

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

<b>STEVEN J. HATFILL, M.D.,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Case No. 1:03-CV-01793 (RBW)</b>
	)	
v.	)	
	)	
<b>ALBERTO GONZALES</b>	)	
<b>ATTORNEY GENERAL, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	
	)	

**NON-PARTY JAMES STEWART’S REPLY TO DEFENDANTS’  
MEMORANDUM REGARDING PLAINTIFF’S MOTION TO COMPEL**

The Agency Defendants – who did not ask James Stewart the names of his sources on cross-examination when he sat for a deposition in this case, who have not and could not therefore seek to compel the disclosure of source identities, and who long ago announced that they suspended their own investigation into source identities – have nonetheless responded to the various reporters’ oppositions to Plaintiff’s Motion to Compel Further Testimony [Dkt. 157] (“Motion”) by submitting a “Defendants’ Consolidated Response, and Memorandum in Support, to Reporters’ Opposition to Plaintiff’s Motion to Compel” [Dkt.185] (“Def. Mem.”). Stripped to its essence, the government’s argument is that the reporters must be compelled to name their sources because otherwise the government will win its case. That argument is such an unusual, self-defeating position for a litigant to advance that it should invite particularly serious scrutiny of the arguments advanced to support it. Not surprisingly, those arguments cannot withstand such scrutiny. Rather, they merely bring into sharper focus the government’s tactic of avoiding a potentially problematic defense of this case by inciting a lengthy battle between Plaintiff and non-parties that neither professed to want or need.

## ARGUMENT

As an initial matter, the government (and Plaintiff) chide Mr. Stewart for allegedly wanting to have it both ways, arguing both that the Privacy Act does not cover the leaks in question and that there is already sufficient evidence for Plaintiff to prevail. Def. Mem. at 1. In reality, there is nothing inconsistent about these alternative positions. Mr. Stewart does seriously question whether the Privacy Act reaches the kind of “leaks” supposedly at issue here.<sup>1</sup> However, if Plaintiff’s construction of the Act is correct, he does not need the names of Mr. Stewart’s sources to prevail. The government itself has and no doubt will continue to advance its own alternative arguments, i.e. that alleged “disclosures” are not covered by the Privacy Act regardless of their source, but if they are, the government wins anyway.

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<sup>1</sup> That is especially so with regard to Mr. Stewart’s reporting. Indeed, Plaintiff’s Reply Brief supporting his Motion to Compel [Dkt. 186] (“Pl. Reply”) barely mentions any of Mr. Stewart’s reporting, referencing just one soundbite that on its face contains no specific investigative details about Plaintiff. Pl. Reply at 12. Plaintiff also lifts out of context a footnoted comment by Judge Collyer in the course of explaining why she declined to recognize a broader common law reporter’s privilege, to the effect that a non-party lacks standing to address the merits of a case. *Lee v. United States Dep’t of Justice*, 401 F. Supp. 2d 123, 142 (D.D.C. 2005). If Plaintiff’s claim that Judge Collyer was purporting to establish some broad, abstract proposition of law with respect to the meaning of “need” or “centrality” with respect to the constitutional reporter’s privilege was correct, a party could overcome the reporter’s privilege even if its case had no merit, or even if the merits of its case were already established without the names of sources. That proposition defies both common-sense and a wealth of case law establishing the proposition that evaluation of whether a party needs source identities necessarily requires a comparison of what may happen to the case with and without those names. *See* Stewart Opposition to Motion to Compel Further Testimony [Dkt. 173] at 11-13. In fact, Judge Collyer’s discussion of the issue of centrality addressed and distinguished, on the merits, another recent Privacy Act case involving a motion to compel the disclosure of a reporter’s sources, which had denied disclosure on the grounds that the purported “disclosure” at issue was not covered by the Privacy Act. *See Lee*, 401 F. Supp. 2d at 133 n.15 (discussing *Wright v. FBI*, 385 F. Supp. 2d 1038 (C.D. Cal. 2005)).

**A. The Government Fails to Point to a Single Inaccuracy in Mr. Stewart’s or any other Reporter’s Testimony**

Defendants begin by attempting to shoot the messenger, casting aspersions on the press in general, including CBS in particular, for “a serious lack of quality control” in reporting about the anthrax investigation, pointing to a few alleged inaccuracies in several dozen news reports. As a result, the government contends that it needs to know the names of sources to rebut the accuracy of the information attributed to sources in the news reports. However, this is not a case about the content of news reports. The Privacy Act is not violated by the publication of news reports.

Rather, if information communicated to at least some of the reporters by agency employees implicates the Privacy Act, this case concerns a half-dozen award-winning reporters’ sworn testimony about what agency employees told them and whether that information was contained in protected records.<sup>2</sup> If reporters in their testimony had in fact mischaracterized what agency employees told them, the government would not need to know the names of sources to make that case because the government knows the accurate facts about the investigation. For example, if a reporter testified that an FBI source said that bloodhounds detected Dr. Hatfill’s

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<sup>2</sup>The Defendants’ fixation on a copy error on CBSNews.com highlights the distinction. The government complains that someone published a website version of one of Mr. Stewart’s news stories without checking with Mr. Stewart, which resulted in information being “entirely misattributed” to Van Harp, an FBI employee. Def. Mem. at 7. In fact, someone made a copy error that added a couple of words to comments that Mr. Harp did actually make, and the error was corrected (contrary to the government’s assertion) as soon as CBS News became aware of it. In any event, this is not an action for defamation. A website rewrite by someone other than Mr. Stewart is wholly irrelevant to the accuracy of *his testimony* in this case about what sources told him. Defendants not only take no issue with Mr. Stewart’s testimony, they affirmatively rely upon it in several instances. See Def. Mem. at 8 (citing Mr. Stewart’s testimony that Plaintiff’s counsel was the primary source of one statement). Similarly, Defendants’ argument based upon citing to *appellate briefing* by Plaintiff in *Hatfill v. The New York Times Co.* (Def. Mem. at 5) to show purported factual inaccuracies in Op-Ed columns is equally unavailing, given that the district court in that libel case actually found that the statements in question were substantially true and granted summary judgment to the *Times*. --- F. Supp. 2d ----, 2007 WL 404856 (E.D. Va. Jan. 30, 2007).

scent at Denny's, and the reporter misstated the source's comments, the government would be able to prove that by showing that bloodhounds did no such thing. However, despite what Plaintiff characterizes as testimony about "over 100" alleged statements by agency sources it contends violated the Privacy Act, the government fails to come forward with any evidence of even a single instance in which a reporter testified about information provided by an agency source that inaccurately characterized the investigation. To the contrary, the government does not contest that testimony by reporters matches up to information the government concedes is contained in its system of records.

In general, the government's arguments proceed as if Plaintiff was prosecuting a criminal case and therefore needs to prove each element of his claim beyond a reasonable doubt. However, this is a civil claim that will be tried to the Court, not to a jury, in which a preponderance of the evidence standard governs. As the government's own witnesses have repeatedly conceded in depositions, the suggestion that on this record there is no preponderance of the evidence that agency employees revealed facts concerning the investigation of Dr. Hatfill to at least some number of reporters cannot be seriously defended. What is at issue are the legal consequences, if any, of those communications.

**B. Mr. Stewart's Testimony is Admissible**

Defendants next assert that, "[i]f the reporters were to succeed on their claim of privilege, it would render the reporters' entire testimony inadmissible at trial," because it "would prevent the defendants from effectively cross examining the reporters, rendering their direct testimony inadmissible." Def. Mem. at 8-9. Again, this is a rather curious argument, since presumably it would serve the interests of the Defendants to undermine their opponent's case by rendering the

reporters' testimony inadmissible. In fact, Defendants' arguments misstate both the facts and the law applicable to these circumstances.

What is at issue in Plaintiff's motion to compel is *not* cross-examination, but rather questions posed to Mr. Stewart in his direct examination by Plaintiff's counsel asking the names of his sources. The question thus being litigated is Plaintiff's motion for an order "compelling the reporters to reveal the names of their confidential sources." Motion at 14. The Defendants' counsel, by contrast, never asked Mr. Stewart on cross-examination for the names of his sources, so denying the motion would not deprive the government of any cross-examination it sought. Given that Mr. Stewart (who now lives in Florida) is not amenable to a trial subpoena in this case, any cross-examination of him has already been completed. The government's claim that it has been prevented from cross-examining Mr. Stewart is therefore specious. Regardless of the outcome of Plaintiff's motion to compel, simply as a factual matter, Defendants could not ask the Court to strike his direct testimony on the grounds that the government was denied cross-examination that it never asked.

What the government is really arguing is not that the Plaintiff needs the names of sources to meet its burden of proof, but rather that the government might want the names to try to rebut any unfavorable inferences reasonably created by the present state of the record. If so, then the government should have asked for the names of sources, filed its own motion to compel, and made its own showing to try to overcome the reporter's privilege. Having failed to take any of those steps, it cannot attempt to do so *ex-post* by pointing to its own litigation interests as grounds for granting its adversary's motion to compel.<sup>3</sup>

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<sup>3</sup> Both Plaintiff and the Defendants asked Mr. Stewart a few questions that might have indirectly provided clues to his sources' identities, to which he asserted a privilege. However, only Plaintiff's counsel actually asked for their identities, and only those questions are at issue in

Once the actual posture of this case is recognized, it becomes obvious that Defendants' assertion that the "entire testimony" from reporters would be inadmissible at trial because they invoked a qualified First Amendment privilege not to reveal the identities of confidential sources is plainly wrong. All of the cases involving other privileges they cite involved a refusal to answer questions or discovery posed by the party seeking the information, not questions posed to a non-party witness by the other party to the case on direct examination. In fact, the two cases cited (see Def. Mem. at 9) that involve qualified privileges actually illustrate the fault line in the Defendants' argument. Neither involves examples of testimony being struck based on a *bona fide* assertion of privilege. Rather, both involve successful efforts by parties in the position of the Defendants here to compel their adversaries to answer questions or provide discovery on the grounds that the attorney-client privilege was *waived* because the nature of their claims or defenses put their communications with their attorneys at issue. See *Ideal Elec. Sec. Co., Inc. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151-52 (D.C. Cir. 1997) (*party waives attorney-client privilege as to attorney's bills, where recovery of attorneys fees was central issue in case*); *United States v. Bilzerian*, 926 F.2d 1285, 1291-94 (2d Cir. 1991) (*party waives right to assert attorney-client privilege when it puts at issue "[its] good faith belief in the legality" of a particular securities transaction*). These cases merely demonstrate that in the circumstances of this case only a motion to compel by the government could be a predicate for the arguments it makes, rather than a claim that testimony should simply be struck. Here Mr. Stewart did not put anything at issue

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the Motion to Compel. Moreover, had the Defendants attempted to lay a foundation to move to compel source identities, their chances of success would have been quite limited. For example, the Defendants would have to demonstrate that they had taken reasonable efforts to exhaust alternative means of identifying the sources. Given that their response to the filing of this lawsuit was to close their own leak investigation, the Defendants would likely face serious obstacles to making such a showing.

that could give rise to a claim of waiver, and the Government is not moving to compel him to answer some question it posed or wishes to pose on the grounds of waiver or any other basis.<sup>4</sup>

Otherwise, all of the other cases involving assertions of privilege cited by the Defendants are criminal proceedings in which co-conspirators or co-defendants in criminal trials (or on *habeas* review) asserted a Fifth Amendment privilege in response to questions posed on cross-examination.<sup>5</sup> Even if this case did involve questions posed on cross-examination, such cases would be wholly irrelevant. Because the Fifth Amendment is an absolute privilege, a motion to compel by the cross-examiner is impossible, and the law often permits adverse inferences to be drawn that are never permitted with respect to *bona fide* assertions of other privileges.

In fact, in *civil* cases involving non-party witnesses who invoke a Fifth Amendment privilege on cross-examination, courts typically consider at most whether to instruct the jury that it may draw an adverse inference regarding the questions a party's witness refused to answer on grounds of self-incrimination, rather than strike the testimony entirely.<sup>6</sup> Otherwise, the law routinely permits witnesses, especially non-party witnesses, to assert privileges on cross-

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<sup>4</sup> In fact, waiver in the particular context of the reporter's privilege to withhold disclosure of confidential sources is a logical impossibility, particularly with respect to a motion to compel disclosure of sources' names. The only way to waive the privilege would be to identify the source, which would vitiate any need to compel further testimony.

<sup>5</sup> See *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963); *Lawson v. Murray*, 837 F.2d 653 (4th Cir. 1988); *United States v. Rosario Fuentes*, 231 F.3d 700 (10th Cir. 2000); *United States v. Newman*, 490 F.2d 139 (3d Cir. 1974); *United States v. Frank*, 520 F.2d 1287 (2d Cir. 1975), all cited in Def. Mem. at 9-10.

<sup>6</sup> Even then, courts tend to permit adverse inferences even in this situation *only* when there is an established relationship between the witness (such as employer/employee) and the party offering the testimony and when the witness seems to have some interest in the outcome of the litigation. See, e.g., *United States v. LiButti*, 107 F.3d 110 (2d Cir. 1997) (setting out factors to be considered by court in determining whether to grant adverse interest); *Emerson v. Wembley USA*, 433 F. Supp. 2d 1200 (D. Colo. 2006) (denying adverse inference and allowing testimony to stand with unanswered questions). Even if Mr. Stewart had invoked the Fifth Amendment, this test would not support an adverse inference instruction.

examination without courts striking their entire testimony. *See, e.g., United States v. Rainone*, 32 F.3d 1203, 1207 (7th Cir. 1994) (“A trial judge does not violate the Constitution when he limits the scope of cross-examination for a good reason, and here as in the usual case desire to protect the attorney-client privilege was a good reason.”); *United States v. Gatzonis*, 805 F.2d 72, 74-75 (2d Cir. 1986) (“the court’s limitation of cross-examination, based on the attorney-client privilege, was within its discretion”). “When [a] privilege makes relevant evidence unavailable, the parties will have to present their cases as best they can without the evidence, as would occur in other instances when non-parties possess privileged information.” *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 32 (D.C. Cir. 2006) (Brown, J., concurring); *see also Sharon v. Time, Inc.*, 599 F. Supp. 538, 560 (S.D.N.Y. 1984) (“Where a party to a litigation is denied information by a third party, the established rule is that the litigation simply proceeds without the information sought.”). In this case, however, the record does not provide Defendants with any standing even to raise these arguments because Plaintiff’s Motion to Compel does not seek to compel answers to any questions posed during the cross-examination of Mr. Stewart.

**C. Defendants Misstate the Standard for Establishing a Safeguarding Claim Under the Privacy Act**

Finally, the Defendants advance a number of arguments to rebut the proposition that disclosure of the names of Mr. Stewart’s sources is not necessary for Plaintiff potentially to prevail on its “safeguarding claims” under the Privacy Act. First, the Defendants argue that the points made by Mr. Stewart with respect to Plaintiff’s “safeguarding” claims are an exercise in “question begging.” They maintain that, in order to prove a failure to safeguard or a resulting “adverse effect,” Plaintiff would have to prove the existence of agency leaks. Def. Mem. at 13-14, 20. To do that, the Defendants contend, Plaintiff would need to know the names of sources

for the same reason the government maintains they are required for purposes of its disclosure claims. Defendants' logic is premised on an implicit assertion of law that is simply wrong.

It is true that Plaintiff's safeguarding claim would at least be strengthened by proof of *agency* leaks. However, as previously discussed, there is far more than a preponderance of evidence in this case that leaks emanated from the Agency Defendants. Where Defendants err is their assertion that, in order for a plaintiff to recover on a safeguarding claim under Sections 552(e)(9) or (e)(10), a plaintiff must prove all the elements of a disclosure claim. Def. Mem. at 3 ("the same showing is necessary to prevail upon a safeguarding claim"). If that were true, the safeguarding provisions would be wholly superfluous.

Rather, it is established that whether a defendant "failed to establish adequate safeguards to protect Privacy Act records ... is an entirely separate question under the Act" from a disclosure claim. *Pilon v. United States Dep't of Justice*, 73 F.3d 1111, 1117 n.4 (D.C. Cir. 1996). Defendants' theory is contradicted even by the authorities they cite. *McCready v. Principi*, for example, involved a situation where a single memorandum had been leaked and "no one can identify the individual who 'leaked' the [document]." 297 F. Supp. 2d 178, 197 (D.D.C. 2003), *aff'd in part and rev'd in part*, 465 F.3d 1 (D.C. Cir. 2006). The trial court entered a defense judgment on the claim not because the leaker could not be identified, but because no evidence established that the *agency* failed to adopt "appropriate administrative, technical and physical safeguards for the memorandum." *Id.*; *see also Schmidt v. U.S. Department of Veterans Affairs*, 218 F.R.D. 619, 634 (E.D. Wis. 2003) (safeguarding claim established where access to records made in "virtual anonymity").

Thus, there is no authority for the proposition that in order to prove that a failure to safeguard had an "adverse effect" on a plaintiff, proof of actual retrieval of records or "willful

and intentional” conduct by a particular leaker is required. Rather, what is required is a showing of somewhat more than gross negligence by the *agency* in failing to safeguard information that ultimately reached persons unauthorized to receive it. In this case, there is certainly evidence in the record from which the trier of fact (in this case the Court) could draw reasonable inferences concerning whether the agencies’ failure to take measures to stop leaks they knew were occurring facilitated more leaks, thus causing an “adverse effect” on Plaintiff. Once again, the Defendants’ argument is that knowing the names of sources might assist its defense, rather than be a necessary predicate for Plaintiff to recover damages.

Second, Defendants cite *McCready* and two other cases that purportedly demonstrate “[t]he difficulty of prevailing on a safeguards claim.” Def. Mem. at 19. A close look at these authorities reveals how different they are from a situation, as here, where it is uncontested that an agency was aware of a significant and continuing pattern of leaks over a long period of time, but failed to take meaningful action to stop them. In *McCready*, judgment was awarded based upon the agency’s “description of the careful manner in which the document was created, hand carried for delivery, and *not* entered into [an electronic database].” 297 F. Supp. 2d at 197. In *Thompson v. Department of State*, a safeguarding claim was based on a single incident where a supervisor left a sensitive document for the employee plaintiff in a sealed envelope on her chair in an open cubicle – an action that was held not to be “patently egregious.” 400 F. Supp. 2d 1, 23 (D.D.C. 2005) (citation omitted), *aff’d*, 210 Fed. App’x 5 (D.C. Cir. 2006). Finally, *Kostyu v. United States* involved a safeguarding claim arising from the classification of a single record as “Official Use Only” rather than the more-secure “Limited Official Use.” 742 F. Supp. 413, 416 (E.D. Mich. 1990). Although the court concluded in retrospect that the lesser classification may have been “inappropriate in light of the anticipated threats to its security and integrity ... the

agency's miscalculation, if any, did not approach the level of culpability necessary for liability to attach under the Act." *Id.* None of these cases consider a situation where an agency had knowledge of *ongoing, acknowledged* leaks. Defendants relegate to a footnote a case in which a safeguarding claim was adequately alleged where "disclosures which are the subject of this lawsuit occurred after the Department became aware of several prior disclosures regarding this plaintiff and several requests for investigation and corrective action." *Pilon v. United States Dep't of Justice*, 796 F. Supp. 7, 12-13 (D.D.C. 1992). *Pilon* illustrates that the safeguarding provisions are not limited to actual "physical" safeguards, but rather can extend to any "administrative" action or inaction that facilitated leaks. Defendants also fail to address the decision in *Schmidt*, except to note in a footnote that partial summary judgment was awarded (although not for the proposition cited by Mr. Stewart). Def. Mem. at 19 n.7. In fact, the court in *Schmidt* found a safeguarding claim established where sensitive information was available on a computer system restricted to authorized agency personnel, but access was provided with "virtual anonymity." 218 F.R.D. at 634.

### **CONCLUSION**

We respectfully submit that the Court should reject the Defendants' attempt to lead the charge in support of a legally and factually unnecessary dispute between Plaintiff and Mr. Stewart. Because Plaintiff's case can be fully adjudicated without invading the privilege

