

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Steven J. HATFILL, M.D.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil No. 1:03-CV-01793 (RBW)
)	
Attorney General Michael MUKASEY,)	
<i>et al.,</i>)	
)	
<i>Defendants.</i>)	
_____)	

PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF

MOTION FOR PARTIAL SUMMARY JUDGMENT

April 11, 2007

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INTRODUCTION

The factual backdrop for this case need hardly be described in any detail, even six years later, because we all remember it well. The anthrax attacks of 2001 are etched into our memories not just because they were unprecedented—the first acts of bioterrorism on U.S. soil—but also, paradoxically, because they came right on the heels of the September 11, 2001 attacks and seemed to be related in some way. Pl.’s Statement of Undisputed Facts (“SOF”) ¶¶ 6-7. If one is inclined to consider the attacks as crime rather than warfare, then we deal here with the most notorious crime of a generation.

It is an unsolved crime, but many people think they know who did it. They think they know that Steven Hatfill did it. And they think this because, for months stretching into years, that is what various DOJ and FBI officials led them to believe. SOF ¶ 87. Sometimes the officials did this in the open, at press conferences even, but more frequently they cloaked themselves in anonymity while leaking information about the anthrax investigation and Dr. Hatfill’s role in it. SOF ¶¶ 21-48, 62-86, 96-118. In doing so, they violated the Privacy Act. Their unlawful actions have left Dr. Hatfill a ruined man—ruined for the rest of his life as far as his career in biodefense is concerned, and ruined for the ages as far as his reputation is concerned. SOF ¶ 87, 175.

It has never been possible to chase down each illegal leak, nor even each publication that contained illegal leaks—the Agency Defendants’ remarkable profligacy with investigative information made that impossible. Literally *thousands* of mainstream news stories have now linked Dr. Hatfill’s name to anthrax forever; Lexis-Nexis alone shows over 2800 such articles and broadcasts. SOF ¶ 175. The sheer number of investigative leaks attributed to FBI or DOJ in these stories has always been extremely damning for the Agency Defendants, for surely no one

can believe that virtually every major news outlet in the nation was engaging in simultaneous wholesale fabrication.

Even more damning, however, is the content of these stories, which was typically detailed enough to show both that the leaks came from the Agency Defendants and that no competent law enforcement official could possibly think they were appropriate. Leakers told the news media not just that they were focusing their investigation on Dr. Hatfill, but *why* they were focusing on Dr. Hatfill: his alleged motive, his alleged ability to commit the crimes, and even the nature of the evidence that was supposedly being gathered against him. SOF ¶¶ 96-117. In some cases, the leakers said directly what others clearly implied: that investigators thought Dr. Hatfill had committed the attacks. *See, e.g.*, SOF ¶¶ 113, 116. Leakers revealed specific investigative techniques being used against Dr. Hatfill, *see, e.g.*, SOF ¶¶ 22-23, 62, 68, 96, 116, sometimes going so far as to reveal the time and place of *future* searches that were expressly linked to Dr. Hatfill. *See, e.g.*, SOF ¶¶ 41, 101(a). Leakers described for reporters exactly what was found in searches connected with Dr. Hatfill, from the contents of his dumpster to the contents of his hard drive to the contents of a pond where he supposedly disposed of evidence. *See, e.g.*, SOF ¶¶ 96(b), 96(c), 101(c), 113(b). Leakers told the news media about spooky-sounding projects on which Dr. Hatfill had worked—projects he undertook for this nation’s defense against bioterror attacks—and these often appeared in the press after varying degrees of embellishment. *See, e.g.*, 101(b), 117. Dr. Hatfill’s driving record, his supposedly unflattering personality traits, and even his personal medical information were leaked with reckless abandon. *See, e.g.*, SOF ¶¶ 18, 68(i), 106(l), 106(m), 113(e).

At any trial of this case, the evidence would show to the satisfaction of any reasonable person that these and many other disclosures were made by FBI and DOJ officials. In many

cases, the evidence would be uncontroverted. There are, for example, over 140 instances supported by direct testimony or admissions in which FBI or DOJ officials—some whose names we know, and some whose names we do not know—disclosed investigative records about Dr. Hatfill that were protected from public disclosure under the Privacy Act, 5 U.S.C. § 552a. *See* SOF ¶¶ 21-48, 62-86, 96-118. Exs. 201 & 202 (detailing disclosures by identified and unidentified FBI and Justice Department officials).¹ In other cases, the evidence overwhelmingly suggests unlawful disclosure by FBI or DOJ, but there is at least a wisp of a denial that prevents us from treating the attribution to FBI or DOJ as uncontroverted for purposes of summary judgment. And in yet more cases, the identity of the leaker will simply never be known for sure, even though the nature of the information leaked amply justifies an inference of FBI or DOJ origin. *E.g.*, SOF ¶96. All of these leaks, however, have two things in common: They contain information the Agency Defendants had a duty to keep secret, and they show that the Agency Defendants failed in that duty.

Overt, direct disclosure is only one of the ways a federal agency can violate the Privacy Act. That statute also imposes more comprehensive obligations on agencies so that leaks of private information can be prevented as a matter of policy, rather than simply punished after the fact. Three of these more comprehensive obligations are at issue in Count III of the First Amended Complaint and in this motion. First, the Privacy Act requires that each covered agency establish rules of conduct for employees who deal with information about private citizens, and train those employees about the need to avoid unauthorized disclosures. *See* 5 U.S.C. § 552a(e)(9). Second, the Privacy Act also imposes on each covered agency an affirmative obligation to safeguard its records. *See* 5 U.S.C. § 552a(e)(10). Third, the Privacy Act requires

¹ All exhibits cited herein are attached to the Declaration of Steven Fredley filed concurrently herewith.

each covered agency to maintain an accounting of each disclosure of protected information (at least some of which would ostensibly be *properly* made under the Privacy Act), as a check on agency noncompliance.

The violation of these provisions at the FBI and DOJ was shockingly complete. The Agency Defendants admit that they never even attempted to keep an accounting of any disclosures of information about Dr. Hatfill, even ones they might now claim to be legal. In addition, the undisputed evidence from a veritable parade of government witnesses is that training on Privacy Act compliance was virtually non-existent. Many of the same witnesses testified not just that administrative and technical safeguards were lacking, but that they were *known* to be lacking, and still the Agency Defendants did nothing to correct the situation throughout *years* of leaking.

Undisputed evidence shows, for example, that the Agency Defendants were much more successful at keeping the Privacy Act itself secret from their own employees than they were at keeping investigative information secret from the press:

- Virtually no one involved with the Amerithrax investigative records system, from the Attorney General down, could remember any instruction ever provided regarding Privacy Act protections. *See infra* at 10-14.
- Participation in and briefings on the investigation were wide and indiscriminate, extending much farther than any genuine need to know. Indeed, overbriefing was such a significant problem that, in discovery, the Agency Defendants objected even to identifying all those with access to information because doing so was unduly burdensome. *See infra* at 14-15
- The Agency Defendants implemented almost no internal restrictions on contact between reporters and the officials who had access to the entirety of the Amerithrax investigative files. The U.S Attorney for the District of Columbia, his Deputy in charge of the Criminal Division, and the FBI's Assistant Director in Charge for the Washington Field Office ("WFO") could and did make disclosures to the press without need for the approval or even knowledge of any other official. *See infra* at 15-16.

- Early press reports—beginning at least by November 2001 and continuing regularly in every month thereafter—demonstrated beyond any doubt that people inside the agencies were anonymously disclosing investigative information to the press, yet the defendants simply let the problem fester. *See infra* at 16-18.
- The defendants *already knew*—from the objections of whole field offices that were wary of using it, from a blue-ribbon commission and from their own Office of Inspector General—that their computerized records database was a proven security risk, having figured prominently in the Hanssen spy case among many others. Nonetheless, the Agency Defendants made a bad situation much worse by intentionally deciding to make the Amerithrax records in this database available to nearly the entire FBI—approximately 24,000 people—as well as employees of *other agencies* who may have had no role at all in the Amerithrax investigation, with no additional safeguards. *See infra* at 18-20.
- The Agency Defendants well knew how to investigate leaks, and it would have been far easier for them to find the leakers in 2002 than it was for Dr. Hatfill to find them years later. Not only did they fail to do so, they failed to make any serious effort. Their lack of interest in detecting and disciplining leakers speaks volumes. *See infra* at 20-21.
- Senior officials within both the Justice Department and FBI maintained a deafening silence on the leaks; in fact, they cultivated an atmosphere in which anonymous disclosures to the press became standard operating procedure, by setting up numerous “off the record” interviews *through the press offices* and even planning press strategy around the ability to provide certain information “on the record” and leak the rest. *See infra* at 21-28.

In such an environment, no one should be surprised at the number or the egregiousness of the resulting leaks—neither the scores that have been traced to named officials nor the hundreds that will never be.

These stunning institutional lapses made possible all the particular illegal disclosures that occurred *for years* during the anthrax investigation. And because the issues of safeguarding and training depend for the most part on matters of public record rather than shadowy anonymous conversations, Dr. Hatfill’s claims against the Agency Defendants under these sections of the Privacy Act are more susceptible to resolution by summary judgment. In the balance of this motion, we describe the undisputed evidence that warrants entry of summary judgment on these three provisions of the Privacy Act. We choose this course not simply because the evidence is

undisputed, but because a ruling on the inadequacy of the Agency Defendants' institutional violations of the Privacy Act would do far more to prevent similar miscarriages of justice in the future than any purely retrospective judgment based on discrete disclosures could ever do.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where ““there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The non-moving party “cannot rely on ‘mere allegations or denials’ . . . , and ‘conclusory allegations unsupported by factual data will not create a triable issue of fact,’ Rather, the non-moving party must go beyond ‘the pleadings and by [its] own affidavits, or . . . depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.’” *Scarborough v. Harvey*, 493 F. Supp. 2d 1, 12 (D.D.C. 2007) (citation omitted).

ARGUMENT

I. THE AGENCY DEFENDANTS VIOLATED THE SAFEGUARDING, INSTRUCTION, AND ACCOUNTING PROVISIONS OF THE PRIVACY ACT

In addition to its ban on unlawful disclosures, the Privacy Act requires each covered agency maintaining a system of records to do three simple things with the information contained therein: (1) take appropriate steps to *safeguard* those records against disclosure, 5 U.S.C. § 552a(e)(10); (2) establish rules of conduct for officials maintaining records and *instruct* them in the requirements of the Privacy Act, 5 U.S.C. § 552a(e)(9); and (3) keep an accurate *accounting* of each disclosure of records under its control, 5 U.S.C. § 552a(c)(1). Dr. Hatfill alleges that the Agency Defendants violated all three of these requirements. *See* First Am. Compl. ¶¶ 114-125 (Ex. 116).

The Privacy Act does not specify exactly what rules of conduct an agency must establish and teach to its employees, nor does it specify exactly what “administrative, technical, and physical safeguards” an agency must adopt. It does, however, set a very clear standard for what the agency’s rules and safeguards must accomplish: they must

insure the security and confidentiality of records and . . . protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.

5 U.S.C. § 552a(e)(10). This standard is relatively straightforward: If unauthorized disclosure of a record about an individual could cause “substantial harm, embarrassment, inconvenience, or unfairness” to that individual, then the agency must implement “administrative, technical and physical” safeguards to keep the records secure and confidential. Furthermore, this involves, at a minimum, “protect[ing] against any *anticipated* threats or hazards.” *Id.* (emphasis added).

The instruction and accounting provisions complement this statutory purpose. Once the agency has appropriate safeguards in place under subsection (e)(10), subsection (e)(9) requires the agency to instruct its employees with respect to that agency’s Privacy Act rules, including the relevant administrative, technical, and physical safeguards. Subsection (c)(1) facilitates enforcement and oversight of these laws by requiring a detailed accounting of disclosures the agency makes.

The Privacy Act also provides a civil right of action for any person who is adversely affected by an agency’s failure to comply with these provisions. 5 U.S.C. § 552a(g)(1)(D). Damages and attorneys fees are awarded where the violation is intentional or willful. 5 U.S.C. § 552a (g)(4). Thus, the elements of a safeguarding, instruction, or accounting claim are clear from the statute itself:

1. The existence of a record and a “system of records;”

2. Violation of the safeguarding, instruction, or accounting provisions;
3. Intent; and
4. An adverse affect.

The undisputed material facts establish that each of these elements is met. We address each in turn.

A. The Investigative Disclosures in this Case Reflect “Records” Contained Within a “System of Records.”

The Privacy Act defines a “record” as “any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history 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). “The Act defines ‘record’ in a relatively *broad* fashion,” *McCready v. Nicholson*, 465 F.3d 1, 9 (D.C. Cir. 2006) (emphasis added), and was intended to “include as little as one descriptive item about an individual,” *Bartel v. Fed. Aviation Admin.*, 725 F.2d 1403, 1408 n.9 (D.C. Cir. 1984) (citation omitted). To be a “record,” the information must be “about” an individual and “contain the individual’s name or other identifying particular.” *Tobey v. NLRB*, 40 F.3d 469, 471 (D.C. Cir. 1994). This definition is easily satisfied by the investigative disclosures about Dr. Hatfill that have been documented in this case.

Courts have repeatedly held that investigative information about an individual constitutes a “record” protected by the Privacy Act. *See, e.g., Bartel*, 725 F.2d at 1407-11 (holding that disclosures of investigative findings and conclusions constitute disclosure of a “record”); *Jacobs v. Nat’l Drug Intelligence Ctr.*, 423 F.3d 512, 517 (5th Cir. 2005) (holding that a report leaked to the press that alleged the plaintiff was involved in a Mexican money-laundering and drug-

trafficking organization was a Privacy Act “record”); *Clarkson v. IRS*, 678 F.2d 1368, 1373 (11th Cir. 1982) (concluding that documents, including “surveillance reports, newsletters and press releases,” gathered by IRS about the plaintiff, a tax protester, were “records” since they contained individual references to the plaintiff); *Scarborough*, 493 F. Supp. 2d at 16 (“Criminal Alert Notice” that “references the plaintiffs by name and divulges ‘information that actually describes the [plaintiffs] in some way’” is a record). The investigative information the Agency Defendants failed to safeguard in this case also fits squarely within this definition. *See* SOF ¶¶ 129-30, 201-202.

The undisputed facts also show that the Amerithrax investigatory records—electronic and otherwise—are a “system of a records,” *i.e.*, “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). SOF ¶¶ 3, 129-30, 201-202. Discovery in this case has provided direct evidence (by the Agency Defendants’ admissions) that many of the investigative records about Dr. Hatfill unlawfully disclosed exist within a system of records and are retrieved by the name “Hatfill” or some other identifying particular. SOF ¶ 201. For other categories of information, the evidence of their presence in a record within a system of records is circumstantial, but still uncontroverted. SOF ¶¶ 3, 7, 129-30, 202.²

² A Court will “generally draw no distinction between the probative value of direct and circumstantial evidence.” *Doe v. U.S. Postal Serv.*, 317 F.3d 339, 343 (D.C. Cir. 2003). “Moreover, because plaintiffs can rarely produce direct evidence . . . requiring such evidence would eviscerate the protections of the Privacy Act.” *Id.* The fact that so much of the investigative information improperly disclosed has, consistent with the circumstantial evidence, been undeniably established to be within the Agency Defendants’ system of records buttresses the circumstantial evidence.

B. The Agency Defendants Failed to Safeguard Investigative Records About Dr. Hatfill or Instruct Their Officials on Their Privacy Act Obligations.

At the start of the anthrax investigation, a properly trained investigative team with adequate safeguards in place should have expected the public profile of the investigation to develop along the lines set forth in the Privacy Act itself: The system of records should be “secure,” the records themselves should remain “confidential,” and to the extent the Agency Defendants “anticipated threats or hazards” to the security or integrity of the records happened to arise, they would take whatever additional actions might be necessary to “protect” against those threats or hazards. *See* 5 U.S.C. § 552a(e)(10). The reality bore no resemblance to the expectations embedded in the statute, for a cavalcade of bad reasons.

1. Near-Total Ignorance of the Privacy Act.

Even after the slew of early leaks of investigative information in the winter of 2001-02, SOF ¶ 8—well before any leaks about Dr. Hatfill—the Agency Defendants undertook no particular efforts to improve safeguards against anthrax investigation disclosures or to impress upon Agency Defendant personnel that they had a duty to obey the Privacy Act. One reason for this may have been that remarkably few officials within the FBI or DOJ seem ever to have been told anything about the Privacy Act. Despite the extraordinarily high-profile nature of the Amerithrax investigation, SOF ¶ 7, official after official testified either that he had received no Privacy Act instruction whatsoever, or that he received only introductory instruction at the very outset of federal service, with no additional safeguards or training for records generated in this extraordinarily high-profile case. SOF ¶¶ 137-138.

The testimony of former Attorney General John Ashcroft, who ran the Agency Defendants during the era of the most flagrant Privacy Act abuses, is representative of the resultant level of knowledge about Privacy Act limitations:

Q: Now, as to one specific law, the Privacy Act, as the attorney general, did you have ultimate responsibility for the enforcement of the Privacy Act?

A: I don't know.

* * *

Q: Was your statement that Dr. Hatfill was a person of interest in the Amerithrax investigation, the FBI's investigation of the anthrax attacks, is that consistent with the Privacy Act?

A: I believe it was consistent with my responsibilities as attorney general.

* * *

Q: So that's the appropriate language. The question is, as to inappropriate language, would it have been inappropriate for you to identify Dr. Hatfill as a suspect?

A: I don't know.

* * *

Q: You don't know whether regulations permitted you to identify an uncharged person as a suspect or not?

A: I said I did not know. I don't—I said I don't know whether at the time I knew. That's what I said.

Q: Do you know now?

A: I don't know.

* * *

Q: Did Dr. Hatfill have a privacy interest in not having the result of his polygraph examinations disclosed to the American public? Would you agree that if you took a polygraph examination that that would be private?

A: I don't know. I don't know.

* * *

Q: Was it fair to Dr. Hatfill for a[n] anonymous FBI [official] to suggest that the Bureau is far more suspicious of him now?

A: I don't know.

* * *

Q: If it were, would it have been—it would have been appropriate for an FBI official to declare that the dogs "went crazy" when encountering Dr. Hatfill?

A: I don't know.

Ashcroft Dep. at 15:21-16:3, 99:9-15, 141:12-17, 142:18-143:3, 217:16-22, 219:13-16, 224:5-9 (Ex. 2); SOF ¶ 138.

This would be merely disappointing, rather than catastrophic, if officials farther down in the Agency Defendants' hierarchy had greater awareness of the Act and its requirements.

Unfortunately, the former Attorney General was by no means an outlier:

- Former U.S. Attorney Roscoe Howard testified that he received no Privacy Act instruction when he ascended to his office, even though the Agency Defendants' own Privacy Act Security Regulations require "formal training for all Department attorneys and related professionals . . . in regard to the interpretation and application of the . . . Privacy Act." Privacy Act Security Regulations for Systems of Records at 208 (Feb. 8, 1977) (Ex. 187); *see also* Howard Dep., 26:22-29:15 (Ex. 20); SOF ¶ 137.
- Leaker Edwin Cogswell, despite being responsible for responding to press inquiries at FBI headquarters itself, could recall no training in the Privacy Act or any other regulations or guidelines on what he could and could not disclose about investigations. Cogswell Dep. at 148:5-149:4 (Ex. 8); SOF ¶ 138.
- Neither Barbara Comstock nor Mark Corallo, the Justice Department's two top public affairs officials under Attorney General Ashcroft, received any instruction on the Privacy Act. Comstock Dep. at 26:15-28:6 (Ex. 9); Corallo Dep. at 36:4-36:21 (Ex. 10); SOF ¶ 138.
- Longtime FBI agent Dwight Adams received no training on disclosures since attending Quantico almost twenty-five years ago, and he frankly admitted he "remember[s] very little of it today." Adams Dep. at 43:12-44:9 (Ex. 1). SOF ¶ 138.
- FBI Agent Richard Lambert's experience was similar, after basic training at Quantico, he had no Privacy Act instruction until he later attended law school and worked as an attorney in the FBI's General Counsel's Office handling Privacy Act matters. Lambert Dep., 100:2-101:12. He did not believe that FBI agents are generally familiar with the Privacy Act. Lambert Dep. at 100:2-102:12 (Ex. 29); SOF ¶ 138.
- Tracy Henke, despite having served as a Deputy Assistant Attorney General and Deputy Associate Attorney General, acknowledged knowing the Privacy Act "exists" but had never received training in it and had no understanding of its requirements. Henke Dep. at 18:5-19:5 (Ex. 19); SOF ¶ 137.

- Assistant U.S. Attorney Kenneth Kohl, one of the lead prosecutors on the anthrax investigation, also knew that the Privacy Act existed but had “never gotten in the weeds on that.” Kohl Dep. at 27:2-11 (Ex. 26); SOF ¶ 137.
- Timothy Beres, a DOJ grants-funding official who participated in the decision to have Dr. Hatfill fired from Louisiana State University was not “familiar” with the Privacy Act and had no general understanding of what it required. Beres Dep. at 18:17-19:9 (Ex. 12); SOF ¶ 138.
- Deborah Daniels, the Assistant Attorney General who approved Dr. Hatfill’s blackballing and kibitzed about how to spin it to the press, also received no Privacy Act training and did not have even a general understanding of what it required. Daniels Dep. at 14:19-15:17 (Ex. 11); SOF ¶ 138.

Federal agencies should undoubtedly have considerable latitude in their decisions about *how* to implement the Privacy Act, but the statutory requirements must mean *something*. In this case, however, the undisputed facts show that the Agency Defendants did *nothing*.

The lack of even basic training in Privacy Act restrictions predictably led to utter confusion in some cases. For instance, Assistant Director in Charge Van Harp, for whom the FBI press office set up “off the record” anonymous “background briefings” about the anthrax investigation, believed that what he told reporters in such briefings somehow did not count as disclosures. Accordingly, Mr. Harp engaged in wide-ranging discussions and disclosed investigative information he otherwise understood to be improper. SOF ¶¶ 47-48, 137; Harp Dep. at 108:13-111:5, 434:15-436:11 (Ex. 17) (“I didn’t think it was a disclosure, because the ones that were on background were scheduled by the Press Office . . .”). Channing Phillips, the designated media representative for the U.S. Attorney’s Office in the District of Columbia, thought that the Privacy Act involved a “relative obscurity” concept—but no aspect of the statute, any federal regulation implementing it, or any case construing it has *ever* used the phrase. Phillips Dep. at 7:15-11:12 (Ex. 35). Former Attorney General Ashcroft’s explanation for why he declared Dr. Hatfill an anthrax “person of interest” on national television was that the disclosure was “accurate.” Ashcroft Dep. at 108:9-109:5, 119:20-120:15 (Ex. 2); *see also* SOF

¶¶ 84-85. Lacking federal law-enforcement experience and leading a Department that had abandoned both training in and administration of Privacy Act limitations, the Attorney General of the United States appeared to have no idea of long-standing and fundamental limitations on the Agency Defendants' ability to make public disclosures—even accurate ones—about an uncharged and presumptively innocent “person of interest” such as Dr. Hatfill.

2. *Near-Total Absence of Administrative Safeguards on Oral Briefings.*

Case agents were concerned about the number of individuals being briefed about the investigation—many of whom had no need for the investigative information, but nevertheless received the information merely because of the high profile nature of the case. SOF ¶¶ 121-123. However, the Agency Defendants exercised little or no administrative control over attendance at the briefings, even after it became clear that over briefing was very likely contributing to the growing number of leaks. The head of the Criminal Division of the U.S. Attorney's Office in the District of Columbia, for instance, testified that information discussed in briefings on the case quickly found its way into the press “more than once,” and that participants would often pass a remark like “I wonder how long before I'll be reading this in the New York Times.” Seikaly Dep. at 42:6-18, 43:10-13 (Ex. 40); *see also* Eberhart Dep. at 22:7-24 (Ex. 13) (testifying that given the information in the press, FBI personnel had concern about how many people were being briefed on the case).

In fact, the number of individuals who participated in or were briefed on the case was so numerous it was not possible for the Agency Defendants to identify them in discovery. *See* Defs.' Resp. to Pl.'s First Set of Interrs. No. 1 (Ex. 119) (stating “[t]here are hundreds of individuals across the legislative, executive, and judicial branches of the federal government who at some point have ‘participated in any way’ or been ‘briefed’ about various aspects of the investigation”); Def.'s Resp. to Pl.'s Second Req. for Admis. No. 298 (Ex. 123) (admitting that

“given that the sheer number of persons who were ‘briefed on’ or had ‘participated’ in the investigation into the anthrax mailings would have made it infeasible for OPR [Office of Professional Responsibility] to have ‘question[ed]’ every such person”); SOF ¶ 123.³

3. *Near-Total Absence of Administrative Safeguards on Media Interviews.*

The Agency Defendants appeared to maintain no administrative safeguards at all against the release of information to the media by people other than press officers, such as the Attorney General, the U.S. Attorney for the District of Columbia, or the head of the Criminal Section in that office. No one appears to have told the Attorney General, for starters, that he ought not announce on national television that Dr. Hatfill is on the FBI “person of interest” list, and it never occurred to him to ask. SOF ¶¶85, Ashcroft Dep. at 103:19-104:16, 121:15-122:15 (Ex. 2).⁴ Channing Phillips, chief of staff and spokesman for the U.S. Attorney’s Office under Mr. Howard, was in charge of press relations. Phillips Dep. at 41:17-42:2 (Ex. 35). But he testified that in practice, the U.S. Attorney could and did speak to the press without his or any other official’s presence or knowledge. *Id.* at 148:3-151:10; *see also* Howard Dep. at 155:21-156:5 (Ex. 20) (claiming he was not required to report his conversations with the media to the Public Affairs office). Administrative controls on disclosures were so lacking that Mr. Phillips had no idea what disclosures Mr. Seikaly made to the press on his own. Phillips Dep. at 156:18-157:3 (Ex. 35); SOF ¶¶ 67, 73.

³ The best the Agency Defendants could manage was to identify a subset of this universe defined by three limitations: the “principle” officials from DOJ, FBI and the Postal Inspection service who were “directly involved” or “regularly” briefed. Defs.’ Resp. to Pl.’s First Set of Interr. No. 1 (Ex. 119). Notably, proven leaker Edwin Cogswell’s name was never identified by the Agency Defendants in discovery as among those briefed on the case. Def.’s Resp. to Pl.’s Second Set of Interr. Nos. 19-21 (Ex. 122).

⁴ Agency Defendant officials even included the description of Dr. Hatfill as a “person of interest” in the briefing package given the Attorney General so that he would be prepared to describe Dr. Hatfill that way in a New Jersey public appearance. Matters of Local Interest About Which the Attorney General Might Be Questioned at the Press Event (Ex. 146).

The U.S. Attorney's Office claimed to routinely refer reporters' anthrax queries to the FBI or Justice Department headquarters, Phillips Dep. at 47:15-48:18 (Ex. 35), but the administrative-control situation at the FBI was, if anything, even worse:

- Edwin Cogswell was an FBI spokesman who regularly handled calls about what the FBI trumpeted as its "transformation" to a more pro-active approach to terrorism investigations after September 11. Reporters did not have to ask for Cogswell by name; when they called the FBI with questions about the anthrax investigation, he was simply one of the spokesmen to whom they were transferred. Cogswell was even quoted in news accounts of the anthrax investigation. SOF ¶¶ 31-32; *see also* Exs. 111-112 (press accounts quoting Cogswell). Despite the fact that he was a regular FBI spokesman on Amerithrax, quoted on the investigation, and later proved to be one of the leakers, the Agency Defendants' administrative controls were so poor that they did not even *know* that he had spoken to reporters on the subject, let alone that he had made the later-discovered disclosures. Def.'s Resp. to Pl.'s Second Set of Interr. Nos. 19-21 (Ex. 122).
- Arthur Eberhart, the Special Agent in Charge of the WFO in 2002, began making disclosures to reporters at the end of his FBI tenure and faced no restrictions on continuing post-retirement to disclose to the media investigative information he had obtained on the job. SOF ¶¶ 43-44, 99.
- Former Assistant Director in Charge Van Harp, who admitted to "confirming" for reporters the accuracy of their investigative information, had complete discretion to talk to the press without further authorization from anyone. The Agency Defendants allowed him such free reign despite knowing that he was both in charge of the Anthrax investigation and communicating with the press "on a daily basis." SOF ¶¶ 47, 78.
- The Agency Defendants' administrative safeguards are so lacking that, at the outset of this case, they asserted they have no information on the identity of any leakers. Defs.' Resp. to Pl.'s First Set of Interrs. No. 14 (Ex. 119) (responding to request for all information "identifying any person as the source of Leaks" by objecting and explaining that no one "interviewed by OPR or defense counsel has stated that any specific person was the source of any disclosures alleged in plaintiff's complaint."). To this day, the Agency Defendants maintain that they are completely unable to identify any leakers. SOF ¶ 141.

4. Failure to Heed Early Warning Signs.

The first indications of a problem with leaks came quite early in the investigation, yet no one within the FBI or DOJ seems to have thought that any sort of corrective action was

appropriate. *See* SOF ¶ 8. At least by mid-November, newspapers were reporting access to “law enforcement officials, speaking on the condition of anonymity.” Susan Schmidt & Joby Warrick, *Pa. Officials’ Homes Raided in Anthrax Case*, Wash. Post, Nov. 15, 2001 (Ex. 46). When the FBI conspicuously, but without public explanation, raided homes in Chester, Pennsylvania using a battering ram and biohazard suits, the local FBI spokeswoman “could not disclose what prompted the raid,” citing the fact that the search warrant was sealed. *Id.* This official’s reticence proved no barrier to the *Post*’s reporters, who found two “law enforcement officials, speaking on the condition of anonymity,” to explain that the search “was prompted by specific information that was solid enough for the FBI to obtain search warrants but that did not appear to have been borne out.” *Id.*

The leaks quickly multiplied. Beginning in early 2002 and running right up to the as-seen-on-television FBI search of Dr. Hatfill’s apartment on June 25, 2002, numerous media outlets reported anonymous disclosures about the anthrax investigation, attributed to Justice Department, FBI, or “law enforcement” sources:

- A “senior law enforcement official involved in the investigation” who “spoke on condition of anonymity,” told the Wall Street Journal that the FBI planned to “deploy lie detectors and subpoena employee records to compare the handwriting on them with the letters and envelopes that contained the anthrax” and that “the FBI has obtained or requested anthrax from every lab in the United States that it knows worked with the Ames strain” Gary Fields, *FBI Refocuses Anthrax Probe on Scientific Analysis*, Houston Chron., Feb. 10, 2002 (Ex. 48);
- “Another FBI official, speaking on the condition of anonymity because the anthrax case is ongoing, confirmed that one of the hijackers had been treated at a South Florida hospital for a ‘leg lesion’ and that the suspected lead hijacker, Mohammed Atta, had sought treatment for skin irritation on at least one of his hands.” Elizabeth Shogren & Josh Meyer, *FBI Denies that Hijacker Had Skin Anthrax*, L.A. Times, Mar. 24, 2002 (Ex. 49);
- “Still seeking a suspect in the anthrax-by-mail attacks, the Justice Department is preparing to give lie detector tests to hundreds of federal workers at two facilities where anthrax is kept, a law enforcement official says. The government will administer the tests to workers at Fort Detrick, Md. and Dugway Proving Ground,

Utah. The tests will begin in June. Investigators will focus on workers who had expertise in preparing anthrax for use as a weapon and those who may have had access to it, the official said Monday, speaking on condition of anonymity.” Christopher Netwon, *Justice Planning Polygraphs for Hundreds of Federal Workers About Anthrax Attacks*, Associated Press, May 21, 2002 (Ex. 51).

This early evidence of highly detailed investigative leaks in the pages of daily papers across the country put the Agency Defendants on notice of the problem, and should have prompted them to take remedial steps. Unfortunately, that never happened.

5. *Use of a Computerized Investigative Records System Known to be Insecure, With No Additional Safeguards.*

The Agency Defendants’ complete disregard for administrative safeguards extended to the encyclopedic records of Amerithrax investigative information compiled in an electronic record system called the Automated Case Support system (“ACS”).⁵ Despite the extraordinary and obvious importance of the ACS records, “nearly the entire FBI” has access to the system, from Special Agents to analysts to support employees. Access was even extended to other state, federal and local governmental personnel working on *any* FBI task forces (not just the Amerithrax task force). SOF ¶ 131.

Moreover, the Agency Defendants already knew the ACS was a proven security risk. *See* SOF ¶¶ 134-136. It was, for instance, the method notorious Russian spy and FBI traitor Robert Hanssen “exploited almost exclusively in his last period of espionage” The FBI knew that “its ACS databases” were “a form of electronic open storage that allows essentially unregulated

⁵ The ACS includes all communications about a case, such as interviews, follow up on leads, tasking to other field offices, and all reports of investigative activities. The Amerithrax investigation was opened under a particular unique indentifying number within ACS. Records about Dr. Hatfill can be retrieved within ACS by using Dr. Hatfill’s name or other identifying particular. All investigative techniques employed and information gathered by the Amerithrax squad about Dr. Hatfill was done for the purpose of the criminal investigation and would therefore be contained within ACS. Traditional paper investigative files in the FBI’s older “rotor” system are also described and retrievable through the ACS. SOF ¶¶ 3, 129, 130-131.

downloading and printing.” In Hanssen’s own words, “[a]ny clerk in the Bureau could come up with stuff on that system. It was pathetic. . . . It’s criminal what’s laid out. What I did is criminal, but it’s criminal negligence . . . what they’ve done on that system.” Indeed, at least one clerk did unlawfully access the ACS. SOF ¶ 134.

Three FBI Special Agents have been convicted for selling or otherwise misusing information queried from the ACS on individuals and organizations. SOF ¶ 135. The ACS was so notoriously vulnerable that FBI squads from some areas, such as the New York Field Office, simply refused to use it for sensitive cases. A Review of FBI Security Programs at 43-44 (Mar. 31, 2002) (Ex. 199). Warnings from the Justice Department’s own Inspector General had gone unheeded for years. “The serious security flaws in the FBI’s ACS system—which have been discussed in prior OIG reviews and internal FBI inspection reports—have been apparent since the system’s inception in 1995, but they have not been remedied.” SOF ¶ 136. This is the system to which the Agency Defendants turned to collect the investigative information from “one of the largest and most complex criminal investigations in law enforcement history,” Mem. of P&A in Supp. of Agency Defs.’ Mot. For Stay of Proceedings at 1, Nov. 21, 2003 (Dkt. #14), on “an extraordinarily high-profile case of great interest to the media.” Kortan Dep. at 129:14-15 (Ex.).

So many people had actually gotten into Amerithrax case files via the ACS that one agent’s inquiry into who had done so during “some period of time that wasn’t very long” resulted in a “blizzard of paper” that he described as “massive.” So many individuals had accessed the investigatory records that Agent Roth estimated it would have taken a second investigation the size of the Amerithrax investigation just to identify them—even with the FBI’s technical capability to determine who had accessed any particular file. SOF ¶ 132.

Despite the extraordinary scope and sensitivity of the case, its high media profile, its sorry records of leaks, and the ACS's long record of insecurity, the Agency Defendants refused to take obvious steps to safeguard the ACS. They did not, for instance, password-protect or otherwise limit access to the system, even though they admit having the capacity to do so. SOF ¶ 133; *see also* Kohl Dep. at 220:13-223:14 (Ex. 26). Nor did they limit access only to those individuals with a need to know the information. Rather, they left the Amerithrax investigative records wide open to any of the "vast majority" of the 24,000 or so FBI personnel who had generalized access to the ACS system, plus other state, federal and local government personnel working on any FBI task force. SOF ¶ 133.

6. Failure to Detect and Discipline Leakers.

Despite their knowledge of extensive leaks from the Amerithrax investigation and the knowledge that such disclosures violate official policy, jeopardize the investigation, and are unfair to the subject, SOF ¶¶ 90, 93, 95, 171-72, 190, neither the FBI nor DOJ made any serious effort to investigate and put a stop to the practice, SOF ¶¶ 140-143.

The Agency Defendants knew how to seriously investigate and stop those leaks, if they had wanted to do so. FBI agents testified that a thorough and proper leak investigation would have (1) focused on upper management because that is from where the majority of leaks come, (2) pulled emails and telephone records for specific periods, (3) interviewed, under oath, all personnel with access to the leaked information and polygraph examinations administered to a select group, (4) subpoenaed the reporters receiving the leaks, and (5) opened a grand jury investigation. SOF ¶ 143. The Agency Defendants did none of this. Reporters were never asked about their sources of investigative information, and they testified that their sources *never* refused to disclose investigative information because the FBI or DOJ were cracking down on the leaks. SOF ¶ 143.

Instead, the FBI's "internal investigation" of the leaks amounted to no more than asking fifty-nine of the countless personnel participating in or briefed on the investigation whether they were the leakers. SOF ¶ 142. In fact, the Bureau specifically ruled out polygraph examinations. SOF ¶¶ 127, 142. And after Dr. Hatfill filed the present lawsuit, the Agency Defendants cancelled their "investigation," vividly illustrating their preference for closing ranks around their wrongdoers rather than rooting them out. SOF ¶ 141.

To this day, the Agency Defendants maintain they have no information identifying anyone as having leaked information about Dr. Hatfill, and they have never disciplined anyone for any leaks related to the Amerithrax investigation. SOF 141.

7. Silence of Senior Agency Officials.

One of the most surprising facts to emerge from discovery is that despite the literally innumerable leaks from the Amerithrax investigation, no senior FBI or DOJ official issued any statement condemning the leaks or threatening disciplinary action against leakers. *See* SOF 124-126, 128, 147-148. Attorney General Ashcroft did not more than express to FBI Director Mueller, orally, his disapproval of such disclosures (except when he made them). SOF ¶ 124. Attorney General Ashcroft's own chief of staff and deputy chief of staff testified that they were not aware of any action taken by the Attorney General, the Deputy Attorney General, the Office of the Attorney General, the Department of Justice or the FBI to stop leaks. *Id.* Director Mueller, in turn, never issued any written directive against the disclosures or threatened leakers with any consequences for their actions. SOF ¶¶ 125-126. He just asked Assistant Director Harp in passing, at the end of a meeting, to make sure there was no leaking. SOF ¶ 126. Director Mueller never ordered any investigative efforts designed to uncover the source of the leaks; instead, he directed that investigative information be "compartmentalized" within the FBI. Although that compartmentalization apparently limited the ability of the three Amerithrax squads

within the FBI to share information directly with each other, “it would not cause a narrowing of the universe of people with knowledge of the case.” Nor is there evidence that the belated compartmentalization limited what thousands of personnel *not* on the case could learn about it through the ACS. SOF ¶ 127.

The Agency Defendants’ one and only written statement concerning discussing with the press the anthrax investigation came on June 4, 2003—after eighteen months of sustained leaking and at least three or four *bona fide* media circuses involving Dr. Hatfill. That statement came not from the Attorney General, or from FBI Director Mueller, or from any of their deputies or assistants. Instead, the Agency Defendants issued their only written statement in the form of an email by WFO media specialist Debra Weierman, forwarding a message from the Acting Assistant Director in Charge of the WFO, relating that FBI Director Mueller had ordered no one other than Ms. Weierman to discuss the case with the media. SOF ¶ 125. Ms. Weierman’s message, passing along what the ADIC said the Director said, contained no request for information about the leakers, threatened no consequences for future leaks, and had precisely the impact a reasonable person would expect: none.

8. *The “Person of Interest” Disclosures.*

The foregoing facts from discovery arrange themselves into a fairly consistent pattern: FBI and DOJ officials were careless with investigative information from the very start, and they did virtually nothing to plug their leaking investigation even after they were undeniably aware of the leaks, aware they were internal, and aware they were bad for the investigation. SOF ¶¶ 120-123, 169-200. Because the story of how Dr. Hatfill came to be known as *the* “person of interest” in the anthrax investigation has been the subject of more discovery than any other discrete disclosure, it illustrates the general point quite specifically.

The guidelines for classifying and prioritizing “persons of interest” were issued in a memorandum dated December 3, 2001. SOF ¶ 12. Just four days later, FBI Special Agent Jennifer Gant sounded the following prescient warning:

The divisions are reluctant to add names to the “Persons of Interest” list for many reasons. . . . [T]he list is widely disseminated in the FBI and DOJ, and based on part experience, there is a *probability that it will be leaked* or accidentally fall into the hands of the national media. This would end any covert investigation into the potential people involved. This list has the potential to be a major detriment to the case, yet has no apparent investigative value.

SOF ¶ 12. The Agency Defendants did not heed her warning. The list was compiled, regularly updated with a summary of investigative activity conducted vis-à-vis each individual on it, and made available through the FBI’s ACS system, where thousands of FBI personnel as well as personnel from other agencies had free access to it. SOF ¶¶ 9, 13, 133. Despite the specific warning about the probability of a leak from the “persons of interest” list, the Agency Defendants undertook no safeguards beyond those generically applicable to FBI investigations. Def.’s Resp. to Pl.’s First Set of Interr. No. 15 (Ex. 119).

As we have seen, however, the Attorney General received no training on the Privacy Act and knew virtually nothing about it. He did, however, know from FBI briefings that Dr. Hatfill was on the FBI’s “person of interest” list. SOF ¶ 82. The subordinate officials who briefed him—some of them exercising significant day-to-day authority over the investigation—also knew or cared too little to alert him to the sensitivity of the information. Nor does anyone seem to have suggested, after the first time the Attorney General used the phrase, that he should do anything to repair the damage he inflicted on Dr. Hatfill. Indeed, he went on to repeat the disclosure twice more within the following month. SOF ¶ 83.

This leak from the very top of the organization—which was inappropriate and had absolutely no positive effect on the investigation, SOF ¶ 90—signaled to one and all that no one

in the FBI or DOJ needed to concern themselves much with Dr. Hatfill's rights under the Privacy Act, his reputation, or even his presumption of innocence. SOF ¶ 94. After the Attorney General's "person of interest" comments about Dr. Hatfill, FBI agents commented among themselves about Dr. Hatfill "really getting lit up in the press." Indeed, FBI Special Agent James Fitzgerald testified that upon hearing Attorney General Ashcroft identify Dr. Hatfill as a "person of interest," his immediate reaction as a seasoned FBI agent was that "maybe [the FBI] finally ha[d] someone in the anthrax case." SOF ¶ 87. The Agency Defendants' personnel admit, however, they made no effort to dampen the media's enthusiasm about Dr. Hatfill as the likely anthrax killer. SOF ¶¶ 89, 100.

9. Official Use of Anonymity Agreements With the Media.

As noted above, the names of many of the individual officials within the Agency Defendants who made discrete disclosures are still unknown, because reporters who received the disclosures agreed to hide the identities of the disclosing officials. Such anonymity agreements were routinely demanded by the Agency Defendants' public affairs officials, and routinely agreed to by reporters, during the years of the Amerithrax investigation leaks. SOF ¶ 149. Deputy Public Affairs Director Mark Corallo testified that he, too, spoke to the press "off the record" about Dr. Hatfill being a "person of interest," that he did so in his official capacity as a Justice Department spokesman, and that such "off the record" discussions with the media were "absolutely" commonplace, even "routine" for Washington "press professionals." SOF ¶ 86.

The FBI, as a matter of "official policy," allows senior officials to brief the press "on background," and negotiates bargains with reporters on "specifics" of attribution, such as whether the information may be attributed to the FBI without naming the official. SOF ¶ 149. ADIC Harp gave "off the record" information to the press on the anthrax case under such

anonymity agreements set up for him by the FBI press office. In fact, he admitted to doing so “dozens of times.” SOF ¶¶ 47-48.

Saying one thing in official, for-attribution statements, and then using follow-up with individual reporters to spin the story, was standard operating procedure for the Agency Defendants. The norms known to most prosecutors, defense lawyers, and judges regarding the treatment of uncharged individuals were no obstacle to such spin.

For example, when the story broke that the Justice Department effectively had Dr. Hatfill sacked at LSU, reporters wanted to know why. In addition, the Agency Defendants learned that the *Washington Post* was planning an editorial concerning the Agency Defendants’ directive to LSU that was expected to be hostile. SOF ¶¶ 50, 52-55, 60. The Agency Defendants agreed to issue a statement that did not reveal why they had him fired but merely explained that they had the authority to order him off the program at issue and distinguished his “status as an employee of that University” from his service on DOJ-funded programs.⁶ SOF 60. Public Affairs chief Barbara Comstock pointed out that, under the draft official statement, “we don’t in any way answer ‘why’ we did this, just say we CAN” *Id.* Not to worry; Assistant Attorney General Deborah Daniels knew what to do:

We don’t think you need to address that in this written statement. They [reporters] will follow up anyway, and then someone can tell them that it would have been disruptive to the program and [not] conducive to a learning environment; possibly could have cast program into disrepute *if he turned out to be in fact the anthrax terrorist*

Id. (emphasis added). Ms. Daniels sent her suggestion to a Who’s Who of Justice Department top leadership at the time, including the Assistant Attorney General for the Criminal Division,

⁶ Defendants periodically take pains to point out that they did not, technically, require LSU to fire Dr. Hatfill. Rather, they merely directed LSU not to use him as “a subject matter expert or course instructor” on any DOJ-funded program. That this is the explicit and exclusive basis, however, on which LSU hired Dr. Hatfill. SOF ¶¶ 53-54.

the Deputy Assistant Attorney General, and the Director of the Justice Department Public Affairs Office. SOF ¶ 61. Despite the suggestion that the United States Justice Department tell reporters that it thought the evidence of Dr. Hatfill being the anthrax killer was sufficient to merit his firing, none of the recipients of Ms. Daniels's suggestion objected to her proposal. Indeed, none of them even commented to her about it. *Id.*, 186:5-12. SOF ¶¶ 60-61.

These tactical disclosure practices heightened the impact of the leaks upon Dr. Hatfill by hampering his ability to bring out the officials' biases and other reasons to discount suggestions that Dr. Hatfill might be the anthrax culprit; made the successful effort to unmask some of the leakers' identities unnecessarily time-consuming and expensive; and, have succeeded even to this day in hiding the identities of some of the leakers.

Both the Agency Defendants as institutions and individual leaking officials continue to rely on anonymity agreements with reporters, successfully impeding discovery in this case. SOF ¶¶ 150-152. *Many* Agency Defendant personnel refuse to this day to waive anonymity promises given them by reporters: FBI Director Mueller, former Assistant Director Harp, former DOJ Public Affairs Chief Barbara Comstock, FBI spokesman Edwin Cogswell, DOJ press spokesman Bryan Sierra, Daniel Seikaly, former head of the Criminal Division in the U.S. Attorney's office for the District of Columbia, former U.S. Attorney Roscoe Howard, former DOJ Chief of Staff David Ayres, former FBI agent Eberhart, FBI press spokesman Michael Kortan, and former DOJ deputy Public Affairs Chief Mark Corallo. SOF ¶ 151. In fact, several entered into a concerted agreement to rely upon these anonymity agreements in response to this litigation. Upon receiving a request to waive of confidentiality,⁷ former Assistant Director Harp contacted Tom Carey, Dwight Adams, John Collingwood, and other to discuss whether they should waive

⁷ The parties circulated the waivers to Agency Defendant personnel pursuant to the Court's Order of October 21, 2004. Order ¶¶ 2-3 (Oct. 21, 2004) (Dkt #44).

promises of confidentiality they had received from reporters. SOF ¶ 152. These FBI officials reached a “consensus” that only if others waived confidentiality, would they agree to waive the confidentiality extended to them by reporters; yet, they assured each other they would not do so. SOF ¶ 152. Mr. Harp conceded this was inconsistent with the Agency Defendants’ claimed desire to get to the bottom of the leaks. *Id.*

More troubling and more telling, the Justice Department and FBI have, as institutions, refused to waive the protection of agreements their Public Affairs officials negotiated on their behalf with the media. ¶ 150. Following up on the Court’s suggestion that the Agency Defendants’ officials be asked to waive the protection of anonymity agreements with the press, and in light of the testimony from both public affairs and other Agency Defendant personnel that the public affairs offices negotiated such agreements, Dr. Hatfill asked the Agency Defendants to grant the press waivers of anonymity given to the Justice Department and FBI themselves, institutionally. Despite the Agency Defendants’ litigation position that it should not be held liable for Privacy Act violations absent the names of the officials involved, and its professed desire to uncover and punish those responsible, *the Justice Department has even refused to waive anonymity promises given by the media to the Department itself.*⁸ See SOF ¶ 150.

10. Conclusion: Abject Failure to Safeguard and Instruct.

The Agency Defendants’ safeguarding efforts, or lack thereof, clearly violated the statutory standard: they were not adequate to insure the security and confidentiality of their records. 5 U.S.C. § 552a(e)(10). The sorry history of leaks from the anthrax investigation presents perhaps the most comprehensive failure in safeguarding investigative information in

⁸ The Agency Defendants’ continued institutional reliance on media anonymity agreements in this case is, however, consistent with their decision not to seek to compel a single reporter in this case to disclose any Justice Department or FBI sources.

American history. Discovery has provided admissions from FBI and DOJ officials, or in some cases direct testimony from reporters, of over 140 disclosures of investigative information about Dr. Hatfill alone. Eighty of those have now been traced to discrete, identified DOJ and FBI officials. Ex. 201. Reporters who received the disclosures first-hand testified that over 60 more came from still-unidentified DOJ and FBI officials. Ex. 202. Incredibly, even after this Court warned that the ongoing disclosures were unacceptable, and after they assured the Court the matter was being addressed, neither the Attorney General nor the FBI Director could stir himself to issue any written directive on the matter. SOF ¶¶ 124-25, 148. The inescapable result of this avalanche of disclosures is the public ruin of the sole named “person of interest,” who, as of April 2008, is immortalized in 2865 articles and broadcasts on LEXIS and 30,900 Google “hits” found by the simple search “Hatfill” and “anthrax.” SOF ¶ 175. Just as Richard Jewell’s obituaries universally described him as the anonymously leaked suspect in the Atlanta Olympic Park bombings, Dr. Hatfill will one day go to his grave remembered by most, falsely, as the culprit in the anthrax attacks – a crime with which he has never been charged and of which he is completely innocent. SOF ¶175.

The security and confidentiality of the investigative records concerning Dr. Hatfill have simply and obviously not been “insured,” as the statutory standard requires. Equally obviously, the Agency Defendants failed to “protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness” to Dr. Hatfill. 5 U.S.C. § 552a(e)(10).

C. The Agency Defendants Acted Intentionally in Failing to Safeguard

The Privacy Act allows the award of money damages and attorney’s fees where “the court determines that the agency acted in a manner which was intentional or willful.” 5 U.S.C. § 552a(g)(4). As the intent standard has been authoritatively construed in this Circuit, the

undisputed material facts show that the safeguarding and instruction violations here were intentional.

This Circuit has construed the statutory provision to require one of two alternatives: conduct “‘somewhat greater than gross negligence,’ *Hill v. U.S. Air Force*, 254 U.S. App. D.C. 171, 795 F.2d 1067, 1070 (D.C. Cir. 1986) (citations omitted), or, an act committed ‘without grounds for believing it to be lawful, or by flagrantly disregarding others’ rights under the Act.’ *Albright [v. United States]*, 732 F.2d [181,] 189 [(D.C. Cir. 1984)].” *Waters v. Thornburgh*, 888 F.2d 870, 876 (D.C. Cir. 1989) (emphasis added), *overruled on other grounds, Doe v. Chao*, 540 U.S. 614 (2004). It can be satisfied by evidence that the underlying conduct is “so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful.” *Lopez v. Huff*, 508 F. Supp. 2d 71, 77 (D.D.C. 2007) (RBW) (citing *Deters v. United States Parole Comm’n*, 85 F.3d 655, 660 (D.C. Cir. 1996)). Here, as in *Waters*, the uncontradicted material facts are sufficient to prove the requisite intent under either alternative of the formulation, even for those leakers whose names have not been disclosed.

The Agency Defendants acted with *at least* “somewhat greater than gross negligence” or “reckless disregard” for Dr. Hatfill’s Privacy Act rights. Uncontradicted evidence shows that the Agency Defendants put virtually no safeguards in place from the start, conducted virtually no training, and ignored threats to the security of their records that were in fact anticipate by Agent Gant’s tragically prophetic memo. Early press coverage of the investigation made clear that the security of their investigative information was continuously being compromised, yet they took no steps to improve security. Even after it became clear that Agency Defendant officials were leaking a veritable roadmap of the investigation, including *advance notice* of certain searches that were planned for the future, the Agency Defendants did nothing to protect Dr. Hatfill or their

investigation. Instead, they embraced the culture of “official leaks,” and continued to signal to the nation: Don’t worry; we have our man.

Justice Department policies warned that such disclosures were damaging and prohibited, and many of the Agency Defendants’ personnel admitted *knowing* as much. The Agency Defendants’ policy and regulations prohibited (and continue to prohibit) public comment on uncharged individuals and investigative procedures, investigative techniques, and evidence. SOF ¶¶ 90, 92, 169-70. Comment is prohibited to preserve both the integrity of the investigation and the privacy of individuals involved in the investigation prior to any public charging for violations of the law. SOF ¶ 170. The Amerithrax investigation leaks demonstrate, however, that these policies existed on paper only.

In this case, the undisputed facts thus show that leaks continued after earlier leaks became known⁹ and an investigation was requested by the victim. SOF ¶¶ 22, 23, 40-41, 124-25, 140, 144. The undisputed fact that the Agency Defendants knew about the leaks but did nothing

⁹ Anonymous FBI officials in June, 2002, and the Attorney General himself, in early August, revealed to the public one name from their “person of interest” list—Steven Hatfill—and the anthrax investigation leaks focused upon him from that day forward. *See* SOF ¶¶ 21-23, 26-27, 33, 35, 37-43, 45-47, 68, 75, 77-78, 82-83, 86, 91, 96-97, 99, 101, 104, 106-110, 113, 116-117, 144-146, 153-163. Multiple Justice officials, including the Attorney General himself, admitted eventually knowing that the investigation was beset by leaks, and disclosures about Dr. Hatfill in particular. SOF ¶¶ 40, 120, 121, 124-25. They also understood that officials “who had in part participated” in the investigation or had been briefed on the investigation must have been disclosing investigative details. Mueller Dep. at 14:5-16:5 (Ex. 32); SOF ¶121. Mr. Seikaly testified that in his experience, information that would be discussed by the FBI in the briefings would make its way into the press within a day or two. *Id.* Mr. Howard suspected the leaks were coming from the FBI but there were so many people around the case information that it was possible it was being leaked by others. *Id.* Some officials suspected in most cases that the sources of the leaks were supervisors. SOF ¶ 122. The leaks “weren’t necessarily coming from the core but they were—they were coming from someone that was either tapping into ACS or they were coming from people that were getting briefed by us up the chain (or sideways in the chain).” Roth Dep. at 255:5-10 (Ex. 39); SOF ¶121. While different Defendant personnel held different theories about who among them provided the disclosures, all realized that disclosures were coming from the investigation. SOF ¶¶ 121-22.

serious to stop them confirms their satisfaction of the “willful or intentional” standard of a violation of the Act’s § 552a(e)(10) requirement to establish adequate safeguards over its records. *Pilon v. United States Dep’t of Justice*, 796 F. Supp. 7, 12-13 (D.D.C. 1992) (holding the intent element in safeguarding claim is satisfied by failure to establish safeguards even after learning about disclosures and request for investigation). The Privacy Act policies that the Agency Defendants promulgated but declined to enforce also illustrate their knowledge of the need for appropriate safeguards and the intentional and willful nature of their violations. *See Romero-Vargas v. Shalala*, 907 F. Supp. 1128, 1133-34 (N.D. Ohio 1995) (finding intentional and willful violation under the Privacy Act where an agency routinely failed to follow its own privacy guidelines). Where, as here, agency employees “have a custom and practice of violating both” their own agency guidelines and the Privacy Act, their knowledge of and subsequent disregard for applicable protections confirms their intentional violation. *Id.* at 1134.

The Court confronted a similar wholesale disregard for the Privacy Act in *Dong v. Smithsonian Institute*. 943 F. Supp. 69 (D.D.C. 1996), *rev’d on other grounds*, 125 F.3d 877 (D.C. Cir. 1997). In that case, “[a]ll employees who testified on the subject at . . . trial stated that they never received any training or education about the substance or the requirements of the Privacy Act” *Id.* at 72. The “Smithsonian made no effort to educate or instruct employees about the procedures and substance of . . . the Privacy Act” because it believed itself not to be covered by the Act. *Id.* at 73. Under these facts, the Court had no difficulty finding that the Privacy Act violations were intentional: “These are clear indications that the agency intentionally chose to ignore the law This constitutes reckless disregard for the Privacy Act.

. . . Such reckless disregard promotes an environment in which Privacy Act violations can readily and easily occur.” *Id.*¹⁰

D. The Agency Defendants Intentionally Violated the Privacy Act’s Accounting Provision.

Section 552a(c) of the Privacy Act requires each agency to keep an accurate accounting of each disclosure of records under its control, stating the date, nature, and purpose of each disclosure of a record to any person or to another agency, along with the name and address of the person or agency to whom the disclosure is made. 5 U.S.C. § 552a(c)(1). This accounting must be retained for at least five years, and must be made available to any individual named in the disclosed record at his or her request. 5 U.S.C. § 552a(c)(2) & (3).

Section 552a(c) “assure[s] against administrative departure” from the requirements of the Privacy Act. S.R. Rep. No. 93-1183 at 52-53 (1974), *reprinted in* Source Book at 205-206. It is “an essential element” in protecting privacy rights and acts as a check on administrative agencies and their compliance with the Privacy Act. *Id.* The provision was not designed to burden agencies, but “to make oversight of information practices of the government more manageable and efficient.” *Id.*

The Agency Defendants attempted to evade such oversight by willfully and intentionally failing to keep an accurate accounting—indeed, any accounting at all—of the numerous disclosures to persons outside DOJ or the FBI about Dr. Hatfill. In fact, the Agency Defendants admitted “that they have not maintained a running tabulations [sic] of disclosures concerning Dr. Hatfill.” Answer ¶119 (Ex. 117). Their only rationale for failing to keep an accounting is the

¹⁰ Ironically, the Smithsonian had a better reason for ignoring the Privacy Act than the Agency Defendants ever could. The D.C. Circuit eventually ruled that it is not covered by the Privacy Act. *Dong v. Smithsonian*, 125 F.3d 877, 878 (D.C. Cir. 1997) (holding Smithsonian not an “‘agency’ . . . without reaching its ‘intentional or willful’ defenses”).

claim that they are not required to do so, a claim that confirms that they fully intended the action (or here, inaction) which violates the Privacy Act. *See Dong v. Smithsonian*, 943 F. Supp. 69 (D.D.C. 1996), *rev'd on other grounds*, 125 F.3d 877 (D.C. Cir. 1997).

II. THE PRIVACY ACT VIOLATIONS ADVERSELY AFFECTED DR. HATFILL

The final element of a Privacy Act damages claim is adverse effect. 5 U.S.C. § 552a(g)(1)(D). The Agency Defendants' violations have unequivocally had an adverse effect on Dr. Hatfill. SOF ¶ 169-200. Section 552a(g)(1)(D) of the Privacy Act provides civil remedies whenever any agency fails to comply with any provision of the Act or rule promulgated under the Act "in such a way as to have an adverse effect on an individual."

Federal courts, including the D.C. Circuit, have taken an encompassing view of what qualifies as an "adverse effect" under the statute, finding that effects such as emotional and reputational harm are adverse effects. *Dong*, 943 F. Supp. at 74 (finding a reputational harm was an adverse effect where "[t]he injury was not severe, but when we are speaking of something as important, as amorphous, and as evanescent as reputation, even the slightest whisper can stain a lifetime of hard work"); *McCready v. Principi*, 297 F. Supp. 2d 178, 194 (D.D.C. 2003) (holding that plaintiff's complaints that "her reputation [had] been significantly damaged . . . and that she [was] cut off from work assignments commensurate with her grade . . . [were] sufficient to constitute an adverse effect"); *Montemayor v. Federal Bureau of Prisons*, No. 02-1283, 2005 U.S. Dist. LEXIS 18039 * 14 (D.D.C. Aug. 25, 2005) (stating that "the recent trend at the District Court level has been to allow Privacy Act suits seeking general compensatory damages, such as pain and suffering and non-pecuniary losses, to proceed."). The D.C. Circuit found that even "emotional trauma alone is sufficient to qualify as an 'adverse

effect' under Section 552a(g)(1)(D) of the [Privacy] Act." *Albright v. United States*, 732 F.2d 181, 186 (D.C. Cir. 1984).

It is clear that Dr. Hatfill has suffered adverse effects as defined by the Privacy Act. SOF ¶ 175. Among other adverse effects, the Agency Defendants' failure to safeguard anthrax investigative files or give instruction on Privacy Act limitations eliminated Dr. Hatfill's employment opportunities and ability to earn a living. For example, a potential employer told Dr. Hatfill that he was unemployable because of the publicity he had received. Hatfill Dep. at 280:14-281:12 (Ex. 18); *see also id.* at 291:19-292:22 (Dr. Hatfill had a job interview with UNMOVIC, but after the record disclosure began Dr. Hatfill called to check on the status of his application and was told that "he had a lot of nerve phoning."). The Agency Defendants themselves have confirmed that Dr. Hatfill will not be hired on a Department of Justice or any other federal program because of the record disclosures. SOF ¶¶ 55-57.

The Agency Defendants' actions have damaged not only his employment prospects, but his personal and professional reputation. SOF ¶ 157. Dr. Hatfill's girlfriend, Peck Chegne, testified that the press coverage destroyed the majority of Dr. Hatfill's friendships and other social relationships. Chegne Dep. at 100:7-105:6 (Ex. 7) (stating that disclosures caused harm to Dr. Hatfill's personal and professional relationships). Dr. Hatfill and Ms. Chegne both testified that the disclosures harmed his professional reputation making it hard for Dr. Hatfill to find employment or even communicate with his former colleagues or other potential employers. *Id.* at 100:7-103:1; Hatfill Dep. at 296:20-300:10 (Ex. 18).

The disclosures have also caused Dr. Hatfill extreme mental and emotional distress. SOF ¶ 175; Hatfill Dep. at 308:5-310:6 (Ex. 18) ("[I]t's like death by a thousand cuts until eventually what you are physically and mentally is destroyed, and socially. It is unbelievable and

indescribable what I have had to go through for something I had nothing to do with.”); Chegne Dep. at 112:9-114:8 (Ex. 7) (“They’ve made him into a man who’s drinking, who has no will to do anything else, you know, because whatever he does, you know, he lives incomplete [h]e has nowhere to go, he has no hope.”).

It is also clear that the Agency Defendants’ violations of the Privacy Act caused these adverse effects.¹¹ In order to establish the requisite causal connection, a plaintiff must demonstrate a close nexus between the disclosures and the adverse effects alleged. *See Molerio v. FBI*, 749 F.2d 815, 826 (D.C. Cir. 1984); *Albright*, 732 F.2d at 186-88. The best way to demonstrate this close nexus is inquire whether the Agency Defendants’ compliance with the Privacy Act, *i.e.*, effectively protecting the investigative record information regarding Dr. Hatfill, would have changed the outcome. *Id.* Several witnesses in this case testified that the adverse effects that Dr. Hatfill suffered were a direct result of the record disclosures, *e.g.*, Chegne Dep. at 100:7-105:6 (Ex. 7), but in this case, this analysis is self-evident. The Privacy Act failures led to disclosures that the FBI and Justice Department suspected Steven Hatfill of being the anthrax murderer, and *why* they suspected him. This information is so extreme and devastating that it is impossible to argue that absent the violations Dr. Hatfill would have suffered the same adverse effects.

¹¹ The accounting violations adversely affected Dr. Hatfill in two distinct ways: they both contributed to the disclosures and they impeded his ability to gather evidence of the disclosure, safeguarding, and instruction violations. Had Defendants not violated the accounting provision, the substantive violations would have been less likely to occur: accounting for their individual disclosures would surely have chilled them by making a record of the individual perpetrators. They would also have highlighted, and to the same extent deterred, the safeguarding and instruction violations. And, by creating essential discoverable evidence, the statutorily required accounting would have made the other violations provable with much less time, expense, and effort than has been expended in the nearly five years of litigation to date.

CONCLUSION

The Justice Department and FBI investigate thousands of people every year. Some of those investigations result in indictments and convictions, some in acquittals, and some in no charges being filed at all, because some people turn out to be innocent. In all such cases, the Privacy Act requires the agencies employing the federal government's vast power to collect investigatory information to safeguard the potentially destructive records that result. As the Court of Appeals has noted, "where an agency—such as the FBI—is compiling information about individuals primarily for investigatory purposes, Privacy Act concerns are at their zenith." *Henke v. United States Dep't of Commerce*, 83 F.3d 1453, 1461 (D.C. Cir. 1996). Rarely, if ever, has there been a greater marshalling of the government's investigatory power than in the Amerithrax investigation. SOF ¶ 7.

The Act requires the FBI and the Justice Department to protect investigatory records against public disclosure as the information is compiled. The Agency Defendants' willful failure to safeguard their Amerithrax records, to instruct their personnel in what can and cannot be released about an uncharged individual such as Dr. Hatfill, or to account for their myriad disclosures, allows investigatory disclosures to be used as a weapon against the innocent. Every American should be offended by the entire affair.

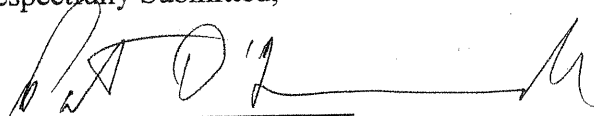
As Judge Greene observed in a similar case sixteen years ago:

[T]hose providing the leaks were personnel of the Department of Justice. By virtue of their employment at an agency at the heart of the administration of justice, these individuals were under a special duty to be careful not to violate the rights of individuals. . . . [I]n actions reminiscent of Franz Kafka's novel *The Trial*, Department of Justice officials leaked confidential information concerning plaintiff with considerable abandon . . . , while at the same time plaintiff was told that he could not be allowed access to the facts underlying the investigation the government had conducted of him.

Pilon, 796 F. Supp. at 8 n.1. Those same observations apply here.

The undisputed material facts show the Agency Defendants violated the Privacy Act in failing to protect the Amerithrax investigative records about Dr. Hatfill against this unseemly tradition. For the foregoing reasons, Dr. Hatfill's motion for partial summary judgment should be granted, to vindicate not only his personal interests under the Privacy Act, but the public interest in safeguarding federal investigative records against disclosure and misuse.

Respectfully Submitted,



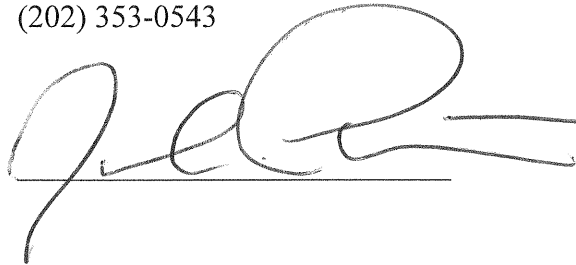
Dated: April 11, 2007

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion for Partial Summary Judgment was delivered to the following person by hand on this 11th day of April, 2008:

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A handwritten signature in black ink, appearing to read "Paul Freeborne", is written over a horizontal line. The signature is stylized and cursive.