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 REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiff, Special Agent Robert G. Wright, Jr. ("SA Wright"), by counsel, hereby responds to Defendant's opposition to Plaintiff's Cross Motion for Summary Judgment.

MEMORANDUM OF LAW

I. The Cross Motion for Summary Judgment Should Be Granted As SA Wright Has Been Denied His First Amendment Rights.

A useful starting point in review of this case might be Chapter 26 of SA Wright's *Fatal Betrayals* manuscript. In his cross motion for summary judgment, SA Wright refers to Chapter 26 as evidence that the manuscript contains information about more than just the Vulgar Betrayal investigation. Pl.'s Cross-Mot. for S.J. at 17. Chapter 26 is an analysis – based entirely on public newspaper accounts – of previous FBI investigations *other* than the SA Wright's investigation and contains no sensitive information regarding any current investigation. *Id.* In its opposition, the FBI does not dispute – or even respond to – this fact in any way. Instead, the FBI has represented to the Court that, but for the few sections approved for release, the manuscript is

"interconnected" with material that cannot be publicly released as it relates to an on-going terrorism investigation. Def.'s Opp. at 10. A review of Chapter 26 should reveal whether this representation is accurate, or whether the FBI still is trying to suppress material that it perceives as embarrassing to the agency.

The key facts in this case – demonstrating that the FBI wrongfully refused SA Wright permission to publish his manuscript – remain undisputed:

- SA Wright properly submitted his manuscript for review in October 2001 and that he received permission in January 2002 to publish the vast majority (82 percent) of the manuscript;

- SA Wright resubmitted his manuscript for review in February 2002 after making edits and deletions to address the FBI's concerns, but on May 10, 2002, well after the 30 day deadline for review – and one day after this lawsuit was filed – the FBI reversed its position, ordering that no part manuscript could be published, even the portion the agency previously concluded could be published; and

- The FBI reversed its position yet again in October 2003, concluding that sections of the manuscript did not, after all, contain any unpublishable material.

These reversals by the FBI – in regard to SA Wright's manuscript as well as the *New York Times* interview answers – has had the effect of denying SA Wright the opportunity to exercise his First Amendment rights. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (denial of First Amendment rights for even brief periods constitutes irreparable injury). By effectively delaying SA Wright's ability to publish *any* part of his manuscript or the NYT interview answers for more than two years, SA Wright's First Amendment rights were violated and he suffered an irreparable injury, as he was denied the opportunity to speak on a matter of critical public concern. For this reason, SA Wright is entitled to summary judgment in regard to both the manuscript and the NYT interview answers.

The FBI's primary response is that, because the manuscript allegedly pertains to an open investigation, this essentially excuses the FBI's admittedly flawed responses to SA Wright's requests – the reversals, the delays, and the failure to provide detailed responses. This misses the point for two reasons. First, it is undisputed that the investigation upon which the manuscript focuses, the Vulgar Betrayal investigation, was closed in 1999. If this investigation was essentially re-opened, as the FBI apparently now contends, this does not alter the fact that the manuscript was based on a nearly two year-old investigation.[1]

Second, and more critically, it is undisputed by the FBI that they cannot prohibit the publishing of information already in the public domain. *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) ("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.") (citing *Snepp v. U.S.*, 444 U.S. 507, 513 n. 8 (1980) (per curiam)). The FBI concedes that SA Wright provided copious documentation (3 large binders) along with the manuscript for review. *See* Def.s Response to 7(h) Statement ¶ 13. These supporting documents, totaling 1,187 pages, provide a publicly available source of information for each fact contained in the manuscript. Pl.'s Cross Motion at 17. A review of this documentation will reveal that, but for a handful of additional documents submitted with manuscript for re-review, none of the documents post-date the initial submission of the manuscript. Moreover, in regard to the NYT interview answers – and again undisputed by the FBI – the information upon which this document was based had been put into the public domain already by FBI officials meeting with *New York Times* reporter

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[1] It is, of course, ironic that this new investigation, opened apparently as a result of SA Wright's public complaints, is now relied upon by the FBI as a justification to withhold permission to SA Wright to discuss the original, closed investigation.

Judith Miller. *Id.* Accordingly, because the facts upon which the manuscript and the NYT interview answers are based are in the public domain, the FBI cannot prohibit their release.[2]

II. SA Wright is Entitled to Declaratory And Injunctive Relief.

The Court should declare the flawed handling of SA Wright's prepublication review requests – the reversals, the delays, and the failure to provide detailed reasons for denial – to be unlawful. Even under the FBI's most innocuous explanation of its actions, SA Wright's First Amendment rights were violated. Moreover, the Court should find that the FBI continues to unlawfully withhold permission to publish the bulk of the manuscript and the NYT interview answers, or at a minimum, require that the FBI provide additional detailed information to demonstrate their entitlement to continue to deny permission.

The FBI makes the remarkable argument that SA Wright still has the opportunity to "obtain an audience for his claims of nonfeasance or malfeasance" regarding the FBI's performance. Def.'s Opp. at 3. The FBI suggests that SA Wright could still approach the FBI's Office of Inspector General ("OIG"), the Office of Professional Responsibility ("OPR"), or an appropriate congressional committee. This suggestion completely ignores the history of this case and demonstrates a disregard for the seriousness of the violations of law that have occurred in this case.

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[2] The FBI recounts that Patricia Solley, Unit Chief of the Prepublication Review Unit, now denies that she made statements to SA Wright regarding the unusual way his prepublication review requests were handled by the FBI. Def.'s Opp. at 6; Pl.'s Cross Motion at 6. SA Wright unequivocally affirms that the statements he attributes to Ms. Solley were made by her. SA Wright states that, if necessary, he will submit to a polygraph examination, administered by a third party, to confirm the accuracy of his representations.

SA Wright played by the rules at every step, submitting complaints to the OIG and OPR without receiving any meaningful response. *See* Defs. Response to Pl. 7(h) Statement ¶ 18, 28; Pl.'s Cross Motion at 7; Boalthouse Decl. Ex. I (Letter to Robert G. Wright dated January 24, 2002). Moreover, when members of Congress requested to review SA Wright's manuscript, it was the FBI that denied their requests. Thus, it is now too late in the day – after the reversals, the delays, and failure to provide detailed reasons for denial – for the FBI to fall back on the argument that SA Wright might yet receive a fair hearing of his concerns within the FBI.

Finally, the FBI complains that injunctive relief would not be appropriate in this case as SA Wright is entitled to relief particular to him. Def.'s Opp. at 13. However, as this case demonstrates, the FBI has and continues to use its prepublication review system to deprive agents of their First Amendment rights.[3] 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. It is critical that 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.

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

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[3] In its opposition, the FBI suggests for the first time that November 2002 changes in the agency's prepublication review office make it "less likely" that what happened in this case will recur. Opp. at 15 n.4. This assertion belies the fact that most of the actions at issue in this case occurred after November 2002 and that, to this day, the FBI has failed to provide the requisite detailed response justifying the denial of permission to publish the manuscript and the NYT interview answers.

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.

/s/

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