

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Steven J. HATFILL, M.D.,)
)
Plaintiff,)
)
v.) Civil No. 1:03-CV-01793 (RBW)
)
Attorney General Alberto GONZALES, *et al.*,)
)
Defendants.)
_____)

**DR. HATFILL’S CONSOLIDATED REPLY MEMORANDUM
IN SUPPORT OF MOTION TO COMPEL FURTHER TESTIMONY**

The briefs submitted by the reporters read more like a Christmas list than an opposition.¹ Their arguments are based not on what the law is, but what they wish the law would be. They wish that the well-established, two-pronged qualified-reporter’s-privilege test had a third prong, where the public’s “desperate need of information and reassurance,” Isikoff Opp’n at 26, would trump the illegality of agency leaks and resulting devastation to an innocent American citizen. It does not. They wish that the Privacy Act excluded illegal leaks about the investigation of Dr. Hatfill from the rubric of its protections. It does not. They wish that, in its March 30, 2007 order, the Court stated that Dr. Hatfill did not need the names of the anonymous sources to succeed on his claims. It did not. And they wish that this Circuit had adopted a common law reporters privilege, more vigorous in its protection than even the qualified First Amendment privilege, to fill in for Congress’s repeated rejection of a federal shield statute. It has not.

¹ For the Court’s convenience, Dr. Hatfill submits this consolidated reply brief in response to the oppositions of Messrs. Isikoff, Lengel, Klaidman, and Stewart. Dr. Hatfill has filed a separate reply to Ms. Locy’s opposition, which incorporates the arguments stated herein.

The reporters come to the Court, long list in hand, asking that it reject its own precedent,² heedlessly extend others,³ ignore the law,⁴ and change its mind.⁵ But this is a legal action, not a holiday fantasy. Accordingly, for the reasons stated below, Dr. Hatfill respectfully requests that the Court hew to precedent and established law, reject the wish list put before it, and order the reporters to disclose the identities of the officials and employees of the agency defendants who leaked information about Dr. Hatfill in violation of the law.

ARGUMENT

I. DR. HATFILL HAS ESTABLISHED THE ELEMENTS NECESSARY TO OVERCOME THE QUALIFIED REPORTER'S PRIVILEGE.

The reporters do not contest that Dr. Hatfill has overcome their qualified reporter's privilege. Nor could they. Dr. Hatfill has met the controlling legal test by demonstrating that the sources' identities go to "the heart of the matter" and that he has "exhaust[ed] 'every reasonable alternative source of information.'" *Lee v. Dep't of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005) (quoting *Carey v. Hume*, 492 F.2d 631 638 (D.C. Cir. 1974)). *Lee*, a case materially indistinguishable from Dr. Hatfill's, held that source identities are central to a plaintiff's Privacy Act claim. *Id.* at 60. Here, Dr. Hatfill has pursued alternative sources of this information to an even greater extent than Dr. Lee, whom the Court concluded had "met his burden as to exhaustion." *Id.* The Court recognized the controlling nature of *Lee* when it stated that "there is clear case authority, at least in this Circuit, that it seems to me would be controlling in reference

² *Lee v. Dep't of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005).

³ *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1150 (D.C. Cir. 2006); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005).

⁴ See 5 U.S.C. 552a(b); *Scarborough v. Harvey*, No. 05-1427, 2007 WL 1470694 (D.D.C. May 22, 2007).

⁵ Order at 2-3 (Mar. 30, 2007) (Dkt. 144).

to [Dr. Hatfill's] right to force [the press] to provide [their sources' identities]." Hr'g Tr. 42:1-4, Mar. 19, 2007 (Ex. A).

Unable to rebut Dr. Hatfill's showing of centrality and exhaustion, the reporters argue that Dr. Hatfill has failed to establish a third factor—that the public's interest in disclosure is outweighed by the public's interest in newsgathering generally and its need for "information and reassurance" specifically. Isikoff Opp'n at 24-27; Stewart Opp'n at 38. But there is no third factor under the law. Its existence, proposed in a concurrence, was rejected by the Court of Appeals. "*Zerilli* and *Lee* set the standard in this Circuit for determining when a reporter's First Amendment privilege must yield to a plaintiff's need for information." *Lee v. Dep't of Justice*, 401 F. Supp. 2d 123, 132 (D.D.C. 2005). That standard requires a two-part showing—centrality and exhaustion—not three. "The law in this Circuit requires no more." *Id.* at 133 n.14; *see also id.* at 138 (recognizing that Judge Tatel's "balancing test was disavowed in *Lee*, which reaffirmed that *Zerilli* imposes a two-prong test without an interest-balancing requirement").

Even if the law included a "public interest" factor, the reporters could not satisfy it. To meet this non-existent third factor, the reporters trivialize the interests implicated by Dr. Hatfill's suit as solely the personal recovery of money damages, and they wrongly equate the promises of confidentiality made to the leakers with the "transcendent importance of a free press" itself. *See id.* at 141. But, as this Court has recognized, "[a]nonymous sources are not a *sine qua non* of journalism but only an important and useful tool." *Id.* The reporters ignore that Congress's enactment of the Privacy Act reflects a very real and legitimate public interest in protecting certain information from disclosure, and cases brought under the Act, such as this one and Dr. Lee's, "bring to light a serious abuse of power by senior federal officials who intentionally leaked information ... to create a smokescreen to cover up their own ineptitude." *Id.* at 139-40.

In fact, shortly after the present suit was initiated, the defendants suspended all internal efforts to locate the leakers. This is no Watergate. Here, the press was not exposing and checking government abuse; instead it acted as a conduit for illegal activity. The reporters now actively seek to cover up their sources' unlawful conduct because of the promised anonymity. As the Supreme Court recognized in *Branzburg v. Hayes*:

The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. ...[T]he First Amendment [does not]... confer[] a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. *The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.*

408 U.S. 665, 691-92 (1972) (emphasis added). The public interest does not favor eviscerating the Privacy Act for an entire category of violations—leaks made to reporters—solely to preserve a “useful tool” of journalism.

II. THE REPORTERS' CLAIM THAT DR. HATFILL CANNOT SHOW NEED BASED ON THE MERITS OF HIS CASE ARE UNAVAILING.

The reporters argue that Dr. Hatfill does not need the leakers' names because, on the one hand, his case cannot succeed even with that information, and on the other, his case is so strong he should win summary judgment without it. They argue Dr. Hatfill has no case because the leaked information is not “about” him and thus not a Privacy Act “record.” *See* Isikoff Opp'n at 10-21; Stewart Opp'n at 35-37. Mr. Stewart argues Dr. Hatfill is entitled to summary judgment because he knows the leakers were employed by the agency defendants. *See id.* at 19-26.

Those arguments, however, are irrelevant, and the reporters have no standing to make them. *See Lee*, 401 F. Supp. 2d at 142 n.24 (D.D.C. 2005) (rejecting reporter’s argument that he “should not be compelled to reveal his confidential sources to support a case that has no merits” because the reporter “lack[ed] standing to raise arguments concerning the merits”). Dr. Hatfill’s need for the identities of the leakers does not turn on whether his case will ultimately succeed or fail. *See In re Natural Gas Commodities Litig.*, 235 F.R.D. 241, 244-45 (S.D.N.Y. 2006) (rejecting argument that discovery was not “necessary or critical” because plaintiffs would not succeed in establishing merits of case). “To obtain information during pretrial discovery proceedings that is sufficiently relevant and necessary to maintain a claim, a litigant should not be compelled to establish that the requested material will enable it to prevail on the merits.” *Id.* at 245. The identities of the sources are central to establishing elements of the Privacy Act claims.⁶ “That being so, the eventual outcome of the litigation is not for the appellant nor for this court now [to] prophesy.” *Garland v. Torre*, 259 F.2d 545, 551 (2d Cir. 1958). Notwithstanding the irrelevance of their arguments, the reporters’ analysis of the merits of this case are legally and factually incorrect.

⁶ Stewart argues “there are almost no [disclosure] cases arising out of oral leaks,” so he should not be compelled to reveal his sources because proving a violation of the Privacy Act based on “murky” memories will be more difficult than cases involving a leaked document. Stewart Opp’n at 33-35. He invites the Court to create Privacy Act immunity where the Act is violated by an oral disclosure rather than disclosure of a document. That argument is contrary to the plain text of the Privacy Act, which prohibits disclosures by “any means of communication.” 5 U.S.C. § 552a(b). Stewart cites to the prosecution of Mr. Libby as an example of the “phenomenon” of cases involving oral leaks, noting that because “the circumstances of the oral leaks involved were so murky and subject to dispute” the case moved from being about the Intelligence Identities Protection Act to one about perjury. Stewart Opp’n at 34 n.6. Notwithstanding Mr. Stewart’s speculation as to why that case became a perjury prosecution, even in the perjury case—where a heightened standard of proof not applicable here was applied—guilt was proven based largely on testimony concerning oral communications.

A. The Information Leaked by Anonymous DOJ and FBI Officials Are “Records” as Defined by the Privacy Act.

The Privacy Act’s intended purpose is to “safeguard[] the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records.” *Bartel v. FAA*, 725 F.2d 1403, 1407 (D.C. Cir. 1984). This purpose is especially important in safeguarding against the misuse and abuse of information collected about an individual in the course of a criminal investigation. As the D.C. Circuit recognized, “where an agency—such as the FBI—is compiling information about individuals primarily for investigatory purposes, Privacy Act concerns are at their zenith.”⁷ *Henke v. Dep’t of Commerce*, 83 F.3d 1453, 1461 (D.C. Cir. 1996). The unlawful disclosures at the heart of Dr. Hatfill’s case and the present motions to compel concern precisely this type of information. The reporters contention that information the FBI collected about Dr. Hatfill and his suspected role in the murder of five

⁷ The reporters allege, without citing a single authority, that “it is *clear* that the Privacy Act cannot be read to create a private right of action against the United States whenever federal agents reveal information that was gathered in the course of a criminal investigation, even when that information has been associated in the government’s system of records with a person’s name.” Isikoff Opp’n at 13 (emphasis added); *see also* Stewart Opp’n at 17-18. Their contention is contrary to a long line of precedent recognizing that disclosure of investigative information about a person can form the basis of a Privacy Act claim. *See, e.g., Lee*, 413 F.3d at 55 (leaks concerned investigation of plaintiff for espionage); *Chung v. Dep’t of Justice*, 333 F.3d 273 (D.C. Cir. 2003) (leaks concerned plaintiff’s involvement in investigation into violations of federal election laws by agents of the Chinese government); *Bartel*, 725 F.2d at 1405 (leaks concerned results of investigation about plaintiff’s violation of the Privacy Act); *Zerilli v. Smith*, 656 F.2d 705, 706 (D.C. Cir. 1981) (leaks involved transcripts of electronic surveillance obtained by FBI in course of criminal investigation of organized crime); *Scarborough v. Harvey*, No. 05-1427, 2007 WL 1470694, at *7-8 (D.D.C. May 22, 2007) (leaks concerned investigation of plaintiff for fraud); *Jacobs v. Nat’l Drug Intelligence Ctr.*, 423 F.3d 512, 517 (5th Cir. 2005) (leaks suggesting plaintiff was involved in a Mexican money-laundering and drug-trafficking organization); *Orekoya v. Mooney*, 330 F.3d 1, 6 (1st Cir. 2003) (holding that disclosure of information from FBI files about plaintiff’s prior arrest is actionable under the Privacy Act); *Britt v. Naval Investigative Serv.*, 886 F.2d 544 (3d Cir. 1989) (leaks involved investigative information about plaintiff, including “accounts of persons interviewed, results of the execution of any searches, and a record of all physical evidence seized”).

people is not information “about” Dr. Hatfill is unsupported by the law, ignores the admissions of the defendants, and misconstrues the leaked information.

Section 552a(b) of the Privacy Act provides that “[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person.”

“Record” is a defined term and was intended to “include as little as one descriptive item about an individual.” *Bartel*, 725 F.2d at 1408 n.9 (citation omitted); *see also* 5 U.S.C. 552a(a)(4).

Although the reporters contend that a record is “carefully and *narrowly* defined,” Isikoff Opp’n at 11 (emphasis added), in fact, “[t]he Act defines ‘record’ in a relatively *broad* fashion.”

McCready v. Nicholson, 465 F.3d 1, 9 (D.C. Cir. 2006) (emphasis added).⁸ To be a “record,” the information must be “about” an individual and “contain the individual’s name or other identifying particular.” *Tobey v. NLRB*, 40 F.3d 469, 471 (D.C. Cir. 1994). Courts have thus held that investigative information about an individual constitute “records” as defined by the

⁸ The reporters rely principally on two factually inapposite cases in support of their argument. In *Tobey v. NLRB*, 807 F. Supp. 798 (D.D.C. 1992), and *Houston v. Dep’t of Treasury*, 494 F. Supp. 24 (D.D.C. 1979), two federal employees complained that information about them had been improperly used against them in personnel actions. In *Tobey*, the “record” allegedly improperly used was information about each case handled by the NLRB. 807 F. Supp. at 800. This information included the case name, the allegations of unfair labor practices made, the number of employees involved, and the *name of the field examiner* assigned to the case. *Id.* The information, therefore, was not “about” the plaintiff, *a field examiner*, but about particular cases of allegedly unfair labor practices. Only by accessing and synthesizing data from the cases handled by the plaintiff such as the date a charge was filed and the date the case was dismissed or closed, did information arguably “about” the plaintiff’s job performance (*e.g.* that he took too long to resolve his cases) exist. *Id.* Because information about the plaintiff’s job performance existed only through this data manipulation, the court held the NLRB case files were not “about” the plaintiff. *Id.* at 801. Similarly, in *Houston*, the court held the information used was not “about” the plaintiff. There, the information at issue was the plaintiff’s supervisor’s notes reflecting particular deadlines for work to be completed, the status of working assignments being performed, and audit reports and calculations prepared by the plaintiff. *Houston*, 494 F. Supp. at 26. As in *Tobey*, the information, standing alone, reflected nothing about the plaintiff. Conversely, the investigative information at issue here requires no contextual evaluation to be “about” Dr. Hatfill.

Privacy Act. *See, e.g., Jacobs v. Nat'l Drug Intelligence Ctr.*, 423 F.3d 512, 517 (5th Cir. 2005) (holding report leaked to the press alleging plaintiff was involved in a money-laundering and drug-trafficking organization was a “record”); *Clarkson v. IRS*, 678 F.2d 1368, 1373 (11th Cir. 1982) (concluding that documents, including “surveillance reports, newsletters and press releases,” gathered by IRS about the plaintiff were “records” since they contained individual references to the plaintiff).

This Court recently addressed whether investigative information can constitute a protected “record” under the Privacy Act. In *Scarborough v. Harvey*, the Army’s Criminal Investigation Division (“CID”) commenced an investigation into the allegedly fraudulent issuance of individual surety bonds to the U.S. government. No. 05-1427, 2007 WL 1470694, at *1 (D.D.C. May 22, 2007). The plaintiffs alleged that the defendants unlawfully disclosed investigative information implicating them in that activity. The defendants, like the reporters here, advanced a hypertechnical reading of “record,” asserting that the plaintiffs’ claim lacked merit because the information disclosed was entrepreneurial, not personal information, and therefore was not a record.⁹ *Id.* at *5. Because the information disclosed contained the names of at least one plaintiff, the Court’s “sole inquiry” was “whether the documents, and the information contained therein, are ‘about’ the plaintiffs.” *Id.* at *8.

The definition of “record,” the Court stated, “is undeniably expansive, and there is nothing in the statute to indicate an intent to exclude certain classes of information, as long as

⁹ The D.C. Circuit has “taken particular care not to undermine the Act’s fundamental goals” and has “consistently turned back ‘neat legal maneuvers’ attempted by the government.” *Pilon v. Dep’t of Justice*, 73 F.3d 1111, 1118 (D.C. Cir. 1996) (citation omitted). Because the reporters here are simply borrowing that tactic to protect its sources (and their employers) from legal liability, it should similarly be rejected.

they ‘actually describe [an individual] in some way.’” *Id.* (internal citations omitted). The Court described the information at issue as follows:

The CAN [Criminal Alert Notice] implicates the plaintiffs by name in an investigation into the issuance of potentially fraudulent surety bonds, describes in detail business actions undertaken by the plaintiffs in connection with several individuals also under investigation, states that plaintiff Wright has previously ‘been investigated by [the] CID ... for the same activity identified in this alert,’ The letter to First Bank expressly states that the plaintiffs ... ‘are currently being investigated by [the CID] for fraudulent surety bonds and the assets that back those bonds.’ ... The letter to plaintiff Wright’s attorney states that plaintiff Scarborough is a ‘convicted felon’ ... and the letter to Scarborough’s attorney states that Wright ‘was convicted of surety bond fraud in the early 1990s.’

Id. at *8 (internal citations omitted). Each of these documents, the Court reasoned, “references the plaintiffs by name and divulges ‘information that actually describes the [plaintiffs] in some way, thus meeting the requirements of § 552a.” *Id.* (internal citations omitted). The Court held that “documents identifying the individual plaintiffs by name and describing the plaintiffs’ involvement in allegedly criminal or otherwise unsavory activity are ‘about’ the individual plaintiffs, and therefore not excluded from the Privacy Act’s definition of ‘records.’” *Id.*

The investigative information disclosed here falls squarely within the definition of “record.” The defendants have admitted as much, and an objective evaluation of the disclosures’ content makes clear that the information is “about” Dr. Hatfill.

Use of Bloodhounds to Investigate Dr. Hatfill: Multiple DOJ and FBI sources revealed investigative information about using bloodhounds to investigate Dr. Hatfill. For example:

The agents quietly brought the dogs to various locations frequented by a dozen people they considered possible suspects—hoping the hounds would match the scent of the letter. In place after place, the dogs had no reaction. But when the handlers approached the Frederick, Md., apartment building of Dr. Steven J. Hatfill . . . the dogs immediately became agitated, NEWSWEEK has learned. “They went crazy,” says one law-enforcement source. The agents also brought the bloodhounds to the Washington, D.C., apartment of Hatfill’s girlfriend and to a Denny’s restaurant in Louisiana, where Hatfill had eaten the day before. In both places, the dogs jumped and barked, indicating they’d picked up the scent.

After months of frustration, the Feds believed they were finally on the verge of a breakthrough.

Something else about Hatfill caught their eye. Agents surveilling his apartment watched him as he pitched loads of his belongings into a dumpster behind his apartment building—getting rid of evidence, some agents wondered. Though the FBI says Hatfill has been cooperative all along, the dogs and dumpster led agents to obtain a criminal-search warrant for Hatfill’s apartment—to turn up the heat. Agents arrived Thursday morning, with the bloodhounds in tow. When they entered the apartment, one of the dogs excitedly bounded right up to Hatfill. “When you see how the dogs go to everything that connected him, you say ‘Damn!’” says a law-enforcement official.

Ex. B, M. Miller & D. Klaidman, *The Hunt for the Anthrax Killer*, Newsweek, Aug. 12, 2002.¹⁰

The investigative information reported therein constitute “records” contained within a “system of records” retrievable by Dr. Hatfill’s name. See Ex. D, Am. Admis. Nos. 59 & 60 (“dogs operating under the auspices of the FBI”); Ex. E, Second Admis. No. 378 (“search warrant for Dr. Hatfill’s apartment”); Answer to Am. Compl. ¶ 116.c (Dkt. 109) (“evidence sought or obtained in searches”); *id.* ¶¶ 116.v & x (“law enforcement techniques used”).

Search of Pond in Connection with Tip About Dr. Hatfill: Multiple DOJ and FBI officials disclosed information relating to the search of a pond in connection with the FBI’s investigation of Dr. Hatfill. For example:

Earlier this year, acting on a tip, FBI divers recovered a plastic container from the depths of an ice-covered pond near Frederick, Md. ... [W]hat is more intriguing to the FBI is the source of the tip in the first place. NEWSWEEK has learned that the tipster was an acquaintance of Hatfill’s; agents searched the pond after interviewing the friend, who relayed a provocative conversation he’d had with the bioweapons researcher. Hatfill, the source told the bureau, was questioning the FBI’s current theory of the case, that whoever manufactured the anthrax would have needed access to sophisticated equipment and a lab. He said the toxic bacteria could be made in the woods and the evidence could be tossed “in a lake.” When agents found the box in the Frederick pond, they thought they had a eureka moment. The FBI tested the box for residue of anthrax bacilli, and at first

¹⁰ See also Ex. C, M. Thompson, *The Pursuit of Steven Hatfill*, Washington Post, Sept. 14, 2002 (reporting bloodhounds positively identified Hatfill after sniffing anthrax letters).

got a positive result. But subsequent tests have been negative. . . . Next month the FBI may drain the entire pond in hopes of finding new evidence. One item agents might be looking for: a wet suit that could have been used and disposed of by the anthrax attacker.

Ex. F, D. Klaidman & M. Isikoff, *Finally, the FBI Uncovers a Tantalizing Clue*, Newsweek, May 26, 2003.

Law enforcement officials said a weeklong search of ponds and woods in the area last month netted some materials that were being tested for links to the anthrax attacks, which killed five people and sickened 13 others in late 2001. . . . Sources said the search is tied to scientist Steven Hatfill, who authorities have described as a “person of interest” in the investigation. Law enforcement sources said the search was triggered by a hypothetical statement Hatfill had made about anthrax. . . . Specifically, investigators are trying to determine whether Hatfill, a former scientist at the U.S. Army’s principal biodefense laboratory at nearby Fort Detrick, disposed of any containers or byproducts that may be linked to the anthrax spores that were sent through the mail, law enforcement sources said.

Ex. G, A. Lengel, *Hunt for Clues in Anthrax Case Revived*, Washington Post, Jan. 25, 2003.¹¹

Information that the FBI searched a pond, conversations the FBI had with “tipsters” about Dr. Hatfill, techniques used to investigate Dr. Hatfill, and the results of those techniques are all contained in “records” about Dr. Hatfill. *See* Answer to Am. Compl. ¶ 97.h (“divers were searching at least one pond”); *id.* ¶¶ 116.n & o (“times, dates, and substance of conversations” investigators had with Dr. Hatfill and other persons in which Dr. Hatfill was named or mentioned).

¹¹ *See also* Ex. H, M. Thompson, *New Find Reignites Anthrax Probe*, Washington Post, May 11, 2003 (describing clear box and vials recovered in pond); Ex. I, D. Snyder & M. Thompson, *Md. Pond Drained for Clues in Anthrax Probe*, Washington Post, June 10, 2003 (describing items found in pond search and continuing tests for presence of anthrax); Ex. J, A. Lengel & G. Gugliotta, *Md. Pond Produces No Anthrax Microbes*, Washington Post, Aug. 1, 2003 (disclosing search was prompted by tip about Hatfill and describing items recovered in search).

Other Personal Information: In addition to the detailed information about the FBI's use of bloodhounds and its search of the pond in connection with the investigation of Dr. Hatfill, other specific information about Dr. Hatfill was revealed in the following excerpts:

[W]hen the Feds left [Hatfill's] apartment hours later, they found nothing linking Hatfill to the crime (lab tests of their findings are ongoing)... [O]fficials say they aren't close to making any arrests in the case.... When agents began asking around the scientific community, one name kept popping up: Steven Hatfill. . . . [Hatfill] even waived his physician-patient privilege so investigators could ask his doctor about Hatfill's prescription for Cipro.... The searches came up empty. There was one intriguing, but inconclusive, find. On Hatfill's computer hard drive, agents discovered the draft of a novel.

Ex. B, M. Miller & D. Klaidman, *The Hunt for the Anthrax Killer*, Newsweek, Aug. 12, 2002.

Bioweapons research Dr. Steven Hatfill, sources confirm, remains the FBI's number-one suspect in the attacks, even though round-the-clock surveillance and extensive searches have failed to develop more than what is described as a highly circumstantial case.

Ex. K, J. Stewart, *Still No Arrest in Anthrax Attack Case*, CBS Evening News, May 8, 2003.

Hatfill had even gotten pulled over by the D.C. police while driving along Wisconsin Avenue on May 9, 2002.... Hatfill, investigators learned, had obtained a prescription for the antibiotic Cipro, which could be used to fight anthrax infection, not long before the attacks.

Ex. C, M. Thompson, *The Pursuit of Steven Hatfill*, Washington Post, Sept. 14, 2003.

Hatfill continues to be a key focus of the probe, law enforcement sources said, but some of them doubt that the team of 25 FBI agents and 12 postal inspectors will find the evidence to make a case against anyone. Even if tests point to one laboratory, it may not be clear who had access to the infectious bacteria, they said.

Ex. L, C. Leonning & A. Lengel, *Judge Delays Lawsuit to Help Anthrax Probe*, Washington Post, Mar. 30, 2004.¹²

¹² See also Ex. M, A. Lengel, *Anthrax Prober Still Seek Md. Leads*, Washington Post, July 18, 2004 ("Described in August 2002 by Attorney General John D. Ashcroft as a 'person of interest' in the probe, Hatfill is still viewed that way, according to law enforcement sources.").

Information concerning Hatfill’s medical and criminal history, items recovered during the search of Dr. Hatfill’s apartment, the FBI’s 24-hour-surveillance of Dr. Hatfill, and the FBI’s characterization of Dr. Hatfill as person of interest and suspect, is all information the defendants have admitted is contained within a Privacy Act “record” about Dr. Hatfill. *See* Ex. N, First Admis. Nos. 5 & 6 (“items discovered ... during any search of Dr. Hatfill’s properties”); *id.* Admis. Nos. 72 & 73 (“officials recovered from Dr. Hatfill’s computer a draft novel authored by Dr. Hatfill”); *id.* Admis. Nos. 219 & 220 (“surveillance of Dr. Hatfill”); *id.* Admis. Nos. 232 & 233 (“person of interest”); Ex. D, Am. Admis. No. 312 (“‘potential suspect’ in the Anthrax Murders”); Ex. E, Second Admis. No. 438 (“waived his physician-patient privilege so that investigators could obtain his medical records”); Ex. O, Third & Fourth Admis. No. 833 (“Dr. Hatfill’s driving record”); Answer to Am. Compl. ¶ 116.i (“Dr. Hatfill’s medical history”).

Yet, even apart from the defendants’ admissions, a review of the disclosures demonstrates that this investigative information satisfies the two-prong test of “record” outlined by the court in *Tobey* and applied by this Court in *Scarborough*. First, the disclosures contain the name of Dr. Hatfill. The anonymous sources were not disclosing investigative information about some hypothetical, unnamed suspect. Second, the disclosures were about Dr. Hatfill in that they described the FBI’s investigation of him as the possible perpetrator of the anthrax attacks. Like the information this Court concluded were records in *Scarborough*, this information implicated Dr. Hatfill in criminal activity and as such is “about” Dr. Hatfill.¹³

¹³ A telling indicator that the reporters might never concede that a particular disclosure is a “record” is their contention that information about Dr. Hatfill’s criminal and medical history (DUI and use of Cipro), personal information specifically delineated in the definition of “record,” is not a “record.” Mr. Klaidman argues that the information leaked about Dr. Hatfill’s medical history is not a record because Dr. Hatfill later revealed this to reporters. Isikoff Opp’n at 18 n.7. Mr. Klaidman’s source was not Dr. Hatfill, but a DOJ who illegally leaked that information *years before* Dr. Hatfill’s attorney publicly replied to the leaked allegations relating

The information at issue here is precisely the same type as that at issue in *Lee* where the Court held Dr. Lee was entitled to discover the sources. The reporters' attempt to distinguish *Lee* on the ground that Dr. Lee alleged that defendants disclosed information about “his and his wife's employment history, their financial transactions, details of their trips to Hong Kong and China, details of the investigation and interrogation of Lee, and purported results of polygraph tests.” Isikoff Opp'n at 21. But the reporters' list omits myriad examples of investigative information that also was at issue.

For example, the D.C. Circuit noted that one article “referred to a Chinese-American computer scientist working in nuclear weapons at Los Alamos and provided considerable detail about the nature and scope of the government's investigation.” *Lee*, 413 F.3d at 55. Another article “named Lee and described a lie detector test he had been given that indicated deception.” *Id.* Similarly, other articles disclosed that the FBI investigation had “c[o]me to focus on an Asian American scientist at Los Alamos who had contacts with the Chinese and has since been transferred to a job outside the national security area” and that Dr. Lee was the “weapons designer ... who was under suspicion of handling nuclear secrets to China.” *Lee*, 401 F. Supp. 2d at 129 n.8. The reporters cannot simply ignore those investigative disclosures. Nor can they deny that similar disclosures form the basis of Dr. Hatfill's suit.

to Dr. Hatfill's medical history. Mr. Lengel argues that, although one of his DOJ sources disclosed that Dr. Hatfill had been arrested for DUI, this information is not a record because Lengel, after receiving the leak, “went to court and just dug [the records] up.” Isikoff Opp'n at 19. Isikoff argues that the leaked information that the FBI discovered a draft novel on Dr. Hatfill's computer during a search is not a record because the novel was already on file with the U.S. copyright office. Isikoff Opp'n at 16 n.6. The same type of arguments were advanced in *Scarborough* and rejected by this Court. “[T]he District of Columbia Circuit has expressly declined to adopt the proposition ‘that when a release consists merely of information to which the general public already has access ... the Privacy Act is not violated.’” *Scarborough*, 2007 WL 1470694, at *8 n.28 (quoting *Pilon v. Dep't of Justice*, 73 F.3d 1111, 1118 (D.C. Cir. 1996)).

B. Whether Dr. Hatfill Is Entitled to Summary Judgment on Certain of His Privacy Act Claims Is Immaterial.

Mr. Stewart believes that Dr. Hatfill ought to win summary judgment on his claim that the defendants failed to adequately safeguard their systems of records and that, assuming Dr. Hatfill recovers all his damages through that claim, disclosure of the leakers' identities is unnecessary. *See* Stewart Opp'n at 19-25. The reporters argue that Dr. Hatfill ought to succeed on his Privacy Act claims without knowing the leakers' names because Dr. Hatfill was successful in obtaining testimony that the leakers were officers and employees of the agency defendants. Isikoff Opp'n at 22-24; Stewart Opp'n at 26-32. But it is the Court's opinion—not the reporters' self serving one—that matters here. We do not know whether the Court will grant summary judgment on Dr. Hatfill's safeguarding claim, and we do not know whether damages awarded under that theory of recovery would fully compensate Dr. Hatfill. With regard to the other assertion, we do know that the Court is of the opinion that Dr. Hatfill needs the identities of the sources to prevail on his non-safeguarding Privacy Act claims. The Court said so in its March 30 Order. Although Dr. Hatfill appreciates the reporters' vigorous advocacy on his behalf, ultimately it is the Court's opinion, not theirs—that is relevant.¹⁴

III. THE COURT SHOULD NOT REVERSE ITSELF AND CREATE A COMMON LAW REPORTER'S PRIVILEGE, AS THE REPORTERS REQUEST.

The reporters request that this Court reverse itself and recognize a common law reporter's privilege. As they describe it, the common law privilege requested here (1) incorporates the never-adopted "third factor" derived from Judge Tatel's concurrence; (2) provides protections

¹⁴ Stewart alternatively suggests that the Court proceed with this litigation in a piecemeal fashion by delaying a decision on the present motions to compel source identities until after briefing, argument, and a decision on summary judgment. The Court already has rejected a similar suggestion that this case be conducted in piecemeal fashion. Hr'g Tr. 51:16-53:11, Mar. 19, 2007 (Ex. A).

that Congress rejected when it chose, on multiple occasions, not to enact a federal shield law; and (3) provides more vigorous and expansive protection than the qualified First Amendment privilege. In summary, the specifics of the privilege have been rejected by this Court, this Circuit, and Congress, and is more expansive than what the Constitution provides.

A. The Reporters Improperly Attempt To Incorporate the Rejected “Public Interest” Factor Through the Already Rejected Common Law Privilege.

The fact that this Circuit’s law does not incorporate a third “public interest” factor has been discussed above, and will not be repeated, except to note that what the reporters are requesting by way of a novel common-law privilege would adopt precisely the third factor that this Court and Circuit have rejected. *See* Isikoff Opp’n at 36; Stewart Opp’n at 38; Locy Opp’n at 14. Indeed, when the Court of Appeals expressly rejected incorporating the public interest factor, it also declined the invitation to recognize a common law privilege that would have included that factor. *See Lee*, 401 F. Supp. 2d at 139 (“This Court cannot reasonably import a three-part test ... into a common law privilege as if consensus on the privilege and that test already existed when it so obviously does not. The reasoned disagreement among the learned judges on the D.C. Circuit cautions against recognizing a privilege that would have such indistinct contours.... [I]t would circumvent the Court of Appeals’ decisions in *In re Miller and Lee* to recognize the same test now under the common law.”) (emphasis added).¹⁵ In *Lee*, this

¹⁵ The reporters’ tactic of attempting to elevate a concurrence to controlling law has been rejected before and should be rejected again here. In *In re Grand Jury Subpoena*, 438 F.3d at 1148, the journalists “persist[ed] in arguing that the District Court erred in concluding that the journalists subpoenaed to reveal their sources ... enjoy no First Amendment protection,” and their argument was “base[d] ... on the concurring opinion of Justice Powell in *Branzburg*....” *Id.* The Court of Appeals held that the concurrence “provide[d] no support for the existence of such a privilege,” and recognized Justice White’s opinion as “the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants.” *Id.*

Court squarely rejected the argument that a common law privilege protects sources' names from disclosure when sought in a Privacy Act case. *See id.* at 131 (rejecting journalists' assertion "of both privileges"—the qualified First Amendment privilege and "a federal common law privilege"). There is no reason to reverse that holding here and do what the Court of Appeals has declined to do, especially when, to the extent *any* common law reporter's privilege theoretically could exist, such privilege would necessarily be qualified, not absolute. *See In re Grand Jury Subpoena*, 438 F.3d at 1150 (noting even Judge Tatel acknowledged that such privilege would be qualified); *see also New York Times Co. v. Gonzales*, 459 F.3d 160, 169 (2d Cir. 2006) (recognizing that any common law reporter's privilege would necessarily be a qualified privilege).

B. Reassuring “a Public in Desperate Need of Reassurance” by Reporting Illegal Leaks Is Not a “Public Interest” that Trumps the Privacy Act.

“[T]he party seeking recognition of a new privilege must ‘demonstrate with a high degree of certainty that the proposed privilege will effectively advance a public good.’” *Lee*, 401 F. Supp. 2d at 137 (quoting *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998)). The reporters assert that, because the leaks were reported during “an extraordinary time, when the public was facing unprecedented threats,”¹⁶ “[t]he public was understandably in desperate need of information and reassurance, and the information published by these journalists served that

¹⁶ Like unauthorized wiretaps and torture, there is no real argument that suspension of the Privacy Act's protections is justified in the name of the public interest during times of “unprecedented threats,” especially when the leaks served only to hinder the investigation. *See* Mem. Supp. Mot. Compel at 13 (citing FBI officials' testimony),

need.” Isikoff Opp’n at 26. Even a cursory review of the published reports demonstrates that “reassurance” is a made-for-litigation, *post hoc* justification.¹⁷

The reporters cannot articulate how reporting information leaked for the purpose of *incorrectly* suggesting that the FBI had their man “satisfied the public’s need for reassurance about the nature of the threat it was facing.” *Id.* The reporters are reduced to asserting that “*any* report of progress in the investigation” (even, apparently, leaks falsely claiming progress) “was reassuring,” and “[*a*]ny indication that the source of the anthrax mailings was domestic, rather than foreign” (even, apparently, when wrongly identifying an American as the likely culprit) “was doubly reassuring to the public.” *Id.* (emphasis added). Their use of the word “any” accounts for the fact that the leaks actually hid the absence of real progress in the investigation and the lack knowledge as to who the true culprit was (a fact still unknown today).

As noted above, the “useful tool” of promising anonymity to leakers is not the *sine qua non* of a free press sufficient to trump the interests, public and private, served by the Privacy Act. Nor could the novel, albeit disingenuous, theory that reporting leaked investigative information, including inaccuracies, lies, and half-truths, to “reassure” the masses, trumps the public interest in “bring[ing] to light a serious abuse of power by senior federal officials who intentionally leaked information about the ... investigation to create a smokescreen to cover up their own ineptitude.” *Lee*, 401 F. Supp. 2d at 139-140. Like the notion that their object in reporting leaks

¹⁷ Far from “reassuring” the public, Newsweek, for example, reported that U.S. government labs were producing “weapons-grade anthrax” and, citing an unnamed law-enforcement official, stated that security at these labs was so lax “[s]omeone could just put a Baggie in his coat and walk out of a lab with the stuff,” an especially alarming prospect since Newsweek also warned—in the very reports now claimed to have serve the public’s “desperate need of ... reassurance”—that “the anthrax killer is presumably still alive, and at large.” Ex. B. Indeed, it is as—if not more—likely that the published reports increased unease and alarm.

was to “reassure” the public, the reporters’ argument that Dr. Hatfill’s suit serves “purely ... his own private interests,” Isikoff Opp’n at 34 n.16; Locy Opp’n at 15, is self-serving and wrong.

C. The Court Ought Not Create by Judicial Fiat What Congress Has Repeatedly Rejected.

The reporters give short shrift to the fact that Congress has repeatedly rejected a federal shield law because, as they argue, “discretion to adopt such a privilege has already been delegated by Congress to the courts” by Evidence Rule 501. Isikoff Opp’n at 35 n.17. Yet any such discretion is not unbridled and should be exercised judiciously. *Jaffee v. Redmond*, 518 U.S. 1, 15-18 (1996). When a *federal* court has been presented with a request to create a *federal* common-law privilege under the generic “discretion” granted to it by Rule 501, it is sensible for that court to recognize that Congress has repeatedly rejected enacting the requested privilege. *See In re Grand Jury Subpoena*, 438 F.3d at 1158 (Sentelle, J. concurring) (“The creation of a reporter’s privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision. I suggest that the media ... would better address those concerns to the Article I legislative branch for presentment to the Article II executive than to the Article III courts.”). There is no good reason for this Court to reverse itself and recognize a privilege that Congress has rejected.

D. The *Jaffee* Factors Are Not Met Here.

1. The “Need for Confidence and Trust” To Hide Unlawful Activity Does Not Support Creation of a Common Law Privilege.

The reporters assert that “there is no question that this privilege is rooted in the imperative need for confidence and trust,” and they cite “affirmations relating to the importance of being able to promise confidentiality to their ability to gather and report the news.” Isikoff Opp’n at 30. Yet the “confidence and trust” at issue here is the trust that one who violates the

Privacy Act places in the reporter to whom he has chosen to illegally leak information, and the illegal nature of this activity means it cannot justify the creation of a common law privilege.¹⁸

Any conspiracy to violate the law requires the conspirators to place in one another the “confidence and trust” not to reveal the conspiracy or its participants. Yet it would be a bold conspirator indeed who would assert a “conspirator’s privilege” in an effort to block the admission of testimony about the unlawful conspiracy or its participants based on the fact the conspiracy was rooted in “confidence and trust.” Courts reviewing the assertion of a reporter’s privilege, from *Branzburg* onward, have refused to treat reporters differently from others when it comes to providing testimony that relate to violations of the law. *See Branzburg*, 408 U.S. at 682 (“[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”); *Lee*, 413 F.3d at 60 (“[T]he protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official may feel the information is.”); *see also In re Grand Jury Subpoena*, 438 F.3d at 1149 (“The Constitution protects all citizens, and there is no reason to believe that Justice Powell intended to elevate the journalistic class above the rest.”). Notwithstanding the self-serving affirmations provided by those reporters claiming that a

¹⁸ *Jaffee*, wherein the Court recognized the “need for confidence and trust” inherent in the psychotherapist-patient relationship, 518 U.S. at 10, was similar to other privileges recognized at common law, including the priest-penitent privilege, spousal privilege, and attorney-client privilege, none of which finds its basis in interactions that violate the law. By contrast, the reporter’s privilege advocated here is specifically needed to protect those who chose to violate the law by leaking information protected by the Privacy Act.

“meaningful” reporter’s privilege, *see* Isikoff Opp’n at 35, is necessary to their ability to gather and report the news, this Court has recognized in rejecting a common law reporter’s privilege that “[a]nonymous sources are not a *sine qua non* of journalism but only an important and useful tool.” *Lee*, 401 F. Supp. 2d at 141.

2. The Privilege Requested Here Would Not “Serve Public Ends.”

For similar reasons, the reporter’s argument that it “should go without saying that ‘public ends’ are served by the free flow of information promoted by this privilege,” Isikoff Opp’n at 30, also should be rejected. Protecting this “free flow of information” serves only to exempt an entire class of disclosures—illegal leaks to *reporters* (as opposed to leaks to anyone else)—from protection under the Privacy Act. The Privacy Act serves important public ends, and facilitating the illegal leaking of protected information does not justify a broad “public end” of “free flow of information.” Recognizing a reporter’s privilege here would erode the Privacy Act and the public ends it serves.

If a decision were made to exempt illegal disclosures to reporters from the Privacy Act, determining who is a “reporter” triggering that exemption would not be an easy task. Unlike a licensed social worker (psychotherapist-patient privilege), a member of the legal bar (attorney-client privilege), or a married couple (spousal privilege), determining whether illegal disclosures were made to a “reporter” triggering an exemption would not be as straightforward as whether one possessed a social worker’s, law, or marriage license. A reporter’s privilege exemption could easily swallow the rule and eviscerate the Act. As Judge Sentelle asks:

Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? ... [D]oes the privilege also protect the ... stereotypical ‘blogger’ sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? ... If so, then

would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation ... to call a trusted friend or political ally, advise him to set up a web log ... and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?

In re Grand Jury Subpoena, 438 F.3d at 1156 (Sentelle, J. concurring). The reporters argue for a common law privilege “more robust than the Constitutionally-required minimum,” Isikoff Opp’n at 35, even though so “robust” a privilege would eliminate the statutory protections of the Privacy Act here and potentially in many other situations. Congress has determined that there is a public interest in protecting against the unlawful disclosure of protected information by government agencies. It is not in the public interest to ignore the policies underlying the Act simply to preserve a “useful tool” of the reporters’ profession.

3. The Mishmash of State Reporter’s Privilege Rules of Varying Application Does Not Support Creation of a New Privilege Here.

In discussing the third *Jaffee* factor—the examination of whether comparable rules exist at the state level—the reporters begin by asserting “every state except Wyoming recognize some form of the reporter’s privilege.” *Id.* at 32. But “some form” of the privilege does not equate to the expansive privilege they advocate here. Indeed, Rule 501 looks to whether a “*comparable*” privilege—not similarly named “privileges” of widely varying applicability—has been adopted by the states. The admittedly varied nature of state “reporter’s privilege” statutes and rules is good reason *not* to manufacture a new common law privilege here. As recognized by Judge Sentelle, states do not agree as to whether such a privilege should “be absolute or limited” or “[i]f limited, how limited?” *In re Grand Jury Subpoena*, 438 F.3d at 1158 (Sentelle, J. concurring).

Without attempting to catalog, I note that state statutes provide a variety of answers to that policy question. Therefore, if such a decision requires the resolution of so many difficult policy questions, many of them beyond the normal compass of a single case or controversy such as those with which the courts regularly deal, doesn’t that decision smack of legislation more than adjudication?

Id. To avoid answering that rhetorical question, the reporters argue that the Court should simply adopt a reporter’s privilege now “without regard to whether other problems may arise in the future.” Isikoff Opp’n at 29 n.9. Yet even *Jaffee* does not support the recognition of a privilege so indefinite or potentially varied in nature that it would provide little guidance to future litigants. *See Jaffee*, 518 U.S. at 18 (“[I]f the purpose of the privilege is to be served, the participants in the confidential conversation ‘must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.’”) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

Although the reporters start with the all-but-Wyoming statement, the number of states with relevant privilege rules gets whittled down significantly as their argument progresses. Eventually, the reporters assert (without any real explanation) that an uncouneted “majority of states voted in favor of privileges that are *arguably* more robust” than the First Amendment, and then recognize that only nineteen states have adopted privileges that they describe as “absolute *in the circumstances presented by this case* (a civil suit not involving a libel claim against the newspaper).” Isikoff Opp’n at 32 (emphasis added). Given the degree of context-sensitivity displayed in the statutes cited by the reporters, it must be observed that these state-law protections for journalists have each been created for use in state courts for decided under state law—not under the Privacy Act or other federal statute.

The Privacy Act vests jurisdiction with the federal courts and a claim under the Act presents issues of federal law. To the extent a state’s reporter’s privilege statute exempts from that privilege *only* cases “involving a libel claim against the newspaper,” it is not taking a position with regard to the Privacy Act. By contrast, this Court and this Circuit have held that

the policy reasons underlying the Privacy Act are not inferior, and should not be subordinate, to a reporter's interest in maintaining the anonymity of his or her sources. *See Lee*, 413 F.3d at 60 (“[T]he protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official may feel the information is.”); *Lee*, 401 F. Supp. 2d at 141. State legislation simply does not speak to the Privacy Act, and because state reporter's privilege rules are so varied in their application, they should hardly serve as the basis for crafting a new common law privilege.

E. Rule 501 Provides No Basis To Create a New Discovery Rule.

The very fact that the journalists have invoked Rule 501 masks an important aspect of this controversy: namely, that the issue is not really one of evidence, but of discovery. *See Lee*, 413 F.3d at 58 (“[W]hat we are reviewing is a discovery order.”). If the leaker were to come forward and say he released Privacy Act information about the plaintiff, it is inconceivable that any court would refuse to admit that evidence. The admission of such evidence despite a reporter's privilege could not be explained by a waiver, because the reporters stoutly maintain that the reporter's privilege belongs to the reporter alone and cannot be waived by the source.

In this case, Allan Lengel refused to identify any source with whom he had “off the record” conversations, and testified that he did not recall any “on the record” conversations with Van Harp, the special agent in charge of the Amerithrax investigation. Lengel Dep. at 185:16-186:3 (Ex. P). Mr. Harp, however, testified that he had conversations with Mr. Lengel and that Mr. Lengel extended to him a promise of confidentiality. Harp Dep. at 74:14-15, 156:12-16 (Ex. Q). This testimony constitutes compelling evidence that Mr. Harp was one of Mr. Lengel's anonymous sources. Yet Mr. Lengel steadfastly refused to waive any privilege when testifying. It cannot seriously be argued, however, that Mr. Harp's testimony reflecting this “privileged”

communication with Mr. Lengel would be inadmissible at trial as some kind of privileged communication.

Considered purely as an evidentiary matter, there is no justification for the privilege. The reporters now press Rule 501 upon the Court not because there is an evidentiary issue here, but because they are out of other arguments for the privilege they have sought unsuccessfully since 1958. The real issue here is compelled disclosure, and this Court should not create an evidentiary rule as a roundabout mechanism for regulating discovery. The discovery rules and the cases construing them give judges wide latitude to protect reporters from harassment, whether from the government or from private litigants. *See Lee*, 413 F.3d at 60 (even though the “protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, ... [t]his does not leave the journalists without protection. Besides the qualified privilege described in *Zerilli*, the usual requirements of relevance, need, and limited burdens on the subpoenaed person still apply.”) (citations omitted).¹⁹ The discovery standards prevail for everyone else in society, and neither the First Amendment nor any valid public policy supports a different rule for reporters.

CONCLUSION

For the foregoing reasons and those set forth in Dr. Hatfill’s opening memorandum, Dr. Hatfill respectfully requests that the Court grant his motion to compel.

¹⁹ Point in fact, counsel for Mr. Stewart trumpeted the strength of protections existing under the current state of the law by noting that they “are aware of more than thirty cases in which federal courts have quashed testimonial subpoenas served on journalists on the basis of the reporter’s privilege, including roughly half a dozen in this jurisdiction.” Mem. Supp. Mot. Quash at 20 (Dkt. 159).

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