

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,  
Plaintiff,  
v.  
U.S. DEPARTMENT OF JUSTICE,  
Defendant.

Civil Action No. 75-1996

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant respectfully moves the Court for partial summary judgment as to the decision not to reproduce certain photographs found in its files on the grounds these are no genuine issues as to any material fact and defendant is entitled to partial summary judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

In support of the motion, defendant submits a statement of material facts as to which there is no genuine issue, the letter of Harry M. Johnston, Associate Counsel, Legal Department, Time Incorporated (Defendant's Exhibit 1), and a response to plaintiff's Statement of Material Facts. Also submitted herewith are a memorandum of points and authorities in support of defendant's motion and in opposition to plaintiff's motion for summary judgment with respect to crime scene photographs taken by Joseph Louw and a proposed order.

*Earl J. Silbert*  
EARL J. SILBERT  
United States Attorney

*Robert N. Ford*  
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Assistant United States Attorney

*John R. Dugan*  
JOHN R. DUGAN  
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendant's Motion for Partial Summary Judgment with additional pleadings and proposed Order has been served upon plaintiff by mailing copies to his attorney James Hiram Lesar, 910 Sixteenth Street, N.W., Suite 600, Washington, D.C. 20006, this 19th day of September, 1977.



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UNITED STATES DISTRICT COURT  
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DEFENDANT'S STATEMENT OF MATERIAL FACTS AS  
TO WHICH THERE IS NO GENUINE ISSUE

In support of the motion for partial summary judgment and in conformity with Local Rule 1-9(h), defendant submits a statement of material facts as to which there is no genuine issue:

(1) On April 18, 1968, two weeks after the assassination of Dr. Martin Luther King, Jr., the FBI received copies of 107 photographs of the crime scene taken at and in the vicinity of the Lorraine Hotel by Life Magazine photographer Joseph Louw. (Attachment 4 to Plaintiff's Affidavit, p. 3).

(2) Pursuant to plaintiff's FOIA request, by letter from the Director of the FBI, dated May 11, 1976, plaintiff was denied copies of these 107 photographs. The letter stated in pertinent part:

Additionally, 107 photographs, the property of Time, Incorporated, but in possession of the FBI, were displayed to Mr. Weisberg and he was advised that Time, Incorporated, had not granted authority to release copies of these photographs, although they had no objection to his viewing them. Mr. Weisberg indicated that he would be interested in obtaining copies of 15 of these photographs and he was advised that he would have to request these of Time, Incorporated. The reproduction of these 15 photographs by the FBI is exempt by the following subsections of Title 5, United States Code, Section 552:

(b)(3) information specifically exempted from disclosure by statute;

(b)(4) commercial information obtained from

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RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL  
FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

In addition to moving for partial summary judgment, defendant strongly opposes the granting of plaintiff's motion for summary judgment. As required by Local Rule 1-9(h) defendant take issue with several of plaintiff's statements of material facts:

1. Admitted.

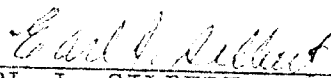
2. This statement is incomplete. In addition to plaintiff's desire to obtain these photographs for scholarly study, plaintiff has represented himself to be an investigator for the defendant convicted of the assassination of Dr. King and further that he is an author of several books, and is about to publish a second book on the assassination of Dr. King.

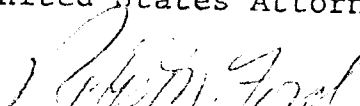
3. Defendant's counsel is without knowledge of this fact since he has not viewed these photographs.


4. Admitted, but defendant states that plaintiff has reviewed all 107 photographs and also has obtained contact prints of each from Time Incorporated (Attachments 10 and 18 to Plaintiff's Affidavit).

5-7. Defendant submits there is a clear question of fact as to the harm to the Government, to Time Incorporated and the photographer, Joseph Louw, if this Court were to

All records provided plaintiff in this case must be made available to any other requestor. Court-ordered reproduction of these photographs may deter others from submitting similar kinds of information to the government during an investigation. With respect to Time Incorporated and the photographer, the letter from Mr. Johnson documents how valuable these photographs are to its owners. (Defendant's Exhibit 1).

  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

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U.S. DEPARTMENT OF JUSTICE,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND  
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT WITH RESPECT TO CRIME SCENE PHOTOGRAPHS  
TAKEN BY JOSEPH LOUW

Preliminary Statement

The issues raised in the cross motions for summary judgment are not typical of those normally involved in a Freedom of Information Act case. Typically a plaintiff seeks an order of Court requiring an agency to disclose certain information which previously had been denied on grounds that disclosure would be exempt under the F.O.I.A. Act.

In the instant case, plaintiff has had access to the information, i.e. he has reviewed the 107 photographs and initially selected 15 for reproduction. Now it appears that plaintiff desires not 15, but all 107 photographs.

The FBI has denied plaintiff's request for copies of these photographs because the photographs were not the property of the FBI, but rather they were loaned to the FBI for purposes of the investigation. The FBI has not been granted the right to reproduce these photographs. The FBI has directed plaintiff's request for copies to Time Incorporated and it appears that plaintiff is able to obtain copies through that organization. Because the cost is higher if plaintiff obtains the copies from Time I

Defendant respectfully submits that it has properly refused to reproduce the photographs and therefore this Court should grant summary judgment in defendant's favor. First, the photographs are not agency records and hence are not subject to disclosure on an order of the Court requiring the government to reproduce copies under the Act. Second, assuming arguendo they are, to reproduce these photographs for the plaintiff, and others, would place officials in the Federal Government in violation of the Copyright Laws 17 U.S.C. §1 et seq. Hence under 5 U.S.C. 552(b)(3) as amended, disclosure by defendant in the form of reproducing copies is exempt. Third and finally, reproduction of these photographs is exempt pursuant to 5 U.S.C. §552(b)(4). The FOIA was not intended to allow the Government to give away items having value in and of itself merely for the price of reproduction.

#### Argument

##### I. The Photographs Are Not "Records" or "Agency Records" That Are Subject To FOIA

The threshold issue, that must be faced by the Court is whether the 107 photographs are "records" or "agency records" that are subject to the Act.

It is undisputed that the photographs requested by the plaintiff were taken by Joseph Louw, and not by the FBI. The photographs were loaned to the FBI two weeks after the assassination of Dr. Martin Luther King, Jr. The FBI does not have any rights to reproduce or copy the photographs.

Defendant therefore respectfully submits that these photographs are not "records" or "agency records" that are subject to the Act.

The words "records" and "agency records" are critical in interpreting the operation of the Freedom of Information Act.

542 F.2d 116 (9th Cir. 1976), the Ninth Circuit discussed the absence of a definition in the Act and concluded that:

the type of documents Congress was seeking to include in the public disclosure provision of the Freedom of Information Act were primarily those which dealt with the structure, operation, and decision-making procedure of the various government agencies

542 F.2d at 119

In the SDC Development case, plaintiff sought under the FOIA copies of tapes that were prepared by the Library of Medicine pursuant to a statute. Access to these tapes was available on a subscription basis and cost approximately \$50,00 for one year. Plaintiff tendered \$500 for these tapes for the duplication of the tapes under FOIA. The Court held that:

library reference materials for which charges are specifically authorized, such as the MEDLARS tapes sought in this case, are not "records" or "agency records" which must be made available at nominal charges pursuant to 5 U.S.C. §§552(a)(3) and (a)(4)(A)

542 F.2d at 1120

In the instant case plaintiff asks that the FBI reproduce photographs that are available from the copyright owner for is customarily charged any person who wants a copy. These photographs not taken by a government employee are not the kinds of records that are subject to the Act.

In addition, we rely on the case of Ciba-Geigy Corporation v. Mathews, 428 F. Supp. 523 (S.D.N.Y. 1977) for the proposition that records in the possession of the government which are not owned by it or not under its control are not "agency records" subject to the Act. The Court there held:

The raw data of the research organization's study was its own private property and not Government property. Because there has not been an adequate showing that the underlying data of the researchers was directly controlled or substantially utilized by a Government agency in the performance of governmental operations,



Finally, we submit that while photographs taken by the government may be under the Act, where they are loaned to it, disclosure is not warranted. Any written reports regarding what the photographs depict may be subject to disclosure, but not the particular photographs Nichols v. United States, 325 F. Supp. 130 (D. Kansas 1971) (X-Rays films of the autopsy of President Kennedy not "records" within the Act, but the diagnosis and findings of the radiologist is a record); affirmed on other grounds Nichols v. United States, 460 F.2d 671 (10th Cir. 1972) (Court held records exempt under (b)(3) of FOIA).

For these reasons defendant submits that plaintiff may not properly obtain copies of the photographs from the FBI since they are not "records" and "agency records" within the meaning of the Act.

II. Assuming Arguendo These Photographs Are Agency Records, They Are Exempt From Disclosure Pursuant To 5 U.S.C. §552(b)(3)

In the May 11, 1976 letter from Director of the FBI, plaintiff was advised in part that the 107 photographs were the property of Time, Incorporated and that the FBI had no authority to reproduce copies thereof. The FBI asserted exemption (b)(3) of the Act, which provided at the time:

(b) This section does not apply to matters that are --

(3) specifically exempted from disclosure by statute.

This exemption was recently amended in the Government in the Sunshine Act, PL. 95-409 §5(b), 94th Cong. (Sept. 13, 1976). The law now provides:

(b) This section does not apply to matters that are --

(3) specifically exempted from disclosure

This (b)(3) exemption is applicable to the Low photographs in that the copyright laws of the United States, found at Title 17 of the United States Code, specifically grants at Section 1 the exclusive right to ". . . print, publish, copy and vend the copyrighted work. . ." to the copyright proprietor. In view of the fact that plaintiff's FOIA request is a "third party" request (for records other than his own) all records provided the plaintiff must be made available to any and all other requesters. Therefore, no matter what legal and equitable use the plaintiff makes of the Low photographs, the FBI, by reproducing and distributing the photographs to the financial detriment of the copyright proprietor, would be violating the Copyright Law.

As pointed out in the letter of Harry W. Johnston, Legal Department, Time Incorporated:

Time Incorporated is the copyright proprietor, in trust for the photographer, of 107 photographs taken by Joseph Luow in Memphis, Tennessee, in April of 1968. The photographs pertain to events and circumstances surrounding the death of Martin Luther King, Jr., and were lent to the FBI in connection with its investigation into the King assassination. At no time have any rights to reproduce or copy the photographs been granted to the FBI.

Upon information and belief, and with the possible exception of one of the photographs, all the photographs are protected by either statutory or common law copyright. Those of the Luow photographs which were first published in several editions of the April 12, 1968 issue of LIFE Magazine were given protection by the statutory copyright on those editions (Claim to Copyright Registration Nos. B 422404, B 422405, and B 422406). Those of the photographs which have never been published are protected by common law copyright. (Defendant's Exhibit 1).

Photographs are subject to statutory and common law copyright protection 17 U.S.C. §§1, 2 and 5; Nimmer on Copyright, §22 page 98. As noted above, it appears that 3 of the 107 photographs have been registered for statutory copyright protection. The bulk of the photographs have not been and are protected under the common law copyright.

to copy his work. As stated in Nimmer on Copyright §101, p. 377:

As the very name "Copyright" suggests, the right to copy represents the most fundamental as well as historically the first right in the domain of literary property. Indeed, in a broad sense substantially all of the enumerated rights under Sec. 1 of the Copyright Act are merely specific methods of copying, so that a copyright law which prescribed only copying would, if broadly construed, achieve the same protection as is offered under the Sec. 1 enumeration. In fact, it might well be argued that the detailed list of right under Sec. 1 constitutes a qualification of rather than an extension of the right to copy.

(emphasis added, footnote omitted)

The rights under Common Law copyright also protects against unauthorized copying and it has been noted that common law copyright accords rights broader than those available under statutory protection. Nimmer on Copyright §111 p. 456-457 states:

But apart from the scope of works which are protectible, the nature of the rights themselves are in some ways broader under common law copyright. It has been said that common law rights in an unpublished work are "absolute" so that any unauthorized use of the work is an infringement. It has further been judicially stated that the defense of "fair use" is not available in a common law copyright infringement action.

(emphasis added, footnotes omitted)

Pursuant to 17 U.S.C. §101(a) remedies are provided against the person infringing the statutory copyright. The United States is subject to suit for a violation of the copyright statutes in an action brought in the Court of Claims 28 U.S.C. §1498.

In light of the position of Time Incorporated, the copyright proprietor in trust for the photographer it would be a violation of the Copyright Laws for the Government to reproduce copies of the 107 photographs for the plaintiff and to any other person. It matters not what plaintiff intends to do with the photographs and whether he would also violate Time Incorporated rights, the violation would occur at the point when the Government

are capable of co-existence, it is the duty of the Courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective" 542 F.2d at 1120 (citations omitted). The exemption (b)(3) of the FOIA and the laws relating to copyright as discussed above, mandate that the Federal Government not reproduce these photographs in derogation of the rights of the copyright owner. Plaintiff has been granted access to the photographs under FOIA and he clearly has an option available to him to obtain copies of the photographs from the copyright owner.

Finally, some discussion is warranted of plaintiff's reference to the "fair use" doctrine in the law of copyrights. The "fair use" doctrine is judicially created. As noted in Nimmer on Copyrights §145 p. 643-644.

The scope and limits of this judge-made rule of reason are most obscure, so that the issue of fair use has been called 'the most troublesome in the whole law of copyright'

(footnotes omitted).

Defendant respectfully submits that in the context of the FOIA action, it would be clearly improper to resolve the difficult factual issues that have arisen in cases applying the "fair case" doctrine. The issue briefed in this section is whether the (b)(3) exemption is properly claimed. The doctrine of "fair use" is inapplicable in this kind of case and should be a matter raised, if and when, the plaintiff chooses to utilize the photographs he may obtain from Time, Incorporated.

In a case from this jurisdiction, Judge Smith discussed the "fair use" doctrine in an action seeking declaratory relief as to the plaintiff's right to publish speeches of Admiral Rickover. Public Affairs Associates, Inc. v. Rickover, et al., 268 F. Supp. 444 (D.D.C. 1967). The language quoted below is equally pertinent to plaintiff's claims in this action:

The applicability of the doctrine here is doubtful

III. Assuming Arguendo These Photographs Are Agency Records, They Are Also Exempt From Disclosure Pursuant to 5 U.S.C. § 552(b)(4).

The Freedom of Information Act, 5 U.S.C. § 552, as amended, provides in pertinent part:

- (b) This section does not apply to matters that are -

\* \* \*

- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.

The normal case which raises a (b)(4) exemption deals with trade secrets and/or protecting the disclosure of financial information which is privileged or confidential. See Rural Housing Alliance v. U.S. Department of Agriculture, 162 U.S. App. D.C. 122, 127, 498 F.2d 73, 78 (1974); National Parks and Conservation Association v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765 (1974).

The reproduction of the Louw photographs would not only be a serious infringement of the copyright protection of Mr. Louw, but would be a significant loss to the owner of the copyright. As noted in Mr. Johnston's letter:

Many non-book customers have purchased reproduction rights in the Luow [sic] photographs for payments ranging from \$500 (for the use of several photographs by WNET-TV in 1975) to \$5000 (for the use of one photograph by the German magazine Der Stern in 1968). These payments reflected normal commercial negotiations between the parties, with Time Inc. acting as Luow's [sic] agent. (Defendant's Exhibit 1.)

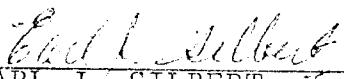
While this exemption is generally discussed in terms of protecting trade secrets, it is also intended to protect valuable property submitted to the government. As stated in the June 1967, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act at page 34:

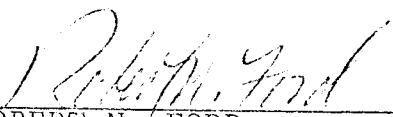
An important consideration should be noted as to formulae, designs, drawings, research data, etc., which although set forth on pieces of paper,


Therefore (b)(4) would be a proper basis to exempt the FBI from reproducing copies of these photographs since they are a valuable property and the FOIA was not intended to take property of a person who submits it to the government for a specific purpose.

Finally, defendant submits that reproduction of these Low photographs over his objection, would be a significant harm to the Government in any future criminal investigation.<sup>1/</sup> It would appear not unreasonable to conclude that persons who have taken photographs which may constitute valuable property, would be reluctant to come forward and disclose their existence if their property rights were taken under the guise of the FOIA.

For these reasons, defendant submits that the Court should grant defendant partial summary judgment and deny plaintiff's motion for summary judgment.

  
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JOHN R. DUGAN  
Assistant United States Attorney

<sup>1/</sup> Plaintiff's argument that information which is available by law through subpoena to a government agency cannot be considered confidential pursuant to the FOIA and exemption (b)(4) in particular is specious. Pursuant to the FOIA, confidential information is simply what the term connotes -- and nowhere does the law require that to be confidential information must not be available through subpoena.



September 13, 1977

Dear Mr. Matthews:

Time Incorporated is the copyright proprietor, in trust for the photographer, of 107 photographs taken by Joseph Luow in Memphis, Tennessee, in April of 1968. The photographs pertain to events and circumstances surrounding the death of Martin Luther King, Jr., and were lent to the FBI in connection with its investigation into the King assassination. At no time have any rights to reproduce or copy the photographs been granted to the FBI.

Upon information and belief, and with the possible exception of one of the photographs, all the photographs are protected by either statutory or common law copyright. Those of the Luow photographs which were first published in several editions of the April 12, 1968 issue of LIFE Magazine were given protection by the statutory copyright on those editions (Claim to Copyright Registration Nos. B 422404, B 422405, and B 422406). Those of the photographs which have never been published are protected by common law copyright.

I am informed that Mr. Harold Weissberg has requested, under the Freedom of Information Act, that copies of the Luow photographs be made for him by the FBI. As copyright proprietor of the photographs, Time Inc. objects to any such unauthorized copying.

Time Inc. has offered, in correspondence with Mr. Weissberg, to make as many prints of any of the photographs as he desires at our standard print charge. This is the same rate as any customer for Time Inc. prints would be charged.

Mr. Weissberg indicated to Time Inc. in correspondence in 1976 that he had at that time no interest in publishing any of the Luow photographs. However, he further indicated that if he did publish any of them,

*DEFENDANT'S Exhibit 1*

*CA. 75-1996*