

**Procedures For
Review of Nonofficial Publications
By Employees, Former Employees,
and Contractor Personnel**

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1. INTRODUCTION

a. The purpose of the FBI's prepublication-review program is not to suppress materials critical of the FBI, the Government, or Government officials, or to "correct" the record. Rather, it is to identify information obtained during the course of an author's employment or other service with the FBI that, if disclosed, could harm national security, violate Federal law, or interfere with the authorized law enforcement functions of the FBI. In the case of works submitted by current employees and contractors, the purpose is also to identify statements that might impair the author's performance of duties or have an adverse impact on the foreign relations or security of the United States.

b. The Bureau's prepublication-review program is based on the obligation of FBI personnel and persons with whom we contract to safeguard sensitive and classified information from unauthorized disclosures. This obligation, in turn, is based on statutes, regulations, access and employment agreements, contractual clauses, and the fiduciary relationships into which employees or contractor personnel enter when they are entrusted with such information in the performance of their official duties.

c. The Bureau's employment agreement, for example, specifically requires FBI employees, as a condition of employment, to promise that they will --

never divulge, publish, or reveal . . . any information from the investigatory files of the FBI or any information relating to material contained in the files, or disclose any information or produce any material acquired as a part of the performance of [the employee's] official duties or because of [the employee's] official status.

The scope of this obligation is, thus, quite broad and is not limited to FBI programs, operations, and responsibilities. If, for example, a Bureau employee acquired, in the course of official duties, sensitive information about another agency's operations, then the employee could not divulge that material without proper authorization even though the information did not concern FBI or DOJ programs, operations, or responsibilities.

d. On the other hand, the terms of the employment

agreement do not extend to materials clearly unrelated to the FBI or to an employee's official duties. For example, most writings about personal hobbies, religion, and so forth are outside the scope of the employment agreement.

e. The FBI prepublication-review program is designed to implement the employment agreement by establishing a process by which employees and former employees who wish to make disclosures within the scope of their respective agreements may seek permission to do so. The prepublication-review program also establishes procedures for the review of proposed nonofficial publications by Bureau contractors. If a contractor is a former Bureau employee, then his or her obligations are the same as any other former employee. The scope of the obligation of other contractor personnel to submit a work for review under the program depends on the terms of his or her contract and any related agreements. In general, if a work authored by a contractor is referred to a prepublication-review panel, then the panel may assume that the contractor is held to the same standard as an employee in this regard.

2. SCOPE OF THE PREPUBLICATION-REVIEW OBLIGATION

a. As a condition of employment, all FBI personnel sign an "Employment Agreement" (FD-291) in which they promise to never divulge, publish, reveal, or otherwise disclose any information or material from or relating to FBI files or any other information acquired by virtue of their official employment, duties, or status, without the written permission of the Director. Each employee also promised to present the full text of any proposed disclosure in writing for the Director's consideration at least 30 working days in advance of the proposed disclosure. Breach of these obligations is grounds for disciplinary action, a civil suit against the offender, or both. In some instances, unauthorized disclosure may also constitute cause for revocation of a security clearance or be a criminal offense. For example, 5 U.S.C. § 552a(i)(1) makes it a crime to wrongfully disclose individually identifiable information from a system of records protected by the Privacy Act, and 18 U.S.C. § 1905 makes it a crime for Federal employees to wrongfully disclose trade secrets acquired during the course of their employment.

b. The FBI prepublication-review program is designed to implement the Employment Agreement by establishing a process by which employees and former employees who wish to make disclosures--whether oral, electronic, or written--within the scope of the agreement may request permission to do so. By its nature, the prepublication-review process contemplates a tangible expression of information. Most often this involves a writing but, regardless of the medium through which a disclosure is to be made (written, oral, electronic, etc.), an employee's obligation under the Employment Agreement is **not** to disclose **any** information within the scope of the agreement without written

permission to do so.

c. Current and former employees must submit for prepublication review any nonfiction or fiction work, regardless of the medium in which the work is to be memorialized, that they intend to publish or otherwise divulge which discusses, concerns, is based on, derived from, or otherwise relates to any data, information, files, documents, or materials acquired from or relating to FBI files or any other information acquired by virtue of official employment, duties, or status.

(1) Thus, outlines of oral presentations, drafts and manuscripts of fictional or nonfictional written works, software and other electronic works, and so forth must be submitted for prepublication review if their subject matter falls within the scope of the Employment Agreement.

(2) Disclosures made in the performance of official duties are outside the scope of the prepublication-review program. Official speeches, writings, and publications are reviewed and authorized by cognizant FBI officials and need not be further reviewed.

(3) Completely extemporaneous oral disclosures by their very nature cannot be reviewed in advance. This does not mean that an employee or former employee can disregard the terms of the Employment Agreement when making such disclosures; on the contrary the Agreement covers all disclosures, not just written ones. It does, however, mean that as a practical matter, compliance with the prepublication-review program is impossible in such situations. Thus, while an employee or former employee may be held accountable for making an extemporaneous oral disclosure of information obtained during the course of FBI employment without permission to do so, he or she will not be sanctioned for failing to comply with the prepublication-review program.

(4) Works that clearly have nothing to do with the FBI or its activities, investigations, mission, or which are not otherwise related to any information, documents, or materials acquired by virtue of FBI employment, duties, or status need not be submitted for review. For example, a book of children's stories, an article on stamp collecting, or an outline of a

presentation on religion need not be submitted for prepublication review.

d. Compliance with the prepublication review program does not relieve a current employee from the obligation to comply with the FBI's outside employment rules or the Standards of Ethical Conduct for the Executive Branch. Thus, current employees must ensure that any acceptance of compensation for speaking or writing conforms to these rules and standards. These concerns, however, are outside the scope of the prepublication-review program.

3. REVIEW PROCESS

a. The following procedures govern the prepublication-review process.

(1) Submissions must be made in writing even if an oral disclosure is contemplated. Submissions must be presented to OPCA at least 30 **working** days in advance of the proposed disclosure. (Some oral presentations are not scheduled that far in advance. In such cases, the concerned employee must submit the related written materials as far in advance as possible. The Bureau will endeavor to review the material in a timely manner but disclosure is not authorized until the review is complete.)

(2) OPCA will coordinate the prepublication-review process for the Director. In this regard, OPCA will --

(a) provide assistance to persons with questions about the prepublication-review process.

(b) prepare the FBI response to each request for prepublication review not later than 30 working days after the request and all related materials are received by the FBI. (The day of receipt is not counted for purposes of calculating the 30 working-day period but the day of response is.)

(c) screen all requests.

(1) If no further review is required, then OPCA will inform the requester in writing that the FBI has no objection to disclosure or publication of the material in question.

(2) If further review is required, then OPCA will refer the work, in writing, to a prepublication-review panel (see below), via the responsible Division Assistant Director (AD), and inform the requester in writing that the work has been received and is under review.

(3) If the request reveals that the author has breached his or her employment agreement by making an unauthorized disclosure prior to submitting the work for review, then OPCA will forward copies of the request and the work to the Deputy General Counsel, Litigation Branch, Office of the General Counsel (OGC) for possible institution of civil suit against the author. If the author is a current employee, then OPCA shall also forward copies to the Personnel Security Unit for evaluation of the effect of the disclosure on the employee's continued trustworthiness and security clearance, and to the Office of Professional Responsibility (OPR) for further investigation. OPCA will also simultaneously pursue the

actions described in subparagraph (2) above, as appropriate in such cases, unless directed to the contrary by OGC or OPR.

(3) A prepublication-review panel shall review all works referred by OPCA for further review.

(a) Three panels shall be constituted. Each panel shall be comprised of one FBI employee from each of the following: the Criminal Investigative Division, the National Security Division, the Information Resources Division, the Laboratory Division, and the Training Division. Members will be appointed in writing by their respective Division AD and shall serve on-year terms. For continuity, OPCA will ask the

respective Division AD's to extend selected original appointments for six to twelve months to stagger the members' departure dates. Designated attorneys appointed by the General Counsel shall provide legal advice and counsel to the panels, as needed.

(b) OPCA shall refer a work to a panel via the AD who, in OPCA's judgment, has the greatest interest in the subject matter of that particular work. (Advance copies of the work will be provided directly to the panel members by OPCA to permit them to begin their substantive review.) That AD shall then be responsible to OPCA, acting for the Director, for ensuring that the panel to which the work is assigned completes its review in a timely and substantively correct manner. The panel member from the Division through which the work is referred by OPCA shall act as the chairman for the review panel for that particular work and is responsible to his or her respective AD for completing the review in a timely and substantively correct manner.

(c) When a work is referred to a panel, each member shall review the work in question using the standards set forth below and such guidelines as may be provided by OPCA. (OPCA will provide the panel with five copies of the work at the time of the referral, one for each member.) The panel may request the assistance of any FBI employee with specialized knowledge or skills in reviewing the work. Additionally, the panel may request the assistance of personnel from other agencies or entities if the work pertains or relates to matters under the cognizance of or involves the expertise of such agencies or entities.

(d) The panel may meet to discuss the work or otherwise determine how to proceed at the discretion of the chairman. The panel will either authorize disclosure in full or provide written objections to specific portions or words (marked directly on the manuscript and noted by page and paragraph number) specifying why the FBI should withhold permission to disclose. The chairman shall be responsible for writing up the

panel's findings but may task any member of the panel with assisting. The panel's findings must be submitted to OPCA not later than 5 working days before the date when the FBI response is due to the author. OPCA may presume that the panel has no objections to the work if this deadline is not met.

(4) If a panel objects to disclosure of any portion of a work, OPCA shall notify the requester that the FBI withholds permission to disclose or publish the portions to which the board has objected and request such modifications as may be necessary. If the author submits corrected portions for further review, OPCA will continue to work with the requester and the concerned panel until final clearance is authorized. If a particular matter cannot be resolved, then the requester may appeal to the Director. The decision of the Director is final, except that decisions relating to the deletion of classified information may be appealed to the Deputy Attorney General per 28 C.F.R. § 17.144(s)(3).

(5) If a current or former employee publishes or otherwise discloses information within the scope of the Employment Agreement without obtaining the requisite FBI authorization, and OPCA (or any other FBI entity or employee) learns of the violation, then it will refer the case to the Deputy General Counsel, Litigation Branch, OGC and to OPR and the Personnel Security Unit if the individual is a current employee. OGC will determine whether institution of civil suit is warranted. OPR will investigate the matter and refer the case, if warranted, for consideration of appropriate disciplinary action to the Administrative Summary Unit. The Personnel Security Unit will evaluate the effect of the disclosure on the employee's continued trustworthiness for security access and clearance.

(6) Any work submitted for prepublication review is presumed to be proprietary and shall not, with the exceptions set forth in paragraph (3)(c) above, be disseminated to any person not involved in the prepublication-review process or in the enforcement of that process. In general this means that the work shall not be disclosed outside OPCA and the concerned prepublication-review panel except on a "need-to-know" basis during the prepublication review process, and to OGC and OPR during the enforcement process. No copies of the work may be made without the approval of OPCA.

4. STANDARDS & GUIDELINES

a. General Standards. Proposed disclosure or publication by current or former employees of the following ordinarily will be grounds for objection:

- * Information protected from agency disclosure by the Privacy Act. While the Privacy Act does not apply to former employees, we can and should object to the disclosure of personal information obtained from FBI files if disclosure by the Bureau itself is prohibited by the Act.

- * Information that is classified or the disclosure of which could reasonably be expected to harm national security. The damage must be reasonably specific and must flow logically from the unique circumstances of the disclosure proposed by the author. The reviewers' major concern should be the protection of the substance of information which could be expected to damage national security if disclosed, not just individual words. It is especially important to be consistent about recommended deletions and to ensure that all references in a manuscript to a given classified subject have been identified and marked for deletion. In addition, if there are reasonable changes to classified information in a manuscript that would make such information unclassified, reviewers should note those suggested changes in their responses.

- * Information that reveals sensitive law enforcement, intelligence, or counter-intelligence techniques, sources or methods; or that reveals the sensitive, confidential, or proprietary techniques, sources, or methods of other agencies or governmental entities.

- * Information that would reveal grand jury material protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure.

- * Information that would reveal the identity of a confidential source of informant.

- * Information that relates to any sensitive operational details or the substantive merits of any ongoing or open investigation, inquest, probe, prosecution, appeal, or case.

* Information that consists of the proprietary information of another, including trade secrets.

* Information pertaining to wiretaps or intercepts protected or regulated by Title III (18 U.S.C. §§ 2510-2520).

* Information pertaining to currency transaction reports regulated or protected by 31 U.S.C. §§ 5513-5519.

* Tax return information regulated or protected by 26 U.S.C. § 6103.

* Information pertaining to contractor bids or proposals or source-selection information before the award of the procurement contract to which the information relates.

* Information protected from disclosure by any other Federal statute or regulation.

* Information exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552) unless the material is clearly already in the public domain.

b. Criticism. No objection to disclosure or publication by a current or former employee will be interposed solely because a work is critical or disparaging of the FBI, the Government, or its officers and employees. If, however, a work by a current employee or contractor employee contains material the disclosure of which would adversely affect the ability of the FBI to effectively and efficiently fulfill its responsibilities to the public (including speech concerning private grievances or that impairs discipline or harmony among co-workers or exerts a personal loyalty and confidence are necessary), then the declarant or author shall be informed that disclosure or publication may result in adverse consequences, including disciplinary action or contract termination. In other words, the FBI will not object to the disclosure or publication of such material but the declarant or author may be warned that disclosure is not without potential consequences.

c. Mistakes and Inaccuracies. No objection will be interposed solely because of errors (factual, grammatical or otherwise) in the work.

d. Fiction

(1) The review of works that purport to be fictitious poses a special problem. Most fiction is based to some degree on fact, but the real and imaginary are mingled in such a way that the reader may not know which is which. The fiction writer generally does not enlighten the reader by identifying factual elements, which compounds the mystery or disguise. The veil of fiction thus adds a layer of deniability and removes the information one step further from potentially damaging national security.

(2) Facts that could cause harm when published as true statements may damage national security less or not at all when embellished with fictional detail and embedded in a tale of make-believe. This is especially the case when the classified information is generally known to the public and any harm that could arise would derive primarily from authoritative confirmation. For example, references to commonly known FBI counterintelligence activities against foreign adversaries are generally permissible in fiction whereas, for foreign relations reasons, they would not usually be allowed in factual accounts. Foreign liaison arrangements with long-standing allies are another topic considered classified when treated factually, but might not be considered harmful to intelligence cooperation when included in a work of fiction. On the other hand, a case for deletion can be made when supposedly fictional accounts make detailed disclosures based on classified events or activities to which the author had access during FBI employment.

(3) Tools of tradecraft widely known and normally employed by any law enforcement or intelligence service are a regular feature of crime and spy novels by both FBI and non-FBI authors and should not be deleted from manuscripts submitted to the Bureau for review unless the description reveals sensitive operational details unique to the FBI. For example, generic descriptions of placing "bugs" and eavesdropping on conversations will likely pass without objection in fiction. On the other hand, details of how a technologically advanced "bug" is manufactured or concealed should remain confidential even in fictional works.

5. TIME LIMITS

a. The assigned time lines by which reviews must be completed are very important. In United States v. Marchetti in 1974, the Fourth Circuit Court of Appeals held that:

"Because we are dealing with the prior restraint upon speech, we think that the CIA must act promptly to approve or disapprove any material which may be submitted to it by Marchetti. Undue delay would impair the reasonableness of the restraint, and that reasonableness is to be maintained if the restraint is to be enforced. We should think that, in all events, the maximum period for responding after the submission of material for approval should not exceed thirty days."

b. The Department of Justice has since adopted and imposed the 30-day rule as a standard. See 28 C.F.R. § 17.144. The processing "clock" begins to run on the day after a manuscript is received by OPCA and stops on the day that the FBI responds to a request for prepublication review. Only working days are counted for this purpose.

6. INFORMATION FROM OTHER AGENCIES OR FOREIGN GOVERNMENTS

a. Occasionally a reviewer will encounter material known or believed to be classified by or derived from another agency. The FBI, for example, has a legitimate secondary interest in cryptological material, but the National Security Agency's interest is paramount. Such material cannot be ignored if its publication in the context under review could harm national security, violate Federal law, or otherwise interfere with the legitimate functions of the FBI or other concerned agency. The FBI employment agreement concerns the protection of all information as long as it is acquired by the authors in the course of their official duties--not just information contained in FBI files and records.

b. When material classified by or relating to another agency is included in work being reviewed, and the reviewer believes that the other agency must be consulted as part of the review process, the reviewer should notify OPCA immediately. OPCA will arrange for the transmission of those portions of the work pertaining to the second agency to that agency. A deadline

for review will be assigned to the second agency to ensure that the entire review process can be completed expeditiously, if possible before the 30-day period expires. Panel members may request the assistance of other agency personnel directly but may not provide excerpts from the work without coordinating the matter with OPCA.

c. Mere mention of another agency's activities does not require referral if it is clearly innocuous. Only when publication appears potentially harmful to national security or otherwise violates the standards set forth above should a work be referred, and then only that portion of the manuscript that is of legitimate concern to the other agency.

d. Information provided by a foreign government in confidence to the U.S. is presumed to cause damage to national security if disclosed in an unauthorized manner. Foreign government information also includes information produced by the U.S. Government pursuant to a joint arrangement requiring confidentiality with a foreign government or international organization of government.

7. USE OF OPEN SOURCES

When a reviewer is considering a work containing information that the author has learned from classified sources but which also is available in published open sources, the reviewer must determine whether republication of the information by that author at the time of review will cause additional damage to national security through authoritative confirmation of previous publications. The reviewer must exercise due care and discretion in making these determinations on a case-by-case basis, and should include as factors in the decision the following: the sensitivity of the information from classified sources; the number and currency of previous publications; the level of detail previously exposed; the source of the previous disclosures (whether authoritative and acknowledged or an

anonymous "leak"); the current author's access to classified sources; and the authority and credibility the author's Bureau experience brings to a confirmatory statement. The panel may require that the author identify any public sources of information that, in the reviewer's judgment, originates from classified sources and may also require the author to cite the public source in a footnote.

8. Additional References:

- a. MAOP Part I, 1-24 (Prepublication Review).
- b. 28 C.F.R. § 17.144 (Nondisclosure of Classified Information).
- c. Executive Order 12958, National Security Information. This Order defines the levels of classification in

terms of the degree of damage to national security that could result from disclosure of the information in question. It also describes classification requirements and procedures.