IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT G. WRIGHT, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 02-0915 (GK)
	)	
FEDERAL BUREAU OF INVESTIGATION,	)	
	)	
Defendant.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiff, Special Agent Robert G. Wright, Jr. ("SA Wright"), by counsel, respectfully submits this Opposition to Defendant's Motion for Summary Judgment and hereby cross moves for summary judgment. As grounds therefore, Plaintiff alleges as follows:

MEMORANDUM OF LAW

I. Introduction.

This case is about the denial of the First Amendment rights of a special agent of the Federal Bureau of Investigation ("FBI") and a prepublication review process that is broken and must be repaired. SA Wright is the author of a manuscript detailing his efforts to investigate known terrorist threats and the FBI's efforts to thwart those investigations. Far from meeting its obligation to review that manuscript for material the FBI could legitimately order SA Wright not to publish, the FBI acted at every turn to deprive SA Wright of his First Amendment rights.

SA Wright's manuscript is highly critical of the FBI and its counter-terrorism efforts. The manuscript, entitled Fatal Betrayals of the Intelligence Mission ("Fatal Betrayals"), sets forth the FBI's apathy in investigating and prosecuting terrorism before September 11, 2001 and the FBI's effort to retaliate against SA Wright when he voiced his concern with the same. The most significant and telling fact in this case is that the FBI initially reviewed SA Wright's manuscript and approved the overwhelming majority of it for publication. Subsequently, after deleting passages to which the FBI objected, SA Wright resubmitted the manuscript for review and the FBI untimely responded that it had changed its position and SA Wright could not publish any portion of this manuscript.[1] Ultimately, the FBI reversed itself again finding that certain sections of the manuscript were after all releaseable. The net effect of the FBI's actions has been to accomplish its real goal – use delay and stalling tactics to prevent public embarrassment of the agency by depriving the public of information of critical concern. The FBI has effectively used its flawed "prepublication review process" to achieve this improper end.

SA Wright's goal has been to provide a public service by calling attention to the critical and dangerous failings of the FBI. As such, SA Wright spent more than two years of his life writing his manuscript and carefully documenting each fact with a publicly available source. He then appropriately sought pre-publication review in accordance with the FBI requirements. In short, SA Wright played by the rules at each and every step. For his efforts, however, SA Wright

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[1] This case is troublingly similar to the FBI's recent attempt to classify and restrict information already in the public domain regarding FBI whistleblower Sibel Edmonds. *See* R. Jeffrey Smith, "Access to Memos is Affirmed," *The Washington Post*, February 23, 2005, at A17. In that case the FBI tried to classify two letters from U.S. Senators regarding the Edmonds case even though the letters had been publicly available. Shortly before a court hearing on the issue, however, the FBI changed its position and declared that the letters no longer were viewed as containing classified information.

has been rewarded with persistent roadblocks and retaliation. Among other things, the FBI has retaliated against SA Wright by releasing Privacy Act protected information for the purpose of attempting to damage SA Wright's professional reputation.[2] Overall, the failure of the FBI and its prepublication review process in this matter demonstrates not only that summary judgment should be entered for SA Wright, but that the FBI's prepublication review process itself is broken and must be repaired.

As discussed herein, the FBI has established no legitimate basis for continuing to deny SA Wright permission to publish his manuscript and the other documents he submitted for review. Accordingly, the Court should deny the FBI's motion for summary judgment and grant SA Wright's cross motion for judgment. It should also enter an injunction requiring the FBI to comply with the law and its own prepublication review procedures in all respects, in order to make certain that neither SA Wright nor any other special agent has to suffer such a violation of his or her constitutional rights in the future.

II. Statement of Facts.

SA Wright is an FBI special agent assigned to the Chicago Field Office, where he worked as a member of the Counter-Terrorism Task Force. *See* Declaration of Robert G. Wright, Jr., ¶¶ 1-2 ("Wright Decl.), attached hereto as Exhibit 3. In early 1994, SA Wright became concerned

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[2] This and other disclosures are the subject of another legal action by SA Wright against the FBI currently being heard in U.S. District Court in the Northern District of Illinois. *Wright v. FBI*, Civil Action No. 03C-5876 (N. Ill.)(Norgle, J.) (Complaint attached as Exhibit 1). According to a document provided to SA Wright's counsel by a Congressional office, high-level officials of the FBI had vowed, as a result of SA Wright's public criticisms of the FBI, to "take him out." *See* Exhibit 2 (Memorandum of John Roberts of the FBI's Office of Professional Responsibility (discussing, *inter alia*, FBI misuse of the disciplinary process to silence criticism)).

that terrorist suspects in the Chicago area were deeply involved in organized criminal activities, in particular that nonprofit organizations were being used by the "HAMAS" terrorist organization to recruit, organize, train and support terrorist operatives. Wright Decl. ¶ 3. SA Wright repeatedly brought this information to the attention of his supervisors in the Chicago Field Office and officials at FBI headquarters but was thwarted in his efforts to undertake investigations of these terrorist suspects and organizations. Wright Decl. ¶ 4. Rather than arresting the suspects and attempting to stop any terrorist attacks, the FBI only ever undertook intelligence (*i.e.*, information gathering) investigations of these suspects and organizations. *Id.* When SA Wright complained to his supervisor that the FBI was merely gathering intelligence so it would know who to arrest when a terrorist attack occurred, his supervisor agreed that this was true. *Id.*

Despite the FBI's attempts to hinder him, SA Wright nonetheless succeeded in bringing about the June 9, 1998 seizure of $1.4 million of funds destined for terrorist activities in an investigation called "Vulgar Betrayal." Wright Decl. ¶ 5. The seized funds were linked directly to Saudi businessman Yassin Kadi. This seizure was the first occasion that the U.S. Government utilized civil forfeiture laws to seize terrorist assets in the United States. On October 21, 2001, Kadi, a/k/a Yassin Al-Qadi, was designated by the U.S. Government as a financial supporter of Osama Bin Laden. According to a U.S. Government source, Kadi provided $3 million to Bin Laden and his al-Qaeda organization. *Id.*

Despite the success of his investigation, the FBI failed to take seriously the threat of terrorism in the United States, and continued to block SA Wright's attempts to launch a more comprehensive investigation to identify terrorist suspects in the United States and their sources and methods of funding. Wright Decl. ¶ 6. In fact, the FBI withheld resources, funding and

support from SA Wright, forcing SA Wright at one point in 1999 to purchase much needed equipment and software with his personal funds because he was unable to obtain the necessary funding and support from the FBI. Wright Decl. ¶ 7.

The FBI also withheld information from SA Wright. Wright Decl. ¶ 8. For example, in 1997, SA Wright began an investigation of two known HAMAS terrorist suspects believed to be residing in the Chicago area. *Id.* SA Wright asked a relief supervisor whether he had any information about these suspects. *Id.* The relief supervisor said he did not. *Id.* SA Wright then spent several weeks investigating the whereabouts of these two terrorist suspects, only to learn later that the relief supervisor not only knew one of the suspects had been arrested overseas in 1995 as a result of terrorist activities, but that he had placed a copy of a statement provided by the arrested terrorist to overseas authorities in an obscure location where no one would find it. *Id.*

On August 4, 1999, the FBI removed SA Wright from the investigation that led to the 1998 seizure of funds linked to Yassin Kadi. Wright Decl. ¶ 9. Shortly thereafter, the FBI closed the "Vulgar Betrayal" investigation. *Id.* SA Wright subsequently began writing a manuscript about his investigation into known terrorist threats against U.S. national security and the FBI's efforts to thwart this investigation. SA Wright completed this 500-page manuscript entitled "Fatal Betrayals of the Intelligence Mission" prior to the September 11, 2001 attacks. Wright Decl. ¶ 10. Shortly after the 9/11 attacks, SA Wright added a brief section to the manuscript discussing the FBI's responsibility in failing to prevent the attacks. *Id.*

In accordance with an employment agreement with the FBI, SA Wright submitted his manuscript to the Office of Public and Congressional Affairs ("OPCA") on October 3, 2001 for

prepublication review. Wright Decl. ¶ 11, 13. Subsequently, SA Wright sent a second copy of his manuscript to the OPCA in early November 2001 after the first copy purportedly was delayed by mail disruptions caused by the anthrax terror attacks. Wright Decl. ¶ 14. On November 19, 2001, OPCA notified SA Wright that it had received the manuscript and was reviewing it. Wright Decl. ¶ 19. On January 2, 2002, the OPCA informed SA Wright that it had reviewed his manuscript and that approximately 18 percent of it would require modifications to be cleared for publication as it allegedly contained "classified information; information containing sensitive investigative material; and information protected by the Privacy Act, 5 U.S.C. 552a." Wright Decl. ¶ 19; Defs. Mem. at 3. The remaining 82 percent was approved for publication. Wright Decl. ¶ 19. On February 10, 2002, SA Wright resubmitted his manuscript, with the 18 percent identified by the OPCA either deleted or modified to comply with the OPCA's concerns. Wright Decl. ¶ 22.

SA Wright was informed by Patricia Solley, Unit Chief of the FBI's Prepublication Review Unit, that after he resubmitted his documents with modifications for review, the FBI became worried because previously they did not believe that he would follow through and go public with the highly critical documents. Wright Decl. ¶ 29. Ms. Solley further stated to SA Wright that the FBI's concern was that as an active agent of the FBI, this "would provide a tremendous amount of validity" to the documents. *Id.* Ms. Solley subsequently told SA Wright that she had never seen anything like how his documents were handled in the prepublication review process, stating that the documents physically were removed from the offices of the Prepublication Review Unit by FBI headquarters legal staff. *Id.*

On November 13, 2001, SA Wright submitted two additional documents to OPCA for prepublication review. Wright Decl. ¶ 16. The first document was a 38 page complaint filed by SA Wright with the U.S. Department of Justice, Office of Inspector General entitled "Dereliction of Duty by the Federal Bureau of Investigation in Failing to Investigate and Prosecute Terrorism and Obstruction of Justice in Retaliating Against Special Agent Robert G. Wright, Jr." *Id.* The second document was a 113 page complaint to be filed with the U.S. Department of Justice, Office of Inspector General entitled "Whistleblowing Retaliation by the Federal Bureau of Investigation Against Special Agent Robert Wright, Jr." *Id.* (together referred to as the "OIG Complaints"). The OPCA responded to SA Wright on January 7, 2002, identifying issues with approximately 4 percent of the first document and approximately 6 percent of the second. Wright Decl. ¶ 20. Thus, 96 percent of the first document and 94 percent of the second were approved for publication. *Id.* On January 18, 2002, SA Wright resubmitted both documents with the required edits or deletions. Wright Decl. ¶ 21. At the time he filed this lawsuit on May 9, 2002, the FBI had not responded to SA Wright regarding any of the three documents submitted for a second review, more than 60 business days after the documents were submitted for review. Wright Decl. ¶ 32; *see also* Defs.' Mem. in Support of Mot. for S.J. ("Defs. Mem.") at 3-6.

In the interim, in March 2002, *New York Times* reporter Judith Miller learned that SA Wright was publicly charging the FBI with mishandling a closed, counter-terrorism investigation. Ms. Miller submitted a series of written questions to SA Wright concerning his allegations. Wright Decl. ¶¶ 25-27. On March 31, 2002, SA Wright submitted to OPCA his proposed answers to these questions for prepublication review. Wright Decl. ¶ 28; (hereafter "NYT interview answers"). Although the OPCA was required to respond to SA Wright within thirty

days, it failed to do. Wright Decl. ¶ 30. In the meantime, Ms. Miller contacted the FBI about SA Wright's charges, and the FBI allowed Ms. Miller to interview several FBI officials, including SA Wright's supervisor, regarding the substance of SA Wright's charges. Wright Decl. ¶ 26. The interview took place on March 20, 2002 at FBI Headquarters in Washington, D.C. *Id.*; *see also Vincent v. FBI*, Civil Action No. 03-226 (GK), Defs. Statement of Material Facts at ¶ 24.

On May 10, 2002, the day after this lawsuit was filed, the OPCA responded to all four of SA Wright's pending requests, issuing a blanket denial to publish any of the submitted materials – the manuscript in its entirety, the NYT interview answers, and the OIG complaints. Defs. Mem. at 6. SA Wright appealed this blanket denial to FBI Director Robert Mueller on June 5, 2002, and was informed on July 24, 2002, by W. Wilson Lowery, Executive Assistant Director of the FBI, that his appeal had been denied and he still could not publish any portion of the submitted materials. Wright Decl. ¶¶ 37-38.

On November 7, 2002, SA Wright appealed to the Office of the Deputy Attorney General pursuant to 28 C.F.R. § 17.18(i). On December 19, 2002, Deputy Attorney General David Margolis responded to SA Wright, contending that an appeal to his office was not appropriate as "no classified information" was contained in the documents submitted by SA Wright for review. Wright Decl. ¶ 40; Defs. Mem. at 8.

Almost a year later, on October 31, 2003, the FBI reversed its position again and advised SA Wright that, following another review after a Congressional inquiry, certain sections of his Fatal Betrayals" manuscript could be publicly disclosed. *See* Defs. Mem. Exh. NN (stating that Chapter 1-4 and pages 103-16 and 119-22 of Chapter 7 were releasable). The FBI stated that the remainder of the manuscript still could not be publicly disclosed as it allegedly contained

information relating to: (1) an ongoing investigation; (2) matters occurring before a federal grand jury; (3) sensitive law enforcement techniques; and (4) intelligence information and other unspecified information prohibited from disclosure. Defs. Mot. for S.J. at 8.

On February 5, 2004, the FBI reversed its position again – this time on the NYT interview answers submitted by SA Wright for publication. Without explanation, the FBI stated that 16 full answers and three partial answers did not contain prohibited information. Seven other full answers and three partial answers were still deemed prohibited. Defs. Mem. at 8-9.

Finally, on March 25, 2004, more than two years after he submitted them, the FBI reversed itself yet again, concluding that the OIG complaints could be submitted to their "intended audiences" without prepublication review, but that disclosure to any other party would require prepublication review. *Id.* at 9. The FBI's belated action was of no consequence, however, as the two complaints had previously been submitted to the OIG in 2001. Wright Decl. ¶ 43.

III. Summary Judgment Standard.

Summary judgment is appropriate when the pleadings and the record demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment may support its motion by 'identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *See Celotex v. Catrett*, 477 U.S. 317, 323 (1986). In opposing summary judgment, the "nonmoving party [must] go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and

admissions on file,' designate specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. The Court must view the facts in the light most favorable to the nonmovant, giving the nonmovant the benefit of all justifiable inferences derived from the evidence in the record. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

ARGUMENT

IV. The FBI Has Wrongfully and Unconstitutionally Refused Permission to SA Wright to Publish His Manuscript and the New York Times Interview Answers.

A. The First Amendment Protects SA Wright's Right to Publish.

While the government has a legitimate interest in restricting certain employee speech, this interest is not limitless. The Supreme Court has recognized that "speech concerning public affairs is more than self-expression; it is the essence of self government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Thus, speech on public issues occupies the "highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). A prior restraint has the immediate and irreversible sanction of "freezing" speech. *Id.*

As a result, "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship." *U.S. v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972); *see also McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) (quoting *Marchetti*). Moreover, when the information at issue derives from public sources, the agent's special relationship of trust with the government is greatly diminished if not

wholly vitiated." *McGehee*, 718 F.2d at 1141 (citing *Snepp v. U.S.*, 444 U.S. 507, 513 n. 8 (1980) (per curiam)).

B. The FBI Has Wrongfully and Unconstitutionally Refused Permission to Publish the "Fatal Betrayals" Manuscript.

The key facts demonstrating that the FBI wrongfully refused SA Wright permission to publish his manuscript are not in dispute. The FBI's motion recounts the long and troubling history of the FBI's handling of SA Wright's entirely lawful request to publish his manuscript in accordance with his professional obligations and First Amendment rights.

First, the FBI does not dispute that SA Wright properly submitted his manuscript for review to the OPCA in October 2001 and that he received permission in January 2002 to publish the vast majority (82 percent) of the manuscript. The FBI also does not dispute that, after making edits and deletions to address the OPCA's concerns, SA Wright resubmitted his manuscript for review in February 2002. Defs. Mem. at 4. The FBI concedes that it did not respond to SA Wright regarding the revised manuscript until May 2002, far beyond the 30 day deadline for review, and abruptly reversed its position, contending that no part manuscript could be published, even the portion the agency previously concluded could be published. *Id.* at 6. Notably, the FBI reached this conclusion exactly one day after this lawsuit was filed. Finally, the FBI concedes that it reversed its position yet again, when in October 2003, it concluded that significant sections of the manuscript did not, after all, contain any material that could not be published. *Id.* at 8.

This inexplicable series of reversals by the FBI – granting permission in part, denying permission entirely, and then granting permission in part again – cannot simply be disregarded as

bureaucratic bungling.[3] The reversals and the lack of timeliness has had the effect of denying SA Wright the opportunity to exercise this First Amendment. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (denial of First Amendment rights for even brief periods constitutes irreparable injury). According to the U.S. Court of Appeals for the Fourth Circuit, because an agreement requiring an employee to submit to prepublication review is a prior restraint on speech, a government agency "must act promptly to approve or disapprove any material which may be submitted to it." *Marchetti*, 466 F.2d at 1317. This is because "[u]ndue delay would impair the reasonableness of the restraint, and that reasonableness is to be maintained if the restraint is to be enforced." *Id.* The Fourth Circuit held that, "in all events, the maximum period for responding after the submission of material for approval should not exceed thirty days." *Id.* Hence, the FBI's own internal procedures incorporate this rule by requiring a requestor to receive notice of approval or disapproval within thirty working days.[4]

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[3] Just as the FBI's position on whether or what part of the manuscript could be published evolved over time, so did its rationale for why this allegedly was so. When FBI initially reviewed the manuscript, it concluded that the manuscript could be published, but for the fraction of text that "contained classified information; information containing sensitive investigative material; and information protected by the Privacy Act, 5 U.S.C. 552a." Defs. Mem. at 3 (citing OPCA's January 2, 2002 letter to SA Wright). On appeal, however, the FBI would discover that actually no classified information was included in the manuscript. Defs. Mem. at 8 (citing Letter of December 19, 2002, Deputy Attorney General David Margolis). Subsequently, however, the FBI discovered new reasons, and abandoning its previous rationale, and stated that the remainder of the manuscript still could not be publicly disclosed as it allegedly contained information relating to: (1) an ongoing investigation; (2) matters occurring before a federal grand jury; (3) sensitive law enforcement techniques; and (4) intelligence information and other unspecified information prohibited from disclosure. Defs. Mem. at 8.

[4] *See* Defs. Exhibit 2 (Excerpt from FBI's Manual of Administrative Operations and Procedures) at § 1-24(4)(a)(2)(b); Defendants' Exhibit 4 (A Handbook for Reviewers) at 7.

By effectively delaying SA Wright's ability to publish any part of his manuscript for more than two years (October 2001 to October 2003), SA Wright's First Amendment rights were violated and he suffered an irreparable injury as he was denied an opportunity to speak on a critical matter of public concern. SA Wright is entitled to summary judgment on this point.

Moreover, the FBI failed to provide the requisite detailed or meaningful justification to SA Wright for its denial. *Penguin Books USA Inc. v. Walsh*, 756 F. Supp. 770, 788 (S.D.N.Y. 1991) (agency obligated to specify objections to requester). The FBI's own internal procedures incorporate this rule by requiring the requestor receive detailed, written objections specifying why the FBI is withholding permission to publish. Moreover, these objections must identify the reasons for the denial "by page and paragraph number" of the material submitted.[5] The obvious reason for this requirement is to enable the requestor to modify and resubmit his or her request without unduly infringing on the requestor's First Amendment rights. *Id.* By failing to provide an appropriate detailed explanation, SA Wright's rights were further violated as he effectively was denied the opportunity to modify and resubmit his request for review.

The FBI makes the extraordinary argument that now, because certain sections of the manuscript have been approved for publication, the Court should not even consider the preceding denials and delays. Defs. Mem. at 17 ("claims with respect to these documents or portions of documents are moot"). In effect, the FBI asks the Court to cover its eyes to the denial of SA Wright's rights and only look now at the FBI's most recent position regarding SA Wright's right

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[5] *See* Defs. Exhibit 2 (Excerpt from FBI's Manual of Administrative Operations and Procedures) at §§1-24(4)(a)(3)(d) and 1-24(4)(a)(4); Defs. Exhibit 4 (A Handbook for Reviewers) at pp. 8-9.

to publish his manuscript. This argument must not succeed as it would only reward the FBI for its obstruction and encourage future delay and stalling tactics by the FBI.

C. The FBI Wrongfully Denied Permission to Publish the *New York Times* Interview Answers.

The FBI again violated SA Wright's First Amendment rights by its tardy response and summary denial of his request to publish answers to questions posed to him by *New York Times* reporter Judith Miller. The FBI concedes that it received SA Wright's proposed written answers on March 31, 2002, but did not respond until May 10, 2002 – one day after this lawsuit was filed. The FBI's response was a blanket denial refusing to give SA Wright permission to publish any portion of his answers to Ms. Miller. On February 5, 2004 – almost two years after submission of the request – the FBI reversed its position and suddenly determined that a significant majority of SA Wright's answers were after all releasable. *See* Defs. Mem. at 8.

The FBI's summary denial and later reversal is identical to their mishandling of former SA John Vincent's prepublication review request to provide similar answers to Ms. Miller. That violation of former SA Vincent's rights also is pending before this Court. *See Vincent v. FBI*, Civil Action No. 03-0226 (GK). In the *Vincent* case, the FBI has conceded that its denial of former SA Vincent's request was "not the proper course" and that if the FBI had "not done so, perhaps this litigation (at least in part) may have been avoided." Defs.' Opp. to Pl.'s Cross-Mot. for S.J. at 10. In this case, SA Wright expects that the FBI's response to this pleading will include a similar *mea culpa* and request to the Court to be excused for their misconduct. This request should not succeed for three reasons.

First, SA Wright has suffered an irreparable harm as he did not receive permission to publish any of his answers (or even a response to the request) until almost two years after the request and more than 18 months after SA Wright initiated this action. *Cf. Marchetti*, 466 F.2d at 1317 (agency "must act promptly to approve or disapprove any material which may be submitted to it"). Second, the FBI did not provide any detailed or meaningful justification to SA Wright for their denial. *Penguin Books USA Inc. v. Walsh*, 756 F. Supp. 770, 788 (S.D.N.Y. 1991) (agency obligated to specify objections to requester). By failing to provide an appropriate detailed explanation, SA Wright's rights were further violated as he effectively was denied the opportunity to modify and resubmit his request for review.

Finally, and importantly, the information SA Wright sought to publish had already been provided to Ms. Miller by FBI officials. Wright Decl. ¶ 26. This is critical for two reasons. First, it demonstrates that the FBI's real motive was to "spin" the *New York Times* story in a favorable way to the agency, even if it meant depriving an employee of his lawful exercise of his First Amendment rights. The FBI still has not granted permission to SA Wright to answer 10 of the questions posed by Ms. Miller (seven questions in full, three in part). The FBI has refused to do so even though the information upon which SA Wright was being asked to comment already was in the public domain. Wright Decl. ¶ 26. It is undisputed that Ms. Miller interviewed FBI officials about specifically the "Vulgar Betrayal" investigation. *Id.* These officials provided detailed, on-the-record information to Ms. Miller which then served as the basis for her questions to SA Wright. The ten questions posed by Ms. Miller and to which SA Wright still is being denied permission to respond all concern information Ms. Miller obtained from the FBI and,

therefore, was already in the public domain. For this reason, the FBI should also be ordered to grant permission to SA Wright to publish the ten remaining answers.

As is now evident, the FBI never had a valid legal basis for withholding permission from SA Wright to publish both his manuscript and his NYT interview answers, but only sought to delay and/or wrongfully suppress SA Wright's speech. The FBI's objective was to delay and/or wrongfully suppress SA Wright's speech because it is critical of how the FBI handled a closed counter-terrorism investigation. However, it is unlawful for the FBI to suppress SA Wright's speech merely because it is undesirable and/or critical of the FBI. *See Agee v. CIA*, 500 F. Supp. 506, 508 (D.D.C. 1980) ("[I]t is certain that the Government cannot use enforcement of [a] Secrecy Agreement for the sole purpose of suppressing speech that is unfavorable to the agency."); *see also* Defendants' Exhibit 2 (Excerpt from FBI's Manual of Administrative Operations and Procedures) at § 1-24(5)(a)(2) (prohibiting suppression of speech because it is critical of the FBI) and Defendants' Exhibit 6 (A Handbook for Reviewers) at pp. 3 and 11 (same).

D. The FBI's Proffered Reasons For Refusing Permission to Publish Are Without Merit.

1. None of the Information Submitted by SA Wright for Publication Review Pertained to an Open Investigation.

The FBI argues that it denied SA Wright permission to publish his submissions allegedly because they pertain to an open investigation. *See* Defs. Mem. at 19-21. The FBI's argument has no merit, both factually and legally.

First, SA Wright's submissions did not discuss an open investigation, but instead concerned an investigation -- Vulgar Betrayal -- that had been shut down in October 1999 and

officially closed in August 2000, nearly two years before SA Wright sought prepublication review. Wright Decl. ¶ 9. Because the investigation at issue was closed in October 1999, more than two years before SA Wright sought prepublication review, none of the FBI's concerns about preventing harm to an ongoing criminal investigation or prosecution are valid. At a minimum, the FBI's own admissions create a genuine dispute of material fact about whether the investigation was open or closed, precluding entry of summary judgment in the FBI's favor.

Second, in regard to both the manuscript and the NYT interview answers, the FBI cannot prohibit SA Wright from publishing information that is already in the public domain.
As the FBI itself notes, SA Wright provided copious documentation in support of his submissions. Defs. Mem. at 2, 4. These supporting documents provide a publicly available source of information for each fact contained in SA Wright's submissions relating to terrorism. Wright Decl. ¶¶ 12, 13, 15, 33. Moreover, in regard to the NYT interview answers, the FBI itself injected the information SA Wright desires to publish into the public domain by disclosing it to Ms. Miller in the first instance. The FBI cannot suppress information that is already in the public domain.

Finally, the manuscript itself contains information about more than the Vulgar Betrayal investigation. It is a wide-ranging analysis – based entirely on public information – of FBI failures *other* than the Vulgar Betrayal investigation. Wright Decl. ¶ 12. For example, Chapter 26 of the manuscript is entitled "Do As I Say and Not As I Do" and focuses on a wide range of recent FBI operations. *Id.* Critically, Chapter 26 is not among those sections most recently approved for release. Yet, Chapter 26 is based entirely on newspaper accounts and discusses well-known cases such as accused spy Wen Ho Lee, the Ruby Ridge incident, and missing

documents that delayed the trial of Oklahoma City bomber Timothy McViegh. Wright Decl. ¶ 12. This chapter contains no sensitive information concerning an ongoing investigation or any other such information. Nevertheless, demonstrating that FBI's intent is simply to squelch criticism, this chapter is prohibited from release.

2. None of SA Wright's Submissions Pertain to Matters Occurring before a Grand Jury.

The FBI also argues that it denied SA Wright permission to publish his documents because they each allegedly pertain to matters occurring before a grand jury. *See* Defs Mem. at 17-19. This argument, like the FBI's argument regarding the allegedly open investigation, has no factual or legal merit.

First, as a factual matter none of the information SA Wright seeks to publish pertains to matters occurring before a grand jury. Wright Decl. ¶ 33. While Fed.R.Crim.P. 6(e) prohibits disclosure of "a matter occurring before [a] grand jury," the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has held that this rule does not "draw a veil of secrecy over all matters occurring in the world that happen to be investigated by a grand jury." *Senate of the Commonwealth of Puerto Rico v. Dep't of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987) (citations and quotation marks omitted). Indeed, there "is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers." *Id.* According to the D.C. Circuit:

> [T]he touchstone is whether disclosures would tend to reveal some secret aspect of the grand jury's investigation[,] such matters as the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like. The disclosure of information coincidentally before the grand jury which can be revealed in such a

> manner that its revelation would not elucidate the inner workings of the grand jury is not prohibited.

Id. (citations and quotation marks omitted).

Most significantly, the "disclosure of information obtained from a source independent of the grand jury proceedings, such as a prior government investigation, does not violate Rule 6(e)." *In re: Sealed Case*, 192 F.3d 995, 1002 (D.C. Cir. 1999) (quoting *In re Grand Jury Investigation*, 610 F.2d 202, 217 (5th Cir. 1980)); *see also Penguin Books USA Inc. v. Walsh*, 756 F. Supp. 770, 780 (S.D.N.Y. 1991) ("The requirement that information revealing the strategy or direction of the investigation be kept secret refers to the investigation by the *grand jury*," not the prosecution.), *decision vacated and appeal dismissed as moot*, 929 F.2d 69 (2d Cir. 1991). Moreover:

> A discussion of actions taken by government attorneys or officials -- *e.g.*, a recommendation by the Justice Department attorneys to department officials that an indictment be sought against an individual does not reveal any information about matters occurring before the grand jury. Nor does a statement of opinion as to an individual's potential criminal liability violate the dictates of Rule 6(e). This is so even though the opinion might be based on knowledge of the grand jury proceedings, provided, of course, the statement does not reveal the grand jury information on which it is based.

Id. at 1003. "[W]here reported deliberations do not reveal that an indictment *has been* sought or *will be* sought, ordinarily they will not reveal anything definite enough to come within the scope of Rule 6(e)." *Id.* In addition, the "extent to which the grand jury material in a particular case has been made public is clearly relevant because even partial previous disclosure often undercuts many of the reasons for secrecy." *Id.* (quoting *In re Petition of Craig v. U.S.*, 131 F.3d 99, 107 (2d Cir. 1997)). "The purpose in Rule 6(e) is to preserve secrecy. Information widely known is not secret." *Id.* (quoting *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994)).

In the case at bar, the information SA Wright seeks to publish does not reveal any secret aspect of a grand jury investigation, such as the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, or the deliberations or questions of jurors, or even refer to the existence of a grand jury. Wright Decl. ¶ 33. Indeed, some, but not all, of the information SA Wright submitted for prepublication review concerns his involvement in the FBI's closed Vulgar Betrayal investigation, not any grand jury investigation. *Id.* Whether or not some of the information contained in SA Wright's submissions coincidentally ended up in front of a grand jury is of no consequence because grand jury material was not SA Wright's source for the information other than information that had been lawfully released in the form of publicly available affidavits and/or criminal trial transcripts. Wright Decl. ¶ 34; *see Senate of the Commonwealth of Puerto Rico*, 823 F.2d at 582.

Moreover, the FBI has failed to demonstrate that its prior restraint on SA Wright's free speech rights was or is justified by any overriding "substantial government interest unrelated to the suppression of free speech," or was or is "narrowly drawn" to restrict SA Wright's speech "no more than is necessary to protect the substantial government interest." *McGehee*, 718 F.3d at 1142-43. This is especially the case where the FBI itself has taken inconsistent positions on whether SA Wright's answers concern "a matter occurring before [a] grand jury," as demonstrated by their subsequent reversals allowing SA Wright to publish at least some portions of his submissions.

3. None of SA Wright's Submissions Reveal Sensitive Law Enforcement Techniques and Intelligence Information.

The FBI contends that SA Wright's submissions reveal sensitive law enforcement techniques and intelligence information. As a factual matter, this is simply incorrect. SA Wright's submission contains no discussion of any "sensitive law enforcement technique" that is not already widely known, such as the use of wiretaps by the FBI. Wright Decl. ¶ 33. Even if there were discussion of some publicly unknown technique, deletion of such information would have been easily accomplished if the FBI had followed its own regulations and provided specific guidance as to information allegedly of concern. Tellingly, as with the FBI's other proffered rationales, the FBI made no attempt to identify and allow SA Wright to delete specific references to any such alleged techniques. Again, the FBI has no basis for its denial.

4. The FBI's "Other Reasons" Not to Allow Disclosure Are Without Merit.

The FBI makes a new – and remarkable – argument against disclosure in its motion, suggesting that disclosure would violate various forms of privilege including "grand jury secrecy, law enforcement privilege, and attorney-client privilege." Defs. Mem. at 23. This justification – never argued by the FBI until now – is thus by definition a *post hoc* rationalization and should be viewed with suspicion. In any event, the non-specific material allegedly of concern simply creates another question of fact precluding judgment in favor of the FBI.

V. SA Wright Is Entitled To Declaratory And Injunctive Relief.

This Court should declare the FBI's summary denial of permission to publish the manuscript and the NYT interview answers, and the failure to provide detailed, specific reasons for the denial, to be unlawful. The Court should also find that the FBI continues to unlawfully

withhold permission to publish the remaining portions of these documents, or at a minimum, require that the FBI provide additional detailed information to demonstrate its entitlement to continue to deny permission.

Perhaps an even more significant question before the Court that cannot be ignored is whether the FBI's prepublication review process that resulted in the wrongful denial of SA Wright's First Amendment rights is itself unconstitutional. In this case, SA Wright received no meaningful relief as even the decision to allow him to publish certain sections of his submissions came long after his request and after filing this action. Vindication of his First Amendment rights in such a tardy manner amounts to no relief at all. *See Elrod*, 427 U.S. at 373. The FBI's ability to delay an agent's rightful exercise of his or her First Amendment rights will usually, as here, be an effective denial of that right.

SA Wright is not proposing any prospective relief that would require the Court to continual supervision of the prepublication review process. Rather, appropriately tailored relief, requiring the FBI to provide meaningful and timely review of prepublication requests, would be narrow and proper. It is critical that the Court take action to prevent the stifling of the First Amendment rights of FBI agents – persons often with information critical to the nation. The effective denial of SA Wright's rights in this case, orchestrated merely to protect the public image of the FBI, demonstrates that the current prepublication review system is broken and must be repaired.

WHEREFORE, SA Wright respectfully requests that the Court: (1) declare Defendant's refusal to grant him permission to publish his documents as being unlawful; (2) enjoin Defendant

from continuing to refuse to grant him permission to publish his documents; (3) award him reasonable attorney's fees and costs; and (4) grant such other relief as the Court may deem just and proper.

Respectfully submitted,

JUDICIAL WATCH, INC.

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