

Time

The Louw/Life Photographs

"Plaintiff's success in obtaining the TIME/LIFE photos -- which were withheld solely because they had been copyrighted by TIME, Inc -- also did not confer a public benefit," the brief states on page 53. On page 47 it is represented that TIME had opposed providing copies.

The actuality is that the FBI first swore it did not have these photographs, which were taken by a photographer on contract for public TV who was at the scene of the crime at the time of the crime. SA Thomas Wiseman attested to a search of the MURKIN file and that there is no mention of them in it.

I knew from LIFE that it had given copies to the FBI. Any search limited to MURKIN, if it did not disclose these pictures, was an inadequate search. But they are in MURKIN, a complete tracing of their possession from the New York field office to FBIHQ, which sent them to Memphis, which ignored them entirely. They present a serious problem to the official account of the crime. When FBIHQ was forced to consult Memphis, Memphis suggested the withholding by copyright claim,

Only after remand by this court ~~did the truth come out when this court~~ to join TIME, Inc., did the truth come out. Time RTIME had no objections and had stated specifically that it felt it was adequately protected by the copyright.

All litigation involving these photographs was entirely unnecessary and was forced by the defendant which knew that TIME had no objections and felt it was adequately protected by copyright.

Citing nothing in the case ~~record~~ record in support -- and ignoring the case record, which is quite specific and unrefuted in this regard -- the brief alleges further that "(p)laintiff's need to possess copies of the photos was a matter of purely private concern with no public benefit whatsoever." (Page 53) *E m p h i s i s p r i v e*

One of the major disclosures of this litigation with regard to FBI investigations in political crimes (later confirmed by similar JFK assassination FOIA litigation) is that the FBI avoids any photograph that does not have its candidate from criminal with

a smoking gun in his hand. It likewise holds that anything with which it does not agree, for whatever reason, whim or fancy, is valueless.

I had seen these pictures. TIME also had let about 20 of them out, and I had not only seen them, I provided them to the court to underscore the unserious nature of the FBI's claimed reason for refusing ~~these~~ copies of them

Scholarship and investigation are not to be confused with idle curiosity or souvenir collection. I stated under oath, without contradiction of any kind, that these pictures had to be examined closely, with magnification, and then compared with other evidence. This is precisely what I did. I then offered to inform the court in camera what these pictures that the FBI ignored do disclose and its significance. There is public benefit in it that will be made public not as a one-shot sensation but in context with this other evidence. If the defendant had not stonewalled this case for so many years I would have done that long before this. But it is not responsible or even fair to the FBI and the Department for a writer to write a book involving litigation until that litigation is complete.

It is significant that the FBI did not accept my offer for the in camera showing. There is nothing in the case record that supports the convenient and untrue claim that there "is no public benefit whatsoever."

Incredible as it may seem, given the FBI's self-ortrayal and claim to unending diligence and devotion to detail, that the FBI never took any crime-scene pictures of its own until months later and then for the limited purpose of making a mockup in its exhibit unit. The FBI also never asked anyone for pictures taken at the scene of the crime and at the time of the crime. (It later forgot some of those of the local police and managed to get them all mixed up so it can give no accounting or identification of them, as I discovered after it withheld them to and was compelled to disclose them by the court.) Such pictures were taken by others than Louw. The local and out-of-town papers and the wire services all had such pictures but the earliest of them were taken a little after Louw's which were taken immediately, when he heard the shot.

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The explanation of the brief (page 57) is that TIME "decided not to become embroiled in this litigation." The actuality is that TIME had always felt that it was adequately protected by copyright and the defendant withheld this until the defendant was confronted with joining TIME. The claim to "reasonable basis in law" for the withholding is based on what is not true, that TIME feared loss of or violation of its copyright.

This shows how they can down to search while

Plaintiff claimed that the FBI had taken the taxicab records from a Memphis taxicab driver, James McGraw, and the Department was ordered by the court to search for such documents (Opinion of Dec. 1, 1981, p. 10 n.1 and Order, p. 4). After a thorough search, no evidence of any FBI records on a taxicab driver named James McGraw were found. R.228, Fourth Affidavit of John Phillips.

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(9) TIME/LIFE Photos.

The FBI had in its files some copyrighted photographs which the copyright holder, with TIME, Inc., acting as its agent, refused to release to plaintiff. The copyright holder and TIME had no objection to plaintiff's looking at the pictures in the FBI files or negotiating a purchase of them. It did object to the FBI's giving them to plaintiff. The issue was litigated before the district court, which ordered the photos released, and in this Court, which remanded the case to the district court with orders that TIME, Inc. be joined as a party. Weisberg v. Department of Justice, 631 F.2d 824 (D.C. Cir. 1980). Rather than do this, TIME wrote to the Department waiving its objections and permitting release of the photos to plaintiff. The FBI promptly did so (Tr. August 15, 1980, pp. 3-4).¹⁷

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¹⁷ Our position with respect to this item of plaintiff's initial request is discussed at n.15, supra.

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the abstracts are essentially duplicative of information already released to plaintiff. The abstracts reveal less information than the documents which plaintiff received.

R. 223, p. 3. Regarding item (6), as we have already stated at page 46, supra, it is clear that this item was not the source of any page one item in the L.A. Times.

Finally, plaintiff's success in obtaining the TIME/LIFE photos--which were withheld solely because they had been copyrighted by TIME, Inc.--also did not confer a public benefit. As explained by this Court in its opinion on this

issue:

When the FBI advised TIME of Weisberg's FOIA request, TIME stated it had no objection to having the photographs viewed, but that it would object if they were copied because such reproduction would violate its alleged copyright on the photos.

Weisberg v. Department of Justice, 631 F.2d 824, 825 (D.C.

Cir. 1980). Consequently, plaintiff's accomplishment of having

TIME, Inc. eventually voluntarily agree to give copies of the documents to him, involved no "disclosure" at all. The photos had always been available for his or the public's viewing; indeed, plaintiff had viewed them himself at FBI headquarters.

Plaintiff's need to possess copies of the photos was a matter of purely private concern with no public benefit whatsoever.

Thus, it is plain that plaintiff's lawsuit has not benefited the public in any meaningful sense. Plaintiff has succeeded only in forcing the Department to undertake countless futile searches and to release thousands upon thousands of pages of

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numerous denials of plaintiff's repetitive motions for reprocessing and further searching, and by the duplicative and/or non-responsive nature of the documents obtained by plaintiff after 1977. It is equally clear that the Department had a reasonable basis for withholding copyrighted photographs at the copyright holder's request; indeed, this Court recognized that plaintiff's request for copyrighted materials raised a "novel question" under the FOIA (631 F.2d at 825), and the Court reversed the district court's exemption holding and remanded the case to the district court for further consideration of the exemption claims after joinder of the copyright holder, TIME, Inc., as a party. At this point, TIME--whose interests the Department had been representing--decided not to become embroiled in this litigation and authorized release of the photos to plaintiff. Thus, it is apparent that the Department had a "reasonable basis in law" for every position it took in this case.

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In sum, there can be no question but that the "public benefit" and "reasonable basis" prongs weigh heavily in the Department's favor in this case, and outweigh plaintiff's non-commercial interest in disclosure. Accordingly, plaintiff is not entitled to fees or costs for this litigation.

C. Assuming Arguendo That Plaintiff Is Entitled To Fees And Costs, The District Court's Award of \$93,926.25 In Fees Is Plainly Excessive.

Even if plaintiff is entitled to an award of fees in this case, the district court's exorbitant award of \$93,926.25 is

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