

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AGENCY DEFENDANTS’ MOTION FOR A PROTECTIVE ORDER

Pursuant to Fed. R. Civ. P. 26(c), and this Court’s Order dated October 21, 2004, defendants U.S. Department of Justice and Federal Bureau of Investigation (collectively, the “Agency Defendants”) hereby move, through their undersigned counsel, for a Protective Order to prevent public disclosure of certain information that may be exchanged during discovery. In support of this motion, the Agency Defendants state as follows:

1. Plaintiff has served discovery upon the Agency Defendants requesting identities of certain non-supervisory personnel, including investigative agents and support persons.
2. Releasing the names of such persons to the public could result in annoyance, harassment, and interference with an ongoing investigation. Line-level agents may take on undercover roles, and the widespread dissemination of their identities is a danger to them and to the investigations on which they work. Moreover, non-supervisory personnel, like all other citizens, have a compelling interest in maintaining their privacy; given the level of public interest in the anthrax investigation, it is possible that members of the public who gain access to the names of

persons associated with the investigation will seek direct access to those persons in order to ask questions about or register criticism of the anthrax investigation, or, worse, to intimidate or threaten those persons. Cf. In re Dep't of Investigation of City of New York, 856 F.2d 481, 484 (2d Cir. 1988) (purpose of the law enforcement privilege is “to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation”).

3. Under Fed. R. Civ. P. 26(c), the Court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (2) that the disclosure or discovery may be had only on specified terms and conditions.” The draft Protective Order attached hereto will allow the Agency Defendants to release names of certain non-supervisory personnel to plaintiff by ensuring that those names will be protected from disclosure to the public, thus alleviating concerns about annoyance, harassment, and interference with an ongoing investigation. In particular, the draft Protective Order establishes procedures for ensuring that the names will be disclosed only to persons with a need to know that information. Moreover, the draft Protective Order requires that persons to whom the names will be disclosed sign a acknowledgment form binding them to abide by the specific terms of the Protective Order.

4. The draft Protective Order does not inhibit plaintiff from pursuing discovery from any party or non-party as long as the procedures contained in the Protective Order are followed.

5. Pursuant to the Court’s Order, the Agency Defendants have conferred with plaintiff in effort to reach agreement on the terms of a proposed protective order. In order to accommodate

plaintiff's concerns, the Agency Defendants advised plaintiff on November 1, 2004, that they would agree to several of plaintiff's proposed changes to the Agency Defendants' initial draft, including extending the time period for returning documents after the close of this litigation and allowing counsel for the Department of Justice to consent to disclosure of protected information to particular persons.

6. The Agency Defendants also advised plaintiff that they did not agree to certain other proposals by plaintiff. In particular, plaintiff seeks to require protection only as to the *list* of names of non-supervisory personnel that the Agency Defendants may provide or any substantial portion of that list. This limited protection, however, would not adequately address the potential for annoyance, harassment, and interference with an ongoing investigation discussed above. The potential for harm to non-supervisory personnel and investigations and for intrusions upon individual privacy will be present regardless of whether a person's name is released to the public individually or only as part of a list including other names.¹ The Agency Defendants also advised plaintiff that they did not agree to plaintiff's proposal that the acknowledgment form used in connection with the Protective Order omit details concerning the obligations that a person receiving protected information must undertake; the Agency Defendants believe that the detailed Acknowledgment of Protective Order attached hereto is more likely than a generic acknowledgment form to ensure that such persons are on notice of, and take seriously, the responsibilities that come along with acquisition of protected information. The Agency Defendants also made clear that plaintiff should not be allowed to serve third-party discovery requests that include the protected information without

¹ Plaintiff has asserted to the Agency Defendants that he already possesses the names of many non-supervisory line-agents; but the names plaintiff claims to have gathered may or may not correlate to the particular names that the Agency Defendants may release during discovery.

first obtaining the third-party's signed acknowledgment to comply with the Protective Order; any proposal to the contrary would fail to accomplish the purpose of the Protective Order because service of the discovery request itself would result in release of the information that needs to be protected.²

7. Initially, the Agency Defendants were considering including within the terms of the Protective Order protection for phone numbers of certain individuals – in particular, phone numbers of FBI and DOJ personnel named in response to plaintiff's interrogatories seeking the identities of persons with knowledge of the anthrax investigation. Work, home, and cell phone numbers of these persons were requested in Interrogatory Number 2 in Plaintiffs' First Set of Interrogatories, as well as well as in the Definitions and Instructions accompanying the Interrogatories. Public disclosure of the phone numbers of the identified persons, however, would clearly open up the possibility of annoyance, harassment, and interference with an investigation because the phone number itself provides direct access to the individual.³ Indeed, even if a phone number is not linked in a discovery response to a particular person, the knowledge that the phone number is somehow tied to the anthrax investigation may well be sufficient to induce a member of the public to dial it; in addition, computer technology may allow the phone number to be traced to a particular person or particular address. Public disclosure of phone numbers therefore could lead to the harms described in paragraph 2 above.

² To the extent that plaintiff is concerned that he will be unable to secure a third party's agreement to the acknowledgment form in advance of serving discovery on the third party, plaintiff can easily formulate his documents requests to omit protected information – e.g., by asking for documents relating to communications with "FBI agents" rather than documents relating to communications with "FBI Agent X."

³ It bears noting in this regard that the phone numbers plaintiff is seeking include the home, cell, and work phone numbers of numerous high-level officials, including Attorney General John Ashcroft and FBI Director Robert Mueller.

8. The Agency Defendants have determined, however, that a Protective Order with respect to phone numbers is not needed because plaintiff can obtain the information he is seeking – evidence of phone calls (if any) between reporters and FBI and DOJ personnel – without requiring the Agency Defendants to disclose the phone numbers. The Agency Defendants accordingly advised plaintiff that they would not be providing phone numbers but would instead be proposing an arrangement involving matching calls between outside phone numbers and the phone numbers of relevant FBI or DOJ personnel. Depending upon technical feasibility, this matching would take one or both of two forms: either plaintiff would provide the Agency Defendants with phone numbers of particular reporters and the Agency Defendants would search by computer for any calls (during relevant time frames linked to specific leaks alleged by plaintiff) between those numbers and the work and official cell phone numbers of its personnel identified in response to the relevant interrogatories, or plaintiff would provide the Agency Defendants with phone records of reporters or lists of phone numbers dialed by reporters and the Agency Defendants would confirm whether calls had been made (during relevant time frames linked to specific leaks alleged by plaintiff) to the work, home, or official or personal cell phone numbers of FBI or DOJ personnel identified in response to the relevant interrogatories. An approach involving matching of phone numbers has been used in another Privacy Act case in this Court involving alleged leaks, Dr. Wen Ho Lee, et al. v. U.S. Department of Justice, et al., Civ. No. 99-3380 (TPJ) (D.D.C.). Plaintiff, however, has declined to discuss any such arrangement with the Agency Defendants.

9. Accordingly, the Agency Defendants respectfully request that the Court adopt the attached Protective Order and Acknowledgment of Protective Order.

Dated: November 4, 2004

Respectfully Submitted,

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Defendants.)	
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PROTECTIVE ORDER

Upon consideration of the Agency Defendants’ Motion for a Protective Order, and pursuant to Fed. R. Civ. P. 26(c), IT IS HEREBY ORDERED as follows:

1. For purposes of this Order, the term “Protected Information” shall mean the names of lower-level non-supervisory attorneys, investigative agents, or support personnel that the U.S. Department of Justice and the Federal Bureau of Investigation (collectively, the “Agency Defendants”) may disclose during discovery and specifically identify as “Protected Information.”

2. The limitations set forth in this Order shall not apply to documents, discovery requests, discovery responses, deposition transcripts, or other materials if the Protected Information contained therein has been fully redacted and cannot be determined from context.

3. Documents that contain Protected Information shall be marked “PRODUCED SUBJECT TO PROTECTIVE ORDER” or “SUBJECT TO PROTECTIVE ORDER” or contain a similar marking, and may be used only for purposes of this litigation. For any records, such as computer data, whose medium makes such stamping impracticable, the diskette case and/or

accompanying cover letter shall be marked “PRODUCED SUBJECT TO PROTECTIVE ORDER” or “SUBJECT TO PROTECTIVE ORDER” or contain a similar marking. Discovery requests or responses to discovery requests, if any, that contain Protected Information shall be marked “PRODUCED SUBJECT TO PROTECTIVE ORDER” or “SUBJECT TO PROTECTIVE ORDER” or contain a similar marking, and may be used only for purposes of this litigation. Deposition transcripts, if any, that contain Protected Information shall be marked “PRODUCED SUBJECT TO PROTECTIVE ORDER” or “SUBJECT TO PROTECTIVE ORDER” or contain a similar marking, and may be used only for purposes of this litigation. Except as provided herein, no person having access to Protected Information shall make public disclosure of Protected Information without further Order of the Court.

4. Protected Information shall be used by the plaintiff or his representative(s) only for purposes of litigating this case, including any appeals, and shall not be disclosed by the plaintiff or his representative(s) to the public or any other person or entity for any reason other than for purposes of litigating this case.

5. Except as specifically provided in this Order, or as otherwise ordered by this Court, any Protected Information may be disclosed only to the following persons: (a) parties and counsel for the parties in this action; (b) partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this case; (c) persons retained by the parties or their counsel to assist in discovery, preparation for any hearing, or to serve as expert witnesses, provided that such disclosure is reasonably and in good faith calculated to aid in litigating this case; (d) persons with factual knowledge relating to this case who may be called as witnesses at any hearing, provided that such disclosure is reasonably and in good faith

calculated to aid in litigating this case; (e) any deponent in this case during his or her deposition; and (f) any other person as to whom counsel for the Department of Justice expressly consents in writing.

6. All individuals to whom Protected Information is disclosed shall be informed of and shall agree with the terms of this Order and shall not otherwise disclose the Protected Information to the public or to any person or entity, and shall, before receiving Protected Information, acknowledge their agreement to comply with the provisions of this Order by signing a copy of the attached acknowledgment form. Plaintiff's counsel will retain copies of the acknowledgment forms until such time as this litigation, including all appeals, is concluded.

7. The plaintiff or other third party to this Order may challenge the Agency Defendants' designation of particular information as Protected Information by moving the Court to have the information made public. In addition, each party reserves the right to move to modify the terms of this Protective Order at any time, and each party reserves the right to oppose any motion to modify the terms of the Protective Order.

8. Unless Protected Information is fully redacted from documents, briefs, or other materials presented to the Court, and cannot be determined from context, those portions of the documents, briefs, or other materials containing the Protected Information shall be filed under seal. Neither plaintiff nor any third party may use Protected Information in open Court or at trial, orally or through documents, without first obtaining the written consent of the Department of Justice or an Order from the Court ruling that the Protected Information is relevant and may be publicly disclosed.

9. Within sixty days of the conclusion of this case, including any appeals, documents, discovery requests, discovery responses, and deposition transcripts, and all copies thereof, containing Protected Information and produced or served in connection with this case must be returned by the

plaintiff or other receiving party to the Agency Defendants. Within sixty days of the conclusion of this case and any appeals, plaintiff or plaintiff's counsel or other person receiving protected documents, discovery requests, discovery responses, or deposition transcripts must certify in writing that all documents, discovery requests, discovery responses, and deposition transcripts, and all copies thereof, containing Protected Information and produced or served in connection with this case have been returned to the Agency Defendants. Within sixty days of the termination of this case, including any appeals, plaintiff or plaintiff's counsel or other person receiving documents, discovery requests, discovery responses, or deposition transcripts containing Protected Information must also certify in writing that any documents he or she or his or her attorneys or agents have created which contain Protected Information derived solely from the protected documents, discovery requests, discovery responses, or deposition transcripts have been fully redacted with respect to the Protected Information or destroyed; provided, however, no party is required to redact or destroy any document that has been filed with this Court or with a court of appeals of competent jurisdiction in connection with this case.

10. Neither the United States Department of Justice nor the Federal Bureau of Investigation nor any of their officers, employees, or attorneys, shall bear any responsibility or liability for any unauthorized disclosure of any Protected Information obtained by plaintiff's counsel under this Order.

11. This Order does not constitute any ruling on the question of whether any particular document or category of information is properly discoverable and does not constitute any ruling on any potential objection to the discoverability, relevance, or admissibility of any document or information.

12. This Order does not apply to any information or documents other than the Protected

Information as defined in paragraph 1, and this Order shall not be precedent for adopting any procedure with respect to the disclosure of any other information.

IT IS SO ORDERED this _____ day of _____, 2004

UNITED STATES DISTRICT JUDGE

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Plaintiff,)	
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ATTORNEY GENERAL)	
JOHN ASHCROFT, et al.)	
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Defendants.)	
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ACKNOWLEDGMENT OF PROTECTIVE ORDER

I, _____, hereby acknowledge that I have read and understand the Protective Order entered in this action. I hereby agree to be bound by the terms of the Order. Specifically:

1. I agree that I will use information protected by the Order only for purposes of this litigation, including any appeals, and not for any other purpose of any kind, including that I will not disclose any such information to the public.
2. I agree that I will return all documents, discovery requests, discovery responses, and deposition transcripts containing information subject to this order to counsel for the U.S. Department of Justice and the Federal Bureau of Investigation (collectively, the “Agency Defendants”) within sixty days of the termination of this litigation or, when I am no longer a party to or assigned or retained to work on this case, to the plaintiff’s counsel who within sixty days of the termination of this litigation will return such records to the Agency Defendants. I also agree to destroy or redact, or to

return to plaintiff's counsel for destruction or redaction, any records created that contain information subject to this Order, within sixty days after the termination of this litigation.

3. I (or plaintiff's counsel on my behalf) will certify to the Agency Defendants that any documents created that contain information subject to this Order have been destroyed or redacted within sixty days after the termination of this litigation.

4. I agree that I will disclose information protected by the Order solely to the Court (under seal), the parties to this action and their attorneys of record, persons regularly in the employ of such attorneys, and any experts or consultants hired for this case by the parties or their attorneys and who (except the Court, the Agency Defendants' employees and the Agency Defendants' counsel) have signed an acknowledgment like this one and have a need for such information to perform duties specifically related to the conduct of this litigation.

5. Should I wish to disclose the information which is subject to the Order to any additional persons except those indicated in the Order and herein, I will first seek the Agency Defendants' consent. If the Agency Defendants do not consent to the disclosure, then I may, on motion, seek modification of the Order from the Court.

6. I agree that any information subject to the Order may not be disclosed in open Court, orally or through documents, without first obtaining an Order from the Court or the written consent of the Department of Justice. I further agree that portions of filings that contain information subject to this Order shall be filed under seal.

7. I hereby confirm that my duties under this Acknowledgment shall survive the termination of this case and are binding upon me for all time.

8. I hereby consent to the personal jurisdiction of the United States District Court for the

District of Columbia in the above-captioned case for the purpose of enforcing the aforementioned Order.

[signature]

[print name]

DATED: _____