decision of the PRB with respect to the review of the documents Mr. Boening submitted, and included a detailed list of

⁷ At that time, Mr. Boening also submitted additional memoranda dated 16 January 2003, 24 March 2003 and 20 May 2004. The March 2003 and May 2004 memoranda are not at issue in this lawsuit. Complaint, ¶ 5. The PRB considered the 16 January 2003 memorandum when Mr. Boening was a current CIA employee, and the redactions on that memorandum relate to Mr. Boening's status as a then-current employee; now that he is no longer a CIA employee, the document can be released in full. This re-reviewed document is being provided to plaintiff.

redactions required prior to publication of the May 10, 2001 memorandum. The Board also required the following disclaimer:

All statements of fact, opinion, or analysis expressed are those of the author and do not reflect the official positions or views of the CIA or any other U.S. Government agency. Nothing in the contents should be construed as asserting or implying U.S. Government authentication of information or Agency endorsement of the author's views. This material has been reviewed by the CIA to prevent the disclosure of classified information.

Ex. F.

36. By email dated 29 June 2006, Mr. Boening contacted the PRB, stating that he had demonstrated that the "M documents" were based on open sources, and challenging the PRB's assertion that the subject of the memorandum could not be mentioned by name. He still had not, however, and has not to date, revised his memorandum to include the specific open source citations linked to each sentence and paragraph as required by the CIA. Mr. Boening also sought information on the "Classified Annex" to the 10 May 2001 memorandum that he had submitted, and which had not been addressed by the PRB.

37. The PRB responded by email the following day, stating:

As we have told you a number of times in the past, if you rewrite your M story in a different

format, outside of the official-looking memo-type one it currently is in[,] and attribute those statements to open sources in the new format (as you basically have), there should be no problem with you getting your message out. The deletions noted in our letter pertain to the information as presented in the old format and not to the information itself.

As you should be well aware, anyone with access to classified systems can easily access classified information on a wide variety of subjects, including those they don't work on.

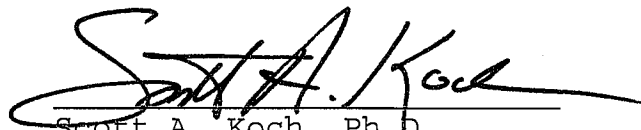
He also stated that the PRB would look into the issue of the Classified Annex. Ex. G.

38. By letter to Mr. Boening dated 11 August 2006, the PRB Chairman wrote that the PRB had located the "2001 classified annex" document that Mr. Boening had created when employed by the Agency. He further stated that a classification review of the May 10, 2001 document had been completed, and "The Board determined that, in accordance with the terms of your secrecy agreement, all of the information contained within the document is inappropriate

for disclosure in the public domain (i.e., is considered to be classified information)." Ex. H.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of July, 2007.

A handwritten signature in black ink, appearing to read "Scott A. Koch", written over a horizontal line.

Scott A. Koch, Ph.D.
Information and Privacy Coordinator
Central Intelligence Agency