

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 REPLY MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL FURTHER TESTIMONY FROM TONI LOCY**

In opposition to Dr. Hatfill’s motion to compel further testimony, Ms. Locy claims the Court should uphold her reporter’s privilege because (1) Dr. Hatfill has failed to satisfy this Circuit’s two-prong test for overcoming the reporter’s privilege and (2) the Court should adopt a federal common law privilege. The invalidity of Ms. Locy’s invocation of a common law privilege is addressed in Dr. Hatfill’s Consolidated Reply Memorandum.¹ Dr. Hatfill, however, submits this reply to address the issues specific to Ms. Locy with regard to her argument that Dr. Hatfill has failed to show centrality or exhaustion.

I. DR. HATFILL HAS ESTABLISHED THAT MS. LOCY’S ANONYMOUS SOURCES ARE CENTRAL TO HIS CASE.

Ms. Locy received investigative information about Dr. Hatfill from anonymous sources within the DOJ and FBI, and she undeniably knows the identities of these sources. Locy Dep. at 47:3-9, 52:7-10, 54:3-22, 133:7-11 (Ex. 1). Among the specific investigative information Ms. Locy’s sources leaked about Dr. Hatfill is that FBI officials believed Dr. Hatfill committed the anthrax attacks and the basis for that belief, Dr. Hatfill was under 24-hour-surveillance, and Dr.

¹ Dr. Hatfill hereby incorporates by reference his Consolidated Reply Memorandum.

Hatfill's polygraph examination showed evasive answers when questioned about the anthrax attacks. *Id.* at 55:15-18, 56:15-18; T. Locy, *Anthrax Investigators Tail Scientist "24/7"*, USA Today (May 29, 2003) (Ex. 2). Nevertheless, Ms. Locy argues that Dr. Hatfill has failed to show that her sources are central to his case. Specifically, she argues that because she claims to be unable to attribute specific disclosures about Dr. Hatfill to a particular anonymous source, she should not be compelled to reveal the identities of any of her sources.

But Ms. Locy does apparently remember that the FBI and DOJ disclosures she reported about Dr. Hatfill came from a small and defined universe of her FBI and DOJ sources. She does not claim that she cannot recall who her FBI and DOJ sources were; she just claims that she can no longer recall *which* sources made *which* disclosures. Dr. Hatfill will be happy to take on follow-up discovery required to relieve her of this burden.²

² Notably, Ms. Locy did not speak to her FBI or DOJ sources about the matter before giving the testimony that provides the basis not only for her memory argument but the privilege dispute itself. Locy Dep. at 9:14-18. Had she done so, she could have confirmed both the information they disclosed about Dr. Hatfill and her supposition that they wish her to continue to conceal their disclosures from discovery in this civil action. Government officials who make disclosures pursuant to confidentiality agreements with reporters may not actually object to the relevant testimony, thus allowing courts to avoid the need to overrule a claim of reporter's privilege and risk the harm the media claims to suffer from such a ruling. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1131, 1144 (D.C. Cir. 2006) (recounting that contempt proceeding against one reporter was resolved when he "agreed to provide testimony and documents relevant to a specific source who had stated that he had no objection to their release"). To the extent there is a risk of overbreadth in the discovery of the set of FBI and DOJ personnel who leaked information to Ms. Locy, that risk is caused entirely by Ms. Locy's reluctance to undertake any effort to refresh her recollection about the specific disclosures, which she also could do by calling her sources. *Cf. New York Times v. Gonzales*, 459 F.3d 160, 168-69 (2d Cir. 2006) (rejecting reporters' claim that discovery of telephone records related to concealed sources risked overbreadth when reporters asserted privilege to block more limited discovery of sources at issue). Moreover, as no societal interest is served by giving the court's imprimatur to the protection of *any* federal law enforcement officials who disclosed investigative information to reporters in exchange for protection against discovery, there is no harm in any incidental overbreadth that might result from a compulsion order.

Notwithstanding her inability to make the final linkage between individual source and individual leak, it is clear from Ms. Locy's deposition testimony that she can name the individual sources (1) who gave her information about the investigation and (2) whom she offered the protection of anonymity. In a May 29, 2003 article, Ms. Locy relied on "four law enforcement sources" for information about Dr. Hatfill. Ex. 2. While not appearing in the May 29 article, the identities of two of these law enforcement sources were further identified in a draft of the article as a "high-ranking FBI official" and a "top FBI source." Locy Dep. at 115:2-5, 117:20-118:1. When asked, however, to further define these terms, Ms. Locy invoked the reporter's privilege. *Id.* at 134:2-9, 135:5-13. In particular, with respect to the "high-ranking FBI official," she acknowledged that not all of her FBI sources would fall into that category. *Id.* at 134:11-16. And when asked whether based on this title she could narrow down who this person was, Ms. Locy evasively answered, "maybe." *Id.* at 134:17-22.

Ms. Locy refused to answer similar questions that might further identify her anonymous sources. For example, she would not confirm whether any of her sources of information about Dr. Hatfill were both for attribution sources and confidential sources. *Id.* at 79:6-80:3. If it were the case that she used the same source for on-the-record and off-the-record information, the universe of FBI and DOJ official could be dramatically reduced based on a simple search of all of Ms. Locy's articles. She refused to answer whether any of her sources had first-hand knowledge of the investigation. *Id.* at 93:13-19. Nor would she state whether her sources carried a gun. *Id.* at 95:10-96:15. Further, she refused to reveal whether she ever spoke to the DOJ or FBI press offices off-the-record about Dr. Hatfill. *Id.* at 47:18-48:11, 109:3-14. She even invoked the privilege with respect to whether the four law enforcement sources identified in the May 29 article were still employed by the FBI today. *Id.* at 145:10-15.

Other information suggesting Ms. Locy can provide the names of sources is the fact that some of these individuals had not previously been used. *Id.* at 88:22-89:4. If she is able to distinguish her sources based on when she first began using them for information, then she clearly knows who they are. Moreover, Ms. Locy refused to reveal whether she had spoken with particular officials within the FBI, despite the fact that these individuals testified under oath that they had communicated with her. *Id.* at 120:12-123:1, 125:17-126:6. She also refused to reveal whether any of her sources were included on a list of officials within the DOJ and FBI who had waived any promise of confidentiality they may have been granted. *Id.* at 119:11-120:10.

Dr. Hatfill has shown that answers to all of these questions go to the heart of his Privacy Act case. Until these questions have been fully answered, it is simply incorrect for Ms. Locy to assert that she should not be compelled to reveal information that identifies or may tend to identify her confidential sources.

II. DR. HATFILL HAS EXHAUSTED REASONABLE ALTERNATIVE FOR THIS INFORMATION.

Ms. Locy's claim that Dr. Hatfill failed to exhaust other means of acquiring the identities of her sources does not state all the relevant facts. Ms. Locy correctly notes that Dr. Hatfill questioned David Israelite, the Attorney General's Deputy Chief of Staff and Counselor, whether he disclosed any information to Ms. Locy. In addition, however, Dr. Hatfill deposed twenty DOJ and FBI officials specifically regarding whether they disclosed any information to Ms. Locy or any other reporter at USA Today.³ Dr. Hatfill's First Amended Complaint included allegations

³ See Adams Dep. at 122:21-126:22 (Ex. 3); Ayres Dep. at 266:8-269:14, 273:8-12 (Ex. 4); Carey Dep. at 158:4-167:14 (Ex. 5); Corallo Dep. at 272:11-273:8 (Ex. 6); Daniels Dep. at 193:14-194:16 (Ex. 7); Darnell Dep. at 179:14-182:13 (Ex. 8); Eberhart Dep. at 48:23-55:14 (Ex. 9); Fitzgerald Dep. at 85:4-95:16 (Ex. 10); Garrett Dep. at 22:3-23:18 (Ex. 11); Harp Dep. at 70:20-75:14, 157:18-158:4 (Ex. 12); Henke Dep. at 208:7-209:15 (Ex. 13); Kohl Dep. at 134:11-137:14 (Ex. 14); Kortan Dep. at 221:15-224:5 (Ex. 15); Lambert Dep. at 50:16-58:11 (Ex. 16);

that officials unlawfully leaked information about Dr. Hatfill to Ms. Locy—which the defendants denied. *See* First Am. Compl. ¶ 96.j, o (Dkt. 103); Answer ¶ 96 (Dkt. 109). Further, not only did Dr. Hatfill propounded specific document requests, interrogatories, and requests for admission designed to discover whether the defendants disclosed information about Dr. Hatfill to the press in general, he also propounded specific requests about disclosures to Ms. Locy or any reporter at USA Today. *See, e.g.*, Interrog. Resp. Nos. 37, 52, 148-55, 171-73 (Ex. 25); Resp. Doc. Req. Nos. 44, 47 (Ex. 26); Admis. Req. Nos. 664-79, 711-16 (Ex. 27). Such efforts satisfy this Circuit’s exhaustion requirement. *Lee v. Dep’t of Justice*, 413 F.3d 53, 60-61 (D.C. Cir. 2005).

CONCLUSION

Ms. Locy’s confidential FBI and DOJ sources are central to Dr. Hatfill’s case and he has exhausted reasonable means to discover their identities. Dr. Hatfill, therefore, respectfully requests that the Court overrule Ms. Locy’s invocation of the reporter’s privilege and order the disclosure of her sources’ identities.

Dated: June 4, 2007

Respectfully submitted,

/s/ Steven A. Fredley

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Murray Dep. at 190:6-195:20 (Ex. 17); Reynolds Dep. at 41:11-20, 44:2-45:5 (Ex. 18); Roth Dep. at 43:10-46:22 (Ex. 19); Sierra Dep. at 259:18-261:6 (Ex. 20); Stockham Dep. at 169:11-172:12 (Ex. 21); Weierman Dep. at 440:2-441:18, 447:9-21, 457:14-459:8 (Ex. 22); *see also* Ex. 23 (deposition exhibit 17); Ex. 24 (deposition exhibit 24).