UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SABRINA DE SOUSA,

Plaintiff,

v.

DEPARTMENT OF STATE, *et al.*,

Defendants.

Case No. 09-cv-896 (RMU)
[FILED UNDER SEAL]

DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFF'S MOTION FOR *IN CAMERA* SESSION AND MOTION FOR LEAVE TO FILE UNDER SEAL

Plaintiff has filed a motion for an "*in camera* classified session," at which Plaintiff intends to disclose classified information to the Court, over the objection of the United States. Pl.'s Mot. at 1 (proposing session that "will necessarily involve the disclosure of classified information"). Defendants[1] oppose this request, for numerous reasons.[2] To begin with, Plaintiff's motion appears designed to introduce evidence external to the Amended Complaint for the purpose of resisting Defendants' long-pending motions to dismiss. Defendants' motions raise legal issues which are ripe for resolution — and which dispose of this case — regardless of whatever information Plaintiff would like to use to buttress her defective complaint. At a bare minimum, and in accord with settled precedent cautioning against inquiring into classified information unless legally necessary, the Court should require Plaintiff to file a response to, and

[1] Defendants include the Central Intelligence Agency ("CIA"), the Secretary and Department of State ("State"), the Department of Justice, the United States, and three individual defendants sued in their individual capacities as putative U.S. officials.

[2] Defendants oppose Plaintiff's request to file Plaintiff's motion (and Plaintiff's counsel's notice of appearance) under seal. It is Defendants' understanding that, to the extent Defendants believe Plaintiff's filing (and this opposition) may be filed on the public record, Plaintiff has no

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the Court should assess, the pending motions to dismiss without reference to classified information before entertaining Plaintiff's extraordinary request. Moreover, Plaintiff's request should be denied because the Executive Branch, which holds exclusive responsibility for the protection and control of classified national security information, has not authorized Plaintiff (or her counsel) to disclose classified information for any purpose relating to this civil litigation. Absent such authorization, there is no basis for Plaintiff to thwart well-established prohibitions against unauthorized disclosure in the pursuit of this case.

ARGUMENT

I. Defendants' Motions To Dismiss Raise Legal Arguments That Are Ripe For Resolution, And The Court Should Assess Defendants' Motions To Dismiss Based Upon Public Filings Prior To Any Potential Consideration Of Classified Information.

Plaintiff's request for an "*in camera* classified hearing" should be denied. Defendants filed their original motion to dismiss sixteen months ago and their renewed motions four months ago. These motions raise dispositive legal issues — including lack of subject-matter jurisdiction, failure to state a claim, nonjusticiability, and preclusion — that are ripe for resolution and do not require any consideration of classified material. Plaintiff has avoided responding to these dispositive defenses for months, and now seeks to introduce evidence external to her own complaint, in an apparent effort either to cure pleading defects or to generate a separate dispute over issues regarding sensitive national security information that cannot plausibly impact the legal issues raised in Defendants' motions. Even assuming that classified information was

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objection.

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implicated by this action as a factual matter,[3] the Amended Complaint raises legal issues that are ripe for resolution irrespective of any classified information that may relate to the facts alleged therein.[4]

The Constitution commits to the President the authority and responsibility to protect our Nation's security, including the obligation to protect certain information from disclosure, where such disclosure could be expected to harm national security. *See, e.g.*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."). Thus, courts have long recognized "the primacy of the Executive in controlling and exercising responsibility" over classified information. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (recognizing the Executive's "'compelling interest' in withholding national security information from unauthorized persons in the course of executive business") (internal citation omitted); *see also People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003). That deference is due not only to the constitutional role of the President, but also because of "practical" concerns: "the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a

[3] The government neither confirms nor denies that this is the case.

[4] As they must, Defendants' motions to dismiss accept the Amended Complaint's well-pled factual allegations as true solely for purposes of the motions themselves, without accepting the allegations to be true in fact. Likewise, Plaintiff is bound by her own pleading. *See Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003) ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.") (quotation marks and citation omitted). To the extent that Plaintiff may have had access to classified information that might elaborate upon or better represent facts alleged therein, Plaintiff was (and is) bound by her obligation not to disclose such information unless authorized by the Executive Branch, and by her obligation to make accurate representations to

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release of sensitive information." *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007).

Accordingly, it is well settled that, in light of the inherent risks attendant to litigation concerning sensitive information, and giving due respect to the separation of powers, courts should scrupulously avoid delving into questions regarding sensitive information unless necessary and should seek other alternatives wherever possible. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Al Odah v. United States*, 559 F.3d 539, 547 (D.C. Cir. 2009) (counseling that a district court should "consider[] unclassified alternatives before ordering disclosure of classified information"); *Doe v. C.I.A.*, 576 F.3d 95, 104-105 (2d Cir. 2009).[5] This case requires such a course of action: Rather than agree to Plaintiff's extraordinary request for some type of classified proceeding in this civil case, the Court should require Plaintiff to respond to Defendants' dispositive motions without making reference to any classified information. At the very least, doing so will narrow the issues in dispute and prevent unnecessary inquiries into sensitive matters with regard to claims that would not survive, in any event.

II. Plaintiff Has Not Been Authorized To Use Or Disclose Classified Information In This Case.

Plaintiff's request also should be denied because Plaintiff has not been authorized by the Executive Branch to access, use, or disclose such information in this case.[6] Such authorization is

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the Court.

[5] As courts have recognized, the disclosure of classified information may increase the risk to national security, irrespective of the trustworthiness of any particular individual: "It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised." *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975)).

[6] Whether a court may review classified information is a different inquiry. In appropriate cases, federal regulations provide that classified information may be disclosed by Department of Justice attorneys to a court, as long as proper security measures are taken. *See* 28 C.F.R.

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required. Plaintiff would have the Court believe that merely because Plaintiff and/or her attorney may have been given access to classified information at some point in the past, that this permits Plaintiff to, of her own volition, use that same information in civil litigation. Plaintiff is mistaken. First, this notion is at odds with the Executive's exclusive control over access, use, and disclosure of classified information. *See, e.g.*, *Holy Land*, 333 F.3d at 164. Moreover, Plaintiff and her counsel are bound by nondisclosure agreements that prohibit any disclosure of classified information absent authorization from the Executive Branch. Relatedly, Plaintiff may not access or use classified information here in the first instance — even classified information to which she previously had access in other contexts — without an Executive Branch approval. Such approval has not been given.

Responsibility for controlling access to, use of, and disclosure of classified information lies with the Executive Branch. *See* Executive Order 13,526 ("E.O. 13,526"), 75 Fed. Reg. 707 (Jan. 5, 2010), revoking Exec. Order 12,958, 60 Fed. Reg. 19825 (Apr. 17, 1995), and Exec. Order 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003); *see also Egan*, 484 U.S. at 527 (authority to determine who may have access to classified information "is committed by law to the appropriate agency of the Executive Branch."); *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"); *Stehney v. Perry*, 101 F.3d 925, 931-32 (3d Cir. 1996) (finding that judicial review of the merits of an Executive Branch decision to grant or deny a security clearance would violate separation-

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§ 17.17. Federal Article III Judges and Justices, like Members of Congress, do not require individual access-eligibility determinations. *See* 28 C.F.R. § 17.46(c).

of-powers principles). In accordance with this responsibility, decisions concerning control, use and dissemination of such information rest with the Executive. *See Egan*, 484 U.S. at 529 (security clearance decisions committed to agency discretion); *People's Mojahedin*, 327 F.3d at 1242-43; *Holy Land*, 333 F.3d at 164 (recognizing "the primacy of the Executive in controlling and exercising responsibility over access to classified information, and the Executive's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business") (internal citation omitted).

For nearly a century, the Executive Branch has maintained a system of classifying national security information according to its sensitivity. *See Egan*, 484 U.S. at 528; *see generally* E.O. 13,526. Such classified information is governed by Executive Order. *See* E.O. 13,526; *see also* Executive Order 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995), *as amended by* Executive Order 13,467, 73 Fed. Reg. 38,103 (July 2, 2008). There are three prerequisites before an individual will be authorized to access and use particular classified national security information.

First, an agency head must make "a favorable determination of eligibility for access." E.O. 13,526 § 4.1(a)(1). Second, the individual must "sign[] an approved nondisclosure agreement." E.O. 13,526 § 4.1(a)(2). Third, access to particular information is allowed only if "the person has a need-to-know the information." *Id.* § 4.1(a)(3). The Executive Order defines "need-to-know" as "a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." *Id.* § 6.1(dd). A need-to-know determination can only be made "within the executive branch."

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Id. § 6.1(dd). And classified information generally may not be disseminated outside of the Executive Branch absent approval from the originating agency.

A. Plaintiff May Not Circumvent Her And Her Counsel's Nondisclosure Obligations.

Plaintiff's request to the Court for permission to disclose classified information runs directly contrary to binding nondisclosure agreements Plaintiff and her counsel have with the government. *See* E.O. 13,526 § 4.1(a)(2). Generally speaking, such agreements prohibit disclosure of any kind, absent authorization from the agency controlling the information. *See*, *e.g.*, SF-312 (Rev. 1-00) ¶ 3, available at http://www.archives.gov/isoo/security-forms/sf312.pdf (standard nondisclosure form acknowledging signatory's understanding and agreement that "I will never divulge classified information to anyone unless" authorized to do so).[7] In asking the Court to permit disclosure regardless of Executive authorization, Plaintiff necessarily seeks judicial abrogation of voluntary agreements both she and her counsel signed. *Cf. United States v. Aguilar*, 515 U.S. 593, 606 (1995) ("As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.").

Moreover, by definition, nondisclosure agreements require that individuals obtain authorization to disclose classified information. Plaintiff has declined to seek authorization with

[7] SF-312 is a standard nondisclosure agreement form prepared by the Information Security Oversight Office ("ISOO"), a federal agency charged with overseeing the security classification programs in both Government and industry. Although not all agencies use SF-312, it is generally representative of typical terms included in national security nondisclosure agreements. *See* 32 C.F.R. § 2001.80.

any particularity, instead filing a request directly with the Court for an order permitting her to disclose unspecified classified information to the Court regardless of whether the government authorizes the disclosure. Neither E.O. 13,526 nor applicable nondisclosure agreements permit such a course of action, substantively or procedurally. *See Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) ("When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review...."). Indeed, in order for the government even to assess whether Plaintiff or her counsel may be authorized by the Executive to use or disclose the information here, the government must be informed by Plaintiff what information Plaintiff intends to bring forward.[8] Thus far, Plaintiff has declined to do so, opting instead to proceed directly to the Court.

Procedurally, then, Plaintiff's request is precisely backwards. Even if the Court were to entertain the notion that Plaintiff may disclose classified information over the government's objection, at the very least, the government should have an opportunity to assess the putative disclosure before a litigant seeks relief directly from the Court. *See Aguilar*, 515 U.S. at 606. To permit a different course of action would sanction a violation of the Executive Order and the specific applicable nondisclosure agreements which that Order requires to be enforced. *See* E.O. 13,526 § 4.1(a)(2).

B. The Executive Branch Has Not Authorized Plaintiff To Use Classified Information Here, And Disclosure Is Therefore Prohibited.

Even if one puts the nondisclosure agreements to the side, neither Plaintiff nor her counsel has been authorized by the government to access or use any classified information for

[8] This also would allow the government to make a determination that the information

purposes of this litigation.

As noted, pursuant to the Executive Order, the United States grants access to classified information only where an agency official with appropriate authority determines that the applicant has a work-related need for the information in connection with the performance of a "governmental function" authorized by the agency. *See* E.O. 13,526 §§ 4.1(a), 6.1(dd). Such a determination inherently is discrete; that is, when a person has been given access in a particular instance and for a particular authorized governmental function, that access is limited both in time and in use. *Id*. Ultimately, the information belongs to the government and its dissemination and use is subject to government control. *Pfeiffer v. CIA*, 60 F.3d 861, 864 (D.C. Cir. 1995) (copies of classified document to which private individual previously had authorized access were "indisputably the property of the Government"). An individual given access to classified information may only use it for the authorized function, and only for the period of time necessary to perform that function. Concomitantly, access authorization may be withdrawn at any time. Moreover, regardless of whether access has been granted, any such access is governed by the mandatory nondisclosure agreement the individual signs as a precondition to access. E.O. 13,526 § 4.1(a)(2).

Because authorization determinations inherently are discrete, it necessarily follows that an individual's access (i.e., authorization to use) ceases once there is no longer a need-to-know for purposes of performing an "authorized governmental function." This is true regardless of whether the individual may retain the information in their memory.[9] Accordingly, the authorized

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Plaintiff seeks to publish is, in fact, classified.

[9] In this sense, "need-to-know" is a term of art that does not refer strictly to mental

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access is not transferred automatically when the individual works on other classified matters and, by definition, terminates when the individual leaves government employment. *See* E.O. 13,526 § 4.1(c) ("An official or employee leaving agency service may not remove classified information from the agency's control…."); Am. Compl. ¶¶ 3, 66 (alleging that Plaintiff resigned her position with the government); *see also* SF-312 ¶ 7.[10]

Plaintiff's request, if granted, would dispense with this essential authorization determination entirely. Plaintiff asks the Court to assume the Executive's role in determining whether Plaintiff may use such information here, in pursuit of her claims. Plaintiff's request is misguided. Absent Executive authorization, Plaintiff may not access or use classified information for purposes of pursuing this litigation, regardless of whether she or her attorney has been granted access, for defined authorized governmental purposes, previously. E.O. 13,526 §§ 4.1(a)(3), 6.1(dd); *see also In re United States*, 1993 WL 262656 at * 9 (finding that, under separation of powers principles, "the access decisions of the Executive may not be

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awareness, but to a principle of access and use. *See* E.O. 13,526 § 6.1(dd) (defining "need-to-know" as "a determination within the executive branch … that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function").

[10] For example, in *Pfeiffer v. CIA*, a historian for the CIA was granted access to classified information in order to write a report on the agency's internal investigation into the Bay of Pigs Operation. 60 F.3d at 862. The historian subsequently requested a copy of the report and asked that the CIA review and clear the report for publication. *Id.* When the CIA refused, the historian sued on the theory that the report belonged to him and that any attempt to prevent him from publishing it was a violation of his First Amendment right to free speech. *Id.* The D.C. Circuit found to the contrary that "the report at issue in this case — in both its original form and in the form of Pfeiffer's copy — is indisputably the property of the Government." *See id.*at 864. The D.C. Circuit further held that while "the first amendment may protect his right to speak of his unclassified experiences with the Agency (classified material apart)," "no law grants him the right to keep — and therefore in this instance to publish — the papers that he purloined from the Agency." *See id.* at 866.

countermanded by either coordinate Branch"). And, by virtue of Plaintiff's nondisclosure obligations, Plaintiff may not disclose such information.

C. Executive Controls And Restrictions Regarding Classified Information Are Binding Here.

These restrictions on access, use, and disclosure are well settled and binding on Plaintiff. In this regard, the Supreme Court and the lower courts have made it clear that there is no constitutional right of access to national security information. *See Egan*, 484 U.S. at 528; *Doe v. Cheney*, 885 F.2d 898, 909-10 (D.C. Cir. 1989) (no property interest in a security clearance); *Jones v. Dep't of Navy*, 978 F.2d 1223, 1225 (Fed. Cir. 1992) ("there is no access 'right' to classified documents"); *Hill v. Dep't of Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) ("Whatever expectation an individual might have in a clearance is unilateral at best, and thus cannot be the basis for a constitutional right"). Likewise, prohibitions against disclosure of classified information do not raise constitutional problems. *Snepp*, 444 U.S. at 509 n.3 (censorship arising from prohibition against disclosure of classified information does not violate the First Amendment). To the contrary, these restrictions arise directly from the voluntary obligations that individuals incur when they enter security agreements and from the Constitution's vesting of control over classified national security information in the Executive Branch. Plaintiff can claim no entitlement, therefore, to use classified information in this context without Executive authorization.

Importantly, this is not a criminal case. In that context, Congress has specifically passed legislation — the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 — which governs such use. By its plain terms, however, CIPA has no application to civil cases.

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See CIPA, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. App. III) ("An act to provide certain pretrial, trial and appellate procedures for criminal cases involving classified information.").[11] As the Supreme Court observed in *Reynolds*, there are key differences between civil litigation and criminal prosecutions. In the latter, the Government may, as a last resort, choose to withdraw evidence, dismiss charges, or dismiss an indictment rather than disclose classified information. Thus, in a criminal case "the Government can invoke its evidentiary privilege only at the price of letting the defendant go free." *Reynolds*, 345 U.S. at 12; *see also* 18 U.S.C. App. III §§ 7(a), 6(e) (CIPA provisions stating that if a court orders disclosure of classified information in a criminal case, the government may seek an interlocutory appeal, or cause the court to dismiss an indictment). This principle, however, "has no application in a civil forum where the [g]overnment is not the moving party, but is a defendant only on terms to which it has consented." *Reynolds*, 345 U.S. at 12.[12]

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[11] Similarly, the Guantanamo habeas cases, in which the government has permitted limited access to and use of classified information by private individuals in litigation, present unique circumstances not applicable here. In those cases, the government granted security clearances and access to some classified information in part because the detainees' liberty interests were at stake, in part to regulate and limit access to sensitive information, and in part to facilitate physical access to the secure Guantanamo Bay facility. *See Al Odah*, 559 F.3d 539; *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 2009 WL 50155 (D.D.C. Jan 9, 2009); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004).

[12] Defendants note that in the prepublication decision in *Stillman v. C.I.A.*, 319 F.3d 546 (D.C. Cir. 2003), the D.C. Circuit held that the district court should review the government's *ex parte* submissions prior to considering even the possibility of authorizing a private individual (in that case, counsel) to use classified information in litigation. *Id.* at 548-49. After reaching this determination, the court suggested *in dicta* the possibility that, on remand, Stillman (who had previously been given access to sensitive information) could provide "materials" to the district court. *Id.* This statement does not compel a contrary result from that advocated by Defendants. Most obviously, the court did not specify that Stillman could submit classified materials (indeed, the purpose of such submissions would be to demonstrate that information was not classified). In point of fact, on remand, the submissions received from Stillman included only "public source

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At bottom, Plaintiff asks the Court to grant Plaintiff the extraordinary relief of permitting her to use classified information in civil litigation, notwithstanding (1) prohibitions, embodied in binding nondisclosure agreements Plaintiff and her counsel signed, against any disclosure of such information absent Executive authorization; (2) the lack of an Executive determination that Plaintiff may even use classified information in this context, regardless of whether Plaintiff may have been given access in another, prior context; (3) the lack of any statutory authorization for Plaintiff to circumvent binding Executive controls for purposes of this civil litigation; and (4), critically, the lack of any basis for permitting such an extraordinary procedure at the outset of litigation, before the Court has considered dispositive legal issues raised on the public record in Defendants' motions to dismiss. Each of these factors counsels against giving Plaintiff's motion any consideration; together, they require denial of the motion.

III. Plaintiff's Allegations Concerning Access To Secure Computers Warrant No Consideration.

Finally, there are no grounds to consider Plaintiff's allegations concerning use of secure government computer systems. This dispute arose in the context of Plaintiff's counsel's submission of the motion for an *in camera* hearing for pre-filing classification review with a federal agency. An administrative process by definition, this review is controlled by the agency, and in conjunction with this process, Plaintiff's counsel was instructed that no government computers would be provided for purposes of drafting the proposed motion for review to the agency. Notwithstanding this instruction, counsel obtained separate permission from security officials at the Department of Justice to permit use of their secure systems, on which counsel

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documents provided to the government" and filed on the public record. *See Stillman v. C.I.A.*,

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prepared the present motion. Plaintiff contends that the instructions from the agency somehow violate Plaintiff's unspecified constitutional rights. Pl.'s Mot. at 2.

Even if there were some basis for the Court to insert itself into this administrative process, the dispute is moot: Counsel prepared the subject motion and submitted it for review, and the agency cleared it for publication after determining that it contained no classified information. *See Stillman II*, 517 F. Supp. 2d at 36 (holding that an APA challenge of unreasonable CIA delay in reviewing prepublication manuscript was moot where the review was already complete).

In any event, Plaintiff's counsel has no right to disclose classified information in any context without authorization; therefore counsel was obligated to ensure that no classified information appeared in his submission. *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) ("[T]he entire scheme of prepublication review is designed for the purpose of preventing publication of classified information."); *Snepp*, 444 U.S. at 509 n.3 (censorship arising from prohibition against disclosure of classified information does not violate the First Amendment). Because, by definition, the motion was required to contain only unclassified information, there is no basis to presume that access to a secure system would be appropriate, much less required by the Constitution. *See Doe. v. C.I.A.*, 576 F.3d at 105-108 (no First Amendment right to access secure communications facilities).

Even if the Court were to entertain the possibility that Plaintiff's constitutional rights somehow are implicated here, *but see id.*; *see also Snepp*, 444 U.S. at 509 n.3 ("When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated

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517 F. Supp. 2d 32, 39 (D.D.C. 2007) ("*Stillman II*").

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him to submit any proposed publication for prior review...."), Plaintiff's complaint amounts to a collateral attack on an administrative process separate and distinct from this litigation. The Court may not review such an attack in the context of this litigation, in which claims concerning these procedures have not been properly raised.[13] To the extent Plaintiff's counsel may have had concerns, justified or not, regarding the adequacy of the procedures (with which he necessarily agreed to comply when he executed his nondisclosure agreement), he was obligated to resolve them with the agency to the agency's satisfaction, rather than entreat a separate agency to permit counsel's actions contrary to instructions received from the originating agency. Regardless, the matter is moot.

* * * * *

In sum, Plaintiff requests this Court's approval to disclose classified information, despite a lack of Executive authorization or even administrative review. Plaintiff has given no reason to justify the extraordinary step of permitting such a disclosure in this case, particularly at the outset of the litigation. Quite to the contrary, Plaintiff has failed to respond to Defendants' motions to dismiss, which establish as a matter of law — without any need for consideration of classified or potentially classified information — that all of Plaintiff's claims must fail at the outset. Given the pendency of Defendants' motions to dismiss, should the Court consider it even possible that

[13] Any challenge to these procedures must come through an actual claim for relief, rather than through an informal motion made in a case raising separate claims. *See Benoit v. U.S. Dep't of Agriculture*, 608 F.3d 17, 21 (D.C. Cir. 2010) (amendments of pleadings may not be accomplished informally and require proper written motions for leave to amend); *Doe v. C.I.A.*, 576 F.3d at 107 n.9; *Banks v. York*, 515 F. Supp. 2d 89, 97 n.2 (D.D.C. 2007) ("axiomatic" that a plaintiff cannot amend a complaint in opposition to a motion to dismiss); *Brunetti v. Resolution Trust Corp.*, 1994 U.S. App. LEXIS 1542, at *4 (10th Cir. Jan. 28, 1994) (agency action is reviewable under APA, and "is not subject to collateral attack"). In making this observation,

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classified information might bear on those motions, the Court should reserve such judgment until after public, unclassified briefing has completed. Only thereafter should the possibility of further consideration of these issues arise. Finally, Plaintiff's complaints about independent administrative procedures and access to government computers are of without merit and are, in any event, moot.

CONCLUSION

For all the foregoing reasons, Plaintiff's request for an *in camera* status hearing involving disclosure of sensitive government information should be denied.

Dated: January 14, 2011

Respectfully submitted,

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Defendants do not concede that such a challenge would be justiciable.

CERTIFICATE OF SERVICE
[UNDER SEAL]

I HEREBY CERTIFY that on this 14th day of January, 2011, I caused a true and correct copy of the foregoing memorandum to be served upon Plaintiff by first-class mail to:

BRADLEY MOSS
Mark S. Zaid, P.C.
1250 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036

Brigham J. Bowen