

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

STEVEN J. HATFILL, M.D.,)	
)	
Plaintiff,)	
)	
v.)	Civ. A. No. 03-1793 (RBW)
)	
ATTORNEY GENERAL)	
ALBERTO GONZALES, et al.)	
)	
Defendants.)	
)	

**DEFENDANTS' CONSOLIDATED RESPONSE, AND MEMORANDUM IN SUPPORT,
TO REPORTERS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL**

PETER D. KEISLER
Assistant Attorney General

JEFFREY S. BUCHOLTZ
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO, D.C. Bar # 418925
PAUL G. FREEBORNE
JEFFREY M. SMITH
Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW,
Washington, D.C. 20530
Tel: (202) 514-5302
Fax: (202) 616-8470

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Counsel for the Defendants

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	4
A. Without the Names of Sources, Dr. Hatfill Cannot Carry His Burden of Proof in Establishing Liability Under the Privacy Act for the Disclosures He Alleges	4
1. Without the Names of Sources, There Is No Way To Test the Validity of the Testimony Offered by the Reporters	5
2. The “Intentional or Willful” Standard Cannot Be Satisfied Without an Identification of the Alleged Sources	11
3. Dr Hatfill Cannot Show that the Information Allegedly Disclosed Was Actually Retrieved from a System of Records	16
B. Without The Names Of Sources, Dr. Hatfill Similarly Cannot Establish Liability for Any Safeguarding Claim that He May Wish To Pursue	17
CONCLUSION	25

INTRODUCTION

After extensive briefing and argument, the Court recognized in its March 30, 2007 Order that the “wealth of case law suggests that in order to prove that a violation of the Privacy Act has occurred, the actual source of the information must be identified.” Order, at 3. The Court should reject the reporters’ arguments to the contrary and find, in accordance with its observation in its Order, that discovering the source of the alleged “leaks” goes to the heart of this Privacy Act suit.

Without the names of sources, Dr. Hatfill cannot show (1) that Privacy Act protected information was retrieved from a record in a system of records; (2) that the information was disclosed in violation of the Act; or (3) that it was disclosed in a “willful and intentional” manner, as that term is construed under the Privacy Act. Moreover, while the reporters would have this Court believe that they are unfailingly accurate in their recording of what sources tell them, discovery has proven otherwise.

The reporters’ argument that the record demonstrates massive evidence of agency misconduct is both circular as a matter of law and incorrect as a matter of fact. On the one hand, the reporters allege that the “leaks” themselves constitute evidence of agency misconduct and violate the Privacy Act; on the other hand, the reporters claim that the Privacy Act was not meant to address leaks. It was instead intended to be a narrow and specific waiver of sovereign immunity, requiring a plaintiff to satisfy each of the Act’s elements before liability can be imposed.

As set forth in the government’s earlier filing (Dkt. No. 125), any purported “disclosures” that were made by employees of the defendants must be scrutinized to determine if they were “willful and intentional.” This can only be done by questioning each purported source to

determine his or her purpose in disclosing the underlying information, as well as the underlying circumstances. And each alleged source must also be questioned about whether the information was retrieved from a protected record, or, as the reporters suggest, came from “friends and associates of Dr. Hatfill himself,” the rumor mill, or some other source altogether.

This “rule of retrieval” is particularly important given the reporters’ representation to the Court that, in the small number of instances where the alleged disclosures purportedly came from employees of the defendants, they did not appear to come from a system of records at all, but rather consisted of what “investigators were thinking, what leads they intended to pursue, and what events they had recently witnessed -- none of which comes within the ambit of the Privacy Act.” Isikoff, Klaidman, and Lengel Opposition to Plaintiff’s Motion to Compel, at 2. Contrary to the reporters’ claim, Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984), does not nullify the rule of retrieval in criminal investigations. That case involved a situation in which an agency official disclosed his personal recollection of information contained in a record that he had a primary role in creating. No such showing has been made here and none is possible absent the names of the sources.

Finally, absent the identification of sources, the accuracy of the statements at issue and their attribution to a particular source cannot be tested. Because the refusal to identify sources would thwart the ability to effectively cross-examine the reporters, their testimony – even with respect to agency identification – would be inadmissible.

In apparent recognition that the names of the sources are indeed necessary for plaintiff to make out his “disclosure” claim under Section 552a(b), the reporters also argue that they should not be forced to reveal their sources because plaintiff has a “better theor[y]” of recovery under a

so-called safeguarding claim under Section 552a(e)(10). In addition, the reporters suggest that Dr. Hatfill has enough to support his damage claims in the statements made by former Attorney General Ashcroft and FBI spokeswoman Debra Weierman and that it is unnecessary for the reporters to reveal their sources. Neither of these arguments has any merit.

With respect to plaintiff's safeguards claim, plaintiff has little prospect of recovery. Congress intended the requirement of appropriate safeguards to be highly deferential to the agency. Here, there was nothing in the FBI's systems and safeguards that allowed leaks to occur, and appropriate measures were taken to attempt to prevent leaks from occurring. But even if that were not the case, as the reporters necessarily concede, any such claim must be linked to an "adverse effect" upon plaintiff. 5 U.S.C. § 552a(g)(1)(D). For the same reasons that the identity of the sources must be known for plaintiff to prevail upon his disclosure claim, therefore, the same showing is necessary to prevail upon a safeguarding claim here. Indeed, without such evidence, causation between the alleged safeguard violations and harm plaintiff alleges cannot be shown.

With respect to the reporters' contention that the on-the-record statements make the pursuit of plaintiff's other alleged disclosures unnecessary, the government disagrees that either former Attorney General Ashcroft or FBI spokeswoman Debra Weierman violated the Privacy Act. In any event, defendants previously offered to brief these issues on summary judgment, and the Court has already determined not to proceed in a bifurcated manner.

ARGUMENT

A. Without the Names of Sources, Dr. Hatfill Cannot Carry His Burden of Proof in Establishing Liability Under the Privacy Act for the Disclosures He Alleges

The burden to prove a violation of the Privacy Act, including proving that the agency has acted willfully or intentionally, rests with the plaintiff. Numerous cases have resulted in summary judgment for defendant agencies because the plaintiff failed to prove that the agency had acted with the requisite intent. Hill v. United States Air Force, 795 F.2d 1067, 1070 (D.C. Cir. 1986); Moskiewicz v. United States Dep't of Agriculture, 791 F.2d 561, 564 (7th Cir. 1986) (finding that plaintiffs must advance “evidence of conduct which would meet a greater than gross negligence standard, focusing on evidence of reckless behavior and/or knowing violations of the Act on the part of the accused”)¹

Dr. Hatfill also has the burden of showing that the information was contained in a “record” and that the disclosure was retrieved from a record. “Under the Act, there is a rule of retrieval, not a rule of coincidence. If there is information in a record, and a federal employee gained that same information from the use of her own senses, the employee’s telling others what she saw or heard does not violate the Privacy Act, merely because there is a record, subject to the Privacy Act, which also contains that information.” Krieger v. Fadely, 199 F.R.D. 10, 13 (D.D.C. 2001). If the disclosed personal information does not originate in a record within a system of records, it is not covered by the Privacy Act and liability cannot be imposed upon the

¹ See also Hogan v. England, 159 Fed. Appx. 534 (4th Cir. 2005); Conrod v. United States Bureau of Prisons, 146 Fed. Appx. 857 (8th Cir. 2005); Pelletier v. Federal Home Loan Bank of San Francisco, 16 Fed. Appx. 762 (9th Cir. 2001); Reinbold v. Evers, 187 F.3d 348 (4th Cir. 1999); Rebuth v. United States Peace Corps, 947 F.2d 950 (9th Cir. 1991).

defendants. McCready v. Principi, 297 F.Supp.2d 178, 197 (D.D.C. 2003).

In an attempt to dodge plaintiff's motion to compel, the reporters claim that Dr. Hatfill can prevail now without any obligation on their part to reveal their sources. Isikoff, Klaidman, and Lengel Opposition to Plaintiff's Motion to Compel ("IKL Opp."), at 22-23; Stewart Opposition to Plaintiff's Motion to Compel ("Stewart Opp"), at 26-30. But this argument has been fully briefed by the parties in the context of plaintiff's motion to compel (Dkt. No. 121). Based upon that briefing, the Court has already recognized that the "wealth of case law suggests that in order to prove that a violation of the Privacy Act has occurred, the actual source of the information must be identified." March 30, 2007 Order, at 3. Because none of the reporters' arguments disturb this observation, the reporters' arguments in this regard should be rejected.

1. Without the Names of Sources, There Is No Way To Test the Validity of the Testimony Offered by the Reporters

The implicit starting point for the reporters' argument is the notion that the Court must accept as true everything that they attribute to an anonymous source. This is a false premise. Discovery in this case and in plaintiff's related defamation suit has revealed examples of reporting that was at best fallible, and at worst grossly inaccurate.

In Dr. Hatfill's defamation suit against *The New York Times*, plaintiff claimed that *The Times* inaccurately reported that Dr. Hatfill had access to an isolated residence that was a CIA safe house and that Dr. Hatfill distributed Cipro at that location. The sources relied on by *The Times* for that information denied in deposition that they ever communicated such information. Exhibit 1 hereto, at 39-42. Other statements reported by *The Times* were also flatly denied by the purported sources of the information. Id. at 42-44; 45-53.

Discovery has revealed that the accuracy of news reports published by the reporters here are equally subject to question. One of the reporters Dr. Hatfill cites as a recipient of “leaked” information is Brian Ross of *ABC News*. Dr. Hatfill’s spokesperson, Patrick Clawson, had “serious ethical issues” with Mr. Ross’s reporting, Attachment G to Defendants’ Memorandum in Opposition to Plaintiff’s Motion to Compel, Dkt. Nos. 125 &127) id. at 177: 20-21, citing examples of the misidentification of sources and inaccurate reporting. Id. at 177: 12-15. Mr. Clawson claimed that his own “involvement in [a] particular piece was misidentified, and deliberately misidentified” by Mr. Ross. Id. at 178: 13-15. With regard to the substance of Mr. Ross’s reporting, Mr. Clawson testified that “[i]n terms of the anthrax investigation, [Mr. Ross] has broadcast several things where I felt that the information that he broadcast was inaccurate and . . . he was less than responsive in getting it corrected.” Id. at 178:18-22. According to Mr. Clawson, Mr. Ross “was trying to make more out of a report than what he had substance to do . . . You try to make something look bigger than what it actually is based on the facts that you have at hand.” Id. at 222:17-22. This was “not uncommon with Brian Ross reports.” Id. at 222: 19-20.

Indeed, while the reporters seek to prevent the parties from questioning the sources of their news reports, the accuracy of articles presented by the reporters here has been brought into serious question. Mr. Lengel testified that his editor at the *Washington Post* attributed a statement to an anonymous federal law enforcement source that the source never made. See Lengel Deposition Transcript, at 280-82 (Attachment A to the Defendants’ Memorandum in Opposition to Plaintiff’s Motion to Compel, Dkt. Nos. 125 &127). Although Mr. Lengel believes he brought the error to the editor’s attention, the *Washington Post* did not run a

correction. Id. at 277-78. *CBS.com*, meanwhile, reported that, during an interview with Mr. Stewart, former Assistant Director-in-Charge of the FBI's Washington Field Office Van Harp stated that the FBI had "made progress, said Harp of the case against Hatfill." Upon reviewing this report, Mr. Stewart conceded that this was inaccurate. Stewart Deposition Transcript, at 179: 2-11 (Attachment B to Defendants' Memorandum in Opposition to Plaintiff's Motion to Compel, Dkt. Nos. 125 & 127). Mr. Stewart testified that Mr. Harp never made this statement, and that he had never even asked Mr. Harp about Dr. Hatfill, see id. at 179-80; Mr. Harp stated merely that the FBI had made progress in the anthrax investigation (and said nothing at all about Dr. Hatfill).

While the reporters bury these examples in a footnote at the back of their brief, Stewart Opp., at 29 n. 5, the *CBS.com* example demonstrates a serious lack of quality control. Wholly inaccurate comments were put into someone's mouth without the *CBS.com* reporter ever checking with the original reporter, Mr. Stewart. Even after it was published and after Mr. Harp denied the comments in his deposition, *CBS* took no steps to correct it, and Mr. Stewart was completely unaware of it. The reporters claim that "only three" such errors came out in discovery. Stewart Opp., at 29 n. 5. But even if the Court were to accept the reporters' math, that is only because they have steadfastly refused to divulge the names of their sources, thereby preventing the parties from testing the accuracy of the reported statements. As in Dr. Hatfill's suit against *The Times*, those purported sources may in fact dispute more of what was published, or like the *CBS.com* story, it may turn out that the information was entirely misattributed. This is particularly the case here, where Mr. Stewart asserts that he did not intend to quote sources, but simply summarized a collection of opinions that were expressed to him. Stewart Opp. at 36.

Indeed, the reporters themselves point up the fact that understanding the context is critical to understanding what was said by the “sources” and whether a Privacy Act claim is implicated. Mr. Stewart stated in one of his broadcasts that “sources suggest” that the FBI could bring unrelated charges against Dr. Hatfill if they believe he is guilty, not unlike tax charges against Al Capone. As the reporters correctly point out, however, Mr. Stewart explained that his primary source for this “information” was *counsel for Plaintiff* in this case, not any confidential FBI sources. Stewart Opp., at 7 (citing Stewart Dep. at 56: 12-21, 65:6-71:20)(emphasis in original). And when Mr. Stewart then asked his FBI sources if plaintiff’s counsel’s suggestion was a possibility, they purportedly made a “‘grudging’ admission that that was a possibility” but “it did not seem to be a terribly viable one to them.” *Id.* (citing Stewart Dep. at 71:11-20). The context makes clear the source of this information was not the FBI, but plaintiff’s counsel. The context also makes clear that what was said by the sources was not derived from a record in a system of records, but rather was an off-the-cuff statement prompted by information attributed to plaintiff’s counsel. The reporters should not be able to hide behind a purported privilege to insulate the accuracy of their reporting, or prevent the Court from gaining a full understanding of what was said.

The Court should therefore reject the reporters’ theory that identifying their sources is unnecessary. If the reporters were to succeed in their claim of privilege, it would render the reporters’ entire testimony inadmissible at trial. While plaintiff would no doubt seek to introduce reporter testimony that identified certain statements as emanating from unnamed sources at the defendant agencies, the reporters’ refusal to identify those sources would prevent the defendants from effectively cross examining the reporters, rendering their direct testimony

inadmissible. “[C]ross-examination is an indispensable tool in the search for truth,” Lawson v. Murray, 837 F.2d 653, 656 (4th Cir. 1988), and “courts cannot sanction the use of the privilege to prevent effective cross-examination on matters reasonably related to those introduced in direct examination,” United States v. Bilzerian, 926 F.2d 1285, 1293 (2d Cir. 1991)(involving attorney-client privilege); see also United States v. Rosario Fuentes, 231 F.3d 700, 707 (10th Cir. 2000) (a party may not present testimony from a witness who will not submit to cross-examination of that testimony because it would be a “presentation of a half-truth, free from the ‘legitimate demands of the adversarial system’” (quoting Taylor v. Illinois, 484 U.S. 400, 412-13 (1988))); Ideal Elec. Security Co., Inc. v. Int’l Fidelity Ins. Co., 129 F.3d 143, 151 (D.C. Cir. 1997) (a party may not “partially disclose[] the allegedly privileged information in support of its claim against another, but then assert[] the privilege as a basis for withholding from its opponent the remainder of the information which is necessary to defend against the claim”).

For this reason, courts have long held that a witness who refuses to respond to cross examination on a subject of his direct testimony should have his direct testimony on that subject stricken. Rosario Fuentes, 231 F.3d at 707 (“Because [the nonparty witness’s] testimony was not reliable without subsequent cross-examination [precluded by an assertion of privilege], it was properly . . . excluded.”); Lawson, 837 F.2d at 656 (a defense witness’s “refusal to answer questions so relevant and pertinent [to his direct testimony] left the trial judge with no alternative but to strike [his] entire testimony”); United States v. Frank, 520 F.2d 1287, 1292 (2d Cir. 1975) (“[B]y virtue of [the defense witness’s] refusing to answer (for whatever reason) proper, relevant questions on cross-examination going directly to the heart of his testimony on direct examination, the direct testimony became hearsay, since not subject to cross-examination, and

was therefore properly struck.”); United States v. Newman, 490 F.2d 139, 146 (3d Cir. 1974) (“The witness’s refusal to permit questioning on this topic should have led to a striking of the testimony regarding the [topic.]”); United States v. Cardillo, 316 F.2d 606, 611 (2d Cir. 1963) (“[I]f the witness by invoking the privilege precludes inquiry into the details of his direct testimony . . . that witness’s testimony should be stricken in whole or in part.”)²

The sources of the reporters’ information are obviously central both to the litigation and to the reporters’ testimony. Indeed, the sources are essentially the only reason for reporter testimony. If a reporter testifies on direct examination that he had sources inside the defendants, but refuses to respond to defendants’ cross-examination questions regarding the identities of those sources, the defendants will be deprived of their right to inquire into the details of the direct testimony, unable to test the validity of that testimony, and unable to probe the circumstances of the alleged leaks, circumstances that are crucial for claims under a technical statute such as the Privacy Act. For this reason alone, Dr. Hatfill’s case cannot proceed without an identification of the sources, which only the reporters can provide.

² See also, United States v. McKneely, 69 F.3d 1067, 1074-76 (10th Cir. 1995) (where defense witness refused to identify source of drugs on cross-examination, district court properly struck witness’s direct testimony); United States v. Montgomery, 998 F.2d 1468, 1479-80 (9th Cir. 1993) (where defendant refused to identify the source of drugs on cross-examination, district court properly struck his direct testimony because “the government could not effectively impeach [his] testimony without the actual identities of the suppliers”); Cardillo, 316 F.2d at 611-13 (where witness testified that he gave money to defendant but refused to identify the source of that money (citing privilege), it was reversible error not to strike witness’s direct testimony).

2. The “Intentional or Willful” Standard Cannot Be Satisfied Without an Identification of the Alleged Sources

The reporters are correct to recognize that “the Privacy Act constitutes a limited waiver of sovereign immunity” that must “be construed narrowly[.]” IKL Opp. at 11. The Privacy Act thus imposes vicarious liability upon an agency only where there is a showing that there has been an “intentional or willful” dissemination of personal records from an agency’s system of records. 5 U.S.C. § 552a(g)(4). The Act’s legislative history characterizes the “intentional or willful” criterion as falling “[o]n a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, [where] this standard is viewed as only somewhat greater than gross negligence.” *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, reprinted in 120 Cong. Rec. 40405-06 (1974). The D.C. Circuit has thus recognized that an agency acts in an intentional or willful manner “either by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others’ rights under the Act.” Albright v. United States, 732 F.2d 181, 189 (D.C. Cir. 1984); *see also* Hill v. United States Air Force, 795 F.2d 1067, 1071 (D.C. Cir. 1986). The “willful and intentional” standard thus extends only to conduct that is so “patently egregious and unlawful” that anyone undertaking the conduct should have known it to be “unlawful.” Laningham v. United States Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987).

The “intentional or willful action requirement of Section 552a(g)(4) refers only to the intentional or willful failure of the agency to abide by the Act, and not to all voluntary actions which might otherwise inadvertently contravene one of the Act’s strictures.” Albright, 732 F.2d

at 189.³ The reporters allege that Dr. Hatfill is able to satisfy the willful and intentional standard because he has adduced testimony from the reporters that the unidentified sources who purportedly leaked information ““were not unconscious, sleepwalking, intoxicated, injured, deceived by the reporter, otherwise unable to control themselves.”” IKL Opp., at 2 (quoting statements offered by plaintiff in support of his motion to compel law enforcement information). In other words, the reporters assert that the standard is satisfied so long as the conduct in question was not inadvertent or negligent. Albright, 732 F.2d at 189. But the D.C. Circuit ruled in Albright that the express “language of the Privacy Act precludes this conclusion.” Id.

Congress had to balance its goal of protecting the right of privacy with its concern – quite evident in the legislative history – about the potential drain on the public fisc. See, e.g., 120 Cong. Rec. at 36,659 (Rep. McCloskey) (“[W]e are trying to balance two great interests here. We are trying to balance the necessity of balancing the budget, and we are trying to protect the Government from undue liability. I think it is wrong to make the Government of the United States and this congressional budget subject to an absolutely incalculable amount of liquidated damages.”); id. at 36,956 (Rep. Erlenborn) (opposing an amendment that would have awarded

³ All of the reporters testified that they had no reason to believe that any of the sources intended to harm Dr. Hatfill or deprive him of his privacy rights. See, e.g., Deposition Transcript of Allan Lengel (Attachment A Defendants’ Memorandum in Opposition to Plaintiff’s Motion to Compel, Dkt. Nos. 125 & 127), at 321: 7-14; Deposition Transcript of James Stewart (Attachment B Defendants’ Memorandum in Opposition to Plaintiff’s Motion to Compel, Dkt. Nos. 125 & 127 (“Defs’ Mem. in Opp.”), at 181:4-18; Deposition Transcript of Brian Ross (Attachment C to Defs’ Mem. in Opp.), at 249-50, 258; Deposition Transcript of Michael Isikoff (Attachment D Defs’ Mem. in Opp.), at 196: 3-6, 203:11-14; Deposition Transcript of Daniel Klaidman (Attachment E to Defs’ Mem. in Opp.), at 147: 5-8. Indeed, one reporter testified that the sources she spoke with were not attempting to violate Dr. Hatfill’s rights, but rather to “caution” her “off” of inaccurate stories that had already been swirling around Dr. Hatfill. Deposition Transcript of Toni Locy, (Attachment F to Defs’ Mem. in Opp.), at 149:11-15.

“actual damages” for negligent violations on the ground that the amendment “expose[d] the Government to undue liability” which “[w]e just cannot afford”).

“The Act does not make the Government strictly liable for every affirmative or negligent action[.]” Id. It is true (see Stewart Opp. at 15-18) that the Act talks in terms of agency conduct. But for the most part there is no private right of action with respect to that statutory direction. For those areas where Congress intended to permit damages against the government, it was very specific that very particular technical elements must be met, including the intent requirement (and the rule of retrieval discussed in the next section).

Rather, regardless of the type of violation, the trial court must consider “the agency’s purpose”; “the source of the idea”; and the underlying “circumstances[.]” Albright v. United States, 732 F.2d 181, 189 (D.C. Cir. 1982) (reiterating earlier decision in Albright v. United States, 631 F.2d 915, 917 (D.C. Cir. 1980)). The fact that Albright concerned a different type of violation than is alleged here, Stewart Opp., at 27, is of no moment. Regardless of whether the claimed violation is an improper disclosure under Section 552a(b), or under Section 552(e)(7), both are governed by the same “intentional or willful” standard set forth in Section 552a(g)(4). In either case, the Court must dig “deep into the breach’s context[.]” Cummings v. Dep’t of the Navy, 279 F.3d 1051, 1060 (D.C. Cir. 2002).

Even if Dr. Hatfill could establish that an employee of the defendants disclosed information contained in a protected record, he could not succeed on his claim without also establishing that the disclosure occurred with the requisite level of intent. To sustain his burden of proof, plaintiff must introduce evidence concerning the state of mind of the particular individual(s) who actually disclosed the information. And, of course, before that can occur,

those individuals must be identified. The D.C. Circuit has recognized as much in Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005), which also involved alleged leaks in violation of the Privacy Act.

The reporters try mightily to distinguish Lee from this case, and for good reason. In Lee, the D.C. Circuit soundly rejected the assertion of a reporters' privilege in circumstances nearly identical to this case. The plaintiff Wen Ho Lee had alleged that certain on-the-record and anonymous statements to reporters, some of which allegedly revealed investigatory information about him, injured him. He sought and was granted the right by the trial court to depose reporters regarding the names of government sources. In upholding that order, the D.C. Circuit recognized that the threshold piece of "relevant information is the identity of the individuals[.]" Lee, 413 F.3d at 60. Without the names of the sources, the court recognized that plaintiff's "ability to show the other elements of [his lawsuit], such as willfulness and intent, will be compromised." Id.; see also Lee v. Department of Justice, 401 F.Supp.2d 123 (D.D.C. 2005) ("without obtaining truthful testimony from journalists concerning the identity of the Government sources who allegedly leaked information to the press, [plaintiff] cannot proceed with this lawsuit"); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981) ("The success of [appellants'] Privacy Act and Fourth Amendment claims may depend on the identities of the individuals who leaked the wiretap logs").⁴

⁴ In *dicta*, the Lee court noted that the journalists refused to reveal "even the employer of their unidentified sources, information that arguably would have been sufficient to support at least a portion of Lee's claim." Lee, 413 F.3d at 60. In the very next sentence, however, the court cited Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974), where the court "similarly observed" that success in a libel case where proof of malice was required was "very unlikely" absent the identity of the parties. See id.

This case presents, if anything, an even more difficult problem for the reporters. In Lee, one of the primary points of contention between the plaintiff and the reporters was whether the plaintiff had adequately exhausted discovery against the government, as required by the D.C. Circuit in Zerilli. 413 F.3d at 60-61 (citing Zerilli, 656 F.2d at 713). Here, there is no question that plaintiff has adequately met his exhaustion requirement, and the reporters have not even attempted to argue otherwise.⁵ The only difference between the two cases is that, in this case, the reporters agreed to identify whether a source worked for the defendant agencies.⁶ But, as the government has demonstrated, this is a distinction without a difference. The mere fact that a disclosure was made by an unnamed individual affiliated with an agency is not sufficient. In McCready v. Principi, 297 F. Supp. 2d 178, 197 (D.D.C. 2003), Judge Collyer of this court rejected a claim under the Privacy Act where no one could identify the individual who leaked the document. As Judge Collyer observed, “[w]ithout more evidence of the perpetrator of the alleged ‘leak’ and that the ‘leak’ was intentional and wilful, no violation of the Privacy Act can be determined.” Id. Likewise, the D.C. Circuit has noted that “[t]he agency’s actions must be viewed in their context to determine whether the agency’s staff acted in a willful or intentional manner.” Waters v. Thornburgh, 888 F.2d 870, 876 (D.C. Cir. 1989).

⁵ The reporters’ argument that this case is distinguished by greater evidence of agency misconduct is question-begging. The only evidence of misconduct the reporters point to are the alleged leaks themselves and the agency’s alleged indifference to them, which cannot be tested without identification of the alleged leakers. In any event, the alleged misconduct in this case and in Lee is the same, as both involved an alleged proliferation of leaks in high profile investigations.

⁶ The reporters provided such testimony despite their sworn declarations in Lee that such a revelation would gravely impair the news-gathering function, and most likely because of the adverse decision in Lee.

And because plaintiff bears the burden of proof on the issue of intent, his claim would fail as a matter of law. Speculation regarding intent, without evidence tested through cross-examination, is insufficient to carry this burden.

3. Dr Hatfill Cannot Show that the Information Allegedly Disclosed Was Actually Retrieved from a System of Records

The Privacy Act also only applies to information “actually retrieved” from a system of records -- not information learned through other means. The Act prohibits only “non-consensual disclosure of any information that has been *retrieved* from a protected record.” Bartel v. FAA, 725 F.2d 1403, 1408 (D.C. Cir. 1984)(emphasis in original). “Under the Act, there is a rule of retrieval, not a rule of coincidence. If there is information in a record, and a federal employee gained that same information from the use of her own senses, the employee’s telling others what she saw or heard does not violate the Privacy Act[.]” Krieger v. Fadely, 199 F.R.D. 10, 13 (D.D.C. 2001).

This element is made all the more critical in this case in light of the fact that many of the alleged disclosures plaintiff has cited contain a purported source’s observations, impressions, and opinions, which by their nature are less likely to have been retrieved from an investigative record. Indeed, Mr. Stewart states that none of “[t]he statements in [his] broadcasts . . . even suggest disclosure of information derived from records protected by the Privacy Act.” Stewart Opp. at 36. The other reporters similarly claim that, in the small number of instances where the alleged disclosures are attributed to employees of the defendants, they did not come from a record at all, but rather consisted of what “investigators were thinking, what leads they intended to pursue, and what events they had recently witnessed -- none of which comes within the ambit of the Privacy Act.” IKL Opp. at 2.

Contrary to the reporters' claims, the D.C. Circuit's ruling in Bartel does not negate the rule of retrieval in the context of a criminal investigation. If anything, Bartel reinforces the fact that the Privacy Act only "prohibits nonconsensual disclosure of any information that *has been retrieved from* a protected record." Bartel, 725 F.2d at 1408 (emphasis added). Any attempt to read Bartel in the sweeping manner suggested by the reporters should be rejected. The D.C. Circuit has explained and narrowed its holding in a later case, noting that under the unique facts presented there, the rule of retrieval "would have allowed an official to 'circumvent [the Act] with respect to a record he himself initiated by simply not reviewing [the record] before reporting its contents or conclusions.'" Pilon v. United States Dept. of Justice, 73 F.3d 1111, 1118 (D.C. Cir. 1996) (quoting from Bartel). Dr. Hatfill has adduced no evidence that anything similar occurred in this case. Without knowing the identity of the DOJ and FBI sources that Dr. Hatfill claims leaked information about him, there is no way to know whether these sources "initiated" the creation of any protected record about him and "leaked" information memorialized in such a record.

In short, to the extent plaintiff intends to pursue a disclosure claim under the Privacy Act, the names of the sources are critical.

B. Without the Names of Sources, Dr. Hatfill Similarly Cannot Establish Liability for Any Safeguarding Claim that He May Wish To Pursue

Mr. Stewart's Opposition relies heavily on the argument that Dr. Hatfill need not pursue his disclosure claim because he could pursue a safeguards claim pursuant to Section 552a(e)(10). See Stewart Opp. at 19-26. Mr. Stewart seeks to limit Lee to circumstances in which "other meaningful evidence of agency violations" is absent, alleging that substantial "evidence of misconduct [exists] that is independent of the circumstances surrounding any particular 'leak' by

individual agency employees.” Stewart Opp., at 13. The Lee court never recognized such an exception.

While Dr. Hatfill is free to drop his disclosure claim in favor of pursuing a safeguards claim, the latter claim has no merit and, in any event, would still require the identification of sources. As an initial matter, a safeguards claim is a difficult claim on which to prevail. “The Privacy Act does not make administrative agencies guarantors of the integrity and security of materials which they generate,” or “authorize the federal courts to act as micro-managers of the records practices of the administrative agencies.” Kostyu v. United States, 742 F. Supp. 413, 417 (E.D. Mich. 1990). Instead, “the agencies are to decide for themselves how to manage their record security problems, within the broad parameters set out by the Act.” Id. In doing so, “the agencies have broad discretion to [choose] among alternative methods of securing their records commensurate with their needs, objectives, procedures, and resources.” Id. And, “it is clear that Congress intended to reserve civil liability only for those lapses which constituted an extraordinary departure from standards of reasonable conduct.” Id.

Section 552a(e)(10) was never intended to place an onerous burden on agencies. When the Privacy Act was enacted, Congress refrained from prescribing "in this subsection or in this Act a general set of specific technical standards for security of systems[.]" S. Rep. No. 93-1183, at 54 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6969. Instead, it directed each agency "merely . . . to establish those administrative and technical safeguards which it determines appropriate and finds technologically feasible for the adequate protection of the particular information it keeps." Id. Endorsing the notion that "the term ‘appropriate safeguards’ should incorporate a standard of reasonableness," Congress enacted a statute that "thus provides

reasonable leeway for agency allotment of resources to implement this subsection. At the agency level, it allows for a certain amount of ‘risk management’ whereby administrators weigh the importance and likelihood of the threats against the availability of security measures and the consideration of cost." S. Rep. No. 93-1183, at 54, 55 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6969.

The difficulty of prevailing on a safeguards claim is demonstrated by several of the cases cited by Mr. Stewart in which the government won summary judgment. See Thompson v. Dep’t of State, 400 F. Supp. 2d 1, 23 (D.D.C. 2005) (granting summary judgment to government because leaving confidential document unsecured was not “patently egregious”), aff’d, 210 Fed. Appx. 5 (D.C. Cir. 2006); Kostyu, 742 F. Supp. at 417 (granting summary judgment to the government because “[i]t is not for this Court to second guess the wisdom of defendant’s decision as to the appropriate level of security for [a confidential document]”); McCready v. Principi, 297 F. Supp. 2d 178, 197 (D.D.C. 2003) (granting summary judgment to the government “for lack of evidence”); aff’d in part and rev’d in part, 465 F.3d 1 (D.C. Cir. 2006).⁷

This case would be no different. The only evidence of “misconduct” cited by Mr. Stewart is the testimony of other individuals who opined that, based solely on what was written in the press and accepting what was written as true, they believed it was wrong to divulge the information at issue. But that does not mean (a) that there was any Privacy Act violation, or (b) that what was reported was accurate. The FBI and DOJ, moreover, undertook great efforts to

⁷ Of the other cases cited by Stewart in this section of his brief, in Schmidt v. United States Dep’t of Veterans Affairs, 218 F.R.D. 619 (E.D. Wisc. 2003), the government’s motion for summary judgment was granted in part and denied in part; Pilon v. United States Dep’t of Justice, 796 F. Supp. 7, 12-13 (D.D.C. 1992), was decided based on Plaintiff’s pleadings; and Swenson v. United States Postal Serv., 1994 U.S. Dist. LEXIS 16524 (E.D. Cal. Mar. 10, 1994), was not a safeguards case.

attempt to stem leaks. Former Attorney General Ashcroft and FBI Director Mueller gave instructions in no uncertain terms that leaking investigatory information would not be tolerated. Ashcroft Deposition Transcript, Exhibit 2 hereto, at 26-27, 30-31, 238-39, 241-42; Mueller Deposition Transcript, Exhibit 3 hereto, at 13-15, 32-33, 102-105; Directive, Exhibit 4; Lambert Deposition Transcript, Exhibit 5, at 206, 350-56. The FBI went so far as to compartmentalize investigative information, against the views of the lead agent on the case. Mueller Deposition Transcript, Exhibit 3, at 32-33, 102-06; Lambert Deposition Transcript, Exhibit 5, at 206, 350-56. Both efforts were accompanied by an internal FBI investigation of the leaks and a later referral to the Justice Department's Office of Professional Responsibility ("OPR"). Mueller Deposition Transcript, Exhibit 3, at 31-33; Harp Deposition Transcript, Exhibit 6, at 51-52; OPR Referral, Exhibit 7.

Mr. Stewart's argument that there is massive evidence of agency misconduct that gives rise to Privacy Act liability, as noted earlier, is illogical and rests solely on the alleged leaks themselves. Equating misconduct with leaks conflicts with Mr. Stewart's observations elsewhere in his brief that Congress never "intended the Privacy Act to act as a broad anti-leak law and bar the government from disseminating information to the press about federal investigations of crimes of enormous public import such as the anthrax mailings." Stewart Opp. at 17 (citing and quoting Cochran v. United States, 770 F.2d 949, 959 n.15 (11th Cir. 1985)). Indeed, Mr. Stewart argues that "leaks" are essential to the news gathering function, and that to deter them would result in fewer "Deep Throats" and less information available to the public. Stewart Opp. at 17.

And the alleged failure to password-protect the Automated Case Support (“ACS”) database (Stewart Opp. at 24-25) is most assuredly not a violation of the Privacy Act. Cf. Roth Deposition Transcript, Exhibit 8, at 280 (authorized ACS users access ACS through an FBI system known as “FBI net and you have a specific password to get into FBI Net”). The entire purpose of the ACS database is to permit law enforcement information to be shared across the FBI and with state and local law enforcement officers participating in FBI task forces. Lambert Deposition Transcript, Exhibit 4, at 115 (ACS is “the electronic system into which all communications concerning [an] investigation are placed -- [i.e.] reports of interview, following up of leads, taskings to other field offices to conduct investigations,”); Roth Deposition Transcript, Exhibit 8, at 268. Indeed, like the information in Kostyu, the database “was only useful if it could be widely disseminated among [agency] field employees.” Kostyu, 742 F. Supp. at 417; see also Roth Deposition Transcript, Exhibit 8, at 278-79 (access to all of ACS is necessary “because what you’re searching for [in a criminal investigation] is any commonality between subjects”); id. at 285-86 (the AMERITHRAX investigation “is not a restricted case file . . . [W]e just talk to thousands of people so . . . there’s some incentive for the agency not to restrict the sort of information”). Thus making the information available for law enforcement purposes cannot be an inadequate safeguard. See Kostyu, 742 F. Supp. at 417.

The briefings provided to congressional staff members likewise do not violate the Privacy Act. The Privacy Act prohibits the unauthorized disclosure of information retrieved from a covered system of records *unless* the disclosure falls within one of nine specific categories. See 5 U.S.C. § 552a(b). One such category encompasses disclosures “to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or

subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.” 5 U.S.C. § 552a(b)(9). Although there is little case law discussing this provision, courts have acknowledged that its sister provision in the Freedom of Information Act (“FOIA”)⁸ was intended “to carve out for [Congress] a special right of access to privileged information not shared by others,” in order to further “public policy which encourages broad congressional access to governmental information.” Murphy v. Department of the Army, 613 F.2d 1151, 1155-56 (D.C. Cir. 1979); see also id. at 1155 (describing section 552(d) as embodying a “special reservation of congressional access to executive information”).

There is nothing improper about making such disclosures to Committee *staff*. While defendants are unaware of any cases that address this question, the Court of Appeals for this Circuit has indicated that the analogous “congressional access” provision of the FOIA must be interpreted in a manner that is consistent with how Congress actually functions. In rejecting the claim that the term “Congress” should be construed to apply only to the legislative entity as a whole, the Court of Appeals stated:

This view of the statute is not consistent with the mode of operation of the Congress. Except when it finally and formally enacts legislation, the Congress rarely acts as a body. Its manifold duties in the legislative, investigative, and oversight fields are almost invariably carried out through committees, committee chairmen, individual members, *and staff personnel*. Thus, a construction of section [552(c)] which would relate it only to action of Congress as an entity would render the provision largely meaningless

Murphy, 613 F.2d at 1156-57 (emphasis added). The Court of Appeals concluded that the plaintiff’s “hierarchical construction” – under which disclosures could not be made to any unit of Congress smaller than the entire legislative body – “loses sight of the realities of the work of the

⁸ Section 552(d) of the FOIA (formerly section 552(c)) provides that the FOIA “is not authority to withhold information from Congress.”

Congress.” Id. at 1157.

This observation holds equally true for the “congressional access” provision of the Privacy Act. It is well-understood that committee members’ staff play an integral role in the work of the committee. Accordingly, even when litigants have urged a narrow view of the Privacy Act’s “congressional access” provision, arguing that it does not apply to members of Congress acting as individuals, they have nonetheless assumed the appropriateness of authorized staff involvement. See Chang v. Department of the Navy, 314 F. Supp. 2d 35, 45 (D.D.C. 2004) (noting plaintiffs’ argument that disclosure was improper because “the requests for information from Senator Warner and Representative Moran . . . were not made by committee staff members . . . [but] were made by staff members of the individual Congress members to assist them in answering constituent inquiries”).

Indeed, it simply makes no sense to argue that the Privacy Act allows agencies to disclose certain information to Congress, but deprives Congress of its usual means of operation when obtaining that information. As the Court of Appeals stated in Murphy, the propriety of congressional access should depend, not on “whoever in Congress may be the recipient of the information,” but on the purpose of the disclosure: whether it is for “official congressional purposes” or whether a member of Congress seeks the information “in a purely private or personal capacity.” Murphy, 613 F.2d at 1157. Insofar as the Privacy Act acknowledges that congressional committees may have legitimate business with otherwise protected information, that business is not rendered illegitimate by the fact that it is performed in part through staff members. In the same vein, nothing in the Privacy Act suggests that Congress intended for its members to lose the benefit of their employees’ assistance as the price of access to needed

information.

Most fundamentally, even if Dr. Hatfill could make out a colorable safeguards claim, it would still require the identification of sources in this case. As even Mr. Stewart concedes, such a claim requires proof that an agency's lack of safeguards "caused an 'adverse effect' on the Plaintiff." Stewart Opp. at 20 (quoting 5 U.S.C. § 552a(g)(1)(D)).⁹

The alleged adverse effects on Dr. Hatfill all came through the media's reporting of information. In order to determine that the lack of a particular safeguard caused injury to him, Dr. Hatfill would have to show a causal connection between the lack of that safeguard and a damaging disclosure. For example, even if the Court found that the FBI failed to adequately protect the ACS database, Dr. Hatfill would still have to show that the lack of protection led to a leak of information that would not otherwise have occurred. This would require knowing whether information in particular press reports came from the ACS database and whether it was accessed by someone who would not have had authorized access to the database. This requires knowing the circumstances of the alleged leak and the identity of the leaker. The necessity of this information is evidenced by Stewart's own brief where he asserts, correctly, that "Plaintiff has simply assumed, but has utterly failed to show, that Mr. Stewart learned or reported any information subject to the [Privacy Act]." Stewart Opp. at 37.

⁹ See also Orekoya v. Mooney, 330 F.3d 1, 5 (1st Cir. 2003) (plaintiff must prove causal nexus between violation and adverse effect); Hudson v. Reno, 130 F.3d 1193, 1207 (6th Cir. 1997) (dismissing claim because plaintiff "did not carry her burden of showing that the alleged violations of the Privacy Act caused her any damages" (emphasis in original)), abrogated on other grounds, Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001); Quinn v. Stone, 978 F.2d 126, 135 (3rd Cir. 1992) ("[T]o state a claim under the [Privacy] Act, the plaintiff must also allege a causal connection between the agency violation and the adverse effect."); Albright v. United States, 732 F.2d 181, 186 (D.C. Cir. 1984) (causation is an essential element of a Privacy Act claim); Edison v. Dep't of Army, 672 F.2d 840, 842 (11th Cir. 1982) (plaintiff has burden of proving adverse effect was caused by specific violation of the Privacy Act).

While Mr. Stewart nonetheless relies upon Schmidt v. United States Dep't of Veterans Affairs, 218 F.R.D. 619 (E.D. Wis. 2003), in that case the alleged adverse effect was not an alleged leak. Instead, plaintiff “testified she had a hard time sleeping at night as a result of issues raised in this case, and [another plaintiff] testified he suffered mental anguish and emotional distress, and his blood pressure increased as a result of his concern about the availability of his [social security number] on the [agency’s] system.” Id. at 632-33. The Court found the testimony to be enough to show the necessary “adverse effect.” Id. at 633. The exclusive focus of plaintiff’s harm in this case, by contrast, is the disclosures that he alleges that the unnamed sources made to the media. Compl. ¶ 124. Learning the source of the alleged disclosures thus goes to the heart of plaintiff’s case, regardless of the Privacy Act section on which he relies.

CONCLUSION

The reporters’ argument that the identification of sources in this case is not required should be rejected.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JEFFREY S. BUCHOLTZ
Principal Deputy Assistant Attorney General

/s/ Paul G. Freeborne

ELIZABETH J. SHAPIRO, D.C. Bar # 418925

PAUL G. FREEBORNE

JEFFREY M. SMITH

Department of Justice

Civil Division, Federal Programs Branch

20 Massachusetts Ave., NW,

Washington, D.C. 20530

Tel: (202) 514-5302

Fax: (202) 616-8470

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Counsel for the Defendants