UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG	:	
Plaintiff	:	
v.	:	Civil Action No. 75-1996
U. S. DEPARTMENT OF JUSTICE	:	
Defendant	:	

OPINION

In this case plaintiff is suing under the Freedom of Information Act, 5 U.S.C. 552, for materials in the possession of the Federal Bureau of Investigation which pertain to the assassination of Dr. Martin Luther King, Jr. The particular items in controversy here, certain photographs of the crime scene taken after the shooting, are the subjects of cross-motions for summary judgment by the parties. The Court grants plaintiff's motion and denies defendant's, for the reasons stated below.

I.

On April 15, 1975, plaintiff submitted an FOIA request to the Department of Justice for information on the assassination, including "[a]ll photgraphs from whatever source taken at the scene of the crime on April 4th or April 5th, 1968." The request was referred to the FBI, which had investigated the killing for the Department, and the Bureau acknowledged receipt of the letter on April 29, 1975.

The Bureau apparently encountered difficulty in processing plaintiff's request; by late November it had not notified plaintiff either that the information would be supplied or that exemptions in the FOIA would be invoked as to some or all of the

material. On November 28, 1975, plaintiff filed this suit to compel disclosure of the records.

The number of FBI documents covered by plaintiff's request has turned out to be enormous, and as of this date, the search for and processing of pertinent items continues. At one conference between plaintiff and the FBI on March 23, 1976, plaintiff raised the possibility that certain crime scene photographs existed. Subsequently, the agency's Memphis Field Office reported discovery in its records of 107 photographs of the scene taken by a Mr. Joseph Louw moments after Dr. King had been shot. Mr. Louw had been employed by Life Magazine at the time he took the photographs, and Time, Inc., had retained rights to the pictures.

On May 11, 1976, FBI Director Clarence Kelley informed plaintiff that copies of the 107 photographs in the FBI's possession would not be turned over to him. The letter pointed out that Mr. Weisberg had been allowed to inspect the copies, but that they were "the property of Time" and that the company "had not granted authority to release copies of these photographs, although they had no objection to Mr. Weisberg's viewing them." The letter stated further that the FBI was exempt from any duty to make prints of the photos for Mr. Weisberg by FOIA exemptions 5 U.S.C. § 552(b)(3) and § 552(b)(4).

In a letter dated June 25, 1976, an official for Time indicated that prints of each of the 107 photographs could be obtained for $10.00 and that if Mr. Weisberg, at a later time, wished to secure the right to reproduce the prints, he would have to secure additional permission and pay an additional fee. Plaintiff points out that, at $10.00 each, Time's charge for the 107 pictures amounts to $1,070. He points out further that, in contrast, the FBI charges

$0.40 a print for reproducing photographs in its possession, and that it would cost plaintiff a total of $42.80 to obtain the pictures this way.

Plaintiff asserts in an affidavit accompanying his motion for summary judgment that his interest in the photographs is "for study, not publication."

The issue before the Court is the applicability of the Freedom of Information Act to the facts described.

II.

Defendant raises a "threshold issue" of whether the 107 photographs are "records" within the meaning of the Freedom of Information Act. Defendant suggests that an appropriately narrow definition of "records" is supplied by SDC Development Corp. v. Matthews, 542 F.2d 1116 (1976), a case from the Ninth Circuit, which concludes that the Act was "primarily" intended to cover documents "which dealt with the structure, operation, and decision-making procedure of the various governmental agencies." Id. at 1119.

Whatever the value of this definition for the particular facts of the SDC case, it has no relevance for the massive disclosures which the trial and appellate courts of this circuit have ordered regarding government investigations into the assassinations of the last fifteen years, the activities of political dissidents, and other controversial matters of public concern. See Brandon v. Eckard, No. 74-1503 (C.A.D.C. December 22, 1977); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (1976). The materials sought in these suits have not concerned bureaucratic structure, operation and procedure; they have involved investigatory materials and other raw data of interest to journalists, historians and activist groups.

The architecture of the Freedom of Information Act refutes defendant's narrow reading of the term "record." The presence in the Act of an exemption for trade secrets and commercial or financial information "obtained from a person," 5 U.S.C. § 552(b)(4), indicates that Congress foresaw that much of the information sought under the Act would be matter supplied to the government agency by outside parties. Before an item can be a candidate for an exemption, it must be a "record;" otherwise the exemption would be redundant and unnecessary. See Soucie v. David, 448 F.2d 1067, 1076-1079 (1971). Therefore, Congress must have understood that the term "record" would encompass material submitted to the agencies by outsiders.

The Court also notes that an agency has discretion to release materials which qualify for exemption under the Act. EPA v. Mink, 410 U.S. 73, 80 (1973). Thus, even if an agency -- or a court upon de novo review -- were to determine that an item was "obtained from a person," is a trade secret, and is "confidential," it could still disclose that item if the countervailing needs of the public required it.

The language of § 552 (b)(4) and the vesting of discretion in agency and court would be empty gestures if submitter-supplied material did not count as "records." Defendant's restrictive definition of the word must be rejected.

III.

Defendant's second argument for refusing to supply plaintiff with copies of the photographs is that they are exempt from

disclosure by the terms of § 552(b)(3). To be eligible for this exemption, the records requested must be "specifically exempted" from disclosure by a "statute". The government identifies the statute in question as the Copyright Law, 17 U.S.C. 1 et seq.

Defendant's claim has a fatal flaw -- by its own admission, only 3 of the 107 photographs have been registered for statutory copyright protection. Defendant's Motion for Partial Summary Judgment at 5. 104 of the photographs, therefore, are ineligible for the (b)(3) exemption.

The Court is loathe to analyze in any depth the application of the exemption to the remaining three photographs, because less than $30 is at stake. The Court notes, however, that a statute can spread its exemptive umbrella only if it requires that the matters in question be withheld from the public "in such a manner as to leave no discretion on the issue," or, alternatively, establishes "particular criteria for withholding" or "refers to particular types of matters to be withheld." The Copyright Law does not satisfy these criteria. Application of the law by the courts has traditionally been subject to the equitable doctrine of "fair use" and in 1976 the Law was amended to formally incorporate the doctrine. See SENATE COMMITTEE ON THE JUDICIARY, REPORT ON COPYRIGHT LAW REVISION, S. REP. NO. 94-473, 94th Cong., 1st Sess.(1975); CONFERENCE REPORT TO ACCOMPANY S. 22, GENERAL REVISION OF THE COPYRIGHT LAW, H. REP. No. 94-1733, 94th Cong., 2d Sess. (1976).

The Court finds that the "nature of the copyrighted work" and the "purpose and character of the use" proposed qualify plaintiff to receive the photos under the fair use doctrine as codified at 17 U.S.C. § 107. See 1 NIMMER ON COPYRIGHT § 9.232-9.24 (1976).

In light of plaintiff's pledge to use the pictures for scholarly work and not for publication, the effect of the use "upon the potential market for or value of the copyrighted work" will not be substantial. 17 U.S.C. § 107(4).

In addition, the Court notes that even if it had found the Freedom of Information Act's (b)(3) exemption to have been applicable, it would have exercised its discretion to make the photos available, given the substantial controversy surrounding both the assassination of Dr. King and the thoroughness of the government's investigation of the matter.

IV.

Defendant's third argument against supplying copies of the photographs to plaintiff is that they qualify for exemption from disclosure under § 552(b)(4). The photographs must be found to constitute trade secrets, commercial information, or financial information. Moreover, they must then be found to be protected by privilege or to be "confidential."

The policy underlying the Freedom of Information Act requires that the disclosure requirement be construed broadly, the exemptions narrowly. Soucie, supra at 1078, 1080. The words of § 552(b)(4) cannot be easily manipulated to fit the photographs at issue here. The pictures are not trade secrets or financial information, and they are not "commercial information" as the term has been defined in this Circuit. See National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (1974).

Moreover, the photographs are certainly not protected by privilege; neither are they "confidential." It is true, as defendant asserts, that among the legislative purposes underlying use of the term "confidential" is avoidance of any impairment of the

"Government's ability to obtain necessary information in the future." Id. at 770. It is useful, in connection with defendant's claim of confidentiality for these photographs, to emphasize the special circumstances which govern the Court's decision to order disclosure of these items. These photographs are, for the most part, unprotected by statutory copyright. To the extent that they are so protected, their relevance to one of the most tragic events of the last several decades qualify them for "fair use" when photographs of many other events would not. Moreover, they portray the scene of the King slaying as it existed within minutes of the crime; if the FBI had desired,it could have subpoenaed the pictures as a valid step in its investigatory function. As such, the photos are similar to the audit reports considered in the National Parks case:

> Since the concessioners are required [emphasis in original] to provide this financial information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future. Id. at 770.

IV.

The Court concludes that the 107 photographs at issue here constitute "records" subject to the Freedom of Information Act and do not fall within the exemptions claimed by defendant. Plaintiff's FOIA request for prints of the photos in the FBI's possession is hereby granted.

JUNE L. GREEN
U.S. District Judge

Dated: February 9, 1978