

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV 97-1479 -WDK

Date March 9, 1998

Title Allan J. Favish v. Office of Independent Counsel

DOCKET ENTRY

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

ENTERED
CLERK, U.S. DISTRICT COURT
MAR 11 1998
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY
BY

CLERK U.S. DISTRICT COURT
MAR - 1998
CENTRAL DISTRICT OF CALIFORNIA
BY

PRESENT:

HON. WILLIAM D. KELLER, JUDGE

Amalia Carrillo
Deputy Clerk

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None Present

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL TO ALL COUNSEL
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF
RECORD IN THIS ACTION ON THIS DATE.
DATE: MAR 11 1998
DEPUTY CLERK

PROCEEDINGS:

Before the Court are the parties' Cross Motions for Summary Judgment. The Court issued a preliminary ruling and held a hearing on this matter. The following is a clarification of the Court's final ruling, which was given orally at the hearing.

BACKGROUND

On January 6, 1997, Plaintiff Allan J. Favish sent to Defendant Office of Independent Counsel ("OIC") a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff's request sought photographs taken in connection with the investigation into the death of Deputy White House Counsel Vincent Foster. On January 24, 1997, the OIC denied Plaintiff's request, asserting: (1) Exemption (b)(7)(A), which exempts from disclosure law enforcement information whose disclosure could interfere with enforcement proceedings [5 U.S.C. § 552(b)(7)(A)]; and (2) Exemption (b)(7)(C), which exempts from disclosure law enforcement information whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" [5 U.S.C. § 552(b)(7)(C)]. The OIC also reserved the right to assert other relevant exemptions. Plaintiff administratively appealed the OIC's decision, and the appeal was denied on February 19, 1997.

On March 6, 1997, Plaintiff filed the present "Complaint for Injunctive Relief Under the Freedom of

Initials of Deputy Clerk AC

Information Act.” On October 10, 1997, the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels (the “Special Division”), permitted the OIC report on the death of Vincent Foster to be released to the public. Following the release of this report, the OIC reviewed the photographs sought by Plaintiff and modified its response. As a result, the OIC withdrew its assertion of Exemption (b)(7)(A), but still asserted Exemption (b)(7)(C). Additionally, the OIC asserted Exemption (b)(3), which exempts from disclosure matters that are specifically exempted from disclosure by a separate statute. 5 U.S.C. § 552(b)(3).

On February 12, 1998, the Court entered the parties’ “Stipulation to Dismiss With Prejudice Claims As To Information Withheld Pursuant to Exemption (b)(3) and Claims As To Certain Information Withheld Pursuant to (b)(7)(C) and Identification of What Remains At Issue.” In that stipulation, the parties dismissed with prejudice Plaintiff’s claims regarding all photographs withheld pursuant to Exemption (b)(3). Stipulation, at 1:26 - 2:12. The parties also dismissed with prejudice Plaintiff’s claims regarding certain photographs withheld pursuant to Exemption (b)(7)(C). Stipulation, at 2: 4-12. The stipulation also identified the documents that Plaintiff still seeks. Plaintiff still seeks 11 Polaroid photographs, including 9 post-mortem photographs of Foster’s body in Fort Marcy Park, 1 post-mortem photograph of Foster’s right hand holding a gun, and 1 photograph of Foster’s eyeglasses lying on the ground at Fort Marcy Park. Stipulation, at 2: 13-19; Defendant’s Motion for Summary Judgment, at 20:19 - 22:13.

The stipulation also stated that Defendant still asserts Exemption (b)(7)(C) to withhold the 11 photographs. The parties stipulated that the remaining 11 photographs were “compiled for law enforcement purposes,” the threshold requirement for Exemption (b)(7)(C). Stipulation, at 2: 19-22. The parties stated that “[t]he only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Stipulation, at 2: 22-25. In addition, the parties noted that Plaintiff claims that Defendant is required to produce color copies of the unredacted photographs already released to Plaintiff in black and white. Stipulation, at 2:25 - 3:1.

On February 11, 1998, Plaintiff filed the present motion for summary adjudication of issues, seeking an order that: (1) release of the eleven remaining photographs will not result in an unwarranted invasion of the privacy of Vincent Foster’s surviving family members; and (2) release of color copies of the photographs already received is required by FOIA. On February 13, 1998, Defendant filed the present motion for summary judgment, claiming that no genuine issue of material fact exists with regard to the claimed exemption and that Defendant is entitled to judgment as a matter of law.

DISCUSSION

I. Cross Motions For Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only where there is “no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56. All reasonable inferences are granted in favor of the non-moving party; however, the non-moving party must provide specific facts showing that there are genuine issues for trial. Fed.R.Civ.P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). When

“the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In deciding a motion for summary judgment, the Court must “determine whether the ‘specific facts’ set forth by the non-moving party, coupled with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on the evidence.” T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 631 (9th Cir. 1987). A “party opposing summary judgment may not rest on conclusory allegations, but must set forth specific facts showing that there is a genuine issue for trial.” Leer v. Murphy, 844 F.2d 628, 631 (9th Cir. 1988). A “mere scintilla of evidence” is insufficient to oppose a summary judgment motion under Rule 56. Anderson v. Liberty Lobby Co., 477 U.S. 242, 252 (1986).

B. Eleven Remaining Contested Photographs: Privacy Exemption Under 5 U.S.C. § 552(b)(7)(C)

Exemption (b)(7)(C) exempts from disclosure “records or information compiled for law enforcement purposes” that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). The parties have stipulated that the remaining 11 photographs were compiled for law enforcement purposes. Stipulation, at 2: 19-22. Thus, as the parties recognize, “[t]he only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Stipulation, at 2: 22-25.

1. Privacy Interest of Foster’s Surviving Family Members

The parties take opposite positions on the question of whether Foster’s surviving family members have a privacy interest in the withheld photos. Defendant claims that the family members’ privacy interests exist and would be infringed by disclosure of the 11 photographs. Defendant claims that the photographs sought by Plaintiff are “graphic, explicit, and extremely upsetting.” Defendant’s Motion, at 22. Defendant further claims that disclosure of these 11 photographs can reasonably be expected to cause the surviving Foster family members an extreme amount of anguish beyond that which they have already suffered, thus constituting an invasion of their personal privacy. Joseph Declaration, ¶¶ 15, 17. Plaintiff asserts that the concern argued by the OIC is not for the “privacy” of the Foster family members, which is protected by Exemption (b)(7)(C), but rather is an argument for a “family grief” exemption to FOIA which does not exist.

In support of its privacy argument, Defendant points to several cases which recognize such a privacy interest in surviving family members, including New York Times Co. v. National Aeronautics and Space Administration, 782 F.Supp. 628 (D.D.C. 1991). In New York Times, a reporter submitted a FOIA request to NASA seeking a copy of the voice communications tape recorded aboard the space shuttle Challenger prior to its explosion on January 28, 1986. *Id.* at 630. NASA provided the transcripts of the tape, but denied the request for a copy of the tape itself, claiming the privacy exemption under § 552(b)(6) (“Exemption (b)(6)”).¹ *Id.* The

¹Exemption (b)(6) exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Since the exemption argued in this case exempts records or information

district court found that the astronauts' families had a "valid and substantial" privacy interest against disclosures which would cause them to suffer additional anguish. *Id.* at 631. The court stated that the privacy interest included "reasonable expectations of undisturbed enjoyment in the solitude and seclusion of [one's] own home." *Id.* at 632 (citation omitted). The court noted that exposure to the voice of a deceased family member would cause the Challenger families pain and that the Challenger families would face a disruptive assault on their privacy if the tape were disclosed, because of the notoriety surrounding the accident. *Id.* at 631-632. The court found that this potential invasion of privacy outweighed the public interest in the disclosure of the tape. *Id.* at 633.

The court in New York Times cited Badhwar v. United States Department of the Air Force, 829 F.2d 182 (D.C.Cir. 1987), as another court that recognized privacy interests of relatives in various records of deceased family members. New York Times, 782 F.Supp. at 631. In Badhwar, the D.C. Circuit remanded for the district court to determine whether disclosure of a portion of an autopsy report would constitute a "clearly unwarranted invasion of personal privacy," because of the possibility that it would "shock the sensibilities of surviving kin." Badhwar, 829 F.2d at 186. In doing so, the court implicitly but necessarily recognized that such a privacy interest existed and remanded to determine whether the disclosure sought would impact that interest. *Id.*

Another district court has recognized this family privacy interest with regard to the Foster family members whose privacy is sought to be protected in the present case. See Dow Jones & Company, Inc. v. United States Department of Justice, 880 F. Supp. 145, 152 (S.D.N.Y. 1995). In Dow Jones, the court allowed the disclosure of an allegedly forged note found in Vincent Foster's briefcase. In doing so, the court recognized that the Foster family members had a privacy interest that would be impinged by the pain and anguish that would accompany the renewed scrutiny resulting from disclosure of the note. *Id.* The court allowed disclosure because it found that this privacy interest would be outweighed by the substantial public interest in viewing the note. *Id.*

Defendant also cites several cases which implicitly recognize such a privacy interest in the relatives of the deceased. See Hale v. United States Department of Justice, 973 F.2d 894, 902 (10th Cir. 1992) (finding that Exemption (b)(7)(C) applied to exempt from disclosure photographs of a deceased victim, because no public interest could be discerned "that would outweigh the personal privacy interests of the victim's family"), vacated on other grounds, 509 U.S. 918 (1993)²; Katz v. National Archives & Records Administration, 862 F.Supp. 476,

compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy," the standards for determining whether each exemption applies obviously differ. However, both exemptions involve privacy interests, and there is no apparent difference in the privacy interests that may be recognized by the two exemptions. Therefore, the cases discussing the more stringent (b)(6) privacy standard are applicable to this Court's determination of whether the interest asserted by the OIC is a privacy interest recognized by Exemption (b)(7)(C).

²The Tenth Circuit's decision in Hale was vacated and remanded for reasons unrelated to Exemption (b)(7)(C) [Hale v. United States Department of Justice, 509 U.S. 918 (1993)], but Plaintiff concedes that the Tenth Circuit implicitly reinstated the portion of the opinion discussing Exemption (b)(7)(C) on remand [Hale v. United States Department of Justice, 2 F.3d 1055, 1057-58 (10th Cir. 1993)]. Plaintiff's Reply, at 7: 4-5.

483 (D.D.C. 1994) (accepting as undisputed that the Kennedy family has a privacy interest in the autopsy records of President Kennedy, limited to preventing public disclosure that would cause clearly unwarranted anguish or grief), aff'd on other grounds, 68 F.3d 1438 (D.C.Cir. 1995); Bowen v. U.S. Food and Drug Administration, 925 F.2d 1225 (9th Cir. 1990) (holding that the FDA properly withheld medical records and autopsy reports under the (b)(6) privacy exemption, thereby necessarily recognizing a privacy interest belonging to others in documents relating to a deceased family member, at least with regard to the autopsy reports); Outlaw v. United States Department of the Army, 815 F.Supp. 505, 506 (D.D.C. 1993) (finding that the deceased's family members' privacy interest was "not substantial" and was outweighed by the public interest in disclosure).

Plaintiff assails this collection of persuasive authority by arguing that many of these cases did not expressly hold that such a privacy interest exists and by arguing that the courts that recognized such an interest did so "by making their own law" in contravention of the Supreme Court's definition of privacy. Plaintiff's Motion, at 4:23. Plaintiff cites the Third Circuit's definition of "privacy" in United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 n. 5 (3rd Cir. 1980) (quoting Fried, Privacy, 77 Yale L.J. 475, 483(1968)), as "control over knowledge about oneself." Plaintiff argues that the Supreme Court agreed with this definition in United States Department of Justice v. Reporters Committee, 489 U.S. 749, 762-63 (1989), when it stated: "To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." The Court in Reporters Committee also stated:

"As we have pointed out before, '[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'"

Id. at 762 (citation omitted).

However, neither this passage nor footnote 5 purports to define the full contours of "privacy" as that term is understood in the FOIA privacy exemptions. Therefore, Plaintiff's argument that all of the foregoing authority is contrary to Supreme Court precedent must be rejected. While the courts in New York Times, Badhwar, Dow Jones, Hale, and Katz may have extended the definition of "privacy" in exempting their respective documents from disclosure, these extensions did not occur in the face of contrary Supreme Court precedent. The Court finds this collection of cases to be persuasive, and therefore finds that Foster's surviving family members possess personal privacy interests that could be infringed by the disclosure of the 11 photographs still at issue. Accordingly, the OIC's assertion of Exemption (b)(7)(C) does not fail for lack of a privacy interest.

2. Public Interest in Disclosure

Plaintiff argues that, even if the surviving family members have a privacy interest in the nondisclosure of the 11 photographs, this privacy interest is outweighed by the public interest in their disclosure. In determining the applicability of Exemption (b)(7)(C), the Court must balance the public interest in disclosure against the possible invasion of privacy caused by the disclosure. Reporters Committee, 489 U.S. at 776; Schiffer v. Federal Bureau of Investigation, 78 F.3d 1405, 1409 (9th Cir. 1996). The government bears the burden of establishing that privacy interests outweigh the public's interest in disclosure. Schiffer, 78 F.3d at 1409-1410.

Defendant claims that Plaintiff has not established that a public interest in disclosure exists. Defendant correctly notes that a public interest cognizable under FOIA is informing the citizenry about how the government is performing its statutory duties. Defendant's Reply, at 13: 8-10 (citing Reporter's Committee, 489 U.S. at 773). See also Hunt v. Federal Bureau of Investigation, 972 F.2d 286, 289-90 (9th Cir. 1992) (discussing the "public interest in ensuring the integrity and the reliability of government investigation procedures"). Defendant argues that none of the 11 photographs at issue have any bearing upon how Vincent Foster performed his duties as Deputy Counsel to the President. Defendant's Reply, at 13: 11-13. From this, Defendant argues that Plaintiff merely demonstrates "curiosity" in the photographs, not a cognizable public interest.

However, it is clear that the public interest Plaintiff attempts to identify is not a concern for how Vincent Foster performed his duties. Rather, Plaintiff's concerns appear to be for the circumstances surrounding Foster's death and for the OIC's investigation of that death. Pages 9-33 of Plaintiff's Motion for Summary Adjudication attack the government investigations of Foster's death (as conducted by Independent Counsels Robert Fiske and Kenneth Starr) as "grossly incomplete and untrustworthy." These pages attempt to raise several questions, contradictions, and inconsistencies with regard to what the public was told regarding: (1) the extent of Foster's injuries; (2) the statements made by Starr's family regarding the gun allegedly found in Foster's hand; (3) the condition of Foster's body as it was found; (4) the condition and location of Foster's eyeglasses; (5) the circumstances surrounding Foster's autopsy; and (6) the condition of the death scene. Plaintiff's Motion, at 9-33. Plaintiff's allegations question the manner in which the OIC investigated Foster's death and implicitly question the manner in which Foster died as well. Thus, the public interest asserted by Plaintiff clearly involves the question of how the OIC performed its statutory duties, not how Vincent Foster performed his duties.

3. Balancing the Privacy Interest With the Public Interest in Disclosure

The issue remains, however, of whether the privacy interests of Foster's family members outweigh the public interest in ensuring the integrity and reliability of the OIC's investigation procedures. There is no doubt that the public interest in ensuring that the OIC conducted a proper and thorough investigation is substantial. However, this interest is lessened because of the exhaustive investigation that has already occurred regarding Foster's death. Five government inquiries have determined that Vincent Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993. The United States Park Police initially investigated the death and conducted another investigation under the direction of Independent Counsel Robert Fiske. Report on the Death of Vincent W. Foster, Jr., By the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association ("Exhibit A to Defendant's Opposition") at 2. Congress conducted two inquiries which reached the same conclusion. *Id.* Finally, the OIC reached the same conclusion in its report that was recently ordered to be released to the public. *Id.* at 114. In addition to these investigations, Foster's death has been subject to intense media scrutiny, as evidenced by the several news sources mentioned by both parties in their briefing. For these reasons, the public interest in investigation of Foster's death is not as strong as it was prior to the extensive examination it has already received.

Additionally, the Court is not convinced that the disclosure of these 11 photographs will serve the asserted public interest. Plaintiff has not sufficiently explained how the disclosure of these photographs will advance his investigation into Foster's death. Nor has he sufficiently explained how the disclosure of these photographs will illuminate any deficiencies of the OIC investigation. Due to this uncertainty and the extensive investigation of this affair that has already occurred, the Court finds that the privacy interests of the Foster family

members outweigh the public interest in disclosure. See Katz, 862 F.Supp. at 484-486 (finding that the Kennedy family members' privacy interests in preventing the disclosure of President Kennedy's autopsy photos and x-rays outweighed the public interest in their disclosure, because, *inter alia*, "the records had already been reviewed by a number of government entities and private researchers"); New York Times, 782 F.Supp. at 633 (finding that the Challenger families' privacy interest outweighed the public interest in disclosure).

Based on the foregoing, the Court finds that summary judgment is appropriate in favor of the OIC, with one exception. The Court finds that the privacy interests in the nondisclosure of the photograph of Foster's eyeglasses are not as strong as the privacy interests in the nondisclosure of the other ten photographs. Thus, the balancing tips in favor of the public interests with regard to this photograph. Accordingly, the OIC is required to produce the photograph of Foster's eyeglasses within 90 days.

C. Photographs Already Produced: Color Copies

With regard to the photographs that have been released, Plaintiff objects to the OIC's "redaction of the color from the photographs." Plaintiff argues that he originally requested color copies of the photographs, but has received only black and white copies. Plaintiff argues that the OIC has not cited and cannot cite any FOIA exemption which allows it to redact the color from these photographs.

Defendant counters that it is not required to provide color copies of color photographs. Defendant argue that the version of FOIA that was effective at the time of Plaintiff's request requires only that agencies make records promptly available upon a proper request. 5 U.S.C. § 552(a)(3). Defendant argues that § 552 at that time did not impose a requirement of providing color copies of color photographs. Defendant claims that Plaintiff was provided with the best photocopy available.

However, a new subsection of § 552 became effective in April of 1997. That subsection states: "In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Since this subsection was effective in January of 1998, when the OIC made records available to Plaintiff, it applies to the OIC's disclosures. Therefore, the issue becomes whether color copies of color photographs are "easily reproducible" by the OIC.

The OIC argues that it is not equipped to make color photocopies and therefore cannot do so without undue burden and interference with its investigatory mandates. The OIC also argues that either engaging an outside contractor to make color copies or allowing Plaintiff to make color copies himself would burden the OIC and expose it to the significant risk of leakage of sensitive, non-public material pertaining to its pending criminal investigations. Defendant's Opposition, at 19 n. 10.

The problem with this argument is that Plaintiff has offered to pay "the costs of providing the OIC with the appropriate equipment to make suitable copies under circumstances consistent with the OIC's security needs." Plaintiff's Reply, at 18: 12-13. Plaintiff suggests that this offer extends to paying the bill of any source of equipment and personnel that the OIC trusts. *Id.* at 18: 13-15. In light of this offer of accommodation, it is difficult to understand how making copies with a color copier in the OIC's offices creates any more of an "undue burden" than doing so with the OIC's own black and white copier. As for the risk of leakage, the Court does

not believe that this risk would be enhanced by a single delivery of a piece of office equipment. In footnote 8 of its Reply, the OIC claims that the Court is to “accord substantial weight to any agency’s determination as to . . . reproducibility under [§ 552(a)(3)(B)].” 5 U.S.C. § 552(a)(4)(B). Even with this deference in mind, the Court cannot accept the arguments advanced by Defendant. Consequently, the Court finds that color copies are “readily reproducible,” and therefore must be provided to Plaintiff within 90 days.

IT IS SO ORDERED.