

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

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DOE(P),)	
)	
	Plaintiff,)	
)	
	v.)	Civil Action No. 1:04CV02122 (GK)
)	
Gen. MICHAEL V. HAYDEN, USAF)	
Director, Central Intelligence Agency,)	
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
and)	
)	
JAMES L. PAVITT,)	
)	
	Defendants.)	
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**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S REVISED MOTION TO PARTIALLY
DECLASSIFY THE SECOND AMENDED COMPLAINT**

Plaintiff Doe’s motion to have the Court declassify certain paragraphs of the Second Amended Complaint that the Central Intelligence Agency (“CIA”) instructed Plaintiff to redact is unsupported by either law or fact. There is, in fact, no citation to any legal authority in support of the motion at bar. It is not for Plaintiff to decide whether the information in the Second Amended Complaint is classified; that decision is left to the Executive Branch, and courts traditionally defer to the Executive Branch’s determinations regarding classification. Here, release of the information at issue in the Second Amended Complaint has been determined to pose a risk to national security. The paragraphs are thus properly classified; accordingly, the Court should deny Plaintiff’s motion.

BACKGROUND

Plaintiff is required to submit any filings to the CIA for classification review prior to filing. In keeping with secrecy agreements executed by both Plaintiff and his attorney, Plaintiff submitted his not-yet-filed Complaint for classification review prior to filing it in December 2004. Plaintiff did so, in accordance with standard CIA practice, by transmitting it to an Area Security Officer, who in turn provided it to an Information Review Officer in the CIA's Directorate of Operations for classification review.¹ Information Review Officers are senior CIA officials who exercise original classification authority under written delegation of authority pursuant to Executive Order 12958 § 1.3(c).² Information Review Officers are authorized to make classification decisions regarding national security information. Section 6.1 of Executive Order 12958 defines "national security" as "the national defense or foreign relations of the United States" and defines "information" as "any knowledge that can be communicated or documentary material . . . that is owned by, produced by or for, or is under the control of the United States Government."

For information to be eligible to be classified under E.O. 12958, it must fall into one of eight categories enumerated in section 1.4 of the order, and an official who possesses original

¹ The Directorate of Operations in the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities, including the collection of intelligence through the clandestine use of human sources.

² Executive Order 12958 was amended by Executive Order 13292. See Exec. Order 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003) All citations to Executive Order 12958 are to the Order as amended by Executive Order 13292. See Exec. Order 12958, 3 C.F.R. 333 (1995), reprinted as amended in 50 U.S.C.A. § 435 note at 91 (Supp. 2004).

classification authority must determine that disclosure of the information could reasonably be expected to cause damage to the national security.

The Information Review Officer, after consultation with other CIA employees familiar with the intelligence information implicated in the not-yet-filed Complaint, concluded that the not-yet-filed Complaint contained information which falls into one of E.O. 12958's enumerated categories and that disclosure of that information could reasonably be expected to cause damage to the national security. Accordingly, the Information Review Officer provided the Area Security Officer with a redacted copy of the not-yet-filed Complaint with the classified information removed. The Area Security Officer then returned the unclassified not-yet-filed Complaint to Plaintiff's counsel and instructed counsel to purge the classified information from counsel's files and computer systems. The Amended Complaint went through an identical process before it was filed on April 27, 2005. The Second Amended Complaint went through the same process before it was filed on November 15, 2005, as did the instant motion and all other motions and briefs filed in this litigation.

DISCUSSION

Plaintiff has asked that this Court declassify certain specified paragraphs of the Second Amended Complaint. See Plaintiff's Revised Motion to Partially Declassify Second Amended Complaint at 1 (hereinafter "Pl.'s Motion"). It appears that Plaintiff is contending that information that the CIA instructed him to redact from the Second Amended Complaint is no longer classified, and so the redactions should be removed. See, generally, id. However, Plaintiff is not in a position to decide whether the Second Amended Complaint requires redaction; only the Executive Branch can make such a determination. See Ctr. for Nat'l Sec.

Studies v. U.S. Dep't of Justice, 331 F.3d 918, 932 (D.C. Cir. 2003); People for Am. Way Found. v. NSA, 462 F. Supp. 2d. 21, 33 (D.D.C. 2006). In this case, the CIA has determined that the information at issue is classified and therefore must be redacted. When Plaintiff filed the instant motion (as well as the prior, virtually identical, motion in March 2008), the CIA considered the information in light of Plaintiff's claim that it is "no longer classified," Pl.'s Motion at 1, and determined that in the context of this litigation, the information continues to be classified. That determination is clearly demonstrated by the redactions that the CIA instructed Plaintiff to make on the instant motion.

Classification and declassification is an executive function. It is not the role of the Court to review classification decisions made by the executive branch. Rather, the courts may consider classification decisions only in a limited set of circumstances and with substantial deference to the decisions made by the government. See Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); CIA v. Sims, 471 U.S. 159, 179 (1985) ("The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake."). "[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." Id. at 180. See also Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003), rehearing & rehearing en banc denied (2003), cert.

denied 540 U.S. 1218 (2004) (noting “the primacy of the Executive in controlling and exercising responsibility over access to classified information”).

Regardless of whether Plaintiff thinks the specified redactions made to the Second Amended Complaint were proper, courts have consistently recognized that national security information may form a mosaic such that the release of a particular piece of seemingly innocuous information may, when coupled with other information already publicly available, form a picture of classified information. See Sims, 471 U.S. at 178 (“[T]he very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data ‘may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.’”) (quoting Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980)). “What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.” Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978). That is why classification decisions are made by those with expertise and not by random former CIA operatives and their counsel. See Center for Nat’l Sec. Studies, 331 F.3d at 927-28 (discussing government officials’ expertise in making classification decisions). Thus, the CIA looked at the information at issue in context of the Second Amended Complaint as a whole when determining whether the information is classified.

There is no caselaw supporting a court’s review of classification decisions in a context such as this. The Court’s authority to engage in such review is narrowly circumscribed and, where permitted, highly deferential to the agency. See McGehee v. Casey, 718 F.2d 1137, 1148-49 (D.C. Cir. 1983); Gardels v. CIA, 689 F.2d 1100, 1106 (D.C. Cir. 1982). It would, therefore, be inappropriate for the Court to review the CIA’s classification determinations as to

which information in the Second Amended Complaint could pose a threat to national security if made public.³

The CIA has determined in this case that the information identified by Plaintiff is, in this context, classified, and that determination is entitled to deference. See Taylor v. Dep't of Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (requiring "utmost deference" to affidavits of military intelligence officers). The D.C. Circuit has emphatically "reject[ed] any attempt to artificially limit the long-recognized deference to the executive on national security issues." Center for Nat'l Security Studies, 331 F.3d at 928. Thus, the CIA's determination that the information in Plaintiff's Second Amended Complaint should be upheld, and Plaintiff's motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the motion to partially declassify the Second Amended Complaint be denied.

Respectfully submitted,

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³ If the Court nonetheless determines that it needs to evaluate whether these paragraphs were properly classified in order to resolve this motion, the approach recommended in Stillman may be of assistance. See Stillman v. CIA, 319 F.3d 546, 548 (D.C. Cir. 2003) ("Precisely because it is often difficult for a court to review the classification of national security information, '[w]e anticipate that in camera review of affidavits, followed if necessary by further judicial inquiry, will be the norm'").

/s/ Marcia N. Tiersky

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