

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STEVEN J. HATFILL, M.D.,

Plaintiff,

v.

ALBERTO GONZALES
ATTORNEY GENERAL, et al.,

Defendants.

Case No. 1:03-CV-01793 (RBW)

**NON-PARTY JAMES STEWART’S MEMORANDUM
IN OPPOSITION TO PLAINTIFF’S MOTION TO COMPEL DOCUMENTS**

The problem with Plaintiff’s motion to compel production of documents from non-party James Stewart is that the motion ignores testimony in this case making clear that Mr. Stewart *never had any* responsive documents identifying sources. Plaintiff ignores this uncontroverted testimony in moving to compel production, relying on statements from different reporters or assertions about the kinds of records media companies or reporters ought to have. *See* Plaintiff’s Memorandum of Points and Authorities in Support of Motion to Compel Documents from the Media Companies, Allan Lengel, James Stewart, Daniel Klaidman, and Michael Isikoff [Dkt. 166-2] (“Motion”) at 2-4, 6. But Mr. Stewart testified that he did *not* take notes of his conversations with confidential FBI sources on the anthrax investigation or receive any documents from them. He is not a media company, or even still employed by one since his retirement in November 2006. Plaintiff’s motion to compel production of documents from Mr. Stewart should be denied for the simple reason that there is nothing to compel.

DISCUSSION

A. The Subpoena

A true and correct copy of Plaintiff's subpoena to Mr. Stewart is attached hereto as Exhibit 1 ("Stewart Subpoena"). Its document requests are broken down into general requests and requests specific to three broadcasts and a website article.

Broadly stated, the general requests seek (1) notes taken by Mr. Stewart regarding conversations about the anthrax investigation with federal law enforcement officials, including Van Harp, (2) documents provided by federal law enforcement officials regarding the anthrax investigation, and (3) notes or written documentation regarding promises of confidentiality to FBI or DOJ officials relating to the anthrax investigation, as well as any documents reflecting protests or discussions of FBI or DOJ confidentiality requirements for press briefings. *See* Stewart Subpoena. With regard to three specific broadcasts – which aired on May 8, 2003, June 9, 2003, and July 2, 2003 – the subpoena requested from Mr. Stewart all notes related to each broadcast, unaired videotape or "outtakes" of each broadcast, and tapes of each broadcast. *Id.* Finally, the subpoena requested all notes, manuscripts, or other documents drafted by Mr. Stewart relating to a May 8, 2003 article published on the CBS News website summarizing Mr. Stewart's broadcast report.

On March 28, 2006, Mr. Stewart objected to the document requests. *See* Motion Exhibit A [Dkt. 166-3]. Nevertheless, at or around the time of his deposition, Plaintiff was offered copies of the three broadcasts directly by CBS.

B. Mr. Stewart's Testimony

Plaintiff took the opportunity at Mr. Stewart's May 8, 2006 deposition to inquire about potentially responsive documents. Mr. Stewart testified that he did not take notes of any of his conversations with his confidential sources about the anthrax investigation. *See* Declaration of

Chad R. Bowman (“Bowman Decl.”) [Dkt. 174-2] Exhibit 1 (“Stewart Dep.”) at 100:21-101:1, 117:17-19, 125:12-18, 133:4-6. He further testified that none of his FBI sources provided him with any documents. *Id.* at 100:13-20, 117:13-16, 125:9-11, 133:1-3. Finally, he explained that confidentiality promises were a function of his long-standing relationships with these individuals in which they provided information to him in confidence, rather than pursuant to any written agreement. *Id.* at 38:14-40:5. In short, Mr. Stewart testified that the documents requested in Plaintiff’s general request for documents *have never existed*.

With regard to the specific broadcasts, the answers regarding notes about confidential sources or documents from the confidential sources are the same. Indeed, Mr. Stewart did not recall which source he spoke with for which broadcast, *id.* at 20:21-21:6, 46:14-21, 48:3-17, 52:16-20, 53:12-16, 55:18-22, 56:7-11, 56:22-57:10, 61:3-5, 62:2-7, 66:2-6, 67:2-6, 68:10-15, and therefore answered questions by describing his entire course of dealing with the sources relating to the anthrax investigation. Plaintiff did not ask Mr. Stewart at his deposition about any other documents, nor has Plaintiff ever approached Mr. Stewart’s counsel to inquire about whether Mr. Stewart ever had any other documents responsive to his subpoena. Instead, Plaintiff simply filed a motion to compel. In fact, Mr. Stewart has no documents responsive to his subpoena. While CBS Broadcasting Inc. does possess outtakes of an interview with Van Harp that was filmed in advance of the May 8, 2003 broadcasts, these outtakes are outside Mr. Stewart’s possession, custody, or control – and were even before he retired from CBS. *See generally* CBS Opposition at 7-10 (discussing Harp outtakes). Because those outtakes are within CBS’s possession, custody and control, they are addressed in CBS’s separately filed Opposition to Plaintiff’s Motion to Compel.

Finally, the subpoena also seeks documents from Mr. Stewart concerning an article that appeared on a CBS News website on May 8, 2003. However, Mr. Stewart testified with regard to

