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

DAVID HOFFMAN,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

No. CIV-98-1733-A

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.)

7. "[A]ll documents received from or maintained in conjunction with the Oklahoma County, Oklahoma, Sheriff's Department, related to the bombing . . . from April 19, 1995 to the present [March 3, 1998; and] . . . crime scene logs related to the Murrah site, whether the records were generated or maintained by the FBI . . . , by the Oklahoma County Sheriff's Department, or by any other agency that has provided the FBI with copies of such documents." (Def.'s Mot. Summ. J., Hodes Decl. at Ex. Q.)

The FBI provided no documents to plaintiff. Although no written answer to Request #1 is available, FBI records indicate that this request generated a "No Record" response. All other requests were denied. Plaintiff timely appealed the FBI's non-disclosure decisions.[1] On May 8, 1998, the Department of Justice affirmed the decisions on the ground that responsive materials were properly withheld under Exemption 7(A). (Second Am. Compl., Ex. B.) This statutory exemption shields law enforcement records whose disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

There is no question that the FBI obtained the materials at issue solely for the purpose of investigating and prosecuting persons liable for the bombing. The investigation resulted in federal criminal convictions of two individuals, Timothy McVeigh and Terry Nichols. The convictions and sentences of both men are final, as they have exhausted the direct appeal process, but post-conviction proceedings are expected. *See United States v. McVeigh*, 153

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[1] The Court accepts plaintiff's statement of this fact, even though the record contains no evidence of administrative appeals concerning some requests, because defendant does not controvert it and raises no issue concerning lack of administrative exhaustion. (Pl.'s Mot. Summ. J. Br. at 1; Def's Resp. Pl.'s Mot. Summ. J. at 2.)

F.3d 1166 (10th Cir. 1998), *cert denied*, 119 S. Ct. 1148 (1999); *United States v. Nichols*, 169 F.3d 1255 (10th Cir.), *cert. denied*, 120 S. Ct. 336 (1999). Further, the Oklahoma County District Attorney has filed murder and conspiracy charges against Nichols for his alleged part in the bombing, and the state criminal case remains pending. The FBI is cooperating in the state prosecution.

Standard for Summary Judgment

Summary judgment is appropriate if the pleadings, affidavits, and other evidence on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it is essential to proper disposition of a claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if the evidence is such that a rational trier of fact could resolve the issue either way. *Id.* The movant bears the initial burden of demonstrating the absence of a disputed material fact warranting summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If the movant carries its initial burden, the nonmovant then must "set forth specific facts" outside the pleadings and admissible in evidence that show a genuine issue for trial. *See Anderson*, 477 U.S. at 248; *Celotex*, 477 U.S. at 324; Fed. R. Civ. P. 56(e). The Court's inquiry is whether the facts and evidence identified by the parties "presents a sufficient disagreement to require submission to [the fact-finder] or whether it is so one-sided that one party must prevail as a matter of law." *Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997) (internal quotation omitted).

Analysis

When a person seeks access to records under FOIA, "[t]he federal agency resisting disclosure bears the burden of justifying nondisclosure." *Audubon Society v. United States Forest Serv.*, 104 F.3d 1201, 1203 (10th Cir. 1997); *see* 5 U.S.C. § 552(a)(4)(B). Thus defendant must demonstrate that Exemption 7(A) applies to all FBI documents responsive to plaintiff's requests, that is, their disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The relevant inquiry ordinarily would involve a two-step analysis to determine: (1) whether a law enforcement proceeding is pending or prospective; and (2) whether "release of the information could reasonably be expected to cause some articulable harm," *Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995), or "perceptively to interfere with an enforcement proceeding," *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989). Here, however, the first point is conceded. Defendant asserts, and plaintiff does not dispute, that there is a pending law enforcement proceeding -- Oklahoma's criminal case against Nichols.

To carry its burden of proof that release of requested information would likely harm or perceptively interfere with the state case, defendant presents the declaration of an FBI attorney, Scott Hodes. The first issue presented is the adequacy of this document to show that the FBI engaged in an appropriate process of searching for, identifying, and reviewing responsive documents. This issue must be addressed in order to reach the ultimate question of whether the FBI has justified withholding its records.

Adequacy of the FBI's Form of Proof

Plaintiff's first attack on the FBI's declaration is the competence of Mr. Hodes to testify about the agency's records searches. Mr. Hodes identifies his current position as: "Acting Chief of the Litigation Unit, Freedom of Information-Privacy Acts Section, Office of Public and Congressional Affairs at FBI Headquarters (FBIHQ) in Washington, D.C." (Hodes Decl. at 1, ¶ 1.) In that capacity, Mr. Hodes states that he is familiar with the FBI's procedures for responding to FOIA requests and that he is "aware of the treatment which has been afforded to the requests of David Hoffman for access to FBIHQ and the Oklahoma City Field Office (OCFO) records concerning specific aspects of the bombing . . . ." (Hodes Decl. at 1, ¶ 2.) He further attests: "All information contained herein is based upon information provided to me in my official capacity." (Hodes Decl. at 1-2, ¶ 2.)

Plaintiff deems this insufficient as a matter of law because Mr. Hodes did not actually conduct or supervise any of the records searches and so cannot speak from personal knowledge about them, and because the persons who conducted the searches are not identified. Plaintiff argues that a general awareness of how a records request was treated, as opposed to personal supervision of the process, does not qualify Mr. Hodes to testify about the search under the standard announced in *Carney v. Unites States Dep't of Justice*, 19 F.3d 807, 814 (2d Cir. 1994) (authority cited by defendant). Plaintiff relies on *Weisberg v. United States Dep't of Justice*, 627 F.2d 365, 370-71 (D.C. Cir. 1980), to argue that an affidavit that reveals nothing about who actually conducted the search does not provide enough information to permit a reasonable challenge to the search procedure that was used.

The Court finds no legal authority for the proposition that an agency must submit the affidavit of an employee with personal knowledge of a FOIA search. Instead, the opposite rule appears in *Patterson v. IRS*, 56 F.3d 832 (7th Cir. 1995). The court there relied on the principle that "an agency need not submit an affidavit from the employee who actually conducted the search." *Id.* at 840-41 (internal quotation omitted). From this, the court reasoned that an affiant's reliance on information about the search contained in agency records "is not unlike a supervisor's reliance on information provided by underlings . . . ." *Id.* at 841. Here, although Mr. Hodes does not explain how he learned of the treatment given plaintiff's requests -- whether directly from the searchers or their supervisors, or through agency records -- the fact that he is aware of what was done and how it was done by virtue of information provided to him in his official capacity is sufficient to permit him to testify on the FBI's behalf. If his testimony lacks specificity, it may be substantively inadequate, but it is not incompetent.

As to Mr. Hodes' failure to say who processed plaintiff's requests, "[t]here is . . . no general requirement for an agency to disclose the identity and background of the actual persons who process FOIA requests." *Maynard v. CIA*, 986 F.2d 547, 563 (1st Cir. 1993). Further, this information goes to the adequacy of the FBI's efforts to retrieve responsive materials. *See Weisberg*, 627 F.2d at 371 (finding genuine issue as to thoroughness of search where affidavits lacked specific information about procedures used, including "which files were searched or by whom"). This issue arises here from the FBI's report that it has no materials for two requests (#1 and #4), and constitutes a separate challenge to defendant's case.

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

identified by its label; however, until this videotape is viewed for processing, it is not possible to state that it is definitely responsive." (Def.'s Mot. Summ. J., Hodes Decl. at 13.) Similarly, in a footnote omitted from the above quote, Mr. Hodes explains the uncertainty concerning page counts as follows:

> Most pages of the OCFO file have been imaged, scanned, or indexed onto a computerized database. The search for responsive documents by OCFO personnel has been performed with the aid of these databases. These searches have identified the number of documents, *not pages*, that are responsive. The page counts for these documents are estimated as approximately 3 pages per document, which may fluctuate when these documents are physically reviewed.

(Def.'s Mot. Summ. J., Hodes Decl. at 13 n.6 (emphasis in original).)

Based on this description of the FBI's search, plaintiff complains that no person has actually reviewed the records at issue and that the records found are inadequately described to permit judicial review of the FBI's decisions. The adequacy of the FBI's descriptions of withheld materials -- supplemented later in the declaration and addressed further below -- bears on whether the agency has properly justified its decisions. The adequacy of the FBI's search, on the other hand, decides whether the agency has improperly withheld responsive materials by failing to locate them. On this point, the Court finds no genuine factual issue as to the reasonableness of the FBI's search.

Plaintiff correctly argues that courts generally have required federal agencies to conduct actual, physical reviews of records for requested information. This Court sees no legal reason to impose such a requirement, however, if other computer-assisted search procedures available to an agency are more efficient and serve the same practical purpose of reviewing

hard copies of documents. In *Nation Magazine*, 71 F.3d at 891, the court found defects in a search because the agency had read the request too restrictively, not because an electronic records system had been used in part of the search. Here, plaintiff does not object to the FBI's construction of his requests to seek only materials compiled for purposes of investigation or the concomitant limitation of its searches to investigative records. For example, the declaration states that public source information (such as newspaper articles) concerning the bombing is maintained separately from the main file in sub-volumes and that these volumes were not reviewed. (Def.'s Mot. Summ. J., Hodes Decl. at 30-31, ¶ 68.) Plaintiff does not address this omission, which leads the Court to conclude that the FBI correctly interpreted his request. Because the declaration states that the file searched, 174A-OC-56120, contains all investigative records concerning the bombing, the Court concludes that searches directed only at this file could reasonably be expected to produce all of the information requested.

Plaintiff does not criticize any particular aspect of the FBI's search other than its use of indices and computer databases. Absent an identified defect in the procedure used, or any showing by plaintiff that the agency might have discovered a responsive document if it had conducted a more thorough search, the Court concludes that the FBI's search was reasonably calculated to retrieve relevant information.[2] Therefore, the Court finds that the search conducted in response to plaintiff's requests was adequate.

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[2] Where an agency does not establish that its search was reasonable, "the FOIA requester may avert summary judgment merely be showing that the agency might have discovered a responsive document had the agency conducted a reasonable search." *Maynard*, 986 F.2d at 560.

Adequacy of the FBI's Justification of Claimed Exemption

The FBI claims secrecy is warranted as to all materials requested by plaintiff because their release "would jeopardize further investigative and/or prosecutive efforts" in these respects: (1) providing information prematurely to Nichols and McVeigh that would enable them to identify "individuals and potential witnesses who possess information relative to the investigations and possible harm to, or intimidation of these individuals" and "use of information released to counteract evidence developed by investigators;" and (2) releasing information to nonparties to the criminal case "could allow these third parties to interfere with the pending prosecutions by harassment, intimidations, and creation of false evidence dispensing facts discussed during the FBI's investigation." (Def.'s Mot. Summ. J., Hodes Decl. at 21-22.) The FBI also contends that a waiver of Exemption 7(A) "would inhibit the FBI's assistance to the justice system" in view of its continuing involvement in the federal and state prosecutions. (Def.'s Mot. Summ. J., Hodes Decl. at 23.) More specifically, the FBI identifies the following categories and subcategories of responsive materials and potential harms from their disclosure:

(1) Evidentiary/ Investigative Materials

(a) Source Statements

> . . . These statements contain information obtained from confidential informants, records custodians and other third parties whose knowledge, relationship with and/or activities brought them into contact with McVeigh, Nichols, the Murrah building or vicinity of the Murrah bombing on April 19, 1995. . . . [R]eleasing their names and/or information they provided in furtherance of the FBI's investigation could result in retaliation, intimidation, or harm. This could have a chilling effect . . .

inasmuch as potential witnesses and/or confidential sources might fear exposure and reprisals from supporters of McVeigh and Nichols. . . . .

(b) Exchange of information between various local, state, and federal agencies.

Release of this type of information will disclose investigative information developed by various agencies that cooperated with the FBI . . . . Inherent in this cooperative effort is the mutual understanding that information provided to the FBI by those agencies will not be prematurely released. This information was gathered to help identify subjects, suspects or other individuals of potential investigative interest and to assist in locating witnesses or confidential sources. To release this information would identify local and federal investigative interest in a particular individual as well as subject witnesses and/or confidential sources to potential intimidation and physical harm.

(c) Information concerning Physical Evidence

[This category] . . . includes items such as fingerprint and handwriting samples submitted to the FBI laboratory for analysis, receipts, invoices, surveillance videotapes, bomb damaged material, correspondence of third parties, and Grand Jury subpoenas.

To fully describe these items could reasonably lead to the identification of the evidentiary items and, ultimately, sources of information. This release could result in the possible harm or intimidation of those witnesses and/or confidential sources who provided the material. . . . Disclosure could be detrimental to success of the future prosecutions by permitting subjects to formulate a strategy as to how the evidence and/or test results could be contradicted in court.

(2) Administrative Materials

(a) Reporting Communications

. . . These communications are replete with detailed information about the investigative activities as well as detailed information about potential witnesses and/or confidential sources to be interviewed. Additionally, they contain background information about third parties, the origin of pertinent information which ties them to the investigation, their connection with the subjects, and their relationship with the pending investigation. The release of this information would reveal the investigative steps taken to pursue witness and/or confidential source interviews, techniques and investigative methods used to compile and/or solicit information from various sources

and the perceived weaknesses in the investigation. To release this information would reveal the nature and scope of the investigation as it pertains to these witnesses and/or confidential sources.

(b) Miscellaneous Administrative Documents

These materials include items such as storage envelopes, transmittal forms, and standardized forms used for particular purposes. . . . While these materials are not solely applicable to this investigation, they were adapted or used in such a manner as to contain information of investigative value.

An example is the envelope used to store original handwritten agent notes. . . . [H]andwritten notations on the envelope identify dates, places, and persons who, for example were interviewed. The disclosure of these materials could harm the investigation by providing details which, when viewed in conjunction with knowledge possessed by the subjects, could provide information useful in identifying witnesses, investigative strategies and items of evidence.

(c) Administrative Instructions

This type of information . . . , if released to a knowledgeable person, will disclose specific investigative procedures employed, which in turn will permit a defendant to anticipate (and possibly negate) incriminating evidence which could be used in future prosecutions of others.

Specific examples of these instructions include the setting out of investigative guidelines, requests for laboratory or fingerprint analyses, and requests for specific investigative inquiries at various FBI Field divisions or other government agencies. These instructions are commonly referred to as investigative "leads" . . . .

(Def.'s Mot. Summ. J., Hodes Decl. at 23-29.)

Plaintiff's substantive attack on the FBI's declaration focuses on its alleged lack of specificity, arguing that the FBI's justification is based on "generalities which could be cited in any FOIA case." (Pl.'s Resp. Def.'s Mot. Summ. J. at 11.) Plaintiff disputes as patently insufficient allegations of possible harm from releasing information that has already been provided to McVeigh and Nichols or that has "passed into the public domain" through use

of materials as trial exhibits in the federal case. (Pl.'s Resp. Def.'s Mot. Summ. J. at 8-9.) He challenges as "speculative" the alleged justification that releasing documents to persons not directly involved in the federal and state cases could lead to harassment and intimidation of witnesses or creation of false evidence. (Pl.'s Resp. Def.'s Mot. Summ. J. at 10.) Plaintiff thus urges the Court to order immediate release of the records sought.

In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court ruled that, although Exemption 7 is not a "blanket exemption" for all investigatory files of a law enforcement agency, it permits generic determinations that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *Id.* at 236. The Court found sufficient proof of interference with an unfair labor practice proceeding where the target of an investigation sought access to witness statements that were unavailable under normal discovery rules. No particularized showing was needed that release of the statements in that case likely would interfere with the pending proceeding. *Id.* at 236-42.

In later cases involving other parts of Exemption 7, the Supreme Court has reinforced the view that a "categorical approach" to law enforcement records is permissible. In *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 777 n.2 (1989), the Court noted that a 1986 amendment of the statute to replace "would interfere" with "could reasonably be expected to interfere" was designed to "give the Government greater flexibility in responding to FOIA requests for law enforcement records . . . ." By substituting a reasonableness standard for one that had focused on the effect of a particular

disclosure, Congress provided support for a categorical approach that permits law enforcement agencies to justify nondisclosure by reference to certain circumstances and inferences therefrom. *See United States Dep't of Justice v. Landano*, 508 U.S. 165, 179-81 (1993). Nevertheless, an agency must provide sufficient information for a judicial determination that law enforcement records are properly withheld. *See In re Department of Justice (Crancer v. United States Dep't of Justice)*, 999 F.2d 1302, 1309-11 (8th Cir. 1993) (en banc); *see also Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 (7th Cir. 1998); *Dickerson v. Department of Justice*, 992 F.2d 1426, 1431 (6th Cir. 1993); *Curran v. Department of Justice*, 813 F.2d 473, 475 (1st Cir. 1987). "[T]he government must show that disclosure of [requested] documents would, in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding." *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989).

The FBI admits through Mr. Hodes' testimony that it routinely asserts Exemption 7(A) whenever it receives a FOIA request concerning an ongoing investigation. (Def.'s Mot. Summ. J., Hodes Decl. at 21, ¶ 48.) Mr. Hodes also reports, however, that the documents and evidentiary materials related to plaintiff's requests were subsequently reviewed and categorized for the purpose of his declaration. (Def.'s Mot. Summ. J., Hodes Decl. at 21, ¶ 48, and 23, ¶ 52.) Plaintiff identifies no fact or evidence that creates doubt whether the FBI undertook in good faith a review of its files after this case was filed or after defendant's initial motion for summary judgment was denied.[3] Plaintiff also does not question whether

[3] "Affidavits submitted by an agency are accorded a presumption of good faith." *Carney*, 19 F.3d at 812 (internal quote omitted); *see Maynard*, 986 F.2d at 560.

all responsive records fall into one or more of these categories: source statements, exchange of information between various agencies, information concerning physical evidence, reporting communications, miscellaneous administrative documents, and administrative instructions. Plaintiff instead contends that the articulated harms from public release of these materials are not real or substantial due to prior disclosures in the federal criminal case.

The Court cannot accept plaintiff's view that disclosure of the investigative records at issue raises no interference concerns. The Court agrees, however, that the FBI has failed satisfactorily to explain why *all* investigative materials responsive to plaintiff's requests must be withheld. The FBI may not know which potential witnesses and physical evidence will be of interest or use to prosecutors in the pending state case, but some witnesses and evidence already have been publicly revealed. This fact undercuts the FBI's concern that divulging the identities of persons who might be witnesses in the state case could expose them to intimidation or retaliation and could discourage future cooperation with prosecutors. Further, the FBI's concern that premature disclosure of information would enable Nichols or McVeigh to formulate a strategy for impeaching or contradicting evidence in court loses all force to the extent they already possess the information.[4] Accordingly, the Court finds that the broad categories constructed by the FBI are inadequate to permit a determination that

[4] The FBI has previously presented testimony by the Chief Division Counsel for its Oklahoma City Office that "[t]he materials sought by plaintiff were produced to the defense during criminal discovery" in the federal case against McVeigh and Nichols. (Pl.'s Mot. Summ. J., Ex. B, Rogers Decl. at 2, ¶ 11.)

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.

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[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 Alley

WAYNE E. ALLEY
United States District Judge