

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 John ASHCROFT, *et al.*,)
)
 Defendants.)
)
 _____)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND OVERRULE
DEFENDANTS' ASSERTION OF LAW ENFORCEMENT PRIVILEGE OVER
INFORMATION DISCLOSED TO THE PRESS**

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Plaintiff Steven J. Hatfill, M.D. hereby reluctantly moves to compel admissions and a small amount of related discovery from defendants Federal Bureau of Investigation and United States Department of Justice, and to overrule those defendants' unfounded assertions of law enforcement privilege. The agency defendants have interposed these claims of privilege even as to facts which, according to uncontradicted evidence, *FBI and DOJ officials have already disclosed to the public*. Because the defendants cannot contend that the information was too secret to reveal *and at the same time* that they did not violate the Privacy Act by revealing it, their claims of privilege should be overruled and the Court should deem it admitted that the specific facts disclosed were all contained in agency records and were therefore required to be kept secret under the Privacy Act. This is the remedy that is suggested by the testimony collected so far, by the logic of the defendants' privilege claims, and by the legitimate needs of law enforcement in this case. Alternatively, the Court should appoint a master under Rule 53 to ascertain whether the disclosed facts are contained within the defendants' investigative records and were therefore subject to the Privacy Act's prohibition on public disclosure.

At the heart of this motion, and at the heart of the case as a whole, is the agency defendants' fundamentally self-contradictory attitude toward the secrecy of criminal investigative files. Like Dr. Hatfill, the agency defendants undoubtedly believe that the contents of their investigative files should not be disclosed to the public. If they had always adhered to that view, Dr. Hatfill would not be litigating this case; he would be working in relative obscurity to improve our readiness for preventing and responding to bioterrorism. Unfortunately, the defendants have not always protected the confidentiality of their files with the vigor they now muster in litigation. On the contrary, the testimony in this case has already established scores of investigative details about the anthrax investigation that *FBI and DOJ officials* disclosed to

reporters who promptly published the information to the world. Thus, Dr. Hatfill asserts that the defendants violated the Privacy Act by disclosing what should have remained secret. By contrast, the defendants try to escape liability under the Act by asserting that the information they disclosed was *so* secret that they cannot say whether the Act prohibited them from disclosing it. This Court must not permit such whipsawing.

In this motion, Dr. Hatfill does not ask to be given access to a single record in the defendants' files. Nor does Dr. Hatfill ask that the defendants confirm the accuracy of any of the hundreds of news reports their unauthorized disclosures have already generated. Indeed, with a single exception noted in Part V below, Dr. Hatfill *does not seek the disclosure of any new information at all*. All Dr. Hatfill asks is that the defendants be prevented using the very secrecy they violated to avoid any liability for violating it. If the information at issue in this motion is too secret to be revealed to the public now, then it was *always* too secret to be revealed to the public and the defendants should have admitted as much in response to the plaintiff's requests for admission under Rule 36 of the Federal Rules of Civil Procedure. Alternatively, if the defendants seriously mean to *deny* that the information at issue here was protected from disclosure under the Privacy Act, then they cannot simultaneously invoke law enforcement privilege to prevent this Court from effectively reviewing that denial. The choice is theirs, but they cannot have it both ways.

We are not, of course, unmindful of the very real need to protect investigative information from public disclosure. Toward that end, counsel for Dr. Hatfill have scrupulously honored our commitment to this Court to pursue discovery that was narrowly focused on the facts the defendants had already disclosed to the press. We have made no attempt to gain access to investigative files about the anthrax attacks, and in depositions we have made every effort to

steer wide of any areas that could legitimately be considered sensitive because of the ongoing investigation. We have not challenged a single invocation of law enforcement privilege until now, and even the instant motion deals only with information that the defendants have already disclosed to one or more of the nation's largest news outlets. With respect to those specific disclosures, all proven by other evidence in the case, we have proceeded primarily by way of requests for admission so that the defendants might admit the matter in question "for the purpose of the pending action only," Fed. R. Civ. P. 36(b). We have even offered the possibility of a negotiated stipulation that would avoid any fresh factual disclosures. Unfortunately, all attempts at compromise have failed. The agency defendants apparently cannot bring themselves either to admit that their secrets have already been disclosed, or to admit that their disclosures were once secret.

Part I of this Memorandum provides the context within which the claims of law enforcement privilege should be weighed, including the basic requirements of the Privacy Act and the degree of care plaintiff's counsel has exercised to avoid discovery into sensitive investigative facts. Part II summarizes the extensive *and uncontradicted* testimony from various reporters who have confirmed under oath that they received sensitive information about Dr. Hatfill from FBI and/or DOJ employees. Part III analyzes the defendants' various invocations of law enforcement privilege and explains why that qualified privilege either does not apply or is outweighed with respect to each category of information at issue here. Part IV addresses the remedy question, explaining why the Court should either deem the relevant matters to be admitted for purposes of this litigation, or in the alternative, appoint a properly cleared and qualified master under Rule 53 to examine the defendants' files and report back to the Court. Finally, Part V addresses the defendants' claim of privilege with respect to nine documents

summarizing what they disclosed to various congressional staffers in violation of the Privacy Act. As with the Requests for Admission discussed in Parts II through IV, the agency defendants have claimed law enforcement privilege as the basis for redacting these summaries, but have refused to admit whether the information disclosed was subject to the protection of the Privacy Act. With respect to all of the enumerated items, Dr. Hatfill asks the Court either to rule that the matters disclosed were indeed in the defendants' files and were therefore protected by the Privacy Act, or to appoint a master under Rule 53 to examine the defendants' files and report back on whether the specific information these defendants disclosed is contained there.

I. Dr. Hatfill's Narrowly Tailored Discovery Requests Have Met with Defendants' Overly Aggressive Assertion of the Law Enforcement Investigatory Privilege

This case unavoidably requires some discovery regarding the scope of the information maintained within the defendants' systems of records, because the Privacy Act generally applies only to such "records." For example, Dr. Hatfill alleges that the defendants violated 5 U.S.C. § 552a(b), which forbids an agency to "disclose any record which is contained in a system of records by any means of communication to any person . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains," unless certain specific exceptions apply. First Am. Compl. ¶ 118 (the "Unauthorized Disclosure" claim).¹ The Act defines a "record" as "any item, collection, or grouping of information about an individual that is maintained by an agency . . . and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph . . ." 5 U.S.C. § 552a(a)(4). To succeed on his Unauthorized

¹ Most of the disclosures in this case are Unauthorized Disclosures in violation of 5 U.S.C. § 552a(b). Dr. Hatfill also alleges that the defendants violated 5 U.S.C. § 552a(e)(6), which bars in relevant part "disseminating any record about an individual to any person" without first making "reasonable efforts to assure that such records are accurate [and] complete." First Am. Compl. ¶ 121 (the "Inaccurate Disclosure" claim).

Disclosure claim, Dr. Hatfill must prove that the “item . . . of information” disclosed without authorization is “contained in a system of records,” which the Privacy Act defines as “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.” 5 U.S.C. § 552a(a)(5).

Dr. Hatfill has agreed from the outset to take an unusually restrained approach in civil discovery because the relevant system of records from which the disclosures came is a system of law-enforcement records. Sensitive to concerns regarding the ongoing criminal investigation, Dr. Hatfill has avoided pressing discovery demands or asking deposition questions that would reveal the content of the investigative files. Instead, he specifically targeted discovery at Privacy Act *disclosures* and tailored deposition questions to stop short of inquiries into specific investigative facts aside from the disclosures. In the depositions of agents involved in the Amerithrax investigation, Dr. Hatfill’s counsel asked hypothetical questions regarding the inclusion of specific disclosed information such as Dr. Hatfill’s polygraph results or searches of Dr. Hatfill’s property in the files. Counsel *directly* cautioned agents not to reveal further investigative or law enforcement privileged information:

Agent Lambert:	Yes. In the course of conducting the investigation, Guy Gugliotta was identified to me as someone who may possess information of lead value to the investigation. And he was interviewed in the capacity of a witness.
Plaintiff’s Counsel:	Okay. Let me just stop you right there. I don’t need to know any more than that.

Lambert Dep. at 61:22 – 62:9.² See also *id.* at 113:21 – 115:17; Roth Dep. at 102:13-16; Garrett Dep. at 145:1-12.

Similarly, in order to establish that the disclosures at issue reflected information that was protected by the Privacy Act without seeking access to the defendants' investigative files, Dr. Hatfill propounded a series of requests for admissions that tracked the various disclosures. For example, one of the requests for admission dealing with the use of bloodhounds in the investigation read as follows:

Admit that information regarding whether Law enforcement officials subjected Dr. Hatfill to dogs ostensibly trained for law enforcement purposes is contained within a record or records within a system of records maintained by defendant United States Department of Justice from which information can be retrieved by the name of Dr. Hatfill, or by some identifying number, symbol, or other identifying particular assigned to Dr. Hatfill.

Pl's. First Set of Req. for Admis. ¶ 59 (emphasis added). It should be noted that this request does not ask the defendants to produce documents about the bloodhounds, or to list the times and places the bloodhounds were used, or to summarize the results of the bloodhounds' activities, or even to admit that bloodhounds were definitely used. The Request, rather, is only to admit that *information regarding whether* the bloodhounds were used is contained in a record within a system of records, *etc.* – which is enough to establish that the defendants' use of this information was governed by the Privacy Act.

The agency defendants, however, objected to this Request – and to at least twenty-nine other similar requests – pursuant to the law enforcement privilege. In an effort to avoid any conceivable interference with the ongoing criminal investigation, Dr. Hatfill offered to let the government avoid discovery on the contents of investigative files altogether by stipulating that,

² A true and correct copy of the Deposition of Richard Lambert, and all other pertinent documents referenced herein, is attached to the Declaration of Patrick O'Donnell filed herewith.

without admitting that any particular fact was contained in investigative files, the defendants would not contest the file-presence issue for any of a list of facts as to which the defendants wished to invoke the law enforcement privilege. Unfortunately, the parties were unable to reach an agreement. The agency defendants have asserted that the law-enforcement investigatory privilege allows them to refuse to admit – for the purpose of this litigation – the presence in their files of the information they *already* disclosed to the press. They refuse to respond to a number of requests for admission structured like Request No. 59 excerpted above and have even refused to answer similar allegations in Dr. Hatfill’s Complaint.³

As noted in detail *infra* in Part II, Dr. Hatfill already has evidence that each of the disclosures at issue here *does* reflect file information; however, because defendants have signaled their continued intent to dispute that fact even while clinging to an extraordinarily aggressive⁴ assertion of the law enforcement privilege, Dr. Hatfill is forced to bring this motion to compel.

³ As explained *infra* at Part IV, Dr. Hatfill requests that the following requests be deemed admitted by the agency defendants: First Set of Admissions 18, 19, 33, 34, 59, 60, 98, 99, 204, 205 (and any other Admissions for which the agency defendants have limited their response based on the invocation of the law-enforcement investigatory privilege in their General Objection Nos. 3, 5) and Second Set of Admissions 306, 312, 324, 330, 336, 342, 348, 354, 366, 384, 390, 408, 420, 426, 432, 444, 475, 482 (and any other Admissions for which the agency defendants have limited their response based on the invocation of the law-enforcement investigatory privilege in their General Objections 3, 5). Dr. Hatfill similarly requests that paragraphs 37 i, j, m, n, r, s; 57 e, g, m, o, p, u, v, w, x, y, z; 66 a, b, e, f, i, p, q, s, t, u, v, x; 97 a, b, c, d, e, k, l, m, o, p, q, r, s, t, x, y, z, aa, bb, cc, ee, ff, gg, hh, ll, mm, qq, rr; and 102 f, g, h, i, j, p, r; and 116 h, i, m, q, r, s, t, u, y, aa, bb, cc, dd, gg of defendants’ Answer be stricken and the corresponding allegations deemed admitted on the same basis.

⁴ The Justice Department’s position in this case contrasts with a more measured approach taken in the past to the treatment of FBI files in civil litigation, such as providing access to parts of the file directly relevant while withholding other parts not as relevant. *See, e.g., Black v. Sheraton Corp.*, 564 F.2d 531, 536-37 (D.C. Cir. 1977) (describing the Attorney General’s decision to authorize production of most directly relevant material from FBI file on plaintiff, while asserting law-enforcement privilege as to remainder).

II. Discovery Has Confirmed that the Defendants Leaked Investigative Facts About Dr. Hatfill to the Media and the Leaked Facts Are Likely to Be in the Agency Defendants' Records.

Discovery has established that officials of the Department of Justice, and in particular the Federal Bureau of Investigation, revealed to members of the media a host of investigative facts regarding Dr. Hatfill and the Amerithrax investigation. Numerous members of the media have testified under oath that information they reported about the FBI's investigation of Dr. Hatfill was leaked to them by sources within the DOJ and FBI.⁵ The government has sensibly conceded that the law enforcement privilege is no bar to admitting that *certain* of these disclosures revealed information contained within their Privacy Act records concerning Dr. Hatfill.⁶ For the

⁵ Members of the media have generally claimed a First Amendment privilege against providing the names of the DOJ and FBI officials who made the disclosures, but they have repeatedly, and in some detail, testified that specific disclosures came from specific unnamed DOJ and FBI officials. While the government has not admitted that DOJ and FBI officials were the sources of sensitive investigative information reported in the media, neither has it denied this now-established fact. Instead, it has responded to Dr. Hatfill's requests for such admissions either by asserting that it lacks sufficient knowledge to admit or deny the request, *see, e.g.*, DOJ's Resp. to Pl.'s Second Set of Req. for Admis. ¶ 305, or by invoking the law enforcement privilege, *see, e.g., id.* ¶ 317.

⁶ Defendant agencies have admitted, for purposes of this litigation, that *some* of the information they disclosed to the press *was* contained within a protected Privacy Act system of records. These improper disclosures include their repeated disclosures that Dr. Hatfill was a "person of interest" in the anthrax investigation, *see* DOJ's Resp. to Pl.'s First Set of Req. for Admis. ¶¶ 232, 233; Ashcroft Dep. at 94:4-96:4; *see also* Ross Dep. at 171:5-22 (admitting that FBI disclosed, as the anthrax investigation unfolded, that Dr. Hatfill was the *only* "person of interest"), and their disclosure of myriad investigative details leading to their designation of Dr. Hatfill as a "person of interest," *see* DOJ Resp. to Pl.'s First Set of Req. for Admis. ¶¶ 5, 6, 46, 47, 72, 73, 85, 86, 165, 166, 178, 179, 219, 220, 246, 247; DOJ Resp. to Pl.'s Second Set of Req. for Admis. ¶¶ 300, 372, 378, 438, 462, 488; Answer ¶ 37a, b, d, e, h, k, l, o; 57a, b, e, h; 66m, o, y; *see also* Ross Dep. at 74:17-75:2 (consent search of Dr. Hatfill's apartment); Carey Dep. at 245:21-247:5 (same); Ross Dep. at 76:4-20, 107:4-17 (results of search at Dr. Hatfill's apartment); Carey Dep. at 245:21-247:5, 267:10-268:22 (FBI search of Dr. Hatfill's residence and storage shed); Weierman Dep. at 373:8-375:2 (inaccurate assertion that Dr. Hatfill refused to consent to a second search); Weierman Dep. at 373:8-375:2 (obtaining judicial warrant for second search); Carey Dep. at 269:9-270:6 (same); Isikoff Dep. at 123:15-22, 124:1-10 (search of Dr. Hatfill's hard drive and information found therein); Carey Dep. at

vast majority of information indisputably disclosed by sources within the DOJ and FBI, however, the government refuses to admit (or deny) that this information is contained within a Privacy Act record.

The *disclosure* element of Dr. Hatfill's claims is not at issue in this motion, but the undisputed evidence that the agency defendants actually did disclose the information at issue highlights how self-serving and baseless their invocation of privilege is. Their contention that these are confidential investigative matters is not necessarily wrong – that, indeed, is why the defendants should not have disclosed them to the press to begin with – but it is impossible to believe that the anthrax investigation would be harmed in any way by an admission that (for example) the FBI files contain information about whether bloodhounds were used at Dr. Hatfill's apartment. This is particularly the case because Rule 36 expressly states that an admission under that rule is made “for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding,” Fed. R. Civ. P. 36(b). In essence, the agency defendants have been asked only to admit that what they have already disclosed to ABC, the *Washington Post*, *Newsweek*, *USA Today*, CBS, and others was information that should have remained secret. To refuse such an admission request on the ground that the information is secret is an exercise in self-contradiction.

261:14-262:2, 270:12-271:15 (FBI's interviews and polygraph examination of Dr. Hatfill); Stewart Dep. at 56:12-21 (“round-the-clock surveillance” of Dr. Hatfill); Klaidman Dep. at 91:17-92:12 (Dr. Hatfill's use of antibiotic “Cipro”); Ross Dep. at 169:7-18; 185:17-186:3 (circumstantial evidence relating to Dr. Hatfill's location during Anthrax attack on AMI building in Florida).

A. Disclosures on Which Defendants Continue to Assert Law Enforcement Privilege as Barring Discovery Confirming That Information Disclosed by DOJ and FBI Sources is Contained Within a Privacy Act System of Records.

The agency defendants have invoked the law-enforcement investigatory privilege in order to avoid admitting or denying that their records contain investigative details that they have already publicized in the nation's major news outlets – despite the fact that experienced FBI agents have testified under oath that the information that has been disclosed is of the type routinely recorded in investigative files. It is the groundless assertion of the law-enforcement privilege over these disclosures that makes this motion necessary, despite Dr. Hatfill's efforts to focus discovery on what the defendants leaked to the press rather than on the anthrax investigation itself.

Although the disclosures at issue reflect an extraordinary range of investigative information about Dr. Hatfill, they can be grouped into three broad categories: 1) the use of bloodhounds to investigate him, 2) the Frederick, Maryland pond search linked to him, and 3) anonymous explanations of why he should be understood as the FBI's main suspect despite the defendants' official, for-the-record statements that he was just one of many "persons of interest."

B. Disclosure of the Defendants' Use of Bloodhounds to Investigate Dr. Hatfill.

Multiple reporters have now testified that multiple FBI and/or DOJ officials disclosed how bloodhounds were used to investigate Dr. Hatfill.

Newsweek's Daniel Klaidman testified that a DOJ official initially disclosed to him the fact of bloodhound use in the anthrax investigation early in the week of July 29, 2002. Klaidman Dep. at 45:11-21. Klaidman also testified that this same DOJ official disclosed to him some of the details of how the dogs were used, such as the fact that FBI agents presented the dogs with "scent packs" lifted from anthrax-tainted letters and that the bloodhounds were barking and howling and straining at their leashes at search sites associated with Dr. Hatfill. Klaidman Dep.

at 51:12-16, 52:18-53:5, 59:8-17, 62:1-63:4. The depositions of *Newsweek*'s Michael Isikoff and Klaidman further revealed that DOJ officials also disclosed to them that FBI "agents quietly brought the dogs to various locations frequented by a dozen people they consider possible suspects -- hoping the hounds would match the scent on the letters." Klaidman Dep. at 61:13-15, 62:1-63:4; Isikoff Dep. at 74:15-75:19. Both reporters also testified that the DOJ officials disclosed that "[i]n place after place, the dogs had no reaction. But when the handlers approached the Frederick, Md., apartment building of Steven J. Hatfill, an eccentric 48-year-old scientist who had worked in one of the Army's top bioweapons-research laboratories, the dogs immediately became agitated." Klaidman Dep. at 66:22-67:11, 68:1-6; Isikoff Dep. at 74:9-14, 77:21-78:20; *see also* Isikoff Dep. at 79:3-22 (testifying that a DOJ official disclosed to him that the dogs "went crazy" around Hatfill); Klaidman Dep. at 80:8-81:10 (testifying that a DOJ official disclosed that agents arrived at Dr. Hatfill's apartment on the morning of August 1, 2002 "with the bloodhounds in tow. When they entered the apartment, one of the dogs excitedly bounded right up to Hatfill."). Klaidman also testified that a DOJ official disclosed that "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." Klaidman Dep. at 69:9-17.

The agency defendants' disclosures to Klaidman and Isikoff included not only investigative facts but evaluative assessments and tactical uses of the disclosed facts. Isikoff testified that a DOJ official made the disclosure that "the dogs and the dumpster led agents to obtain a criminal search warrant for Hatfill's apartment to turn up the heat,"⁷ Isikoff Dep. at

⁷ Isikoff further testified that a DOJ source revealed the following information: "Agents surveilling [Hatfill's] apartment watched him as he pitched loads of his belongings into a

110:5-111:20, and that “When you see how the dogs go to everything that connected him, you say ‘Damn!’” Isikoff Dep. at 116:5-117:10. The reporters also testified that the DOJ officials told them the investigation of Hatfill was on the “on the verge of [a] breakthrough” due to the dogs. Klaidman Dep. at 72:1-10; Isikoff Dep. at 87:4-89:21.

Like the disclosures to Isikoff and Klaidman, ABC’s Brian Ross testified that FBI officials disclosed to him evaluative, not just factual disclosures, such as that they considered the bloodhounds being used on Hatfill to be “the best in the country,” Ross Dep. at 143:11-14, that the bloodhound evidence was “most significant to the FBI,” Ross Dep. at 135:22-136:6, 146:11-21, and that “the bloodhound evidence does not justify an arrest warrant, but provides a lead which cannot be overlooked,” Ross Dep. at 135:11-21.

As if these disclosures to the press were not bad enough, discovery also revealed at least one episode in which FBI agents made a similar disclosure directly to one of Dr. Hatfill’s friends. Mrs. Virginia Patrick testified that an FBI agent told her that the bloodhounds provided “smoking gun” evidence that Dr. Hatfill was the anthrax murderer. Patrick Dep. at 12:7-13:6.

Despite the publication of the above disclosures in the national media, and despite the mountain of deposition testimony confirming that the disclosures came from the agency defendants, those defendants claim that they cannot admit or deny whether information related to these disclosures is in their files, even for purposes of this litigation only, without causing serious harm to their investigation.

dumpster behind his apartment building -- getting rid of evidence, some agents wondered.” Isikoff Dep. at 106:10-21, 109:20-110:4.

C. Disclosure of Defendants' Draining and Search of a Frederick, Maryland Pond Based on Purported Connections to Dr. Hatfill

Discovery to date has further shown that numerous DOJ and FBI officials were the “unnamed government sources” of many disclosures related to the FBI’s highly publicized Frederick, Maryland pond search. Multiple reporters testified that law enforcement officials revealed to them that the FBI was conducting underwater searches of ponds near Dr. Hatfill’s residence based on 1) remarks attributed to Dr. Hatfill and 2) the pond’s proximity to his former home and work at Fort Detrick.

Washington Post reporter Allan Lengel testified that a DOJ official disclosed to him that the Frederick pond search was “tied to scientist Steven Hatfill” and “triggered by a hypothetical statement Hatfill had made about anthrax.” Lengel Dep. at 56:5-14; 58:19-59:4. In particular, the DOJ official told the reporter that “[t]he search of the area was prompted by a tip that Steven J. Hatfill, a bioterrorism expert who once worked as a researcher at the institute, had talked hypothetically about how he might dispose of contaminated materials in the water.” Lengel Dep. at 112:19-114:16. Either an FBI or DOJ official (Lengel was sure it was one or the other) also disclosed the search’s purpose: 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 by-products that may be linked to the anthrax spores that were sent through the mail.” Lengel Dep. at 60:3-61:9.

Similarly, *Newsweek*’s Daniel Klaidman revealed that a DOJ official disclosed to him that the Frederick pond search was specifically linked to Dr. Hatfill. Klaidman testified that a DOJ official disclosed that the pond search was based on a “tip” from “an acquaintance of Hatfill’s” that “relayed a provocative conversation he’d had with [Dr. Hatfill].” Klaidman Dep. at 102:15-103:7, 104:16-21, 107:7-10, 107:19-108:16.

ABC's Brian Ross testified that federal law enforcement officials connected with the investigation disclosed to him a different claimed connection between Dr. Hatfill and the pond: "the bloodhounds with [Hatfill's] scent led them to that pond." Ross Dep. at 179:11-18. In addition, federal law enforcement officials told Ross, "The FBI's working theory is that Hatfill, who lived eight miles away in Frederick, Maryland, used makeshift lab equipment to put anthrax in the envelopes and then dumped the equipment in the pond" Ross Dep. at 159:18-162:9.

Having planted in the media the basic idea that the Frederick pond search was specifically part of their investigation of Dr. Hatfill, DOJ and FBI officials proceeded to disclose a number of specific investigative facts about the search. Sworn deposition testimony reveals that DOJ and FBI officials disclosed the following about the search:

- "[T]he FBI had returned to a forested area in Frederick to search for clues in the anthrax killings case." (Lengel Dep. at 46:12-47:10);
- "Agents who arrived this week plan to conduct a more 'thorough' search of the Frederick Municipal Forest, expanding it to a remote area where they have not looked before." (Lengel Dep. at 50:15-51:14);
- "[A] week long search of ponds and woods in the area last month netted some materials that were being tested for links to the anthrax attacks." (Lengel Dep. at 54:22-55:13);
- "[T]he FBI now plans to drain one of the ponds in another search for sunken evidence." (Lengel Dep. at 71:8-72:13);
- "Two sources familiar with the items recovered from the pond described a clear box, with holes that could accommodate gloves to protect the user as he worked." (Lengel Dep. at 72:14-73:7);
- "Also recovered were vials wrapped in plastic." (Lengel Dep. at 72:19-73:7);
- "While some law-enforcement officials are taking the novel [underwater anthrax] theory seriously, others have dismissed it as fantasy. 'It got a lot of giggles,' says one FBI source." (Isikoff Dep. at 131:7-133:2);
- "Hatfill, the [tipster] 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.’” (Klaidman Dep. at 107:19-108:16);

- “When agents found the box in the Frederick pond, they thought they had a eureka moment. The FBI tested the box for the residue of anthrax bacilli, and at first got a positive result. But subsequent tests had been negative.” (Klaidman Dep. at 109:1-22);
- “Next month the FBI may drain the entire pond in hopes of finding new evidence.” (Klaidman Dep. at 110:1-7);
- “Over the Christmas holidays, FBI divers recovered what they think was a piece of the makeshift equipment used to load the anthrax, a plastic sweater box . . . with two hand-sized holes cut in it.” (Ross Dep. at 167:3-17);
- “Agents also discovered vials and gloves wrapped in plastic.” (Lengel Dep. at 95:1-96:1);
- “Tests for the presence of anthrax bacteria on the equipment are continuing, after two rounds of tests produced conflicting results.” (Lengel Dep. at 95:1-96:1);
- “Lab tests of soil samples taken from a Frederick pond that the FBI drained in June have shown no trace of anthrax bacteria.” (Lengel Dep. at 104:19-109:11);
- The search [of the drained pond] netted nothing more than a hodgepodge of items -- a gun, a bicycle, fishing lures -- none of which appeared to be linked to the case.” (Lengel Dep. at 110:13-111:2);
- “[T]he FBI continues to analyze the plastic box and other items recovered from the pond by divers over the winter.” (Lengel Dep. at 114:17-115:20);
- “Publicly, not much at all has happened in the FBI’s anthrax investigation since this search last winter of a small pond in central Maryland. Divers went to the bottom, but came up empty-handed.” (Stewart Dep. at 45:21-47:16).

Incredibly, as with the bloodhound disclosures, the agency defendants maintain that they cannot admit that their records contain information related to the foregoing disclosures, even for purposes of this litigation only, without serious harm to their ongoing investigation.

D. Disclosures of Investigative Details and Theories Regarding Why Dr. Hatfill Should be Understood as the Likely Anthrax Killer.

Despite all of the disclosures related to the use of bloodhounds and pond searches, which discovery has established originated from DOJ and FBI officials, and the predictable inference this information led the public to draw about Dr. Hatfill, the government continued to maintain in its official, on-the-record press statements that Dr. Hatfill was not a suspect and that the FBI was investigating several individuals. Throughout, however, DOJ and FBI officials offset the official line with a *sotto voce* press campaign, using the cloak of anonymity and the cooperation of members of the press to get out the message that Dr. Hatfill was responsible for the anthrax attacks, that a circumstantial case was being developed, and should the FBI fail to gather sufficient evidence in the anthrax matter, Dr. Hatfill would be charged with an unrelated crime.

Multiple reporters have testified that these types of disclosures also were made by multiple DOJ and FBI sources. In particular, sworn deposition testimony establishes that either an FBI or a DOJ official made each of the following specific disclosures:

- “The FBI stresses that Hatfill is one of 20 or 30 scientists under scrutiny and not officially considered a suspect.” (Ross Dep. at 107:18-108:12);
- Hatfill was said to be “mad at the government” in August 2001 “and many in the FBI thought that perhaps gave him the motive for some kind of revenge against the government.” (Ross Dep. at 112:20-113:16, *see also* 115:21-117:13);
- “[H]e’s known as a person who has worked around anthrax experts, although the FBI concedes he could not himself make anthrax, does not have what they call the bench skills to make it.” (Ross Dep. at 120:5-121:20);
- “American officials say, simply put, there’s just not enough, unlike other government scientists, to now clear Hatfill and they are unimpressed with his news conference denials.” (Ross Dep. at 137:19-138:13);
- “[A]uthorities say they are building what they describe as a growing case of circumstantial evidence” against Hatfill. (Ross Dep. at 140:20-141:14);

- “While Hatfill is still not officially a suspect, he still clearly is the main focus of the FBI, even though he continues to deny any involvement.” (Ross Dep. at 148:2-12);
- “The FBI’s working theory is that Hatfill, who lived eight miles away in Frederick, Maryland, used makeshift lab equipment to put anthrax in the envelopes and then dumped the equipment in the pond.” (Ross Dep. at 159:18-162:9);
- “FBI officials say there are just too many questions about Hatfill to back off now.” (Ross Dep. at 170:12-15);
- “The FBI has not officially called him a suspect, but that is without a doubt what he is. In fact, the one and only suspect in the anthrax murders, even though not a shred of hard physical evidence against him exists.” (Ross Dep. at 257:14-258:5);
- “[T]he FBI admits its case against Hatfill is so far only circumstantial, but still potentially significant.” (Ross Dep. at 185:2-16);
- “Hatfill continues to be a key focus of the probe.” (Lengel Dep. at 133:6-143:16);
- “Peter, what’s happening [at Fort Detrick] is part of a last-ditch effort by the FBI to find some hard evidence, and make a case against Hatfill that would stand up in court.” (Ross Dep. at 187:12-188:3);
- The government was only “one spore short from indicting” Dr. Hatfill. (Ross Dep. at 163:15-164:7);
- “The sources, who requested anonymity because the anthrax probe is still active, say the focus on Hatfill stems from the belief by many investigators – but not all of them – that he was behind the mail attacks that killed five people, sickened 17 others and forced thousands to take antibiotics.” (Locy Dep);⁸
- “Privately, however, agents say it would only have been icing on the cake because they believe they already have their man, even if they never get his indictment.” (Stewart Dep. at 48:3-17);
- “Bioweapons researcher Dr. Steve Hatfill, sources confirm, remains the FBI’s number one suspect in the attacks” (Stewart Dep. at 55:15-22);
- “. . . and extensive searches have failed to develop more than what is described as a highly circumstantial case.” (Stewart Dep. at 56:22-57:10);
- “And now one possible outcome, sources suggest, is if the government could bring charges against Hatfill unrelated to the anthrax attacks at all if they become

⁸ Toni Locy’s deposition of May 19, 2006 is currently being transcribed.

convinced that's the only way to stop future incidents." (Stewart Dep. at 65:5-66:1);

- "The FBI is looking very closely at a government report written well before the attacks of last year. The report describes how an attack might be carried out. And the details are very similar to the actual attacks." (Ross Dep. at 101:3-102:3);
- "In fact, the amount and quality of anthrax, actually sent to Senators Leahy and Daschle last October, are remarkably similar to that described in the report's hypothetical attack." (Ross Dep. at 103:7-104:1);
- "The report also describes the same number of spores, one trillion per gram, and particle size as actually found in the Senate letters, a far more deadly anthrax than most experts thought doable." (Ross Dep. at 104:8-105:2);
- "Other circumstantial evidence that has led the FBI to continue its focus on Hatfill includes . . . Hatfill's admission to the FBI that he was taking the powerful antibiotic Cipro at the time of the anthrax attacks, which he has reportedly said was for a nasal infection." (Ross Dep. at 169:7-22; *see also id.* at 186:4-10; Klaidman Dep. at 91:17-92:21);
- "The FBI acknowledged today that one of the reasons it was so quick to zero in on germ warfare expert Dr. Steven Hatfill as a person of interest in the anthrax letter case is because Hatfill once helped build a mockup of the Iraq suspected mobile germ labs. Hatfill collected parts for the mockup and supervised its construction at this Fredrick, Maryland, metal shop in September." (Stewart Dep. at 87:2-89:14);
- "Months prior to the Iraqi invasion, U.S. Special Forces troops trained on Hatfill's mockup to learn how to detect and disarm a germ lab should they encounter one in the war." (Stewart Dep. at 92:19-93:8);
- "Law enforcement officials said, however, that the mockup was never made operational, that no anthrax spores were ever found on the equipment, and that there is no evidence thus far linking Hatfill and the mockup to the anthrax attacks." (Stewart Dep. at 93:9-94:9).

As with the bloodhound and pond-search disclosures, uncontradicted testimony from the reporters who publicized these disclosures confirms that they were made by DOJ and FBI officials. Nonetheless the agency defendants maintain that admitting that their files contain information related to these disclosures risks dire harm to law enforcement.

E. Deposition Testimony From Experienced FBI Agents Confirms that the Disclosures at Issue Here Reflect Information Routinely Maintained in the Relevant System of Records

FBI agent testimony, not to mention common sense, indicate that information of the type disclosed to the public and listed above was certainly in the agency defendants' records. Multiple FBI agents have already testified that the types of information contained in the disclosures identified above are exactly the types of information contained in the FBI's system of records. *See* Garrett Dep. at 144:5-146:8 (polygraph results and searches of property); Roth Dep. at 29:13-22, 30:1-3, 78:7-15; 102:12-22, 103:1-2, 103:7-14, 104:3-7 (lists of persons of interest, search consent forms, search warrant and affidavit, results of property searches, polygraph results). In fact, Agent Roth testified that he could not think of any investigative technique that, if used by the FBI, would not be accounted for in the FBI's files. Roth Dep. at 104:12-22, 105:1-13; *see also* Lambert Dep. at 128:16-131:18 (testifying that investigative techniques done in connection with an individual would be contained in the FBI's files).

That FBI and DOJ records actually contain information of this type will come as no surprise to the Court. The details about the investigation of Dr. Hatfill that the public has read about in *Newsweek*, *USA Today*, and the *Washington Post*, as well as heard and seen in the television broadcasts of CNN, ABC, and CBS, reflect classic and widely known law-enforcement activities and predictable evaluative assessments of them. Thus, common sense – together with the agents' testimony – provides a strong circumstantial case that the investigative facts discussed above are in FBI and/or DOJ files. Nonetheless, the defendants continue to dispute that element of Dr. Hatfill's claim while asserting that the law enforcement investigatory privilege allows them to frustrate his extremely careful effort to obtain confirming discovery.

III. The Law Enforcement Privilege Does Not Excuse the Defendants from Admitting that the Information They Disclosed About Dr. Hatfill Is in Agency Records

Defendants claim that the “investigatory” or “law-enforcement” privilege justifies their refusal to admit for purposes of this litigation only that their records contain the information they disclosed to the press about Dr. Hatfill, summarized in Part II above. However, admitting that their records contain information about commonplace investigative steps *already widely known to have been applied to Dr. Hatfill because the defendants have told the press about them* threatens no legitimate law-enforcement interest, and thus does not meet the privilege’s foundational requirements. In addition, Dr. Hatfill’s need for the information and the utter lack of any public interest in withholding the requested admissions would support plaintiff’s motion under the governing balancing test provided in *Tuite v. Henry*, 98 F.3d 1411, 1413-14 (D.C. Cir. 1996), even if the privilege did apply.

A. No Law Enforcement Privilege Applies To the Specific and Narrow Confirmation Dr. Hatfill Seeks

The law enforcement investigatory privilege is “a qualified privilege that protects against the release of documents whose disclosure might reveal law enforcement investigative techniques or sources” *Tuite*, 98 F.3d at 1413. While the law enforcement investigatory privilege was meant to shield investigative techniques, it “should not be interpreted to include routine techniques and procedures already well known to the public, such as ballistics test, fingerprinting, and other scientific tests or commonly known techniques.” *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 670 F.2d 1051, 1111 n.78 (D.C. Cir. 1981) (citation omitted).

The burden is upon the agency defendants to establish that the law enforcement privilege applies. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341-42 (D.C. Cir. 1984) (citing *Black v. Sheraton Corp.*, 564 F.2d 531, 547 (D.C. Cir. 1977)); cf. *Summers v. Department of Justice*, 140 F.3d 1077, 1083 (D.C. Cir. 1998) (requiring “a clear demonstration

of how it has met that burden”). Merely showing that the requested information is found within law enforcement investigatory files does not satisfy that burden, because “[t]here is a considerable variety of law-enforcement investigatory files and there is a considerable variety of information within particular law-enforcement investigatory files.” *Friedman*, 738 F.2d at 1343. Generalized claims by the defendants’ attorneys that disclosure of information “would reveal law enforcement techniques and sources: disclose strategy, procedures, and direction of the investigation, forewarn suspects, deter witnesses from providing candid testimony, invite others to seek discovery” are insufficient. 738 F.2d at 1342.

Because the plaintiff seeks only *admissions* under Rules 8 and 36, it is extremely doubtful whether the law-enforcement privilege attaches at all. All of the requested admissions that form the basis for this motion are directly tied to specific investigative incidents and facts that the defendants themselves publicized to the press. Many of them consist of no more than the specific application of “procedures already well known to the public.” *Crooker*, 670 F.2d at 1111 n.78. Whatever damage the defendants might have done when they disclosed this information to major news outlets, an admission *for purposes of the pending litigation only* that the information is in their records reveals nothing and therefore does not meet the privilege’s threshold requirement.⁹

⁹ In addition, the narrow discovery at issue here goes directly to clear government misconduct. The law-enforcement privilege cannot be used to shield evidence of government misconduct. *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (“it makes no sense to permit the government to use the privilege as a shield.”). *Cf. Black*, 564 F.2d at 547 (describing misconduct exception as “generally sound” and noting that government had either disclosed or proffered material related to its misconduct while asserting privilege on other material).

B. Even If the Listed Disclosures Did Qualify for the Privilege, They Would be Discoverable in this Case Under the *Frankenhauser* Test

Even if the privilege did attach, the defendants' invocation of the privilege with respect to such routinely gathered and widely publicized information fails under the balancing test applied in this Circuit. "[T]he law enforcement investigatory privilege is qualified. The public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) (citations omitted).

To achieve this end, a number of factors must be considered, including: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; (10) the importance of the information sought to the plaintiff's case.

Tuite, 98 F.3d at 1417 (citing *In re Sealed Case*, 856 F.2d at 272, *Frankenhauser v. Rizzo*, 59.

F.R.D. 339 (E.D. Pa 1973), and *Friedman*, 738 F.2d at 1342-43). Application of the

"*Frankenhauser* factors" clearly demonstrates that the narrow admissions and answers can and should be compelled under the circumstances of this case. *Cf. Waters v. United States Capitol Police Board*, 218 F.R.D. 323, 344 (D.D.C. 2003) (concluding that *Frankenhauser* factors require disclosure of interview notes from police internal investigation).

1. "the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information"

If the information sought had been kept secret, perhaps confirmation in this case of some of the information sought could conceivably discourage citizens from coming forward. But that

is not the case here. The confirmations do not go beyond what the defendants have already had broadcast on ABC News or published in *USA Today*. While citizens who cooperated in the anthrax investigation may well have been dismayed by the defendants' leaking of information collected during the investigation, that damage has already been done – and in spectacular fashion.

2. “*the impact upon persons who have given information of having their identities disclosed*”

No individual source would be identified by any mere admission that already-published information can be found in the agency defendants' files. But even if there existed the possibility of source identification, the same court that decided *Frankenhauser* has rejected the “general proposition” that sources are “less likely to give information . . . because in a few instances that information may be used in a later lawsuit.” *Crawford v. Dominic*, 469 F.Supp. 260, 264 (E.D.Pa. 1979). Even where the specific facts show that there might be such a chilling effect, the remedy is “the deletion of identifying information” rather than outright denial of the relevant discovery. *Id.*

3. “*the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure*”

It is impossible to see how the concerns expressed in this factor could be hurt by disclosure. Defendants have abandoned their own investigation of the leaks,¹⁰ so this case represents the only avenue that offers any prospect for getting to the bottom of the leaks at issue in this case. *Cf. Segura v. City of Reno*, 116 F.R.D. 42, 45 (D. Nev. 1987) (noting that police disciplinary proceedings had been brought but ordering disclosure of police files because the proceedings had been concluded and thus no interference was risked).

¹⁰ Letter from H. Marshall Jarrett, Counsel U.S. Department of Justice Office of Professional Responsibility, to Thomas G. Connolly, Harris, Wiltshire & Grannis, LLP (September 26, 2005).

4. *“whether the information sought is factual data or evaluative summary”*

This factor does not appear to be involved at all. *Frankenhauser* explains that it is designed to get at self-evaluation by the government agencies. *See Frankenhauser* at 344-45 (ordering disclosure in part because “[d]isclosure under the circumstances of this case would not reveal any details of police self-evaluation, because we will limit disclosure to factual data, as opposed to evaluative summaries and recommendations”). No self-evaluation by the government is at issue here. Furthermore, even if the factor addressed other forms of evaluation, such as the investigative evaluation of evidence, Dr. Hatfill asks only that the presence of previously disclosed information in the agencies’ records be deemed admitted for purposes of this litigation, which involves no evaluation at all.

5. *“whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question”*

Despite their campaign of highly public leaks about Dr. Hatfill, the defendants’ official position is that he is not a target of the anthrax investigation. In addition, the potential harm this factor addresses – possibly tipping off a criminal defendant about the case being built against him – is not risked here, because the discovery at issue goes to facts that have already been heavily publicized by the agency defendants themselves.

6. *“whether the police investigation has been completed”*

The Amerithrax investigation has apparently not been completed. It may never be completed, or, like the Jimmy Hoffa investigation, it may remain essentially dormant for years until a random tip or other external factor gives the FBI something new and promising to investigate. In any event, the requested admissions do not reveal new information; they only

concern the extent to which the Privacy Act applies to the information the defendants have already publicly revealed about Dr. Hatfill.¹¹

7. “*whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation*”

Dr. Hatfill does not need convincing that the leaks campaign he suffered merits interdepartmental disciplinary proceedings. As noted above, however, the DOJ Office of Professional Responsibility shut down its internal investigation of these leaks nearly three years ago, right after the complaint in this case was filed. The case before this Court is, in fact, the only proceeding that even approximates the government-corrective function of a disciplinary proceeding regarding the leaks, and the discovery sought will help, not hinder, that function. In that way, this case is analogous to *Frankenhauser* itself, which involved a civil suit against Frank Rizzo’s Philadelphia police department over the killing of an unarmed suspect. *Frankenhauser*, 59 F.R.D. at 339.

8. “*whether the plaintiff’s suit is non-frivolous and brought in good faith*”

The enumeration in Part II *supra* sets forth scores of leaks confirmed under oath to have come from the FBI or DOJ. This is more than sufficient to demonstrate not only the merit of Dr. Hatfill’s suit but its public importance.

¹¹ If defendants are concerned about disclosures undercutting a case against other potential defendants, they can address that concern adequately by a protective order limiting disclosure to Dr. Hatfill’s counsel. See *Bigelow v. District of Columbia*, 122 F.R.D. 111, 115 (D.D.C. 1988) (finding no waiver of law-enforcement privilege as against third parties where government disclosed information in civil discovery “pursuant to a stipulation that would limit its dissemination”) and *United States v. Winner*, 641 F.2d 825, 832-33 (10th Cir. 1981) (analyzing “difficult problem” raised by discovery need for DOJ investigative file and finding “workable solution” in DOJ proposal for *in camera* review attended by opposing party and counsel so long as both are ordered not to disseminate information disclosed *in camera*). See also *King v. Conde*, 121 F.R.D. 180, 190 (E.D.N.Y. 1988) (when considering assertion of state law-enforcement privilege against discovery demand for police file, “a protective order restricting disclosure to the plaintiff and the plaintiff’s attorney, or to the plaintiff’s attorney alone... can mitigate many if not all of the oft-alleged injuries to the police and to law enforcement”).

9. *“whether the information sought is available through other discovery or from other sources”*

Plainly, only the defendants and their agents can confirm that the leaked information was in FBI or DOJ records. The admissions requested here are the least intrusive option.

10. *“the importance of the information sought to the plaintiff’s case”*

This is the one factor on which there is room for serious debate. The evidence Dr. Hatfill has already obtained in discovery, while partly circumstantial, will be sufficient to establish that the information disclosed by the defendants was contained in FBI or DOJ records, provided that the defendants do not intend to offer contrary evidence – which they plainly could not be permitted to do after invoking privilege to frustrate the plaintiff’s discovery. But defendants have not conceded the point. In fact, they have plainly signaled their intention to contest that this information actually came from their files while simultaneously contending that the Court is not entitled to any evidence on this point. Whatever weight can be attributed to this particular factor thus derives entirely from the discretionary litigation position taken by Defendants, and it cannot justly be considered against Dr. Hatfill.

IV. Defendants Should be Deemed to Have Admitted that the Disclosures at Issue Reflect Information in Their Records; or Alternatively, a Master Should Be Appointed to Review the Relevant Agency Records and Report to the Court Regarding the Presence of the Established Disclosures in Agency Records

Parts II and III of this Memorandum have established that the agency defendants’ invocation of law enforcement privilege to avoid admitting that the information they leaked was law enforcement information cannot survive scrutiny. This Part addresses the proper remedy: the Court should deem the requests at issue to be admitted, or in the alternative, appoint a master to review the agency defendants’ files.

A. The Presence of the Disclosed Information in Agency Records Should be Deemed Admitted Because Simply Ordering Defendants to Provide Written Responses is Not an Adequate Remedy

Under Rule 36(a), “[i]f the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.” See *Rainbolt v. Johnson*, 669 F.2d 767, 768 (D.C. Cir. 1981), *Baker v. Potter*, 212 F.R.D 8, 11 (D.D.C. 2002). Similarly, pursuant to Federal Rule of Civil Procedure 8(d), complaint allegations “are admitted when not denied in the responsive pleading.”¹² In the usual case, the Court will compel an objecting party to answer Requests for Admission once the objection based on a claim of privilege is overruled and go to Rule 36’s “deemed admitted” clause only if the answer is inadequate. This case, however, is not the usual case.

Unfortunately, the peculiar circumstances of this case show that simply ordering Defendants to answer the admissions and Amended Complaint allegations at issue will not suffice. First, Dr. Hatfill assumes that the defendants’ files on the anthrax investigation *do* contain *some* confidential information that the defendants have not leaked to the press, and therefore Dr. Hatfill cannot test the reliability of written responses by conventional discovery methods, such as a Rule 34 Request for Production of the relevant records. Furthermore, the government is no exception to the rule that a civil litigant cannot be expected to simply take the other side’s assertions on faith. See *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973) (commenting that government’s factual characterization regarding documents “may or may not be accurate”) and *id.* at 826 (finding it “is vital that some process be formulated that will . . .

¹² Defendants have not claimed to be “without information or belief sufficient to form a belief” as to the allegations that the specified information is in their files. Fed. R. Civ. P. 8(b). They have simply asserted that they are privileged not to respond at all. Having no valid basis for that assertion, the presence in agency defendants’ records of the information disclosed should be taken as admitted under the provisions of Fed. R. Civ. P. 8(d).

assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization").

Second, experience shows that the defendants' written submissions have been unreliable in this case. For example, Dr. Hatfill was surprised to discover that FBI logs of press inquiries regarding the anthrax case seemed to end in September 2002 (except for one log reflecting a June 2004 inquiry). When asked about the missing logs between September 2002 and July 2004, the defendants claimed that the absence of additional logs was due to "a waning of media interest in the anthrax investigation over time."¹³ But FBI Spokesman Debra Weierman, whose office maintained the logs, directly contradicted that explanation, testifying that media interest did not wane. In fact, she testified that events after September 2002, such as the pond searches in the summer of 2003, caused media inquires to reach "the hundreds." Weierman Dep. at 80:7 – 82:9.¹⁴

Similarly, defendants provided an interrogatory response that purported to summarize FBI agent Richard Lambert's contacts with the media about the anthrax case. Deposition testimony again contradicted this written submission. Inspector Lambert testified that he did not have contact with one reporter listed in the interrogatory response, did have contact with another omitted from it, and adamantly denied that, other than the *Washington Post*, he "frequently advise[d] reporters that the FBI was continuing to intensely press forward in the investigation," as the written response claimed. Lambert Dep. at 301:8- 303:16, 53:21-54:3, 324:8-21, 322:2-323:8.

¹³ Letter from Alan S. Modlinger, U.S. Department of Justice, to Thomas G. Connolly and Mark A. Grannis, Harris, Wiltshire & Grannis, LLP (March 24, 2005).

¹⁴ Agency Defendants' written explanation for the logs' disappearance having been directly refuted by their own official, it remains unexplained.

Defendants' written responses concerning the confidentiality of certain law-enforcement techniques have also been directly contradicted by deposition testimony. For example, in the dispute over whether Mrs. Virginia Patrick could be deposed, defendants' written submission claimed they had "demonstrated through the *ex parte* and *in camera* Declaration of Richard L. Lambert that her testimony would implicate sensitive and privileged law enforcement information." *Reply Memorandum of Points and Authorities in Support of Agency Defendants' Motion for Order Barring June 30 Deposition of Virginia Patrick and Quashing Subpoena Issued to Her*, June 28, 2005. But in a later deposition, Supervisory Special Agent Rex Stockham testified that the FBI *routinely* provided bloodhound scent packet demonstrations to members of the press and the public, Stockham Dep. at 98:13 – 102:14, and that he provided the same demonstration to Dr. William Patrick and Virginia Patrick that he had previously provided to several members of the press, Stockham Dep. at 183:6 – 185:1. Agent Stockham testified about everything his dog handlers said to, showed to, or asked of Mrs. Patrick, because none of it was privileged at all.

We hasten to add that these repeated examples of flat-out wrong written assertions are not necessarily the result of any deliberate deception by defense counsel from DOJ's Civil Division, who have behaved honorably throughout. More likely, these miscues may have resulted from reliance on the patently inadequate leak investigation by DOJ's Office of Professional Responsibility. Deposition testimony has revealed that several senior FBI officials involved in the case, and even officials whose job is to talk to the press about the case, had never even been *asked* (before questioning by Dr. Hatfill's counsel) whether they had any information about the

leaks in the Amerithrax investigation.¹⁵ But whatever accounts for this record, it weighs heavily against simply giving the agency defendants the opportunity to issue a denial that Dr. Hatfill cannot test due to his lack of access to the underlying records.

Whatever the cause of the defendants' unreliable written submissions, common sense and circumstantial evidence alike indicate that the disclosed information *is* in the defendants' relevant records. Under these circumstances, the defendants should not be allowed to challenge the presence in their system of files of the disclosed information where there are ample indicators of its presence, where Dr. Hatfill cannot test the defendants' response by examining the files himself, and where the defendants' written responses have not proven reliable. Where a party does not answer a request for admission within the time period allowed under the Rule, the matter is "deemed admitted." Federal Rule of Civil Procedure 36(a).

B. Alternatively, the Court Should Appoint a Rule 53 Master to Review the Agency Defendants' Records in Camera

If the Court chooses not to deem the pertinent requests admitted, Dr. Hatfill respectfully requests that the Court order an *in camera* review of the records to confirm that the disclosures

¹⁵ For instance, Counsel questioned Agent Garrett about whether DOJ or FBI asked him how media arrived at Dr. Hatfill's apartment within minutes of Dr. Hatfill signing a consent to search form on June 25, 2002.

Q. Prior to today, you were never asked by anyone at the FBI or DOJ or otherwise about what happened with the press on June 25, 2002?

A. No.

...

Q. Would you believe it was a reasonable inquiry to find out what happened on June 25, 2002 regarding the press without having spoken to you?

...

A. It would certainly be reasonable to talk to me about – and anyone else who was there that day.

Garrett Dep. at 86:17–88:16.

are contained therein.¹⁶ Because relevant records within FBI and DOJ records likely are voluminous and because defendants have asserted the law enforcement privilege over those records, Dr. Hatfill requests that the Court at the Department of Justice's expense appoint a Rule 53 Master possessing the requisite security clearance to conduct that review.

1. *An In Camera Review of The Relevant Records Is Appropriate.*

There is ample precedent for an *in camera* review of records such as FBI files. In *Black v. Sheraton Corporation of America*, 564 F.2d 531 (D.C. Cir. 1977), the court ruled that *in camera* review of FBI investigative files sought by the plaintiff was appropriate. 564 F.2d at 544. In that case, where the Attorney General himself swore that disclosure of the documents would harm law enforcement by revealing investigative techniques and disclosing collateral investigations, the court held that “sound doctrine *obligated* the district court to examine the file *in camera*.” 564 F.2d at 544 (emphasis added). The court reasoned, “Courts should not hesitate to make a private examination of disputed materials upon a reasonable showing that it can serve a purpose truly useful to a party actually or potentially entitled to some discovery.” 564 F.2d at 544. Here, Dr. Hatfill requests nothing more than what the district court was “obligated” to do in *Black* – engage in an *in camera* review of the FBI's files.

Another factor supporting *in camera* review of defendants' files here is that there is a good reason to believe the issue can be settled without the usual thrust and parry of the adversary process. The issue here is the *contents* of the records – whether they contain the disclosures at issue – not the parties' *interpretation* of those records. In *Quinon v. FBI*, 86 F.3d 1222 (D.C.

¹⁶ Indeed, had Dr. Hatfill requested the files in defendants' system of records that pertain to him, *see* 5 U.S.C. § 552a(d), the Act provides that the Court could conduct an *in camera* review of the files to determine whether any documents withheld from those files by defendants were properly not disclosed to him, and the government would bear the burden of sustaining any decision not to produce any such documents. 5 U.S.C.A. § 552a(g)(3)(A).

Cir. 1996), the court overturned the district court's grant of summary judgment to the FBI regarding the plaintiff's request made under FOIA and the Privacy Act for certain FBI files. *Id.* at 1227. The court held that, where the affidavits presented by the FBI "merely state in conclusory terms that documents are exempt from disclosure, an *in camera* review is *necessary*." *Id.* at 1229 (emphasis added); *see also Simon v. Dep't of Justice*, 980 F.2d 782, 784 (D.C. Cir. 1992) ("[W]here the agency cannot describe the document fully enough to show that it is exempt from disclosure without in the course of doing so disclosing the very information that warrants exemption, the solution is for the court to review the document *in camera*."). In reaching that conclusion, the *Quinon* court specifically noted that "when the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents, *in camera* review may be more appropriate." 86 F.3d at 1228.

Here, defendants have made a blanket, conclusory assertion of the law enforcement privilege over all of their relevant records to avoid responding to Dr. Hatfill's written discovery requests seeking admissions that certain information disclosed by the defendants was in their files. The issue here involves no interpretation of the contents of the files, just a straightforward determination as to whether the various disclosures at issue are contained within defendants' files. Thus, as in *Quinon*, an *in camera* review is appropriate here. *See also Dellums v. Powell*, 561 F.2d 242,250-51 (D.C. Cir. 1977) (permitting discovery of Nixon tapes over claim of Presidential privilege, through special master, where "plaintiffs [had] not established with absolute certainty" that tapes or recordings on the matter at issue actually existed, but the court recognized a "substantial possibility" that they did). Here Dr. Hatfill and his attorneys are not requesting the review of *any* information from defendants' files, but only a determination that certain information *that already has been publicly disclosed* should be considered to be in those

files. Here, the master need only state, yes or no, whether the files contain information on each of the various disclosures still at issue. *See also U.S. v. Burford*, 889 F.2d 1406 (5th Cir. 1989) (remanding with instructions to district court to conduct an *in camera* review of the IRS's "individual master files" on the appellants to determine if those files contained exculpatory evidence, despite the IRS's position that the files were non-discoverable internal documents).

2. *Appointment of a Rule 53 Master To Conduct the In Camera Review is Appropriate.*

It is within the Court's sound discretion to appoint a master to conduct an *in camera* review, *Laxalt v. McClatchy*, 809 F.2d 885 (D.C. Cir. 1987), and use of a Rule 53 master would be particularly appropriate here for four reasons.

First, the master would relieve the Court of the burden of reviewing a potentially large number of files. There are scores of disclosures at issue and only the defendants know where the information in question would be located within defendants' voluminous¹⁷ files. *See In re U.S. Dep't of Defense*, 848 F.2d 232,239 (D.C. Cir. 1988) (holding that "where a massive number of classified documents exist such that the judge and his law clerk simply cannot examine them all," the appointment of a special master to review the documents was appropriate so long as the judge retained decisional authority). *Cf. Vaughn v. Rosen*, 484 F.2d 820, 829 (D.C. Cir. 1973) (recognizing in FOIA suit that it is within the court's discretion to appoint a special master to examine documents where the master would "assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge").

¹⁷ Specifically, all files constituting records retrievable by Dr. Hatfill's name or other identifying particular. *See* 5 U.S.C.A. § 552a(a)(3)-(5).

Second, the Court could select a master who, by virtue of experience in law enforcement, already possesses the requisite security clearance to review the files thus avoiding any real intrusion on the confidentiality of the defendants' files. In *In re U.S. Dep't of Defense*, the DOD argued that the fact that highly sensitive classified materials were at issue counseled against the appointment of a master to review them. 848 F.2d at 238. The court disagreed, and noted that the district court had chosen to appoint a master "who holds, or has recently held, sufficient clearance to have access to the documents," and recognized that the alternative – charging law clerks with assisting in the task – would have expanded the pool of persons with access to the documents and delayed the litigation for months while the clerks obtained necessary clearance. 848 F.2d at 238.

Third, because this "dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents," *Quinon*, 86 F.3d at 1228, use of a master is appropriate. In *In re U.S. Dep't of Defense*, the court noted that the "special master would not act as an advocate; he would, however, assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge." 848 F.2d at 235 (internal quotation omitted). See also *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973) (holding it within trial court's discretion to appoint special master to review disputed documents and determine governmental agency's claims that documents were exempt from disclosure so long as master would not act as advocate).

Fourth, an *in camera* review by a master is particularly appropriate where defendants' invocation of the law enforcement privilege in conclusory fashion threatens to preclude meaningful judicial review of its assertion. In *Vaughn v. Rosen*, the Court of Appeals recognized that the government could not simply "set forth in conclusory terms" its opinion that

information was exempt from disclosure under FOIA because, in such instance, “only one side to the controversy [the government]...is in a position confidently to make statements categorizing information,” and that such “factual characterization may or may not be accurate.” 484 F.2d at 823-24. The court concluded that it was “vital that some process be formulated” that would assure a party’s right to information was not “submerged beneath governmental obfuscation and mischaracterization” and also “permit the court system effectively an efficiently to evaluate the factual nature of the disputed information.” 484 F.2d at 826. In holding that the government was required to provide detailed indices itemizing and explaining its claimed exemptions, the Court also made clear that “it was within the discretion of the trial court to designate a special master to examine documents and evaluate an agency’s contention of exemption.” 484 F.2d at 828. *See also Quinon*, 86 F.3d at 1229 (“[W]here an agency’s affidavits merely state in conclusory terms that documents are exempt from disclosure, an *in camera* review is necessary.”).

Because Dr. Hatfill here is not requesting disclosure of privileged information, but merely an admission *for purposes of this litigation only* that now-public information was contained in the records over which defendants assert privilege, the use of a master to conduct an *in camera* review provides a straightforward solution that respects the privileged nature of any information in defendants’ files that remains secret.

V. Defendants Should Produce Their Disclosures to Congress in Non-Redacted Form for an *In Camera* Review.

So far, we have discussed only requested admissions. However, in the course of discovery, the defendants produced nine documents demonstrating that the FBI disclosed information about Dr. Hatfill to various Senate staffers. Those documents were heavily redacted such that Dr. Hatfill cannot determine the full extent to which information was disclosed in

violation of the Privacy Act. The documents themselves and related deposition testimony reveal that at least some information about Dr. Hatfill was disclosed to Senate staffers in violation of the Act.

In early June 2002, the FBI participated with Senate staffers in an interview of Dr. Barbara Hatch Rosenberg that focused on her criticism of the manner in which the FBI was handling the Anthrax investigation. The document reflects that, after Dr. Rosenberg departed, two FBI employees – “A.D. [Assistant Director] Harp and S.C. Carey provided general comments regarding Dr. Rosenberg’s concerns” to the Senate staffers. On July 1, 2002, S.C. Carey and Dr. Adams of the FBI provided an “Anthrax Briefing” to “Senate Judiciary/Leahy” on the “consent searches of *Hatfill’s residence + shed.*” Even though the section of the document detailing that briefing was redacted by the FBI as law enforcement privilege information (Code “G”),¹⁸ the document makes clear that the FBI was sharing specific information about Dr. Hatfill with Senate staffers in violation of the Act.¹⁹

The documents also reveal that – incredibly – the FBI disclosed to Senatorial staffers that Dr. Hatfill was subjected to a polygraph examination and the *results* of that examination.²⁰ A July 12, 2002 document memorializes a “Conference Call re: NY Times Anthrax article” in

¹⁸ Plaintiff’s Exhibit 166 contains the “deletion codes” used by the FBI in redacting documents produced in discovery. The explanation for Code “G” is “the law enforcement privilege – the disclosure of this information could cause harm to, impede, impair, or hinder an investigation and/or an investigative interest of the FBI.”

¹⁹ The FBI also produced a “Congressional Contact Record” dated July 1, 2002 that discloses a briefing by Dr. Adams and S.C. Carey to Beryl Howell of Senator Leahy’s office. Nearly the entirety of the description of that briefing was redacted by the FBI as information protected by the law enforcement privilege and “information which is properly classified pursuant to executive order, the disclosure of which could reasonably be expected to cause damage to the national security or the conduct of the government’s internal relations.” See Plaintiff’s Exhibit 166 (explaining redaction code “A”).

²⁰ Agent Carey testified at his deposition that he disclosed law enforcement information regarding the polygraphs to Senate staffers. See Carey Dep. at 259:21-261:3; 261:14-262:2.

which S.C. Carey briefed Beryl Howell of Senator Leahy's office. Again, nearly the entirety of this document was redacted by the FBI as law enforcement privileged or non-responsive, except for the statement "Hatfill polygraphed next week." It thus appears that, in an effort to defend against charges by *New York Times* columnist Nicholas Kristof (and, apparently, the U.S. Senate) that it was not making sufficient progress in the Anthrax investigation, the FBI disclosed to Senate staffers its plans to polygraph Dr. Hatfill in connection with its investigation. A subsequent "Congressional Contact Record" dated July 24, 2002 (again redacted in significant part) reveals that FBI official Tom Carey, in briefing eight Senatorial staffers on an "Anthrax Case Update," planned the following update: "Call Ken Johnson [Senatorial staffer] *w/ results of Hatfield's [sic] record polygraph.*" The documents reveal that the FBI, when subjected to Senatorial scrutiny, did not hesitate to disclose information about Dr. Hatfill in violation of the Privacy Act.²¹

The most egregious example of the FBI's disclosures to Congress is reflected in an October 4, 2002 e-mail exchange in which Ann Todd of the FBI forwards "a few questions that need to be followed-up on after our briefing with Sen. Judiciary this afternoon" to Assistant Director Carey. Those documents reveal that the FBI "relayed to [Leahy Staffer] Howell [on] 10-17-02" detailed information relating to (1) search warrants executed on Dr. Hatfill's residences and other property, (2) the FBI's identification of Dr. Hatfill as "a possible subject in the case," (3) the dates when Dr. Hatfill was interviewed by the FBI, and (4) the fact that Dr.

²¹ Indeed, this was not the only example of the FBI disclosing Privacy Act information in an attempt to insulate itself from critical news publications. On November 1, 2002, Ann Todd of the FBI sent an e-mail to other FBI personnel noting that the staffs of Senators Daschle and Leahy had requested a follow up briefing on the Anthrax investigation because they were "disturbed by recent media accounts regarding the progress and focus of the Amerithrax investigation," and they "specifically requested that [FBI Assistant Director In-Charge] Mr. Harp attend this briefing."

Hatfill consented to a polygraph in January 2002 but “resisted” subsequent FBI efforts to “reinterview and polygraph Hatfill.” That exchange also indicated that the information was compiled not only for transmittal to staffer Howell, but because “it might be helpful for *future briefings* because we can probably expect similar questions.”²² A great deal of additional information contained in those documents were again redacted by the FBI under an assertion of the law enforcement privilege and as non-responsive.

Even the very limited information that the FBI chose not to redact from these documents reveal real and extensive Privacy Act violations by defendants. Indeed, the disclosed information suggests that the redacted information likely contains additional (and probably extensive) disclosures by defendants in violation of the Act. Thus, Dr. Hatfill respectfully requests that defendants be ordered to submit non-redacted copies of those documents for an *in camera* review by the Court or by a master appointed by the Court to determine whether additional disclosures in violation of the Act are contained in the redacted portions of those documents.

²² Another document reveals subsequent briefings to Senate staffers on the Anthrax investigation; however, it is so extensively redacted that it is impossible to discern the specific information disclosed. *See* Plaintiff’s Exhibit 157 (detailing a Dec. 17, 2002 “Amerithrax Briefing” to Senatorial Staffer about “Searches in Frederick.”)

CONCLUSION

For the foregoing reasons, we ask the Court to overrule the agency defendants' invocation of law-enforcement investigatory privilege and to grant the relief requested in the proposed orders submitted with this Memorandum.

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Respectfully Submitted,

/s/ Patrick O'Donnell

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