

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

JOHN VINCENT,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 03-0226 (GK)
)	
FEDERAL BUREAU OF)	
INVESTIGATION, <i>et al.</i>)	
)	
Defendants.)	
_____)	

**PLAINTIFF’S REPLY TO DEFENDANTS’ OPPOSITION TO PLAINTIFF’S
CROSS MOTION FOR SUMMARY JUDGMENT**

Plaintiff, by counsel, hereby responds to Defendants’ opposition to Plaintiff’s Cross Motion for Summary Judgment. As discussed herein, this case concerns the denial of the First Amendment rights of a former FBI special agent and raises critical questions concerning the functioning and constitutionality of the FBI’s prepublication review process.

MEMORANDUM OF LAW

I. Plaintiff’s Cross Motion for Summary Judgment Should Be Granted As It Is Undisputed That Plaintiff Has Been Denied His First Amendment Rights.

Defendants’ opposition to Plaintiff’s cross motion for summary judgment (“Opposition”) is notable for both what it does and does not say. Most significantly, Defendants now concede that they wrongfully denied Plaintiff permission to answer the questions posed by *New York Times* reporter Judith Miller. Defs. Opp. at 8-11. Defendants, only now, in perhaps their last

pleading in this litigation, concede that their denial of Plaintiff'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." *Id.* at 10.

Defendants' belated *mea culpa* cannot, however, alter or excuse the fact that as a result of the blanket denial of the publication request, Plaintiff's First Amendment rights were violated and he suffered an irreparable harm. Plaintiff did not receive permission to publish any of his answers to Ms. Miller until more than 18 months after his request and more than 10 months after Plaintiff initiated this action. *Cf. U.S. v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972) (agency must act promptly on prepublication review). Defendants do not dispute that, but for the initiation of this litigation, Plaintiff never would have received permission to publish any of his answers.

Moreover, Defendants do not now seriously contest that they failed to provide any detailed or meaningful justification to Plaintiff for the 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 such detail, Plaintiff's rights were further violated as he effectively was denied the opportunity to modify and resubmit his request for review. As a result, Plaintiff's First Amendment rights were denied and he suffered an irreparable injury as he was denied an opportunity to speak on a critical matter of public concern for almost two years. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (denial of First Amendment rights for even brief periods constitutes

irreparable injury). Plaintiff is entitled to summary judgment on this undisputed point.¹

II. Defendants Do Not Dispute That Plaintiff Was Only Being Asked To Comment On Information Already Disclosed By FBI Officials.

Defendants' Opposition similarly is notable by omitting any response to Plaintiff's contention that the information Plaintiff sought to publish had already been provided to Ms. Miller by FBI officials. *See* Pl. Mem. at 8-11. Defendants' failure to address this point is significant for two reasons.

First, Defendants have still not granted permission to Plaintiff to answer five of the questions posed by Ms. Miller (four questions in full, one in part). Defendants have refused to do so even though the information upon which Plaintiff was being asked to comment was already in the public domain. It is undisputed that Ms. Miller interviewed FBI officials about specifically the "Vulgar Betrayal" investigation. *See* Defs. Response to Pl.'s Statement of Material Facts Not in Dispute ¶¶ 5-7. These officials provided detailed, on-the-record information to Ms. Miller which then served as the basis for her questions to Plaintiff. As set forth in Plaintiff's cross motion for summary judgment (pp. 9-11), the five questions posed by Ms. Miller and to which Plaintiff still is being denied permission to respond all concern information Ms. Miller obtained from the FBI and, therefore, was already in the public domain. Defendants do not dispute this important fact. For this reason, Defendants should be ordered to grant permission to Plaintiff to

¹ Defendant's Opposition discusses at some length (*see* pp. 4-7) the legal standard under which an agency may restrain an employee's speech. Contrary to Defendants' claim, Plaintiff's discussion regarding whether and under what circumstances an agency may restrain publication of non-classified information (*see* Pl.'s Cross Motion for Summary Judgment at 7 and 13 citing *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983)) is substantially in accord.

publish the 5 remaining answers.

Second, the fact that FBI officials had publicly discussed the information which Plaintiff was prohibited from discussing raises a broader and troubling concern regarding the FBI and its use of the prepublication review process. The FBI's apparent intent was to put their own "spin" on a reporter's story while denying the reporter access to a former employee who might have a different perspective from FBI management. The FBI thus used the prepublication review process to squelch criticism it expected from a former employee while at the same time its top officials talked openly to the press. Defendants confirm that this occurred in part when they state that the blanket denial of Plaintiff's request was motivated by factors unrelated to Plaintiff's particular request – specifically, a contemporaneous request of FBI Special Agent Robert Wright to publish a manuscript that was highly critical of the FBI. *See* Def. Opp. at 11 n. 5.²

Defendants nevertheless continue to claim that they must withhold permission from Plaintiff to answer the remaining questions because of an ongoing criminal investigation. Defs. Opp. at 7-8. Defendants continue to try to bootstrap an ongoing investigation onto the closed investigation at issue here, an investigation that was shut down in October 1999. Defendants' arguments concerning this continue to evolve. For example, Defendants' summary judgment motion makes much of an ongoing grand jury investigation – in addition to an alleged investigation by the U.S. Attorney's Office – that necessitated denial of Plaintiff's request. In his cross motion for summary judgment, Plaintiff set forth in detail why this claim was not correct.

² A similar action demonstrating the failure of the FBI's prepublication review process and challenging the violation of SA Wright's First Amendment rights is pending before this Court. *See* Civil Action No. 02-0915 (GK).

Defendants made no response in their opposition – citing only a new investigation by the USAO–N.D. Ill. *See* Defs. Opp. at 7.³ For this additional reason, Plaintiff’s motion for summary judgment should be granted.

III. Plaintiff Is Entitled To Declaratory and Injunctive Relief.

This Court should declare Defendants’ original blanket denial, and the failure to provide detailed, specific reasons for the denial, to be unlawful. The Court should also find that Defendants continue to unlawfully withhold permission to publish the remaining answers, or at a minimum, require that Defendants provide additional detailed information to demonstrate their entitlement to continue to deny permission.

Perhaps the more significant question before the Court is whether the FBI’s prepublication review process that resulted in the wrongful denial of a person’s First Amendment rights is itself unconstitutional. In this case, Plaintiff only received partial relief – permission to publish at least 16 of his answers – more than 18 months after his request and 10 months 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.

Defendants unashamedly assert that injunctive relief to address this apparent flaw in the prepublication review process is not necessary. According to Defendants, a future, similarly aggrieved FBI agent can simply “seek review in the federal courts” as was done here. Defs. Opp.

³ It is, of course, ironic that this new investigation, opened apparently as a result of SA Wright’s public complaints, is now cited by Defendants as a justification to withhold permission to Plaintiff to discuss the original, closed investigation.

at 13. This case, however, plainly demonstrates that such a “remedy” does not afford meaningful relief here, nor is it likely to in future cases. Defendants’ 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.

Defendants complain that injunctive relief would not be appropriate in this case as Plaintiff’s complaint does not specifically request prospective relief to remedy the prepublication review process. Defs. Opp. at 12. While the Complaint does seek injunctive relief in general terms, even Plaintiff had not, at the time the complaint was filed more than two years ago, fully anticipated the severity of the problems with the prepublication review process. Hence, it is entirely appropriate now to seek relief that addresses the very real obstacles for any agent to receive meaningful vindication and protection of First Amendment rights.

Finally, Defendants suggest that any prospective relief would require the Court to “perpetually supervise” the prepublication review process. Defs. App. at 12. Of course, appropriately tailored relief, requiring the FBI to provide meaningful and timely review of prepublication requests, need not take on the dimensions suggested by Defendants. What is more critical, however, is 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 Plaintiff's rights in this case demonstrates that the current prepublication review system is broken and must be repaired.

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/

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