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

13 ALLAN J. FAVISH,) No. CV 97-1479-WDK(Ex)
14)
Plaintiff,)
15) DATE: March 5, 2001
v.) TIME: 3:00 p.m.
16)
OFFICE OF THE INDEPENDENT COUNSEL,)
17)
Defendant.)
18

19 REPLY OF OFFICE OF INDEPENDENT COUNSEL IN SUPPORT OF ITS
20 MOTION TO ALTER OR AMEND JUDGMENT AND FOR CLARIFICATION
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1 The only issue remaining in this FOIA case is whether the
2 defendant Office of Independent Counsel ("OIC") has improperly
3 withheld ten Polaroid photographs. Defendant OIC has filed its
4 motion to alter or amend judgment as to the Court's Order of
5 January 12, 2001 mandating disclosure of five of the Polaroid
6 photographs and for clarification of the Court's Order as to the
7 duty to produce the originals of the five Polaroid photographs
8 ordered to be disclosed ("OIC Motion"). As set forth in the OIC's
9 Motion, the Court of Appeals remanded to this Court to review the
10 Polaroid photographs in camera so that the Court could weigh the
11 privacy interest of the Foster family in withholding the Polaroids
12 against the public interest in release. Favish's Opposition to the
13 OIC's Motion fails to show how the public interests that he has
14 proffered outweigh the legitimate privacy interest of Mr. Foster's
15 family. He has therefore not shown why release of these Polaroids
16 would be justified under FOIA.

17 **I. The Only Issue Properly Before The Court Is Reconsideration**
18 **Of Its Decision That Five Polaroids Were Subject To**
19 **Disclosure**

20 In his Opposition, Favish states that all ten of the
21 Polaroids at issue in this case should be released and that he
22 will appeal the Court's decision. Opposition at 2-3 and n.4.
23 Favish did not timely file a motion for reconsideration under Fed.
24 R. Civ. P. 59(e), and he has failed to show that he is entitled to
25 relief from judgment under Rule 60(b). Thus, the issue before the
26 Court is only whether it should alter its judgment to the extent
27 it ordered release of five of the Polaroid photographs. See
28 Carter v. United States, 973 F.2d 1479, 1488 (9th Cir. 1992).

1 **II. The Areas Of Public Interest That Favish Proffers Do Not**
2 **Support Release Of The Five Polaroid Photographs At Issue**

3 **A. Favish Has Failed To Demonstrate Any Public Interest In**
4 **General Allegations Of Government Misconduct**

5 Under the Freedom of Information Act, this Court's
6 jurisdiction is limited to determining whether the OIC has
7 improperly withheld agency records. 5 U.S.C. § 552(a)(4)(B);
8 Kissinger v. Reporters Committee for Freedom of the Press, 445
9 U.S. 136, 150, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980); United States
10 Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142, 109 S.Ct.
11 2841, 106 L.Ed.2d 112 (1989). As set forth in the OIC's Motion, in
12 determining whether the OIC had improperly withheld the Polaroid
13 photographs at issue the Court had to balance the privacy interest
14 of the Foster family against the public interest in disclosure.
15 See United States Dep't of Justice v. Reporters Committee for
16 Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d
17 774 (1989). Further, as set forth in the OIC Motion at 8, Favish
18 must demonstrate that there is a public interest cognizable under
19 FOIA in the specific information being withheld.

20 In the first 29 pages of his Opposition, Favish provides page
21 after page of his criticism of the investigations conducted by
22 Independent Counsels Fiske and Starr. Favish does not relate his
23 discussion in any way to the five Polaroid photographs at issue in
24 the OIC's Motion. Rather, Favish is positing a general interest
25 in uncovering a conspiracy involving the federal law enforcement
26 officers who conducted the prior investigation. But Favish has
27 fallen far short of demonstrating a public interest in uncovering
28 government malfeasance. As the OIC showed in its Motion,
allegations of government misconduct only become a legitimate

1 issue of public interest cognizable in a FOIA suit when the
2 plaintiff has offered substantial support to prove the misconduct.
3 When "government misconduct is alleged as the justification for
4 disclosure, the public interest is insubstantial unless the
5 requester puts forward compelling evidence that the agency denying
6 the FOIA request is engaged in illegal activity and shows that the
7 information sought is necessary in order to confirm or refute that
8 evidence." Davis v. United States Dep't of Justice, 968 F.2d
9 1276, 1282 (D.C. Cir. 1992) (internal quotation omitted); see also
10 Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000); Spirko v. United
11 States Postal Serv., 147 F.3d 992, 999 (D.C. Cir. 1988); Silets v.
12 United States Dep't of Justice, 945 F.2d 227, 231 (7th Cir.
13 1991) (en banc). See also KTVY-TV v. United States, 919 F.2d 1465
14 (10th Cir. 1990).¹ Thus, in Schiffer v. FBI, 78 F.3d 1405, 1410
15 (9th Cir. 1996), the court held that the requester's proffered
16 public interest in determining whether the FBI had improperly
17 investigated him was not a public interest under FOIA "because

18

19 ¹In that case, plaintiff sought a Postal Service report
20 investigation of shootings of fourteen postal workers and suicide
21 by the shooter and documents from the completed report. The
22 Postal Service disclosed 2,145 pages, with some deletions,
23 refusing to produce the identities of the interviewees, their
24 statements and information regarding an interview of the shooter.
25 While plaintiff argued the public interest was the supposed right
26 of the public to know how the shootings occurred and whether they
27 could be avoided, plaintiff's public interest argument was
28 rejected as the information withheld did not provide information
about the conduct of the government, relying upon Reporters
Committee at 489 U.S. at 773-774. "At most, plaintiff makes a
broad, unsupported statement of possible neglect by defendants".
919 F.2d at 1470. In balancing the privacy interests against the
public interest asserted by the plaintiff, the Tenth Circuit
found that "any slight interest the public may have in knowing
the background and details of the shooting is outweighed by the
reasonable likelihood of harassment and embarrassment of the
witnesses and other persons". Id.

1 there is no evidence suggesting that the FBI engaged in any
2 wrongdoing."

3 Rather than offering any substantial evidence of government
4 misconduct, Favish merely focuses on purported contradictions in
5 evidence gathered during the investigation, or disagreements which
6 Favish has with the conclusions reached by the Independent
7 Counsel. For example, Favish finds it significant that the
8 confidential witness who found Mr. Foster's body stated that he
9 did not see a gun in Mr. Foster's hand. Opposition at 8. If there
10 was no gun in Mr. Foster's hand when the confidential witness saw
11 his body but there was one in his hand later when the Park Police
12 and the Fire and Rescue workers saw it, then it must have been
13 placed there by someone "staging" the death scene. But none of
14 the Polaroids at issue in this case could explain who or why the
15 scene was "staged." That is, even if one assumes that such an
16 event occurred, all of the Polaroids at issue in this case would
17 have been taken after the so-called "staging".

18 Indeed, Favish's own Opposition demonstrates that this issue
19 does not favor release of any of these Polaroid photographs:
20 Favish's arguments assume that the photograph leaked (by an
21 unknown individual long before Starr was appointed Independent
22 Counsel) to ABC-News shows that the scene must have been staged
23 because it contradicts the statements of the confidential witness.
24 See Opposition at 9. Thus, no photograph showing the gun in Mr.
25 Foster's hand can resolve this issue because the supposed
26 controversy is founded on the assumption that the confidential
27 witness' statement cannot be wrong.

28 Favish has merely recognized the fundamental choice that had

1 to be made by those who investigated Mr. Foster's death: either
2 the confidential witness was mistaken about what he saw, or the
3 Polaroid photographs taken at the crime scene and the statements
4 of the witnesses who later saw a gun in Mr. Foster's hand are all
5 evidence of a massive conspiracy. The federal officials that
6 investigated Mr. Foster's death concluded that mistaken
7 observation was more likely than a massive conspiracy. Favish
8 disagrees with that evaluation of the probabilities. But that
9 disagreement does not show how release of the five Polaroids at
10 issue in the OIC's Motion would further any public interest
11 cognizable under FOIA.

12
13 **B. Favish Has Failed To Show How His Proffered Public**
14 **Interest Relates to The Five Polaroid Photographs At**
15 **Issue Here**

16 Favish raises numerous issues that he asserts the public has
17 an interest in resolving and which, therefore, he claims support
18 the release of the Polaroid photographs in this case. There is a
19 fundamental problem with Favish's asserted public interests:
20 either the asserted public interest is wholly irrelevant to the
21 Polaroids at issue in this case or, if it is relevant, it is only
22 relevant to one of the Polaroid photographs which the Court has
23 already ruled would be an unwarranted invasion of the privacy of
24 the Foster family.

25 Favish discusses numerous issues that he purports show that
26 the OIC's report on Mr. Foster's death is "untrustworthy." But
27 Favish does not attempt to link the issues to the five Polaroid
28 photographs. That is, he fails to show how release of the five
Polaroids would advance any public interest. Indeed, many of the

1 issues that Favish raises have no relation to the Polaroids. For
2 example, Favish alleges that the Chief of the Park Police lied to
3 the media on August 10, 1993. Opposition at 13. Favish has not
4 even attempted to show how any of the five death scene Polaroids
5 at issue in the OIC's Motion have any relevance to whether the
6 Chief of the Park Police allegedly lied to the press. Similarly,
7 Favish asserts that there is evidence suggesting that Mr. Foster's
8 car was not in the Fort Marcy Park parking lot at the time of his
9 death. Opposition at 16. Again, none of the Polaroid photographs
10 at issue in the OIC's Motion has any relevance to this issue
11 because none of them show the parking lot at Fort Marcy Park. On
12 the other hand, to the extent that there is a public interest in
13 Polaroids of the Fort Marcy Park parking lot, those Polaroids have
14 already been released to Favish.

15 Relevant to the five Polaroids at issue in the OIC's Motion,
16 the issues Favish proffers as the basis for release can be broadly
17 grouped into two categories: issues relating to the nature of Mr.
18 Foster's wounds, and issues relating to the gun in Mr. Foster's
19 hand. We address each of these in turn.

20 **1. Issues Relating To Mr. Foster's Wounds**

21 Favish's principle concern seems to be that Mr. Foster died
22 from being shot in the neck rather than, as the federal
23 investigators all concluded, from a perforating gunshot wound from
24 the back of his mouth through the back of his head. Thus, Favish
25 is concerned about a report written by Dr. Haut of the medical
26 examiner's office, which in one place refers to the neck but in
27 another refers to the head. Opposition at 14 & 20. Favish is also
28 concerned that there is evidence that is inconsistent with the

1 mouth to head wound, such as statements from witnesses, Opposition
2 at 6, and an FBI teletype relying upon hearsay stating that there
3 was no exit wound, Opposition at 19. Finally, on pages 30 through
4 34 of his Opposition, Favish asserts that the five Polaroids that
5 the Court ordered to be released will resolve a controversy over
6 the contact bloodstain on Mr. Foster's neck and face.

7 None of the five Polaroids at issue in the OIC's Motion show
8 the back of Mr. Foster's head, and none show Mr. Foster's neck and
9 the contact bloodstain. In fact, none of the ten Polaroids at
10 issue in this case show the back of Mr. Foster's head. Only one
11 Polaroid, number 8 from the third group, shows Mr. Foster's neck
12 and the contact bloodstain. The Court has already held that
13 release of that Polaroid would be an unwarranted invasion of the
14 privacy of the Foster family. Thus, none of the five Polaroids
15 ordered by this Court to be released will shed any light on
16 whether Mr. Foster was shot in the neck or died from a self-
17 inflicted gunshot wound from his mouth through his head.

18 This shows the Catch-22 that Favish has placed himself in:
19 to the extent a Polaroid does not show Mr. Foster's wounds, it is
20 not relevant to his asserted public interest; to the extent it
21 does show his wounds, release of it would be an unwarranted
22 invasion of the privacy of the Foster family. As the D.C. Circuit
23 concluded, "[g]iven the subject matter, we cannot imagine any
24 photos that could both elucidate the true nature of Foster's
25 wounds and yet not be disturbingly graphic." Accuracy in Media,
26 Inc. v. National Park Service, 194 F.3d 120, 125 (D.C. Cir. 1999),
27 cert. denied, 120 S.Ct. 1966 (2000).

28

1 2. **Issues Related To the Gun Found In Mr. Foster's**
2 **Hand**

3 Favish asserts several issues relating to the gun in Mr.
4 Foster's hand. Favish raises issues concerning whether the gun
5 found in Mr. Foster's hand was one he owned. Favish asserts that
6 the OIC relied on an "invalid" identification of the gun.
7 Opposition at 9. But none of the Polaroids still at issue in this
8 case have any relevance to whether federal investigators relied on
9 an invalid identification. On the other hand, to the extent that
10 there is some public interest in knowing what the gun found in Mr.
11 Foster's hand looked like, numerous photographs of the gun have
12 been released to Mr. Favish in this case. Thus, Favish has again
13 failed to show how the proffered public interest would be
14 furthered by releasing any of the death scene Polaroids at issue
15 here.

16 Favish asserts that there is some public controversy over why
17 the gun remained in Mr. Foster's hand after he committed suicide.
18 Opposition at 29. Favish asserts that the "leaked" copy of
19 Polaroid number 1 from the third set is too "degraded" to
20 determine whether Mr. Foster's thumb is actually caught in the
21 trigger; he asserts that "[t]he original of this photo would
22 provide a much better view of his thumb and the trigger area."
23 Id. Favish has failed to point to any record evidence that
24 establishes that the "leaked" photograph is "degraded" in a way
25 that the original would not be. Further, Favish has failed to
26 establish how release of the Polaroid photograph would serve the
27 public interest cognizable under FOIA - to show how the government
28 performs its statutory duties.

1 Favish also asserts that release of this Polaroid would
2 permit persons to determine whether there was any blood spatter on
3 the gun, as found by Dr. Lee. Opposition at 29 (citing Report at
4 47). Favish misrepresented what the OIC's report stated. What the
5 the report actually stated was that Dr. Lee observed in
6 photographs high velocity impact type blood spatter "on Mr.
7 Foster's face, hands, and shirt." Report at 47. What Dr. Lee
8 actually reported about blood on the gun was that he found small
9 specks of brownish-colored deposits that gave a positive result
10 when chemically tested for blood. Report at 39. These small specks
11 are not visible in the Polaroid photograph of the gun in Mr.
12 Foster's hand. Moreover, Favish has failed to explain why the
13 photographs of the gun that have been released to him are not
14 adequate to satisfy any public interest about blood on the gun.

15 Favish also asserts that public interest favors release of
16 this photograph because it would help to answer the question of
17 why the gun in Mr. Foster's hand appears to be partially lodged
18 under his leg. Opposition at 29. Favish claims that "[t]he
19 original photo will provide a more detailed view and allow a
20 better evaluation of whether the gun is lodged under his leg."
21 Id. at 29-30. Favish is wrong. As the Court may recall from the in
22 camera inspection of the original Polaroid photograph, the end of
23 the barrel of the gun in Mr. Foster's hand is obscured in the
24 Polaroid by a piece of foliage and one cannot see definitively
25 whether the barrel is resting on Mr. Foster's pants or under them.
26 Compare OIC Report at 78 discussing witness statements who saw the
27 gun and the foliage. Thus, Favish is wrong when he asserts that
28 the production of the original would address this non-issue. More

1 importantly, the production of this original will not shed light
2 on how the OIC performed its statutory duties - the only public
3 interest cognizable under FOIA.

4
5 **III. There is No Statutory Right To Review Or Receive Production
6 of Original Agency Records**

7 Favish also argues that the OIC must make the original
8 Polaroids available for public inspection and copying. Opposition
9 at 34. Favish relies on 5 U.S.C. § 552(a)(2) & (a)(3) as the
10 authority for his alleged "statutory right" to see the originals.
11 Id. at 34. Favish also asserts that the OIC must permit him to
12 bring a computer scanner into the OIC's offices so that OIC
13 personnel can scan the Polaroids for him. Favish is incorrect.

14 Favish bases his claim that he has "a statutory right to see
15 the originals" on a combination of the access rights provided by
16 paragraphs (a)(2) and (a)(3) of the FOIA, 5 U.S.C. § 552(a)(2),
17 (3) (1994 & Supp. IV 1998). Each of those paragraphs, however,
18 provides its own right of access that is separate and distinct
19 from the access right provided by the other. See 5 U.S.C.
20 552(a)(3) ("Except with respect to the records made available
21 under paragraphs (1) and (2) of this subsection, each agency, upon
22 any request for records . . . shall make the records promptly
23 available to any person.") (emphasis added); see also Reeves v.
24 United States, Nos. 94-1291 & 94-1292, 1994 WL 782235, at *1 (E.D.
25 Cal. Nov. 16, 1994) (describing different treatment of (a)(1),
26 (a)(2), and (a)(3) records under the FOIA), aff'd, 108 F.3d 338
27 (9th Cir. 1997) (unpublished table decision); Crews v. Internal
28 Revenue, No. 99-8388, 2000 WL 900800, at *6 (C.D. Cal. Apr. 26,

1 2000) (records made available under (a) (2) need not be made
2 available in response to (a) (3) requests). Thus, a person may
3 access the records he/she seeks under either (a) (2) or (a) (3), but
4 not both. However, as discussed below, neither of the access
5 rights provided by (a) (2) or (a) (3) entitles Favish to inspect
6 original records.

7 Paragraph (a) (2) provides that each agency shall make
8 available for public inspection and copying records that fall into
9 four general categories--final opinions, policy statements, staff
10 manuals, and materials frequently requested under (a) (3). See 5
11 U.S.C. § 552(a) (2). Since the records Favish requested are not
12 final opinions, policy statements, or staff manuals, his only
13 right of access to the requested records under (a) (2) would be
14 pursuant to sub-paragraph (a) (2) (D), which provides that materials
15 frequently requested under (a) (3) must be made available in the
16 agency's reading room. See 5 U.S.C. § 552(a) (2) (D).² By its very
17 terms, (a) (2) (D) explicitly provides for access to copies--not
18 originals--of such records:

19 Each agency, in accordance with published rules, shall
20 make available for public inspection and copying--

21 (D) copies of all records, regardless of form or
22 format, which have been released to any person
23 under paragraph (3) and which, because of the
24 nature of their subject matter, the agency

25
26 ²Records do not become subject to access under (a) (2) (D) at all
27 unless the agency has determined that those records have become
28 or are likely to become the subject of subsequent requests.
However, this presumes that the record, or a portion thereof, is
not exempt from disclosure. In this case, the OIC still asserts
that all ten Polaroid photographs are exempt from disclosure.

1 determines have become or are likely to become the
2 subject of subsequent requests for substantially
3 the same records
4

5 Id. (emphasis added). Thus, Favish's reliance on (a)(2)'s
6 "public inspection and copying" provision is misplaced and does
7 not provide a statutory authority for his assertion of a
8 "statutory right".

9 Furthermore, other language contained in (a)(2) suggests
10 that only copies of records--not the original records themselves--
11 -are to be made available for public inspection and copying. The
12 second sentence of (a)(2) provides that agencies may excise
13 certain information from records placed in its reading room
14 pursuant to (a)(2)(D) in order to prevent a clearly unwarranted
15 invasion of personal privacy. See 5 U.S.C. § 552(a)(2)(D)
16 (second sentence). Under Favish's construction of (a)(2), the
17 agency would have to redact any original documents in its reading
18 room that contain personal privacy information. Given that a
19 reasonable construction of (a)(2) would not require an agency to
20 permanently alter original documents in order to make them
21 publicly available in a reading room, Favish's claim that he is
22 entitled to inspect original documents pursuant to that provision
23 lacks merit.

24 Like (a)(2), (a)(3) does not entitle Favish to inspect
25 original documents. Favish correctly states that (a)(3) requires
26 the agency to "make the [requested] records promptly available to
27 any person . . . in any form or format requested by the person if
28 the record is readily reproducible by the agency in that form or

1 format." 5 U.S.C. § 552(a)(3)(B). On that basis, and without
2 citing any other authority, Favish concludes that the agency
3 should allow him to be present when it makes copies of the
4 requested records, or that he "should be allowed to supply the
5 agency with the equipment to make the copy." Given the plain
6 language of sub-paragraph (a)(3)(B), however, Favish's
7 conclusions are unfounded.

8 Though Favish correctly quotes the language of (a)(3)(B), he
9 completely ignores that fact that this provision places the
10 responsibility of copying the requested records on the agency,
11 not the requester. See id. ("... if the record is readily
12 reproducible by the agency in that form or format.") (emphasis
13 added). Favish does not explain how his presence would assist the
14 agency in copying the requested records. Furthermore, even if
15 Favish were entitled to scanned copies of the requested records,
16 (a)(3)(B) does not require the agency to use his scanner. Sub-
17 paragraph (a)(3)(B) only requires that Favish be provided with a
18 scanned copy of the requested records if those records are
19 readily reproducible in that form or format; it does not require
20 the agency to allow Favish to be physically present when those
21 copies are made or to use Favish's equipment to make those
22 copies.

23 Thus, Favish is not entitled to review or have produced to
24 him the originals of the five Polaroid photographs at issue in
25 the OIC's motion.

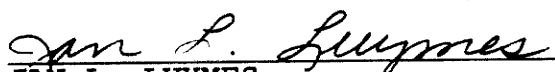
26 **IV. Conclusion**

27 The issue pending before this Court is whether it should
28 alter or amend its judgment to the extent that it ordered five of

1 the Polaroids released to Favish. Because Favish has failed to
2 show how any public interest cognizable under FOIA would be
3 furthered by release of these Polaroids, the Court should alter
4 its judgment to hold that none of the ten Polaroids at issue in
5 this case is subject to release.

6 DATED: This 26th day of February, 2001.

7 ALEJANDRO N. MAYORKAS
8 United States Attorney
9 LEON W. WEIDMAN
Assistant United States Attorney
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10 
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CERTIFICATE OF SERVICE BY MAIL

I, JAN L. LUYMES, declare:

That I am a citizen of the United States and resident of and employed in Orange County, California; that my business address is Office of United States Attorney, 411 West Santa Ana Blvd., Suite 8000, Santa Ana, California 92701; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on February 26, 2001 I deposited in the United States mails in the Post Office in Santa Ana, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of:

REPLY OF OFFICE OF INDEPENDENT COUNSEL IN SUPPORT OF ITS MOTION TO ALTER OR AMEND JUDGMENT AND FOR CLARIFICATION

Addressed to: Allan J. Favish
18645 Hatteras Street, #289
Tarzana, CA 91356-1802

at his last known address, at which place there is a delivery service by United States Mail. This Certificate is executed on February 26, 2001 in Santa Ana, California.

I certify under penalty of perjury that the foregoing is true and correct.


JAN L. LUYMES