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CENTRAL DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_

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7  
8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10

11 ROBERT G. WRIGHT, JR.,

12 Plaintiff,

13 v.

14 FEDERAL BUREAU OF  
INVESTIGATION, *et al.*,

15 Defendants.  
16  
17

Case No. Misc. CV 05-1223-RGK (JTL x)

(Civil Action No.: 03C-5876  
United States District Court, Northern  
District of Illinois, Judge Charles R.  
Norgle)

**NOTICE OF MOTION AND  
MOTION FOR REVIEW OF  
MAGISTRATE'S JUNE 10, 2005  
RULING; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Date: Aug. 8, 2005  
Time: 9:00 a.m.  
Crtrm: 850  
(Klausner, J.)

Action Filed: 08/21/03  
Disc. Cut-off: N/A  
Trial Date: None

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23 **TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:**

24 PLEASE TAKE NOTICE that on Monday, August 8, 2005, at 9:00 a.m., or  
25 as soon thereafter as the matter may be heard in Courtroom 850 of the above-  
26 entitled court located at 255 E. Temple Street, Los Angeles, California, Plaintiff  
27 Robert G. Wright will and hereby does move this Court for an order reviewing the  
28

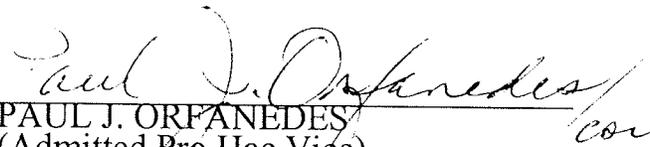
1 June 10, 2005 ruling of the Hon. Jennifer T. Lum, U.S. Magistrate Judge, and  
2 compelling non-party witness James Crogan to testify at deposition and produce  
3 documents.

4 This motion is made pursuant to 28 U.S.C. § 636(b)(1)(A), Rule 72(a) of the  
5 Federal Rules of Civil Procedure, and Local Rule 72-2.1 of the Local Rules of this  
6 Court and is based on the grounds that: (1) the June 10, 2005 ruling of the Hon.  
7 Jennifer T. Lum, U.S. Magistrate Judge, denying Plaintiff's Motion to Compel  
8 Non-Party Journalist James Crogan to Testify at Deposition and Produce  
9 Documents Pursuant to Subpoena *Duces Tecum* and for Attorney's Fees and Costs  
10 is clearly erroneous and contrary to law.

11 This motion is based on this notice of motion and motion, the attached  
12 memorandum of points and authorities in support thereof, all records and  
13 pleadings in the file in this action, and such other matters as may be raised at the  
14 hearing of this motion.

15  
16 Dated: June 29, 2005

By:

  
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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION .....	1
II. FACTUAL BACKGROUND .....	2
III. ARGUMENT .....	5
A. Standards Governing Motions for Review .....	5
B. The Magistrate’s Ruling is Clearly Erroneous .....	5
C. The Magistrate’s Ruling is Contrary to Law .....	11
IV. CONCLUSION .....	14

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **TABLE OF CASES**

2 **Page**

3 **Cases**

4 *Ash v. United States*, 608 F.2d 178 (5th Cir. 1979) ..... 14

5 *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 95 S. Ct. 1029,

6 43 L. Ed.2d 328 (1975) ..... 14

7 *Barry v. Dep't of Justice*, 63 F. Supp.2d 25 (D.D.C. 1999) ..... 13

8 *Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487,

9 114 S. Ct. 1006, 127 L. Ed.2d 324 (1994) ..... 12

10 *Dep't of Justice v. Reporters' Committee for Freedom of the Press*,

11 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed.2d 774 (1989) ..... 12

12 *Gowan v. Dep't of the Air Force*, 148 F.3d 1182 (10th Cir. 1998) ..... 12

13 *Lee v. Dep't of Justice*, No. 04-5301, 2005 U.S. App. LEXIS 12758

14 (D.C. Cir. June 28, 2005) ..... 13

15 *Quinn v. Stone*, 978 F.2d 126 (3d Cir. 1992) ..... 11, 12

16 *Schoen v. Schoen*, 5 F.3d 1289 (9th Cir. 1993) ..... 5

17 *Schoen v. Schoen*, 48 F.3d 412 (9th Cir. 1995) ..... 5, 10

18

19 **Rules and Statutes**

20 5 U.S.C. § 552a ..... 1

21 5 U.S.C. § 552a(b) ..... 1

22 28 U.S.C. § 636(b)(1)(A) ..... 5

23 Fed.R.Civ.P. 72(a) ..... 5

24 L.R. 72-2.1 ..... 5

25

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28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 Plaintiff Robert G. Wright, Jr., a Special Agent (“SA”) with the Federal  
4 Bureau of Investigation (“FBI”), seeks review of a June 10, 2005 ruling by the  
5 Hon. Jennifer T. Lum, U.S. Magistrate Judge, denying Plaintiff’s motion to  
6 compel non-party journalist James Crogan to testify at a deposition and produce  
7 documents pursuant to a duly-served subpoena *duces tecum* in an action pending  
8 in the U.S. District Court for the Northern District of Illinois.

9 Plaintiff’s lawsuit alleges that the FBI and U.S. Department of Justice  
10 violated his rights under the Privacy Act of 1974, 5 U.S.C. §552a (2000), when  
11 SA Royden R. Rice, the Media Coordinator for the FBI’s Chicago Field Office,  
12 disclosed information about Plaintiff to Crogan during a telephone conversation in  
13 late June or early July 2003. Plaintiff alleges that SA Rice’s disclosures to Crogan  
14 violated the Privacy Act because the information at issue was contained in a  
15 system of personnel records maintained by the FBI and was disclosed without  
16 Plaintiff’s prior written consent. *See* 5 U.S.C. § 552a(b).

17 When Plaintiff served Crogan with a subpoena *duces tecum* requiring him to  
18 appear for a deposition and produce documents, Crogan objected, citing the  
19 qualified First Amendment privilege for journalists. Plaintiff moved to compel,  
20 and, on February 17, 2005, Plaintiff and Crogan submitted a Local Rule 37-2 joint  
21 stipulation and supporting documentation to the Court. *See* Joint Stipulation  
22 Regarding Plaintiff’s Motion to Compel Non-Party Journalist James Crogan to  
23 Testify at Deposition and Produce Documents Pursuant to Subpoena *Duces Tecum*  
24 and for Attorney’s Fees and Costs (“Joint Stip.”).

25 On or about February 25, 2005, the Court referred the dispute to the Hon.  
26 Jennifer T. Lum, U.S. Magistrate Judge, who held a hearing on the matter on April  
27 12, 2005.

1 On June 10, 2005, Magistrate Lum denied Plaintiff's motion to compel,  
2 finding that the evidence sought by Plaintiff was not "crucial" to Plaintiff's  
3 Privacy Act claim.<sup>1</sup> See Order Re Plaintiff's Motion to Compel Non-Party  
4 Journalist James Crogan to Testify at Deposition and Produce Documents  
5 ("Order"). More specifically, the Magistrate found that, because certain, limited  
6 pieces of information about Plaintiff were already in the public domain, the  
7 evidence Plaintiff sought from Crogan about the more expansive information  
8 revealed to him by SA Rice was not clearly relevant to whether SA Rice violated  
9 the Privacy Act. *Id.* at 5-6. Because the Magistrate's ruling is based on a clearly  
10 erroneous understanding of Plaintiff's claim and is otherwise contrary to law, it  
11 must be reversed, and Crogan must be compelled to testify at deposition and  
12 produce the requested documents.

13 **II. FACTUAL BACKGROUND.**

14 Plaintiff is a fourteen-year veteran of the FBI and has worked as a special  
15 agent since September 9, 1990. See Joint Stip. at 2. Plaintiff was assigned to the  
16 counter-terrorism squad of the FBI's Chicago Field Office for approximately nine  
17 years. *Id.* Plaintiff also is a whistleblower who, among other disclosures, publicly  
18 revealed that the FBI withheld resources, funding, and support from counter-  
19 terrorism investigations and otherwise incompetently managed or mismanaged  
20 counter-terrorism investigations. *Id.* On June 2, 2003, Plaintiff participated in a  
21 press conference in Washington, D.C., during which he criticized the FBI's  
22 handling of counter-terrorism investigations. *Id.*

23 In late June or early July, 2003, SA Rice disclosed Privacy Act-protected  
24 information about Plaintiff to Crogan during a telephone conversation. *Id.*  
25 Plaintiff learned of these disclosures when Crogan subsequently contacted both  
26

---

27 <sup>1</sup> The Magistrate's ruling was served, by mail, on Plaintiff's counsel on June  
28 13, 2005.

1 Plaintiff and Plaintiff's attorney, David P. Schippers, and informed them of his  
2 conversation with SA Rice. *Id.* Plaintiff believes SA Rice's disclosures were  
3 intended to discredit him and undermine his whistleblowing. *Id.*

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

- 11 (1) Plaintiff had been involved in ten internal investigations, thus  
12 indicating he had a poor record as an agent;
- 13 (2) there were a number of agents in Plaintiff's squad who could  
14 provide adverse information about Plaintiff and he (SA Rice)  
15 would recommend Crogan be permitted to interview these  
16 agents;
- 17 (3) Plaintiff currently was under internal investigation by the FBI;
- 18 (4) Plaintiff maintains a side business and operates a website as  
19 part of that side business; and
- 20 (5) the United States Attorney in Chicago, not the FBI, closed  
21 criminal and civil cases against terrorist suspect Mohammed  
22 Salah because Plaintiff had not produced sufficient evidence to  
23 support any charges.

24 *Id.* at 2-3 (emphasis added). Shippers' letter also states that Crogan assured him  
25 that his conversation with SA Rice had not been "off the record," meaning that  
26 there was no expectation of confidentiality by SA Rice and Crogan had not  
27 promised SA Rice that he would keep their conversation confidential. *Id.* at 3.

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

8 During the course of discovery, Schippers testified at deposition that his  
9 letter to SAC Knier accurately described what Crogan told him about his  
10 conversation with SA Rice. *Id.* Plaintiff likewise testified at deposition that  
11 Schippers' letter to SAC Knier accurately described what Crogan told him about  
12 his conversation with SA Rice. *Id.* At his deposition, SA Rice admitted to  
13 speaking with Crogan on two occasions in late June or early July, 2003. *Id.* SA  
14 Rice specifically admitted to telling Crogan during their second conversation that  
15 Plaintiff was then under internal investigation by the FBI. *Id.* However, he denied  
16 disclosing to Crogan any of the other information about Plaintiff set forth in  
17 Schippers' July 8, 2003 letter to SAC Knier, including that Plaintiff had been the  
18 subject of ten internal investigations. *Id.* at 3-4. Thus, there is a direct and  
19 significant conflict between Schippers' contemporaneous letter to SAC Knier and  
20 the sworn deposition testimony of Schippers and Plaintiff, on the one hand, and  
21 the sworn deposition testimony of SA Rice, on the other hand. *Id.* at 4.

22 After the depositions of Plaintiff, Schippers, SA Rice, and several other  
23 witnesses had been completed, Plaintiff served a subpoena *duces tecum* on Crogan  
24 on or about November 24, 2004. *Id.* The subpoena required Crogan to appear for  
25 deposition and produce documents concerning: (1) Crogan's telephone  
26 conversation with SA Rice in late June or early July, 2003; and (2) Crogan's  
27 subsequent telephone conversations with both Schippers and Plaintiff. *Id.*

1 Crogan served timely objections to Plaintiff's document requests and, in his  
2 objections, asserted that the testimony and documents Plaintiff seeks are protected  
3 by the qualified First Amendment privilege for journalists. *Id.* Crogan has neither  
4 appeared for deposition nor produced any responsive documents to Plaintiff, citing  
5 the qualified privilege. *Id.*

6 **III. DISCUSSION.**

7 **A. Standards Governing Motions for Review.**

8 With the exception of certain limited matters not pertinent here, a  
9 judge may designate a magistrate judge to hear and determine any pretrial matter  
10 pending before the court. 28 U.S.C. § 636(b)(1)(A). "A judge may reconsider any  
11 pretrial matter under this subparagraph (A) where it has been shown that the  
12 magistrate judge's order is clearly erroneous or contrary to law." *Id.*; *see also*  
13 Fed.R.Civ.P. 72(a). Under L.R. 72-2.1, a party objecting to a magistrate's ruling  
14 must file a "motion for review" designating the specific portions of the ruling  
15 objected to and stating the grounds for the objection.

16 **B. The Magistrate's Ruling is Clearly Erroneous.**

17 There is no dispute that the test articulated by the U.S. Court of  
18 Appeals for the Ninth Circuit ("Ninth Circuit") in *Shoen v. Shoen*, 48 F.3d 412  
19 (9th Cir. 1995) ("*Shoen I*") governs Crogan's assertion of the qualified First  
20 Amendment for journalists.<sup>2</sup> Under *Schoen II*, a litigant can overcome the  
21 privilege where the testimony and/or documents sought are: (1) unavailable  
22 despite exhaustion of all reasonable alternative sources; (2) noncumulative; and  
23 (3) clearly relevant to an important issue in the case. *Schoen II*, 48 F.3d at 415-16.  
24 The Magistrate found that Plaintiff satisfied the first two elements of the *Schoen*  
25

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26  
27 <sup>2</sup> In *Schoen II*, the Ninth Circuit clarified a prior ruling in *Schoen v. Schoen*, 5  
28 F.3d 1289 (9th Cir. 1993) ("*Schoen I*").

1 II test, but did not satisfy the third element. See Order at 3-6. Plaintiff disputes  
2 that the Magistrate properly applied the third prong of the test.

3 Specifically, the Magistrate erroneously found that Plaintiff's lawsuit  
4 revolves around only four factual assertions and, because limited information  
5 about these four assertions was already in the public domain, the evidence Plaintiff  
6 sought from Crogan could not be clearly relevant to an important issue. See Order  
7 at 5-6. Indeed, the Magistrate effectively found that, because this limited  
8 information was already in the public domain, Plaintiff could have no Privacy Act  
9 claim:

10 . . . Plaintiff has testified in his deposition that the following four  
11 items form the basis of his Privacy Act claim: (1) a 1999  
12 investigation by the FBI's Office of Equal Employment Opportunity  
13 Affairs ("EEO") in response to another agent's racial discrimination  
14 complaint; (2) a 1999 investigation by OPR concerning a sexual  
15 harassment complaint made against him by SA Karen Medernach; (3)  
16 the June 2003 investigation by [Office of Professional Responsibility]  
17 relating to an unauthorized press conference that plaintiff held on  
18 June 2, 2003; and (4) plaintiff's business of selling baby furniture.  
19 Thus, it appears that the Privacy Act claim, which is the sole claim in  
20 the Complaint, revolves around these four claims only.

21  
22 Yet information regarding these topics had already been placed in the  
23 public domain by plaintiff himself, through press conferences or on  
24 his own website, and, in the case of the sexual harassment complaint,  
25 as a result of a publicly filed lawsuit. The fact that the information  
26 that forms the crux of plaintiff's Privacy Act claims was already in  
27 the public domain undermines plaintiff's claim. Thus, plaintiff's  
28

1 argument that the information is crucial to establishing his claim is  
2 not persuasive.

3 Order at 5-6 (emphasis added).

4 These four items simply do not form the “crux” of Plaintiff’s claim. Rather,  
5 as even the Magistrate acknowledged when she set forth Plaintiff’s factual  
6 contentions in her ruling, Plaintiff alleges that SA Rice disclosed the following  
7 information to Crogan:

8 In the Joint Stipulation, plaintiff contends that SA Rice disclosed the  
9 following information to Schippers (sic): (1) Plaintiff had been the  
10 subject of ten FBI internal affairs investigations, thus indicating that  
11 he had a poor record as an agent; (2) there were a number of agents in  
12 Plaintiff’s squad who could provide adverse information about  
13 Plaintiff, and he (SA Rice) would recommend Crogan be permitted to  
14 interview these agents; (3) Plaintiff currently then under investigation  
15 by the FBI; (4) Plaintiff maintains a side business and operates a  
16 website as part of that side business; and (5) the United States  
17 Attorney in Chicago, not the FBI, closed criminal and civil cases  
18 against terrorist suspect Mohammed Salah because Plaintiff had not  
19 produced sufficient evidence to support any charges.

20 Order at 5 (emphasis added).

21 Plaintiff subsequently clarified that his Privacy Act claim is based on the  
22 following factual contentions: (1) SA Rice disclosed to Crogan that Plaintiff had  
23 been the subject of a combined total of ten internal investigations; (2) SA Rice  
24 disclosed to Crogan that Plaintiff was then under investigation by the FBI’s Office  
25 of Professional Responsibility (“OPR”); and (3) SA Rice disclosed to Crogan that  
26 the U.S. Attorney in Chicago had caused the criminal and civil cases against  
27 Mohammed Salah to be closed because Plaintiff had not produced sufficient  
28

1 evidence to support any charges against Salah. *See* Plaintiff's Supplemental  
2 Memorandum of Law Filed Under L.R. 37-2.3 ("Supplemental Memorandum) at  
3 1.

4 Notwithstanding that the Magistrate erred in finding Plaintiff contends SA  
5 Rice disclosed this information to Schippers, when in actually Plaintiff contends  
6 the disclosure was made to Crogan (*see* Order at 5), Plaintiff has never contended  
7 that SA Rice disclosed information to Crogan about any individual internal  
8 investigations other than an on-going OPR investigation.<sup>3</sup> Plaintiff has never  
9 contended that SA Rice disclosed information to Crogan about the 1999 EEO  
10 investigation or the 1999 OPR investigation regarding Karen Medernach. Plaintiff  
11 has contended that SA Rice told Crogan that Plaintiff had been subject to a  
12 combined total of ten internal investigations. It is this contention and the other  
13 two contentions identified in Plaintiff's Supplemental Memorandum -- not some  
14 contention concocted by Crogan's attorneys -- that give rise to Plaintiff's Privacy  
15 Act claim. The entire factual basis for the Magistrate's ruling is clearly erroneous.

16 In addition, the Magistrate's finding that, in certain, isolated instances,  
17 information about three of the ten individual, internal investigations involving  
18 Plaintiff may have been placed in the public domain is irrelevant to the important  
19 issue here of whether SA Rice disclosed to Crogan that Plaintiff had been involved  
20 in a combined total of ten internal investigations. Plaintiff contends that SA Rice  
21 told Crogan Plaintiff had been involved a total of ten -- not three -- internal  
22 investigations. For the Magistrate to disaggregate Plaintiff's factual contention  
23 that SA Rice told Crogan Plaintiff had been involved in a combined total of ten  
24 internal investigations into individual investigations completely misconstrued  
25 Plaintiff's factual contention. It was clearly erroneous for the Magistrate to base  
26 her ruling on factual contentions Plaintiff never made.

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27  
28 <sup>3</sup> SA Rice admitted making this particular disclosure. *See* Joint Stip. at 3.

1           Moreover, following the Magistrate's erroneous reasoning, Crogan's  
2 assertion of the qualified privilege could be sustained only if he presented  
3 evidence demonstrating that information about the ten separate internal  
4 investigations to which Plaintiff has been subjected was already in the public  
5 domain in June-July 2003.<sup>4</sup> However, Crogan failed to present such evidence, and  
6 there is no such evidence in the record. Nor did Crogan present any evidence  
7 demonstrating that somewhere in the public domain is information about Plaintiff  
8 being subject to a combined total of ten internal investigations. Thus, even if the  
9 Court were to accept the Magistrate's reasoning that Plaintiff cannot maintain an  
10 action for violation of the Privacy Act if the information allegedly disclosed was  
11 already in the public domain, Crogan's assertion of the qualified privilege must be  
12 overruled because he failed to present such evidence. It was clearly erroneous for  
13 the Magistrate to rule otherwise.<sup>5</sup>

14           Finally, it cannot be said that having Crogan provide first hand testimony  
15 and documentary evidence about the information disclosed to him by SA Rice is

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17 <sup>4</sup> By Plaintiff's count, the actual number is nine, including the "current"  
18 investigation referenced by SA Rice during his conversation with Crogan in late  
19 June or early July, 2003. *See* Joint Stip. at 15, n.11.

20 <sup>5</sup> In effect, Crogan asked the Magistrate to usurp the jurisdiction of the U.S.  
21 District Court for the Northern District of Illinois and decide whether Plaintiff  
22 could assert a Privacy Act claim in this case. Neither the Magistrate nor this  
23 Court, however, is in a position to decide the validity of Plaintiff's claim on a  
24 motion to compel, as there are questions of fact concerning what information SA  
25 Rice disclosed to Crogan and whether that information was known previously to  
26 Crogan from public sources, and there are mixed questions of fact and law  
27 concerning whether Plaintiff can maintain a claim the Privacy Act under these  
28 circumstances. The Northern District of Illinois has not ruled that Plaintiff cannot  
assert a claim under the Privacy Act for such reasons, and the Defendants have not  
made any motion to dismiss or motion for summary judgment on such grounds.  
The Court should respect that these issues are properly within the sole  
jurisdictional purview of Judge Norgle in the Northern District of Illinois.

1 not clearly relevant to whether such unauthorized disclosure by SA Rice violated  
2 the Privacy Act. Without this evidence, it is unlikely that Plaintiff will be able to  
3 overcome an expected summary judgment motion by Defendants. Other than SA  
4 Rice, who has denied telling Crogan that Plaintiff was involved in a combined  
5 total of ten internal investigations, Crogan is the only source of direct evidence  
6 about what SA Rice said to Crogan during their 2003 telephone call. Schippers  
7 and Plaintiff may well be precluded from presenting evidence about what Crogan  
8 later told them about his conversation with SA Rice, as such testimony may be  
9 hearsay. Thus, Plaintiff may be unable to demonstrate the existence of a genuine  
10 dispute of material fact about the substance of the 2003 conversation between  
11 Crogan and SA Rice. *See* Fed.R.Civ.P 56(e) (“Supporting and opposing affidavits  
12 shall be made on personal knowledge, shall set forth such facts as would be  
13 admissible in evidence, and shall show affirmatively that the affiant is competent  
14 to testify to the matters stated therein.”). Without question, the evidence Plaintiff  
15 seeks from Crogan is clearly relevant to an important issue, and it was clearly  
16 erroneous for the Magistrate to rule otherwise.<sup>6</sup>

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18  
19 <sup>6</sup> The magistrate also displayed a fundamental misunderstanding of Plaintiff’s  
20 claim when she declared that she was denying Plaintiff’s motion to compel  
21 “without prejudice” because “[P]laintiff’s Privacy Act claim may evolve in the  
22 future as a result of additional discovery or pre-trial motions and rulings . . . .” *See*  
23 Order at 7 n.2. Discovery in this case has closed except for Plaintiff’s effort to  
24 depose Crogan. Plaintiff deliberately chose to depose Crogan last because of the  
25 requirement of *Schoen II* that evidence from a journalist be unavailable “despite  
26 exhaustion of all reasonable alternative sources.” *Schoen II*, 48 F.3d at 416.  
27 Moreover, Plaintiff’s factual contention is that SA Rice disclosed to Crogan that  
28 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 2001 telephone call. 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.

1           **C.     The Magistrate’s Ruling is Contrary to Law.**

2           It also was contrary to law for the Magistrate to find that Plaintiff could not  
3 maintain a Privacy Act claim merely because some, but not all, of the allegedly  
4 disclosed information was already in the public domain. As Plaintiff demonstrated  
5 in his Second Supplemental Memorandum of Law, both the U.S. Courts of  
6 Appeals for the Third and Tenth Circuits have squarely held that the fact that  
7 information is a matter of public domain is *not* a defense to a Privacy Act claim.

8           In *Quinn v. Stone*, 978 F.2d 126 (3rd Cir. 1992), the U.S. Court of Appeals  
9 for the Third Circuit (“Third Circuit”) held that the Department of the Army’s  
10 disclosure of an employee’s address and telephone number from its system of  
11 records without the written consent of the employee was a violation of the Privacy  
12 Act notwithstanding that such information was listed in the local telephone  
13 directory and, therefore, in the public record. Third Circuit Judge A. Leon  
14 Higginbotham, Jr., writing for the court, declared as follows:

15           Appellees have cited to this court no case that stands for the  
16 proposition that there is no violation of the [Privacy] Act if the  
17 information is merely readily accessible to the members of the public  
18 (such as in the local telephone book) and our research has discovered  
19 none. We doubt if any court would so hold. To do so would  
20 eviscerate the Act’s central prohibition, the prohibition against  
21 disclosure. For instance, such an argument would short-circuit the  
22 delicate balancing courts now engage in between the FOIA and the  
23 Privacy Act under 5 U.S.C. § 552a(b)(2). [Citations omitted.] To  
24 define disclosure so narrowly as to exclude information that is readily  
25 accessible to the public would render superfluous the detailed  
26 statutory scheme of twelve exceptions to the prohibition on  
27 disclosure. [Footnote emitted.] We conclude that making available  
28

1 information which is readily accessible to the members of the public  
2 is a disclosure under 552a(b), subject, of course, to the Act's  
3 exceptions.

4 978 F.2d at 134.

5 In *Gowan v. Dep't of the Air Force*, 148 F.3d 1182, 1193 (10th Cir. 1998),  
6 the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") fully adopted the  
7 reasoning in *Quinn* when it stated: "We adopt the Third Circuit's reasoning and  
8 hold that an agency may not defend a release of Privacy Act information simply by  
9 stating that the information is a matter of public record." Thus, two federal courts  
10 of appeal that have considered this issue have held that the fact that information is  
11 a matter of public record is no defense to the unauthorized disclosure of that  
12 information in violation of the Privacy Act.<sup>7</sup>

13 Under the Privacy Act, agencies are prohibited from "disclosing any record  
14 which is contained in a system of records by any means of communication to any  
15 person, or to another agency" unless they have the written consent of the person to  
16 whom the record pertains or the disclosure fits one of the twelve statutory  
17 exceptions. There is no exception to the Privacy Act's unambiguous prohibition

18 \_\_\_\_\_  
19 <sup>7</sup> The notion that a person has no privacy interest in information in the public  
20 domain has been rejected in the context of other federal statutes, such as the  
21 Freedom of Information Act ("FOIA"). In *Dep't of Defense v. Federal Labor*  
22 *Relations Authority*, 510 U.S. 487, 500, 114 S. Ct. 1006, 127 L. Ed.2d 324 (1994),  
23 the Supreme Court upheld an agency's refusal under FOIA to release the home  
24 addresses of non-union members to a union, citing privacy concerns, despite the  
25 fact that the information could be obtained from public records. Similarly, in  
26 *Dep't of Justice v. Reporters' Committee for Freedom of the Press*, 489 U.S. 749,  
27 762-63, 109 S. Ct. 1468, 103 L. Ed.2d 774 (1989), the Supreme Court upheld the  
28 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.

1 on disclosure of information because the information was previously made  
2 available to the public. The absence of such an exception is dispositive that any  
3 prior public disclosure of the information released to Crogan by Rice does not  
4 vitiate the Privacy Act violation in the instant case.

5       Rather than following the clear and persuasive authority of the two appellate  
6 courts in *Quinn* and *Gowan* -- neither Plaintiff, nor Crogan or the Magistrate could  
7 identify any Ninth Circuit authority on point -- the Magistrate relied on the  
8 unreviewed and non-precedential ruling of a U.S. District Court in *Barry v. Dep't*  
9 *of Justice*, 63 F. Supp.2d 25 (D.D.C. 1999).<sup>8, 9</sup> The Magistrate should have  
10 rejected the *Barry* decision for several reasons. First, it lacks the rigorous analysis  
11 of the Privacy Act contained in *Quinn* and, thus, fails to give effect to the  
12 Congressional scheme which, as discussed above, does not include any exception  
13 for disclosure of information previously released to the public. Second, it fails to  
14 cite any legal precedent for its holding. Third, it reaches its holding by incorrectly  
15 distinguishing *Quinn* as a case involving the disclosure of information that could  
16 be found only in isolated public records. While the public telephone directory can  
17 hardly be described as an isolated public record, it is notable that the *Barry* court's  
18 attempt to find a basis for its holding by distinguishing other cases based on the  
19 means used to make the disclosed information available to the public is tenuous  
20 and without any statutory or other legal basis.

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21  
22 <sup>8</sup> The Magistrate's ruling erroneously cites this decision as a ruling of by the  
23 U.S. Court of Appeals for the District of Columbia Circuit. It is a ruling of the  
24 U.S. District Court for the District of Columbia.

25 <sup>9</sup> On June 28, 2005, the U.S. Court of Appeals for the District of Columbia  
26 Circuit upheld contempt findings against several journalists who refused to give  
27 testimony in a Privacy Act case after their assertions of the qualified First  
28 Amendment privilege for journalists were rejected. *Lee v. Dep't of Justice*, No.  
04-5301, 2005 U.S. App. LEXIS 12758 (D.C. Cir. June 28, 2005).

1 The two other decisions on which the Magistrate based her ruling, *Ash v.*  
2 *United States*, 608 F.2d 178 (5th Cir. 1979) and *Cox Broadcasting Corp. v. Cohn*,  
3 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed.2d 328 (1975), are inapposite and easily  
4 distinguishable. *Ash* is not on point because it involved the publication within a  
5 military chain of command of information from a nonjudicial proceeding open to  
6 all personnel in the chain of command, not a disclosure of information from  
7 records maintained within a system of records. *Cox Broadcasting Corp.* is  
8 inapposite because it is not even a Privacy Act case. Thus, in addition to being  
9 clearly erroneous, the Magistrate's ruling also is contrary to law.

10 **IV. CONCLUSION.**

11 For the foregoing reasons, and for the reasons set forth in the Joint  
12 Stipulation, Plaintiff's Supplemental Memorandum of Law Filed Under L.R. 37-  
13 23, and Plaintiff's Second Supplemental Memorandum of Law Filed Pursuant to  
14 Request of the Court, Plaintiff respectfully requests that the Court reverse the  
15 Magistrate's ruling and grant Plaintiff's motion to compel Crogan to testify and  
16 produce documents pursuant to Plaintiff's subpoena.

17  
18 DATED: June 29, 2005

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1 **PROOF OF SERVICE BY MAIL**

2 I am employed in the County of Los Angeles, State of California. I am over  
3 the age of 18 and not a party to the within action. My business address is 2540  
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6 **10, 2005 RULING; MEMORANDUM OF POINTS AND AUTHORITIES IN**  
7 **SUPPORT THEREOF** by placing a true and correct copy thereof in a sealed  
envelope addressed as follows:

8 Counsel for Defendants Federal Bureau of Investigation and  
9 U.S. Department of Justice:

10 Matthew Lepore  
11 Trial Attorney  
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I declare under penalty of perjury of the laws of the State of California that  
the foregoing is true and correct. and that this declaration was executed on June  
29, 2005 at San Marino, California.

27   
28 **CONSTANCE S. RUFFLEY**