



**CONGRESSMAN  
HOWARD L. BERMAN**

**Please deliver immediately**

**Date:** May 23, 2003

**To:** Dr. Nira Schwartz

**Fax:** 310-326-6176

**From:** Bob Blumenfield  
District Director

**Number of Pages (including cover sheet):** 3

**Message (if any):**

Nira,

Per our conversation, here is the letter from DOJ.

- Bob

**In case of transmission problems, please contact:**

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U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20531

The Honorable Howard L. Berman  
U.S. House of Representatives  
Washington, D.C. 20515

MAR 18 2003

Dear Congressman Berman:

This responds to your letter, dated December 3, 2002, regarding concerns raised by Dr. Nira Schwartz about the government's assertion of the State Secrets Privilege in her *qui tam* action against TRW, Inc. and Boeing North America, Inc. Dr. Schwartz alleges that the United States may have violated Executive Order 12598 by classifying information and material to conceal violations of law. There is no evidence to support her contention.

First, the United States declined to intervene in the action against TRW and Boeing after conducting an investigation as called for by the False Claims Act. Subsequently, on January 15, 2003, the United States asserted the State Secrets Privilege, and moved to dismiss the action. The Government also moved to dismiss another action she filed against Raytheon, which also involves the missile defense program. Please be assured that the assertion of the privilege in these cases was a decision that was not taken lightly, and it was founded on national security concerns. Moreover, Dr. Schwartz will have an opportunity to persuade the Court that she can, and should be permitted to, pursue her case without the privileged information. Furthermore, the assertion of the privilege may have no impact on Dr. Schwartz's wrongful termination action against defendant TRW.

Second, the documents subpoenaed by defendants TRW and Boeing, to which Dr. Schwartz refers in her letter, were designated as classified documents at the time they were created. Most were created and classified before, not after, Dr. Schwartz filed her lawsuit.

Third, a key allegation in Dr. Schwartz's Complaint is that TRW failed to meet the technical requirements of the Boeing contract. Those technical requirements are set forth in the Technical Requirements Document (TRD). The TRD is classified and is one of the 38 documents subpoenaed by TRW and Boeing. Dr. Schwartz specifically refers to the TRD in five separate paragraphs of her Complaint. In addition, the Complaint refers to seven other subpoenaed documents that Dr. Schwartz allege contain false statements. The Complaint contains multiple references to many of these documents which are also properly classified.

Fourth, Dr. Schwartz, in order to establish a *prima facie* False Claims Act case, would need to introduce these documents, or information from these documents, as evidence. The TRD is essential to Dr. Schwartz's case because the TRD determines whether the defendants

complied with the technical requirements of the contract. Thus, the actual technical benchmark that Dr. Schwartz contends must be met by the defendants contains classified information. Of course, the defendants would need access to these classified documents, or the information in those documents, in order to defend themselves.

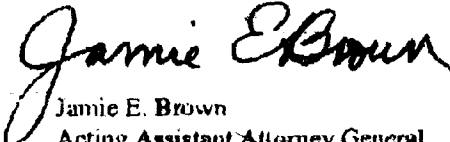
Fifth, no information in any of the subpoenaed documents has been declassified and released to the public under proper authority. In 1998, the Ballistic Missile Defense Organization (BMDO) referred Dr. Schwartz's concerns to a team of senior scientists, called a Phase One Engineering Team (POET), to review and analyze the TRW baseline algorithms. The POET team consisted of six independent scientists. The POET team analyzed the allegations raised by Dr. Schwartz and concluded that they lacked merit. While this matter was still being investigated, Dr. Schwartz was given a copy of the POET report by a Defense Criminal Investigation Service (DCIS) agent who thought that he had redacted all classified information from that copy. In fact, he had not done so. The DCIS does not have the proper authority to determine what information is classified in this program and what is not. Robert Peavey, who is the Director of Security for what is now the Missile Defense Agency (MDA), declared in a sworn affidavit filed in federal court in 2001, that the copy of the POET report in Dr. Schwartz's possession contains classified information. In spite of Mr. Peavey's sworn affidavit, Dr. Schwartz continues to insist that her copy of the POET report contains only unclassified information.

Finally, in addition to the GAO study referred to in your correspondence, the FBI conducted an investigation to determine if any of the parties involved in this program, including Government agencies, engaged in wrongdoing. Neither the GAO, nor the FBI found any evidence of Government officials using the classification authority to conceal violations of law.

The government's decision to decline to intervene in these cases was reached after careful consideration and investigation. The subsequent decision to assert the State Secrets Privilege and to file motions to dismiss were made on the considered recommendation of most senior officials responsible for safeguarding the Nation's secrets and on the basis of this Department's own concurrence that the lawsuits could not proceed without such information.

I hope that this information is helpful. We are sending an identical response to Senator Grassley, who joined in your letter to us. Please do not hesitate to contact me if you would like additional assistance regarding any other matter.

Sincerely,

  
Jamie E. Brown  
Acting Assistant Attorney General