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Assistant Attorney General
Civil Division
Attention: Lynne K. Zusman

~~Di - Mr. Decker~~
Attn: Mr. Hartingh
1 - Mr. Mintz
September 19, 1977
1 - Mr. Mathews

Assistant Director - Legal Counsel
Federal Bureau of Investigation

HAROLD WEISBERG
v. UNITED STATES DEPARTMENT OF JUSTICE
(U.S.D.C., D.C.)
CIVIL ACTION NUMBER 75-1996

Reference is made to the September 7, 1977, telephone conversation between Assistant United States Attorney (AUSA) John Dugan of the District of Columbia, and Special Agent (SA) Charles Mathews III of this Bureau's Legal Counsel Division, and the conversations between AUSA Dugan, SAs Mathews and Parle Thomas Blake, also of this Bureau's Legal Counsel Division, Douglas Mitchell of the Department's Office of Privacy and Information Appeals, and Lynne K. Zusman of the Department's Information and Privacy Section on September 13, 1977.

Enclosed herewith are the original and five copies of the following affidavits:

- (1) SA Edward A. Shea, Atlanta, Georgia
- (2) SA Bennie F. Brewer, Birmingham, Alabama
- (3) SA William L. Deaton, Chicago, Illinois
- (4) SA Kenneth A. Jacobsen, Los Angeles, California
- (5) SA Burl F. Johnson, Memphis, Tennessee
- (6) SA Clifford H. Anderson, New Orleans, Louisiana
- (7) SA Herbert Northcutt, Jr., St. Louis, Missouri
- (8) SA Edward A. Waite, Jr., Washington, D.C.

These affidavits are being provided to demonstrate the FBI's compliance with that stipulation entered into in captioned litigation between plaintiff and the Department of Justice on August 5, 1977.

Also enclosed is one copy of the September 13, 1977, letter from Mr. Harry M. Johnston, Associate Counsel, Time, Inc., to SA Mathews.

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(SEE NOTE PAGE 5)

FOIA

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During the referenced September 7, 1977, telephone conversation, AUSA Dugan advised SA Mathews that on September 6, 1977, plaintiff had filed with the Court a document entitled "Motion for Summary Judgment With Respect to Crime Scene Photographs Taken By Joseph Louw," along with a "Memorandum of Points and Authorities" in support of this Motion. AUSA Dugan also advised that plaintiff's counsel had informed him that plaintiff intends to file a motion in the near future requesting a complete waiver, prospectively and retroactively, of all duplicating fees in this matter. AUSA Dugan thereafter requested the FBI's views as to the Motions filed and contemplated by the plaintiff and the conference of September 13, 1977, was held, in part, to present the FBI's position.

By way of background in this matter, as you are aware, plaintiff filed suit pursuant to the Freedom of Information Act (FOIA) on December 28, 1975, seeking various records pertaining to the assassination of Dr. Martin Luther King, Jr. Among those records located at the FBI's Memphis Office pursuant to plaintiff's request were 107 photographs taken at and in the vicinity of the "crime scene" by Joseph Louw, a professional photographer. Subsequent correspondence by this Bureau with Time, Inc., the agent for Mr. Louw, revealed that Mr. Louw obtained a copyright for these photographs and that Time, Inc., is his agent in this matter. Time, Inc., agreed to allow plaintiff to inspect the photographs but denied permission for this Bureau to reproduce the photographs for distribution to plaintiff or any other individual, suggesting that if plaintiff desires copies of the photographs he should contact Time, Inc., directly. On May 5, 1976, plaintiff was allowed to view the Louw photographs at FBI Headquarters (PEINQ) whereupon he selected 15 photographs he desired copies of. In view of the Time, Inc., position in this matter, plaintiff's request was denied and he was formally advised of this denial by our letter dated May 11, 1976. At that time, plaintiff was advised that he was being denied copies of the Louw photographs pursuant to Title 5, United States Code, Section 552 (b)(3) and (4). Plaintiff thereafter has corresponded directly with Time, Inc., concerning these photographs, but evidently has refused to pay the \$10.00 per photograph charge desired by Time, Inc.

SA Mathews has telephonically contacted Mr. Harry M. Johnston, Editorial Counsel, Time, Inc., on September 8 and 12, 1977, to determine if Time, Inc., still desires, as the agent

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for Mr. Louw, to assert the copyright protection of the Louw photographs. Time, Inc., advised their position has not changed from that originally held and added that while the plaintiff has not accepted the Time, Inc., offer to sell the Louw photographs at \$10 a copy, many other individuals have. The enclosed letter to SA Mathews restates Time, Inc., position in this matter and supplies additional background information concerning Mr. Louw's copyright proprietorship.

By letter dated July 12, 1977, Mr. Quinlan J. Shea, Jr., Director of the Department's Office of Information and Privacy Appeals, advised the plaintiff that after considering his request for a waiver of reproduction fees in this matter, he had decided to reduce the fee from ten cents per page to six cents per page. This reduction was effective immediately and was both prospective and retroactive.

The Bureau's position in the matter of the Louw photographs as conveyed at the September 13, 1977, conference remains as stated in our May 11, 1977, letter to the plaintiff; that is, that Title 5, United States Code, Section 552 (b)(3) prohibits dissemination of the Louw photographs by the FBI and that subsection (b)(4) arguably allows the withholding of these photographs.

As you are aware, the FOIA provides at Title 5, United States Code, Section 552 (b)(3) that records need not be disseminated that are ". . . specifically exempted from disclosure by statute." This exemption is applicable to the Louw photographs in that the copyright laws of the United States, found at Title 17 of the United States Code, specifically grant 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 Louw photographs, the FBI, by reproducing and distributing the photographs to the financial detriment of the copyright proprietor, would be violating the Copyright Law.

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The reproduction of the Louw photographs would not only be a serious infringement of Mr. Louw's copyright but would be of significant harm to the FBI's ability to solicit information of this type in the future. The proprietor of a copyright faced with financial loss if the FBI disseminates (either voluntarily or pursuant to court order) his copyrighted material would be most reluctant to provide this material to the FBI. This position is also the basis for the FBI's co-utilization of exemption (b)(4) to withhold from release the Louw photographs. If it is accepted that the photographs are "commercial information" as required by (b)(4), in that they photographically relay information to Time, Inc., not available to Time, Inc., competitors, then, when this position is coupled with the obvious economic loss to Mr. Louw, and the loss of the ability of the Government to acquire this type of information in the future, the (b)(4) exemption is applicable. 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.

It was suggested by Mr. Mitchell during the referenced September 13, 1977, conference that the second clause of exemption (b)(7)(D) may also be applicable to withhold the Louw photographs. While this Bureau does not believe the fact situation in connection with the Louw photographs is particularly suitable to the application of a (b)(7)(D) exemption¹, we do appreciate the merits of the theory in general.

As to the matter of a further reduction or waiver of reproduction fees in this matter, this Bureau would oppose any such reduction or waiver. While the FOIA at Title 5, United States Code, Section 552 (b)(4)(A) provides that the agency can reduce or waive fees if the production of documents

1. Since we have advised plaintiff (and through papers filed with the Court, the general public) of the identity of the source of the photographs, and allowed him to see all of them, coupled with the fact that Time, Inc., is willing to furnish him and the public, copies of any and all of these photographs at \$10 each, we believe it would be counter-productive to attempt to convince the Court that they comprise "confidential information furnished only by the confidential source."

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can be considered as ". . . primarily benefitting the general public" it should be noted that the FBI has committed itself to processing the documents in question and, as they were processed, making them available for public inspection. These documents are currently available to the public for inspection in the FBI Reading Room and whichever documents are desired after inspection are available for reproduction at the usual charge of ten cents a page. The plaintiff could have availed himself of this procedure, purchasing only those documents he desired and foregoing those of no interest to him, but he did not.

It is further noted that if the reproduction fees are waived in this matter for plaintiff as a "public benefit," the public as well must be granted the same consideration. There have currently been processed over 19,000 pages in this matter from FBIHQ with thousands more pages to be processed from FBI Field Offices. It can readily be seen that even at the current reduced fee of six cents per page, a total waiver of fees would cause a substantial financial and manpower drain if the waiver of fees generates numerous requests.

This matter continues to be handled at this Bureau by SA Mathews. If further information or assistance is required, he may be contacted at (202) 324-4522.

Enclosures (49)

1 - United States Attorney (Enclosures 9)
District of Columbia
Attention: Mr. John Duran
Assistant United States Attorney