

NEWS

LAW

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Raid On The FOI Act:

*Justice Dept.,
CIA & FBI And
Business Target
Public's Right
To Know*

**Press Bites Back At Libel Suits
Bills Outlaw Naming of Agents
Court Closures At Same Pace
Justice Dept. Seizes Toll Data**

**INSIDE: 68 NEWS SUMMARIES OF
LEGAL ACTIONS AFFECTING PRESS**

should also be kept confidential, he says.

The *Star's* Fialka and other reporters who oppose releasing the reports say an interview between a reporter and a government official is the intellectual work product of the reporter in which he has a significant property interest; it is not exclusively information produced by the government. The topics selected, the questions asked and the follow-up questions, are to a great degree the result of the reporter's background and expertise in this particular subject matter, they say.

Reporters Argue 'Work Product'

Therefore, the Army should not be required to disclose the interview because it should be exempted as a "journalistic trade secret" by the Trade Secrets Exemption of the FOI Act, and/or possibly the exemption for intragovernment memorandum.

There does not appear to be any litigated case on this novel question. Copyright cases hold that unpublished and uncopyrighted information, including research, cannot be appropriated without permission and that government information can be considered confidential for a limited period of time because its premature release would cause financial damage.

As a matter of public policy, Fialka says, using the Freedom of Information Act to obtain the after-action reports inhibits initiative reporting for several reasons:

First, reporters will be hesitant to do in-depth pieces because they will fear that their work will be disclosed to competitors.

Second, government contractors who do business with the government and who are criticized by military officials will in turn no longer talk to the press.

Third, because the after-action reports and tapes contain off-the-record and unattributable information, there is a danger that confidential sources will be disclosed.

The Army took the position that disclosure of the after-action reports may be denied under the trade secrets exemption of the FOI Act, but only until the news article is printed or broadcast. After publication of the article, the Army believes that the interview should be released whether or not the entire content of the interview was published.

"Since reporters are employees of competitive business enterprises . . . the release of after-action reports relating to stories not yet published would

cause competitive harm to the news reporter and the enterprises he or she works for," an Army spokesman told Taylor.

The Navy however, came to an opposite conclusion in Taylor's appeal of an earlier denial. It said that the trade secrets exemption did not apply, and released 12 documents Taylor had requested.

Taylor, a member of the Steering committee of the Reporters Committee, asked that fellow members be polled on their views. Of those who responded, almost half favored Fialka's position, while the rest were almost evenly split in favoring either Taylor's or the Army's position.

In early March, *The Washington Star* wrote on reporter Fialka's behalf to Secretary of Defense Weinberger. The *Star's* counsel asserted that the Defense Department must consult with Fialka before any after-action report pertaining to him was released pursuant to an FOI request. The department would have to inquire whether "any part of the report reflects a story line or information not yet published."



Star Reporter John Fialka:
... Private Information

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Failure to protect privileged and confidential information "would constitute a serious violation of Mr. Fialka's and *The Star's* constitutional rights and would be an illegal release of a trade secret," *The Star* warned. In early April, the department agreed to do so.

Secretary Weinberger also notified *The Star* that he had "discontinued the requirement to prepare the . . . after-action reports." But he stopped short of forbidding such monitoring. The department's general counsel said that the decision whether or not to require the reports is now within the discretion of

the separate defense agencies and departments.

In late March, the Air Force Department notified Taylor that it was releasing one audiotape and 692 pages of after-action reports. The other services also released documents and by early May, Taylor said he had received more than 1,200 pages of documents that he had requested. Taylor said he had also succeeded in having copying and search fees for the after-action reports waived by all the services. □

WASHINGTON, D.C.:

Historian Pries King Death Scene Photos From FBI's Files

A historian who is researching a scholarly book on the assassination of Martin Luther King Jr. has secured 107 photographs through a Freedom of Information Act request to the FBI.

The photographs, which had been taken at the assassination scene by a *LIFE* magazine photographer, were part of the FBI file on the assassination. The FBI had said it could not release them because they were copyrighted by *LIFE*. Federal courts upheld the historian's right to them under the fair-use provision of the FOI Act.

In April 1975, historian Harold Weisberg submitted an FOI request to the FBI for information on the assassination of Dr. Martin Luther King Jr. Weisberg asked for all photographs taken at the scene of the crime on April 4 or 5, 1968.

The FBI acknowledged receipt of the request but failed to process it. In November 1975, Weisberg filed suit in U.S. District Court in Washington, D.C., to compel disclosure.

Subsequently, the FBI Memphis field office located 107 photographs of the scene. They had been taken by Joseph Louw, who at the time worked for *LIFE* and Time Inc.

FBI Director Clarence Kelley informed Weisberg several months later that he could not have copies of the photos, but could inspect them. Kelley claimed that the photos were "the property of Time [Inc.]" and the company "had not granted authority to release copies" of them.

Time Inc. offered to sell Weisberg copies of the photos at \$10 per print, as compared to the 40 cents per print that would have been charged by the FBI. But the company also said Weisberg

could not reprint photos without obtaining additional permission and paying an additional fee. Time Inc. never appeared in court to argue for protection of its photos.

Dissatisfied with the price differential, Weisberg pursued his FOI suit.

In court the government argued the photos were not agency records available to the public because they do not "deal with the structure, operation, and decision-making procedure of the various government agencies."

The department also claimed that photos were registered under the Copyright Act and, therefore, could not be reprinted without permission of the copyright holder.

Weisberg argued that the Copyright Act's fair-use provision allowed for limited use of the photos for scholarly purposes.

The District Court in February 1978 ruled in Weisberg's favor and ordered the FBI to provide him with prints of the requested photos.

It said that the photos are agency records. "Congress must have understood that the term 'record' would encompass material submitted to the agencies by outsiders," the court added.

Only three photographs out of 107 were actually found to be copyrighted and even those were not protected from disclosure. The court said the Copyright Act did not qualify as an exempting statute under the FOI Act because it permits limited use of copyrighted materials under its fair-use provision.

The government appealed to the U.S. Court of Appeals in Washington (D.C. Circuit), arguing that the photos copyrighted by Time Inc. should not be

considered agency records.

In June 1980 the appeals court ruled that the photos were agency records subject to disclosure. The fact that the records were copyrighted did not preclude them from being treated as agency records under the FOI Act, the appeals court said.

However, this court refused to decide whether Weisberg's request should be granted, and, if so, under what terms. Instead, the court returned the case to

the district court with orders to name Time Inc. as a party because any ruling would affect the value of its copyright.

When the case was returned to district court, however, the Justice Department announced that Time Inc. had withdrawn its objection to the release of the photographs. The court ordered the 107 requested photos released to Weisberg, who reportedly is researching a book on the King assassination. (*Weisberg v. Department of Justice*) □

WASHINGTON, D.C.:

U.S. Policy Favors Fee Waivers For Journalists' FOIA Requests

Wichita Newspaper Presses Suit Against Agriculture Dept.

Government agencies should be generous in waiving searching and copying fees for reporters and editors who make FOI requests, according to guidelines promulgated by the Justice Department under former Attorney General Benjamin Civiletti.

But the guidelines fall short of mandating fee waivers for news gathering and scholarly research. A suit challenging that aspect of the FOI Act has been filed by a Kansas newspaper reporter, with the legal support of the Reporters Committee.

In hearings on the Freedom of Information Act in 1971 and 1972, the House Committee on Government Operations learned that government agencies were resisting the openness mandated by the act. It concluded that "most of the federal bureaucracy already set in its ways never got the message" that the act was intended to make government records accessible to the public.

The charging of excessive searching and copying fees was among the dilatory tactics used to deter the public from using the act, with the result that the FOI Act was being used mainly by private business and lawyers preparing cases for litigation.

To encourage more public use of the act, Congress passed an amendment in 1974 that agencies shall waive or reduce fees for requesters where "furnishing the information can be considered as primarily benefitting the general public."

Various agencies have interpreted the provision differently. In 1980 a Senate subcommittee reported that the discretion to waive or reduce fees was being

abused to thwart the operation of the act, despite the clear congressional directive that liberal use should be made of the waivers. The report recommended that requests by journalists, among others, should be granted waivers; it encouraged adoption of an agencywide policy to ensure compliance.

A study of the agencies' practices, compiled by John Bonine, a law professor at the University of Oregon, further buttressed perceptions that the fee waiver provision was falling far short of ensuring greater access to the government.

Bonine reported that he had discovered many instances of apparently capricious action. In some cases, agencies had denied a waiver to one requester but had granted it to another for an identical request.

Many agencies failed to give reasons for denying requests, beyond a bald conclusion that a waiver was not in the public interest. Most had not even kept track of fee waiver denials or grants to offer guidance for future cases. Only eight agencies had passed regulations entitling news media to waivers.

In January 1981, Attorney General Benjamin Civiletti directed all federal agencies to follow the congressional mandate to use the fee waivers "generously."

For example, Civiletti explained, requesters who should ordinarily receive consideration for partial fee waivers, at minimum, would be representatives of news media or public interest organizations. . . . Such waivers should extend to both search and copying fees and in all appropriate cases, complete rather



Historian Weisberg:
LIFE And Death Photos

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