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' REPLY MEMORANDUM IN SUPPORT OF SECOND MOTION FOR SUMMARY JUDGMENT

Dated: September 12, 2013.

STUART F. DELERY
Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

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)**

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Introduction

On April 26, 2013, the Government filed its second motion for summary judgment in this pre-publication review challenge, setting forth at length why Plaintiff does not have a right to publish information the Government has determined to be properly classified. Plaintiff had over three months to respond to that motion. But his opposition brief fails entirely to engage in any substantive response on the central issues set forth in the Government's motion and, instead, is devoted to seeking procedural relief this Court has already considered and either afforded to Plaintiff or denied. After extensive time and resources have been expended by Government classification experts on this case, Plaintiff again asserts that he needs an opportunity to submit a declaration regarding the Government's classification determinations, with both he and his counsel first being given access to classified information and secure government computer systems. But the Court has already considered and decided the issue, allowing Plaintiff to submit a declaration and hundreds of pages of exhibits in support of his argument that the information redacted from his manuscript has previously been officially disclosed by the Government. Plaintiff's requests for further procedural relief at this time would turn applicable D.C. Circuit precedent for prepublication review matters on its head, and should be rejected.

The Government's motion and supporting exhibits amply demonstrate that the Government has acted properly and within its authority to foreclose publication of classified information, and nothing in Plaintiff's response supports any different result. The Court has the information necessary to issue a ruling, and summary judgment should now be entered for the Government.

Background

The Government's motion sets forth a concise factual history of the events giving rise to this litigation and the proceedings thus far. *See* Defs.' Mot. 3-6. In his response, Plaintiff offers a ten-page recitation taken nearly verbatim from his complaint. *See* Pl.'s Opp'n 2-11. The bulk of his statement lacks citations to competent record evidence. *See Brown v. Fogle*, 867 F. Supp. 2d 61, 63 (D.D.C. 2012) ("A party opposing summary judgment 'may not rest upon the mere allegations or denials of [the complaint],' but must instead present 'significant probative evidence tending to support the complaint in order to move the case beyond summary judgment to trial.") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)). Moreover, most of Plaintiff's factual recitations are immaterial to the issues currently before the Court.

For purposes of the Government's motion, certain material facts are undisputed. Plaintiff originally submitted his draft manuscript to two officers in his Army Reserve chain-of-command, but did not submit the text to the Defense Intelligence Agency (DIA), the Office of Security Review (OSR), or any other Department of Defense component. Am. Compl. ¶ 13; Pl.'s Opp'n 3. Following DIA's intervention, Plaintiff's publisher released a redacted version of the book in September 2010. Am. Compl. ¶¶ 37, 41. That is where Plaintiff's ten-page factual recitation ends, but it is really where this case begins, and the subsequent events are important to the analysis of Plaintiff's current arguments.

On August 3, 2012, Plaintiff asked OSR to conduct a formal security review of the book because he wanted to publish a new edition in Turkish. *See* Pl.'s Opp'n 13. In response, the Department conducted a complete review of the redacted passages. As part of that review, OSR met with Plaintiff and gave him the opportunity to submit materials in support of his argument that the redacted information was not classified because it had been officially disclosed by the

Government. *Id.*; Unclassified OSR Decl. (Ex. D) ¶¶ 2-3. After completing its review of the information and the materials provided by Plaintiff, the Government determined that certain passages continued to contain classified information. The 233 remaining passages are the extent of the dispute now before the Court.

In the parties' case management report, Plaintiff argued that he must be permitted to submit a declaration "to challenge the Government's classification determinations." *See* Dkt. 50 (Jan. 23, 2013) at 2. He further argued that he must be given access to the classified text of the manuscript and a secure government computer in order to write the declaration. *Id.* At the status conference on February 13, 2013, the Court ordered that Plaintiff be permitted to submit a declaration to the Court. Tr. 7:11-17. The Court did not permit him access to the classified manuscript. *Id.* at 11:22-24 ("He's not going to see anything. He's only going to operate from what he knows. He will then prepare the affidavit."). And the Court rejected Plaintiff's request that the Government be compelled to provide him access to a secure government computer to write his declaration.[1] *See id.* at 24:18-22. Plaintiff submitted his declaration and supporting exhibits to Defendants on March 22, 2013, and the materials were filed in their entirety with the Government's motion. *See* Defs.' Mot. 7 n.4.

With respect to his counsel's access to classified information, Plaintiff argued in the parties' case management report that he needed "specific relief from the Court to permit his

[1] The Government subsequently determined that it would not provide Plaintiff with access to a secure computer, but instead informed him of alternative arrangements for a pre-filing review. *See* Defs.' Status Report, Dkt. 56 (Feb. 27, 2013). Plaintiff then made his own arrangements, unbeknownst to Defendants and in contravention of the Court's ruling, to use the facilities of the Federal Reserve Board to prepare "potentially classified portions" of his declaration. *See* Pl.'s Notice of Submission, Dkt. 58 (Mar. 22, 2013). Given the harms attendant to Plaintiff's introducing classified national security information into an unrelated agency's computer systems, Department of Defense security personnel informed their Federal Reserve Bank counterparts of the situation so that they could take any appropriate measures.

counsel . . . to utilize and analyze publicly available information relating to the manuscript." Dkt. 50 at 2. At the February status conference, Plaintiff's counsel contended that copies of the unredacted manuscript are "publicly available," and that he needed guidance on how he could use those materials. Tr. 36:17-38:24. To resolve this issue, the Court ordered Plaintiff's counsel to "identif[y] in a sealed document the sources that exist other than the ones listed in the complaint of which you know other than the book itself." *Id.* at 40:17-20. The Court indicated that, after counsel filed the document under seal, the parties and the Court would have a telephone conference. *Id.* at 44:20-24. Plaintiff's counsel never filed such a document.

Finally, the Court also made clear that it expected this case to move forward expeditiously. *See id.* at 10:13-15 ("I want to decide this case with as much speed as I can. I don't want to have to go through step after step after step. I want to be able to do it and decide it."); *id.* at 17:11-14 (After ordering that the Plaintiff be permitted to submit a declaration to the Court, "I want him to have a chance in this go round because I want to decide this case without having one go round, oh, no, I need more, two go rounds, oh, no, I still don't understand."); *id.* at 27:11-13 ("[T]his is not a new case. This case needs to be moved forward. I don't want to do it in slow motion, little bits by little bits."); *id.* at 30:20-22 ("We can't take this in little steps by little steps. We have to kind of at least move into the merits as quickly as possible."). Thereafter, as noted, on April 26, 2013, the Government moved for summary judgment on the merits of Plaintiff's claims.

Argument

As the foregoing background indicates, the parties have previously discussed Plaintiff's procedural requests at various stages, in supplemental briefs and at status conferences, and the Court set forth a way forward at the status conference of February 13, 2013, and in an order

issued on the same day. *See* Dkt. 55. Thereafter, the Government expended significant resources preparing its motion for summary judgment, including the time spent by various classification experts responsible for the Government's supporting declarations and the classification review of Plaintiff's filing. Now, more than three months after that motion was filed, Plaintiff seeks to litigate once again many of the same procedural issues that have been addressed over the past three years. Plaintiff's requests are improper, and cannot mask his failure to address the substance of the Government's motion. Because the Government has provided ample evidence demonstrating that the information at issue is properly classified, and Plaintiff has raised no genuine issues of material fact suggesting otherwise, summary judgment should be entered for the Government.

I. The Court Should Again Reject Plaintiff's Demands for Access to Classified Information and a Secure Government Computer

Plaintiff's contention that he and his counsel need extraordinary relief in order to present provide his opposition to the Government's motion should be rejected. Plaintiff has had ample opportunity to present his factual arguments, including an administrative process in which the Department of Defense requested all open source materials that support Plaintiff's claims, and a declaration which has been provided in full to the Court. In arguing that he needs additional information in order to prepare a second declaration regarding the classification of the redacted information, Plaintiff asks this Court at this late stage to reconsider issues that it has already addressed. Moreover, renewed claims by his counsel for additional procedures at this time ignore the opportunities previously offered by the Court.

More fundamentally, the procedural devices Plaintiff now seeks are not consistent with the D.C. Circuit's decision in *Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003). Plaintiff contends that the First Amendment compels the Government to provide him and his counsel access to

classified information and a secure government computer. In *Stillman*, the D.C. Circuit rejected a similar request and held that principles of constitutional avoidance require a court first to consider whether it can review the Government's classification determinations on the basis of the Government's *ex parte* and *in camera* filings. Here, the Government has provided the Court with extensive declarations attesting to the classification of each passage at issue. Plaintiff has pointed to various documents that he contends constitute open source materials, and the Government has addressed each one in turn and shown that those documents do not constitute official disclosures by the Government. Plaintiff's requests for extraordinary relief are not responsive to the Government's motion, and are otherwise without merit.

A. Under *Stillman*, the Court Must Not Reach Plaintiff's Ancillary Constitutional Claims Without First Considering the Government's Motion and Affidavits

Plaintiff contends that the First Amendment requires that he and his attorney be given access to classified information, in the form of an unredacted version of the manuscript. *See* Pl.'s Opp'n 20-24. Attendant to that, he argues that he and his attorney must also be given access to a secure government computer system in order to draft additional filings. *Id.* at 26.

Plaintiff's arguments represent an attempt to re-litigate issues that were unsuccessfully pressed upon the D.C. Circuit in *Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003). In that case, as here, the plaintiff asserted that his First Amendment right to publish unclassified information required this Court to order the Government, at the summary judgment stage, to provide his counsel with access to the classified information at issue. The D.C. Circuit disagreed. *Stillman* held that principles of constitutional avoidance require a district court first to consider whether it can make a determination about the propriety of the classification determinations based upon the Government's *ex parte*, *in camera* filing, and that it constitutes reversible error for a court to

prematurely address, instead, the constitutional question posed by the plaintiff's motion. *See id.* at 548; *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.").

Specifically, the D.C. Circuit held that prepublication review cases can and should begin with an *ex parte* and *in camera* consideration of "the manuscript and the pleadings and declarations filed by the Government, as well as any materials filed by" the author. *Stillman*, 319 F.3d at 548-49. The district court must first "determine whether it can, consistent with the protection of [plaintiff]'s first amendment right to speak and to publish, and with the appropriate degree of deference owed to the Executive Branch concerning classification decisions, resolve the classification issue without the assistance of plaintiff's counsel." *Id.* at 549. *See also id.* at 548 (explaining that "the district court did not wait to evaluate the pleadings and affidavits to be submitted by the Government in defense of its classification decision," but instead "plunged ahead to resolve the constitutional question").

The district court has referred to this *ex parte* and *in camera* inquiry as "stage one of the *Stillman* framework." *See Horn v. Huddle*, 647 F. Supp. 2d 55, 61 (D.D.C. 2009), *vacated on other grounds*, 699 F. Supp. 2d 236 (2010). And the court has followed this framework consistently in cases since *Stillman*. *See, e.g.*, *Stillman v. CIA*, 517 F. Supp. 2d 32, 38-39 (D.D.C. 2007) (On remand, after an initial review of those documents submitted by the Government *ex parte*, which included open source information the author had previously provided to the Government, Judge Sullivan concluded that the Government had properly classified the disputed passages.); *Berntsen v. CIA*, 618 F. Supp. 2d 27, 30 (D.D.C. 2009) (After reviewing an agency's declaration with item-by-item justifications, Judge Kollar-Kotelly

concluded that the government had properly classified the disputed items in the plaintiff's manuscript.); *Boening v. CIA*, 579 F. Supp. 2d 166, 166 (D.D.C. 2008) (After reviewing the classified information at issue, Judge Sullivan dismissed the complaint without prejudice due to the plaintiff's failure to provide specific citations to open source materials.).

Stillman makes clear that the district court should avoid reaching constitutional questions if it can resolve the case without doing so, and nothing in Plaintiff's motion requires this Court to deviate from the sequence of events prescribed by *Stillman*. The Court can readily resolve the classification issue without providing Plaintiff or his counsel access to classified materials.[2]

B. Even if Plaintiff's Requests Were Not Premature, They Remain Without Merit

In addition to conflicting with the process outlined in *Stillman*, Plaintiff's demands that he and his counsel be given access to classified information are without legal merit, for reasons that Defendants have explained at length in prior briefing. *See, e.g.*, Defs.' Resp. to Pl.'s Suppl. Br., Dkt. 28 (Oct. 28, 2011). The Executive Branch has the authority and responsibility to control classified information, *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988), and may not be compelled to provide classified information to an individual who is not authorized to receive it. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (recognizing that disclosure of classified information "is within the privilege and prerogative of

[2] In arguing otherwise, Plaintiff quotes in his brief from the district court's underlying decision in *Stillman*. That decision was reversed by the D.C. Circuit on the very point now pressed by Plaintiff (*i.e.*, the district court's incorrect ruling requiring the government to provide classified information upon the plaintiff's request). *See Stillman v. Dep't of Defense*, 209 F. Supp. 2d 185 (D.D.C.), *rev'd sub nom. Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003). Plaintiff's reliance on this reversed opinion discussing the Government's actions in another case nearly a decade ago is wholly misplaced. Specifically, Plaintiff quotes from the opinion's dicta, issued in response to entirely different facts, in an attempt to show that the Government here is acting to secure a "litigation advantage." That is plainly false. The Government's determinations in both cases have been driven by the Executive's duty to protect classified information, by ensuring that such information is not disclosed to individuals not authorized to receive it.

the executive, and we do not intend to compel a breach of the security which that branch is charged to protect") (quoting *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001)); *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656, at *9 (Fed. Cir. Apr. 19, 1993) (finding that, under separation of powers principles, "the access decisions of the Executive may not be countermanded by either coordinate Branch").

In the context of prepublication review cases, the court in *Boening v. CIA* properly rejected a request nearly identical to Plaintiff's. The claim in that case, as here, was that the plaintiff's writings were compiled entirely from open source materials and thus were not properly classified. The court denied the plaintiff's motion to compel the Government to provide him access to the classified version of the document that the plaintiff had written, stating that "prepublication review cases can and should begin with *ex parte* and *in camera* consideration." *Boening*, 579 F. Supp. 2d at 174. The court determined that the plaintiff had not met his burden to show that the document was compiled from open source material, and as a result the court did not need to consider the plaintiff's request for access to classified materials.

Moreover, neither Plaintiff nor his counsel are authorized to access the information at issue in this case. Although Plaintiff had a security clearance during the time periods covered in the book, his clearance was revoked in 2005. *See Shaffer v. Defense Intelligence Agency*, 601 F. Supp. 2d 16, 21 (D.D.C. 2009) (citing Plaintiff's admission that, prior to September 2005, "the DIA revoked Plaintiff Shaffer's security clearance" on the grounds that "he had engaged in criminal conduct and that he was not credible"). And while Plaintiff's counsel has been given limited and controlled access to certain classified information in particular situations (such as when he is representing a client in an administrative adjudicative proceeding), he has never been granted access to the information at issue here.

Plaintiff's demands that he and his counsel be given access to secure government computers should fare no better. This Court has already considered such arguments and refused to require such access. Plaintiff simply ignores that this issue was previously presented and decided, and he fails to explain why the Court should revisit its treatment of his meritless request. *See* Defs.' Resp. to Pl.'s Suppl. Br., Dkt. 28 (Oct. 28, 2011), at 10-12; *Doe v. CIA*, 576 F.3d 95, 106-07 (2d Cir. 2009) (holding that there is no First Amendment right to access secure government facilities or to access a classified document originally drafted by the requestor).

Finally, to the extent Plaintiff suggests that he has not yet had an opportunity to provide relevant information to the Government and to the Court, that is patently incorrect. After Plaintiff asked the Department of Defense to conduct a formal security review of the manuscript in August 2012, Plaintiff met with Government personnel. At that time, he was given access to the classified manuscript in a secure setting in order to facilitate discussions about the information. *See* Pl.'s Opp'n 13; Pl.'s Decl. (Ex. B) ¶ 56. Plaintiff also "was afforded the opportunity to submit materials in support of his contention that information contained in the book was not properly classified because it had been officially disclosed by the Government." Pl.'s Opp'n 13; Unclassified OSR Decl. (Ex. D) ¶¶ 2, 3. After that meeting, when Plaintiff simply provided a list of reference materials by e-mail, OSR personnel reiterated the need for pinpoint citations to those materials and gave him another opportunity to provide that information. Unclassified OSR Decl. (Ex. D) ¶¶ 7-9. Plaintiff never provided that information. Plaintiff subsequently did, however, prepare a declaration in response to the Government's classification decisions, and that declaration was filed with the Court in its entirety. Plaintiff was aware when he wrote that declaration of the need to present pinpoint citations to the source materials. His belated attempt to claim he needs yet another opportunity to provide such

information, after having had years to present it, fails to sustain his present obligation to set forth any basis to challenge the Government's determinations. Accordingly, pursuant to "stage one of the *Stillman* framework," *Horn*, 647 F. Supp. 2d at 61, the Court should proceed to consider whether the information identified by the Government's motion is properly classified, viewing the Government's *in camera* submissions "with the appropriate degree of deference owed to the Executive Branch concerning classification decisions," *Stillman*, 319 F.3d at 549.

II. The Court Should Grant the Government's Motion for Summary Judgment

The Government has provided detailed declarations attesting to the classification of each of the 233 passages at issue in this case, and has responded to each of the arguments made in Plaintiff's declaration regarding "open source" materials. Plaintiff's opposition provides no basis to deny entry of summary judgment to the Government.

A. The "Evidence" Submitted by Plaintiff Does Not Overcome the Government's Strong Showing on the Merits

The only question before the Court is whether the passages in Plaintiff's book identified by the Government are properly classified. Because Plaintiff argues that the information was "supported by open source material," Am. Compl. ¶ 66, it is his burden to show that the information already has been publicly released through "an official and documented disclosure." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). Plaintiff's burden is thus to identify specific, official public disclosures of the information at issue. Despite having had numerous opportunities to do so, Plaintiff has never provided pinpoint citations to open source materials showing a single official disclosure of information that the Government has deemed classified. In light of the careful analysis that must be performed in considering whether information has entered the public domain, "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." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (emphasis added). "[O]therwise government's task would be 'virtually limitless.'" *Id.* (quoting *Lamont v. Dep't of Justice*, 475 F. Supp. 761, 772 & n.43 (S.D.N.Y. 1979)).[3]

Apart from the lack of pincites, moreover, Plaintiff has failed even to identify relevant official disclosures. While his declaration attached and referred to various documents, Plaintiff has not met his burden of showing that those documents were the subjects of official releases. *See* Defs.' Mot. 29-37 (responding to each document identified in Plaintiff's declaration). Without such a showing, pinpoint citations to those documents would be irrelevant.

Plaintiff's opposition brief adds virtually nothing to his declaration (and indeed Plaintiff's brief barely refers to his declaration, beyond various citations in its lengthy background section). Plaintiff first contends that he is unable to respond to the Government's arguments because "the defendants' substantive arguments are hidden" from him. *See* Pl.'s Opp'n 18 n.4, 27. But that argument is meritless. Plaintiff clearly could have supported his argument that the information redacted from the manuscript was "supported by open source material" or has otherwise been previously officially disclosed to the public. Am. Compl. ¶ 66. Indeed, Plaintiff made that very attempt in his declaration, where he discussed various documents that he had attached as exhibits. That declaration and its supporting exhibits were filed publicly with very limited redactions (and were filed *in camera* in their entirety). *See* Defs.' Mot., Ex. B (cleared version);

[3] There can be no dispute that Plaintiff bears the burden of identifying overt sources for the passages in dispute. Nor does he deny it. As the D.C. Circuit observed in *McGehee v. Casey*, 718 F.2d 1137, 1141 n.9 (D.C. Cir. 1983), "[a]n ex-agent should demonstrate . . . at an appropriate time during the prepublication review, that such information is in the public domain." The reason for this requirement is clear: without specific guidance from Plaintiff as to exactly which information he relies on, an agency has no meaningful way of making the careful comparison that is required to determine whether a particular assertion touching on classified intelligence matters is in fact in the public domain. *See* Defs.' Mot. 26-29 (discussing the stringent three-part test that courts in this circuit apply to determine whether information has been subject to an official disclosure).

id., Ex. C (classified portions). The Government responded to Plaintiff's arguments in its public filing, which provides a document-by-document response to the claims of official disclosures. *See* Defs.' Mot. 29-37. There are no barriers to Plaintiff providing any evidence he has of official and documented disclosures by the Government of the information at issue.

Rather than attempt to make such an argument, Plaintiff's opposition brief provides a short explanation for why he believes that "at least some" of the information is unclassified. *See* Pl.'s Opp'n 27-29. He relies on media reports which suggest that a single piece of information is not properly classified, but his argument proves little. The Government cannot, in a public filing, confirm or deny Plaintiff's counsel's speculation as to the contents of a particular redaction. Instead, the Government respectfully refers the Court to its previously-submitted declarations, which explain the basis for each classification determination.

The thrust of the argument in Plaintiff's brief is not, however, an attempt to show that certain open source materials constitute official disclosures, or even a response to the Government's classification arguments. Instead, Plaintiff attacks the Government's classification system in general. *See id.* at 27-29 & n.6. In a long footnote, Plaintiff strings together various quotations concerning classification determinations that are unrelated to this case or the information at issue here. That argument offers nothing to inform the Court's analysis. Plaintiff and his counsel are free to disagree with the need for classification of national security information, but their policy views are of no relevance or assistance in the Court's review of the information at issue or of the legal questions presented. There is no doubt that the Executive retains the authority and responsibility to protect classified information. The Government has provided the Court with detailed and thorough declarations attesting to the classification determinations on a passage-by-passage basis, and Plaintiff cannot meet his burden

in response merely by challenging the nature of classified information or the classification system in general. Certainly, such an argument does not satisfy Plaintiff's burden of showing the existence of prior, official disclosures by the Government.

B. Plaintiff Has Not Made the Extraordinary Showing Necessary to Warrant Discovery into the Government's Classification Decisions

Plaintiff is also incorrect in arguing that he is entitled to discovery in this matter. While he offers few details as to what discovery he contends is necessary, his attempt to seek discovery is both untimely and without merit.

As an initial matter, Plaintiff has not met the procedural requirements for obtaining discovery at this late stage. To obtain discovery in response to a motion for summary judgment, a litigant must satisfy the requirements of Federal Rule of Civil Procedure 56(d) (which was numbered as Rule 56(f) until 2010). Plaintiff at least seems to recognize this, as he submits an affidavit from his counsel titled "Rule 56(f) Declaration." *See* Pl.'s Opp'n, Ex. 1. Rule 56(d) provides that, "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d).

By invoking this rule, Plaintiff implicitly concedes that he cannot presently defeat the Government's motion for summary judgment. But the rule does not help him, for several reasons. Neither the affidavit nor his brief explain precisely what discovery is necessary. *See Byrd v. EPA*, 174 F.3d 239, 248 n.8 (D.C. Cir. 1999) (requiring nonmovant "to show what facts he intended to discover . . . and why he could not produce them in opposition to the motion"); Pl.'s Opp'n, Ex. 1 at 2 (offering a non-exhaustive list of "unresolved material facts or discovery issues"). Nor does Plaintiff explain why he waited more than three months after the Government

filed its motion to request the type of discovery suggested by his counsel's declaration. *See Kakeh v. United Planning Org.*, 537 F. Supp. 2d 65, 71 (D.D.C. 2008) (Rule 56(d) "is not properly invoked to relieve counsel's lack of diligence.").

Moreover, the basic purpose of Rule 56(d) would not be served by deferring ruling on the Government's motion. Rule 56(d) exists to "prevent 'railroading' the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery." *ASPCA v. Ringling Brothers and Barnum & Bailey Circus*, 502 F. Supp. 2d 103, 106 (D.D.C. 2007). Plaintiff cannot credibly argue that the Government's motion is premature, particularly after the opportunities Plaintiff has been afforded by the Government and the Court. Instead, to allow a Rule 56(d) motion to succeed in these circumstances and to further delay this longstanding litigation would be inconsistent with the Federal Rules' promise "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Beyond his failure to satisfy Rule 56(d), however, Plaintiff ignores that discovery is entirely inappropriate in this case. The Government knows of no legal authority – and Plaintiff certainly cites none – that would permit discovery into the basis for the Government's classification decisions. While prepublication review cases are limited in number, courts considering requests for discovery in the similar context of FOIA cases have repeatedly found that discovery into the Government's classification decisions is improper.[4] Discovery is

[4] The considerations that militate against discovery in FOIA cases apply with equal if not greater force in prepublication review cases. In the prepublication review setting, a plaintiff has sought permission from the agency to publish a document or documents. The agency, having reviewed the materials, has made a determination that some or all of the material sought to be published should not be made public due to a "substantial government interest unrelated to the suppression of free speech." *See McGehee*, 718 F.2d at 1142-43 (citing *Snepp*, 444 U.S. at 509 n.3). The role of the reviewing court is to determine whether the agency has adequately demonstrated that

particularly inappropriate when the plaintiff seeks to inquire into the Government's rationale for withholding classified information. *See Murphy v. FBI*, 490 F. Supp. 1134, 1136 (D.D.C. 1980). Indeed, discovery is allowed only in exceptional circumstances in FOIA cases, and even then it is generally limited to the scope of the agency's search for responsive documents. *See SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200-01 (D.C. Cir. 1991); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 308 (D.D.C. 2007); *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 25 (D.D.C. 2000).

The various cases cited in Plaintiff's brief do not support his argument for discovery. Most curiously, Plaintiff relies on the Eastern District of Virginia's opinion in *United States v. Snepp*, 456 F. Supp. 176 (E.D. Va. 1978), a case in which the United States brought suit against a former CIA agent for breach of his secrecy agreement. Plaintiff's brief completely ignores the subsequent history of that case, in which the Supreme Court later cast serious doubt on the propriety of discovery in cases of this nature. Specifically, in rejecting the Fourth Circuit's ruling that the Government's remedy in prepublication review cases would be limited to nominal and punitive damages based on a jury finding of tortious conduct (rather than the imposition of a constructive trust), the Court reasoned that "[t]he trial of such a suit . . . would subject the CIA and its officials to probing discovery into the Agency's highly confidential affairs." *Snepp v.*

---

there is a logical connection between the material and the reasons for which publication permission has been denied. So long as the Government's 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. *Id.* at 1148-49. Courts must give "substantial weight" to agency 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), and 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). Allowing such discovery is thus inconsistent with the long-recognized deference to the Executive's unique expertise.

United States, 444 U.S. 507, 514-15 (1980). The Court further noted that such discovery would "force the Government to disclose some of the very confidences that Snepp promised to protect," observing that "[r]arely would the Government run this risk." *Id.* *Snepp* firmly supports the proposition that the Government cannot be forced to disclose classified or sensitive information in order to enforce its secrecy agreements, because that would result in the Government "losing the benefit of the bargain it seeks to enforce" by such agreements. *Id.* at 514.[5]

Plaintiff's reliance on the district court's decision in *Wright v. FBI* also does not advance his argument. In that case, the FBI refused to allow the publication of information that the plaintiffs contended was in the public domain. *Wright v. FBI*, Case No. 02-cv-915, 2006 WL 2587630, at *8-9 (D.D.C. July 31, 2006). But the court there did *not* permit discovery. *See Wright*, Order, Dkt. 37 (July 12, 2004) (rejecting plaintiffs' request for discovery in light of *Stillman* and *McGehee*). While Plaintiff contends that the *Wright* court identified genuine issues of material fact that initially precluded the entry of summary judgment, he misunderstands how the court handled that issue. One of the plaintiffs there had provided supporting open source documentation to the agency, but it was not provided to the court, and the court found that the agency had failed to provide specific information regarding the basis for each redaction. The court thus required the defendants to "submit detailed affidavits explaining which portions of the censored submissions were *not* in the public domain, and Plaintiffs will be given an opportunity to respond." *Wright*, 2006 WL 2587630, at *9. Here, of course, the Government has submitted its item-by-item explanations and the materials that Plaintiff submitted during the security review process, and Plaintiff has already had the opportunity to submit a detailed affidavit on the "open

[5] The various other Fourth Circuit cases cited by Plaintiff – *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir. 1975); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972) – also predate the Supreme Court's decision in *Snepp*.

source" issue. *Wright* not only fails to justify discovery in this case, it supports the entry of summary judgment at this time.

The impropriety of permitting discovery here is underscored by the limited insight Plaintiff provides as to the specific discovery he would seek. Plaintiff suggests that he would seek discovery into the classification status of his Bronze Star Medal narrative and certain matters concerning Congressional testimony. But discovery as to these topics would be immaterial: the only relevant information he could seek to provide the Court on these issues would be open source materials demonstrating that the information has already been officially disclosed by the Government. Plaintiff has the burden of producing public source materials containing the officially released information, and Plaintiff's attempt to shift that burden to the Government through discovery is improper. *See Boening v. CIA*, 579 F. Supp. 2d 166, 170-72 (D.D.C. 2008) ("Plaintiff's discovery request attempts to shift the burden on to the CIA to prove that Plaintiff did not exclusively derive his information from publicly available sources. The Court has already held that the initial burden is on Plaintiff to provide adequate citations for the overt material upon which he claims to have relied and he has failed to meet it.").

Plaintiff further claims that he should be permitted discovery into records regarding testimony that he delivered to Congress in February 2006. *See* Pl.'s Opp'n 30-31. The Government explained (and Plaintiff does not dispute) that the relevant Department of Defense regulation in effect at the time required a form signed by the proper authority before testimony could be officially released. *See* Defs.' Mot. 35; Unclassified OSR Decl. (Ex. D) ¶ 5. While Plaintiff contends that his testimony was "both authorized and reviewed for classification purposes before it occurred," Pl.'s Opp'n 31, he has failed to produce the written authorization required by the applicable regulation, and the Government has no record of one ever being

issued, *see* Unclassified OSR Decl. (Ex. D) ¶ 5. Plaintiff's brief cites a paragraph of his declaration in which he provided links to a privately-maintained website that includes what purport to be Plaintiff's "unclassified draft prepared statement" and oral testimony from February 15, 2006. *See* Pl.'s Decl. (Ex. B) ¶ 71. But, as the Government's motion previously explained, neither document indicates that the information was officially released by the Government. In his brief, Plaintiff offers no substantive responsive, saying only that "discovery will prove" that the testimony was cleared.[6] This bare speculation is inadequate to sustain his request to engage in discovery.[7]

Finally, Plaintiff contends that he should be permitted to engage in discovery because he relied on a ghostwriter to conduct research for portions of the book. *See* Pl.'s Opp'n 31. He contends that the ghostwriter "is willing to specifically identify the relevant text if the Court authorizes the proper security protections." *Id.* It is entirely unclear what more the ghostwriter

[6] The Government's motion also provided other reasons why the website links fail to meet Plaintiff's burden, and Plaintiff ignores those points as well. For example, the Government explained that, even if the information presented on the website 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. That Plaintiff himself placed information into the public domain – whether through testimony to Congress or by posting written information on a website – makes no difference, as Plaintiff cannot disclose information without authorization and then rely on that unauthorized disclosure to claim the information is no longer classified. *See Wilson v. CIA*, 586 F.3d 171, 187-91 (2d Cir. 2009).

[7] Events surrounding Plaintiff's Congressional testimony were the subject of a prior lawsuit he brought against various agencies and government officials. *See Shaffer v. Defense Intelligence Agency*, Case No. 06-cv-271 (D.D.C.). Plaintiff filed suit the day before the hearing regarding the Government's refusal to facilitate his appearance before the committee. The case involved numerous rounds of briefing, and yet Plaintiff now points to no filing by any party in that case suggesting that his testimony was cleared for release. Instead, Plaintiff's counsel provides a declaration in which he says that "[t]here is no doubt in my mind that Shaffer's testimony was both authorized and reviewed for classification purposes before he delivered it to the committee." Pl.'s Opp'n, Ex. 1, ¶ 5. Counsel's own statement, no matter how confidently-made, does not constitute competent evidence of an official, documented release by the Government.

could contribute to the Court's review that Plaintiff could not have submitted during the administrative process or addressed in his declaration. It is also unclear why, if the ghostwriter had any relevant information to provide, Plaintiff did not obtain a declaration from her addressing that information. But the fact that portions of the manuscript were written by another party hardly justifies discovery. Nor does it make any difference in the prepublication review process. The Government reviewed the manuscript as Plaintiff's work (and indeed the book was published under only his name). That Plaintiff or his ghostwriter could find certain information in public sources would be legally significant only if the source was the result of an official disclosure by the Government.

Plaintiff has already provided the open source materials that he believes demonstrate official disclosure, and those materials were provided to the Court as an exhibit to the Government's motion. As a result, discovery would be inappropriate and should be rejected.

C. Plaintiff's Claims of Bad Faith and Unclean Hands Are Misplaced, and Do Not Justify Discovery

Plaintiff next argues that the Government has acted in bad faith and has unclean hands because of actions taken during the security review process. His factual claims are unsubstantiated and untrue, but in any event they also fail to justify discovery.

A plaintiff must meet a very high burden to justify piercing the Government's affidavits, and it is settled that unsubstantiated assertions of bad faith do not meet that burden. *See Military Audit Project v. Casey*, 656 F.2d 724, 751 (D.C. Cir. 1981). Indeed, courts routinely refuse to go beyond the affidavits of an agency's classification experts when a plaintiff merely claims bad faith. "Once satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts 'need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.'"

Gardels v. CIA, 689 F.2d 1100, 1104 (D.C. Cir. 1982) (quoting *Weissman v. CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977)). *See also Canning v. U.S. Dep't of Justice*, 848 F. Supp. 1037, 1048 (D.D.C. 1994) (rejecting argument that information was classified to conceal violation of law or to prevent embarrassment where the plaintiff "offered little more than conjecture in support of his theory that the agency's withholding decisions are in violation" of the applicable executive order). Here, Plaintiff offers two arguments that the Government acted in bad faith, but neither comes close to justifying discovery.

First, Plaintiff says that the Government acted improperly by giving him access to the unredacted manuscript during the security review process but then not allowing him to retain or once again access the manuscript in order to prepare a supplemental filing to the Court. *See* Pl.'s Opp'n 34. This issue has been explored again and again, and there is simply nothing to support Plaintiff's claim that the Government's protection of classified information has been motivated by a desire to obtain a "litigation advantage." *Cf. id.* at 23. Plaintiff – whose security clearance was revoked for cause, *see supra* at 9 – was given limited access to the text in a secure setting during the administrative security review process when he met with the Government's representatives. That was done because it was deemed necessary to identify those passages that remain classified for purposes of discussions about potential substitutions of text, and to allow Plaintiff to provide the Government with any open source pincites that Plaintiff contends support his argument. If the Government had in fact been interested in limiting Plaintiff's opportunity to present information to the Court, it would not have permitted him any access to the manuscript during that review process, nor would it even have conducted a security review of his manuscript at his request several years after he initiated this lawsuit. Despite his repeated claims of improper conduct, the Government's actions in this case demonstrate an attempt to ensure a

proper review of the manuscript while also protecting classified information from the risk of unauthorized disclosure.

Second, Plaintiff contends that the Government's bad faith is shown by the fact that a large portion of the information deemed classified by the Government in 2010 was subsequently cleared for release. *See* Pl.'s Opp'n 34. Plaintiff asks, "What, if anything, changed in less than three years?" But the Government has already answered that question in an *ex parte* declaration. *See* Classified DIA Decl. (Ex. F) ¶¶ 53-58. While the Government did a complete review of the manuscript in 2010, the classification status of information may change over time. It was therefore appropriate for the Government to conduct new assessments of the information when Plaintiff formally requested a security review in August 2012 and when the Government filed its motion for summary judgment in April 2013. The explanation provided in the Government's *ex parte* declaration addresses the basis for any changes in classification and further demonstrates that Plaintiff's assertion of bad faith is both unsubstantiated and without merit.

Plaintiff's arguments not only fail to demonstrate bad faith, they also do not support a claim of unclean hands. When the Government acts in the public interest, as it does here, the defense of unclean hands is generally unavailable as a matter of law. *See, e.g.*, *United States v. Philip Morris, Inc.*, 300 F. Supp. 2d 61, 75 (D.D.C. 2004) (collecting cases); *SEC v. Gulf & W. Indus., Inc.*, 502 F. Supp. 343, 348 (D.D.C. 1980). The Government is clearly acting in the public interest here by seeking to protect classified information and to enforce Plaintiff's obligations under various nondisclosure agreements – agreements he made "in conformity with his statutory obligation to protect intelligence sources and methods from unauthorized disclosure." *Snepp*, 444 U.S. at 513 n.9.

Even when courts have recognized a claim of unclean hands against the Government when it is acting in the public interest, it has been in "strictly limited circumstances." *SEC v. Cuban*, 798 F. Supp. 2d 783, 784 (N.D. Tex. 2011). The Government's misconduct must be egregious, and the misconduct must result in prejudice to the opposing party's defense that rises to a constitutional level and is established through a direct nexus between the misconduct and the constitutional injury. *Id.*; *see also, e.g., EEOC v. Lexus of Serramonte*, Case No. C 05-0962, 2006 WL 2619367, at *3 (N.D. Cal. Sept. 12, 2006). Plaintiff does not begin to satisfy this standard. He relies on statements that he alleges were made by two individuals involved in reviewing the information contained in his book. He contends that these individuals made comments that call into question the classification of various pieces of information in the manuscript. While the Government disputes these allegations, even assuming, *arguendo*, that they are factually accurate, they do not support an "unclean hands" argument. Only individuals with original classification authority can determine whether information is properly classified, and the Government has provided sworn declarations from such authorities in support of each piece of information at issue. More importantly, even if everything Plaintiff alleges as to "unclean hands" were true, nothing has prejudiced his ability to pursue the judicial remedy available to him and to challenge the Government's determinations in this forum. Accordingly, Plaintiff cannot claim that the Government's alleged "unclean hands" somehow justifies extraordinary discovery.

Finally, it is notable that Plaintiff has provided no basis on which the Court could conclude that the agencies' classification decisions turned on a desire to prevent embarrassment or to shield supposedly illegal behavior. As set forth at great length in the Government's sworn affidavits, information in Plaintiff's manuscript is properly classified. Plaintiff's unsubstantiated

and conclusory assertions to the contrary cannot overcome the strong showing in the Government's motion.

D. The Court Should Not Appoint an "Expert" to Review the Government's Classification Determinations

Finally, Plaintiff asks the Court to "consider appointing an independent expert to provide guidance as to the legitimacy of the classification decisions." Pl.'s Opp'n 36. Such an extraordinary measure would be wholly premature under the D.C. Circuit's ruling in *Stillman*, for the reasons explained above. The Court must determine if it can resolve Plaintiff's challenges on the basis of the existing submissions, before it considers whether it is necessary to enlist an "expert." But even if it were not premature, appointing an expert would still be wholly inappropriate.

The notion that an "expert" would be provided access to the classified information at issue raises all of the aforementioned concerns about countermanding the Executive's control of access to classified information. Moreover, the opinions of such individuals cannot overcome the substance of the Government's classification experts' determinations. As the Government has explained, courts have repeatedly, and necessarily, rejected the views of outside individuals on the question of whether particular disclosures may harm national security. *See* Defs.' Mot. 14 n.6. Plaintiff fails to support such an extraordinary dramatic departure from the existing form of review in such cases. (He quotes Judge Kessler's opinion in *Wright*, but his failure to provide any context for the quote masks that the court was not even considering the possibility of enlisting an "expert." *See* Pl.'s Opp'n 36; *Wright*, 2006 WL 2587630, at *7.) The Court should therefore not appoint an expert to review and opine on the information deemed classified by the Government.

Conclusion

For the reasons stated herein, and in Defendants' motion for summary judgment, Defendants are entitled to judgment as a matter of law on Plaintiff's claims.

Dated: September 12, 2013.

Respectfully submitted,

STUART F. DELERY
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