

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

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

MOTION TO CONTINUE STATUS CONFERENCE AND SET BRIEFING SCHEDULE

The Court held a status conference in this matter on January 30, 2013, during which the Court and the parties discussed certain issues regarding how the parties will present briefing in this case. Specifically, the Court and the parties discussed the Plaintiff’s contentions that the Government must provide him “access to a secure U.S. Government computer system” in order to create a declaration challenging the defendants’ classification decisions, and that the Court should enter “specific relief” related to his counsel’s preparation of his responsive brief. First Am. Compl. ¶¶ 76-77, 86-88; Joint Case Management Report, Dkt. 50, at 1-3. The Court has scheduled another status conference in this matter for February 8, 2013.

The Defendants respectfully ask the Court to continue or vacate that status conference in order to permit briefing on these matters. Plaintiff’s requested relief raises complex legal questions and involves important precedent that cannot be adequately addressed without substantive briefing. The Plaintiff’s requests are not merely matters of procedure or scheduling, amenable to resolution in a traditional scheduling conference. Instead, the questions before the Court are the very basis of the second and third causes of action in the Plaintiff’s complaint. *See*

First Am. Compl. ¶¶ 75-90. These claims raise constitutional questions concerning the Plaintiff's rights under the First Amendment and the Executive's authority and responsibility to protect classified information, and the Court need not, and should not, rule on such issues without the parties having had sufficient opportunity to present their arguments.¹

Additionally, the Defendants are being asked to respond to requests that the Plaintiff has not fully explained. For example, the Plaintiff has indicated that "it is necessary to seek specific relief from the Court to permit his counsel . . . to utilize and analyze publicly available information relating to the manuscript," *see* Dkt. 50 at 2, but he does not explain what that "specific relief" would entail. Requiring the Plaintiff to set forth the basis for his motion, and the specific relief he requests, would allow the Defendants to respond appropriately, which would more clearly present the issues to be decided by the Court.

The undersigned counsel has conferred with Mark Zaid, counsel for the Plaintiff, who indicated that the Plaintiff opposes this motion because it would require briefing on the request for relief pertaining to the Plaintiff's counsel. The Defendants respectfully note that, in the Joint Case Management Report, Dkt. 50, the parties agreed that further briefing was necessary to resolve all of the Plaintiff's requests, including the one pertaining to his counsel. While the parties previously offered separate scheduling proposals, each side agreed that the Plaintiff should file a motion regarding these issues.

¹ The parties previously provided supplemental briefs on similar issues, in response to an order issued by Judge Urbina on September 22, 2011. *See* Dkt. Nos. 26, 28, 29. Those briefs addressed particular questions from the Court that did not encompass all of the issues raised by the Plaintiff's current requests – for example, the parties have not briefed the Plaintiff's claim that the First Amendment requires any relief with respect to the Plaintiff's counsel – and the briefs do not reflect the current status of this litigation, given that the Department of Defense recently completed the administrative security review of the manuscript.

Consistent with the views expressed in that report, the Defendants ask the Court to enter a briefing schedule on the procedural issues. The Defendants ask that the Court enter a schedule that allows the Plaintiff to file his motion by February 19; the Defendants will file an opposition by March 5, 2013; and the Plaintiff will file a reply by March 15, 2013.² A hearing could then follow the briefing or the Court's decision on the Plaintiff's motion, but the Defendants respectfully suggest that these matters cannot be efficiently and adequately resolved through a scheduling conference alone.³

In the alternative, if the Court determines not to require additional briefing at this time, the Defendants respectfully request a short continuance of the scheduling conference to allow additional time for counsel to consult with the client agencies and others potentially affected by a ruling on these matters. The Defendants are available for a conference on February 13 or 19, 2013.

A proposed order is attached.

Dated: February 4, 2013.

Respectfully submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General

JOHN R. TYLER (DC Bar No. 297713)
Assistant Branch Director

/s/ Scott Risner

² The Defendants respectfully note that the undersigned counsel will be unavailable March 7-15, 2013.

³ In the Joint Case Management Report, the Defendants proposed that the Plaintiff's motion for procedural relief be filed only after the Defendants moved for summary judgment, while the Plaintiff asked that the briefing proceed on parallel tracks. The Defendants recognize now that briefing on the Plaintiff's requests should begin now rather than after the summary judgment motion is filed. To conserve the resources of the Court, counsel, and the personnel who would review the classified material and prepare declarations in support of the Defendants' motion, the Defendants submit that briefing on the summary judgment motion should begin only after the Court has considered the procedural requests.

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