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98 MAR -2 AM 10:50

CLERK U.S. DISTRICT COURT
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

11 ALLAN J. FAVISH,) Case No. 97-1479 WDK (Ex)
12 Plaintiff,)
13 vs.) PLAINTIFF'S REPLY TO DEFENDANT'S
14 OFFICE OF INDEPENDENT COUNSEL,) OPPOSITION TO MOTION FOR SUMMARY
15 Defendant) ADJUDICATION; POINTS AND
16) AUTHORITIES; DECLARATION OF ALLAN
J. FAVISH
Date: March 9, 1998
Time: 3:00 p.m.
Place: 312 N. Spring St., L.A., CA, Rm. 1600

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1 **POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The OIC failed to answer a single question about the serious evidentiary holes in the Fiske and
4 Starr reports. Among those questions are: Why did Fiske use Lisa’s invalid gun identification?
5 Why, if Lisa was shown a black gun in May 1994, did she reportedly simultaneously describe it as
6 silver? Why did Fort Marcy Park parking lot witnesses between 4:30 p.m.,¹ and just before 6:00
7 p.m., report seeing a brown, rather than a gray car in the lot, despite strong evidence that Mr. Foster
8 was dead by 4:30 p.m., after supposedly driving himself to the park in his gray car? Why did Starr
9 and Fiske ignore that portion of the Haut Report that said there was a “mouth to neck” wound and
10 why did Starr use the apparently altered portion of the Haut Report?

11 While the OIC cites conclusions from government reports,² and appeals to the reader’s blind
12 obedience to governmental authority, plaintiff quotes the raw evidence and appeals to the reader’s
13 intellect. If the case has been so thoroughly investigated, why can’t the OIC answer plaintiff’s
14 questions and provide plausible explanations? The OIC’s failure has simply highlighted the public’s
15 need to see the original photos.

16 The OIC said, "this case is not about Mr. Favish's various theories³ or arguments as to why he
17 disagrees with the Report of the Independent Counsel. There is only [sic] issue properly before this
18 Court: whether the defendant is properly withholding 11 photographs still at issue."⁴

19 First, as discussed elsewhere in the OIC's opposition, in addition to the dispute over the 11
20 photographs, there is also a dispute over the failure of the OIC to produce color copies of color
21 originals; this is the OIC’s unauthorized redaction of the color from the copies it releases.

22 Second, while it is true that the broad primary issue before this Court is whether the OIC is
23 improperly withholding the photos and improperly redacting the color from the photos, it is also true
24 that determination of that issue necessarily entails a determination of the validity of the OIC's

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27 ¹ At page 31, line 10, of Plaintiff’s Motion for Summary Adjudication of Issues, “4:00 p.m.” is stated when the
correct time was 4:30 p.m.

28 ² Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 10:18 – 11:1.

³ At least any theories I postulate are consistent with the official evidence. Unfortunately, the government's theories,
as expressed in the Fiske and Starr reports, are inconsistent with the official evidence.

⁴ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 1:14-18.

1 asserted justification for withholding the photos: the FOIA's (b)(7)(C) privacy exemption.⁵ That
2 determination necessarily entails a balancing of whatever privacy interest that may be found to exist⁶
3 against the public's interest in obtaining the color photos. Determination of the public's interest in
4 obtaining the photos necessarily entails an evaluation of the credibility of the government's reports
5 about the death. Naturally, if the government's reports are not credible, the public has a vital interest
6 in exploring the evidence further in order to find credible answers that fit the evidence.

7 In addition to the lack of any legal basis for using the OIC's "family grief" exemption, the OIC's
8 speculation by two government attorneys failed to show how the Foster family members would come
9 to see these photos if they were released and failed to show why the interests of most Americans in
10 having an honest government are outweighed by the possibility that the family members might think
11 about something they probably have thought about very much over the last four and one-half years.

12 1. THE OIC HAS A HEAVY BURDEN TO JUSTIFY WITHHOLDING THE PHOTOS

13 According to the Ninth Circuit Court of Appeals and the U.S. Supreme Court, the FOIA
14 exemptions should be narrowly construed in light of the purpose of the FOIA:

15 The purpose of the FOIA is to "ensure an informed citizenry." *NLRB v. Robbins*
16 *Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978).

17 Under 5 U.S.C. § 552(a)(4)(B) documents are presumed to be subject to disclosure
18 unless the agency proves that one or more of the nine specific statutory exemptions
19 in § 552(b) applies. To ensure maximum disclosure, those nine exemptions should
20 be narrowly construed. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-1, 48 L.
21 Ed. 2d 11, 96 S. Ct. 1592 (1976). See, e.g., *Church of Scientology v. United States*
22 *Dep't of Justice*, 612 F.2d 417, 426 (9th Cir. 1979) (general purpose of the FOIA
23 justifies narrow construction of the exemptions).⁷

24 2. THERE IS NO PRIVACY INTEREST IN THE SUBJECT PHOTOS

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28 ⁵ See 5 U.S.C. § 552(b)(7)(C).

⁶ Plaintiff has demonstrated that there is no privacy interest here.

⁷ *Van Bourg, Allen, Weinberg & Roger v. National Labor Relations Board*, 751 F.2d 982, 984 (9th Cir. 1985).

1 The OIC said, “In essence, the plaintiff has conceded that the Foster family members have privacy
2 interests.”⁸ A casual reader might think that statement was significant. It isn’t. The truth is that the
3 Foster family members have a privacy interest *in information about themselves*. This is clear from
4 the established legal definition of the word “privacy” as endorsed by the U.S. Supreme Court and
5 others.⁹ Plaintiff’s failure to challenge the OIC’s claims on some of the other photos was based on the
6 existence of a legitimate privacy interest and plaintiff’s determination that the public interest in the
7 information to be gleaned from those photos was insufficient to overcome those privacy interests.
8 The remaining disputes concern photos that do not involve any privacy interest and that have far
9 greater value to the public.

10 The OIC’s discussion of *Reporters Committee*,¹⁰ is seriously flawed. It is immaterial that
11 *Reporters Committee* did not directly involve death photographs. More importantly, the opinion set
12 forth the definition of “privacy” as that word is used in the FOIA. The Court expressly described
13 only two definitions of “privacy” and neither of them was a broad right to be free from emotional
14 grief: “One is the individual interest in avoiding disclosure of personal matters, and another is the
15 interest in independence in making certain kinds of important decisions.”¹¹ The first interest is
16 classic privacy, which Charles Fried explained in his seminal law review article as “control over
17 knowledge about oneself.”¹² The second interest is part of a more broadly based liberty interest.¹³

18 When discussing the first interest, the Court quoted many authorities for support of the central
19 proposition that privacy encompasses “the individual’s control of information concerning his or her
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22 ⁸ Defendant’s Opposition to Plaintiff’s Motion for Summary Adjudication of Issues, at 3:14-15.

23 ⁹ See *Department of Justice v. Reporters Committee*, 489 U.S. 749, 763, 103 L.Ed.2d 774 (1989); *United States v.*
Westinghouse Electric Corp., 638 F.2d 570, 577 n. 5 (3d Cir. 1980) (quoting C. Fried, *Privacy*, 77 Yale L.J. 475,
483 (1968)).

24 ¹⁰ Defendant’s Opposition to Plaintiff’s Motion for Summary Adjudication of Issues, at 3:22 - 5:2.

25 ¹¹ *Reporters Committee*, at 762 (citation omitted).

26 ¹² C. Fried, *Privacy*, 77 Yale L.J. 475, 483 (1968). He also explained that privacy is best thought of as a subcategory
27 of the broader interest in personal liberty: “Most obviously, privacy in its dimension of control over information is
28 an aspect of personal liberty.” Thus, with liberty being the freedom to do things without interference, privacy is the
more specific freedom to do a particular thing: control information about yourself.

¹³ The debate over whether the freedom to do things like get an abortion are correctly described as aspects of privacy
or are better described as part of a more general liberty interest, are not material to our problem. The important
point is that the Supreme Court in *Reporters Committee* described privacy as the right to control information about
yourself and did not describe it as a broad interest in being free from emotional grief. Such a broad definition of
“privacy” would render the word useless since it would subsume any conduct that causes emotional grief.

1 person.”¹⁴ These quotes include: “Meaningful discussion of privacy, therefore, requires the
2 recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in
3 selective disclosure.”¹⁵ “The common law secures to each individual the right of determining,
4 ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . .
5 . [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of
6 the publicity which shall be given them.”¹⁶ Information is private if it is “intended for or restricted to
7 the use of a particular person or group or class of persons: not freely available to the public.”¹⁷
8 “Privacy . . . is the rightful claim of the individual to determine the extent to which he wishes to share
9 of himself with others. . . . It is also the individual's right to control dissemination of information
10 about himself.”¹⁸ “Privacy is the claim of individuals . . . to determine for themselves when, how,
11 and to what extent information about them is communicated to others.”¹⁹ “The right of privacy is the
12 right to control the flow of information concerning the details of one's individuality.”²⁰

13 The Supreme Court in *Reporters Committee* made it extremely clear that privacy is the right to
14 control information about yourself and there is no support in Supreme Court cases for the OIC's new
15 definition that privacy (especially as that word was used by Congress in the FOIA) is a broad right to
16 be free of emotional grief. The cases cited by the OIC either do not support the OIC's argument or,
17 if they do, they conflict with the Supreme Court's decision in *Reporters Committee*.

18 The OIC said that in *New York Times Co. v. NASA*, 920 F.2d 1002 (D.C. Cir. 1990), the “case was
19 remanded to the district court to balance the private and public interests involved before making a
20 release determination.”²¹ This is not entirely accurate. The OIC implied that the D.C. Circuit held
21 that the astronauts' surviving family members had a privacy interest in the voice recordings and the
22 only thing left for the district court to do was balance the competing interests.

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24 ¹⁴ *Reporters Committee*, at 763.

25 ¹⁵ *Id.*, at 763 n. 14 (quoting Karst, “*The Files*”: *Legal Controls Over the Accuracy and Accessibility of Stored*
26 *Personal Data*, 31 *Law & Contemporary Problems* 342, 343-44 (1966)).

27 ¹⁶ *Id.*, at 763 n. 15 (quoting Warren & Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193, 198 (1890-1891)).

28 ¹⁷ *Id.*, at 763-64 (quoting Webster's Third New International Dictionary 1804 (1976)).

¹⁸ *Id.*, at 764 n. 16 (quoting A. Breckenridge, *The Right to Privacy* 1 (1970)).

¹⁹ *Id.*, at 764 n. 16 (quoting A. Westin, *Privacy and Freedom* 7 (1967)).

²⁰ *Id.*, at 764 n. 16 (quoting Project, *Government Information and the Rights of Citizens*, 73 *Mich. L. Rev.* 971, 1225
(1974-1975)).

²¹ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 6:6-8.

1 Contrary to the OIC's implication, the D.C. Circuit did not decide the issue of whether there was a
2 privacy interest. As explained in plaintiff's motion²², the D.C. Circuit said: "*The only question before*
3 *this court is whether the tape passes the threshold requirement, [of being a "similar file" under*
4 *exemption 6] not the strength of the private and public interests at stake."²³ The OIC is incorrect to
5 imply that the D.C. Circuit in *New York Times Co.*, decided the question of whether the surviving
6 family members had a privacy interest in the recordings.*

7 The OIC then cited the district court's opinion in *New York Times Co.*, for that court's assertion
8 that the astronauts' surviving family members had a privacy interest in the voice recordings.²⁴
9 However, the OIC failed to mention that, as explained in plaintiff's motion,²⁵ the district court's
10 assertion was based on an erroneous finding that the D.C. Circuit "acknowledged such a privacy
11 interest in this very case."²⁶ Therefore, the OIC is relying on a district court opinion in *New York*
12 *Times Co.*, that was based on a demonstrably incorrect interpretation of the appellate court's opinion
13 in that case.

14 The OIC then cited the district court's opinion in *Katz v. National Archives & Records*
15 *Administration*, 862 F.Supp. 476 (D.D.C. 1994), for the proposition that "the Foster family has a
16 significant privacy interest that would be defeated were the death scene photos released."²⁷ However,
17 the OIC failed to address the point, made in plaintiff's motion,²⁸ that the district court in *Katz* did not
18 decide the question of whether the FOIA's privacy interest was implicated by the alleged emotional
19 grief of surviving family members. This is because the plaintiff in *Katz* conceded the issue at the
20 outset.²⁹ Therefore, the OIC is relying on a district court opinion for a proposition that was
21 uncontested in that case.

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24 ²² Plaintiff's Motion for Summary Adjudication of Issues, at 6:7-13 & n. 35.

25 ²³ *New York Times Co.*, 920 F.2d 1002, 1004 (emphasis added).

26 ²⁴ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 6:9-24.

27 ²⁵ Plaintiff's Motion for Summary Adjudication of Issues, at 7:1-5.

28 ²⁶ *New York Times Co.*, 782 F.Supp. 628, 631.

29 ²⁷ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 6:26 - 7:9.

²⁸ Plaintiff's Motion for Summary Adjudication of Issues, at 7:6-14.

²⁹ *Katz*, 862 F.Supp. 476, 483 ("Plaintiff does not dispute that the autopsy records qualify as 'similar files' or that the Kennedy family has a privacy interest in the records, limited, however, to preventing public disclosure that would cause clearly unwarranted anguish or grief.").

1 The OIC then cited the D.C. Circuit's opinion in *Badhwar v. United States Dept. of Air Force*, 829
2 F.2d 182 (D.C. Cir. 1987) and said the court decided that “survivors of deceased aircraft pilots have
3 privacy interest in autopsy reports....”³⁰ However, as explained in plaintiff's motion,³¹ the D.C.
4 Circuit in *Badhwar* did not decide the question of whether there was a valid privacy interest, but
5 rather, simply sent the case back to the district court to address the exemption 6 privacy claim since
6 the district court previously failed to address it.³² Therefore, the OIC is relying on a circuit court
7 opinion for a proposition that was never endorsed in that opinion.

8 The OIC then cited the Tenth Circuit's opinion in *Hale v. United States Department of Justice*,
9 973 F.2d 894 (10th Cir. 1992), where the Tenth Circuit affirmed a summary judgment against an
10 FOIA requestor who was on death row for murder.³³ The plaintiff in that case requested
11 “photographs of the deceased victim”³⁴ and the district court agreed with the government's claim of a
12 (b)(7)(C) privacy exemption. The Tenth Circuit barely discussed the issue, saying only: “Nor can we
13 discern any public interest in the photographs of the deceased victim, let alone one that would
14 outweigh the personal privacy interests of the victim's family.”³⁵ There is no indication that the legal
15 authorities and arguments raised by plaintiff in this case were considered in *Hale*. There is no
16 attempt in *Hale* to conform its decision with *Reporters Committee* and the established law of privacy
17 or cite any authority for its holding on this point.

18 The OIC then recounted the subsequent history of the *Hale* decision and in so doing, said that the
19 “Supreme Court's decision in Hale contradicts” plaintiff's argument about whether “the decisions in
20 Katz and NY Times are contrary to Reporters Committee....”³⁶

21 However, the OIC attributed far too much significance to the Supreme Court's decision in *Hale*.
22 The Supreme Court did not issue a full opinion in the case and it said the Tenth Circuit's “judgment
23 is vacated and the case is remanded to the” Tenth Circuit for reasons unrelated to exemption
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26 ³⁰ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 7:9-13.

27 ³¹ Plaintiff's Motion for Summary Adjudication of Issues, at 5:15 - 6:6.

28 ³² *Badhwar*, 829 F.2d 182, 186.

³³ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 7:16-24 & n. 3.

³⁴ *Hale*, 973 F.2d 894, 902.

³⁵ *Id.*

³⁶ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 8:24-28.

1 (b)(7)(C).³⁷ By vacating the judgment, for whatever reason, the *entire* judgment by the Tenth Circuit
2 was vacated. The Supreme Court did not preserve any of it and it is wrong for the OIC to say that the
3 Supreme Court did something it did not do.

4 However, the Tenth Circuit did implicitly reinstate the exemption (b)(7)(C) part of its first opinion
5 after the remand from the Supreme Court,³⁸ but did so without adding any additional explanation
6 about how its decision abides by existing privacy law. In fairness to the Tenth Circuit, before
7 presuming that its decision ran afoul of the established law of privacy, it should be noted that it is
8 unclear from its opinion whether the photos in issue only showed the murder victim's body after he
9 was dead or whether the photos showed the victim when he was alive along with the victim's family
10 members and other information about the family members. Therefore, the precedential value of the
11 Tenth Circuit's opinion on the (b)(7)(C) privacy exemption regarding the photos in that case is zero.

12 The OIC then cited the Ninth Circuit's opinion in *Bowen v. U.S. Food and Drug Administration*,
13 925 F.2d 1225, 1228 (9th Cir. 1991), where the Ninth Circuit held that medical records and autopsy
14 reports were properly withheld to protect privacy under the FOIA's exemption 6.³⁹ The OIC said that
15 "the Ninth Circuit necessarily had to find that the surviving family members had privacy interests in
16 the nondisclosure of the medical records and autopsy reports of their deceased family members."⁴⁰

17 However, the Ninth Circuit *did not* necessarily have to find that the surviving family members had
18 privacy interests in the medical records and autopsy reports. The opinion does not give sufficient
19 explanation for its holding on this point. It merely said that "the FDA provided an affidavit
20 describing which documents listed in the *Vaughn* index were subject to exemption 6 and why. The
21 FDA has satisfied its burden of showing that these documents were properly withheld under
22 exemption 6."⁴¹ We don't know if the medical records described persons who were dead or alive.
23 We don't know whether the Ninth Circuit erroneously considered the deceased subjects of the
24 autopsy reports to have privacy rights that were enforceable under exemption 6 or, as the OIC

26 ³⁷ *Hale v. U.S. Dept. of Justice*, 509 U.S. 918, 113 S.Ct. 3029, 125 L.Ed.2d 717 (1993).

27 ³⁸ *Hale v. U.S. Department of Justice*, 2 F.3d 1055, 1057-58 (10th Cir. 1993).

28 ³⁹ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 7:24 - 9:5. *See* 5 U.S.C. § 552(b)(6).

⁴⁰ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 9:2-5.

⁴¹ *Bowen*, 925 F.2d 1225, 1228.

1 contends, whether the Ninth Circuit was trying to enforce privacy interests it believed were possessed
2 by the surviving family members. Additionally, there is no discussion in the opinion about how its
3 decision is consistent with *Reporters Committee* and the established law of privacy and no authority
4 cited for its holding on this point. Moreover, the plaintiff was imprisoned for attempted murder and
5 represented himself and there was no oral argument before the Ninth Circuit.⁴² Therefore, the
6 precedential value of the opinion for our case is zero.

7 More important than the *Hale* and *Bowen* cases is Senior District Court Judge Oberdorfer's
8 opinion in *Outlaw v. U.S. Department of the Army*, 815 F.Supp. 505 (D.D.C. 1993). In that case, in
9 an effort to clear his name, a convicted murderer who was released from prison made a FOIA request
10 for photographs showing the fatal wounds on the man he was convicted of murdering.

11 The opinion has something for both sides in this case, but more for the plaintiff. The Army
12 claimed that the privacy exemptions in 5 U.S.C. § 552(b)(6) & (b)(7)(C) applied and that release of
13 the photos could violate "the personal privacy of the victim's family members."⁴³ Judge Oberdorfer
14 held that the exemptions did not apply, denied the Army's summary judgment motion, granted the
15 plaintiff's summary judgment motion and ordered the photos released.⁴⁴

16 The judge had several reasons. He said that, "there is no showing by defendant that, as of now,
17 there are any surviving relatives of the deceased, or if there are, that they would be offended by the
18 disclosure."⁴⁵ So he subscribed to the idea that any such surviving family members would have a
19 privacy interest in the photos that could protect them from being "offended" by the photos. But there
20 was not any discussion in the opinion about how his decision was consistent with *Reporters*
21 *Committee* and the established law of privacy and he failed to cite any authority for his holding on
22 this point.

23 As seen below, the real significance of the case lies in how Judge Oberdorfer balanced the
24 competing interests and the value he placed on the interest of preventing government corruption.

27 ⁴² *Bowen*, 925 F.2d 1225.

28 ⁴³ *Outlaw*, 815 F.Supp. 505, 506.

⁴⁴ *Outlaw*, 815 F.Supp. 505, 506-07.

⁴⁵ *Id.*, at 506.

1 3. THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS WHATEVER “PRIVACY”
2 INTEREST HELD BY THE FOSTER FAMILY SURVIVORS

3 The more significant part of Judge Oberdorfer’s opinion is his balancing of the so-called privacy
4 interest against the public interest. For even if he found the privacy interest to be “substantial,” he
5 said “that privacy interest is outweighed by the public interest in the contribution to the
6 administration of justice by the Army that disclosure could effect” because “there is an obvious
7 public interest in the disclosure as a check on the administration of justice by the United States
8 Army.”⁴⁶

9 It is important to note that Judge Oberdorfer made his decision in a case that involved the death of
10 an Army Sergeant who apparently had no high level government position or connections and whose
11 death investigation did not involve the FBI, Secret Service, the White House and the U.S. Park Police
12 in Washington, D.C. There is no indication that the deceased Sergeant in *Outlaw* held a position as
13 close to the President of the United States and his wife as did Mr. Foster. Certainly, the potential
14 degree of high level corruption and its significance to the well-being of America is far greater in our
15 case than it was in *Outlaw*. There is no indication in *Outlaw* that the plaintiff in that case had
16 demonstrated, to the degree that plaintiff has in this case, that the official government conclusion was
17 nonsensical. Assuming that Judge Oberdorfer was to erroneously hold that there is a “family grief”
18 exemption masquerading as a privacy exemption, how many seconds would it take him to rule that
19 the public interest in this case outweighed any such “privacy” interest?

20 Judge Oberdorfer’s recognition of the FOIA’s importance in ferreting out government corruption
21 is consistent with established law. The D.C. Circuit has discussed the nature of the public interest
22 that could be served by disclosure of government investigatory records:

23 For example, the public may have an interest in knowing that a government
24 investigation itself is comprehensive, that the report of an investigation released
25 publicly is accurate, that any disciplinary measures imposed are adequate, and that
26 those who are accountable are dealt with in an appropriate manner.⁴⁷

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⁴⁶ *Id.*

⁴⁷ *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984).

1 According to the U.S. Supreme Court:

2 The basic purpose of FOIA is to ensure an informed citizenry, vital to the
3 functioning of a democratic society, needed to check against corruption and to hold
4 the governors accountable to the governed.⁴⁸

5 Even one of the Tenth Circuit's *Hale* opinions described the purpose of the FOIA in similar terms:

6 The predominant objective of FOIA is disclosure. Congress enacted FOIA to
7 ensure that the public has access to government information so that it can scrutinize
8 the government's performance of its statutory duties and thereby promote
9 governmental honesty. *See EPA v. Mink*, 410 U.S. 73, 79-80, 93 S.Ct. 827, 832, 35
10 L.Ed.2d 119 (1973) (tracing the genesis of FOIA and explaining that the FOIA is
11 "broadly conceived" in that "[i]t seeks to permit access to official information long
12 shielded unnecessarily from public view and attempts to create a judicially
13 enforceable public right to secure such information from possibly unwilling official
14 hands"); S.Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) ("A government by
15 secrecy benefits on one. It injures the people it seeks to serve; it injures its own
16 integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and
17 mocks their loyalty.").⁴⁹

18 Therefore, prevention of government corruption is a central purpose of the FOIA and that is a
19 public interest affecting all Americans and their future children that easily outweighs whatever
20 interest may exist in protecting a relatively small number of people who may wish to avoid, not the
21 disclosure of highly sensitive information about themselves, but something even less substantial,
22 some degree of emotional grief from possibly catching a glimpse of photos of the dead body of their
23 deceased family member.

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28 ⁴⁸ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L.Ed.2d 159, 178, 98 S.Ct. 2311 (1978).

⁴⁹ *Hale v. U.S. Dept. of Justice*, 973 F.2d 894, 898 (10th Cir. 1992).

1 The OIC said that “the only” public interest that should be considered is the public’s interest in
2 knowing “how Mr. Foster performed his role as Deputy Counsel to President Clinton.”⁵⁰ The OIC
3 failed to cite any logical reason or authority for this assertion because there is none.

4 The OIC then said that the “Court should conclude that [the 11 photos] simply do not reveal
5 anything about Mr. Foster’s conduct as Deputy Counsel and do not shed any light on how the
6 Executive Branch performs its statutory duties.”⁵¹ The OIC failed to explain how the court can make
7 such a conclusion without seeing the photos. It also failed to explain why no light would be shed “on
8 how the Executive Branch performs its statutory duties” if the photos are consistent with the rest of
9 the publicly available official evidence and conflict with the government’s suicide-in-the-park story.

10 Plaintiff’s Motion for Summary Adjudication of Issues presents extensive evidence demonstrating
11 that the Fiske and Starr reports on the Foster death are untrustworthy. The subject photographs are
12 central to this case and can help answer important questions.

13 These 11 photos will allow the American public to see if Mr. Foster’s eyeglasses were broken as
14 they laid on the ground at the park, as they appear to be in the photo published by the Senate
15 Whitewater Committee.⁵² There is no mention in the public record of the glasses being broken and if
16 they were broken while on the ground, the public will want to know who broke them and how they
17 broke, especially given the government’s story that Mr. Foster was wearing them when he shot
18 himself and they flew off his head and bounced in the vegetation.⁵³ Does the photo of the eyeglasses
19 on the ground show a footprint that does not belong to Mr. Foster? Does the photo of the eyeglasses
20 on the ground show any of the blood reportedly seen by Henry Lee but missed by the FBI Lab?⁵⁴

21 These photos will allow the public to see if the “dried blood” on Mr. Foster’s neck reportedly seen
22 by Dr. Blackbourne in an autopsy photo is visible on the body site Polaroids sought here and whether
23 these body site Polaroids fail to show evidence of any neck injury.⁵⁵ This is important given the
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25 ⁵⁰ Defendant’s Opposition to Plaintiff’s Motion for Summary Adjudication of Issues, at 10:2-4.

26 ⁵¹ *Id.*, at 10:5-9.

27 ⁵² See S. Hrg. 103-889, vol. 2, at 2448 (Plaintiff’s Summary Adjudication Motion exhibit 5, at 152).

28 ⁵³ Try tossing your own eyeglasses in some vegetation and see if they bounce and break.

⁵⁴ See Plaintiff’s Motion for Summary Adjudication of Issues, at 20:3 – 21:17.

⁵⁵ Starr said that one of his experts, Dr. Brian Blackbourne, “stated that a mark on the side of the right upper neck, just below the jawline, seen in autopsy photographs, represents small fragments of dried blood and does not represent any form of injury.” Starr Report, at 64 n. 188 (Plaintiff’s Summary Adjudication Motion exhibit 4, at

1 reports of a neck wound by a paramedic and a medical doctor, both of whom viewed Mr. Foster's
2 body at the park,⁵⁶ and an autopsy performed with a mysterious assistant that violated standard
3 procedure by removing Mr. Foster's tongue and parts of his soft palate before the Park Police arrived
4 at the autopsy.⁵⁷

5 These photos will allow the public to see if there are any signs that a gun was put in Mr. Foster's
6 hand after his death, as can be inferred from the testimony of a key witness, the failure of the Foster
7 family to recognize the official death gun and Chief Langston's public deception about the gun.⁵⁸
8 The gun-in-hand photo currently available is a photo of an ABC News broadcast that shows far less
9 detail that the first generation copy that plaintiff is seeking.

10 These photos will allow the public to see the "possible" bloodstains on vegetation, allegedly seen
11 by Dr. Lee in photos of the body site, that were not seen by those who viewed Mr. Foster's body in
12 the park.⁵⁹

13 In short, these photos will help the public understand what happened to a White House official
14 who the government says drove himself to a park and committed suicide even though the known
15 parking lot witnesses failed to see his car in the lot after the evidence shows he was already dead.⁶⁰

16 The OIC claimed that "Mr. Favish never disputes the defendant's objectively reasonable belief
17 that release of these 11 photographs will cause an unwarranted invasion of Mr. Foster's survivors'
18 privacy"⁶¹ by causing them "emotional anguish."⁶² While it is true that at some point a showing
19 could possibly be made that a particular Foster family member would suffer some degree of
20 emotional grief if he or she were to see a particular photo, it is also true that even if such grief could
21 be considered an invasion of "privacy," such an invasion would be warranted in this case because of
22 the public's interest in discovering the full truth.

23
24 67). As opposed to the autopsy photos cited by Blackbourne, this suit seeks the body site photos that might shed
25 more light on the neck wound controversy.

26 ⁵⁶ See Plaintiff's Motion for Summary Adjudication of Issues, at 9:6 – 12:12.

27 ⁵⁷ See Plaintiff's Motion for Summary Adjudication of Issues, at 21:18 – 24:5.

28 ⁵⁸ See Plaintiff's Motion for Summary Adjudication of Issues, at 12:13 – 18:8, 26:3 – 30:10.

⁵⁹ See Plaintiff's Motion for Summary Adjudication of Issues, at 24:6 – 26:2.

⁶⁰ See Plaintiff's Motion for Summary Adjudication of Issues, at 31:7 – 34:9. This fact alone so demolishes the
credibility of the government's reports that it makes the public's interest in obtaining all the evidence in this case as
high as it could be.

⁶¹ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 9:12-15

1 Ignoring for the moment whether privacy is involved at all, it is clear that the OIC presented
2 nothing to substantiate its claim of “emotional anguish” other than its mere assertion by government
3 attorneys, as opposed to all of the members of the Foster family who are the subjects of the OIC’s
4 “objectively reasonable belief.”

5 For example, the OIC failed to explain how the Foster family members will see these photos
6 against their will if they are released. The OIC did not assert that the Foster family members will be
7 forced to order copies of the photos from the OIC, browse the Internet in search of these photos or be
8 forced to read articles that may display these photos. Even assuming there is legal justification for
9 protecting the Foster family members from emotional grief, according to the OIC, its burden is
10 satisfied by the *speculation* of two government attorneys about the mere *possibility* that the family
11 members would have to see these photos for a second or two before they could divert their gaze and
12 the degree of any anguish the family members *might* feel. The OIC has simply failed to sustain its
13 burden of showing that the Foster family members would be exposed to these photos and suffer the
14 extreme anguish the OIC predicts.

15 The OIC also misconstrued plaintiff’s discussion about the gun-in-hand photo, already published
16 by ABC News, Newsweek and Time.⁶³ While it is true that an unofficial disclosure does not waive
17 whatever right the government may have to withhold the document, it is also true that the effect of
18 disclosing a document, especially in terms of an emotional impact from a photo, is necessarily
19 lessened when that photo has been previously disclosed, even if unofficially.⁶⁴ The OIC failed to
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21 ⁶² Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 17:19.

22 ⁶³ See Time, March 18, 1996, at 68 (exhibit 7). This photo also was published in Newsweek, March 21,
23 1994, at 33 (exhibit 8). This photo was leaked to the news media. Prior to this litigation, the OIC had not
24 officially confirmed its authenticity. I suspected this photo was one of the photos I requested that is listed
25 on an FBI evidence receipt that was reprinted in S. Hrg. 103-889, vol. 2., at 2112 (Joseph Declaration, Ex.
26 II, at OIC Bates # 45-46). I suspected this photo was the first photo listed in the group of eight Polaroids at
27 the bottom of the receipt.

28 I requested this photo twice: In category 2 of my request I expressly describe it as the ABC News photo and it is
included as one of the photos in category 3 of my request in which I cite the photos listed at p. 2112 of the Senate
Hearings (Letter from Allan J. Favish to OIC (January 6, 1997), attached to Joseph Declaration, Ex. II, at OIC Bates
1). The OIC says its response in the *Vaughn* index to my “category 2” request is found in its response to the
request for the photos listed on page 2112 of the Hearings (my category 3 request). This is an admission by the OIC
that the ABC/TIME photo, is the first photo listed in the bottom group of 8 Polaroids on page 2112.

⁶⁴ See *Department of State v. Washington Post Co.*, 456 U.S. 595, 603 n. 5, 102 S.Ct. 1957, 1962, 72 L.Ed.2d 358
(1982) (“public nature of information may be a reason to conclude under all the circumstances of a given case, that
the release of such information would not constitute a ‘clearly unwarranted invasion of personal privacy’”).

1 discuss whether the Foster family members have seen this photo⁶⁵ and how that would affect the
2 nature and degree of emotional grief that might result from release of this photo as opposed to the
3 other photos that have not been disclosed.

4 However, even if the OIC were to make that showing, it should not prevail over the public's
5 interest in an honest government. According to the OIC, the interest in preventing emotional grief to
6 the family members should outweigh the interest of all Americans who want to make sense out of an
7 incredible government story about the violent death of a White House lawyer. Not only does the
8 OIC overvalue its report on the death, it undervalues the public's need to hold its government
9 officials accountable. *If* all of the Foster family members want to blindly accept the government's
10 incredible and untrustworthy reports, they are free to do so. That is what America is about. But
11 those Americans who want to know the truth about how their government officials dealt with this
12 death, whatever it may be, should not have to forgo that opportunity because the family members
13 may inadvertently see these photos for a few seconds and feel some emotional pain.⁶⁶

14 Plaintiff contends that the FOIA does not allow the OIC to withhold the photos under its phony
15 "family grief" exemption and that even if it did, any such grief is outweighed by the public interest in
16 disclosure. But this does not mean that plaintiff dismisses the family's anguish over the death of Mr.
17 Foster as incredible; rather, it is the government's reports that are incredible. Mr. Foster's family
18 members obviously had their close personal attachment to him; however, because of his high
19 government position, the rest of us had an attachment to him also. We paid him to help govern us.
20 Our attachment surely was much less personal than that of the family members, but it was
21 significant. While his family can feel anguish over the death of their family member, millions of
22 Americans can feel anguish over the death of democracy and the rule of law that can result from a
23 corrupt death investigation at the highest levels of government. Without diminishing the family
24 members' anguish, it must be recognized that many people live with that kind of anguish, survive the
25 sadness and live normal healthy lives. How will America live with the kind of corruption suggested

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27 ⁶⁵ If they have seen it, what were the circumstances and what were their reactions? If they haven't seen it, how did
28 they manage to avoid it?

1 by the official evidence in this case and survive? Unfortunately, we cannot bring Mr. Foster back to
2 life; but we can prevent America from sharing his fate.

3 4. THE COURT SHOULD NOT DENY PLAINTIFF'S REQUEST WITHOUT
4 EXAMINING THE PHOTOGRAPHS IN CAMERA

5 The OIC says that the “photographs sought by the plaintiff are graphic, explicit, and extremely
6 upsetting.”⁶⁷ However, without seeing the photos, neither plaintiff or the Court can agree with that
7 statement. The photos are not all the same. One is of the eyeglasses on the ground, without any part
8 of Mr. Foster’s body in the photo. While some of the photos are described in the FBI Evidence
9 Receipt as showing at least some part of Mr. Foster’s “face,” apparently, some of the photos do not
10 show any part of his face.⁶⁸

11 Although there is no privacy interest in these photos, if the Court holds that there is such an
12 interest that entails a need to determine how “graphic, explicit, and extremely upsetting” these photos
13 may be, then the Court should not simply rely on the opinion of Darrell M. Joseph, Associate
14 Independent Counsel to establish as “fact” that these photos are, or are not, “graphic, explicit, and
15 extremely upsetting.”

16 The Court is authorized to examine the original photos in camera, without plaintiff being
17 present.⁶⁹ As noted by the Ninth Circuit:

18 “Before the court orders in camera inspection, the Government should be given the
19 opportunity to establish by means of testimony or detailed affidavits that the
20 documents are clearly exempt from disclosure. The burden remains on the
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23 ⁶⁶ Remember, we are not even talking about disclosing any information about the Foster family members that they
24 want to withhold. At least that would be a legitimate privacy interest; but even in that case, that interest can be
25 outweighed by the public’s interest in disclosure.

26 ⁶⁷ Defendant’s Motion for Summary Judgment, at 22:17-19.

27 ⁶⁸ Joseph Declaration, at 17. The FBI evidence receipt describes these 11 photos as, “VF’s body looking down from
28 top of berm,” “VF’s body - focusing on face,” “VF’s body – focusing on rt. side shoulder/arm,” “VF’s body taken
from below feet,” “VF’s body focusing on right side & arm,” “Right hand showing gun & thumb in guard,” “glasses
on ground,” “VF’s body – focus on Top of head thru heavy foliage,” “VF’s body – focus on head & upper torso,”
“VF’s face – looking directly down into face,” and “VF’s face – Taken from right side focusing on face & blood on
shoulder.” FBI “Receipt for Property Received/Returned/Released/Seized” (May 2, 1994), reprinted in S. Hrg. 103-
889, vol. 2., at 2112 (Joseph Declaration, Ex. II, at OIC Bates # 45-46).

⁶⁹ 5 U.S.C. § 552(a)(4)(B).

1 Government under this law.” S. Rep. No. 1200, 93rd Cong., 2d Sess. 9, reprinted in
2 1974 U.S. Code Cong. & Ad. News 6267, 6287-88.⁷⁰

3 The OIC has had its opportunity and has failed to establish that the photos are “clearly exempt
4 from disclosure.” Any photo that the Court does not order disclosed should be examined in camera
5 before the Court orders that it may be withheld. The opinion of Darrell M. Joseph, while it may be
6 given in good faith, is not deserving of being accepted as the final word. In Mr. Joseph’s opinion,
7 even the photo of the eyeglasses worn by Mr. Foster in public and seen on the ground without any
8 part of Mr. Foster’s body in the picture, is “graphic, explicit, and extremely upsetting.” Mr. Joseph’s
9 opinion is the same for the gun-in-hand picture that has already been published by ABC News,
10 Newsweek and Time.⁷¹ Clearly, Mr. Joseph’s idea of “extremely upsetting” is much too broad. This
11 renders his opinion about the remaining photos highly suspect and unworthy of being given
12 conclusive effect by the Court.⁷²

13 The OIC’s characterization of the photo of Mr. Foster’s eyeglasses demonstrates the unreliability
14 of the OIC as the final arbiter of the nature of these photos. The OIC refers to Mr. Foster’s
15 eyeglasses as an “intimate personal effect.”⁷³ My American Heritage dictionary defines “intimate”
16 as:

- 17 1. Marked by close acquaintance, association, or familiarity. 2. Relating to or
18 indicative of one's deepest nature. 3. Essential; innermost. 4. Marked by informality
19 and privacy. 5. Very personal; private. 6. Of or involved in a sexual relationship.

20 Yet, Mr. Foster’s eyeglasses are not something that he kept from public view when he was alive;
21 he wore them on his head in public! We can all imagine examples of “intimate” personal effects and
22 I don’t think our eyeglasses would be on that list.

23 The OIC attempted to support its position on the eyeglasses:
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26 ⁷⁰ *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987).

27 ⁷¹ See Time, March 18, 1996, at 68 (Plaintiff’s Summary Adjudication Motion exhibit 7). This photo also was
published in Newsweek, March 21, 1994, at 33 (Plaintiff’s Summary Adjudication Motion exhibit 8).

28 ⁷² See *Doyle v. FBI*, 722 F.2d 554, 556-57 (9th Cir. 1983) (review of the documents may not be necessary if the
affidavits were specific, their contents were not contradicted elsewhere in the record, and there was no suggestion of
bad faith on the part of the affiant). Here the affidavits are not specific and are contradicted elsewhere in the record.

⁷³ Defendant’s Motion for Summary Judgment, at 22:20.

1 Given the manner in which Mr. Foster met his death, it also is reasonable to
2 conclude that one or more of his family members may conjure up mental images of
3 how his eyeglasses came to rest in the place and position they did, and it does not
4 require a great leap to imagine the emotional suffering that those inevitable mental
5 exercises will cause.⁷⁴

6 Plaintiff assumes the Foster family members are also concerned about the integrity of their
7 government. Therefore, given that the government has yet to provide a plausible explanation of how
8 Mr. Foster met his death and the apparent impossibility of the government's story about "how his
9 eyeglasses came to rest in the place and position they did," with them supposedly bouncing in
10 vegetation 19 feet from his head in the opposite direction from the path of the bullet, and appearing
11 broken in the FBI lab photo without any mention of the break in the lab report that said the earpieces
12 on the glasses "move very easily,"⁷⁵ any emotional suffering is much more likely to be caused by a
13 careful comparison of the Starr and Fiske reports with the official evidence than is likely to be caused
14 by seeing the photo of the eyeglasses.

15 The Court should exercise its own judgment about how "graphic, explicit, and extremely
16 upsetting" any of these photos may be. The OIC has not presented testimony from all of the
17 surviving Foster family members explaining the details of the emotional grief that the OIC seeks to
18 prevent. Mr. Joseph's opinion is, at best, merely a prediction by him of how all the surviving Foster
19 family members would react to these photos being made public. Mr. Joseph's opinion about this
20 matter has no more weight than the opinion of any other person who has seen the original photos.
21 The Court is equally capable of making such a determination once the Court sees the original photos.

22 Accordingly, if the Court determines that the FOIA does have a "family grief" exemption that can
23 masquerade as a "privacy" exemption and that some family grief would result from public disclosure
24 of a particular photo, then the Court can balance the public interest in keeping its government honest
25 against the private interest of freedom from some possibility of some degree of emotional grief.
26 However, unless the Court sees the original photos it cannot adequately predict any degree of

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28 ⁷⁴ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 12:20 – 13:3. Of course, this speculation assumes that they will see the photo.

1 emotional grief that might result from disclosure of the photos and any required balancing will be
2 based on an educated guess, rather than a first-hand judicious examination that Congress entrusted
3 the Court to perform.

4 5. THE OIC HAS FAILED TO JUSTIFY ITS REDACTION OF THE COLOR
5 FROM THE PHOTOGRAPHS

6 The OIC said that it is not “required to produce color copies of color photographs.”⁷⁶ This is
7 despite the fact that plaintiff requested color copies in his original request.⁷⁷ The OIC did not say that
8 color originals of the requested photos are unavailable. The OIC did not cite any FOIA exemption
9 that allows it to redact the color from the copies of those portions of the photos it discloses. Absent
10 an applicable FOIA exemption, the redaction of the color is improper and the Court should order that
11 the OIC disclose color copies of any color originals that have been or will be released.

12 Plaintiff will pay the costs of providing the OIC with the appropriate equipment to make suitable
13 color copies under circumstances consistent with the OIC’s security needs. This could include the
14 OIC obtaining the equipment and personnel from whatever source it trusts with plaintiff paying the
15 bill. Plaintiff offered to do that shortly after the *Vaughn* index was served.⁷⁸

16 The lack of any applicable FOIA exemption is enough to make the OIC’s redaction of the color
17 improper. However, plaintiff’s case is further strengthened by a 1996 amendment to the Freedom of
18 Information Act that took effect April 1, 1997:

19 In making any record available to a person under this paragraph, an agency shall
20 provide the record in any form or format requested by the person if the record is
21 readily reproducible by the agency in that form or format. Each agency shall make
22 reasonable efforts to maintain its records in forms or formats that are reproducible
23 for purposes of this section.⁷⁹

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26 ⁷⁵ See Plaintiff’s Motion for Summary Adjudication of Issues, at 20:4 – 21:17.

27 ⁷⁶ Defendant’s Opposition to Plaintiff’s Motion for Summary Adjudication of Issues, at 18:2.

28 ⁷⁷ See Letter from Allan J. Favish to FOIA Officer (OIC), dated January 6, 1997 (Joseph Declaration, Ex. II, OIC Bates # 2) (“I also request that my copies be in color if the original photograph is in color.”).

⁷⁸ See Declaration of Allan J. Favish, attached hereto.

⁷⁹ 5 U.S.C. § 552(a)(3)(B) (effective 180 days after Oct. 2, 1996).

1 This new section was effective in January of 1998, when the OIC made records available to
2 plaintiff. Yet, the OIC said that it “is not equipped to make color photocopies and thus any color
3 photographs are not readily reproducible by the OIC in color.”⁸⁰ Does the OIC really believe that its
4 being without a permanent color copier or scanner in its office allows it to redact the color from the
5 photos it releases despite its obligation to provide copies without any redactions unless authorized by
6 one of the FOIA exemptions? What if the OIC ran out of copy paper and couldn’t operate its black
7 & white copier? Would that mean that none of its documents would be “readily reproducible” since
8 somebody would have to leave the office to get some paper or have some delivered? How does this
9 differ from having a trusted source deliver a color copier or scanner? Does the OIC really believe
10 that its position is what Congress intended?

11 This is silly. Color copiers and scanners sell for under \$1,000.00. If the OIC can’t purchase one
12 or make proper arrangements to use one at plaintiff’s expense, this country is in worse trouble than I
13 thought.

14 CONCLUSION

15 The public deserves to know the truth about the circumstances surrounding the death of a White
16 House attorney working closely with the President of the United States. The public deserves to know
17 how and why government officials produced investigations and reports that are not credible when
18 compared with the official evidence. The OIC has failed to provide specific and credible answers to
19 the specific evidentiary points raised by the plaintiff. While there may be very credible and innocent
20 explanations for all of these evidentiary points, plaintiff cannot think of any that are consistent with
21 the totality of the official evidence.

22 It is the government's failure to conduct credible investigations and produce credible reports about
23 this death that have created the public's need to conduct further investigations. If these photos help to
24 support the official government story about this death, then the public deserves to see them. If these
25 photos help to destroy the official government story about this death, then the public deserves to see
26 them. The public deserves to be given the opportunity to conduct a proper investigation because the
27 government has failed to do so. This is a classic example of the public interest that was intended to

28 ⁸⁰ Defendant's Opposition to Plaintiff's Motion for Summary Adjudication of Issues, at 19:20-21.

1 be served by the Freedom of Information Act. It is also a classic example of why the Founders
2 blessed us with an independent federal judiciary.

3 There are societies where the public is supposed to take its government's word without exercising
4 any critical analysis and without questioning the credibility of government officials. Because of
5 Madison, Jefferson, Hamilton, and others, including hundreds of thousands gave their lives, this
6 society is not one of them, yet.

7
8 Dated: March 2, 1998

Allan J. Favish
Attorney for Plaintiff

DECLARATION OF ALLAN J. FAVISH

I, Allan J. Favish, declare as follows:

I am the plaintiff in this action and am an attorney licensed to practice law in California.

All of the exhibits attached to my Motion for Summary Adjudication of Issues are true and correct copies of what they purport to be.

Attached hereto as exhibit 1 is a true and correct copy of a fax cover page I faxed to Assistant U.S. Attorney Jan Luymes on January 14, 1998.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on March 2, 1998.

Allan J. Favish

Allan J. Favish

Attorney at Law

18645 Hatteras St., #289

Tarzana, CA 91356-1802

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Fax Cover Page

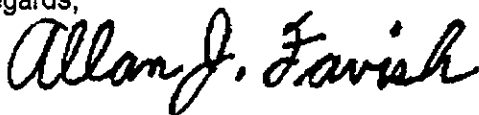
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|---|-------------------------------|
| To: Jan Luymes | Fax Number: 1-714-246-8111 |
| Company : U.S. Attorneys Office | Date : 1/14/98 |
| From : Allan J. Favish | Fax Number : (818) 343-9095 |
| Company : | Pages including cover page: 1 |
| Subject : AJF v. OIC re FOIA and Color Copies | |

This is to confirm that I request that any copies of pictures that I am provided be in color, if the original picture is in color.

The copies that have been provided are black and white copies.

I am willing to pay the increased copy cost for color copies and willing to have a color laser copier brought in to the OIC office at their convenience if they do not have the ability to make color copies or do not want to send the originals out of the building.

Regards,



Allan J. Favish

EXHIBIT 1

22

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am an attorney licensed to practice before all the courts in this state. I am over the age of 18 and my business address is 18645 Hatteras St., #289, Tarzana, California 91356-1802.

On March 2, 1998, I served the document entitled **PLAINTIFF’S REPLY TO DEFENDANT’S OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION; POINTS AND AUTHORITIES; DECLARATION OF ALLAN J. FAVISH**, by placing a true copy thereof enclosed in a sealed envelope addressed to each of those identified in the service list, below.

(X) BY MAIL

I deposited such envelope(s) in the mail at Tarzana, California. The envelope(s) were mailed with postage thereon fully prepaid as follows: I am "readily familiar" with the office's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Tarzana California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in this declaration.

() BY FACSIMILE MACHINE

I faxed such document to the addressees at their fax numbers as follows: _____ [name & fax number]

() BY PERSONAL SERVICE

I delivered such envelope(s) or document by hand to the addressees or the addressees' office(s).

() BY EXPRESS MAIL OR OTHER OVERNIGHT SERVICE

I deposited such envelope(s) in the mail system for _____ [name of overnight service] at Tarzana, California. The envelope(s) were mailed with postage thereon fully prepaid as follows: I am "readily familiar" with the office's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with _____ [name of overnight service] on that same day with postage thereon fully prepaid at Tarzana, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in this declaration.

Executed on March 2, 1998, at Tarzana, California. I declare under penalty of perjury under the laws of California and the United States that the above is true and correct.

Allan J. Favish

SERVICE LIST

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| <p>Ms. Jan L. Luymes Assistant U.S. Attorney U.S. Department of Justice 600 West Santa Ana Blvd., Suite 1100 Santa Ana, CA 92701</p> | <p>Attorney for defendant Office of Independent Counsel</p> |
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