

**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.)	
)	

DEFENDANTS’ RESPONSE TO PLAINTIFF’S SUPPLEMENTAL DECLARATIONS

In his most recent filing in this prepublication review challenge, Plaintiff seeks to satisfy his burden of demonstrating that specific information in two documents has been released to the public through an official and documented disclosure. In June 2014, he supplied new facts about one of those documents – Plaintiff’s prepared testimony delivered to the House Armed Services Committee (HASC) on February 15, 2006 – which allowed the Government to confirm an official release. Plaintiff, however, has still failed to carry his burden with respect to the other document, the nomination narrative supporting Plaintiff’s former Bronze Star Medal.

BACKGROUND

On April 26, 2013, Defendants filed their Second Motion for Summary Judgment. ECF No. 63. After a hearing on Defendants’ motion, the Court entered a Minute Order, dated April 29, 2014, directing Plaintiff and his counsel to submit affidavits regarding the events by which Plaintiff received copies of the two documents – the prepared testimony to the HASC and the nomination narrative.

On June 5, 2014, Plaintiff and his counsel filed under seal the supplemental declarations as ordered by the Court. ECF. No. 82. The declarations included new factual information that Plaintiff had not previously provided to Defendants or the Court. Based on the new information that Plaintiff has provided, Defendants have been able to confirm that Plaintiff's prepared testimony to the HASC was authorized and thus publicly released through an official and documented disclosure. *See* Second Declaration of Mark Langerman ("Langerman Declaration") at 3. Although Plaintiff did not present this new information during the administrative process that he is challenging before this Court, the Government re-examined Plaintiff's manuscript and determined that information in twenty-one redacted passages in his book is no longer classified. *See* Second Supplemental Declaration of David G. Leatherwood at 7 ("Leatherwood Declaration").¹

However, after review of Plaintiff's submission regarding the Bronze Star Medal nomination narrative, Defendants hold to the position they have previously taken in this case – namely that the nomination narrative was not publicly released through an official and documented disclosure and that information in the nomination narrative remains currently and properly classified.

ARGUMENT

The D.C. Circuit has held that "a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Ashfar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

¹ For the Court's convenience, Defendants have also submitted both classified and unclassified tables setting forth the updated classified status of each redaction from Plaintiff's manuscript. The unclassified table has been provided to Plaintiff and has been submitted as part of Exhibit C to the Langerman Declaration. The classified table is Exhibit 1 to the Leatherwood Declaration and has been submitted to the Court for *ex parte, in camera* review.

To meet this burden, a plaintiff must show that three criteria are met: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure. *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Ashfar*, 702 F.2d at 1133). “These criteria are important because they acknowledge the fact that in the arena of intelligence and foreign relations there can be a critical difference between official and unofficial disclosures.” *Id.*

While Plaintiff demonstrated an official and documented disclosure of the HASC testimony, he has not demonstrated such a disclosure of the Bronze Star Medal nomination narrative. Nothing provided by Plaintiff in his supplemental declaration changes this view. Plaintiff described receiving the nomination narrative in the following circumstances:

- a. He was a serving intelligence officer in the employ of Defendant DIA;
- b. he was a United States Army Reserve officer;
- c. he visited a secure DoD facility that handles covers for intelligence operations; and
- d. a Chief Warrant Officer in the office that handles covers provided him a copy of the nomination narrative that had blacked out only the pseudonym under which he had operated in Afghanistan.

Even assuming that all of the above is true, those claims would not demonstrate an official and documented disclosure by the Government.

In a similar prepublication review case, the Second Circuit explained that “the term ‘disclosure’ does not reasonably encompass [government] 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 v.*

CIA, 586 F.3d 171, 188 (2d Cir. 2009). Under the *Wilson* Court’s analysis, the Government here did not disclose the nomination narrative to the public.

According to Plaintiff’s Supplemental Declaration, the nomination narrative – which Plaintiff had previously seen and which contained information that Plaintiff already knew and was legally obligated to keep confidential – was “returned” to him at a government facility sometime in May of 2004. Plaintiff’s Supp. Decl. ¶¶6, 9. By that time, Plaintiff had signed at least five non-disclosure agreements contractually obligating him to maintain the confidentiality of classified and classifiable information and to submit materials regarding his government service for prepublication review before publication. *See* ECF No. 63-3. When Plaintiff received the nomination narrative, he was required not to publish it without further prepublication review. *Id.*

Accordingly, even if the Court accepts all of the allegations in Plaintiff’s Supplemental Declaration, Plaintiff still has not met his burden of showing that Defendants made the nomination narrative public through an official and documented disclosure. The *Afshar* test is simply not satisfied by a showing that a Chief Warrant Officer provided a copy of a service-related document to a serving intelligence officer who was subject to a non-disclosure agreement. Because the nomination narrative has not been officially disclosed, the classified information contained in that document remains properly classified.

Defendants are happy to address any further questions the Court may have. At this stage, Defendants’ Second Motion for Summary Judgment is fully briefed and the Court should now be in a position to decide that motion and enter summary judgment for Defendants.

Dated: August 8, 2014

Respectfully submitted,

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