

- 1 - Mr. Bassett
- Attn: Mr. Beckwith
- 1 - Mr. Mintz
- 1 - Mr. Mathews

April 3, 1978

Assistant Attorney General
 Civil Division
 Attention: Morton Hollander
 Chief, Appellate Section

Assistant Director - Legal Counsel
 Federal Bureau of Investigation

~~FEDERAL GOVERNMENT~~

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

11-1
 2/12

Reference is made to your letter dated March 16, 1978, your reference BAB:MH:WFimmel:bjf, by which this Bureau's comments were solicited pertaining to an adverse decision rendered on February 9, 1978, by United States District Judge June L. Green in captioned matter.

It is this Bureau's opinion that Judge Green's Order is contrary to law and could result in substantial harm to subsequent investigative efforts by the Federal Bureau of Investigation (FBI), and we, therefore, recommend appeal.

As you are aware, Judge Green's Order requires that the FBI reproduce and supply plaintiff, pursuant to his Freedom of Information Act (FOIA) request, with 107 photographs taken and provided the FBI by Mr. Joseph Low. These photographs, which depict the crime scene where Dr. Martin Luther King was assassinated, were taken by Mr. Low in his capacity as a photographer for Time-Life, Inc., and were furnished to the FBI by Mr. Low to assist this Bureau with its investigation of the assassination. Some of the photographs are protected by statutory copyright while the remainder are afforded protection by common law copyright. The FBI, in refusing to release these photographs to plaintiff, relied upon exemptions (b) (3) and (b) (4) of the FOIA, and we believe the Court has erred in not supporting our position.

Exemption (b) (3)

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The FBI's position as to the Low photographs is that both statutory and common law copyright protection are vested in these photographs and that by reproducing these photographs for distribution to the general public the FBI would be violating the law.

These copies are for the use of the U.S. District Court in D.C. and should be returned to the U.S. District Court in D.C. after the hearing on 4/4/78.

- Assoc. Dir. _____
- Dep. AD Adm. _____
- Dep. AD Inv. _____
- Asst. Dir.:
- Adm. Servs. _____
- Crim. Inv. _____
- Ident. _____
- Intell. _____
- Lab. _____
- Legal Coun. _____
- Plan. & Insp. _____
- Rec. Mgnt. _____
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- Director's Sec'y _____

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In denying that the copyright laws require the use of the (b) (3) exemption, the Court, without discussion, summarily held that common law copyright cannot be considered for use with the (b) (3) exemption. While it is recognized that the (b) (3) exemption only addresses those records required to be withheld by statute, it defeats not only the spirit of the exemption but simple logic not to conclude that the exemption also reaches those records required to be withheld under common law. There should be no argument that if the common law forbids dissemination of certain records, then these records should be exempted from release pursuant to (b) (3).

The Court next states that the statutory copyright law (Title 17, United States Code, Section 1, et seq.) does not qualify as the type of statute to be considered under (b) (3). However, the contrary would appear to be the case. The FOIA at (b) (3) allows for the withholding from release of information that is ". . . specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue . . ." Title 17, United States Code, grants the exclusive right to ". . . print, publish, copy and vend the copyrighted work . . ." to the copyright proprietor. Specific criminal penalties exist that are applicable for violations of the copyright law.

Judge Green concludes her discussion of (b) (3) by advising even if that exemption had been found applicable she would have exercised her discretionary powers to make the photographs available to the plaintiff. If it is accepted that the reproduction and distribution ^{1/} of the photographs by the FBI would be a violation of the law to which criminal penalties attach, it is doubtful that the Court would utilize its discretion to order the FBI to violate such laws.

^{1/} It should be noted that while we consider the reproduction and dissemination of the photographs to the plaintiff alone to be contrary to law (even though he has pledged not to reproduce them) that the problem is compounded when it is recognized that these photographs will now have to be made available to all requesters.

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Exemption (b) (4)

The Court, in order to defeat the use of the (b) (4) exemption, generally attacked the applicability of the exemption to the photographs and specifically found that the photographs could not be considered confidential because they were susceptible to subpoena.

While we agree that National Parks and Conservation Association v. Morton, 498 F. 2d 765 (1974) is the leading case pertaining to the (b) (4) exemption in this circuit, we do not feel that a determination that the Low photographs are "commercial information" as required by (b) (4) would do injury to the statute. Furthermore, National Parks, supra., at 770, squarely addresses the confidentiality problem confronted in this matter when it states:

To summarize, commercial or financial matter is "confidential" for purposes of this exemption ((b) (4)) if disclosure of the information is likely to have either of the following effects:
(1) to impair the Government's ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

We believe that both criteria for confidentiality are fully satisfied in this matter. It should be readily recognized that by providing free of charge to an individual an item he would normally be required to pay for, the competitive position of the vendor of that item is substantially harmed. In this instance, the Low photographs will become almost valueless in that, regardless what plaintiff does with the photographs, they will also be available at a nominal charge to the general public. It can further be readily recognized that an individual

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when faced with an almost certain loss of commercial value of an item, will not voluntarily provide that item to the FBI. This, of course, seriously impairs the Government's ability to obtain necessary information.

The Court's reasoning that because the photographs could have been subpoenaed they cannot be considered confidential is specious. At no place does the FOIA require that to be considered exempt, information must not be available through subpoena. To the contrary the law specifically allows for the protection of the identities of informants and all the information provided by informants even though these individuals could be subpoenaed and required to provide much of the information they possess.

Conclusion

It is this Bureau's opinion that the reproduction of the Low photographs would not only be a serious and illegal infringement of Mr. Low's copyright, but would cause significant harm to the FBI's ability to solicit information of this type in the future. If the FOIA is allowed to defeat the purposes of the copyright laws, no citizen will again be willing to assist Federal law enforcement through the voluntary production of copyrighted materials. For the above reasons, we recommend that Judge Green's February 9, 1978, Order, be appealed.

1 - United States Attorney
District of Columbia

1 - Ms. Lynne K. Zusan
Chief, Information and Privacy Section
Attention: Ms. Betsy Ginsberg

NOTE:

Instant memo advised the DOJ that the Bureau recommends an appeal of an order rendered by USDJ June Green on 2/9/78, and provides our reasons therefor. Judge Green's Order disallowed the use of the copyright laws as a (b) (3) statute.

JIF

APPROVED:

Director _____
Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____

Adm. Serv. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____

Legal Coun. *m/ff*
Plan. & Insp. _____
Rec. Mgnt. *F. W. Lee*
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