

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

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

DEFENDANTS’ STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to this Court's Local Civil Rule 7(h) and Local Civil Rule 56.1, Defendants the United States Department of Justice and the Federal Bureau of Investigation hereby submit the following statement of material facts as to which defendant contends there is no genuine issue of dispute.

The Attorney General’s “Person of Interest” Statements Did Not Violate the Act

1. The Attorney General was asked on August 6, 2002 (at an event addressing the subject of missing and exploited children) about Hatfill’s involvement in the investigation. Jane Clayson of *CBS News* asked General Ashcroft about the searches and whether Hatfill was a “suspect” in the investigation. Ex. 30, at 2. General Ashcroft responded that Hatfill was a “person of interest.” General Ashcroft cautioned, however, that he was “not prepared to say any more at [that] time other than the fact that he is an individual of interest.” Id.

2. At the same media event, Matt Lauer of *NBC News* also asked General Ashcroft whether Hatfill was a “suspect” in the investigation. Ex. 31. General Ashcroft responded that Hatfill was a “person that – that the FBI’s been interested in.” Id. at 2. General Ashcroft

cautioned that he was “not prepared to make a . . . comment about whether a person is officially a . . . suspect or not.” Id.

3. General Ashcroft made the same comments at a news conference in Newark, New Jersey on August 22, 2002, stating that Hatfill was a “person of interest to the Department of Justice, and we continue the investigation.” Ex. 32, at 1. As in his previous statements, General Ashcroft refused to provide further comment. Id.

4. When asked upon deposition why he referred to Hatfill as a “person of interest” in the anthrax investigation in response to these media inquiries, General Ashcroft testified that he did so in an attempt to correct the record presented by the media that he was a “suspect” in the investigation, which he believed served a necessary law enforcement purpose. Ashcroft Dep. Tran., Ex. 33, at 81: 5-12; 103:18; 108: 9-13; 138: 5-7; 125: 18-21; 134:22 - 136:8.

5. The Attorney General viewed a “person of interest” as wholly different than a “suspect” or “target.” When asked what his understanding of a “person of interest” was, the Attorney General responded as follows:

5 Q All right, what was your
6 understanding what “person of interest”
7 meant?
8 A A person of interest was a person
9 that the government was interested in talking
10 to.
11 Q Interviewing?
12 A Yes.

Ashcroft Dep. Tran., Ex. 33 at 81: 5-12. When asked whether Hatfill was a “suspect,” the Attorney General explained that his intent was to make clear that Hatfill was not on that “level of identification.” Id. at 103: 18; see also id. at 108: 9-13 (same); 138: 5-7 (same).

6. In the Attorney General's view, doing so "was the appropriate thing to do in the interest of justice and in the interest of individuals related to the case." Id. at 125: 12-21. The Attorney General elaborated his view as follows:

- Q What was the law enforcement reason
1 for disclosing Dr. Hatfill's name and
2 identifying him as a person of interest in
3 the anthrax case?
4 MS. SHAPIRO: Objection to form.
5 THE WITNESS: There are times when
6 explaining the activities of the department
7 support the law enforcement mission of the
8 department, and when inquired of regarding
9 whether Dr. Hatfill was a subject or a
10 suspect, I felt like that interest of the
11 department was advanced by answering the
12 question appropriately, and I did so.
13 BY MR. CONNOLLY:
14 Q How were the interests advanced?
15 A By helping put the activities of
16 the department in the right perspective and
17 understanding of the public at a time when it
18 was both important to the public and when the
19 absence of making that kind of statement
20 might have left the public with an impression
21 that was incorrect.
Q And what would that incorrect
1 impression -- would have been?
2 A That Dr. Hatfill was somehow the
3 focus of greater attention than that of --
4 than being a person in which the department
5 was interested, but that he was, as suggested
6 in the questions being posed to me, that he
7 was indeed some kind of a suspect or target
8 of the investigation.

Id. at 134:22 - 136:8.

7. Prior to making these statements, General Ashcroft did not review or otherwise consult any investigative record. Id. at 128:14 - 129:12.

8. When the Attorney General was shown documents pertaining to a so-called persons of interest list, General Ashcroft did not recognize them. Id.

9. The Attorney General could not even recall how he came to learn the term “person of interest.” As explained below, he may have heard the term from FBI Director Mueller, but not in connection with the review of a record pertaining to persons of interest:

Q How did you learn that Dr. Hatfill
1 was, in fact, a person of interest in the
2 anthrax case?

* * *

10 THE WITNESS: Well, I think I had
11 heard individuals from the FBI use the term.

12 BY MR. CONNOLLY:

13 Q With regard to Dr. Hatfill?

14 A I think so.

15 Q And do you recall who those
16 individuals were?

17 A I believe that the individual that
18 I recall having said that was Robert Mueller.

19 Q And did Director Mueller inform you
20 that the FBI was actually working [off] a
21 persons of interest list that had a number of
22 individuals on that list?

1 A I have no recollection of that.

Id. at 125:22 - 127:1.

Debra Weierman Did Not Violate The Privacy Act

10. Debra Weierman, FBI Spokesperson at the FBI’s Washington Field Office, confirmed some time after the second search of Hatfill’s apartment, which occurred on August 1, 2002, that the search had been conducted pursuant to a warrant. Weierman Dep. Tran., Ex. 27, at 93:16 - 94:14.

11. She did so after that information was “revealed to the media[.]” *Id.* at 94: 2-4.

12. So angry was Mr. Glasberg with investigators that he wrote a letter, dated the same day as the search, to Assistant United States Attorney Kenneth C. Kohl, denouncing the fact that the search had been conducted “pursuant to a search warrant.” Ex. 23 (“Kohl letter”).

13. Glasberg forwarded a copy of this letter to Tom Jackman of the *Washington Post*, and to the *Associated Press*, the morning of August 1st. Glasberg, Dep. Tran., Ex. 24, at 265:12 - 266:5; see also Ex. 25 (Glasberg memorandum to file, stating, among other things, that Glasberg showed Jackman Kohl letter on August 1, 2002). The next day – August 2, 2002 – Glasberg faxed a copy of the Kohl letter to members of the media. Ex. 26.

CBSNews.com Inaccurately Reported Van Harp’s Comments

14. Prior to Harp’s retirement in May 2003, James Stewart of *CBS News* interviewed Harp, on camera, about his career at the FBI. During the interview, Stewart asked Harp “about the still ongoing series of scientific investigations and tests that were being conducted on the anthrax powder, and the overall progress of the investigation.” Stewart Dep. Tran., Ex. 63, at 173:20 -174:8.

15. At least two news stories reported Harp’s response. *CBS News* and Stewart broadcast a story on the CBS Evening News, reporting Harp to say “it’s frustrating that it took so long. I think everyone is frustrated over it.” Ex. 60.

16. The second news story appeared on CBSNews.com. That article stated, “I think we made progress, said Harp of the case against Hatfill.” The next sentence read: “It’s frustrating that it took so long. I think everyone involved in the investigation is frustrated over it.” Ex. 61.

17. Based on the CBSNews.com report, Hatfill alleges that Harp violated the Privacy Act. Am. Compl. ¶ 75. But the CBSNews.com report was simply erroneous. Harp never mentioned Hatfill during the interview, and Stewart never asked about Hatfill. Harp Dep. Tran., Ex. 64, at 346: 10-14; Stewart Dep. Tran., Ex. 63, at 179: 7-11.

18. Upon reviewing the CBSNews.com article at his deposition, Stewart was astonished. Stewart did not know of the report until shortly before his deposition, and after he learned of it, he called to complain to his counsel, who represents CBS News. Stewart Dep. Tran., Ex. 63, at 179:17 - 180:6.

Van Harp Did Not Confirm Details of a *Newsweek* Story to Eleanor Clift

19. On the contrary, Clift called Harp and asked him to confirm some information about the investigation. After Clift went through a litany of items, the specifics of which Harp cannot recall, Harp responded that “there’s some pretty accurate information in there,” and demanded to know where Clift got the information. Harp Dep. Tran., Ex. 65, at 398:2 - 399:17.

20. There is nothing to support the notion that Harp confirmed specific pieces of information about the investigation. Harp emphasized this very point when he testified that he did not confirm for Clift whether “this is accurate, this is not, but rather he only indicated that “[s]ome of that’s pretty accurate.” Id. at 403: 18-21.

21. Harp demanded that Clift reveal her source of the information because he was “upset” that she possessed the information. Id. at 404:20-405:7. In fact, the disclosures in the *Newsweek* article prompted Harp to refer the matter to the FBI’s Office of Professional Responsibility, which he did the day following the article’s publication. Id. at 399:15-17.

22. Plaintiff never deposed Clift.

23. During the discovery period, Hatfill deposed seven journalists: Brian Ross and Victor Walter of *ABC News*, James Stewart (formerly) of *CBS News*, Toni Locy (formerly) of *USA Today*, Allan Lengel of the *Washington Post*, and Michael Isikoff and Daniel Klaidman of *Newsweek*. Hatfill failed to depose the other 31 reporters he alleges received information from DOJ and FBI sources. Plaintiff thus deposed only one of the reporters -- Brian Ross of *ABC News* -- who purportedly obtained the information set forth in paragraph 37 of the amended complaint; none of the reporters who purportedly obtained the information set forth in paragraph 57, one of the reporters (Ross) who purportedly obtained the information set forth in paragraph 65, and only two of the reporters -- Ross and Allan Lengel, and another individual, Don Foster of *Vanity Fair* -- who purportedly obtained the information set forth in paragraph 101.

24. During the depositions that Hatfill did take, each reporter initially refused to identify the name of the sources and only agreed to confirm that certain information had been provided by an employee of the DOJ or the FBI. None of the reporters questioned testified that he or she had any knowledge that of their sources retrieved information from a record. See, e.g., Lengel Dep. Tran., Ex. 65, at 324-30; Ross Dep. Tran., Ex. 8, at 258:17-19; Isikoff Dep. Tran., Ex. 66, at 196-203; Klaidman Dep. Tran., Ex. 67, at 146-47; Locy Dep. Tran., Ex. 68, at 147-148. Each reporter also testified that he or she no reason to believe that any of the sources intended to harm Hatfill or deprive him of his privacy rights. See, e.g., Lengel Dep. Tran., Ex. 65, at 321: 7-14; Stewart Dep. Tran., Ex. 63, at 181:4-18; Ross Dep. Tran., Ex. 8, at 249-50, 258; Isikoff Dep. Tran., Ex. 68, at 196: 3-6, 203:11-14. Indeed, according to Locy, her sources attempted to “caution” her “off” of inaccurate stories. Locy Dep. Tran., Ex. 68, at 149: 11-15.

25. Reporters have attributed certain information contained in an August 12, 2002 *Newsweek* article regarding the FBI's use of bloodhounds in connection to Hatfill to Roscoe Howard, former United States Attorney for the District of Columbia, and Daniel Seikaly, the former Criminal Chief in that office. Seikaly has also been identified as a source for other reporting by *Newsweek* and *The Washington Post*, beginning in January 2003, concerning the FBI's search of a pond in Frederick Maryland. In addition, Edwin Cogswell, a former spokesperson within the FBI's Office of Public Affairs, has been identified as a source for certain *ABC News* broadcasts which were aired by Brian Ross. And Arthur Eberhart, a former Special Agent in Charge in the FBI's Washington Field Office, is alleged to have conveyed information about Hatfill to *ABC News* after he retired from the FBI at the end of August 2002.

26. In this case, none of the individuals alleged to have made improper disclosures retrieved an investigative record from a system of records, much less a record about Hatfill. Howard testified that he knew about the bloodhounds (and other details about the investigation) from oral briefings. Howard Dep. Tran., Ex. 69, at 215:3 - 216:18. Howard never reviewed an investigative file pertaining to the anthrax investigation. Id.

27. Seikaly likewise did not recall reviewing any investigative record. Seikaly Dep. Tran., Ex. 72, at 190:20 - 191:17. Seikaly instead obtained the information he knew about the investigation from oral briefings, which were themselves given from handwritten notes or recollections. Id. at 193: 14-22.

28. The reporters have uniformly testified that they had no reason to believe that Howard and Seikaly obtained their information from a record retrievable by Hatfill's name or personal identifier. Lengel Dep. Tran., Ex. 65, at 403: 13-16; 411: 5-9; 411: 10-12; Isikoff Dep.

Tran., Ex. 66, at 284: 10-14; 287: 11-16; 287: 17-20; 294:16 - 295:1; Klaidman Dep. Tran., Ex. 67, at 58: 15-17

29. The same is true of Eberhart and Cogswell. With respect to Eberhart, Walter, who was the only person at *ABC News* to have spoken to Eberhart, testified that he had no reason to believe that Eberhart obtained his information from a record. Walter Dep. Tran., Ex. 73, at 99: 22 - 100:9.

30. At the time Eberhart is alleged to have made these statements to Walter at the end of August 2002, he was no longer employed by the FBI. *Id.* at 102: 16 - 103: 9.

31. As an FBI press spokesperson, Cogswell testified that he does not recall ever accessing a record pertaining to the anthrax investigation, Cogswell Dep. Tran., Ex. 70, at 180:18 - 181:1, including any record contained in the FBI's database, known as the Automated Case Support system ("ACS"). *Id.* at 181:6-8; 209:16-21. Brian Ross, the reporter at *ABC News* who claims to have spoken to Cogswell on one occasion, and Vic Walter, Ross' producer, who claims to have spoken to Cogswell on other occasions, both testified that they had no reason to believe that Cogswell obtained his information from a record. Ross Dep. Tran., Ex. 8, at 232:18 - 233:14; Walter Dep. Tran., Ex. 73, at 15: 11-14; 19: 19-22.

32. At plaintiff's counsel's request (Cogswell Dep. Tran., Ex. 70, at 232: 14-16), the FBI confirmed the fact that Cogswell did not obtain such information from a document maintained in the FBI's ACS system when the alleged disclosures were made. Decl. of Naomi E. Singer, Ex.75, ¶ 9.

Safeguarding, Accounting and Accuracy Claims

33. DOJ, including FBI, have promulgated extensive regulations codified at 28 C.F.R. §§ 16.1 *et seq.* that safeguard its Privacy Act-protected records.

34. At all relevant times, the FBI's Automated Case Support database has been available only to authorized users with a password. Decl. of Richard L. Lambert, Ex. 76, ¶ 3.

35. In order to become a user of the ACS database, a person had to: 1) possess a Top Secret security clearance; 2) be provided a security briefing and execute security briefing documents; 3) have access to the system approved by their respective supervisor who is in the best position to know what access the employee will need in the performance of his or her job duties; 4) be placed into specific ACS natural security profiles (as requested by the employee's supervisor and appropriate FBI Security Officer) that grant the employee access to specific data while restricting them from specific restricted or sensitive data. Singer Decl., Ex. 75, ¶ 8.

36. The entire reason for the ACS database is to permit law enforcement information to be shared across the FBI and with state and local law enforcement officers participating in FBI task forces. Effective investigation and intelligence analysis depend on the ability to search the widest possible range of information. Lambert Decl., Ex. 76, ¶ 4.

37. Further restricting access to the anthrax investigation files within ACS was not feasible for several reasons. First, restricting access would have been "impractical given the importance and size of the investigation." *Id.* ¶ 5. Second, the Washington Field Office, where the investigation is based, did not have adequate analytical resources to address the needs of such a massive criminal investigation. *Id.* ¶ 6. Thus, the investigative effort required dozens of analysts from several FBI field offices to work concurrently on the case. *Id.* And, analysts and

field offices assisting with records checks and investigative leads changed frequently based on developments in the case, the availability of overtime funds, and the allocation of resources in various field offices. Id. And finally, following the lessons of the September 11 attacks, “the FBI unrestricted access to all counterterrorism cases in order to facilitate ‘dot connecting’ and to accomplish its mission to protect our nation’s security.” Id. ¶ 7.

38. There is no evidence that any “leaks” to the media came from the ACS database, or were by individuals who should not have had access to the Amerithrax investigation files. Indeed, the evidence is decidedly to the contrary. In each case where the source of information has been identified, the evidence is clear that the source did not acquire the information from the ACS database.

39. In response to information about the Amerithrax investigation appearing in new reports, then-Attorney General Ashcroft expressed to subordinates severe displeasure with this activity and signaled that he wanted whatever could be done to stop the unauthorized release of investigative information to be done. Ashcroft Dep. Tran., Ex. 33, at 242: 7-10.

40. The FBI Director similarly instructed appropriate subordinates to take steps to eliminate the leaks. Mueller Dep. Tran., Ex. 77, at 103: 12-13.

41. The FBI conducted an internal investigation and made several referrals to DOJ’s Office of Professional Responsibility for investigation and possible disciplinary action. Id. at 31; Harp Dep. Tran., Ex. 64, at 51-52; Exs. 79 - 82 (OPR referral letters). One of the referrals stated:

To demonstrate the seriousness with which the FBI views this matter, it is requested that this OPR inquiry commence with an interview of [Inspector in Charge] Rick Lambert who will waive all Fifth Amendment privileges and accede to a voluntary polygraph examination to set a tone of candor, forthrightness and cooperation [I]n the interests of both specific and general deterrence, the

Inspector in Charge requests that this OPR inquiry be pursued with unprecedented zeal.

Ex. 82, at 2-3.

42. The FBI went so far as to compartmentalize investigative information, against the advice of the lead agent on the case. Mueller Dep. Tran., Ex. 77, at 33: 1-6.

Date: April 11, 2008

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

/s/ Elizabeth J. Shapiro
ELIZABETH J. SHAPIRO, D.C. Bar # 418925
PAUL G. FREEBORNE
JEFFREY M. SMITH, D.C. Bar # 467936
Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW,
Washington, D.C. 20530
Tel: (202) 514-5302
Fax: (202) 616-8470

Counsel for the Defendants