

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.              | ) |                           |
| _____                    | ) |                           |

**PLAINTIFF’S MOTION FOR A PROTECTIVE ORDER**

Pursuant to Rule 26(c) and this Court’s Order of October 21, 2004, plaintiff Steven J. Hatfill, M.D. hereby proposes the attached Protective Order to prevent public disclosure of the extremely limited information the agency defendants have offered to produce in response to plaintiff’s discovery requests. The parties met and exchanged various drafts for a protective order that could be jointly proposed, but unfortunately no agreement was reached.

The only information at issue here is a list of names of non-supervisory personnel who have participated in or have been briefed about the anthrax investigation.<sup>1</sup> These are people whose names should appear on the “Appendix A” that has been discussed somewhat obliquely at the two most recent hearings before the Court, but who have not yet been named on “Appendix A” because their jobs are non-supervisory in nature. (We shall call this list of missing names

---

<sup>1</sup> For weeks, the parties had been discussing a protective order that would be broad enough to facilitate the exchange of phone numbers that the agency defendants had agreed to provide. However, the agency defendants reneged three days before this motion was filed. Although the agency defendants address this topic in their motion filed this evening, the production of phone numbers is not properly before the Court on this motion because the agency defendants are not proposing to produce telephone numbers under protective order and the plaintiff has not yet moved to compel such production. There is thus no live controversy about phone numbers.

“Appendix A Plus” to distinguish it from the existing Appendix A.) Some background about Appendix A and the respects in which it is incomplete is therefore in order.

Appendix A is part of the agency defendants’ response to the plaintiff’s Interrogatory No. 1, which read, “Identify each officer, employee or agent of the federal government who has participated in any way (including anyone who has been briefed) in the Anthrax Investigation and describe such participation.” In partial response to this Interrogatory, the agency defendants produced a list of 59 names, which they called Appendix A. Appendix A was accompanied by various objections to the Interrogatory, including an objection “to disclosing the identities of lower-level agents or attorneys or support personnel, . . . absent an appropriate protective order.” The reason given for withholding this information was “to protect against annoyance, harassment, and interference with an ongoing investigation.” Defendant Department of Justice’s Responses to Plaintiff’s First Set of Interrogatories, General Objection 7 and Individual Response 1.

The parties met to discuss a protective order for Appendix A Plus, and plaintiffs were willing to consent to extremely tight control of the list itself on the theory that the list of non-supervisory personnel would likely include many people with no substantive information to the case. Plaintiff, of all people, is eager to protect those who are relatively uninvolved from annoyance or harassment to the extent that they possess little or no discoverable information, and the extremely strict procedures proposed by the agency defendants make sense when applied to a list containing many such individuals. However, the agency defendants seek strict protection not just of the list, but of *every single name* on the list, regardless of how much discoverable information that individual might possess and regardless of whether plaintiff might already have learned the name in question from other sources. This would have the effect of actually restricting plaintiff’s ability to use information that is already in his possession. A concrete hypothetical will

make this clear.

John Doe is a non-supervisory individual who is known by Dr. Hatfill to have participated in one or more aspects of the anthrax investigation, including some aspects of the investigation that were later leaked to the press. His name does not appear on Appendix A because of his non-supervisory status. If the agency defendants place John Doe's name on the "Appendix A Plus" list, then the following procedures would be required under the last protective order the agency defendants proposed to plaintiff:

- (a) Any document containing John Doe's name would have to be stamped "SUBJECT TO PROTECTIVE ORDER." This would include any deposition transcript in which John Doe's name were mentioned, either by counsel or by any witness.
- (b) A *subpoena duces tecum* to a third-party witness or custodian of documents that mentioned John Doe by name *could not be served upon the third party* until that party voluntarily signed a two-page acknowledgment, agreeing to be bound by the Protective Order and consenting to personal jurisdiction in this Court. Reluctant witnesses could therefore insulate themselves from any discovery obligations by refusing to sign the acknowledgment. This would essentially terminate the plaintiff's ability to obtain discovery from any unwilling witness without getting a court order each and every time.
- (c) Before any deponent could be asked any questions about Mr. Doe, the witness would have to sign the acknowledgment described above. There is no apparent way a witness could be compelled to do so; the only remedy would be for the plaintiff once again to run to this Court for permission to ask the questions

anyway.

- (d) Plaintiff's counsel would not be permitted to utter the name of Mr. Doe in open court without prior consent of the Department of Justice.
- (e) Briefs referring to Mr. Doe would have to be filed under seal.

The name "John Doe" is used hypothetically here to illustrate the principle, but plaintiff is aware of real-life non-supervisory individuals who *definitely* possess information about the anthrax investigation and *should* be on Appendix A Plus. Plaintiff's ability to obtain discovery from or about these individuals would be substantially impeded by the provisions proposed by the agency defendants, *notwithstanding the fact that their names are already known to the plaintiff*.

Plaintiff has proposed a reasonable solution to this: Protect Appendix A Plus itself from disclosure, in whole or in substantial part. This will protect the relatively uninvolved from annoyance or harassment, and will prevent public disclosure of the vast majority of names on the list, which the government apparently regards as sensitive. At the same time, people who have real information must be treated as witnesses, and the mere utterance of their names is not nearly sensitive enough to warrant the extraordinary procedures sought by the defendants. In addition, it should be noted that the defendants have not properly invoked any law enforcement investigative privilege with respect to the mere listing of names sought in Appendix A Plus. *See In re Sealed Case*, 856 F.2d 268, 271-72 (D.C. Cir. 1988). Among other defects, (1) defendants have not tendered any formal claim of privilege by the head of the department(s) having control over the requested information, based on that person's actual, personal consideration; (2) there has been no explanation of how *any* of the information that has been withheld (let alone *all* of it) will adversely affect the anthrax investigation; and (3) there is no evidence that the government has considered any of the "need" factors adopted by the D.C. Circuit, nor has the government given

plaintiff or the Court the specifics that would need to be considered in applying this ten-factor balancing test.

Consequently, plaintiff asks the Court to adopt the attached Protective Order rather than the one submitted by the agency defendants. There may be – indeed, there almost certainly is – a class of discoverable information that calls for the types of procedures that the defendants have requested here, but a list of non-supervisory personnel does not begin to justify such a significant impairment of the plaintiff’s ability to proceed with discovery in this, particularly third-party discovery.

IN THE ALTERNATIVE, importantly, plaintiff asks to Court to consider his request for the information in question to have been withdrawn, and asks the Court to adopt no protective order at all. Plaintiff needs the requested information, but plaintiff also needs to be able to obtain discovery from third parties. Plaintiff cannot afford to have avenues for third-party discovery effectively foreclosed by an overbroad protective order that applies even to information already within the plaintiff’s possession.

Respectfully submitted,

Dated: \_\_\_\_\_

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.              | ) |                           |
| _____                    | ) |                           |

PROTECTIVE ORDER

Upon consideration of the Joint 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 any list of names of lower-level non-supervisory attorneys, investigative agents, or support personnel that defendants may disclose during discovery and specifically identify as “Protected Information.”
2. The Protected Information and any copies thereof 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.
3. Except as specifically provided in this Order, or as otherwise ordered by this Court, the 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.

4. Nothing in this Protective Order shall prohibit any party from using the Protected Information to formulate discovery requests or responses to discovery requests. However, if any such request or response reproduces the Protected Information in whole or in substantial part, then such request or response shall be marked “PRODUCED SUBJECT TO PROTECTIVE ORDER” or “SUBJECT TO PROTECTIVE ORDER” or contain a similar marking. Similarly, if any deposition transcript reproduces the Protected Information in whole or in substantial part, that transcript shall be marked “PRODUCED SUBJECT TO PROTECTIVE ORDER” or “SUBJECT TO PROTECTIVE ORDER” or contain a similar marking. Materials marked pursuant to this paragraph shall be treated the same as the Protected Information, except that redacted copies may be used without restriction if the redactions are sufficient to prevent the disclosure, in whole or substantial part, of the Protected Information.

5. Nothing in this Protective Order shall prohibit any party from using the Protected Information in documents, briefs, or other materials presented to the Court. However, if any such submission reproduces the Protected Information in whole or in substantial part, then such submission shall be filed under seal. From the date of this Order until the commencement of trial

in this case, no party may disclose the Protected Information in open Court without first obtaining the consent of the Department of Justice or permission from the Court. Treatment of the Protected Information during trial of this matter will be determined by the Court at that time.

6. All individuals to whom the Protected Information is disclosed shall be informed of this Order, and shall 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. Any person whose use of or access to the Protected Information is inhibited by this Order may challenge defendant's 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. Within sixty days after the conclusion of this case, including any subsequent appeals, each person subject to this Order shall (a) return all copies of the Protected Information to counsel for the Department of Justice; (b) certify in writing that all copies of the Protected Information have been returned; and (c) certify in writing that any materials marked pursuant to paragraph 4 of this Order have been fully redacted with respect to the Protected Information or destroyed; provided, however, that no party is required to redact or destroy any document that has been filed with this Court or with an appellate court of competent jurisdiction in connection with this case.

9. 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 by plaintiff's counsel under this Order.

10. 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 record.

11. 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

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.              | ) |                           |
| _____                    | ) |                           |

ACKNOWLEDGMENT OF PROTECTIVE ORDER

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