APPEAL NO. 05-56398

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT G. WRIGHT, JR.,

Plaintiff-Appellant

v.

FEDERAL BUREAU OF
INVESTIGATION, *et al.*,

Defendants,

JAMES CROGAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Robert G. Wright, Jr. ("Plaintiff" or "Wright"), respectfully suggests that oral argument will be of assistance to the Court in this instance, and, in light of the importance of the issues presented, requests oral argument.

STATEMENT OF JURISDICTION

The basis for subject-matter jurisdiction is 28 U.S.C. § 1331, as this case arises under federal law. This appeal is from a final order by the U.S. District Court for the Central District of California, which denied Plaintiff's motion to review and reverse the ruling of a U.S. Magistrate. The Magistrate's ruling denied Plaintiff's motion to compel non-party journalist James Crogan to testify at a deposition and produce documents pursuant to a subpoena *duces tecum* in a Privacy Act lawsuit against the Federal Bureau of Investigation ("FBI"), pending in the U.S. District Court for the Northern District of Illinois.

The basis for appellate jurisdiction is 28 U.S.C. § 1291, because this is an appeal of a final order of the District Court below. *See Premium Services Corporation v. The Sperry & Hutchinson Company*, 511 F.2d 225, 227-229 (9th Cir. 1975). This appeal is timely under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure ("F.R.A.P.") because the notice of appeal was filed on September 9, 2005 from an August 12, 2005 final order of the District Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the Magistrate Judge erred in denying Plaintiff's motion to compel non-party journalist James Crogan to testify at a deposition and produce documents pursuant to a subpoena *duces tecum* served in Plaintiff's Privacy Act

action against the FBI pending in the Northern District of Illinois, notwithstanding the fact that Crogan's testimony and documents are: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case, *i.e.*, whether the FBI disclosed information about Plaintiff to Crogan without Plaintiff's consent in violation of the Privacy Act.

STATEMENT OF THE CASE

Plaintiff is a Special Agent ("SA") for the FBI. He is appealing an August 12, 2005 ruling of the District Court, which denied his motion for review of a June 10, 2005 ruling by a U.S. Magistrate Judge on his motion to compel. Plaintiff had sought to compel non-party journalist James Crogan to testify at a deposition and produce documents pursuant to a duly-served subpoena *duces tecum* in his Privacy Act action against the FBI, pending in the U.S. District Court for the Northern District of Illinois.

Plaintiff's lawsuit alleges that the FBI and U.S. Department of Justice violated his rights under the Privacy Act of 1974, 5 U.S.C. §552a, when SA Royden R. Rice, the Media Coordinator for the FBI's Chicago Field Office, disclosed information about Plaintiff to Crogan during a telephone conversation in late June or early July 2003. Plaintiff alleges that SA Rice's disclosures to Crogan

violated the Privacy Act because the information at issue was contained in a system of personnel records maintained by the FBI and was disclosed without Plaintiff's prior written consent. *See* 5 U.S.C. § 552a(b).

When Plaintiff served Crogan with a subpoena *duces tecum* requiring him to appear for a deposition and produce documents, Crogan objected, citing the qualified First Amendment privilege for journalists. Plaintiff moved to compel, and the District Court referred the dispute to a U.S. Magistrate Judge ("Magistrate"). The Magistrate denied Plaintiff's motion to compel, finding that Crogan's testimony and documents were not "crucial" to Plaintiff's Privacy Act claim, even though Crogan was the recipient of the unlawful disclosure of information and was the only person other than SA Rice capable of providing first-hand testimony identifying the particular information disclosed by SA Rice. *See* Excerpts of Record ("ER") at 94-100. More specifically, the Magistrate found that, because certain, limited pieces of information about Plaintiff were already in the public domain, Crogan's testimony about other information SA Rice disclosed to Crogan about Plaintiff was not clearly relevant to whether SA Rice violated Plaintiff's Privacy Act rights. *Id.* at 98, 99. Because the Magistrate's ruling was predicated on a clearly erroneous understanding of Plaintiff's claim and was otherwise contrary to settled law, Plaintiff moved the District Court for review

pursuant to Rule 72(a) of the Federal Rules of Civil Procedure ("F.R.Civ.P.") and 28 U.S.C. § 636(b)(1)(A). The District Court denied review. *Id.* at 101-104.

STATEMENT OF FACTS

Plaintiff is a fourteen-year veteran of the FBI and has worked as a Special Agent since September 9, 1990. ER at 6 (Wright Deposition). Plaintiff was assigned to the counter-terrorism squad of the FBI's Chicago Field Office for approximately nine years. *Id.* Plaintiff also is a whistleblower who, among other disclosures, publicly revealed that the FBI withheld resources, funding, and support from counter-terrorism investigations and otherwise incompetently managed or mismanaged counter-terrorism investigations. *Id.* at 90 (Complaint ["Compl."] at ¶ 8). On June 2, 2003, Plaintiff participated in a press conference in Washington, D.C. during which he criticized the FBI's handling of counter-terrorism investigations. *Id.*

During a telephone conversation in late June or early July, 2003, SA Rice disclosed to Crogan certain Privacy Act-protected information about Plaintiff, albeit without obtaining Plaintiff's prior written consent. *Id.* at 29-30, 31-46 (Schippers Deposition); 7-8 (Wright Deposition); and 24-26 (July 8, 2003 Letter from David P. Schippers to Thomas Knier). Plaintiff learned of SA Rice's disclosures when Crogan subsequently contacted him and his attorney, David P.

Schippers ("Schippers"), and told them about his conversation with SA Rice and the specific information disclosed to him by SA Rice. *Id.* Plaintiff believes SA Rice's disclosures were intended to discredit him and undermine his whistleblowing. *Id.* at 91-92 (Compl. at ¶¶ 10, 15).

Importantly, Schippers memorialized the substance of his telephone conversation with Crogan in a July 8, 2003 letter to Thomas Knier, then Special Agent in Charge ("SAC") of the FBI's Chicago Field Office. *Id.* at 24-26 (July 8, 2003 Letter from David P. Schippers to Thomas Knier). As set forth in the letter, Crogan told Schippers that he had spoken with SA Rice by telephone and that SA Rice had identified himself as an FBI spokesperson. *Id.* In addition, the letter states that Crogan told Schippers that SA Rice disclosed the following information to him about Plaintiff:

(1) Plaintiff had been involved in ten internal investigations, thus indicating he had a poor record as an agent;

(2) there were a number of agents in Plaintiff's squad who could provide adverse information about him and he (SA Rice) would recommend Crogan be permitted to interview these agents;

(3) Plaintiff currently was under internal investigation by the FBI;

(4) Plaintiff maintains a side business and operates a website as part of that side business; and

(5) the United States Attorney in Chicago, not the FBI, closed criminal and civil cases against terrorist suspect Mohammed Salah because Plaintiff had not produced sufficient evidence to support any charges.

Id. at 24-25 (emphasis added). Schippers' letter also states that Crogan assured him that his conversation with SA Rice had not been "off the record," meaning that there was no expectation of confidentiality by SA Rice and Crogan had not promised SA Rice that he would keep their conversation confidential. *Id.* at 25.

On August 21, 2003, Plaintiff brought an action in the U.S. District Court for the Northern District of Illinois, *Robert G. Wright Jr. v. Federal Bureau of Investigation, et al.*, Civil Action No. 03C-5776 (N. Dist. Ill.) for violation of his Privacy Act rights. *Id.* at 89-93. Plaintiff's lawsuit seeks damages including legal expenses, business losses, injury to his reputation, and emotional distress caused as a direct and proximate result of SA Rice's unauthorized and unlawful disclosure to Crogan of Privacy Act-protected information about Plaintiff. *Id.*

During the course of discovery, Schippers testified at deposition that his letter to SAC Knier accurately described what Crogan told him about his

(Crogan's) conversation with SA Rice. *Id.* at 29-30, 31-46 (Schippers Deposition); and 24-26 (July 8, 2003 Letter from David P. Schippers to Thomas Knier). Plaintiff likewise testified at his deposition that Schippers' letter to SAC Knier accurately described what Crogan told him about his (Crogan's) conversation with SA Rice. *Id.* 7-8, 9-23 (Wright Deposition) At his deposition, SA Rice admitted to speaking with Crogan on two occasions in late June or early July, 2003. *Id.* at 49-74 (Rice Deposition). SA Rice specifically admitted to telling Crogan during their second conversation that Plaintiff was then under internal investigation by the FBI. *Id.* at 74. However, he denied disclosing to Crogan any of the other information about Plaintiff set forth in Schippers' July 8, 2003 letter to SAC Knier, including that Plaintiff had been the subject of ten internal investigations. *Id.* at 73-74. Thus, there is a direct and significant conflict between Schippers' contemporaneous letter to SAC Knier and the sworn deposition testimony of Schippers and Plaintiff, on the one hand, and the sworn deposition testimony of SA Rice, on the other hand.

After the depositions of Plaintiff, Schippers, SA Rice, and several other witnesses had been completed, Plaintiff served a subpoena *duces tecum* on Crogan on or about November 24, 2004. *Id.* at 81-83 (Stipulation Regarding Deposition of Non-Party Journalist James Crogan); and 85-87 (November 8, 2004 Subpoena

Duces Tecum). The subpoena required Crogan to appear for deposition and produce documents concerning: (1) his telephone conversation with SA Rice in late June or early July, 2003; and (2) his subsequent telephone conversations with both Schippers and Plaintiff. *Id.*

Crogan served timely objections to Plaintiff's document requests and, in his objections, asserted that the testimony and documents Plaintiff seeks are protected by the qualified First Amendment privilege for journalists. *Id.* at 81-83 (Stipulation Regarding Deposition of Non-Party Journalist James Crogan). Crogan has neither appeared for deposition nor produced any responsive documents to Plaintiff, citing the qualified privilege. *Id.*

SUMMARY OF THE ARGUMENT

The Magistrate erroneously found that Plaintiff's Privacy Act claim is based solely on four factual assertions[1] allegedly made by SA Rice to Crogan, instead of the information that Crogan specifically told Schippers he had learned from SA Rice during his telephone conversation with SA Rice, which Schippers

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[1] These assertions involve: (1) a 1999 investigation by the FBI's Office of Equal Employment Opportunity Affairs; (2) a 1999 FBI Office of Professional Responsibility ("OPR") investigation concerning a sexual harassment complaint; (3) a then-current, June 2003 OPR investigation concerning an unauthorized press conference Plaintiff held on June 2, 2003; and (4) Plaintiff's side business of selling baby furniture. ER at 98-99.

memorialized in his letter to SAC Knier.[2] The Magistrate then misapplied the established law, ruling that Plaintiff could not maintain a Privacy Act claim as to any factual information disclosed by SA Rice to Crogan if some of that information was already in the public domain. After finding that certain, limited information about these four factual assertions was already in the public domain, the Magistrate ruled as a matter of law that Plaintiff had no Privacy Act claim, and, therefore, Crogan's testimony and documents could not be relevant to an important issue in Plaintiff's lawsuit.

The Magistrate's findings of fact are clearly erroneous for several reasons. First, Plaintiff has never alleged that the four assertions relied on by the Magistrate are the sole basis for his Privacy Act claim. Instead, Plaintiff has contended, and the record evidence shows, Plaintiff's lawsuit is based on the information disclosed to Crogan by SA Rice, as related by Crogan to Schippers and as memorialized in Schippers' letter to SAC Knier. Therefore, the Magistrate's

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[2] This information concerns the allegations that: (1) Plaintiff had been involved in a combined total of ten OPR investigations; (2) Plaintiff was then under investigation by the FBI; (3) there were a number of agents in Plaintiff's squad who could provide adverse information about him to Crogan; (4) Plaintiff maintained a side business and operated a website as a part of that business; and (5) the United States Attorney in Chicago closed criminal and civil cases against terrorist suspect Mohammed Salah because Plaintiff had not produced sufficient evidence to support any charges. E.R. at 24-25 (Schippers' letter.)

ruling must be reversed, and Crogan must be required to testify at a deposition and to produce the requested documents.

Second, the Magistrate's finding that Plaintiff put certain, limited information in the public domain about three internal investigations in which he was involved -- even if true -- is beside the point and does not bear on the ultimate (and obviously important) issue in this action, *i.e.*, whether SA Rice violated Plaintiff's Privacy Act rights when he disclosed to Crogan, without obtaining Plaintiff's consent, that Plaintiff had been involved in a combined total of ten internal investigations.

Third, even under the Magistrate's erroneous reasoning, Crogan's assertion of the qualified journalist's privilege could not be sustained as to the factual allegation that Plaintiff had been involved in a combined total of ten separate internal investigations. There simply is no record evidence showing such information was in the public domain in June-July 2003. Furthermore, there is no evidence in the record demonstrating that there is information already in the public domain about each of the ten internal investigations, which might support an inference Plaintiff was involved in a combined total of ten such investigations.

Fourth, Crogan's first-hand testimony and documentary evidence about the particular information disclosed to him by SA Rice is clearly relevant to whether

such unauthorized disclosure by SA Rice violated Plaintiff's Privacy Act rights. This is because: (a) Crogan is the only source (other than SA Rice) of direct evidence about what SA Rice told Crogan during their telephone conversation; and (b) SA Rice's deposition testimony contradicts the deposition testimony of Plaintiff and Schippers, as well as Schippers' contemporaneous letter to SAC Knier, concerning what information Crogan told them SA Rice had disclosed to him.

The Magistrate's ruling is also contrary to law. The Magistrate erred by concluding that Plaintiff could not maintain a Privacy Act claim merely because some, but certainly not all, of the information disclosed by SA Rice to Crogan was already in the public domain. Both the U.S. Courts of Appeals for the Third and Tenth Circuits have squarely held that the fact that information is a matter of public domain is not a defense to a Privacy Act claim. There is no exception to the Privacy Act's unambiguous prohibition on disclosure of information because the information was previously made available to the public, including information made public by the complainant. The absence of such an exception is dispositive; any prior public disclosure of the information released to Crogan by SA Rice does not vitiate the Privacy Act violation in the instant case.

Nonetheless, the record in this case does not support a presumption that the public already knew all of the information SA Rice disclosed to Crogan.

Lastly, by finding Plaintiff could not maintain a claim under the Privacy Act for the disclosure of information allegedly in the public domain, the Magistrate effectively usurped the jurisdiction of the U.S. District Court for the Northern District of Illinois, which is the court in which this action is pending. The issue for the Magistrate to decide pursuant to established case law in this Circuit was whether Crogan's testimony and notes are clearly relevant to an important issue in Plaintiff's Privacy Act case. It was not, respectfully, whether Plaintiff has a Privacy Act claim to assert in the first instance. Thus, in addition to being clearly erroneous, the Magistrate's ruling also is contrary to law. As a result, this Court should reverse the Magistrate's ruling and grant Plaintiff's motion to compel Crogan to testify and produce documents pursuant to Plaintiff's subpoena.

ARGUMENT

I. Reviewability and Standard of Review.

The issue on appeal was raised in Plaintiff's Motion to Compel Non-party Journalist James Crogan to Testify at Deposition and Produce Documents Pursuant to Subpoena *Duces Tecum* and for Attorneys' Fees and Costs (ER at 118) and Plaintiff's Motion for Review of Magistrate's June 10, 2005 Ruling (ER at

119). The Magistrate denied Plaintiff's motion to compel (ER at 94-100), and the District Court denied Plaintiff's motion for review of the Magistrate's ruling (ER at 113-116).

This Court reviews the District Court's denial of a motion for review under the same standard that a district court uses to review a magistrate judge's ruling, specifically, the standards set forth under F.R.Civ.P. 72(a) and 28 U.S.C. § 636(b)(1)(A). *Osband v. Woodford,* 290 F.3d 1036, 1041 (9th Cir. 2002); *see also Phinney v. Wentworth Douglas Hospital*, 199 F.3d 1, 4 (1st Cir. 1999). Section 636(b)(1)(A) provides, in pertinent part: "A judge of the court may reconsider any pretrial matter . . . where it has been shown that the magistrate's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Rule 72(a), which implements § 636(b)(1)(A), provides in pertinent part that: "The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." F. R.Civ. P. 72(a).

Where a magistrate judge determines issues of fact, review is limited to conclusions that are "clearly erroneous." *Medical Imaging Ctrs. of Am., Inc. v. Lichtenstein*, 917 F. Supp. 717, 719 (S.D. Cal. 1996). "However, 636(b)(1)(A) provides for de novo review . . . on issues of law." *Id.* "A finding of fact is clearly

erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Dollar Rent A Car, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985) (citations omitted). A ruling is "reversible for legal error if, in applying the appropriate standards, the court misapprehends the law with respect to the underlying issues in the litigation." *Id.*

II. The Magistrate's Ruling is Clearly Erroneous Because It is Based on Clearly Erroneous Findings of Fact.

There is no dispute that the test articulated by the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *Schoen v. Schoen*, 48 F.3d 412 (9th Cir. 1995) ("*Schoen II*") governs Crogan's assertion of the qualified First Amendment for journalists.[3] Under *Schoen II*, a litigant can overcome the qualified privilege where the evidence sought is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. *Schoen II*, 48 F.3d at 415-16. The Magistrate correctly found that Plaintiff satisfied the first two elements of the *Schoen II* test. ER at 94-100. However, the Magistrate erroneously ruled Plaintiff did not satisfy the third

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[3] In *Schoen II*, the Ninth Circuit clarified a prior ruling in *Schoen v. Schoen*, 5 F.3d 1289 (9th Cir. 1993) ("*Schoen I*").

element because she based her ruling on erroneous findings of fact and misapplied the applicable law. *Id.*

The Magistrate's ruling is fundamentally flawed because it is predicated on the erroneous finding that Plaintiff's lawsuit is based on only four factual assertions allegedly made by SA Rice to Crogan, notwithstanding that the Complaint, Schippers' contemporaneous letter to SAC Knier and the deposition testimony of both Plaintiff and Schippers make clear that the lawsuit is based on the disclosures detailed in the Schippers' letter. The Magistrate's ruling stated, in pertinent part, as follows:

> . . . Plaintiff has testified in his deposition that the following four items form the basis of his Privacy Act claim: (1) a 1999 investigation by the FBI's Office of Equal Employment Opportunity Affairs ("EEO") in response to another agent's racial discrimination complaint; (2) a 1999 investigation by OPR concerning a sexual harassment complaint made against him by SA Karen Medernach; (3) the June 2003 investigation by [Office of Professional Responsibility] relating to an unauthorized press conference that plaintiff held on June 2, 2003; and (4) plaintiff's business of selling baby furniture. Thus, it appears that the Privacy Act claim, which is the sole claim in the Complaint, revolves around these four claims only.
>
> Yet information regarding these topics had already been placed in the public domain by plaintiff himself, through press conferences or on his own website, and, in the case of the sexual harassment complaint, as a result of a publicly filed lawsuit. The fact that the information that forms the crux of plaintiff's Privacy Act claims was already in the public domain undermines plaintiff's claim. Thus, plaintiff's argument that the information is crucial to establishing his claim is not persuasive.

ER at 98-99 (emphasis added).

The four factual assertions cited in the Magistrate's ruling, however, do not form the sole basis for Plaintiff's Privacy Act claim. Taken in its totality, the record evidence -- including Schippers' letter and the deposition testimony of both Plaintiff and Schippers -- demonstrates that Plaintiff's lawsuit is based on the information disclosed by SA Rice to Crogan, as Crogan related it to Schippers and as Schippers memorialized it in his letter to SAC Knier. In this regard, Plaintiff testified, in pertinent part, as follows:

> Q. It's your belief that Special Agent Ross Rice disclosed Privacy Act protected information to James Crogan of L.A. Weekly, is that correct?
>
> A. Correct.
>
> * * *
>
> Q. Okay. Let's go through the Schippers' letter, because I want to understand the full nature of this. And we'll mark this as Number 2. Let me first ask you, have you seen this letter before?
>
> A. Yes.
>
> Q. Can you tell me what it is?

A. This is a letter that I requested Mr. Schippers send to Mr. Knier, Special Agent in Charge of the FBI, Chicago Division, regarding Ross Rice, Special Agent Ross Rice's providing information to the media about myself.

Q. Now, did you see this letter before it was sent?

A. Yes.

Q. Mr. Schippers allowed you to review it?

A. Yes.

Q. Okay. And is it your understanding that this letter is based on one conversation that Mr. Schippers had with Mr. Crogan?

A. Yes.

* * *

Q. He told you that? What I want to know is what Crogan told you?

A. These are the same things he told me. Like I say, he told me all of these things. And, but there were other things that aren't in here, but I didn't write them down. Just so you understand, the purpose of this letter, I mean I didn't want to file a lawsuit. All I wanted was them stopped. And I figured you send this letter, it will be taken care of. And I'm trying to recall when we filed the lawsuit. A number of

> weeks had gone by. And there was absolutely no response. And I was getting a little ticked off. So I said, "That's it. If they're going to ignore this, like everything else, file the lawsuit . . . So that's what the intent of this letter was for, was just to cut it off so he doesn't say anything more to the media."

ER at 7, 17-18, 21-22 (Wright Deposition at 35, 49-50, 53-54.) As this testimony shows, the information about Plaintiff that SA Rice disclosed to Crogan, as related by Crogan to Schippers and as memorialized in Schippers' letter, was and is the basis of Plaintiff's grievance against the FBI and the gravamen of Plaintiff's Privacy Act claim. Plaintiff first put the FBI on notice of his Privacy Act claim in Shippers' letter to SAC Knier. When Plaintiff could not get the FBI to address SA Rice's unauthorized disclosures through this administrative channel, Plaintiff filed suit, alleging that SA Rice's unauthorized disclosures to Crogan violated his Privacy Act rights.

As even the Magistrate acknowledged when she set forth Plaintiff's factual contentions in her ruling, Plaintiff alleges that SA Rice disclosed the following information to Crogan:

> In the Joint Stipulation, plaintiff contends that SA Rice disclosed the following information to Schippers (sic): (1) Plaintiff had been the subject of ten FBI internal affairs investigations, thus indicating that

> he had a poor record as an agent; (2) there were a number of agents in Plaintiff's squad who could provide adverse information about Plaintiff, and he (SA Rice) would recommend Crogan be permitted to interview these agents; (3) Plaintiff currently then under investigation by the FBI; (4) Plaintiff maintains a side business and operates a website as part of that side business; and (5) the United States Attorney in Chicago, not the FBI, closed criminal and civil cases against terrorist suspect Mohammed Salah because Plaintiff had not produced sufficient evidence to support any charges.

ER at 98 (emphasis added).[4]

In a supplemental memorandum of law, Plaintiff subsequently clarified that his Privacy Act claim is based on the following factual contentions set forth in Schippers' letter: (1) SA Rice disclosed to Crogan that Plaintiff had been the subject of a combined total of ten internal investigations; (2) SA Rice disclosed to Crogan that Plaintiff was then under investigation by the FBI's Office of Professional Responsibility ("OPR"); (3) Plaintiff operated a side business;[5] and

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[4] The Magistrate erroneously stated that Plaintiff contended SA Rice disclosed the information to Schippers. ER at 98. Plaintiff actually contends SA Rice disclosed the information to Crogan. Joint Stipulation p. 2.

[5] Because Plaintiff was an FBI agent, he was required to obtain permission from the FBI to operate his side business. Plaintiff's request and the FBI's subsequent authorization allowing him to operate a side business are contained in records kept in Plaintiff's personnel file. Plaintiff's website made no reference to his being an FBI agent, and, in fact, Plaintiff's permission to operate a side business was conditioned on him not disclosing the fact that he is a FBI agent. Thus, when SA Rice disclosed to Crogan that Plaintiff operated a side business and directed Crogan to Plaintiff's website, he not only violated the Privacy Act, but he also jeopardized Plaintiff's ability to operate his side business.

(4) SA Rice disclosed to Crogan that the U.S. Attorney in Chicago had caused the criminal and civil cases against terrorist suspect Mohammed Salah to be closed because Plaintiff had not produced sufficient evidence to support any charges against Salah. Plaintiff's Supplemental Memorandum p. 1.

In short, the factual basis of the Magistrate's ruling is clearly erroneous for two reasons. First, the ruling omits or excludes from the basis of Plaintiff's lawsuit three of the alleged unauthorized disclosures made by SA Rice to Crogan, disclosures, all of which are memorialized in the Schippers' letter.[6] Second, the ruling incorrectly finds that the lawsuit is based on disclosures by SA Rice concerning the 1999 EEO investigation and the 1999 OPR investigation concerning a sexual harassment charge, notwithstanding the fact that Plaintiff has not alleged SA Rice made any such disclosure to Crogan about those particular investigations and notwithstanding the fact that these alleged disclosures are not referenced anywhere in the Schippers' letter.

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[6] These omitted disclosures, which are memorialized in the Schippers' letter, are that: (1) Plaintiff had been involved in a total of ten internal investigations; (2) there were other agents in Plaintiff's squad who would provide adverse information about Plaintiff to Crogan; and (3) the U.S. Attorney in Chicago had caused criminal and civil cases against Mohammed Salah to be closed because Plaintiff had not produced sufficient evidence to support any charges against Salah.

The Magistrate's reasoning in denying Plaintiff's motion to compel also was flawed because the ruling rested on clearly erroneous findings of fact. Assuming, *arguendo*, the Magistrate was correct in finding that Plaintiff had placed in the public domain certain limited information about the substance of three internal investigations in which he had been involved, that fact is irrelevant to this lawsuit because Plaintiff's lawsuit does not allege that SA Rice disclosed information to Crogan about the substance of the three individual internal investigations referenced by the Magistrate, other than the then-current investigation involving Plaintiff's June 2003 press conference. ER at 98-99. Significantly, the fact that information about those three investigations may have been made public simply has no bearing whatsoever on an important issue in this lawsuit *i.e.*, whether SA Rice violated Plaintiff's Privacy Act rights when he told Crogan that Plaintiff had been involved in a combined total of ten internal investigations. It was clearly erroneous for the Magistrate to conclude that limited information in the public domain about only three investigations involving Plaintiff somehow vitiated Plaintiff's claim that SA Rice violated his Privacy Act rights when he told Crogan that Plaintiff had been involved in a total of ten OPR investigations.

Moreover, the Magistrate's ruling also is flawed because, even under her erroneous reasoning, Crogan's assertion of the qualified privilege could not be

sustained where, as here, there is no record evidence that information about Plaintiff being involved in a total of ten internal investigations was already in the public domain in June-July 2003.[7] Nor did Crogan present any evidence demonstrating that there was information then in the public domain from which someone may have been able to deduce that Plaintiff had been involved in a total of ten investigations. Thus, even if this Court were to accept the Magistrate's flawed reasoning that Plaintiff cannot maintain an action for violation of the Privacy Act if the information disclosed by SA Rice was already in the public domain, Crogan's assertion of the qualified privilege must be rejected because he failed to present such evidence as to SA Rice's assertion that Plaintiff had been involved in a total of ten investigations.

Finally, the Magistrate's ruling is clearly erroneous because Crogan's first-hand testimony and documentary evidence about the particular information SA Rice disclosed to him is clearly relevant to whether such unauthorized disclosure by SA Rice violated Plaintiff's Privacy Act rights. This is the case for two reasons. First, Crogan is the only source (other than SA Rice) of direct evidence about what SA Rice told Crogan during their telephone conversation. Second, SA

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[7] By Plaintiff's count, the actual number is nine, including the "current" investigation referenced by SA Rice during his conversation with Crogan in late June or early July, 2003. ER at 2-3 (Vincent Declaration).

Rice's deposition testimony contradicts the deposition testimony of Plaintiff and Schippers, as well as Schippers' contemporaneous letter to SAC Knier, concerning what information Crogan told them SA Rice had disclosed to him. Without Crogan's evidence, Plaintiff will be unable to offer direct evidence to rebut SA Rice's deposition testimony, even though it is directly contradicted by Crogan's statements to Schippers about his conversation with SA Rice. Other than SA Rice, who has denied telling Crogan that Plaintiff was involved in a combined total of ten internal investigations, Crogan is the only source of direct evidence about what SA Rice said to Crogan during their telephone conversation. Schippers and Plaintiff might be precluded from presenting evidence about what Crogan later told them about his conversation with SA Rice, as such testimony may be hearsay. Thus, on a motion for summary judgment by Defendants, Plaintiff would be unable to demonstrate the existence of a genuine dispute of material fact about the substance of the conversation between Crogan and SA Rice. *See* F.R.Civ.P 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set fort such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Without question, the evidence Plaintiff seeks from Crogan is clearly relevant to

an important issue, and it was clearly erroneous for the Magistrate to rule otherwise.[8]

III. The Magistrate's Ruling is Contrary to Law.

It also was contrary to law for the Magistrate to find that Plaintiff could not maintain a Privacy Act claim merely because some, but not all, of the allegedly disclosed information was already in the public domain. Both the U.S. Courts of Appeals for the Third and Tenth Circuits have squarely held that the fact that information is in the public domain is not a defense to a Privacy Act claim.

In *Quinn v. Stone*, 978 F.2d 126 (3rd Cir. 1992), the U.S. Court of Appeals for the Third Circuit ("Third Circuit") held that the Department of the Army's disclosure of an employee's address and telephone number from its system of

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[8] The Magistrate also displayed a fundamental misunderstanding of Plaintiff's claim when she declared that she was denying Plaintiff's motion to compel "without prejudice" because "[P]laintiff's Privacy Act claim may evolve in the future as a result of additional discovery or pre-trial motions and rulings . . . ." ER at 100. Discovery in this case has closed except for Plaintiff's effort to depose Crogan. Plaintiff deliberately chose to depose Crogan last because of the requirement of *Schoen II* that evidence from a journalist be unavailable "despite exhaustion of all reasonable alternative sources." *Schoen II*, 48 F.3d at 416. Moreover, Plaintiff's factual contention is that SA Rice disclosed to Crogan that Plaintiff had been subject to ten internal investigations. Plaintiff knows this because Crogan subsequently told both Plaintiff and his counsel, Schippers, that SA Rice disclosed this information to him during their telephone conversation. This factual contention cannot "evolve in the future," either as a result of additional discovery (which has closed) or pre-trial motions. It will remain exactly as it is.

records, without the written consent of the employee, was a violation of the Privacy Act, notwithstanding the fact that such information was listed in the local telephone directory and, therefore, was already in the public record. Third Circuit Judge A. Leon Higginbotham, Jr., writing for the court, declared as follows:

> Appellees have cited to this court no case that stands for the proposition that there is no violation of the [Privacy] Act if the information is merely readily accessible to the members of the public (such as in the local telephone book) and our research has discovered none. We doubt if any court would so hold. To do so would eviscerate the Act's central prohibition, the prohibition against disclosure. For instance, such an argument would short-circuit the delicate balancing courts now engage in between the FOIA and the Privacy Act under 5 U.S.C. § 552a(b)(2). [Citations omitted.] To define disclosure so narrowly as to exclude information that is readily accessible to the public would render superfluous the detailed statutory scheme of twelve exceptions to the prohibition on disclosure. [Footnote emitted.] We conclude that making available information which is readily accessible to the members of the public is a disclosure under 552a(b), subject, of course, to the Act's exceptions.

978 F.2d at 134.

In *Gowan v. Dep't of the Air Force*, 148 F.3d 1182, 1193 (10th Cir. 1998), the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") fully adopted the reasoning in *Quinn* when it stated: "We adopt the Third Circuit's reasoning and hold that an agency may not defend a release of Privacy Act information simply by stating that the information is a matter of public record." Thus, two federal courts

of appeal that have considered this issue have held that the fact that information is a matter of public record is no defense to the unauthorized disclosure of that information in violation of the Privacy Act.[9]

The Magistrate found that *Quinn* and *Gowan* are distinguishable from the case at bar because neither involved a situation where the complaining plaintiff was responsible for putting the information in the public domain. ER at 99. The Magistrate erred, however, because nowhere in the holdings of *Quinn* and *Gowan* was such a distinction made or relied upon, nor would such a distinction make sense. Under the Privacy Act, agencies are prohibited from "disclosing any record which is contained in a system of records by any means of communication to any person, or to another agency" unless they have the written consent of the person to whom the record pertains or the disclosure fits one of the twelve specific statutory

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[9] The notion that a person has no privacy interest in information in the public domain has been rejected in the context of other federal statutes, such as the Freedom of Information Act ("FOIA"). In *Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994), the Supreme Court upheld an agency's refusal under FOIA to release the home addresses of non-union members to a union, citing privacy concerns, despite the fact that the information could be obtained from public records. Similarly, in *Dep't of Justice v. Reporters' Committee for Freedom of the Press*, 489 U.S. 749, 762-63 (1989), the Supreme Court upheld the Department of Justice's refusal to release "rap sheet" information on criminal defendants, again citing privacy concerns, even though the underlying criminal convictions were public records. Thus, the mere fact that information about a person may have been disclosed to the public does not mean that such person cannot have a privacy interest in the information.

exceptions. There is no exception to the Privacy Act's unambiguous prohibition on disclosure of information simply because the information was previously made available to the public, including information made public by the complainant. Indeed, Congress could have created such an exception if it had desired. The absence of any such exception is dispositive of Congress's intent that any prior public disclosure of the information, such as the information released by SA Rice to Crogan, does not vitiate a Privacy Act violation.

The Magistrate further noted that the Court in *Quinn* had observed that several courts have found there is no violation under the Privacy Act if each individual member of the public is presumed to know the information at issue. ER at 99. The Magistrate reasoned that the alleged disclosures of information by Plaintiff could be presumed to be known by the widespread public because Plaintiff allegedly disclosed this information through press releases, press conferences and a website. *Id.* The Magistrate erred, however, because, like in *Quinn*, the evidence of record in this case does not support a conclusion that the public already knew the information SA Rice disclosed to Crogan. For instance, there is no evidence in the record demonstrating that information about Plaintiff being involved in ten separate internal investigations was in the public domain in June-July 2003. Nor did Crogan present any evidence demonstrating that

somewhere in the public domain is information about Plaintiff being subject to a combined total of ten internal investigations.

Likewise, there is no evidence in the record demonstrating that Plaintiff or anyone else placed information in the public domain about the U.S. Attorney in Chicago closing criminal and civil cases against terrorist suspect Mohammad Salah because Plaintiff had not produced sufficient evidence to support any charges. Nor is there any record evidence of information in the public domain that Plaintiff's side business of selling baby furniture on the internet was being conducted by an FBI agent.[10] Thus, even assuming, *arguendo*, the Magistrate were correct in finding that a plaintiff cannot maintain a Privacy Act claim if the information at issue was already in the public domain -- an assertion which Plaintiff previously demonstrated is contrary to law -- Crogan still must be required to comply with the subpoena because there is no evidence of record

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[10] Plaintiff's website made no reference to his being an FBI agent, and, in fact, Plaintiff's permission to operate a side business was conditioned on him not disclosing the fact that he is a FBI agent. Plaintiff's request and the FBI's subsequent authorization allowing him to operate a side business are contained in records kept in Plaintiff's personnel file. Thus, when SA Rice disclosed to Crogan that Plaintiff, an FBI agent, operated a side business and directed Crogan to Plaintiff's website, he provided information from Plaintiff's personnel file that had not been previously publically disclosed.

demonstrating that the above-referenced information was already in the public domain.

Rather than following the clear and persuasive authority of the two Courts of Appeals in *Quinn* and *Gowan* -- neither Plaintiff, nor Crogan or the Magistrate could identify any Ninth Circuit authority on point -- the Magistrate relied on the unreviewed and non-precedential ruling of a U.S. District Court in *Barry v. Dep't of Justice*, 63 F. Supp.2d 25 (D.D.C. 1999).[11, 12] The Magistrate should have rejected the *Barry* decision for several reasons. First, it lacks the rigorous analysis of the Privacy Act contained in *Quinn* and, thus, fails to give effect to the Congressional scheme which, as discussed above, does not include any exception for disclosure of information previously released to the public. Second, it fails to cite any legal precedent for its holding. Third, it reaches its holding by incorrectly distinguishing *Quinn* as a case involving the disclosure of information that could be found only in isolated public records. While the public telephone directory can

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[11] The Magistrate's ruling erroneously cites this decision as a ruling by the U.S. Court of Appeals for the District of Columbia Circuit. ER at 97. It is obviously a ruling of the U.S. District Court for the District of Columbia.

[12] On June 28, 2005, the U.S. Court of Appeals for the District of Columbia Circuit upheld contempt findings against several journalists who refused to give testimony in a Privacy Act case after their assertions of the qualified First Amendment privilege for journalists were rejected. *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

hardly be described as an isolated public record, it is notable that the *Barry* court's attempt to find a basis for its holding by distinguishing other cases based on the means used to make the disclosed information available to the public is tenuous and without any statutory or other legal basis.

The two other decisions on which the Magistrate based her ruling, *Ash v. United States*, 608 F.2d 178 (5th Cir. 1979) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), are inapposite and easily distinguishable. *Ash* is not on point because it involved the publication within a military chain of command of information from a nonjudicial proceeding open to all personnel in the chain of command, not a disclosure of information from records maintained within a system of records. *Cox Broadcasting Corp.* is inapposite because it is not even a Privacy Act case. In refusing to overturn the Magistrate's ruling, the District Court also erroneously relied upon the aforementioned cases, in addition to citing *Krowitz v. Dep't of Agric.*, 641 F. Supp. 1536 (W.D. Mich. 1986). Like *Barry*, *Ash*, and *Cox*, *Krowitz* is easily distinguishable and unavailing. *Krowitz* stands for the proposition that the disclosure of information to an individual who is already aware of the information being disclosed does not constitute a violation of the Privacy Act. Crogan has made no showing here that he was already aware of the

information SA Rice disclosed to him about Plaintiff at the time of SA Rice's disclosure. *Krowitz* is inapposite.

Lastly, by finding that Plaintiff could not maintain a claim under the Privacy Act for the disclosure of information allegedly in the public domain, the Magistrate effectively usurped the jurisdiction of the U.S. District Court for the Northern District of Illinois, which is the court in which this action is pending. This matter was not before the Magistrate on a motion to dismiss or motion for summary judgment. It was before the Magistrate on a discovery motion. Neither the Magistrate nor the District Court, however, was in a position to decide the validity of Plaintiff's claim on a motion to compel, as there are questions of fact concerning what information SA Rice disclosed to Crogan and whether that information was known previously to Crogan from public sources, and there are mixed questions of fact and law concerning whether Plaintiff can maintain a Privacy Act claim under these circumstances. The Northern District of Illinois has not ruled that Plaintiff cannot assert a claim under the Privacy Act for such reasons, and Defendants have not made any motion to dismiss or motion for summary judgment on such grounds. The Magistrate and District Court should have respected that these issues are properly within the sole jurisdictional purview of Judge Norgle in the Northern District of Illinois. The issue for the Magistrate

to decide was whether Crogan's testimony and notes are clearly relevant to an important issue in Plaintiff's Privacy Act case. *Schoen*, 48 F.3d at 415-16. It was not, respectfully, whether Plaintiff has a Privacy Act claim to assert in the first instance. It was contrary to law for the Magistrate to decide otherwise. *Id.*

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse the Magistrate's ruling and grant Plaintiff's motion to compel Crogan to testify and produce documents pursuant to Plaintiff's subpoena.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 05-56398

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionally spaced, has a typeface of 14 points or more, and contains 8,046 words.

10/31/05
Date

Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2005 two true and correct copies of the foregoing **Brief of Appellant** was served, via first class U.S. mail, postage prepaid, on the following:

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