

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

ANTHONY SHAFFER

Plaintiff,

v.

DEFENSE INTELLIGENCE AGENCY  
et al.

Defendants.

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Civil Action No: 10-2119 (RMC)

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**REPLY TO DEFENDANTS’ RESPONSE TO  
PLAINTIFF’S SUPPLEMENTAL DECLARATIONS**

This First Amendment litigation to challenge the defendants’ classification decisions of the text in plaintiff Anthony Shaffer’s (“Shaffer”) book Operation Dark Heart (2010) has been ongoing for nearly four years. The defendants have been relentless in continuing their steadfast arguments that classified information remains in the book and a pattern has emerged: as time passes and judicial scrutiny has increased the defendants have been forced to concede additional text is unclassified.

The Government’s latest filing is no different and reveals an extraordinary wholesale capitulation of a position that earlier the defendants had sworn was always in their favor. In defending its constitutional violations the defendants’ arguments have reached the point where Shaffer is compelled to say enough is enough.

**PROCEDURAL BACKGROUND**

On April 9, 2014, the Court issued a Scheduling Order that stated:

The parties’ briefing is inadequate as to the classification status of certain information that allegedly is connected to Plaintiff’s receipt of a Bronze Star Medal and testimony before Congress. Therefore, counsel for the parties shall attend a hearing on April 29, 2014, at 10:00 a.m. To the

extent possible in open Court, counsel should be prepared to discuss both Plaintiff's Bronze Star Medal and congressional testimony.

On April 29, 2014, the parties appeared before the Court to address the identified issues, and a Minute Order was issued later that day stating:

For the reasons stated at the Oral Argument held in open Court on April 29, 2014, Plaintiff and his Counsel are ORDERED to submit under seal affidavits to their personal knowledge concerning the events by which Plaintiff received copies of the narrative associated with Plaintiff's Bronze Star Medal and copies of Plaintiff's 2006 written testimony before Congress. Plaintiff and Counsel shall submit their affidavits to Defendants for classification review no later than May 13, 2014. Defendants shall complete their classification review no later than May 27, 2014, and return the cleared affidavits to Plaintiff. Upon receipt of the cleared affidavits, Plaintiff shall file the declarations within two business days.

On June 5, 2014, Shaffer submitted under seal declarations from himself and his primary counsel.<sup>1</sup> The defendants filed their Response to Plaintiff's Supplemental Declarations ("Defs' Response") on August 8, 2014. This Reply follows.

### ARGUMENT

#### **I. FROM THE OUTSET SHAFFER REPEATEDLY INFORMED THE DEFENDANTS THAT HIS 2006 CONGRESSIONAL TESTIMONY HAD BEEN APPROVED FOR RELEASE AND DETERMINED TO BE UNCLASSIFIED YET HE WAS IGNORED**

The defendants have amazingly and finally conceded that Shaffer's 2006 Congressional testimony before the House Armed Services Committee ("2006 HASC Testimony") "was authorized and thus publicly released through an official and documented disclosure." Defs' Response at 2. Thus, every fact contained within that

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<sup>1</sup> Shaffer believes that there are no reasons to have his two declarations remain under seal and that his submission of June 5, 2014 should be filed on the public record. A request for the defendants' position on this matter has been submitted and we are awaiting a response. Shaffer believes that there are no reasons to have his two declarations remain under seal and that his submission of June 5, 2014 should be filed on the public record. A request for the defendants' position on this matter has been submitted and we are awaiting a response.

testimony is unclassified and any correlation to information within Shaffer's book is similarly and necessarily unclassified, as it has been from the outset.

The defendants' response unbelievably seeks to shift responsibility for its fundamental failure of epic proportions to Shaffer as if somehow he neglected to bring specific facts to their attention. The defendants would have us all believe that only one DIA official had any knowledge of Shaffer's drafting, submission, and ultimate approval of his 2006 HASC Testimony and, unfortunately for the Government, that individual had retired and all institutional knowledge was lost until Shaffer subsequently identified his name and someone was able to contact him. Defs' Response, Ex. 1 (Second Declaration of Mark Langerman), at ¶¶9-10; Defs' Response, Ex. 5, at ¶6 (Second Supplemental Unclassified Declaration of David G. Leatherwood, Director of Operations). Yet Shaffer told defendants *ad nauseum* about his cleared HASC Testimony during just about every classification submission and meeting that he participated in and this includes, but is not necessarily limited to:

- When he originally submitted his manuscript to the Army Reserves for prepublication review in June 2009 a copy of Shaffer's cleared February 2006 HASC Testimony was submitted as a supporting document;
- Shaffer explicitly informed the defendants during their multiple meetings in August and September 2010 that his February 2006 HASC Testimony had been cleared by DIA and that it would address many of their assertions that certain information was classified;
- Shaffer again explicitly informed the defendants during their meetings in October 2012 that his February 2006 HASC Testimony had been cleared by DIA and that it would address many of their assertions that certain information was classified; see Exhibit "1" (E-mail and letter sent to defendants on December 20, 2012), and;
- Shaffer again referenced his February 2006 HASC Testimony in a letter to the defendants dated December 20, 2012, and reminded them that it would address many of their assertions that certain information was classified. Id.

Yet time after time the defendants, both through their declarants and even Department of Justice counsel, have challenged Shaffer's recitation of the facts. Given what has transpired up to this point either the defendants have been intentionally lying, which certainly we do not assert, or they have willfully conspired to ignore key facts and/or deliberately failed to undertake any significant independent efforts to discover the true facts. Instead, it seems clear that the defendants believe it is sufficient to simply continue to present arguments designed to create a litigation advantage under the guise of national security and in so doing trample Shaffer's First Amendment rights. The arrogance of the defendants is beyond the pall.<sup>2</sup>

Part of the problem is that not once has this Court heard from any official or representative of the defendants with personal knowledge of the events or negotiations that have been at issue.<sup>3</sup> Of course, on the contrary, Shaffer and/or his primary counsel have personal knowledge of much, if not all, of the relevant primary facts of this case. This pattern should respectfully be considered by the Court when assessing its next step.

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<sup>2</sup> The Court is likely not aware of the full behind the scenes story. For example, when the review process started DIA contacted CIA not to coordinate a classification review of the manuscript, but to solicit assistance to stifle Shaffer's First Amendment rights and prevent publication of Operation Dark Heart. Exhibit "2" (internal CIA e-mail released through Freedom of Information Act). This case is replete with retaliatory actions and retribution against Shaffer by his former employer. Discovery would further reveal the depths to which DIA has sunk in its effort to violate Shaffer's First Amendment rights.

<sup>3</sup> This lack of personal knowledge frustratingly explains the confusion the defendants labored under for months, despite being informed otherwise, that Shaffer's proposed Congressional testimony for an appearance before the Senate Judiciary Committee in September 2005 was the same as his unclassified approved February 2006 HASC Testimony. See Rule 56(f) Declaration of Mark S. Zaid at ¶5 (dated August 12, 2013)("First Zaid 56(f) Decl."), attached at Exhibit "1" to Plaintiff's Opposition to Defendants' Second Motion for Summary Judgment (filed August 12, 2013).

## **II. THE FILINGS BEFORE THE COURT JUSTIFY SHAFFER BEING PERMITTED TO CONDUCT DISCOVERY**

Although the defendants have now completely conceded Shaffer was correct on the facts surrounding DIA's approval for public release of his 2006 HASC testimony, they still refuse to acknowledge that the nomination narrative supporting his Bronze Star Medal is unclassified. As referenced above, however, not one factual response to the numerous assertions Shaffer and his counsel made have been publicly addressed. There is no indication that the defendants contacted the actual individuals involved in the nomination process, including those who have been specifically identified by Shaffer (such as Col (ret) Jose Olivero, who has explicitly informed Shaffer and counsel that the narrative was drafted as unclassified), or even sought to explain how the nomination process works.

This is particularly egregious given that Shaffer has provided specific substantive evidentiary assertions through Rule 56(f) declarations challenging the defendants' position. See Supplemental Rule 56(f) Declaration of Mark S. Zaid, Esq. at ¶¶7-8 (dated June 5, 2014)(filed UNDER SEAL on June 5, 2014); Supplemental Declaration of Anthony Shaffer at ¶¶5-10 (dated May 20, 2014)(filed UNDER SEAL on June 5, 2014); see also First Zaid 56(f) Decl. at ¶5 (identifying in August 2013 that Col. (ret) Olivero asserted that he drafted the narrative as unclassified). Notwithstanding the presentation on multiple occasions of disputed specific material facts the defendants simply ignore them as if somehow they will fade away. That is not how the judicial process operates.

In light of the unclean hands of the defendants, the Court should respectfully outright reject their conclusory, barebones contentions that they are right and Shaffer is wrong, and instead allow Shaffer to conduct discovery and introduce actual evidence that would

address once and for all the relevant facts surrounding the classification status of his Bronze Star Medal narrative.

**III. SHAFFER AND HIS COUNSEL SHOULD BE PERMITTED ACCESS TO THE UNREDACTED MANUSCRIPT SO THAT THEY CAN SUBMIT SUPPLEMENTAL FILINGS TO THE COURT**

The defendants cannot dispute, and indeed they acknowledge, that Shaffer has been given “temporary clearance” to access his unredacted manuscript. Defs’ Response at Exhibit “4” (DoD Letter dated August 7, 2014). This, of course, occurred because it suited the defendants’ interests at the time. On every other occasion when Shaffer has requested access for himself and his counsel it has been denied. Yet the defendants continue to attack Shaffer for “failing” to have provided “pinpoint cites” in order to document in their eyes why certain information is unclassified. This is nothing less than disingenuous.

This Court should respectfully order the defendants to permit Shaffer and his counsel access to the unredacted copy of his manuscript and the ability to utilize a secure governmental computer system to provide further information that would enable an informed judicial decision. See First Zaid 56(f) Decl. at ¶¶6-12.

**CONCLUSION**

The latest filing of the defendants wherein they reveal a major substantive concession that they were wrong does not instill confidence that prior statements and arguments hold any greater merit.<sup>4</sup> The only way that these issues will receive a proper judicial vetting and Shaffer’s First Amendment claims will receive full due process as to the legitimacy

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<sup>4</sup> For example, despite having dealt with Shaffer, who retired as a LTCOL in the U.S. Army Reserves, for years, the defendants refer to him as a Captain, which is two grades lower. Defs’ Response at Exhibit “4” (DoD Letter dated August 7, 2014).

of the classification of the remaining passages in his book is for discovery to be permitted and for access for he and his counsel to be granted to the unredacted manuscript along with utilization of a secure Government computer.

Date: September 8, 2014

Respectfully submitted,

/s/

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# EXHIBIT “1”



**Subject:** RE: Operation Dark Heart Refereneces  
**Date:** Thursday, December 20, 2012 1:57:11 PM ET  
**From:** Tony Shaffer  
**To:** Walker, Darrell CIV WHS-ESD  
**CC:** Langerman, Mark CIV WHS-ESD, Fitzgibbons, Beth CIV WHS-ESD, 'Mark@MarkZaid.com'

Darrell - here is my answer (attached) - look forward to your guidance - thank you!

V/R

Anthony A. Shaffer  
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Center for Advanced Defense Studies  
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----- Original Message -----

Subject: RE: Operation Dark Heart Refereneces  
From: "Walker, Darrell CIV WHS-ESD" <[darrell.walker@whs.mil](mailto:darrell.walker@whs.mil)>  
Date: Thu, December 20, 2012 11:15 am  
To: "'tony.shaffer@c4ads.org'" <[tony.shaffer@c4ads.org](mailto:tony.shaffer@c4ads.org)>  
Cc: "Langerman, Mark CIV WHS-ESD" <[mark.langerman@whs.mil](mailto:mark.langerman@whs.mil)>, "Fitzgibbons, Beth CIV WHS-ESD" <[beth.fitzgibbons@whs.mil](mailto:beth.fitzgibbons@whs.mil)>, "'Mark@MarkZaid.com'" <[Mark@MarkZaid.com](mailto:Mark@MarkZaid.com)>

My apologies....Here's the attachment.

Darrell Walker  
Office of Security Review  
703=-614-4913

-----Original Message-----

From: Walker, Darrell CIV WHS-ESD  
Sent: Thursday, December 20, 2012 11:13 AM  
To: 'tony.shaffer@c4ads.org'  
Cc: Langerman, Mark CIV WHS-ESD; Fitzgibbons, Beth CIV WHS-ESD;  
'[Mark@MarkZaid.com](mailto:Mark@MarkZaid.com)'  
Subject: Operation Dark Heart Refereneces

COL Shaffer,

My apologies. In getting our letter out to you last evening, the unsigned letter was forwarded. Attached is a copy of the signed original letter.

Darrell Walker  
Office of Security Review  
703=-614-4913

20 December 2012

Mr. Mark M. Langerman

I am in receipt of your letter dated 19 December 2012 regarding the ongoing re-review of my book Operation DARK HEART. You wrote:

In connection with the referenced review, on December 10, 2012, you submitted references to open source materials to show that certain information has been officially released to the public or otherwise properly declassified. By providing a list of publications without identifying specific information in those publications, your submission is too general and does not allow the pertinent agencies to conduct a meaningful review of the submitted material. We therefore ask that you supplement the submission with pinpoint citations, including specific reference to the relevant page numbers.

While I want to completely cooperate with your office in facilitating the review process, candidly I am surprised by your response. During my last face-to-face session with your team at Bolling AFB (DIA Hqs) on 17 October 2012 we discussed at length the text in question that corresponded with publicly released information. The members of your team who participated in that meeting took detailed notes regarding these discussions and I identified for them the specific text in question and what the public source information was that I relied upon for my book.

I was understandably requested to forward to your team the references or documents to which I referred and identified as supportive of the redacted "classified" text. As I promised I would, I did so on 10 December 2012. I obviously did not retain any detailed notes from the meeting other than to note the open source reference or document that would be matched to the area or item in Operation DARK HEART that the Government continues to claim are "classified". It was my understanding that the material I provided would be matched to the specific areas of my book that remain in contention based on the discussions we had at the meeting.

Given that the Government continues to assert the redacted portions of Operation DARK HEART is "classified" I am not permitted to retain a copy of the unredacted book. Since I do not have access I obviously cannot pinpoint any specific text to the public source information as I cannot understandably recall what lies underneath each particular redaction. But, again, it was my understanding from the meeting that your team would do that based on the conversation we engaged in and the detailed notes they took.

You also requested that I "provide any materials showing that your Bronze Star Medal narrative has been officially released." This narrative was a personal document given to me as part of my award of the Bronze Star Medal (BSM). More importantly, a copy was provided to both the United States Senate and House of Representatives as part of the ABLE DANGER congressional hearings held in 2005 and 2006. The testimony and information I supplied, which included my

Bronze Star Medal narrative, was provided in advance to Darryl Walker and his team as part of my preparations for the hearings that I participated in on 14 and 15 February 2005 in front of two committees (the House Government Reform and House Armed Services) to provide testimony. Respectfully, it is unclear what more you need from me on this matter beyond that.

I have very much appreciated the level of cooperation I have received during this second review process of my book. Frankly, it was far more productive than the one we held in 2010 and I am happy to work with your team to resolve any remaining concerns the Government still holds. But unless I come back in to review the "classified" version of my book to yet again go over the text, which I would hope would not need to be repeated, I believe the proverbial ball is in your court now.

I look forward to your response and suggested course of action.

V/R

Tony Shaffer

cc: Mark S. Zaid, Esq.

# EXHIBIT “2”

~~UNCLASSIFIED//ATUO~~



Subject DOD PRB Case "Dark Heart"

08/03/2010 01:52 PM

A friend of mine from DOD called looking for Agency support in their efforts to stop Tony Shaffer, former DOD employee, from publishing a manuscript entitled "Dark Heart." The manuscript concerns Mr. Shaffer's work in Afghanistan in the 03/04 time frame. A referral of material for pre-pub review has reportedly been sent to CIA. Can you research and let me know the status of this case? Thanks

~~UNCLASSIFIED//ATUO~~

APPROVED FOR RELEASE  
DATE: 20-Jan-2012