



IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

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HUMPHREYS, CLERK U.S. DIST. COURT WESTERN DIST. OF OKLA. BY DEPUTY

DAVID HOFFMAN,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

No. CIV-98-1733-A

DOCKETED

ORDER

Before the Court are cross-motions for summary judgment filed by plaintiff on September 21, 1999, and defendant on October 6, 1999. Supporting and opposition briefs have been filed regarding both motions. Each party seeks judgment as a matter of law pursuant to Fed. R. Civ. P. 56 on plaintiff's claim under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for access to records concerning the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City. For reasons that follow, the Court denies summary judgment to either party.

Undisputed Facts

From July 1997 through March 1998, plaintiff made seven FOIA requests seeking materials gathered by the FBI during its investigation of the Oklahoma City bombing. The first five requests were submitted to FBI headquarters in Washington, D.C.; the last two were submitted to the Oklahoma City Field Office. Plaintiff requested access to the following:

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1. "[A]ll reports, memos, notes, transcripts, and other material regarding the debriefing meeting held at the Department of Justice; and White House Situation room, on 4/19/95, following the bombing" (Def.'s Mot. Summ. J., Hodes Decl. at Ex. A.)

2. "All memos, notes, meeting transcripts, and other interagency memorandum [sic] (between FBI and ATF, FBI and CIA, FBI and NSA, FBI and NSC, FBI and State Dept., FBI and OK Sheriff's office, FBI and OCPD), regarding the bombing" (Def.'s Mot. Summ. J., Hodes Decl. at Ex. B.)

3. "[T]he videotape taken from OHP Officer Charlie Hanger's patrol car upon the arrest of Timothy James McVeigh on 4/19/95." (Def.'s Mot. Summ. J., Hodes Decl. at Ex. D.)

4. "Surveillance videos taken from the area surrounding the Alfred P. Murrah Building on 4/19/95." (Def.'s Mot. Summ. J., Hodes Decl. at Ex. E.)

5. "All reports regarding the examination and analysis of all vehicles damaged in the bombing" (Def.'s Mot. Summ. J., Hodes Decl. at Ex. F.)

6. "All videotapes collected by the FBI in Oklahoma from April 15, 1995 through April 19, 1995, particularly those with footage of the Alfred P. Murrah Federal Building . . . [;] all reports, memoranda, transcripts, notes, case files and any other documents concerning these tapes[; and] documentation of all bombs, explosives, ordnance or similar materials removed from the Murrah Building from April 1, 1995, through May 31, 1995, including any inventory lists and each item's ultimate destination and disposal." (Def.'s Mot. Summ. J., Hodes Decl. at Ex. H.)

Adequacy of the FBI's Search for Materials

Plaintiff's second attack on the FBI's declaration is the adequacy of the described search to satisfy the agency's obligation to locate requested materials. The standards governing this issue have been expressed as follows:

To win summary judgment on the adequacy of a search, the agency must demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents. The agency must make a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested To show reasonableness at the summary judgment phase, an agency must set forth sufficient information in its affidavits for a court to determine if the search was adequate. The affidavits must be reasonably detailed, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.

Nation Magazine v. United States Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995) (internal quotations and citations omitted); see *Schwarz v. FBI*, No. 98-4036, 1998 WL 667643 at *1 (10th Cir. Sept. 17, 1998) (quoting *Nation Magazine*).

Mr. Hodes describes in his declaration the FBI's recordkeeping and filing system, which consists of a central records system (CRS) that can be accessed through general indices that denote the subject matter of files in it. The FBI also has an automated case support system, which includes investigative case management, electronic case files, and an universal index. The investigative case management function permits the office that originates an investigation to open a case and assign it a universal case file number that indicates the type of investigation, the office of origin, and the particular investigation involved. The pertinent case file is "174A-OC-56120." The 174A prefix indicates an

investigation of "Actual and Attempted Bombings and Explosives Violation;" OC is the office of origin, Oklahoma City; and 56120 signifies the investigation into the bombing of the Alfred P. Murrah Federal Building. (Def.'s Mot. Summ. J., Hodes Decl. at 10.)

Concerning the searches for records requested by plaintiff, Mr. Hodes states in full:

The records responsive to plaintiff's seven requests pertaining to the Oklahoma City bombing were identified by searches of FBIHQ and the OCFO CRS indices. This search revealed the existence of one main file, 174A-OC-56120 at both FBIHQ and the OCFO. This file houses all FBIHQ and OCFO investigative records concerning the bombing of the Alfred P. Murrah Federal Building. The OCFO is the "OO" [Office of Origin] for this investigation and its file, 174A-OC-56120 is the larger of the two files. Therefore, FBIHQ file 174A-OC-56120, in all likelihood, will be mostly duplicative of the OCFO file. Both FBIHQ and OCFO files have been reviewed for the purpose of identifying documents which are responsive to plaintiff's seven requests Pursuant to those reviews, the following is a summary of the documents/pages/videotapes (approximate figures) determined to be responsive to plaintiff's requests at the offices indicated:

FBIHQ
300 documents totaling 1,500 pages
one videotape

OCFO
147 documents totaling 450 pages
22 videotapes

Until an actual review of this material could be undertaken for processing, it is estimated that there are approximately 447 documents totaling approximately 1,950 pages, as well as 23 videotapes that are responsive to plaintiff's requests.

(Def.'s Mot. Summ. J., Hodes Decl. at 11-13 (footnotes omitted).) This explanation is followed by a "summary of the records determined responsive," which simply lists the number of documents (sometimes qualified by "approximately") and the approximate number of pages that fit each request. As to Request #3, Mr. Hodes states that one videotape "was

the release of any material in these categories could hinder future proceedings.⁵ Under the unique circumstances presented by serial prosecutions for the same alleged criminal conduct, the FBI has failed to group the responsive documents into categories that can be linked to cogent reasons for nondisclosure.

This conclusion leads to the difficult question of how to proceed from here. Inadequate agency explanations have led other courts to call for supplemental affidavits or to undertake *in camera* review of withheld documents or representative samples. See *In re Department of Justice*, 999 F.2d at 1310; see also *Solar Sources*, 142 F.3d at 1036 (district court conducted *in camera* review of specified selections of documents, that is, ones from each identified category "selected from randomly-chosen specified locations" in the agency's files). Neither party here has proposed an *in camera* review of withheld documents, and the Court will not volunteer for the task due to the volume of materials at issue. Also, until the FBI identifies workable categories linked to adequately articulated concerns of possible interference, such review would serve no purpose. Thus, the Court directs defendant to disaggregate its current categories so as to provide a supplemental declaration that states:

(1) For each current category in which the FBI expresses concern about premature disclosure to Nichols or McVeigh, whether the information was produced to these individuals in the federal case and, if so, why these previous productions do not negate the alleged risk of harm.

⁵ The FBI has made no effort to show that it cannot reasonably segregate records or portions of records subject to disclosure from ones properly withheld. See 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.")


(2) For each current category in which the FBI expresses concern about public disclosure to nonparties to the state case, whether the information was previously aired in a public federal trial proceeding and, if so, why the prior disclosure does not negate the alleged risk of harm.

(3) For each category in which the FBI states a general concern about damaging its cooperative relationship with other agencies or its role in the criminal justice system, greater specificity about what damage is apprehended and how a FOIA-compelled disclosure of information could cause it.

Nothing in this call for more information should be interpreted to prevent the FBI from refining or reformulating its previously stated categories or to supplement in other respects its asserted justification for nondisclosure of the records at issue.

Conclusion

Defendant DOJ's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment are both DENIED because neither party has established its entitlement to a judgment as a matter of law. Defendant shall file a renewed motion, supplemented in conformity with this Order, not later than January 10, 2000. Plaintiff may respond to defendant's submission within twenty days after it is filed.


WAYNE E. ALLEY
United States District Judge