IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN J. HATFILL, M.D., Plaintiff, v. ATTORNEY GENERAL JOHN ASHCROFT, et al. Defendants.	)	Civ. A. No. 03-1793 (RBW) (Judge Walton)

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

STATEMENT

In opposing the Agency Defendants' motion to block the deposition of Virginia Patrick, plaintiff has obscured the real issue before the Court. The question presented is not whether the law enforcement privilege may be used "to prevent private citizens from talking." It is whether the Court's power may be used to compel the testimony of a non-party private citizen where the testimony sought would reveal sensitive law enforcement information, would have little if any value, and may be obtained through other means, including a declaration.

Plaintiff ignores the case law that makes clear that a private party can obtain privileged law enforcement information only where there is a compelling need. Although plaintiff asserts that the information he seeks to obtain from Mrs. Patrick only reflects subjects that are already in the public domain, the Agency Defendants have demonstrated through the *ex parte* and *in camera* Declaration of Richard L. Lambert that her testimony would implicate sensitive and

privileged law enforcement information. At the same time, Mrs. Patrick's testimony would be, at best, of marginal relevance to plaintiff's Privacy Act claim, which has focused exclusively on alleged disclosures to members of the press. Lastly, given Mrs. Patrick's willingness to provide a declaration in support of plaintiff's motion, it is plain that no need exists to invoke the power of the court to obtain her testimony through deposition. Thus, the balance of the relevant factors in assessing the assertion of law enforcement privilege weighs decidedly in favor of blocking Mrs. Patrick's deposition. The Court should therefore grant the Agency Defendants' motion.

I. The Government May Invoke Law Enforcement Privilege to Block the Deposition of a Third Party

Plaintiff argues that the government may not appropriately assert the law enforcement privilege to prevent Mrs. Patrick's deposition because she is not a government employee. This argument misses the mark.

"The United States has the right to object [to discovery generally] on the grounds of privilege when the disclosure of secret information would be contrary to public policy or the public interest." Black v. Sheraton Corp. of Am., 50 F.R.D. 130, 132 (D.D.C. 1970). Because executive privileges "belong[] to the Government[,]" United States v. Reynolds, 345 U.S. 1, 6 (1953), the government may assert these privileges regardless of whether the information is under the control of the government or, as here, resides with a third-party.

Indeed, this must be the case. Law enforcement information is necessarily gathered from members of the public who have knowledge relevant to an investigation. If the law enforcement privilege prevented a plaintiff from deposing government employees about their investigative activities, but could not be invoked to preclude the depositions of the members of the public from

whom investigative information was gathered, the privilege would be effectively gutted; a plaintiff would simply subpoena informants pursuant to Fed. R. Civ. P. 45, invoking the power of the Court to gather the same information that the Court would be obliged to protect were it sought from the government. This, in turn, would chill the ability of the government to gather investigative information and thus would undermine the very public interest that the law enforcement privilege is designed to protect – "the effective functioning of law enforcement," Tuite v. Henry, 181 F.R.D. 175, 176 (D.D.C. 1998).

Plaintiff deflects this issue by asserting instead that the Agency Defendants are seeking to "prevent private citizens from talking" and to "control the flow of information to the Court." Pl.'s Br. at 1. But the Agency Defendants do not seek to muzzle private citizens who wish to provide information in support of plaintiff's claim. The Agency Defendants merely submit that the Court should not use its power pursuant to Rule 45 to *compel* testimony of a non-party that will interfere with a law enforcement investigation.

Given the Executive's independent power to conduct law enforcement investigations, and the deference due to its law enforcement judgments, see Center for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 927-28 (D.C. Cir. 2003); Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 32 (D.C. Cir. 1998), the Court should be reluctant to take actions that will adversely affect a criminal investigation. As the Seventh Circuit has observed, "[u]nlike France, Italy, and other European countries in which judicial officers control the investigation of crimes, the United States places the control of such investigations firmly in the executive branch, subject only to such limited judicial intervention as may be necessary to secure constitutional and other recognized legal rights of suspects and defendants." Dellwood Farms, Inc. v. Cargill, Inc., 128

F.3d 1122, 1125 (7th Cir. 1997). Courts should avoid efforts by civil litigants to "thrust [them] too deeply into the criminal investigative process." See id.

Finally, there is no merit to plaintiff's argument that, to the extent that the Agency Defendants are seeking to protect the disclosure of information about the purported use of bloodhounds in the investigation, assertion of the law enforcement privilege is inappropriate because the alleged use of the technique has been "highly public." Pl.'s Br. at 2. The fact that a piece of information appears in the press does not, of course, mean that the information is true and complete, much less that it has been officially acknowledged by investigators. In fact, in the national security context, which is analogous to the law enforcement context here, it is well-established that, in responding to a FOIA request, the government may properly withhold information that is purportedly already within the public domain. See, e.g., Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983); Edmonds v. F.B.I., 272 F. Supp. 2d 35, 48-49 (D.D.C. 2003); Washington Post v. U.S. Dep't of Defense, 766 F.Supp. 1, 10 (D.D.C. 1991). As these cases explain, the possible harm from the government's release of details and context that may not be reflected in "public" sources and the potential harm from official acknowledgment of the information warrant the government's withholding of purportedly public information. Here, the reasons for the assertion of law enforcement privilege are set forth in Inspector Lambert's declaration.[1]

[1] The government does not seek "to prevent the plaintiff from deposing *anyone* who witnessed . . . [an improper] disclosure on the ground that the information should not have been disclosed." See Pl.'s Br. at 7-8 (emphasis added). Inspector Lambert's declaration details the reasons for asserting the law enforcement privilege with respect to Mrs. Patrick's deposition in particular.

II. Plaintiff's Proffered Need for Mrs. Patrick's Deposition Is Insufficient

As the Agency Defendants have explained, in light of the law enforcement interest here, plaintiff can obtain Mrs. Patrick's deposition only by demonstrating a particularized and "compelling" need for the testimony that outweighs the public interest in non-disclosure. See In re United Telecommunications, Inc. Sec. Litig., 799 F. Supp. 1206, 1208 (D.D.C. 1992); see also Black, 564 F.2d at 545 ("[C]laimant must make 'a showing of necessity sufficient to outweigh the adverse effects the production would engender.'"). Plaintiff has failed to do so.

To begin with, as discussed in the Agency Defendants' opening brief, plaintiff has not established the threshold relevance necessary to take any discovery from Mrs. Patrick, let alone discovery of privileged information. See, e.g., Food Lion, Inc. v. United Food & Comm. Workers Int'l Union, AFL-CIO-CLC, 103 F.3d 1007, 1012 (D.C. Cir. 1997) ("'[D]iscovery should [not] be allowed of information that has no conceivable bearing on the case'"). None of the theories of relevancy offered in plaintiff's opposition brief has any merit. See Pl.'s Br. at 5.

First, although plaintiff now claims that Mrs. Patrick's deposition is necessary to prove the improper disclosure of Privacy Act information to her, the reality is that plaintiff's claim has been exclusively about alleged leaks to members of the press – not ordinary citizens. Indeed, although plaintiff has served DOJ and the FBI with 826 requests for admission, 230 interrogatories, and 60 document requests – over written 1000 discovery requests – plaintiff has never propounded a single discovery request that relates in any way to Virginia Patrick; rather, plaintiff's extensive discovery efforts have focused on disclosures to the media. Accordingly, plaintiff's suggestion that he now needs to obtain "direct evidence" of an alleged improper disclosure to Mrs. Patrick, see Pl.'s Br. at 5, lacks merit. In any event, as noted in the Agency

Defendants' opening brief, any disclosure to Virginia Patrick was covered by the FBI's routine uses and thus was permissible under the Privacy Act. A deposition of Mrs. Patrick thus could not possibly be probative of an impermissible disclosure of Privacy Act information, and should not be permitted to proceed, particularly in light of the law enforcement concerns presented.[2]

Plaintiff further claims that he requires Mrs. Patrick's deposition to obtain "circumstantial evidence that the disclosed information – the account of the use of bloodhounds against Dr. Hatfill and the investigators' opinions about Dr. Hatfill – is Privacy Act information." Pl.'s Br. at 5. Although somewhat opaque, it appears that he seeks Mrs. Patrick's deposition to demonstrate that certain investigative information about plaintiff exists and that it is retrievable from a system of records searchable by plaintiff's name. See 5 U.S.C. § 552a(a)(5). This theory is tenuous to say the least. Any testimony by Mrs. Patrick about what investigators allegedly told her could not possibly demonstrate that the information was contained in a Privacy Act system of records at the time of the alleged disclosures.

Plaintiff next asserts that Mrs. Patrick's deposition would "demonstrate[] some of the actual damage Dr. Hatfill suffered" from alleged Privacy Act disclosures. Pl.'s Br. at 5. But the basis for this assertion is entirely unclear. Plaintiff has not established that any disclosure to Mrs. Patrick damaged him in any way, much less in any way that is cognizable under the Privacy Act. Indeed, Mrs. Patrick testifies that, despite the alleged disclosures to her, she remains "fond of Dr.

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[2] Plaintiff contends that, if the Agency Defendants are going to claim that any disclosure to Mrs. Patrick was pursuant to a routine use, they must do so in a motion for summary judgment. But the law enforcement privilege requires that the importance of the information be evaluated now, as part of the balancing test for the privilege. See Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996)

Hatfill and do[es] not believe that he had any involvement in the atrocious anthrax murders of 2001." See Declaration of Virginia Patrick ¶ 2.

Due to the investigative information at issue, the Agency Defendants are unable to respond publicly to plaintiff's remaining theories of relevancy. The *ex parte* and *in camera* Declaration of Richard L. Lambert effectively rebuts these theories, however. Thus, on no basis can plaintiff establish the relevance of Mrs. Patrick's deposition.

Finally, even if plaintiff could demonstrate some relevance for Mrs. Patrick's testimony, as plaintiff has pointed out, one factor to be considered in balancing the asserted law enforcement interests against the private interest of a litigant is whether the information sought can be obtained from other sources. See In re Sealed Case, 856 F.2d at 272. Here, plaintiff has obtained from Mrs. Patrick (and filed with the Court) a declaration as to her alleged interactions with the FBI. According to plaintiff, this declaration describes the very testimony that plaintiff seeks to elicit. See Pl.'s Br. at 4. There is no reason for the Court to use its power to compel testimony pursuant to Fed. R. Civ. P. 45 – and to force the public disclosure of privileged law enforcement information – when plaintiff can obtain (and apparently already has obtained) the evidence he seeks through a declaration.

CONCLUSION

Accordingly, for the foregoing reasons, and the reasons set forth in the *ex parte* and *in camera* Declaration of Richard L. Lambert, the Agency Defendants respectfully request that the Court enter an order barring Virginia Patrick's deposition and quashing the subpoena issued to her.

Dated: June 28, 2005

Respectfully Submitted,

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