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1 Sterling E. Norris, Esq. (SBN 040993)
2 JUDICIAL WATCH, INC.
2540 Huntington Drive, Suite 201
3 San Marino, CA 91108
Tel.: (626) 287-4540
4 Fax: (626) 237-2003
Attorneys for Plaintiff

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CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES

FILED

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

11 ROBERT G. WRIGHT, JR.,
12 Plaintiff,
13 vs.
14 FEDERAL BUREAU OF
INVESTIGATION, et al.,
15 Defendants

) Case No. Misc. CV 05 1223 RGK
) (Civil Action No.: 03C-5876
) United States District Court, Northern
) District of Illinois, Judge Charles R.
) Norgle)

) **PLAINTIFF'S SECOND
) SUPPLEMENTAL MEMORANDUM
) OF LAW FILED PURSUANT
) REQUEST OF THE COURT**

) Complaint Filed: August 21, 2003
) Discovery Cutoff: None
) Pre-trial Conference: None
) Trial Date: None

1 Plaintiff Robert G. Wright, Jr. ("Plaintiff") files this supplemental
2 memorandum of law pursuant to the request of the Court at the oral argument on
3 Plaintiff's Motion to Compel non-party journalist James Crogan ("Crogan") to testify
4 and produce documents pursuant to Plaintiff's duly-served subpoena *duces tecum*.
5 Specifically, the Court requested Plaintiff to file a supplemental memorandum
6 discussing any case law holding that a Privacy Act violation had been committed
7 where the information disclosed in violation of the Privacy Act previously had been
8 made available to the public.¹
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10 Although we have not found any decisions of the U.S. Court of Appeals for the
11 Ninth Circuit ("Ninth Circuit") on point, both the U.S. Courts of Appeals for the
12 Third and Tenth Circuits have squarely held that the fact that the information
13 disclosed is a matter of public record is not a defense to a Privacy Act violation
14 claim. In *Quinn v. Stone*, 978 F.2d 126 (3rd Cir. 1992), the U.S. Court of Appeals for
15 the Third Circuit ("Third Circuit") held that the Department of the Army's disclosure
16 of an employee's address and telephone number from its system of records without
17 the written consent of the employee was a violation of the Privacy Act
18 notwithstanding that such information was listed in the local telephone directory and,
19 therefore, in the public record. In *Quinn*, the Lettterkenny Army Depot released the
20 address and telephone number of a plaintiff civilian employee to the Pennsylvania
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22 ¹ As a preliminary matter, *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) ("*Shoen*
23 *IP*") does not instruct or require this Court to decide the ultimate issue in this action --
24 - *i.e.*, whether there is a Privacy Act violation in this case. This Court must respect
25 the jurisdiction of U.S. District Judge Charles Norgle in the U.S. District Court for
26 the Northern District of Illinois to decide the ultimate issue in this case. Crogan must
27 be compelled to comply with Plaintiff's subpoena because his testimony and
28 documents are relevant to determine what information was disclosed to him by FBI
Special Agent Royden Rice ("Rice"). This factual issue is the crux of Plaintiff's case
and Crogan's testimony bears directly on this important issue.

1 Game Commission (“PGC”) in connection with a PGC investigation of whether the
2 plaintiff had committed a wildlife hunting violation under Pennsylvania law. Third
3 Circuit Judge A. Leon Higginbotham, Jr., writing for the appellate court, stated in
4 pertinent part as follows:

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

20 978 F.2d at 134 (Emphasis added.).

21 Even though the plaintiff’s address and telephone number had previously been
22 made a matter of public record because the plaintiff had it listed in the local
23 telephone directory, this prior public disclosure was not a defense to the Privacy Act
24 violation committed in *Quinn*. The *Quinn* holding properly interprets the Privacy
25 Act as written by Congress, and respects the Congressional intent evidenced in the
26 detailed statutory scheme in the Privacy Act, which flatly prohibits an agency’s
27 disclosure of information about a person maintained by the agency as a record in a
28 system of records without the written consent of the affected person. Importantly,
 there is no exception in the Privacy Act for records that previously have been made

1 accessible to the public. Had Congress desired to create such an exception, it could
2 have done so.

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4 In *Gowan v. Dep't of the Air Force*, 148 F.3d 1182, 1193 (10th Cir. 1998), the
5 U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") fully adopted the
6 reasoning in *Quinn* when it stated: "We adopt the Third Circuit's reasoning and hold
7 that an agency may not defend a release of Privacy Act information simply by stating
8 that the information is a matter of public record." Thus, two federal courts of appeal
9 that have considered this issue have held that the fact that information is a matter of
10 public record is no defense to the unauthorized disclosure of that information in
11 violation of the Privacy Act.
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15 Under the Privacy Act, agencies are prohibited from "disclosing any record
16 which is contained in a system of records by any means of communication to any
17 person, or to another agency" unless they have the written consent of the person to
18 whom the record pertains or the disclosure fits one of the twelve statutory exceptions.
19 There is no dispute that Plaintiff did not consent to Rice's disclosure of information
20 about him to Crogan. Furthermore, Congress did not provide for an exception to the
21 Privacy Act's unambiguous prohibition on disclosure of information because the
22 information was previously made available to the public. The absence of such an
23 exception is dispositive that any prior public disclosure of the information released to
24 Crogan by Rice does not vitiate the Privacy Act violation in the instant case.
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1 In addition, even though certain facts concerning several internal FBI
2 investigations involving Plaintiff may have been made accessible to the public, there
3 is no evidence in the public record that Plaintiff had been involved in ten
4 investigations, as Rice disclosed to Crogan. This further precludes this Court from
5 ruling in favor of Crogan here.
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8 Plaintiff submits that this Court should follow the federal courts of appeals'
9 decisions in *Quinn* and *Gowan, supra*, and reject the federal district court decision in
10 *Barry v. Dep't of Justice*, 63 F. Supp.2d 25 (D.D.C. 1999). The Barry decision
11 should be rejected for several reasons. First, it lacks the rigorous analysis of the
12 Privacy Act contained in *Quinn* and, thus, fails to give effect to the Congressional
13 scheme which, as discussed above, does not include any exception for disclosure of
14 information previously released to the public. Second, it fails to cite any legal
15 precedent for its holding. Third, it reaches its holding by incorrectly distinguishing
16 *Quinn* as a case involving the disclosure of information that could be found only in
17 isolated public records. While the public telephone directory can hardly be described
18 as an isolated public record, it is notable that the *Barry* court's attempt to find a basis
19 for its holding by distinguishing other cases based on the means used to make the
20 disclosed information available to the public is tenuous and without any statutory or
21 other legal basis.
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1 Finally, the notion that a person has no privacy interest in information that has
2 previously been released to the public has no basis under the Privacy Act and other
3 federal statutes too, such as the Freedom of Information Act (“FOIA”). In *Dep’t of*
4 *Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994), the
5 Supreme Court upheld an agency’s refusal under FOIA to release the home addresses
6 of non-union members to a union, citing privacy concerns, despite the fact that the
7 information could be obtained from public records. Similarly, in *Dep’t of Justice v.*
8 *Reporters’ Committee for Freedom of the Press*, 489 U.S. 749, 762-63 (1989), the
9 Supreme Court upheld the Department of Justice’s refusal to release “rap sheet”
10 information on criminal defendants, again citing privacy concerns, even though the
11 underlying criminal convictions were public records. Thus, the mere fact that
12 information about a person may have been disclosed to the public does not mean that
13 such person cannot have a privacy interest in the information.
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19 For all of the above reasons, the mere fact that certain information disclosed by
20 Rice to Crogan may have previously been made public is not a defense to the Privacy
21 Act violation alleged in the instant case. *See Quinn, supra; Gowan, supra.*
22 Furthermore, the fact that Plaintiff had been involved in ten internal investigations
23 had not previously been made public. Therefore, Crogan’s argument that Plaintiff
24 did not have a privacy interest in this information is without basis and must be
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1 rejected. Accordingly, this Court should grant Plaintiff's motion to compel. See n.1
2 *supra*.

5
6 DATED: April 18, 2005

JUDICIAL WATCH, INC.
PAUL J. ORFANEDES
STERLING E. NORRIS

8
9 By: 
10 _____
11 STERLING E. NORRIS
12 Attorneys for Plaintiff
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1
2 **PROOF OF SERVICE BY MAIL**

3 Case Name: Wright v. FBI *et al.*
4 Court: United States District Court, Northern District of Illinois
5 Case No.: 03C-5876 (N.D. Ill.); Case No.: **CV-05-1223-RGK** (C.D. Cal.)

6 I am over the age of 18 years and not a party to this action. My business address is 2540
7 Huntington Drive, Suite 201, San Marino, California 91108, which is located in the county where the
8 mailing described below took place.

9 On April 18, 2005, I placed a true and correct copy of document entitled:

10 **PLAINTIFF'S SECOND SUPPLEMENTAL MEMORANDUM OF LAW FILED
11 PURSUANT TO REQUEST OF THE COURT**

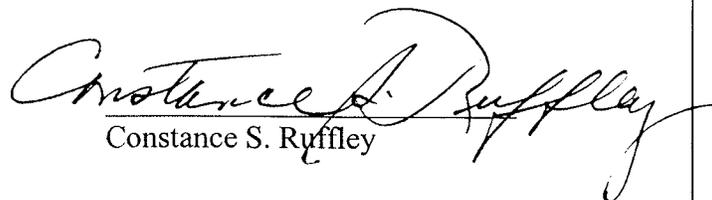
12 in an envelope, sealed the envelope, placed proper first-class postage thereon, and placed it for collection
13 with the United States Postal Service mail pick-up at 2540 Huntington Drive, San Marino, California
14 91108. The envelope was addressed as follows:

15 Susan E. Seager, Esq.
16 DAVIS WRIGHT TREMAINE LLP
17 865 S. Figueroa St., Suite 2400
18 Los Angeles, CA 90017-2566
19 *Attorneys for James Crogan*

20 Matthew Lepore
21 U.S. Department of Justice
22 Civil Division, Federal Programs Branch
23 P.O. Box 883
24 Washington, D.C. 20044
25 *Attorneys for Defendant FBI*

26 I declare under penalty of perjury under the laws of the United States of America that the
27 foregoing is true and correct.

28 Executed on April 18, 2005, at San Marino, California.


Constance S. Ruffley