

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:   
STEVEN J. HATFILL, :   
:   
Plaintiff, :   
- against- : No. 04 Civ. 9577 (CM) (GAY)   
:   
DONALD FOSTER, et al., : ECF CASE   
:   
Defendants. :   
-----X

**NON-PARTY DEPARTMENT OF JUSTICE’S MEMORANDUM OF LAW IN  
OPPOSITION TO CONDÉ NAST PUBLICATIONS’S MOTION TO COMPEL**

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The United States Department of Justice (“DOJ” or “Department”), by its attorneys, Michael J. Garcia, United States Attorney for the Southern District of New York, and Peter D. Keisler, Assistant Attorney General, Civil Division, respectfully submits this memorandum of law in opposition to Condé Nast Publications’s (“CNP”) Motion to Compel.

### **PRELIMINARY STATEMENT**

The anthrax attacks of October 2001 were the worst incidents of bioterrorism in American history. Twenty-two persons were infected; five died. In response to the attacks, the government launched one of the largest and most complex criminal investigations ever undertaken. Over four years later, that investigation remains open and active, and one of the DOJ’s highest priorities. CNP now seeks access to essentially the entirety of the Federal Bureau of Investigation’s (“FBI”) investigative files for the purpose of defending itself in civil litigation to which the government is not a party. Recognizing that such access would unacceptably compromise the integrity of this massive and ongoing criminal investigation, the Deputy Attorney General denied CNP’s request. The Court should uphold that decision.

The deferential standard of review established by the Administrative Procedure Act (“APA”), 5 U.S.C. § 701, et seq., not any standard presented under Rule 45 of the Federal Rules of Civil Procedure, should govern the Court’s review. Indeed, multiple courts have now recognized that Rule 45 does not even apply to the government, as it refers only to “persons,” a term long interpreted to exclude the sovereign.

The governing APA standard requires that a court defer to the agency’s decision so long as the decision was not arbitrary or capricious. The Deputy Attorney General’s decision warrants deference. Turning over the FBI’s investigative files in a matter of this magnitude to a private party would jeopardize the integrity of over four years of intensive investigative effort,

permitting anyone – including those responsible for the attacks – to map the investigation. It would also reveal the sources and methods that the FBI has brought to bear on the case, jeopardizing not only this particular investigation, but future cases as well. Moreover, given the enormous volume of documents at issue – perhaps as many as one million pages – the processing and production of these documents would unduly burden the government and drain necessary resources away from solving this crime.

Similar concerns require rejection of CNP's contention that, under Rule 45, the government must provide a document-by document description of the withheld documents. Even if Rule 45 applied, not only would the production of an index be revealing of the ongoing investigation, it would be virtually impossible to accomplish given the number of documents at issue.

Balanced against the weighty interests of the government and the public in protecting the investigation and conserving DOJ resources, moreover, CNP's need for the documents is insubstantial. This Court has already held that the article at issue in this case was not directed at the FBI's investigation, but was instead the product of Donald Foster's own investigation. CNP is free to discover all the sources of Foster's investigation if it wishes to defend the case based on the ground that the matters reported in the article were true. CNP is also free to use the tools of civil discovery to conduct its own investigation. CNP can, in addition, defend its case based on the state of mind and intent of the author. The Court should, accordingly, uphold the Deputy Attorney General's decision denying CNP's request for documents and testimony and deny CNP's motion to compel.

## **BACKGROUND**

Two years after the anthrax attacks, CNP published an article in the October 2003 issue of Vanity Fair, entitled “The Message in the Anthrax.” The article was based upon the conclusions of a Professor of Dramatic Literature at Vassar College, Donald Foster. Foster conducted his own investigation into who committed these murders. Hatfill v. Foster, No. 04 Civ. 9577 (CM), 2005 WL 2932071, at \*13 (S.D.N.Y. Nov. 2, 2005). The views expressed are Foster’s alone – not those of the FBI. Foster “discusses in great detail the steps *he* took, the analysis *he* carried out, the theories *he* devised about the anthrax attacks and the efforts *he* made to sell those theories to the FBI.” Id. at \*15.

Following publication of this article, Hatfill sued CNP and other defendants for defamation in the United States District Court for the Eastern District of Virginia. In connection with that action, CNP served a subpoena upon DOJ seeking testimony and documents. The subpoena sought testimony relating to investigative actions taken against Hatfill, the results of those actions, the scientific analysis and conclusions regarding the type of anthrax used in the mailings, and investigatory findings relayed to Congress. Memorandum of Law In Support of Condé Nast Publications’ Motion to Compel Discovery From Nonparty United States Department of Justice (“CNP Mem.”), Ex. 1, Tab B (Ex. B). It also called for all documents provided by or to a number of individuals, including the head of the FBI Field Office handling the investigation, one of the two lead case agents on the investigation, and the prosecutor assigned to work with the FBI’s Amerithrax task force on a daily basis. Id., Ex. 2, Tab C ¶ 7 (Ex. C).

Pursuant to the Federal Housekeeping Statute, 5 U.S.C. § 301, and the Supreme Court’s decision in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951),<sup>1</sup> the subpoena was treated as a request for production of documents and testimony under DOJ’s Touhy regulations at 28 C.F.R. § 16.21 et seq. Applying these regulations, Deputy Attorney General James Comey concluded that releasing the requested information would adversely affect law enforcement interests and, rather than advance the administration of justice, would impair efforts to identify and prosecute the anthrax mailer. CNP Mem., Ex. 3. The Deputy Attorney General also concluded that the information sought was protected by the law enforcement privilege and that CNP had not shown that the need for such protected information outweighed the potential harm to the United States and to the public from disclosure. Id. The Deputy Attorney General further determined that CNP’s requests sought the disclosure of documents that were also protected by other common law and statutory privileges or bars on disclosure and, thus, could not be released for that additional reason. Id.<sup>2</sup>

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<sup>1</sup> In Touhy, the Court upheld the authority of the Attorney General to prescribe regulations for the custody, use, and preservation of DOJ records. 340 U.S. at 468. As the Court noted, “[w]hen one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed, the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious.” Id.

<sup>2</sup> In further support of its opposition, DOJ is submitting two *ex parte* declarations – (1) a classified declaration from Michael A. Mason, the Acting Executive Assistant Director for Administration of the FBI (“EAD”) and former Assistant Director In-Charge of the FBI’s Washington Field Office, dated Jan. 18, 2006, which is available for review by the Court upon request; and (2) a declaration from the Chief of the Criminal Division of the United States Attorney’s Office for the District of Columbia, Stevan E. Bunnell, dated Jan. 18, 2006, which the government seeks leave to file *in camera*. These declarations further explain the decision of the Deputy Attorney General denying CNP’s request for documents and testimony, should the Court require such information. See Camp v. Pitts, 411 U.S. 138, 143 (1973). In addition, to the extent the Court concludes that Rule 45, rather than the APA, governs the Court’s review of this matter, the declarations also assert appropriate privileges on behalf of the FBI and U.S.

## ARGUMENT

### POINT I

#### **THE AGENCY’S DECISION TO WITHHOLD DOCUMENTS AND TESTIMONY MUST BE UPHELD SO LONG AS IT WAS NOT ARBITRARY AND CAPRICIOUS**

##### **A. The APA Governs the Application of DOJ’s Touhy Regulations**

While conceding that the APA provides the Court with jurisdiction to hear its motion, CNP nonetheless contends that the standard of review in Fed. R. Civ. P. 45, rather than the deferential standard in § 706 of the APA, governs the court’s review of DOJ’s Touhy response. CNP Mem., at 6-8. But most of the courts of appeals that have directly considered the issue have concluded that judicial review of an agency’s response to a subpoena is limited to whether the agency action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). See COMSAT Corp. v. Nat’l Science Foundation, 190 F.3d 269, 277 (4th Cir. 1999); Moore v. Armour Pharm. Co., 927 F.2d 1194, 1197 (11th Cir. 1991); Davis Enters. v. EPA, 877 F.2d 1181, 1186 (3d Cir. 1989); cf. Houston Bus. Journal v. Office of the Comptroller of the Currency, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (noting, in dictum, appropriateness of “arbitrary and capricious” standard).<sup>3</sup> Many district courts, including

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Attorney’s Office.

<sup>3</sup> The Ninth Circuit has reached a contrary result. In Exxon Shipping Co. v. United States Dep’t of Interior, 34 F.3d 774, 780 (9th Cir. 1994), it declined to consider the requester’s claim under the APA, and concluded instead that the federal rules of discovery provided the framework for analyzing discovery requests made against government agencies. The Second Circuit has, however, “disagree[d] with the Ninth Circuit’s approach,” at least to the extent that the Ninth Circuit overlooked the necessity of invoking the APA’s waiver of sovereign immunity. See EPA v. General Elec. Co., 197 F.3d 592, 598 (2d Cir. 1999) (“GE”). Moreover, as discussed below, the standards of Fed. R. Civ. P. 45, which the Ninth Circuit found controlling, in fact have no relevance to third-party subpoenas issued to the government, which is not a “person” within the meaning of the Rule.

this Court, have followed suit. See Moran v. Pfizer, Inc., No. 99 Civ. 9969 (WHP) (HBP), 2000 WL 10998844, at \*2 n.1 (S.D.N.Y. Aug. 4, 2000) (collecting cases). In Moran – not cited by CNP – the Court noted that even if plaintiff had not conceded that the arbitrary and capricious standard governed, the Court would have applied it anyway because it had “been routinely applied in other circuits in cases involving an agency's refusal to comply with a subpoena.” Id.

The APA should likewise be applied here. The APA standard applies universally to judicial review of agency actions except where Congress has created an alternate scheme for judicial review. See 5 U.S.C. § 706(2); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986). The Deputy Attorney General's decision is no different than any other final agency action amenable to APA review. The APA's deferential standard recognizes the principle of separation of powers that “federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do . . . [because] [o]ur Constitution vests such responsibilities in the political branches.” COMSAT, 190 F.3d at 278 (quoting Chevron U.S.A. Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837, 866 (1984)). “When an agency is not a party to an action, its choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources.” Id.<sup>4</sup>

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<sup>4</sup> Although the Second Circuit has declined to rule on what standard should apply to judicial review of an agency's denial of a request for documents and testimony, see EPA v. General Elec. Co., 212 F.3d 689, 690 (2d Cir. 2000), it has strongly signaled its deference to the agency review process. In In re: SEC ex rel. Glotzer, 374 F.3d 184 (2d Cir. 2004), the court ruled that the sovereign immunity waiver in § 702 of the APA that provided the court with jurisdiction over a subpoena enforcement action against the government was only triggered upon “final agency action” under APA § 704. Id. at 192. Accordingly, the court concluded that “a party seeking to invoke the court's limited power to review agency action under § 702 must first exhaust her administrative remedies” under the agency's Touhy regulations. Id. The Second Circuit in Glotzer thus conceptualized the court's role as being limited to reviewing the agency's determination upon completion of its decision-making process – the same role accorded to courts under § 706 of the APA.

CNP argues that applying a deferential standard of review will somehow improperly interfere with its “‘right to every man’s evidence.’” United States v. Bryan, 339 U.S. 323, 331 (1950). As demonstrated below and through the in camera declaration submitted by EAD Mason, protecting the integrity of a massive and ongoing criminal investigation outweighs the needs of a civil litigant, particularly when other means of discovery are available. Indeed, even a defendant in a criminal trial whose liberty is at stake is not entitled to discover the breadth of information called for in CNP’s request. See Fed. R. Crim. P. 16. Surely a litigant in a civil suit for money damages is not entitled to more.

**B. Rule 45 Does Not Apply to the Federal Government**

Even setting aside the persuasive judicial authority and logic favoring application of the arbitrary and capricious standard of the APA, CNP’s attempt to invoke the standards of Rule 45 fails for an even more fundamental reason: Rule 45 does not apply to non-party federal government agencies. By its terms, Rule 45 authorizes parties to serve subpoenas on “persons” who are not parties to litigation. Fed. R. Civ. P. 45(a)(1)(C) (“Every subpoena shall . . . command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying” of documents or tangible things) (emphasis added). The term “person” is not defined in the Federal Rules, but it is a firmly established rule of statutory construction that “the term ‘person’ does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude [the government].” Will v. Michigan Dep’t of State Police, 491 U.S. 58, 64 (1989) (citations omitted). Indeed, the “longstanding interpretative presumption that ‘person’ does not include the sovereign” has been repeatedly applied, see

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Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 780 (2000), and was well-rooted in the Supreme Court’s precedents before the Court (with the approval of Congress) prescribed the federal rules in 1937. See e.g., United States v. United Mine Workers, 330 U.S. 258, 272 & n.20 (1947) (citing cases from 1873 in support of “an old and well-known rule”); United States v. Fox, 94 U.S. 315, 321 (1876) (“The term ‘person’ as here used . . . cannot be so extended as to include within its meaning the Federal government.”).

The advisory committee notes in Rule 45 make no reference to the federal government. Moreover, the Second Circuit has observed that Rule 45 “make[s] no specific provisions regarding service on the Government as a non-party.” See GE, 197 F.3d at 597. And, even the Dictionary Act defines the term “person” to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals,” omitting any reference to the federal government. 1 U.S.C. § 1.

Because of this, the D.C. Circuit has suggested that a subpoena issued pursuant to Rule 45 may not be used to seek discovery from an agency of the federal government because the term “person” as used in that Rule is ordinarily, and presumptively, construed not to include the sovereign. See Al Fayed v. C.I.A., 229 F.3d 272, 276-77 (D.C. Cir. 2000) (holding that, under 28 U.S.C. § 1782(a), a statute authorizing the issuance of subpoenas, there was “no affirmative evidence to disturb the presumption that ‘person’ excludes the sovereign” in that statute). See also Linder v. Calero-Portocarrero, 251 F.3d 178, 181-82 (D.C. Cir. 2001) (“Although our past decisions have assumed that ‘person’ in Rule 45 included the federal government, we have never expressly so held and our assumption may need to be reexamined in light of Al Fayed”); id. at 181 (finding that Section 1782 – the statute at issue in Al-Fayed – is “a statute similar in effect to Rule 45”). In addition, four district courts have recently expressly held that the federal

government is not within the scope of Rule 45. See Robinson v. City of Philadelphia, 2005 WL 3046308, at \*3 (E.D. Pa. Nov. 10, 2005); United States v. Gabelli, 2005 WL 2375173, at \*2 (D.D.C. May 3, 2005); Yousuf v. Samantar, 2005 WL 1523385, at \*4 (D.D.C. May 3, 2005); Lerner v. Dist. of Columbia, 2005 WL 2375175, at \*2 (D.D.C. Jan. 7, 2005).

To be sure, the Second Circuit has never held that Rule 45 does not include non-party federal government agencies and, in GE, it “permit[ted] the use of subpoenas for discovery to be served upon the United States as a non-party in accordance with the pertinent rules of discovery.” GE, 197 F.3d at 599. But the statutory construction issue presented here was not raised with the Second Circuit in GE and has never been discussed in any Second Circuit opinion. The Second Circuit’s silence on this issue should not preclude the Court from considering the validity of the government’s argument at this juncture, particularly in light of the long-standing presumption reflected in Supreme Court precedent excluding the sovereign from the term “person.”

This Court should accordingly hold that the APA’s arbitrary and capricious standard, not Rule 45, provides the governing standard of review. Under that standard, the Deputy Attorney General’s Touhy denial is to “be given substantial deference,” Moran, 2000 WL 1099884, at \*2 (citing Soler v. G.U., 833 F.2d 1104, 1107 (2d Cir. 1987), and the Court may not substitute its judgment for that of the agency, unless “the agency relies on factors that Congress did not intend it to consider, fails to consider an important factor, or offers an explanation for its decision that is contrary to the evidence before the agency,” id. (quoting Connecticut Dep’t of Public Utilities v. FCC, 78 F.3d 842, 849 (2d Cir. 1996)).

## POINT II

### THE DEPUTY ATTORNEY GENERAL REASONABLY DENIED THE REQUESTS BECAUSE OF POTENTIAL HARM TO LAW ENFORCEMENT INTERESTS

In considering CNP's request for documents and testimony, the Deputy Attorney General properly applied DOJ's Touhy regulations and reasonably concluded that the CNP's request for investigatory records should be denied. The decision should, therefore, be upheld.

#### A. The Deputy Attorney General Properly Applied DOJ Touhy Regulations Barring Disclosure of Investigatory Records Unless Required by the Administration of Justice

Under DOJ's Touhy regulations, the Deputy Attorney General must determine whether a “[d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired[.]” 28 C.F.R. § 16.26(b)(5). Where a disclosure would result in any of these identified harms, the Deputy Attorney General may not authorize such disclosure unless he determines that “the administration of justice requires disclosure.” *Id.* § 16.26(c). Applying this standard, the Deputy Attorney General concluded that authorizing the release of the requested documents and testimony would disclose and impair the effectiveness of certain investigatory procedures and techniques critical to the Amerithrax investigation and was not required for the administration of justice.

The reasonableness of the Deputy Attorney General's conclusion can hardly be questioned. The entire purpose of CNP's Touhy request is to obtain information “essential to answer the basic question of truth or falsity” of the alleged defamatory suggestions and statements in the Vanity Fair article – principally, that “Steven J. Hatfill . . . is, in fact, guilty of being the ‘anthrax mailer.’” *See* Brown Decl. ¶¶ 4, 6, CNP Mem., Ex. 1. To that end, CNP

specifically sought testimony on, for example, actions taken to investigate Hatfill and the results of those investigative actions, information conveyed by DOJ to Congress concerning the investigation in the anthrax mailings, and the scientific analysis of the anthrax contained in the letters. See Subpoena ¶¶ 1, 2, 5, CNP Mem., Ex. 1, Tab B (Ex. B). Similarly, it sought all documents pertaining to Hatfill, including, for example, “investigative reports, witness interviews, affidavits, declarations and any other form of written statement.” Subpoena Ex. C., ¶ 9, id. (Ex. C). The subpoena also sought other documents relating to the Amerithrax investigation that were reviewed by the former head of the FBI field office handling the investigation (Van Harp), a lead agent on the investigation (Robert Roth), or the prosecutor assigned to the Amerithrax team (Kenneth Kohl). Id. ¶ 7. CNP, in short, seeks the release of core investigative information relating to the anthrax attacks.

The dangers of revealing such information are obvious. As the Deputy Attorney General found, the disclosure of the Amerithrax files “would greatly increase the likelihood that those who may be of interest to investigators could circumvent or impede investigative efforts by, for example, fabricating defenses, manufacturing or concealing evidence, or tampering with witnesses.” CNP Mem., Ex. 3, at 2. Revealing the direction of DOJ’s investigation and the evidence it has amassed could assist potential suspects creating obstacles to further investigation or prosecution. See Raphael v. Aetna Cas. & Surety Corp., 744 F. Supp. 71, 74 (S.D.N.Y. 1990) (“Law enforcement operations have little hope of being effective if conducted in full public view.”); Virginia Dep’t of State Police v. Washington Post, 386 F.3d 567, 574 (4th Cir. 2004) (“[L]aw enforcement agencies must be able to investigate crime without the details of the investigation being released to the public in a manner that compromises the investigation.”)

The importance of the law enforcement interest sought to be protected by the Deputy Attorney General and recognized in § 16.26(b)(5) of DOJ's regulations has been repeatedly recognized in various contexts. The law enforcement privilege, for example, has been specifically developed to prevent interference with law enforcement investigations. See In re Dep't of Investigation of New York, 856 F.2d 481, 484 (2d Cir. 1988) ("The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation."). Likewise, in the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., Congress has exempted from disclosure records or information compiled for law enforcement purposes that "could reasonably be expected to interfere with enforcement proceedings," "could reasonably be expected to disclose the identity of a confidential source . . . [or] information furnished by a confidential source," or "would disclose techniques and procedures for law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(7)(A), (D), (E). In addition, courts have frequently stayed discovery civil cases that could adversely impact active law enforcement investigations.<sup>5</sup>

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<sup>5</sup> See, e.g., St. Paul Fire & Marine Ins. Co. v. United States, 24 Cl. Ct. 513, 517 (1991); United States v. Hugo Key & Son, Inc., 672 F. Supp. 656, 659 (D.R.I. 1987); FDIC v. Chuang, No. 85 Civ. 7468 (SWK), 1986 WL 3518, at \*2 (S.D.N.Y. 1986); Capital Eng'g & Mfg. Co. v. Weinberger, 695 F. Supp. 36, 41 (D.D.C. 1988); Souza v. Schiltgen, No. C-95-3997 MHP, 1996 WL 241824, at \*3 (N.D. Cal. 1996); United States v. Any and All Assets of that Certain Business Known as Shane Co., 147 F.R.D. 99, 101 (M.D.N.C. 1993); First Merch.'s Enter. v. Shannon, No. 88 Civ. 8254 (CSH), 1989 WL 25214, at \*1-\*3 (S.D.N.Y. 1989) (citing S.E.C. v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (upholding grant of stay)); Integrated Generics v. Bowen, 678 F. Supp. 1004, 1009 (E.D.N.Y. 1988); Larouche Campaign v. F.B.I., 106 F.R.D. 500, 501 (D. Mass. 1985).

Moreover, in situations analogous to those presented here, in which the government was not a party to underlying civil lawsuits in which it received subpoenas, this court and others have routinely declined to enforce subpoenas threatening to intrude on government investigations. In Raphael, 744 F. Supp. at 74, for example, this court quashed a third-party subpoena issued to the FBI and one of its agents that “ha[d] a direct bearing on [an] ongoing F.B.I. car theft ring investigation.” The court concluded that “the Government's interest in protecting the secrecy and integrity of its criminal proceeding outweighs plaintiff's need for the information sought in this case.” Id. Likewise, in Borchers v. Commercial Union Assur. Co., 874 F.Supp. 78, 81 (S.D.N.Y. 1995), this court held that the fire department could not be compelled to produce documents *via* a third-party subpoena in a civil suit that “reflect the scope of the criminal [arson] investigation, as well as the identity and substantive testimony of various witnesses interviewed by [the fire marshal] in the course of his investigation.”

Similarly, the U.S. District Court for the Eastern District of Pennsylvania recently denied a defendant's motion to enforce a third-party subpoena for testimony and document production from two federal officials. After concluding that Rule 45 did not authorize the court to compel compliance by federal officials, the court ruled that “even if this Court had such authority, it would be unwise to exercise that power here. The Court cannot allow the sweeping discovery requests of a party in a civil action to disrupt an ongoing criminal investigation.” Robinson v. City of Philadelphia, – F.R.D. –, 2005 WL 3046308, at \*4 (E.D. Pa. Nov. 10, 2005).

CNP argues that even if the Deputy Attorney General correctly concluded that the requirements of §16.26(b)(5) had been met, that DOJ regulations imply that the requested information may be released if it is important to the requesting party's case and is not available through other means. CNP Mem., at 14. But CNP's gloss on DOJ's regulations is wrong and

misleading. Section 16.26(c) provides that information may be disclosed, even if it implicates law enforcement files, if “the Deputy or Associate Attorney General determines that the administration of justice requires disclosure.” See 16 C.F.R. § 16.26(c). Section 16.26(c) makes clear that the term “administration of justice” refers to the *government’s* role in “*administ[ering]*” its law enforcement duties through, for example, “pursu[it] [of] a civil or criminal prosecution or affirmative relief, such as an injunction.” Assisting the defense of the libel action here would not fall within any understanding of DOJ’s duties to administer justice, or anything “require[d]” by those duties. Indeed, the Deputy Attorney General concluded that “the administration of justice -- in particular, the effort to identify and prosecute the anthrax mailer(s) -- would be impaired by disclosure of law enforcement records.” See CNP Mem., Ex. 3, at 2. The Deputy Attorney General’s construction of the Department of Justice’s Touhy regulations must be accorded “substantial deference.” Lyng v. Payne, 476 U.S. 926, 939 (1986).

**B. The Need to Protect the Investigation Outweighs Any Interest CNP Has in Defending Civil Litigation**

Unable to mount a plausible challenge to the substance of the Deputy Attorney General’s decision that the information sought is law enforcement sensitive, CNP claims that its “constitutionally rooted interest” in gathering discovery to defend the libel claim against it overrides the public interest in protecting the government’s investigatory files. CNP Mem., at 15. This claim is incorrect.

To begin with, CNP’s asserted “constitutional” right to discovery derives from two cases, Condit v. Dunne, 225 F.R.D. 100 (S.D.N.Y. 2004), and Perrone v. CBS, No. Civ. A. 96-110, 1997 WL 863266 (D.N.J. Mar. 20, 1997). Both, however, address a defamation defendant’s right to seek discovery from the *plaintiff*. Moreover, in both cases, the courts emphasized that

discovery requests were appropriate because the plaintiff had put the subjects of the discovery at issue. See Perrone, 1997 WL 863266, at \*4 (“Far from constituting ‘fishing,’ the defendants’ discovery requests relate to precisely the matters that plaintiffs themselves put at issue in the complaint.”); Condit, 225 F.R.D. at 108 (“[T]his District has adamantly refused to allow a litigant to invoke privilege to protect discovery of information relating to the matter the litigant has put at issue.”). DOJ is not a party to this litigation. It certainly has not put any information at issue or opened the door to discovery.

Moreover, CNP cites only a single case, In re Nat’l Ass’n of Sec. Dealers, No. 96-0518, 1996 WL 406826 (E.D. La. 1996), for the proposition that a libel defendant is entitled to files from an active investigation. That case concerned a privilege invoked by a self-regulating organization, not the nation’s principal law enforcement organization. And the public interest in the resolution of the fraud issues that were the subject of the investigation in NASD was minimal compared to the public interest in resolving the anthrax murders. In any event, in NASD, the court rejected the proposition that the requesting party was “entitled to blanket inspection of all investigative information utilized” by the NASD. Id. at \*2.

In addition, CNP overstates its need for the requested information. First, CNP ignores the fact that it can defend the libel claim on the grounds that the statements were not made with the requisite intent. See Jordan v. Kollman, 269 Va. 566, 569, 612 S.E.2d 203 (Va. 2005); Gazette, Inc. v. Harris, 229 Va. 1, 15, 325 S.E.2d 713, 725 (Va. 1985). A defense based on lack of fault would turn on CNP’s knowledge and state of mind at the relevant time. See Jordan, 269 Va. at 567 (to establish actual malice, plaintiff must prove that “the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.”); Gazette, 229 Va. at 15, 325 S.E. at 725 (where negligence standard applies,

plaintiff must prove that “the defendant either knew [the statement] to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based.”). There would therefore be no need to open DOJ files to scrutiny.

Second, although CNP repeatedly suggests that it needs discovery of DOJ’s investigation because that investigation is the focus of challenged matters in the Vanity Fair article, this Court has firmly concluded that Foster’s own investigation, not DOJ’s investigation, is the subject of the article and the focus of Hatfill’s defamation claim. See Foster, 2005 WL 2932071, e.g., at \*15 (“[I]t does not take a literary forensicist to figure out the focus of the article is Foster’s investigation, not the FBI.’s”); id. (“What was going on at the FBI while Foster was doing the work that led him to identify Hatfill as ‘my suspect’ is barely mentioned.”). Thus, CNP’s claim that it needs to explore the activities and findings of the investigation itself misses the mark.<sup>6</sup>

Third, to the extent that CNP needs to prove the truth of what is allegedly defamatory in the article – the suggestion that Hatfill was the anthrax mailer – CNP could do so through its own investigation. CNP is entitled to depose Hatfill, questioning him directly on whether he is responsible for the mailings and probing his ability and motive to commit the crimes. It can likewise subpoena private individuals and entities who may have knowledge bearing on whether Hatfill had any involvement in the mailings. And CNP may obviously offer the declaration of its

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<sup>6</sup> CNP argues that DOJ’s interest in protecting its investigative information is “at best, weak” because certain information about Hatfill has appeared in press reports. See CNP Mem. at 18. But the fact that information has appeared in the press does not mean that the information is, in fact, true, or that further harm would not come from official public confirmation of investigative details through the release of investigative files. And any suggestion that the public’s interest in prosecuting the bioterrorist(s) responsible for the anthrax mailings has diminished is unsupported.

co-defendant Professor Foster, whose expertise and knowledge CNP relied upon in publishing the alleged defamatory article. CNP thus has no need to peer into DOJ's investigation.

At bottom, law enforcement agencies are not mere repositories of investigative information for civil litigants seeking to "shortcut their own discovery efforts." See Ross v. Bolton, 106 F.R.D. 22, 24 (S.D.N.Y. 1985) (the "strong public interest in maintaining the integrity of effective industry self-regulation . . . would clearly be undermined by making NASD files fair game for any of the thousands of private securities fraud litigants across the country who wish to shortcut their own discovery efforts and instead to reap the benefits of the Association's ongoing, statutorily governed work"). Given the magnitude of the public interest in solving the anthrax mailings, CNP's interest in defending a civil claim must yield to law enforcement considerations.

**C. The Deputy Attorney General Is Not Obligated to Conduct a Document-by-Document Review of the Million Pages of Documents Sought by CNP to Justify His Decision**

CNP also asserts that the Deputy Attorney General must support his Touhy denial with a "document-by-document (or, for testimony, subject-by-subject)" privilege log. CNP Mem. at 10. But CNP's request calls for an enormous quantity of investigative information. The files sought by CNP – such as all documents provided to or by certain key persons from DOJ and the FBI – include as many as one million pages. Moreover, there can be little question but that the information sought by CNP is law enforcement sensitive. The request on its face seeks the files and testimony pertaining to an active investigation, including specific information relating to the investigative techniques and the results of those techniques. Neither DOJ's Touhy regulations nor any other principle of law requires that DOJ divert resources to reviewing and logging such a volume of documents where the request so plainly seeks law enforcement information. In fact,

the Touhy regulations do not require an index of documents withheld under any circumstances.

Moreover, like subsection (b)(7) of the FOIA, which exempts from disclosure investigatory records compiled for law enforcement purposes, 5 U.S.C. § 552(b)(7), section 16.26(b)(5) of DOJ's Touhy regulations categorically states that the Deputy Attorney General "will not" disclose "investigatory records compiled for law enforcement purposes." Id. It is well-established that no document-by-document justification is necessary to justify a withholding based upon law enforcement concerns in response to requests under the FOIA. Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-36 (1978) (applying principle to FOIA subsection 7(A)). Indeed, "Congress [has] recognized that law enforcement agencies ha[ve] legitimate needs to keep certain records confidential lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case." Id. at 224. Thus, "generic determinations of likely interference" with law enforcement are sufficient to justify non-disclosure. Id. at 236. No greater obligation can exist under DOJ's Touhy regulations, which, like FOIA, address public dissemination of information.

It is also no answer to argue that DOJ must produce a privilege log because it has a burden of showing that every page of every requested document is sensitive. CNP Mem., at 9-13. Where non-law enforcement material "is so interspersed with [law enforcement sensitive] material that separation by the agency and policing of this by the courts would impose an inordinate burden, the material is still protected because . . . it is not 'reasonably segregable.'" Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979) (citation omitted).

The case law CNP relies upon as purportedly requiring the Deputy Attorney General to produce a privilege log of the anthrax investigative files does not even address the Touhy context, or the obvious analogue presented in FOIA. Indeed, each of the third-party cases CNP

relies upon, In re DG Acquisition Corp., 151 F.3d 75, 81 (2d Cir. 1998), Cruz v. Kennedy, No. 97 Civ. 4001 (KMW), 1997 WL 839483 (S.D.N.Y. Dec. 19, 1997), and Friedman v. Bache Halsey Stuart Shields, 738 F.2d 1336 (D.C. Cir. 1984), arose under Fed. R. Civ. 45(d) alone and, therefore, has no application. Each of these cases, moreover, involved circumstances far different than those presented in this case. In re DG Acquisition did not even involve a request for law enforcement documents. Cruz involved a situation, unlike here, in which investigatory records were sought to corroborate a claim of wrongdoing on the part of the police. 1997 WL 839483, at \*3. And, in Friedman, one of the two subpoenaed agencies had already completed its investigation and published its findings, see 783 F.2d. at 1339, and the other agency represented to the court that much of the investigative information requested was already in the public domain, see id. at 1343. Here, the anthrax investigation is on-going and the investigatory files CNP seeks are not in the public domain. Thus, unlike in Friedman, there is a danger that producing the type of privilege log or index CNP urges would allow an active investigation to be mapped.<sup>7</sup>

Lastly, even in the Rule 45 context, a party is only required to perfect a privilege through a privilege log once there has been a preliminary showing of relevance by the requesting party. See e.g., Friedman, 738 F.2d at 1341; Kuntsler v. City of New York, No. 04 Civ. 1145 (RWS) (MHD), 2005 WL 2656117, at \*2 (S.D.N.Y. 2005). CNP has not even attempted to make a preliminary showing as to why it needs virtually all of the anthrax documents to prove the truth

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<sup>7</sup> The circumstance presented here is also distinguishable from that of Maher v. Monahan, No. 98 Civ. 2319 (JGK), 2000 WL 648166 (S.D.N.Y. 2000), which CNP also relies upon (CNP Memo, at 10-11), where the law enforcement privilege asserted by the party was “speculative.” Id. at \*4.

of its allegations against Hatfill.<sup>8</sup>

Notwithstanding the reasons why a privilege log is neither required nor appropriate, the ex parte declarations submitted by DOJ, see supra note 2, discuss generally the files at issue in CNP's request and the DOJ's need to withhold the requested information.

### POINT III

#### **THE DEPUTY ATTORNEY GENERAL PROPERLY DETERMINED THAT PRODUCING THE REQUESTED INFORMATION WOULD UNACCEPTABLY DIVERT RESOURCES DIRECTED AT SOLVING THE CRIME**

The Deputy Attorney General also appropriately found CNP's request to be unduly burdensome. CNP Mem., Ex. 3, at 3. The Deputy Attorney General found that committing DOJ's and FBI's limited resources and personnel "to locating and reviewing potentially responsive documents and redacting privileged or otherwise protected information would result in a significant and unacceptable diversion of essential resources from the Amerithrax investigation" and other duties. Id. The Deputy Attorney General also found that the requested testimony would unduly tax investigative personnel. Id.

The Court should uphold this decision. One of the purposes behind Touhy regulations is to "conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business."

Boron Oil Co. v. Downie, 873 F.2d 67, 70 (4th Cir. 1989). Given the tremendous breadth of the

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<sup>8</sup> In fact, CNP's own brief reveals the overbreadth of its requests. For example, CNP specifically requested from DOJ all documents concerning Hatfill's Privacy Act lawsuit, including all documents produced in the case. Notwithstanding its objections, DOJ agreed to produce to CNP a redacted set of DOJ's entire production in that case. CNP now complains in its brief that the materials produced "concern almost exclusively the subject of press contacts with the federal government and do not bear at all on the core issues of the truth or falsity of the challenged statements and implications in the article." CNP Mem., at 6.

documents sought, and the tremendous burden that the requested testimony would place upon investigative personnel, the need to conserve government resources is reasonable and is an independent basis to reject the requests.

Ample authority supports the Deputy Attorney General's decision. In COMSAT, 190 F.3d 269, for example, the National Science Foundation ("NSF") similarly refused to respond to three subpoenas issued by an arbitrator to produce documents and testimony related to a construction contract dispute between third parties (the plaintiff corporation and an NSF awardee). The Fourth Circuit upheld NSF's decision, finding that "[c]ompliance with the third-party subpoenas issued in this single case, where the litigant sought a tremendous number of agency documents and demanded the presence of agency officials at depositions, would measurably strain agency resources and divert NSF personnel from their official duties." Id. Other courts have reached similar conclusions. Davis Enters., 877 F.2d at 1187; Moore, 927 F.2d at 1197-98.

#### **POINT IV**

#### **THE DEPUTY ATTORNEY GENERAL REASONABLY CONCLUDED THAT APPLICABLE PRIVILEGES AND STATUTORY BARS PROHIBIT THE RELEASE OF THE REQUESTED INFORMATION**

In addition to denying CNP's request for documents and testimony based on harm to law enforcement interests described in Point II above, the Deputy Attorney General also concluded that other privileges and statutory bars require withholding of the requested information. This decision was reasonable and should be upheld.

##### **A. Attorney-Client Privilege and Attorney Work Product**

The Deputy Attorney General reasonably concluded that CNP's request sought information protected by the attorney-client privilege and the work product doctrine. Paragraph

8 of Exhibit C to the subpoena expressly seeks “all documents relating to Hatfill v. Ashcroft, et al., No. 1:03-cv-1793, currently pending in the United States District Court for the District of Columbia,” including all “written material” concerning the case. The request would thus clearly encompass privileged documents, such as drafts of pleadings and internal memoranda, notes, and emails, by DOJ attorneys working on the Hatfill v. Ashcroft matter. The Deputy Attorney General’s decision to decline to release these materials was therefore reasonable and should be upheld.

More generally, CNP requests not just all information pertaining to Hatfill, but all documents related to the Amerithrax investigation provided by or to Kenneth Kohl, the lead prosecutor assigned to the investigation. CNP’s request thus essentially captures all written analyses and other materials prepared by the prosecutors in connection with grand jury proceedings and other efforts undertaken in anticipation of the ultimate trial of the anthrax mailer. The Deputy Attorney General reasonably determined that the request would therefore encompass protected work product. See generally United States v. Nobles, 422 U.S. 225, 238 (1975) (“Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital.”). Affording a libel defendant access to a prosecutor’s work product would no doubt interfere with “the thorough preparation and presentation” of the prosecutor’s case and potentially undermine “the interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence.” Id.

#### **B. Deliberative Process Privilege**

The subpoena also specifically requests testimony on the “bases for DOJ’s determination that Steven J. Hatfill is a ‘person of interest’ to the Amerithrax investigation.” Subpoena, Ex. B,

¶ 3. In addition, the subpoena requests “any and all communications that refer or relate to Steven J. Hatfill between or among the DOJ” and a variety of cabinet-level departments and agencies. *Id.*, Ex. C, ¶5. The Deputy Attorney General properly determined that these requests potentially call for privileged opinions, recommendations, and deliberations and, thus, cannot be disclosed.

More broadly, to the extent that the subpoena calls for information about decisions made in the course of the Amerithrax investigation, the subpoena implicates internal memoranda, emails, and correspondence concerning deliberations about whether to take certain investigative steps. In this regard as well, the subpoena calls for protected predecisional and deliberative information. The decision to withhold these materials should thus be upheld.

**C. Rule 6(e)**

Rule 6(e) expressly precludes an attorney for the government from “disclos[ing] a matter occurring before the grand jury.” *See* Fed. R. Crim. P. 6(e)(2)(B)(vi). “Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.” *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). “The indispensable secrecy of (the) grand jury proceedings . . . must not be broken except where there is a compelling necessity.” *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

CNP requests information that clearly falls within Rule 6(e). Indeed, by requesting all information related to the anthrax investigation provided by or to Kenneth Kohl – the lead Assistant United States Attorney conducting the grand jury proceedings – CNP essentially seeks the entire contents of the grand jury proceeding. Disclosing the requested information would

undoubtedly reveal “matter[s] occurring before a grand jury,” Fed. R. Crim. P. 6(e), and, moreover, would “seriously compromise the secrecy of the grand jury’s deliberations,” DiLeo v. Comm’r, 959 F.2d 16, 19-20 (2d Cir. 1992) (citation omitted). In addition, given the other discovery tools available to CNP, CNP cannot show that its “defense would be greatly prejudiced [without grand jury materials] or that without reference to [them] an injustice would be done.” Procter & Gamble Co., 356 U.S. at 683. Certainly, CNP has not demonstrated a “particularized [and] . . . discrete showing of need” for the entirety of the grand jury proceedings. See Douglas Oil, 441 U.S. at 218 (rejecting “wholesale discovery” request). The Deputy Attorney General’s decision to deny CNP’s request on the grounds of grand jury secrecy should be upheld.

#### **D. Classified Materials**

As explained in the Declaration of Michael Mason, many of the investigative documents CNP seeks are classified. Without question, CNP is not entitled to access these documents. See Exec. Order No. 12958, as amended by Exec. Order 13,292, 68 Fed. Reg. 15,315 (March 3, 2003) (concerning access to classified information); Dep’t of Navy v. Egan, 484 U.S. 518, 529 (1988). The Deputy Attorney General’s decision denying such access was proper.

**CONCLUSION**

For all of the foregoing reasons, CNP's motion to compel the requested documents should be denied.

Dated: January 18, 2006

Respectfully submitted,

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