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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 ALLAN J. FAVISH,) No. CV 97-1479-WDK(Ex)
14)
Plaintiff,)
15)
v.)
16)
OFFICE OF THE INDEPENDENT COUNSEL,) DATE: March 9, 1998
17)
Defendant.) TIME: 3:00 p.m.
18)

- 19
20 (1) DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION
FOR SUMMARY ADJUDICATION OF FACTS
21 (2) DECLARATION OF JAN L. LUYMES AND EXHIBITS A,B
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1 **INTRODUCTION**

2 The plaintiff has filed a Complaint under the Freedom of
3 Information Act seeking documents allegedly improperly withheld
4 from the plaintiff. As reflected in the Ninth Circuit's decision
5 in Spurlock v. FBI, 69 F.3d 1010, 1015 (9th Cir. 1995), "[t]he
6 Supreme Court has explained that `federal jurisdiction [to order
7 disclosure] is dependent on a showing that an agency has (1)
8 `improperly' (2) `withheld' (3) `agency records'." Kissinger v.
9 Reporters Committee for Freedom of the Press, 445 U.S. 136, 150
10 (1980). `Unless each of these criteria is met, a district court
11 lacks jurisdiction to devise remedies to force an agency to
12 comply with the FOIA's disclosure requirements.' Department of
13 Justice v. Tax Analysts, 492 U.S. 136, 142 (1989).'" 69 F.3d at
14 1015. Thus, this case is not about Mr. Favish's various theories
15 or arguments as to why he disagrees with the Report of the
16 Independent Counsel. There is only issue properly before this
17 Court: whether the defendant is properly withholding 11
18 photographs still at issue.¹ For the reasons set forth below and
19 in defendant's motion for summary judgment, the defendant
20 respectfully requests that plaintiff's so-called motion for
21 summary adjudication of facts be denied and defendant's motion
22 for summary judgment be granted. As set forth in defendant's
23 Motion at pp. 12-13, Congress recognized that not all records

24 _____
25 ¹These eleven photographs at issue have been identified in
26 Defendant's Motion for Summary Judgment and in the defendant's
27 Vaughn index as Document No. 2112, Top Section, Polaroids 3,4,
28 and 5; and Document 2112, Bottom Section, Polaroids 1, 2, 3, 4,
5, 6, 7, and 8.

1 should be disclosed and therefore provided that agency records
2 may be withheld under any of the nine exemptions defined in 5
3 U.S.C. § 552(b), of which (b)(7)(C) at issue in this case
4 properly supports the withholding of the eleven photographs.

5 **ARGUMENT**

6 A. Defendant is Properly Withholding The Eleven
7 Death Scene Photographs

8 From the defendant's Motion for Summary Judgment at pp. 12-
9 26, this Court has before it the legal standards to use in order
10 to determine the eleven photographs are of the type, the release
11 of which could reasonably be expected to constitute an
12 unwarranted invasion of personal privacy. Such a conclusion
13 requires a balancing of the possible invasion of the individual's
14 right of privacy against the public interest at stake. Schiffer
15 v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996); Fund for
16 Constitutional Gov't. v. National Archives and Records Service,
17 656 F.2d 856,862 (D.C. Cir. 1981); United States Dep't of Justice
18 v. Reporters Committee for Freedom of the Press, 489 U.S. 749,
19 762, 109 S. Ct. 1468, 1476, 103 L.Ed.2d 774 (1989).

20 Plaintiff concedes, as he must, that the OIC already has
21 furnished him with copies of 118 Foster-suicide investigatory
22 photographs (or their backs, at plaintiff's request). Further,
23 the plaintiff has stipulated that he no longer challenges the
24 information withheld pursuant to (b)(7)(C) in 14 documents. See
25 "Stipulation To Dismiss With Prejudice Claims As To Information
26 Withheld Pursuant To Exemption (b)(3) And Claims As To Certain
27 Information Withheld Pursuant to (b)(7)(C)" entered on February
28 12, 1998. The plaintiff stipulated he was no longer challenging

1 the withholding of the handwritten name of a Foster family
2 member, which name was located on a piece of paper appearing
3 among Mr. Foster's effects in his automobile in Documents 2401A
4 and 2401B (located in Exhibit II Tab 8). In addition, the
5 plaintiff stipulated he was no longer challenging the withholding
6 of the depiction of a piece of personal property pertaining to a
7 Foster family member in Documents 2402A, 2402B, 2402C, 2402D,
8 2403A, 2403B (located in Exhibit II, Tab 8). Further, the
9 plaintiff stipulated he was no longer challenging the withholding
10 of information pertaining to a Foster family member which would
11 assist in identifying that family member in Documents 2422A,
12 2422B (which are located in Exhibit II, Tab 9). See Narrative
13 descriptions for these Documents in Joseph Decl., pp. 40-41, 63-
14 70. In essence, the plaintiff has conceded that the Foster
15 family members have privacy interests. However, the plaintiff
16 contends that as a matter of law, the surviving Foster family
17 members do not have a privacy interest in the ten graphic
18 photographs of Mr. Foster's body (and one photograph of Mr.
19 Foster's eyeglasses, found near his body in Fort Marcy Park). As
20 is clear below and in defendant's Motion for Summary Judgment,
21 the plaintiff's argument fails.

22 Plaintiff contends that he is entitled to judgment as a
23 matter of law because he believes that "under the law of privacy
24 as endorsed by the U.S. Supreme Court, Mr. Foster's survivors do
25 not have any privacy interest in these photos." (Plaintiff's
26 Motion, pg. 4) Plaintiff's reading of United States Department of
27 Justice v. Reporters Committee for Freedom of the Press, 489 U.S.

1 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) does not support the
2 plaintiff's proposition. First, the issue in Reporters Committee
3 did not involve, and the decision did not purport to decide, the
4 scope of privacy concerns that are implicated in death-photograph
5 cases, and most assuredly did not purport to define for all cases
6 the meaning of the Exemption (7)(C) statutory phrase "personal
7 privacy." Further, the Supreme Court recognized that
8 "information may be classified as 'private' if it is 'intended
9 for or restricted to the use of a particular person or group or
10 class of persons: not freely available to the public." 109 S.Ct.
11 at 1477.² As the Reporters Committee case dealt with the issue of
12 a third party seeking rap sheet information about a living
13 individual, the Supreme Court also spoke of privacy as the right
14 to control information "about oneself" in the context of that
15 request for rap sheet information. There is nothing in the
16 Reporters Committee decision which holds that surviving family

18
19 ²The plaintiff concedes that none of the photographs have
20 been published by the OIC. Further, none of the documents were
21 published in the Report of the Independent Counsel. As the Report
22 reflects at pg. 16, the OIC sought to comply with the 1994
23 Independent Counsel Reauthorization Act regarding the contents of
24 reports. The House Conference Report stated that an independent
25 counsel must exercise "restraint" in a report and that "the
26 conferees want to make it clear that the final report requirement
27 is not intended in any way to authorize independent counsels to
make public findings or conclusions that violate normal standards
of due process, privacy or simple fairness." H.R. Conf. Rep. No.
103-511, at 19 (1994). "However, based on traditional privacy
considerations, this report does not include death scene or
autopsy photographs. The potential for misuse and exploitation
of such photographs is both substantial and obvious." (Report,
pg. 17) Thus, the photographs still at issue in this action are
not readily available to the public and the photographs were
intended to be restricted in their use.

1 members have no privacy interests in the non-disclosure of
2 photographs of deceased family members.

3 As the defendant's Motion for Summary Judgment reflects at
4 pp. 23-26, subsequent to the Reporters Committee decision, many
5 courts have recognized the significant privacy interests of
6 surviving family members in the non-disclosure of photographs
7 associated with the deceased and other matters intimately
8 associated with the decedent. These courts, which have faced
9 similar issues as are presented at bar, refused to order
10 disclosure of images or attributes of deceased persons because of
11 their survivors' compelling interests in maintaining the privacy
12 of such matters.

13 For example, in New York Times Company v. National
14 Aeronautics and Space Administration, 920 F.2d 1002 (D.C. Cir.
15 1990), plaintiff sought access to a tape recording of the
16 Challenger astronaut's voices in the moments before they died.
17 NASA invoked FOIA Exemption 6, 5 U.S.C. § 552(b)(6), to justify
18 withholding the tape. Exemption 6 permits the withholding of
19 "personnel and medical and similar files the disclosure of which
20 would constitute a clearly unwarranted invasion of personal
21 privacy." As is reflected in defendant's Motion for Summary
22 Judgment at pg. 23, n. 11, the Exemption 6 standard is a more
23 difficult standard to meet than the standard for withholding
24 under (b)(7)(C) which is at issue in the action before this
25 Court. The district court held that the audio tape failed the
26 threshold test because it did not constitute a "personnel" or
27 "medical" or "similar" file; it ordered the tape released. 920

1 F.2d at 1003. On review of a divided-panel affirmance, the
2 District of Columbia Circuit, sitting in banc, reversed, finding
3 Exemption 6's threshold test satisfied. NASA was thus entitled
4 "to an opportunity to prove its claim that release of the tape
5 would invade the privacy of the deceased astronauts, or of their
6 families." Id. at 1004 (emphasis added). The case was remanded
7 to the district court to balance the private and public interests
8 involved before making a release determination. Id.

9 On remand, the district court found that the privacy
10 interest asserted on behalf of the astronauts' surviving families
11 was a "valid and substantial one." The court rejected
12 plaintiff's argument that because NASA published a transcript of
13 the tapes, no privacy interest in the tapes remained. 782 F.
14 Supp. at 631. The court found that the privacy interest
15 implicated in the tape was "the sound of the astronauts' voices.
16 Exposure to the voice of a beloved family member immediately
17 prior to that family member's death is what would cause the
18 Challenger families pain." Id. Further, the court also weighed
19 in the balance that release of the tape could subject the
20 Challenger families to "a barrage of mailings and personal
21 solicitations, [and] also to a panoply of telephone calls from
22 media groups as well as a disruption of their peace of mind every
23 time a portion of the tape is played within their hearing." Id.
24 at 632.

25 Other cases, cited in the OIC's motion for summary judgment,
26 lend ample support to the proposition that the Foster family has
27 a significant privacy interest that would be defeated were the
28

1 death scene photos released. See Katz v. National Archives &
2 Records Administration, 862 F. Supp. 476 (D.D.C. 1994), aff'd on
3 other gnds, 68 F.3d 1438 (D.C. Cir. 1995) (Exemption (b)(6) case;
4 Kennedy family had clear privacy interest in preventing
5 disclosure of x-rays and optical photographs taken during
6 President Kennedy's autopsy; public interest in disclosure was
7 not sufficient in the balance to justify the clearly unwarranted
8 invasion of the Kennedy family's privacy that disclosure would
9 cause); see also Badhwar v. United States Dep't of Air Force, 829
10 F.2d 182, 185-86 (D.C. Cir. 1987) (survivors of deceased aircraft
11 pilots have privacy interest in autopsy reports; district court
12 entitled to balance whether disclosure of such material would
13 work a clearly unwarranted invasion of personal privacy).

14 In addition to those cases cited in defendant's Motion for
15 Summary Judgment, defendant also brings to the Court's attention
16 two other cases. In Hale v. United States Department of Justice,
17 973 F.2d 894 (10th Cir. 1992), the Tenth Circuit upheld the
18 withholding pursuant to Exemption (b)(7)(C) of the photographs of
19 the deceased victim of a murder perpetrated by the requester (who
20 sought the photos as part of a collateral attack on his
21 conviction). "Nor can we discern any public interest in the
22 photographs of the deceased victim, let alone one that would
23 outweigh the personal privacy interests of the victim's family".
24 973 F.2d at 902.³ In Bowen v. U.S. Food and Drug Administration,

26 ³The Supreme Court granted certiorari and reversed and
27 remanded the case back to the Tenth Circuit on other grounds: for
28 further consideration in light of the Supreme Court's decision in

1 925 F.2d 1225, 1228 (9th Cir. 1991), the Ninth Circuit upheld the
2 FDA's withholding of third party medical records and autopsy
3 reports concerning individuals injured by cyanide-contaminated
4 consumer products pursuant to Exemption 6, which as noted above,
5 is a more difficult standard to meet than (b)(7)(C). The
6 requester in that case was convicted of attempted murder in a
7 state court criminal proceeding charging the requester/defendant
8 with cyanide tampering involving Anacin-3 capsules. In finding
9 that the disclosure of those records would constitute a clearly

11 United States v. Landano, 508 U.S. 165, 113 S.Ct. 2014, 124
12 L.Ed.2d. 84 (1993), which dealt with the showing the Government
13 needed to present as to confidential source information withheld
14 pursuant to (b)(7)(D). Hale v. U.S. Department of Justice, 509
15 U.S. 918, 113 S.Ct. 3029, 125 L.Ed.2d 717 (1993) Upon remand, the
16 Tenth Circuit only considered the (b)(7)(D) exemption, overruling
17 those portions of its prior decision at 973 F.2d 899-900 that
18 were contrary to its prior holding on (b)(7)(D) and remanding the
19 case back to the district court for reconsideration of the
20 Exemption (b)(7)(D) claims. Hale v. U.S. Department of Justice,
21 2 F.3d 1055, 1057 (10th Cir. 1993). After the district court
22 upheld the withholding of information pursuant to (b)(7)(D), upon
23 a further appeal to the Tenth Circuit, the Circuit Court noted
24 that "The United States continues to withhold certain requested
25 materials on the grounds that other exemptions to the FOIA apply
26 [(b)(2), (b)(7)(C), (b)(7)(E)]. The district court's prior
27 determination that these materials were properly withheld on
28 other FOIA grounds was affirmed on appeal by this court in Hale I
[973 F.2d 894], and those claims of exemption are no longer at
issue. The only FOIA exemption at issue here is Exemption 7(D)."
99 F.3d 1025, 1029, n. 3. In the case at bar, there is no
(b)(7)(D) exemption at issue in this litigation. Thus, when faced
with the issue of a (b)(7)(C) withholding of the photographs of
the deceased victim, the Supreme Court did not reverse and remand
that portion of the Tenth Circuit's decision in Hale I which
found a privacy interest for surviving family members which
outweighed any public interest, and that portion of the Tenth
Circuit's decision is still good law. It should be noted that
the Supreme Court's decision in Hale post-dated its decision in
Reporters Committee. Thus, to the extent that the plaintiff
argues that the decisions in Katz and NY Times are contrary to
Reporters Committee, the Supreme Court's decision in Hale
contradicts that argument.

1 unwarranted invasion of personal privacy under Exemption 6 [925
2 F.2d at 1228], the Ninth Circuit necessarily had to find that the
3 surviving family members had privacy interests in the non-
4 disclosure of the medical records and autopsy reports of their
5 deceased family members.

6 Thus, it is clear that other courts have properly found that
7 surviving family members have privacy interests in the same types
8 of graphic depictions of their deceased family members as is at
9 issue in this case. As did the Supreme Court in Reporters
10 Committee, this Court should reject the plaintiff's "cramped
11 notion of personal privacy". 109 S.Ct. at 1476.

12 Before proceeding further, it cannot be overlooked that Mr.
13 Favish never disputes the defendant's objectively reasonable
14 belief that release of these 11 photographs will cause an
15 unwarranted invasion of Mr. Foster's survivors' privacy. Rather,
16 he simply disputes the legal proposition that the Foster family's
17 privacy is entitled to be balanced against the public interest in
18 disclosure: his argument should be rejected for the reasons set
19 forth above and in defendant's Motion for Summary Judgment.

20 In the face of compelling privacy interests of the surviving
21 Foster family members, the question then becomes whether there is
22 a public interest which outweighs the compelling privacy
23 interests. As is set forth in the defendant's Motion at p. 16,
24 the sole cognizable public interest is the interest to open
25 agency action to the light of public scrutiny, to inform the
26 citizenry about what their government is up to.

27 At the outset, it must be recognized that the photographs of
28

1 Mr. Foster (and his glasses lying near his body) do not provide
2 the citizens with any information as to how Mr. Foster performed
3 his role as Deputy Counsel to President Clinton. That is really
4 the only "public interest" which should be considered. In
5 considering this "public interest", this Court should conclude
6 that post-mortem photographs of Mr. Foster (and his glasses lying
7 near his body) simply do not reveal anything about Mr. Foster's
8 conduct as Deputy Counsel and do not shed any light on how the
9 Executive Branch performs its statutory duties.

10 The plaintiff ignores the only type of "public interest"
11 which could be considered (and rejected) by this Court, and
12 instead argues that the release of photographs of Mr. Foster's
13 corpse is necessary "to give the public an opportunity to keep
14 its government honest." Favish Motion. at 35.⁴ Defendant submits
15 that the plaintiff's avowed public interest either is not
16 cognizable or is outweighed by the compelling privacy interests
17 of the surviving Foster family members.

18 First, there is no question but that the Foster death has
19 been investigated. Five government inquiries have determined that
20 Vincent W. Foster, Jr. committed suicide by gunshot in Fort Marcy
21 Park on July 20, 1993. See Report on the Death of Vincent W.
22 Foster, Jr., by the Office of Independent Counsel In re: Madison
23
24
25

26
27 ⁴The plaintiff's argument as to any alleged public interest
is limited to 1 page.

1 Guaranty Savings & Loan Association at 2, 114 (1997). Mr.
2 Favish's submissions indicate that he is not satisfied with that
3 conclusion, and as noted above, contends that he needs release of
4 the withheld photographs in order to "give the public an
5 opportunity to keep its government honest." As noted earlier,
6 plaintiff has conceded, as he must, that the OIC already has
7 furnished him with copies of 118 Foster-suicide investigatory
8 photographs (or their backs, at plaintiff's request) and portions
9 of 14 additional photographs, and he offers no explanation --
10 much less a plausible one -- as to why the OIC would have done so
11 if it truly were motivated by a desire to hide the truth.

12 Plaintiff has cited nothing to support his contention that
13 the Foster family's privacy interests are insufficient, as a
14 matter of law, to defeat his generalized (and unsupported)
15 contention that release of the graphic death scene photos at
16 issue in this case will give the public a greater chance than it
17 already has had -- in his words -- "to keep its government
18 honest." Even in instances where convicted criminal defendants
19 have requested copies of death scene photographs, in addition to
20 the cases involving the Kennedy assassination and the Challenger
21 accident, the defendant has demonstrated above and in its Motion
22 for summary judgment that courts have refused to order disclosure
23 of images or attributes of deceased persons because of their
24

25 ⁵The plaintiff has attached as Exhibit 4 to his Motion for
26 Summary Adjudication of Facts only certain of the pages found in
27 the Report of the Independent Counsel. Attached to the
28 Declaration of Jan L. Luymes as Exhibit A are true and correct
copies of certain other pages referenced by the defendant.

1 survivors' compelling interests in maintaining the privacy of such
2 matters.

3 Finally, plaintiff contends that a photograph of Mr.
4 Foster's eyeglasses, and a photograph of a gun in Mr. Foster's
5 hand⁶ should both be released. As to Mr. Foster's eyeglasses,
6 plaintiff claims that a photograph of the eyeglasses already has
7 been published in the Senate Hearings, see Favish Motion. 34 &
8 n.159; id. Exhibit 5, at 152. Plaintiff fails to recognize (or is
9 deliberately obfuscating the fact) that the photo the Senate
10 published, however, is not the photograph which is being withheld
11 by the OIC. The defendant is withholding a photograph taken at
12 the crime scene of the glasses lying near Mr. Foster's body. In
13 other words, there are two different photos. It is ludicrous to
14 suggest, as Mr. Favish has done, that a specimen photograph taken
15 after the eyeglasses were removed from the scene is in any way
16 similar to the photograph taken at the Park. The contextual
17 difference obviously is crucial. One could reasonably expect the
18 Foster family members to suffer additional anguish should they be
19 confronted with an image of one of Mr. Foster's personal effects
20 at the scene where he died. Given the manner in which Mr. Foster
21 met his death, it also is reasonable to conclude that one or more
22 of his family members may conjure up mental images of how his

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25 ⁶ The "eyeglasses" photo which is being withheld by the OIC
26 is a depiction of Mr. Foster's eyeglasses lying on the ground
27 near his body in Fort Marcy Park. It is identified in this case
as Document No. 2112, Bottom Section, Polaroid No. 2. The "gun
in hand" photo is identified in this case as Document No. 2112,
Bottom Section, Polaroid No. 1.

1 eyeglasses came to rest in the place and position they did, and
2 it does not require a great leap to imagine the emotional
3 suffering that those inevitable mental exercises will cause.
4

5 ⁷Relying solely on his own interpretation of page 157 of
6 Exhibit 5 to the plaintiff's Motion (and without any further
7 foundation), the plaintiff asserts that the Department of
8 Interior determined that there was no "Family privacy implicated"
9 by release of the eyeglasses photo at page 2448 of the Hearings.
10 Obviously, even if the plaintiff's interpretation is correct
11 (which defendant does not concede), plaintiff's interpretation is
12 irrelevant, as the photograph of eyeglasses on page 2448 was
13 neither requested by the plaintiff, nor is the photograph on page
14 2448 the photograph which the OIC is withholding. Indeed, it is
15 disingenuous for the plaintiff to overlook the fact (and fail to
16 mark as an Exhibit), the letter of Timothy S. Elliott, Deputy
17 Associate Solicitor General for the U.S. Department of the
18 Interior dated July 5, 1994, a true and correct copy of which is
19 attached to the Luymes Declaration as Exhibit B. In that letter
20 (published at pp. 2110 and 2111 of the Senate Hearings Volume
21 II), the Department of the Interior specifically advised the
22 Senate Committee on Banking that it was not releasing
23 "photographs, or copies thereof, of Vincent Foster's body at the
24 death scene." This would "result in an unwarranted invasion of
25 the personal privacy of the Foster family. They have not to our
26 knowledge been released outside of the Executive Branch.
27 Furthermore, we are protecting them in pending litigation under
28 the Freedom of Information Act." The disclosure of information
to an authorized congressional committee does not waive FOIA
exemptions. Safeway Stores, Inc. v. Federal Trade Commission, 428
F.Supp. 346 (D.D.C. 1977) Further, the Senate's publishing of any
photograph in its hearing volumes does not require the disclosure
of the information by the OIC. Cf. Peterzell v. CIA, 1986 WL
15352 at 1 (D.D.C. July 11, 1986) (Congressional publications and
articles appearing in the media do not constitute "official
acknowledgment"); Public Citizen v. Department of State, 787
F.Supp. 12 (D.D.C. 1992) (testimony at Congressional hearings of
Ambassador to Iraq regarding meeting with Saddam Hussein shortly
before the Iraqi invasion of Kuwait held not to require
disclosure of memoranda and teletypes from the Ambassador to
Department of State); Salisbury v. United States (690 F.2d 966
(D.C.Cir. 1982) (Senate report discussing the monitoring practices
of the NSA and admission by Director of NSA as to NSA monitoring
of communications between Hanoi and US did not equate with
disclosure by NSA of its methods of information gathering and
information sought was protected from disclosure); Earth Pledge
Foundation v. CIA, 1996 WL 934024 at 5 (S.D.N.Y December 4,
1996) (district court upholds non-disclosure of information
despite Senate Report confirming the existence of a CIA

1 The same holds true of the photograph of the gun in Mr.
2 Foster's hand. Mr. Favish's only argument on this issue is that
3 the photograph already has been widely disseminated in the media.
4 Plaintiff's argument, which in part is a prior disclosure
5 argument and in part is a privacy argument, fails for several
6 reasons.

7 First, the plaintiff bears the burden of proving a prior
8 official disclosure. In terms of plaintiff's motion for summary
9 adjudication of facts, there is a key distinction as to who bears
10 the burden of production and persuasion. While the OIC has the
11 burden to justify its nondisclosure of the information being
12 requested, the courts clearly recognize that it is the plaintiff
13 who bears the burden of proving that there is a prior official
14 duplicative disclosure.⁸ Conversely, the defendant is not
15 required to prove the negative - that information has not been
16 revealed - as it would require the government to undertake an

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19 installation, as confirmation by another branch of government
(the Senate) is different from the CIA itself acknowledging the
20 existence of the base).

21 ⁸In Afshar v. Department of State, 702 F.2d 1125, 1130-31
22 (D.C. Cir. 1983), the D.C. Circuit articulated a strict test for
"official acknowledgment" involving exemption 1 information.
23 First, the information requested must be as specific as the
information previously released. Second, the information
24 requested must match the information previously disclosed. Third,
the information requested must already have been made public
25 through an official and documented disclosure. Unless the
information requested meets those criteria, it has not been
26 "officially acknowledged" and the government may continue to
withhold it.) Accord Public Citizen v. Department of State, 11
27 F.3d 198, 201-203 (D.C. Cir. 1993); Fitzgibbon v. CIA, 911 F.2d
755, 765 (D.C. Cir. 1990) see also Schlesinger v. CIA, 591
F.Supp. 60, 68 (D.D.C. 1984).

1 exhaustive, potentially limitless search. See McGehee v. Casey,
2 718 F.2d 1137, 1141 n. 9 (D.C.Cir. 1983); Davis v. U.S.
3 Department of Justice, 968 F.2d 1276, 1279 (D.C. 1992). Thus, in
4 order to obtain a summary adjudication of facts as to plaintiff's
5 argument, the plaintiff must make a showing sufficient to
6 establish the existence of the elements essential to the
7 plaintiff's case and on which the plaintiff will bear the burden
8 of proof at trial, and to demonstrate that there are no genuine
9 issues of material fact. See Celotex Corp. v. Catrett, 477 U.S.
10 317, 322, 106 S.Ct. 2548, 91 L.Ed. 265 (1986) see also Lujan v.
11 National Wildlife Federation, 497 U.S. 871, 110 S.Ct. 3177, 111
12 L.Ed.2d 695, 713-714 (1990).

13 Plaintiff cannot meet his burden as the plaintiff admits
14 that there has been no official disclosure of the information he
15 seeks. Plaintiff admits that the photo has never been "officially
16 published by the government" (Favish Motion. at 1), and in fact
17 alleges the photograph he seeks was "leaked." Id. at 13 n.62. An
18 unauthorized release of information does not require the agency
19 to release additional information. In order for there to be an
20 official disclosure, the disclosure must be authorized. See
21 Safeway Stores Incorporated v. Federal Trade Commission, 428 F.
22 Supp. 346 (D.D.C. 1977) (when FTC provided congressional
23 committee with information, the later publication of such
24 information by the Washington Post was unauthorized leak and did
25 not constitute waiver of FOIA exemption by the agency). Further,
26 the earliest date of dissemination plaintiff identifies is March
27 21, 1994. See Favish Motion. 13 & n.62, 35. The statutory OIC,
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1 however, did not come into existence until months later in
2 August, 1994. see Joseph Decl. ¶ 6(b). Thus, even assuming for
3 argument's sake that the relevant photograph in its files is the
4 same as the one disseminated in the media, the OIC could not be
5 and was not responsible for that dissemination. In addition, any
6 publication by the news media does not constitute official
7 disclosure.⁹

8 Finally, even assuming for argument's sake that the relevant
9 photograph in the OIC's files is the same as the one disseminated
10 in the media, the plaintiff's argument that he could not give the
11 photo any more exposure than it has already received ignores the
12 "practical obscurity" standard in Reporters Committee. There,
13 the Supreme Court recognized the privacy interest in the
14 nondisclosure of certain information even where the information

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17 ⁹Rumors, speculation and press articles are not official
18 disclosures. Pfeiffer v. CIA, 721 F.Supp. 337, 342 (D.D.C. 1989)
19 (excerpts from books, magazine articles and interviews purporting
20 to demonstrate that some of the information withheld by the
21 agency is part of the public record is "of no legal significance"
22 because plaintiff failed to meet his burden of establishing that
23 any of the proffered evidence represented an official agency
24 disclosure, dissemination, or acknowledgment). Peterzell v. CIA,
25 1986 WL 15352, at 1 (D.D.C. 7/11/86) (Congressional publications
26 and articles appearing in the media do not constitute "official
27 acknowledgment"). United States v. Marchetti, 466 F.2d 1309, 1318
28 4th Cir., cert. denied, 93 S.Ct. 553 (1972) ("Rumor and
speculation are not the equivalent of prior disclosure").
Logically, "it is one thing for a reporter or author to speculate
or guess that a thing may be so or even, quoting undisclosed
sources, to say that it is so; it is quite another thing for one
in a position to know of it officially to say that it is so."
Knopf v. Colby, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421
U.S. 992, 995 (1975), cited with approval by the D.C. Circuit in
Fitzgibbon v. CIA, supra, 911 F.2d at 765. Thus, the plaintiff's
attempts to bootstrap his argument by reference to Newsweek and
Time articles is legally irrelevant and insufficient.

1 may have been at one time public. 109 S.Ct. at 1479. The Supreme
2 Court further noted that "[i]n sum, the fact that an event is
3 not wholly "private" does not mean that an individual has no
4 interest in limiting disclosure or dissemination of the
5 information. [citation omitted]" 109 S.Ct. at 1480. See also Rose
6 v. Department of Air Force, 495 F.2d 261, 267 (2d Cir. 1974) ("[A]
7 person's privacy may be as effectively infringed by reviving
8 dormant memories as by imparting new information") (Exemption 6),
9 aff'd 425 U.S. 352 (1976). Thus, the Supreme Court has rejected
10 the implication in plaintiff's argument that there is no harm to
11 the privacy interests from further publication of any photograph
12 which the plaintiff believes has already been published.

13 Thus, the OIC properly continues to claim Exemption
14 (b) (7) (C) to withhold from disclosure the photograph in its files
15 depicting a gun in Mr. Foster's hand.

16 In sum, the privacy interests implicated by the Foster
17 death-scene photographs are substantial. Any purported,
18 incremental public interest in disclosure is more than outweighed
19 by the emotional anguish the Foster family will face by the
20 inevitably wide dissemination the photographs will receive if
21 they are disclosed. Indeed, the so-called "evidence-rich"
22 section of Mr. Favish's brief (pp. 9-34) noticeably falls short
23 of demonstrating how release of the withheld photographs will
24 answer the "questions" he raises so that, as a matter of law, the
25 Foster family's interests must be ignored or outweighed. Rather,
26 this Court should conclude that the significant, compelling
27 privacy interests of the surviving Foster family members outweigh

1 whatever the meager public interest asserted by the plaintiff.

2 **B. The OIC Is Not Required to Produce Color Copies of**
3 **Color Photographs**

4 The plaintiff suggests on pg. 1 of his Motion that he
5 entitled to obtain color copies of color photographs. The Freedom
6 of Information Act does not impose an obligation upon an agency
7 to provide a requester with color copies of color photographs.
8 On the contrary, at the time of plaintiff's Request, the Act
9 specifically provides as follows:

10 Except with respect to the records made
11 available under paragraphs (1) and (2) of
12 this subsection [not applicable to this
13 case], each agency, upon any request for
14 records which (A) reasonably describes such
15 records and (B) is made in accordance with
16 published rules stating the time, place, fees
17 (if any), and procedures to be followed,
18 shall make the records promptly available to
19 any person.

20 5 U.S.C. § 552(a)(3). There is no requirement for providing color
21 copies of any color photographs. As the Court can see by
22 reference to Exhibit II to the Joseph Declaration and by
23 comparing the reproduction in the Senate hearing Volume with the
24 reproduction in black and white of the documents released by the
25 OIC, the plaintiff was provided with the best photocopy
26 available. Indeed, extreme care was taken to obtain the best
27 photocopy copy. (Joseph Decl., ¶6(c)) Plaintiff provides no basis

1 as to why he believes he is entitled to something which the FOIA
2 did not require. The OIC has provided the plaintiff with copies
3 of the records requested. Having met its obligations under the
4 FOIA, any suggestion by the plaintiff in Motion that he is
5 entitled to color copies should be rejected.¹⁰

6 CONCLUSION

7 For all the foregoing reasons and as presented in
8 defendant's Motion for Summary Judgment, defendant respectfully
9 requests that the Court deny plaintiff's motion for "summary
10 adjudication of issues," and, at the same time, the Court grant
11 the OIC's motion for summary judgment on the grounds that: (1)
12 the eleven death-scene photographs were properly withheld under

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17 ¹⁰Defendant notes that amendments to the FOIA, which took
18 effect in late 1997, now provide in pertinent part: "In making
19 any record available to a person under this paragraph, an agency
20 shall provide the record in any form or format requested by the
21 person if the record is readily reproducible by the agency in
22 that form or format." 5 U.S.C. § 552(a)(3)(B) (emphasis added).
23 The OIC is not equipped to make color photocopies and thus any
24 color photographs are not readily reproducible by the OIC in
25 color. The OIC has no facilities to make color photocopies, and
26 cannot do so without undue burden and interference with its
27 investigatory mandates. Moreover, plaintiff has cited nothing to
28 support any contention he might make that the OIC is obligated to
engage a government or commercial contractor to make such copies,
or to permit him access to the OIC's facilities with his own or
hired equipment to do the work himself. Any such alternative
would put a burden on the agency's personnel and other resources
that FOIA does not require it to bear, and would expose the
defendant to the significant risk of leakage of sensitive, non-
public material pertaining not only to the investigation of Mr.
Foster's suicide, but also of other pending criminal
investigations.

1 FOIA Exemption (b)(7)(C); and (2) the OIC has no legal obligation
2 to furnish to plaintiff color copies of color photographs in its
3 files.

4 DATED: This 23rd day of February, 1998.

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