

## THE ANTHRAX INVESTIGATION: A NEWSGATHERING AND PRIVACY HYPOTHETICAL<sup>†</sup>

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During the first week of January 2002, reporters at KJRN, a top-rated television news station in Southern California, heard a rumor that anthrax was being produced at Initech, a local laboratory. The reporters knew that the laboratory was owned by Albert K. Da, a man of Afghan descent, and they believed that, perhaps, this laboratory and Da were connected to a series of anthrax-laced letters that had been sent to politicians and members of the news media a few weeks earlier.

The reporters at KJRN put the word out on January 10 to a number of their sources—sources they often used for non-attribution background information and to whom the station had just given “bonus” checks for prior services—to see if they could gather some information and proof about whether anthrax was being produced at Initech. About two weeks later, on January 21, a cassette tape arrived at KJRN via U.S. Mail, addressed to reporter Geraldo O’Reilly. There was no information or identification as to who might have sent the tape. On the tape was a handwritten note: “Cellular phone conversation between Lumbergh and Da, recorded January 15, 2002.”

O’Reilly listened to the tape in its entirety, which contained the following brief dialogue:

Lumbergh: “It’s coming along slowly, but we’re producing the materials now. We’ve got enough of this stuff now to kill

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<sup>†</sup> The following represents a set of hypothetical facts prepared for a panel discussion held in conjunction with the Fourth Annual Entertainment Law Symposium sponsored by Loyola of Los Angeles Law School on February 22, 2002. An edited transcript of the panel discussion appears in this Issue. *The Anthrax Investigation: A Newsgathering and Privacy Panel Discussion*, 22 LOY. L.A. ENT. L. REV. 267 (2002) (panel discussion transcript).

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hundreds of thousands of people if we put a little of the stuff into about fifty or so envelopes. Imagine that.”

Da: “Nice job, Lumbergh. Keep up the good work.”

Lumbergh: “Thanks. By the way, Al, hope all is well with your family—I won’t tell your wife about that affair you’re having with the server from that restaurant, Flingers.”

Da: “Appreciate it.”

O’Reilly knows he’s got something good with the tape, but before he will play it (which the station eventually does, in its entirety—including the part about the affair because O’Reilly believes it reveals Da’s true character and shows how morally depraved he is), O’Reilly wants something more: videotape from the lab itself. He and his news director contact a friend, Peter Gibbons, and they recruit him to apply for a job at Initech. KJRN agrees to pay Gibbons two thousand dollars for his efforts.

Gibbons goes to Initech and fills out a job application for a position as office assistant (filing documents, inputting computer data, and working at the reception desk). He uses a false name, and provides phony references and a fictitious employment history. Initech, impressed by his desire to file as well as his employment history and references, hires Gibbons, who soon shows up to work at Initech with KJRN-supplied cameras and microphones concealed on his person.

One day, Gibbons wanders beyond his Initech workstation, down an office hallway, toward a laboratory marked “Laboratory Workers Only.” There are windows on the wall separating the laboratory from the hallway, so a person can look into the lab from the hallway. Gibbons positions himself near the windows so that his clothing-concealed camera shoots videotape through the glass, capturing what appears to be—although it remains unclear to him—the production of anthrax in the lab. To obtain even better footage, he pushes open the lab door and, for about thirty seconds, steps inside the lab to pan the camera around the room. Gibbons ducks out before anyone notices.

Gibbons’ microphone records only one statement by Da that slightly suggests the production of anthrax. In the public lobby of the Initech offices, Da said, “This stuff rocks. If the authorities knew about it, they’d have our collective asses in a secret military tribunal.”

A few days later, Gibbons quits the Initech job and delivers the videotape and audiotape to O’Reilly at KJRN.

On January 30, KJRN runs a lengthy news package at 11:00 p.m. regarding Initech’s possible manufacture of anthrax and subsequent release through the mail to kill people. The report includes the complete audiotape

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of the cellular phone conversation between Lumbergh and Da, as well as the videotape gathered by Gibbons both through the glass window looking into the laboratory and in the laboratory itself. In addition, the report broadcasts Gibbons' audiotape snippet of Da's statement.

Through wily editing, juxtaposition, and O'Reilly's voice-over, the report creates the impression to a reasonable viewer (although it is never expressly stated) that, indeed, anthrax is being manufactured at Initech and that Da is sending letters laced with anthrax. The report mentions Da's Afghan heritage and notes, "Da visited Afghanistan in August 2001, just one month before the terrorist attacks on the Pentagon and the World Trade Center." The report closes with a video morphing Da's image into that of Osama bin Laden. That image of Da was captured by a KJRN cameraperson outside the Initech offices, in the parking lot shared by Initech and several other companies.

Lumbergh and Da watch the report and are peeved (as is Da's wife, of course). They are upset by the secretive taping (of their cellular conversation, the videotape in the laboratory, and the audiotape in the office), as well as the disclosure of all the information contained therein, and also by the report's implication that they are terrorists. They seek legal counsel, asking about the potential for filing a lawsuit based on both the gathering of information for the report and the dissemination of that information on the 11:00 p.m. news.