

**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’ ANSWER TO PLAINTIFF’S FIRST AMENDED COMPLAINT

Defendants Department of Defense, Defense Intelligence Agency, and Central Intelligence Agency, through undersigned counsel, hereby answer Plaintiff’s First Amended Complaint as follows:

First Defense

The Court lacks subject matter jurisdiction over this case.

Second Defense

Plaintiff’s claim is not ripe for judicial review.

Third Defense

Plaintiff’s claim is premature for lack of final agency action and for failure to exhaust administrative remedies, as the parties are currently engaged in an ongoing administrative security review process initiated by Plaintiff.

Fourth Defense

The Complaint fails to state a claim against Defendants for which relief may be granted.

Fifth Defense

Plaintiff is not entitled to relief due to unclean hands.

Sixth Defense

The unnumbered paragraphs of the complaint state legal conclusions and Plaintiff's characterizations of his own claims, to which no response is required. To the extent a response is deemed required, the paragraphs are denied.

Defendants respond to the numbered paragraphs as follows:

1. This paragraph consists of a legal conclusion, to which no response is required. To the extent a response is deemed required, this paragraph is denied.
2. This paragraph consists of a legal conclusion, to which no response is required. To the extent a response is deemed required, this paragraph is denied.
3. Defendants admit the second and third sentences of this paragraph. As to the remainder of this paragraph, including its footnote, Defendants are without sufficient knowledge or information or information to form a belief as to its truth, except that Defendants admit that Plaintiff was an intelligence officer in the U.S. Army Reserve from 1982 to 2004, was mobilized in December 2001, served two tours of military duty in Afghanistan, was awarded the Bronze Star Medal, and is a U.S. citizen.
4. As to the first sentence, Defendants admit that the Defense Intelligence Agency is a component of the Department of Defense, which is an agency of the United States. The remainder of the first sentence of this paragraph consists of a legal conclusion, to which no response is required. To the extent a response is deemed required, the allegation is denied. Defendants deny the second sentence except to admit that they took actions to prevent the publication of classified information contained in the book.

5. Defendants admit that the Department of Defense is an agency of the United States, but the remainder of the first sentence of this paragraph and the third sentence of this paragraph consist of legal conclusions, to which no response is required. To the extent a response is deemed required, the allegations are denied, except to admit that the entities are components of the Department of Defense. Defendants deny the second sentence except to admit that they took actions to prevent the publication of classified information contained in the book.

6. Defendants admit that the Central Intelligence Agency is an agency of the United States. The remainder of the first sentence of this paragraph consists of a legal conclusion, to which no response is required. To the extent a response is deemed required, the allegation is denied. Defendants deny the second sentence except to admit that they took actions to prevent the publication of classified information contained in the book.

7. Admitted.

8. Defendants are without sufficient knowledge or information or information to form a belief as to the truth of the first sentence of this paragraph. The second, third, fourth, and fifth sentences are a characterization of Plaintiff's book, to which no response is required. To the extent a response is deemed required, Defendants respectfully refer the Court to the book for a full and accurate statement of its contents.

9. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

10. Defendants admit the first sentence of this paragraph. The second, third, and fourth sentences consist of legal conclusions and characterizations of an agreement between Plaintiff and St. Martin's Press, to which no response is required. To the extent a response is

deemed required, Defendants respectfully refer the Court to the agreement for a full and accurate statement of its contents. The fifth sentence consists of a legal conclusion, to which no response is required. To the extent a response is deemed required, the allegation is denied.

11. Defendants deny this paragraph except to admit that Plaintiff mentioned to Col. John D. Strickland III, his supervisor in the 94th Training Division (Force Sustainment), U.S. Army Reserve, that Plaintiff was writing a book about his experiences in Afghanistan.

12. Defendants deny this paragraph except to admit that Lt. Col. Paul A. Raaf, the staff judge advocate of the 94th Training Division (Force Sustainment), U.S. Army Reserve, conducted an ethics review of Plaintiff's proposed publication, and that Col. Strickland conducted an initial operations security scan of the manuscript.

13. Denied.

14. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

15. This paragraph is a characterization of a memorandum from Lt. Col. Raaf, dated December 26, 2009, to which no response is required. To the extent a response is deemed required, Defendants deny this paragraph and respectfully refer the Court to the memorandum for a full and accurate statement of its contents. Defendants are without sufficient knowledge or information to form a belief as to the truth of the second sentence except to deny that Plaintiff relied on the memorandum in good faith.

16. The first sentence of this paragraph is a characterization of a memorandum from Col. Strickland, dated January 4, 2010, to which no response is required. To the extent a response is deemed required, Defendants deny this sentence and respectfully refer the Court to

the memorandum for a full and accurate statement of its contents. Defendants deny the second and third sentences.

17. Defendants deny this paragraph except to admit that the publisher scheduled a publication date of August 31, 2010.

18. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

19. Defendants admit the first sentence of this paragraph and deny the second sentence.

20. Denied.

21. Defendants deny the first and second sentences of this paragraph except to admit that the DIA did not request a copy of the manuscript directly from Shaffer, his attorney, his literary agent, or publisher because it was obtained through the Department of the Army after the DIA became aware of its existence. Defendants are without sufficient knowledge or information to form a belief as to the truth of the third sentence.

22. Defendants deny this paragraph except to admit that Plaintiff was ordered to provide a copy of his manuscript to his command.

23. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

24. Defendants deny the first sentence of this paragraph, except to admit that DIA first received a copy of the manuscript on July 14, 2010 and subsequently circulated it to the U.S. Special Operations Command, Central Intelligence Agency, and National Security Agency for a preliminary security review. Defendants admit the second sentence.

25. Defendants admit the first sentence of this paragraph, except that Defendants are without sufficient knowledge as to the precise date of the call. Defendants are without sufficient knowledge or information to form a belief as to the truth of the second sentence.

26. This paragraph is a characterization of a memorandum from Lt. Gen. Ronald Burgess, dated August 6, 2010, to which no response is required. To the extent a response is deemed required, Defendants respectfully refer the Court to the memorandum for a full and accurate statement of its contents.

27. This paragraph is a characterization of a document, to which no response is required. To the extent a response is deemed required, Defendants respectfully refer the Court to the document for a full and accurate statement of its contents.

28. This paragraph is a characterization of an e-mail from Lt. Col. Raaf to Plaintiff, dated August 10, 2010, to which no response is required. To the extent a response is deemed required, Defendants respectfully refer the Court to the e-mail for a full and accurate statement of its contents.

29. Admitted.

30. Defendants are without sufficient knowledge or information to form a belief as to the publisher's actions in "readying its initial shipment of the book." Defendants admit the remainder of this paragraph.

31. Defendants deny the first sentence of this paragraph, except to admit that on August 16, 2010, the publisher told Defendants that approximately sixty review copies of the book had already been distributed. The second sentence consists of Plaintiff's speculation and opinion, the truth as to which Defendants lack sufficient knowledge or information to form a belief.

32-33. Admitted.

34. Defendants admit that Plaintiff's attorney stated that he currently maintained a Secret level clearance, that he stated a desire to participate in any meetings involving his client in order to facilitate any negotiations, and that Defendants did not grant the attorney access to the classified information identified in the book. With respect to the second sentence, Defendants admit that the publisher's attorney was granted limited access to select classified information for a short period of time in order to assist Defendants. Defendants deny the third sentence.

35. Defendants deny the first sentence of this paragraph, except to admit that Plaintiff met with Defendants to discuss the book, including on August 20, August 23, and August 26, 2010. Defendants deny the second and third sentences, except to admit that Plaintiff was granted a limited, temporary clearance to allow him to participate in the discussions concerning the classified information in the book.

36. Defendants deny this paragraph, except to admit that over the course of meetings on August 20, August 23, and August 26, 2010, Plaintiff agreed to modify some information in the book but insisted on publishing other information identified by Defendants as classified.

37. Denied.

38. With respect to the first sentence, Defendants admit only that on August 31, 2010, counsel for Defendant Department of Defense transmitted to the publisher a copy of the manuscript with portions marked for deletion or revision and asked the publisher for additional time for editing. With respect to the second sentence, Defendants are without sufficient knowledge or information to form a belief as to whether the publisher "accepted" that copy of the manuscript for publication.

39. Defendants admit the first sentence of this paragraph and deny the second sentence.

40. Admitted.

41. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph, except to admit that the publisher informed Defendants that it intended to publish the book with redactions and that this second printing was released on September 24, 2010.

42-48. These paragraphs are characterizations of Internet websites, to which no response is required. To the extent a response is deemed required, Defendants respectfully refer the Court to the website addresses listed in the complaint for a full and accurate statement of their contents.

49. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph, except to admit that St. Martin's Press published a paperback edition of the book in October 2011 and to deny that there was any infringement upon Shaffer's First Amendment rights.

50. Defendants deny the first sentence of this paragraph. Defendants deny the second sentence, except to admit that Plaintiff was promoted to Lieutenant Colonel. With respect to the third sentence, the sentence contains characterizations of Plaintiff to which no response is required, and Defendants admit only that Plaintiff made the public statements alleged in this sentence.

51. Defendants admit the first and second sentences of this paragraph. Defendants deny the third sentence, except to admit that some of the information presented in support of the motion was classified and filed *in camera* and *ex parte*.

52. Defendants deny this paragraph, except to admit that on June 7, 2011, counsel for Plaintiff asked that Defendants provide Plaintiff with access to a secure computer to prepare a classified declaration addressing Defendants' classification of certain information.

53. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph, except that Defendants deny Plaintiff submitted unclassified source materials to Defendants in August or September 2010.

54. Defendants deny the first sentence of this paragraph and admit the second sentence. The third sentence consists of a legal conclusion, to which no response is required. To the extent a response is required, Defendants deny the sentence, except to admit that in order to demonstrate that information is no longer classified because of a prior release Plaintiff must show that the information has been publicly released through an official and documented disclosure, and to admit that Plaintiff must submit those materials to the agency during the administrative process .

55. Defendants admit the first sentence of this paragraph. Defendants deny the second sentence, except to admit that Plaintiff's clearance was revoked in 2005 and that he was granted a limited, temporary clearance to allow him to participate in the discussions concerning the classified information in the book. The third sentence consists of a legal conclusion to which no response is required. To the extent a response is deemed required, the sentence is denied. The fourth sentence consists of Plaintiff's argumentative, subject opinion, to which no response is required.

56. Defendants deny this paragraph except to admit that Defendants denied Plaintiff's request for access to a secure computer for preparing a classified declaration.

57. Defendants deny the first sentence of this paragraph, except to admit that on September 27, 2010, pursuant to Army Regulation 15-6, the Department of the Army initiated an investigation into Plaintiff's conduct and the circumstances leading to the publication of his book. Defendants deny the second sentence except to admit that Plaintiff retired from the U.S. Army Reserve in July 2011.

58. Defendants deny the first sentence of this paragraph, except to admit that on February 9, 2012, Plaintiff's counsel informed Defendants' counsel of his contention that "certain pages of the initial unredacted print version of Operation Dark Heart are available online and there are even side-by-side comparisons to the published redacted version. The original Complaint in the litigation provided cites to these examples." Defendants are without sufficient knowledge or information to form a belief as to the second sentence of this paragraph.

59. Defendants deny this paragraph except to admit that the Department of Justice issued guidance to petitioners' counsel with clearance concerning the use of potentially classified information posted on the WikiLeaks website and continued compliance with counsel's obligation to protect all classified information.

60. Admitted.

61. Defendants deny this paragraph except to admit that they had not responded to Plaintiff's counsel's February 9 request by the February 13 filing of Plaintiff's amended complaint, and that they subsequently informed counsel that they need not address the request in light of their motion to dismiss the amended complaint for lack of jurisdiction.

62. Defendants incorporate by reference their responses to paragraphs 1 through 61.

63. Denied.

64. This paragraph consists of legal conclusions, to which no response is required. To the extent a response is deemed required, this paragraph is denied.

65. Defendants deny this paragraph, except to admit that they identified classified information in the book and sought to prevent its publication, whether by Shaffer or the publishing company, where agreement could not be reached as to modification or deletion.

66. This paragraph consists of legal conclusions and argument, to which no response is required. To the extent a response is deemed required, Defendants deny this paragraph except to admit that the publication of information in violation of his secrecy agreement or applicable law may subject Plaintiff to civil and criminal penalties.

67-71. These paragraphs consist of legal conclusions, to which no response is required. To the extent a response is deemed required, these paragraphs are denied.

72. Defendants deny the first sentence of this paragraph, except to admit that the publisher released a paperback version of the book in October 2011. The second and third sentences consist of legal conclusions, to which no response is required. To the extent a response is deemed required, Defendants deny that they have engaged in any unlawful actions, and admit that the publication of information in violation of his secrecy agreement or applicable law may subject Plaintiff to civil and criminal penalties.

73. Defendants are without sufficient knowledge or information to form a belief as to the truth of the first sentence of this paragraph insofar as it concerns Plaintiff's subjective desires. The remainder of the first sentence consists of a legal conclusion, to which no response is required. To the extent a response is deemed required, the remainder of the sentence is denied. Defendants deny the second and third sentences of this paragraph.

74. This paragraph consists of legal conclusions, to which no response is required.

To the extent a response is deemed required, the paragraph is denied.

75. Defendants incorporate by reference their responses to paragraphs 1 through 61.

76-81. These paragraphs consist of legal conclusions, to which no response is required.

To the extent a response is deemed required, the paragraphs are denied.

82. Defendants incorporate by reference their responses to paragraphs 1 through 61.

83. Defendants deny this paragraph, except to admit that they have not provided his counsel with access to any of the classified information at issue in this case.

84. Defendants neither admit nor deny the truth of this paragraph.

85-86. These paragraphs consist of legal conclusions, to which no response is required.

To the extent a response is deemed required, the paragraphs are denied.

87. Defendants deny the first sentence of this paragraph except to admit that the Department of Justice issued guidance to petitioners' counsel with clearance concerning the use of potentially classified information posted on the WikiLeaks website and continued compliance with counsel's obligation to protect all classified information. The second sentence consists of a legal argument and conclusion to which no response is required. To the extent a response is deemed required, the sentence is denied.

88. Defendants deny the first sentence of this paragraph. The second sentence consists of a legal conclusion to which no response is required. To the extent a response is deemed required, Defendants deny the sentence except to admit that Defendants may submit materials in this case *in camera* and *ex parte* in order to protect classified information.

89. Defendants deny this paragraph except to admit that they had not responded to Plaintiff's counsel's February 9 request by the February 13 filing of Plaintiff's amended

complaint, and that they subsequently informed counsel that they need not address the request in light of their motion to dismiss the amended complaint for lack of jurisdiction.

90. Denied.

The remainder of Plaintiff's First Amended Complaint consists of a prayer for relief, to which no response is required. To the extent a response is deemed required, Defendants deny Plaintiff is entitled to the requested relief or to any relief whatsoever.

Defendants deny all and all other allegations set forth in the First Amended Complaint not otherwise admitted or qualified above.

WHEREFORE, having fully answered Plaintiff's First Amended Complaint, Defendants pray for a judgment dismissing the Complaint with prejudice and for such further relief as the Court may deem just.

Dated: November 21, 2012.

Respectfully submitted,

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