



BULLETIN

2007 ISSUE No. 4 Supplement, ISSN 0737-8130

December 2007

MLRC 2007 ARTICLES & REPORT ON
SIGNIFICANT DEVELOPMENTS
Supplement

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**INVASION OF THE PRIVACY ACT:
HOW RECENT INTERPRETATIONS THREATEN CONFIDENTIAL SOURCES**

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Invasion Of The Privacy Act: How Recent Interpretations Threaten Confidential Sources

In the wake of several recent high-profile confidential source cases,¹ considerable time and attention has been devoted to the proposed enactment of a federal shield law that would create a statutory privilege in federal court comparable to the one already recognized in the overwhelming majority of state courts. A federal shield law, however, will not put an end to the battles over the disclosure of confidential sources. Even if Congress enacts such a law, courts will still have to determine, on a case-by-case basis, whether there is an overriding need for the identification of a confidential source. And in two of the recent source cases, the law has taken a questionable turn—we have argued, a wrong turn—that will continue to haunt reporters in the future, whether or not a shield law is enacted.

In the *Wen Ho Lee* and *Steven Hatfill* cases, the courts have interpreted the federal Privacy Act of 1974, 5 U.S.C. § 552a, to create a cause of action against the government for the unauthorized disclosure of information about the status of active criminal investigations. That has enabled Dr. Wen Ho Lee and Dr. Steven Hatfill—respectively, a government scientist investigated for providing classified nuclear technology to a foreign government, and a bioweapons expert investigated for possible involvement in the 2001 anthrax attacks—to claim a need for identifying confidential sources within the government who gave reporters truthful information about the investigations into their activities.

The drafters of the Privacy Act surely did not foresee these developments. As explained below, they thought they were protecting citizens against the accumulation of inaccurate information in government files and the disclosure of information that the public had no business knowing. And that is how the Privacy Act has been used for the most part.

In the more than thirty years since the law was enacted, there have been dozens of reported Privacy Act cases, but most are employment related cases that concern the disclosure of information contained in personnel files.² Few cases that we have been able to identify have been premised on the theory that it is illegal for the government to disclose the status of an active criminal investigation, and the reported decisions in those cases either have not been on the merits or contain only superficial discussions of the Privacy Act. In *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), the D.C. Circuit's seminal decision on the reporter's privilege, reputed mobsters brought suit complaining that their rights under the Privacy Act were violated by the disclosure of transcripts of their conversations compiled from FBI wire taps. *Id.* at 707-08. After agreeing with the district court that the plaintiffs had not exhausted alternative sources, the Court affirmed summary judgment in the government's favor without passing on the merits of this Privacy Act theory. *Id.* at 716.

¹ See, e.g., *In re Grand Jury Subpoena (Judy Miller)*, 397 F.3d 964 (D.C. Cir. 2005); *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005); *In re Grand Jury Subpoenas (Mark Fainaru-Wada and Lance Williams)*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006); *Hatfill v. Gonzales*, 505 F. Supp. 2d 33 (D.D.C. 2007).

² For an illustrative list of adjudicated Privacy Act claims, see Wasil, *What Is 'Record' Within Meaning of Privacy Act of 1974*, 121 A.L.R. Fed. 465 §§ 7[a], [b] (West 1994 & 2006 Supp.).

Two decades later, Dr. Lee and Dr. Hatfill expanded on the *Zerilli* theory to allege that the Privacy Act was violated not by the disclosure of intercepted private conversations, but by the disclosure of investigative information that does not implicate traditional notions of privacy. Wen Ho Lee complained, for example, of the statement by an unnamed government official that he had been removed from his position in a nuclear lab because of his refusal to cooperate with an FBI investigation into how the Chinese government may have acquired American nuclear secrets, an investigation in which Lee was reported to be a suspect. And Steven Hatfill complained, among other things, that Attorney General John Ashcroft violated the Privacy Act by confirming that he was a “person of interest” in the anthrax investigation—and that other unnamed sources committed separate violations by later confirming that Hatfill remained a person of interest. No sooner had Dr. Lee and Dr. Hatfill pressed these claims than an Oregon lawyer, Brandon Mayfield, sought recovery from the government for alleged violations of the Privacy Act, among other alleged wrongs, when he was wrongfully accused of participation in the 2004 train bombings in Madrid.³

Whether the Privacy Act should be construed to permit such claims—and whether, if it is so construed, it should be amended—are questions of obvious importance to news organizations facing the prospect that any reporting they engage in concerning a federal criminal investigation could one day beget a Privacy Act case in which the plaintiff seeks to subpoena their reporters’ sources. So how strong are these claims?

The Privacy Act’s Language

The statutory prohibition forming the basis for the suits in *Lee* and *Hatfill* is the Privacy Act’s ban on the unauthorized disclosure by the government of “any record which is contained in a system of records.” 5 U.S.C. § 552a(b). Whenever “records pertaining to an individual have been improperly disclosed,” that person is entitled to bring a civil action for damages and attorneys fees. *Lee*, 413 F.3d at 55. But what constitutes a “record” for these purposes is not always clear, as the statutory definition is less than precise:

[T]he term ‘record’ means 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) (emphases added). Given this definition, it is perhaps unsurprising that the federal courts of appeals have split three ways on the proper interpretation of the term “record”

³ See Compl. ¶¶ 38-40, *Mayfield v. United States*, No. 6:06-cv-00305 (D. Or.). Mayfield’s counsel subpoenaed several journalists in the summer of 2006, but the case was settled before the issues of privilege were joined.

as used in the statute.⁴ For its part, the D.C. Circuit remains largely undecided, saying only that it rejects the tests adopted by the Third and Eleventh Circuits, and otherwise reserving the question for later cases. *See Tobey v. NLRB*, 40 F.3d 469, 472 (D.C. Cir. 1994). The U.S. District Court for the District of Columbia has added to the confusion with its own inconsistent results.⁵

Applicable Principles of Statutory Construction

Despite the obvious disagreement over what constitutes a protected “record” under the Privacy Act, there are well-recognized principles supporting a narrow interpretation that would not include the kind of current, newsworthy information about an active criminal investigation that was at issue in cases like *Hatfill* and *Lee*.

First and foremost, the Privacy Act is a statute that effects a limited waiver of the government’s sovereign immunity. As a result, standard interpretive doctrine holds that it “must be construed strictly in favor of the sovereign, and not enlarged beyond what the language requires.” *Tomasello v. Rubin*, 167 F.3d 612, 618-19 (D.C. Cir. 1999) (alterations and quotations omitted) (construing the Privacy Act).⁶ As the D.C. Circuit explained in *Tomasello*, this means that courts cannot embrace an interpretation of the Privacy Act that would impose liability on the government so long as there is at least one “plausible” alternative reading that would allow the government to prevail. *Id.* at 618.

This principle was invoked most recently in *Sussman v. United States Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007). In that case, the court resolved a statutory ambiguity in the government’s favor and imposed strict requirements for proving that an unlawfully-disclosed record was, prior to its disclosure, actually retrieved from a government file bearing the plaintiff’s name (as opposed to being coincidentally within a file and disclosed by an official with personal knowledge of the information). *Id.* at 1123. The defendant agency did not dispute that information relating to the plaintiff had been released from a government file, but it argued as a defense that the information had been located in a file bearing another person’s name, and that this fact took the disclosure outside the purview of the Privacy Act. *Id.* The court

⁴ Compare *Boyd v. Secretary of Navy*, 709 F.2d 684, 686 (11th Cir. 1983) (per curiam) (A “record” must “reflect some quality or characteristic of the individual involved.”), with *Quinn v. Stone*, 978 F.2d 126, 133 (3d Cir. 1992) (criticizing *Boyd* and holding that the “statutory definition of a record . . . [has] a broad meaning encompassing any information about an individual that is linked to that individual through an identifying particular”), and with *Bechhoefer v. Dep’t of Justice*, 209 F.3d 57, 62 (2d Cir. 2000) (following *Quinn* but limiting it to “personal information” about the individual).

⁵ Compare *Houston v. Dep’t of Treasury*, 494 F. Supp. 24, 28 (D.D.C. 1979) (Privacy Act merely prohibits “circulation of sensitive information about an individual’s private affairs”), with *Scarborough v. Harvey*, 493 F. Supp. 2d 1, 13-14 & n.28 (D.D.C. 2007) (“[T]he Act’s definition of information that is ‘about’ an individual is clearly drawn in broad and expansive terms. . .”).

⁶ See also *Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002) (same), *aff’d*, 540 U.S. 614 (2004).

acknowledged that the Privacy Act could equally have been read to reject the government's argument, *id.*, but it found the language sufficiently ambiguous that it was required to side with the government and "construe [the statute's] waiver of sovereign immunity narrowly." *Id.* "Thus, for his action to survive, [plaintiff] must present evidence that materials from records *about him*, which the Marshals Service retrieved by *his name*, were improperly disclosed." *Id.* (emphasis added).

Second, and related, is the fact that a violation of the Privacy Act is not merely a tort for which damages may be recovered against the government, but also a misdemeanor for which individual government employees can be prosecuted. 5 U.S.C. § 552a(i)(1). This is important because of the "rule of lenity," an interpretive doctrine that requires (much like the sovereign immunity canon) that statutory ambiguities be resolved against a finding of wrongdoing. *See, e.g., United States v. Anderson*, 59 F.3d 1323, 1333 (D.C. Cir. 1995) (en banc).

From these principles, one can argue with some force that the notion of an "expansive" or "broad" reading of the Privacy Act is fundamentally at odds with the nature of the statute, which requires that it be read narrowly and with doubts about its meaning resolved against a finding of coverage. And when it comes to the question whether the Privacy Act prohibits the dissemination of current, newsworthy information about a criminal investigation, there is substantial room to doubt that the statute has anything to say about the matter.

Legislative History

As more than one Court has found, the "legislative history indicates [that] the Privacy Act was primarily concerned with the protection of individuals against the release of *stale personal information* contained in government computer files to other government agencies or private persons." *Cochran v. United States*, 770 F.2d 949, 959 n.15 (11th Cir. 1985) (emphasis added). The Congressional findings supporting the statute's enactment manifestly reflect that concern:

[T]he increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information

Houston, 494 F. Supp. at 27-28 (quoting Privacy Act, Pub. L. No. 93-579, § 2(a), 88 Stat. 1896 (1974)); *see also* S. Rep. No. 93-1183, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6916 (The purpose of the Privacy Act is to "promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal Government and with respect to all of its other manual or mechanized files."). The emphasis in the legislative history is on "the need to protect against governmental abuse of '*personal information*.'" *Bechhoefer*, 209 F.3d at 62 (emphasis added). There is no comparable suggestion of "any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest to a large number of people." *Cochran*, 770 F.2d at 959 n.15.

As an historical matter, the Privacy Act was at least in part a response to the abuses of the Watergate era, as reflected in the Report of the House Committee on Government Operations:

Additional impetus in Congress to enact privacy safeguards into law has resulted from recent revelations connected with Watergate-related investigations, indictments, trials, and convictions. They included such activities as the break-in at the Democratic National Committee's headquarters in June 1972, the slowly emerging series of revelations of "White House enemies lists," the break-in of the office of Daniel Ellsberg's psychiatrist, the misuse of CIA-produced "personality profiles" on Ellsberg, the wiretapping of the phones of government employees and news reporters, and surreptitious taping of personal conversations within the Oval Office of the White House as well as political surveillance, spying, and "mail covers."

H.R. Rep. No. 93-1416, at 8-9 (1974). No one was suggesting at the time that there needed to be a remedy for providing information about the status of legitimate government investigations.

Indeed, a great deal of the Privacy Act has nothing to do with unlawful disclosures of information, but is instead addressed to the manner in which the government is permitted to collect and maintain information about individuals. 5 U.S.C. § 552(d), (e). Under the act, "records" are supposed to be gathered in the first instance by requesting the information from the person to whom it pertains, *id.* § 552a(e)(2), and that person has a qualified right to insist upon reviewing records maintained about him or her in order to verify their accuracy, *id.* § 552(d). Even if such provisions do not exclude the possibility that Congress was attempting to restrain the dissemination of broader categories of information in the government's possession, they at least suggest that the Privacy Act was in substantial part understood as a vehicle for protecting individual citizens' right to control the use of personal and sensitive information that the government might have a need to collect from them over the course of time.

The statute's definition of a "record" supports this understanding. It includes an illustrative list of items that would qualify, specifying an individual's "education, financial transactions, medical history, and criminal or employment history." 5 U.S.C. § 522a(a)(4). Each of those items is the type of *historical* and *personal* information that one would expect to find listed if Congress's intention was, as the legislative history suggests, to prevent the dissemination of sensitive personal information gathered by the government over time.⁷ And while the statute says that the definition of a record is "not limited to" the listed items, canons of statutory

⁷ Indeed, an earlier draft of the Privacy Act passed by the Senate used the same illustrative list for its definition of the term "personal information," which meant "any information that identifies or describes any characteristic of an individual." *See* S. 3418, 93rd Cong. § 301(2) (as passed by Senate, Nov. 21, 1974). When Congress later substituted the term "record" in place of "personal information," it did not change this list of examples that comported with its definition of information protected by the Privacy Act.

interpretation suggest that anything else that could be called a record must share the same core attributes.⁸

This is not to suggest that the Privacy Act is wholly inapplicable to federal law enforcement agencies. Rather, the point is simply that not *everything* contained in a government file is information subject to the Privacy Act's restrictions on disclosure. A statute preventing the dissemination of *personal* information in the government's possession is not naturally read to encompass current, newsworthy information about a legitimate, ongoing criminal investigation, and there is ample basis in the text, structure and history of the Privacy Act to make it at least "plausible" that the statute does not restrict the disclosure of such information. And, as we have seen, plausibility is all the government needs to show to prevail in a Privacy Act case.

The Wen Ho Lee and Steven Hatfill Cases

To date, the federal courts in the District of Columbia have not seen it this way—at least, not in the course of considering the reporters' arguments that there is no overriding need for their testimony. In the *Lee* case, the district court focused attention on the information contained in the very first news article identifying Dr. Lee as a suspect in an FBI investigation, noting that the article included details that might reasonably be understood to contain core Privacy Act material—namely, information about his "employment history" and "personal financial situation." *Lee v. Dep't of Justice*, 287 F. Supp. 2d 15, 19 (D.D.C. 2003). Although such disclosures were generally confined to one "seminal story" about Dr. Lee, *id.* at 22, the court ordered other reporters who had not published the same kind of information to disclose the identities of their sources as well, *id.* at 24-25. That holding was challenged on appeal, with three reporters in particular arguing that the information they reported was not personal to Dr. Lee and did not implicate the Privacy Act, but was instead newsworthy information about the status of the FBI's nuclear espionage investigation. The D.C. Circuit did not substantively address those arguments in its decision affirming the district court's finding of contempt. *See Lee*, 413 F.3d 53.

In the *Hatfill* case, the claims are potentially even broader than in *Lee*. Dr. Hatfill seeks recovery under the Privacy Act not just for the disclosure of the fact that he was named as a "person of interest" in the FBI's investigation into the 2001 Anthrax attacks—a fact that was disclosed on the record by then-Attorney General John Ashcroft in August 2002—but also for numerous additional disclosures about the status of the government's investigation. Dr. Hatfill challenges, for example, the public disclosure of the fact that in 2003 divers searched a pond in Maryland near his home, where they recovered a clear box originally thought to have been used in the anthrax attacks, but that could not be positively linked by lab tests to the case.⁹ He

⁸ *See, e.g., United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005) ("The words 'including, but not limited to' introduce a non-exhaustive list that sets out specific examples of a general principle. Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated.").

⁹ *See* First Am. Compl. ¶ 97, *Hatfill v. Dep't of Justice*, No. 1:03-cv-01793-RBW (D.D.C.).

likewise challenges public reports to the effect that investigators' suspicions about him were raised when specially-trained bloodhounds reacted strongly to his scent, and when he was seen dumping belongings in a dumpster. First Am. Compl. ¶ 62. And, he challenges various reports concerning agents' analysis of the strength of their case, including doubts about whether they had enough information to successfully prosecute him, or that they ever would. *Id.* ¶ 97.

None of these published reports—and there are other reports of the same character that we are not discussing for the sake of brevity—contained the kind of personal or private information one would expect to be covered by a Privacy Act. With few exceptions, the challenged disclosures describe facts witnessed by government investigators as they occurred, or subjective analyses of the strength of the government's case—not personal and sensitive information that Dr. Hatfill ever had any inherent right to control. Reporters challenged Dr. Hatfill's subpoenas on that basis, but the district court rejected their arguments. Relying upon its recent opinion in *Scarborough*, 505 F. Supp. 2d at 2-4, the district court found that the definition of a "record" was written in "undeniably expansive" terms and required only a finding that published information was to some degree "about" Dr. Hatfill. *Hatfill*, 505 F. Supp. 2d at 38-39. The court found that standard to have been satisfied through the publication of "investigative information" that led the FBI to suspect Dr. Hatfill's involvement in the anthrax attacks: any reports containing "the identification of Dr. Hatfill by name and a description of his suspected involvement in criminal or otherwise suspicious activity are clearly about him and therefore not excluded from the Privacy Act's definition of records." *Id.* at 39. Based on that interpretation of the Privacy Act, the district court ordered six journalists to identify their confidential sources. *Id.* at 51. (On March 7, 2008, the District Court held reporter Toni Locy, formerly of *USA Today*, in civil contempt for refusing to identify her sources. Ms. Locy has appealed that order to the D.C. Circuit, which stayed the order pending appeal. A motion to hold another reporter in contempt is pending before Judge Walton.)

If this is how the Privacy Act is to be interpreted, we can reasonably anticipate more such Privacy Act claims in the future by investigative subjects motivated to "fight back" against those who are pursuing them. It is hardly unusual for journalists to report that someone is a suspect in an investigation. Did Congress intend or contemplate that the Privacy Act would be invoked to challenge that disclosure? We don't think so. And we suspect that the Congress that passed the Privacy Act would have appreciated the irony in such an application. A law that was passed to guard against the misuse of personal information of no legitimate interest to the public is being invoked to challenge the release of information of current public interest. And a law that was prompted by Watergate-era abuses brought to light by confidential sources is being invoked to challenge reporters' rights to maintain their confidential source relationships.

The D.C. Circuit's recent opinion in *Sussman v. United States Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007) may prove to be a substantial first step towards correcting that interpretation. Although the decision does not directly speak to the definition of a protected "record" under the Privacy Act, the court's reliance on sovereign immunity principles to limit the statute's scope provides a strong guidepost for courts later addressing the question whether Congress knowingly made it a tort for government officials to discuss the status of high-profile criminal investigations of the kind that were at issue in *Lee* and *Hatfill*. Moreover, even if *Sussman* does not lead courts to construe the term "record" narrowly, plaintiffs who would use

the Privacy Act to complain generally about the fact that they were identified as suspects in a criminal investigation may simply find it too difficult to prove (as *Sussman* requires them to) that such information was actually retrieved from a government file bearing the plaintiff's name prior to its disclosure. That alone may discourage, if not altogether deter, these types of Privacy Act suits. Only time will tell whether *Sussman* has that effect.

Two Ways Out

There are ultimately two paths to victory for journalists in these cases. Either the Privacy Act is interpreted (or amended) to narrow its application, or courts faced with reporters' privilege claims will—either on their own or as a result of a federal shield law—factor into their equation the strength of the public interest in vindication of a Privacy Act claim. As Judges Tatel and Garland of the D.C. Circuit have noted, in a leak investigation the plaintiff will almost always be able ultimately to establish relevance and exhaustion.¹⁰ And if that is all that is required, the reporter's privilege becomes nothing more than a scheduling order, requiring that the journalist's deposition be scheduled last. If, on the other hand, the courts balance the public interest in the underlying reporting against the public interest in identifying the confidential source, the outcome is anything but a foregone conclusion. Judge Tatel, for one, has explained how he thinks the balance should be struck in a Privacy Act case like the one filed by Wen Ho Lee:

Without slighting Lee's private interest in receiving compensation for governmental malfeasance, his claim *pales in comparison to the public's interest in avoiding the chilling of disclosures about what the government then believed to be nuclear espionage*. This case is thus very different from [*Miller*]. Not only was that a criminal case, but there we held that the grand jury's interest in securing the name of a source suspected of committing a felony outweighed any applicable privilege. [*Miller*], 397 F.3d at 973.

Lee's private interest in this civil suit implicates no similarly critical concerns, and it's hard to imagine how his interest could outweigh the public's interest in protecting journalists' ability to report without reservation on sensitive issues of national security.

Lee, 428 F.3d at 302 (Tatel, J., dissenting from denial of rehearing en banc) (emphases added). Reporters, of course, have every reason to be nervous about a test that balances their rights against the interests of litigants. As Judge Tatel's analysis makes clear, however, a rigorously

¹⁰ *Miller*, 397 F.3d at 997 (Tatel, J., concurring in the judgment) (“[W]hen the government seeks to punish a leak, a test focused on need and exhaustion will almost always be satisfied, leaving the reporter's source unprotected regardless of the information's importance to the public.”); *Lee v. Dep't of Justice*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc) (same); *id.* at 302 (Garland, J., dissenting from denial of rehearing en banc) (“Barring an unexpected confession by the leaker, in most such cases the subject of the leak will be able to satisfy the centrality and exhaustion requirements cited in the court's opinion. Thus, if the reporter's privilege is limited to those requirements, it is effectively no privilege at all.”).

applied balancing test at least leaves room to hope that, as promised in *Zerilli*, confidential source relationships will be preserved in “all but the most exceptional cases.” 656 F.2d at 712.