

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

FILED

JUL 10 2001

RUSSELL J. LEWIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLAHOMA
BY [Signature] DEPUTY

DAVID HOFFMAN,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES DEPARTMENT OF)
 JUSTICE,)
)
 Defendant.)

No. CIV-98-1733-A

DOCKETED



ORDER

This matter is before the Court for a ruling on Department of Justice's Motion for Summary Judgment filed April 23, 2001, which was deferred pending the receipt of additional information. (Order of June 14, 2001, at 4.) The required information has now been filed under seal and reviewed by the Court.

Defendant's motion is the latest in a series of attempts to obtain a judgment under 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. These attempts began immediately after service; a motion for summary judgment was the first paper defendant filed in the case.¹ The first motion invoked a specific statutory exemption that the FBI had cited in its decision not to release any records: the exemption for law enforcement records whose production "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C.

¹ Defendant did not file an answer until its motion for summary judgment had been denied.

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§ 552(b)(7)(A). The motion was patently insufficient, however, to permit a judicial determination that documents responsive to plaintiff's FOIA requests had been properly withheld under the exemption. Defendant merely cited statements made by Judge Matsch in a different context in the criminal case, United States v. McVeigh, 918 F. Supp. 1452, 1459-60 (W.D. Okla. 1996), and submitted a vague and cursory declaration by the Field Privacy Control Officer for the FBI's Oklahoma City office. (Order of April 16, 1999, at 7-8.)

Following a status conference and a plan for cross-motions by the parties, defendant filed its second summary judgment motion. This motion also invoked Exemption 7(A) but still was not accompanied by a Vaughn index.² Defendant instead purported to present categorical justifications for withholding all materials in its investigative files concerning the Oklahoma City bombing based on the declaration of an attorney from the FBI's headquarters in Washington, D.C. The Court rejected this motion as insufficient as well, finding that "the broad categories constructed by the FBI [were] inadequate to permit a determination that the release of any material in these categories could hinder future proceedings." (Order of Dec. 15, 1999, at 17-18.) The Court concluded that further judicial review would serve no purpose "until the FBI identifies workable categories linked to adequately articulated concerns of possible interference." (Order of Dec. 15, 1999, at 18.) The Court, therefore, directed defendant to provide a supplemental declaration and to file a renewed motion for summary judgment.

What followed was defendant's third motion for summary judgment. This motion abandoned Exemption 7(A) and instead invoked the decision of GTE Sylvania, Inc. v.

² An index of withheld documents is customarily required under Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

Consumers Union of the United States, Inc., 445 U.S. 375 (1980), that an agency does not improperly withhold responsive records that are subject to an injunction by another federal district court barring disclosure. Defendant relied on orders entered by Judge Matsch in the federal criminal case that effectively enjoined the FBI from disclosing any documents exchanged in discovery and maintained under seal in that case. See United States v. McVeigh, 931 F. Supp. 756, 760-61 (D. Colo. 1996); see also United States v. McVeigh, 157 F.3d 809, 812 (10th Cir. 1998). Once again, however, defendant's factual showing was insufficient to justify a summary judgment. The Court deferred a ruling on the motion and directed defendant to supplement the record with materials showing that Judge Matsch's order continued in effect (since the federal criminal judgments against Timothy McVeigh and Terry Nichols had become final) and that certain videotapes introduced at trial were the only documents responsive to plaintiff's FOIA requests that had been made public. (Order of June 21, 2000, at 9, 11-12.)

Following this direction, defendant obtained and submitted to this Court a clarification order of Judge Matsch stating that his prior orders restricting disclosure remain in effect. Defendant accompanied this submission, however, with an ambiguous declaration of the FBI's Oklahoma City Field Privacy Control Officer that did not establish that all materials responsive to plaintiff's requests (except the videotape exhibits) remain under seal. The Court, therefore, denied summary judgment to defendant and ordered the case set for hearing. (Order of Sept. 28, 2000, at 4-5.) Accordingly, a scheduling order was then issued setting the case for non-jury trial in June 2001.

In keeping with the scheduling order, which stated a deadline for dispositive motions, defendant made a fourth motion for summary judgment. Not surprisingly, this motion was

again presented in a cursory fashion and supported by a conclusory affidavit of the Oklahoma City Field Privacy Control Officer. The FBI did reveal, however, for the first time that it possessed lists of documents responsive to plaintiff's FOIA requests that could be compared to lists of trial exhibits to determine which requested materials had been publicly disclosed. Upon learning this, the Court ordered defendant to submit the lists for in camera review, and defendant's June 22 filing under seal complies with the order.

The Court's review of the sealed materials leads to the following conclusions. First, aside from videotapes made by security cameras inside the Regency Tower on April 16 and 19, 1995, it appears that one additional document on the list of responsive documents was used as a trial exhibit. Compare Defendant's Response to Court Order Dated June 14, 2001, Ex. A at 14, "Search log of Timothy James McVeigh's 1977 yellow Mercury Marquis," and Ex. C at 91, "Search log of crime scene search conducted on Mercury Grand Marquis." The Court orders a copy of this document supplied to plaintiff unless defendant demonstrates that two different documents are involved.


Second, there is no other congruity between the lists of trial exhibits and the lists of materials responsive to plaintiff's FOIA requests. Because no other responsive documents have been publicly revealed, they remain subject to Judge Matsch's order barring disclosure. Further, the lists refute plaintiff's challenge to the completeness of the FBI's responses to his FOIA requests. In opposition to the pending motion for summary judgment, plaintiff alleges that the FBI "has not been forthcoming . . . regarding the existence of other responsive videotapes which exist but were not acknowledged in the FBI's Freedom of Information Act responses," based on evidence of videotapes made by surveillance cameras in the area near the Murrah Building on April 19, 1995, other than

the Regency Tower. (Pl.'s Obj'n & Resp. Def.'s Fourth Mot. Summ. J., at 4-5, Exs. D & E.) In fact, the FBI's list of responsive materials from its Oklahoma City Field Office includes numerous other videotapes dated April 19, 1995, from several sources. Therefore, plaintiff has not raised a genuine dispute of material fact concerning the credibility of defendant's summary judgment evidence.

Finally, were it not for the lengthy procedural history of this case and defendant's shoddy conduct in the litigation, the Court would be inclined to grant summary judgment to defendant based on the current motion and record. In view of Judge Matsch's clarification order, the Court is presently powerless to grant plaintiff relief under FOIA. Plaintiff raises a legitimate point, however, that the federal criminal case may be nearing its end and defendant's current justification for its shroud of secrecy may likewise soon end. Thus, the Court will stay its hand and give plaintiff an opportunity to apply for relief from the only federal judge who can alter the existing limits on the FBI's disclosure of its records concerning the bombing investigation, namely, Judge Matsch. If plaintiff does apply, he should append a copy of this order so that Judge Matsch will know how defendant has behaved in this case.

Therefore, a ruling on Department of Justice's Motion for Summary Judgment filed April 23, 2001, is once again DEFERRED. Plaintiff may seek relief from Judge Matsch's order by application filed in the federal criminal case not later than August 20, 2001. Plaintiff should inform this Court by that date whether he has elected to seek relief from Judge Matsch, and if he does, plaintiff should thereafter keep this Court informed of the status of his application. Defendant shall provide to plaintiff not later than July 20, 2001, a copy of the document described as "Search log of crime scene search conducted on

Mercury Grand Marquis," unless defendant shows the Court by that date that a similarly described exhibit in the *McVeigh* case was a different document. This case is stricken from the Court's civil trial docket


WAYNE E. ALLEY
United States District Judge