

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

Priority   
Send   
Enter   
Closed   
JS-5/JS-6   
JS-2/JS-3   
Scan Only

FILED  
CLERK, U.S. DISTRICT COURT  
JUN 10 2005  
CENTRAL DISTRICT OF CALIFORNIA  
BY  DEPUTY

SCANNED

DOCKETED ON CM  
JUN 10 2005  
BY  051

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROBERT G. WRIGHT, JR.,	)	NO. <del>MISC.</del> CV 05-1223-RGK(JTLx)
	)	
Plaintiff,	)	ORDER RE PLAINTIFF'S MOTION TO
	)	COMPEL NON-PARTY JOURNALIST
v.	)	JAMES CROGAN TO TESTIFY AT
	)	DEPOSITION AND PRODUCE DOCUMENTS
FEDERAL BUREAU OF INVESTIGATION,	)	
ET AL.,	)	(Civil Action No.: 03C-5876
	)	United States District Court,
Defendants.	)	Northern District of Illinois,
	)	Judge Charles R. Norgle)
	)	
	)	

On April 12, 2005, the Court heard argument on plaintiff's Motion to Compel Non-Party Journalist James Crogan to Testify at Deposition and Produce Documents, which the parties filed on February 17, 2005. Thereafter, the Court took the matter under submission. Upon review of the pleadings filed in this matter and the argument presented by counsel, the Court rules as follows:

On August 21, 2003, plaintiff filed an action in the United States District Court, Northern District of Illinois, entitled Wright v. FBI, et al., No. 03C-5776. In that action, plaintiff alleges that the Federal Bureau of Investigation ("FBI") and U.S. Department of Justice ("DOJ") violated his rights under the Privacy Act, 5 U.S.C. §

10

1 552a (2000). The action is premised upon a claim that FBI Special  
2 Agent (SA) Royden Rice disclosed information about plaintiff that was  
3 protected under the Privacy Act to journalist James Crogan, a  
4 freelance journalist. Plaintiff claims that Crogan then had a  
5 conversation with plaintiff and his attorney, Douglas Schippers, and  
6 discussed with them the confidential information that SA Rice had  
7 disclosed to Crogan.

8 Plaintiff now seeks information from Crogan, who is not a party  
9 to this action, by taking his deposition and requesting documents  
10 regarding his contacts with SA Rice. Crogan objected to the  
11 deposition subpoena and request for documents and informed plaintiff  
12 that he would refuse to answer any questions regarding his  
13 conversations with SA Rice, Schippers, or plaintiff, and that he would  
14 assert the journalist's qualified First Amendment privilege. Crogan  
15 also objected to plaintiff's request for documents, asserting that the  
16 documents were protected by the qualified privilege. (Joint Stip. at  
17 3-4).

18 A qualified privilege exists for journalists that protects them  
19 against compelled disclosure of information gathered in the course of  
20 their work. Schoen v. Schoen, 5 F.3d 1289, 1292 n. 5 (9<sup>th</sup> Cir. 1993)  
21 ("Schoen I"). "Rooted in the First Amendment, the privilege is a  
22 recognition that society's interest in protecting the integrity of the  
23 newsgathering process, and in ensuring the free flow of information to  
24 the public, is an interest of sufficient social importance to justify  
25 some incidental sacrifice of sources of facts needed in the  
26 administration of justice. Schoen, 5 F.3d at 1292. In Schoen v.  
27 Schoen, 48 F.3d 412, 416 (9<sup>th</sup> Cir. 1995) ("Schoen II"), the Ninth  
28 Circuit clarified the test for determining whether a civil litigant's

1 interest in disclosure was sufficient to override a journalist's  
2 privilege. The Court noted that the test it adopted must ensure that  
3 compelled disclosure was the exception, not the rule. Id. at 415.  
4 The Court reasoned that frequent court-compelled disclosures could  
5 encourage destruction of research materials soon after publication.  
6 Id. Moreover, "in the ordinary case the civil litigant's interest in  
7 disclosure should yield to the journalist's privilege. Indeed, if the  
8 privilege does not prevail in all but the most exceptional cases, its  
9 value will be substantially diminished. Id. (quoting Zerilli v.  
10 Smith, 656 F.2d 705, 712 (D.C. Cir. 1981)). The Court then held that  
11 a civil litigant is entitled to requested discovery notwithstanding a  
12 valid assertion of the journalist's privilege by a nonparty only upon  
13 a showing that the requested material is: (1) unavailable despite  
14 exhaustion of all reasonable alternative sources; (2) noncumulative;  
15 and (3) clearly relevant to an important issue in the case.  
16 Furthermore, there must be a showing of actual relevance; a showing of  
17 potential relevance was not sufficient. Id. at 416.

18 In this case, the first two elements of the test set forth in  
19 Schoen II have been satisfied. Plaintiff has already taken the  
20 depositions of SA Rice, Schippers, and plaintiff. Second, an issue  
21 exists as to what SA Rice specifically told Crogan during their  
22 conversations. Thus, Crogan's testimony, and the information sought  
23 by the document requests, would not be cumulative. The third factor  
24 that plaintiff must address is whether the information sought is  
25 clearly relevant to an important issue in the case. It is here that  
26 the court must closely examine the arguments raised by both parties.  
27 Plaintiff contends that the information SA Rice disclosed to Crogan  
28 pertains to a major issue in the case and, therefore, Crogan's

1 testimony is clearly relevant. On the other hand, Crogan argues that  
2 the information is not protected under the Privacy Act, which is the  
3 crux of plaintiff's action, because plaintiff, himself, disclosed the  
4 information earlier and it was already in the public domain.

5 Information that is already made public is not protected by the  
6 Privacy Act. See Barry v. U.S. Department of Justice, 63 F. Supp. 2d  
7 25, 28 (D.C. Cir. 1999) (plaintiff had no protectable privacy interest  
8 in a report posted on the Internet because it had already been  
9 released to the media); Ash v. United States, 608 F.2d 178, 179 (5th  
10 Cir. 1979) (disclosure of information in proceeding that was open to  
11 Navy personnel was in that sense public and was not a "disclosure"  
12 under the Privacy Act). Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S.  
13 469, 494-495 (1975) ("even the prevailing law of invasion of privacy  
14 generally recognizes that the interests in privacy fade when the  
15 information involved already appears on the public record").

16 The Complaint filed in this action alleges that defendants  
17 violated plaintiff's rights under the Privacy Act, 5 U.S.C. § 552a.  
18 (See Complaint, Exh. D to Joint Stip). As set forth in the Complaint,  
19 the Privacy Act allegations revolve primarily around the claim that SA  
20 Rice disclosed information pertaining to plaintiff's involvement in  
21 Internal Affairs ("IA") investigations and an investigation being  
22 conducted of the Office of Professional Responsibility ("OPR"). (See  
23 Complaint at ¶s 9, 11, 19, and 20). A violation under the Privacy Act  
24 requires the following: (1) the agency "disclosed" information; (2)  
25 the information "disclosed" a "record" contained within a "system of  
26 records;" (3) an adverse impact resulted from the disclosure; and (4)  
27 the agency's disclosure was willful and intentional. 5 U.S.C. § 552a.

28 ///

1 Plaintiff also alleges that in addition to the information  
2 protected by the Privacy Act, SA Rice made other statements of fact  
3 that he knew were misleading or blatantly false. (See Complaint at ¶s  
4 11-15). In the Joint Stipulation, plaintiff contends that SA Rice  
5 disclosed the following information to Schippers: (1) plaintiff had  
6 been involved in ten internal affairs investigations, indicating he  
7 had a poor record as an agent; (2) there were a number of agents in  
8 plaintiff's squad who could provide adverse information about  
9 plaintiff; and SA Rice would recommend that Crogan be permitted to  
10 interview these agents; (3) plaintiff currently was under internal  
11 investigation by the FBI; (4) plaintiff maintained a side business and  
12 operated a website as part of that side business; and (5) the United  
13 States Attorney in Chicago closed criminal and civil cases against a  
14 terrorist suspect because plaintiff had not produced sufficient  
15 evidence to support any charges.

16 More specifically, however, plaintiff has testified in his  
17 deposition that the following four items form the basis of his Privacy  
18 Act claim: (1) a 1999 investigation by the FBI's Office of Equal  
19 Employment Opportunity Affairs ("EEO") in response to another agent's  
20 racial discrimination complaint; (2) a 1999 investigation by OPR  
21 concerning a sexual harassment complaint made against him by SA Karen  
22 Medernach; (3) the June 2003 investigation by OPR relating to an  
23 unauthorized press conference that plaintiff held on June 2, 2003; and  
24 (4) plaintiff's website called "Little Bobby Creations" relating to  
25 plaintiff's business of selling baby furniture. (Exh. D at 211:7-  
26 212:5 to Joint Stip). Thus, it appears that the Privacy Act claim,  
27 which is the sole claim in the Complaint, revolves around these four  
28 claims only.

1 Yet information regarding these topics had already been placed in  
2 the public domain by plaintiff himself, through press conferences<sup>or</sup>  
3 on his own website, and, in the case of the sexual harassment  
4 complaint, as a result of a publicly filed lawsuit. (See Joint Stip.  
5 at 6-7). The fact that the information that forms the crux of  
6 plaintiff's Privacy Act claims was already in the public domain  
7 undermines plaintiff's claim. Thus, plaintiff's argument that the  
8 information is crucial to establishing his claim is not persuasive.<sup>1</sup>  
9 Moreover, the facts in this case do not involve public information  
10 that could have only been found in isolated public records. See  
11 Barry, 63 F. Supp. 2d at 28 (distinguishing cases involving  
12 information that may have been "public" but that could be found only  
13 in isolated public records and finding that "[t]here was nothing  
14 isolated or obscure about the [] in this case").

15 ///

16  
17 <sup>1</sup> Plaintiff filed a Second Supplemental Memorandum in which he  
18 referred to two cases, Quinn v. Stone, 978 F.2d 126, 134 (3d Cir.  
19 1992) and Gowan v. Dep't of the Air Force, 148 F.3d 1182, 1193 (10<sup>th</sup>  
20 Cir. 1998) (relying upon Quinn) in support of his argument that  
21 information disclosed as a matter of public record is not a defense  
22 to a Privacy Act violation. The court in Quinn found that making  
23 available information which is readily accessible to members of the  
24 public is a disclosure under the Privacy Act. Quinn, 978 F.2d at  
25 134. Notwithstanding this, both Quinn and Gowan are  
26 distinguishable. Neither case involved a situation where the  
27 complaining plaintiff was responsible for putting forth the  
28 information in the public domain. Here, plaintiff issued press  
releases, held press conferences, and established a website  
discussing the information of which he now complains. Furthermore,  
the court in Quinn observed that several courts have held that there  
is no violation under Section 552a if each individual member of the  
public is presumed to know the information at issue. Id. at 135  
(court found that one cannot presume that the public knows of  
addresses and telephone numbers of all persons listed in a local  
telephone book). In this case, the public domain into which the  
subject information was presented was far more reaching (i.e.,  
through a press release, a press conference, and the Internet).

1 Finally, upon balancing plaintiff's request against the strong  
2 policy considerations in favor of upholding the journalist's  
3 privilege, see, e.g., Zerilli, 656 F.2d at 712, this Court cannot find  
4 that plaintiff has met his burden in establishing the clear and actual  
5 relevance of the information sought to the claims. Accordingly,  
6 plaintiff's Motion to Compel is DENIED without prejudice.<sup>2</sup>

7 DATED: June 9, 2005

8   
9 \_\_\_\_\_  
JENNIFER T. LUM  
UNITED STATES MAGISTRATE JUDGE

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26 \_\_\_\_\_  
27 <sup>2</sup> Because plaintiff's Privacy Act claim may evolve in the  
28 future as a result of additional discovery or pre-trial motions and  
rulings, this Court's Order is without prejudice to plaintiff  
renewing his discovery request in the future.