

1 Allan J. Favish, Bar No. 99651
Attorney at Law
2 18645 Hatteras St., #289
Tarzana, CA 91356-1802
3
4 Voice: (818) 343-9095
Fax: (818) 343-9097
E-mail: ajfavish@worldnet.att.net
5 Plaintiff/Appellant, in pro per

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8 UNITED STATES COURT OF APPEALS
9 FOR THE NINTH CIRCUIT

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11 ALLAN J. FAVISH,) No. 98-55594
12 Plaintiff/Appellant,) CV-97-1479 WDK (Ex)
13 vs.)
14 OFFICE OF INDEPENDENT)
15 COUNSEL,)
16 Defendant/Appellee)

17
18 APPELLANT’S OPENING BRIEF

19
20 **STATEMENT OF ISSUES PRESENTED**

21 1. Whether former White House counsel Vincent Foster’s
22 surviving family members have a privacy interest (as the word “privacy”
23 is used in the Freedom of Information Act) in photos of his dead body
24 when those photos do not contain any information about those family
25 members.

26 2. Assuming Mr. Foster’s surviving family members have a
27 privacy interest in photos of his dead body when those photos do not
28 contain any information about those family members, whether that

1 privacy interest outweighs the public's interest in disclosure of the
2 photos.

3 **STATEMENT OF JURISDICTION**

4 The district court had jurisdiction over this action pursuant to 5
5 U.S.C. § 552(a)(4)(B). The summary judgment which plaintiff is
6 appealing was entered March 11, 1998.¹ This court has jurisdiction
7 over this appeal pursuant to 28 U.S.C. § 1291. On March 13, 1998,
8 plaintiff filed a notice of appeal. ER-16.

9 **INTRODUCTION**

10 With this Freedom of Information Act² lawsuit, plaintiff seeks
11 some of the photographs created in connection with the investigation
12 into the death of former White House Counsel Vincent W. Foster, Jr.
13 The photographs sought were listed and/or published by the U.S.
14 Senate,³ but many of the published images were poorly reproduced in
15 black and white.⁴

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17 ¹ Excerpts of Record, Tab 4 (hereinafter ER-4).

18 ² See 5 U.S.C. § 552 et al.

19 ³ See Hearings Relating to Madison Guaranty S&L and the Whitewater
20 Development Corporation--Washington, DC Phase, S. Hrg. 103-889,
21 Volumes 1 & 2 (1995). The pages from these hearings containing the
22 photographs or list of photographs, are reproduced in Exhibit II to the
23 Declaration of Darrell M. Joseph, Associate Independent Counsel,
24 comprising a part of the OIC's *Vaughn* index. ER-4. (Pursuant to the
25 case of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), in FOIA
26 litigation, the government files an index describing the withheld
27 documents and the reasons for nonproduction.)

28 ⁴ Paragraph four of the complaint (ER-1) identifies the requested
photographs by citing to pages from the Senate Hearings. Many, if not
all of the requested photos, were taken by the U.S. Park Police, an
agency within the U.S. Department of the Interior.

1 After this suit was filed, most of the requested photos were
2 released to plaintiff in the form of black and white photocopies, despite a
3 request for color copies. Initially, the OIC resisted plaintiff's request on
4 the basis of two exemptions in the FOIA, one for "interference with
5 enforcement proceedings" and one for "privacy."⁵ With the October 10,
6 1997, public release of the OIC's report on the death, the "enforcement
7 proceedings" exemption ceased to be at issue and apparently as a result
8 of this litigation, the OIC dropped its "privacy" claim for the photos and
9 portions of photos it released.

10 The remaining dispute is over the OIC's failure to produce color
11 copies of the portions of photos it releases and its failure to release 11
12 photos—none of which have been officially published by the
13 government—that were listed and described on an FBI evidence receipt
14 published in the Hearings books. Of the 11 photos being withheld, all
15 were taken while Mr. Foster's deceased body was at the park; none of
16 the photos are autopsy photos.⁶ One photo is described as a
17 "photograph of Mr. Foster's eyeglasses, lying on the ground near his
18 body."⁷ There is no claim that Mr. Foster's body is depicted in this
19 photo. Another photo is described as a "photograph depicting, post-

22 ⁵ Exemptions 7(A) &(C), respectively. *See* 5 U.S.C. § 552. Letter from
23 Stephen A. Kubiowski to Allan J. Favish, dated January 24, 1997
24 (Joseph Declaration, Ex. I, at Exhibit I-2 (OIC Bates # 23)); Letter from
25 John D. Bates to Allan J. Favish, dated February 19, 1997 (Joseph
26 Declaration, Ex. I, at Exhibit I-2 (OIC Bates # 25)). ER-3.

27 ⁶ *See* FBI "Receipt for Property Received/Returned/Released/Seized"
28 (May 2, 1994), reprinted in S. Hrg. 103-889, vol. 2., at 2112 (Joseph
Declaration, Ex. II, at OIC Bates # 45-46). ER-4.

⁷ Joseph Declaration with exhibits I & III, at 17. ER-3.

1 mortem, Mr. Foster’s right hand clutching a gun.”⁸ The remaining nine
2 photos are described as “post-mortem photographs of Mr. Foster’s face
3 and/or body.”⁹ The OIC claims release of the photos will violate the
4 privacy of Mr. Foster’s surviving family members.¹⁰

5 The first section of the argument portion of this brief will establish
6 that Mr. Foster’s survivors do not have a privacy interest in the photos
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8 ⁸ Joseph Declaration with exhibits I & III, at 17. ER-3.

9 ⁹ Joseph Declaration with exhibits I & III, at 17. ER-3. The FBI
10 evidence receipt describes these nine photos as, “VF’s body looking
11 down from top of berm,” “VF’s body - focusing on face,” “VF’s body –
12 focusing on rt. side shoulder/arm,” “VF’s body taken from below feet,”
13 “VF’s body focusing on right side & arm,” “VF’s body – focus on Top
14 of head thru heavy foliage,” “VF’s body – focus on head & upper torso,”
15 “VF’s face – looking directly down into face,” and “VF’s face – Taken
16 from right side focusing on face & blood on shoulder.” FBI “Receipt for
17 Property Received/Returned/Released/Seized” (May 2, 1994), reprinted
18 in S. Hrg. 103-889, vol. 2., at 2112 (Joseph Declaration, Ex. II, at OIC
19 Bates # 45-46). ER-4.

18 ¹⁰ The OIC claims:

19 These photographs sought by the plaintiff are graphic, explicit,
20 and extremely upsetting. The privacy interest being asserted is
21 that of Vincent Foster's family members. Disclosure of the
22 foregoing photographs would cause Mr. Foster's surviving
23 family members a great deal of anguish well beyond that which
24 they have already suffered, and thus would constitute an
25 unwarranted invasion of their personal privacy.

25 Joseph Declaration with exhibits I & III, at 17. ER-3.

26 5 U.S.C. § 552(b)(7)(C) creates an exemption for documents
27 “compiled for law enforcement purposes, but only to the extent that the
28 production of such law enforcement records or information ... (C) could
reasonably be expected to constitute an unwarranted invasion of
personal privacy”

1 being withheld and even if they did, violation of that interest by release
2 of the photos is warranted by the public's need to determine if their
3 government is being accurate about the circumstances of Mr. Foster's
4 death.

5 The second section of the argument portion of this brief will
6 establish that the government investigations of this death are grossly
7 incomplete and untrustworthy, thereby justifying the public's need to
8 obtain the withheld photos in order to evaluate the performance of the
9 OIC, the FBI, the U.S. Park Police and other federal agencies and to
10 protect our constitutional democracy.¹¹

11 The third section of the argument portion of this brief will explain
12 why the public should be able to see the specific photos at issue.

13 **STATEMENT OF THE CASE**

14 On March 6, 1997, plaintiff filed a complaint under the Freedom of
15 Information Act seeking photos taken in connection with the
16 investigation of the death of Vincent Foster. ER-1. About April 28,
17 1997, the OIC filed an answer. ER-2.

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21 ¹¹ Only a small sample of the many problems with the government
22 investigations are presented here. Others the court should examine are
23 in Plaintiff's Motion for Summary Adjudication (ER-6) and they will be
24 presented in the reply brief, so as to include everything that was
25 presented to the district court. It is expected that the OIC will argue that
26 this death has been investigated several times by the government, the
27 verdict has been "suicide in the park" in each case and the public has
28 already been told the complete truth about this death. The evidence-rich
second section of the argument portion of this brief is designed to evoke
laughter from anybody hearing any such argument by the government.

1 On January 5, 1998, the OIC filed a *Vaughn* index that included
2 black & white photocopies of many of the requested photos and the
3 OIC's reasons for withholding the remaining photos. ER-3 & ER-4.

4 On February 12, 1998, the district court entered the parties'
5 stipulation regarding issues that were able to be resolved and issues that
6 remained for litigation. ER-5.

7 On February 11, 1998, plaintiff filed a motion for summary
8 adjudication of issues. ER-6. About February 23, 1998, the OIC filed
9 an opposition to plaintiff's motion for summary adjudication of issues.
10 ER-9. On March 2, 1998, plaintiff filed a reply to the OIC's opposition
11 to plaintiff's motion for summary adjudication of issues. ER-10.

12 About February 13, 1998, the OIC filed a motion for summary
13 judgment. ER-7. On February 23, 1998, plaintiff filed an opposition to
14 the OIC's motion for summary judgment. ER-8. About March 2, 1998,
15 the OIC filed a reply to plaintiff's opposition to the OIC's motion for
16 summary judgment. ER-11.

17 About March 6, 1998, the OIC filed a declaration of Sheila Foster
18 Anthony in support of its position. ER-13.

19 On March 9, 1998, the district court heard oral argument on
20 motions for summary judgment and summary adjudication (ER-14) and
21 issued a summary judgment that was entered March 11, 1998. ER-15.
22 The district court said: 1) the 10 photos that showed a portion of Mr.
23 Foster's deceased body as it laid in Fort Marcy Park did not have to be
24 released by the OIC; 2) the photo of Mr. Foster's eyeglasses that laid on
25 the ground in Fort Marcy Park, that did not show any of Mr. Foster's
26 body, had to be released by the OIC; and 3) any copies of photos or
27 portions of photos released by the OIC must be in color if the original
28 photo is in color. ER-15.

1 **STATEMENT OF FACTS**

2 The OIC is in possession of the following: 1) The 10 photos at
3 issue in this case of Mr. Foster’s deceased body as it laid in Fort Marcy
4 Park that were taken by the United States Park Police; 2) The photo of
5 Mr. Foster’s eyeglasses that laid on the ground in Fort Marcy Park, that
6 did not show any of Mr. Foster’s body; 3) The color photos and portions
7 of photos of other things that were released to plaintiff during this
8 litigation in black & white format.

9 None of these photos and portions of photos contain any
10 information about Mr. Foster's surviving family members.

11 The OIC is refusing to release the 10 body photos, claiming FOIA
12 exemption (b)(7)(C)¹² on the grounds that disclosure of these photos
13 would cause Mr. Foster’s surviving family members emotional grief,
14 thereby violating their right of privacy because their privacy interest in
15 the photos outweighs the public’s interest in disclosure.

16 Based on the same exemption, the OIC also has refused to release
17 the photo of Mr. Foster’s eyeglasses that laid on the ground in Fort
18 Marcy Park. The district court ordered that this photo be released.

19 Plaintiff is claiming that the law does not give Mr. Foster’s
20 surviving family members any privacy interest in the 10 body photos or
21 the eyeglasses photo because the photos do not contain any information
22 about these family members. Additionally, plaintiff is claiming that
23 even if the family members did have a privacy interest in the photos, that
24 interest would be outweighed by the public’s interest in disclosure since
25 the official investigations of the death by the USPP, the FBI and the OIC
26 are untrustworthy, nonsensical and deceptive and the subject photos will
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¹² 5 U.S.C. § 552(b)(7)(C).

1 help answer significant questions about the death and the related
2 performance of these government agencies.

3 STANDARD OF REVIEW

4 A grant of summary judgment is reviewed *de novo*.¹³ The appellate
5 court must determine, viewing the evidence in the light most favorable
6 to the nonmoving party, whether there are any genuine issues of material
7 fact and whether the district court correctly applied the relevant law.¹⁴
8 The appellate court's review is governed by the same standard used by
9 the district court under FRCP 56(c).¹⁵

10 Although a recent Ninth Circuit opinion said that it is “unclear”
11 whether the “clearly erroneous” standard or the “de novo” standard
12 should be used in reviewing district court summary judgments in FOIA
13 cases,¹⁶ the better rule was stated in a recent Ninth Circuit opinion: The
14 Court of Appeals first determines whether the district judge had an
15 adequate factual basis for his or her decision. If so, the factual findings
16 are overturned only if they are clearly erroneous. But the decision about
17 whether a particular document falls within a FOIA exemption is not
18 entitled to deference and is reviewed *de novo*.¹⁷

19 In the present case, the district court did not have an adequate
20 factual basis since it did not see the photos. However, even if the court
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23 ¹³ See *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d
24 1416, 1421 (9th Cir. 1989).

25 ¹⁴ See *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-
26 40 (9th Cir. 1989).

27 ¹⁵ See *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).

28 ¹⁶ *Maricopa Audubon Soc’y v. United States Forest Serv.*, 108 F.3d 1082,
1085 (9th Cir. 1997).

¹⁷ See *Schiffer v. FBI*, 78 F.3d 1405, 1408-09 (9th Cir. 1996).

1 were to see the photos, the public interest would still outweigh any
2 privacy interest.

3 Moreover, the determination of whether there is a privacy interest
4 strictly is a legal determination. The same is true of any balancing of the
5 public interest against any privacy interest. The only factual issues at
6 stake in the present case are the identity of the photos and the detailed
7 contents of these photos.

8 **SUMMARY OF ARGUMENT**

9 The law does not give Mr. Foster's surviving family members any
10 privacy interest in the 10 body photos and the eyeglasses photo because
11 the photos do not contain any information about these family members.
12 Even if the family members did have a privacy interest in the photos,
13 that interest would be outweighed by the public's interest in disclosure
14 since the official investigations of the death by the USPP, the FBI and
15 the OIC are untrustworthy, nonsensical and deceptive and the subject
16 photos will help answer significant questions about the death and the
17 related performance of these government agencies.

18 **ARGUMENT**

19 **I. THERE IS NO PRIVACY INTEREST IN** 20 **THE WITHHELD PHOTOS**

21 **1. FOIA POLICY IS FULL DISCLOSURE WITH** 22 **THE BURDEN OF PROOF ON THE AGENCY**

23 The FOIA began in 1946 as part of the Administrative Procedure
24 Act, but lacked any teeth.¹⁸ "In 1966 Congress amended that section to
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28 ¹⁸ See *Department of Justice v. Reporters Committee*, 489 U.S. 749, 754,
103 L.Ed.2d 774 (1989).

1 implement a general philosophy of full agency disclosure.”¹⁹ According
2 to the U.S. Supreme Court: “Unlike the review of other agency action
3 that must be upheld if supported by substantial evidence and not
4 arbitrary or capricious, the FOIA expressly places the burden ‘on the
5 agency to sustain its action’ and directs the district courts to ‘determine
6 the matter de novo.’”²⁰

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

10 The purpose of the FOIA is to “ensure an informed
11 citizenry.” *NLRB v. Robbins Tire & Rubber Co.*, 437
12 U.S. 214, 242, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978).
13 Under 5 U.S.C. § 552(a)(4)(B) documents are presumed
14 to be subject to disclosure unless the agency proves that
15 one or more of the nine specific statutory exemptions in §
16 552(b) applies. To ensure maximum disclosure, those
17 nine exemptions should be narrowly construed. *Dep’t of*
18 *the Air Force v. Rose*, 425 U.S. 352, 360-1, 48 L. Ed. 2d
19 11, 96 S. Ct. 1592 (1976). See, e.g., *Church of*
20 *Scientology v. United States Dep’t of Justice*, 612 F.2d
21 417, 426 (9th Cir. 1979) (general purpose of the FOIA
22 justifies narrow construction of the exemptions).²¹

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25 ¹⁹ *Id.*, 489 U.S. 749, 754, 103 L.Ed.2d 774 (1989) (quotations & citations
omitted).

26 ²⁰ *Id.*, 489 U.S. 749, 755, 103 L.Ed.2d 774 (1989) (quoting 5 U.S.C. §
27 552(a)(4)(B)).

28 ²¹ *Van Bourg, Allen, Weinberg & Roger v. National Labor Relations*
Board, 751 F.2d 982, 984 (9th Cir. 1985).

1 2. THE FOIA’S CENTRAL PURPOSE IS TO
2 KEEP GOVERNMENT HONEST

3 The central purpose of the FOIA is to give ordinary citizens the
4 power to keep the government honest in order to preserve our
5 constitutional democracy. It is established that “the FOIA’s central
6 purpose is to ensure that the Government’s activities be opened to the
7 sharp eye of public scrutiny....”²² According to the U.S. Supreme Court:
8 “The generation that made the nation thought secrecy in government one
9 of the instruments of Old World tyranny and committed itself to the
10 principle that a democracy cannot function unless the people are
11 permitted to know what their government is up to.”²³ Congress
12 expressed “the core purpose of the FOIA as ‘contribut[ing] significantly
13 to public understanding of the operations or activities of the
14 government.’”²⁴ This is “the public interest that the FOIA was enacted to
15 serve.”²⁵

16 The D.C. Circuit has discussed the nature of the public interest that
17 could be served by disclosure of government investigatory records:

18 For example, the public may have an interest in knowing
19 that a government investigation itself is comprehensive,
20 that the report of an investigation released publicly is
21 accurate, that any disciplinary measures imposed are

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24 ²² *Department of Justice v. Reporters Committee*, 489 U.S. 749, 774, 103
L.Ed.2d 774 (1989).

25 ²³ *Id.*, 489 U.S. 749, 772-773, 103 L.Ed.2d 774 (1989) (quoting Henry
26 Steele Commager).

27 ²⁴ *Id.*, 489 U.S. 749, 775, 103 L.Ed.2d 774 (1989) (quoting from 5 U.S.C.
28 § 552(a)(4)(A)(iii)).

²⁵ *Id.*, 489 U.S. 749, 775, 103 L.Ed.2d 774 (1989).

1 adequate, and that those who are accountable are dealt
2 with in an appropriate manner.²⁶

3 According to the U.S. Supreme Court:

4 The basic purpose of FOIA is to ensure an informed
5 citizenry, vital to the functioning of a democratic society,
6 needed to check against corruption and to hold the
7 governors accountable to the governed.²⁷

8 The Tenth Circuit described the purpose of the FOIA in similar
9 terms:

10 The predominant objective of FOIA is disclosure.
11 Congress enacted FOIA to ensure that the public has
12 access to government information so that it can scrutinize
13 the government's performance of its statutory duties and
14 thereby promote governmental honesty. *See EPA v.*
15 *Mink*, 410 U.S. 73, 79-80, 93 S.Ct. 827, 832, 35 L.Ed.2d
16 119 (1973) (tracing the genesis of FOIA and explaining
17 that the FOIA is “broadly conceived” in that “[i]t seeks to
18 permit access to official information long shielded
19 unnecessarily from public view and attempts to create a
20 judicially enforceable public right to secure such
21 information from possibly unwilling official hands”);
22 S.Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) (“A
23 government by secrecy benefits on one. It injures the
24 people it seeks to serve; it injures its own integrity and
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27 ²⁶ *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984).

28 ²⁷ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L.Ed.2d
159, 178, 98 S.Ct. 2311 (1978).

1 operation. It breeds mistrust, dampens the fervor of its
2 citizens, and mocks their loyalty.”²⁸

3 Therefore, prevention of government corruption is a central
4 purpose of the FOIA and that is a public interest affecting all Americans
5 and their progeny.

6 3. NOBODY HAS A PRIVACY INTEREST IN THE PHOTOS

7 There is no basis upon which to conclude that a privacy interest is
8 involved with any of these photos. According to the Third Circuit,
9 privacy is “control over knowledge about oneself.”²⁹ The U.S. Supreme
10 Court agrees, stating: “To begin with, both the common law and the
11 literal understandings of privacy encompass the individual’s control of
12 information concerning his or her person.”³⁰

13 It is immaterial that *Reporters Committee* did not directly involve
14 death photographs. The opinion set forth the definition of “privacy” as
15 that word is used in the FOIA. The Court expressly described only two
16 definitions of “privacy” and neither of them was a broad right to be free
17 from emotional grief: “One is the individual interest in avoiding
18 disclosure of personal matters, and another is the interest in
19 independence in making certain kinds of important decisions.”³¹ The
20 first interest is classic privacy, which Charles Fried explained in his
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25 ²⁸ *Hale v. U.S. Dept. of Justice*, 973 F.2d 894, 898 (10th Cir. 1992).

26 ²⁹ *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 n. 5
(3d Cir. 1980) (quoting Fried, *Privacy*, 77 Yale L.J. 475, 483 (1968)).

27 ³⁰ *Department of Justice v. Reporters Committee*, 489 U.S. 749, 762-63,
28 764 n. 16, 103 L.Ed.2d 774 (1989).

³¹ *Id.*, at 762 (citation omitted).

1 seminal law review article as “control over knowledge about oneself.”³²
2 The second interest is part of a more broadly based liberty interest.³³

3 When discussing the first interest, the Court quoted many
4 authorities for support of the central proposition that privacy
5 encompasses “the individual's control of information concerning his or
6 her person.”³⁴ These quotes include: “Meaningful discussion of privacy,
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8 ³² Fried, *Privacy*, 77 Yale L.J. 475, 483 (1968). He also explained that
9 privacy is best thought of as a subcategory of the broader interest in
10 personal liberty: “Most obviously, privacy in its dimension of control
11 over information is an aspect of personal liberty.” Thus, with liberty
12 being the freedom to do things without interference, privacy is the more
13 specific freedom to do a particular thing: control information about
14 yourself.

15 ³³ The debate over whether the freedom to do things like get an abortion
16 or refuse medical care are correctly described as aspects of privacy or
17 are better described as part of a more general liberty interest, are not
18 material to our problem. The important point is that the Supreme Court
19 in *Reporters Committee* described privacy as the right to control
20 information about yourself and did not describe it as a broad interest in
21 being free from emotional grief. Such a broad definition of “privacy”
22 would render the word useless since it would subsume any conduct that
23 causes emotional grief.

24 Subsequent to *Reporters Committee*, the Supreme Court clarified the
25 definition of “privacy” and endorsed the proposition that the right to
26 refuse medical care is an aspect of liberty, rather than privacy:
27 “Although many state courts have held that a right to refuse treatment is
28 encompassed by a generalized constitutional right of privacy, we have
never so held. We believe this issue is more properly analyzed in terms
of a Fourteenth Amendment liberty interest.” *Cruzan v. Director,
Missouri Dept. of Health*, 497 U.S. 261, 279, n. 7, 110 S.Ct. 2841, 111
L.Ed.2d 224 (1990) (citation omitted).

³⁴ *Reporters Committee*, at 763.

1 therefore, requires the recognition that ordinarily we deal not with an
2 interest in total nondisclosure but with an interest in selective
3 disclosure.”³⁵ “The common law secures to each individual the right of
4 determining, ordinarily, to what extent his thoughts, sentiments, and
5 emotions shall be communicated to others. . . . [E]ven if he has chosen
6 to give them expression, he generally retains the power to fix the limits
7 of the publicity which shall be given them.”³⁶ Information is private if it
8 is “intended for or restricted to the use of a particular person or group or
9 class of persons: not freely available to the public.”³⁷ “Privacy . . . is the
10 rightful claim of the individual to determine the extent to which he
11 wishes to share of himself with others. . . . It is also the individual’s right
12 to control dissemination of information about himself.”³⁸ “Privacy is the
13 claim of individuals . . . to determine for themselves when, how, and to
14 what extent information about them is communicated to others.”³⁹ “The
15 right of privacy is the right to control the flow of information concerning
16 the details of one’s individuality.”⁴⁰

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20 ³⁵ *Id.*, at 763 n. 14 (quoting Karst, “*The Files*”: *Legal Controls Over the*
21 *Accuracy and Accessibility of Stored Personal Data*, 31 *Law &*
22 *Contemporary Problems* 342, 343-44 (1966)).

23 ³⁶ *Id.*, at 763 n. 15 (quoting Warren & Brandeis, *The Right to Privacy*, 4
24 *Harv. L. Rev.* 193, 198 (1890-1891)).

25 ³⁷ *Id.*, at 763-64 (quoting Webster’s Third New International Dictionary
26 1804 (1976)).

27 ³⁸ *Id.*, at 764 n. 16 (quoting A. Breckenridge, *The Right to Privacy* 1
28 (1970)).

29 ³⁹ *Id.*, at 764 n. 16 (quoting A. Westin, *Privacy and Freedom* 7 (1967)).

30 ⁴⁰ *Id.*, at 764 n. 16 (quoting Project, *Government Information and the*
31 *Rights of Citizens*, 73 *Mich. L. Rev.* 971, 1225 (1974-1975)).

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

8 Yet, the OIC claims that the photos are being withheld to protect
9 the privacy interests of Mr. Foster’s surviving family members;⁴¹
10 however, none of the withheld photos contain any information about Mr.
11 Foster’s surviving family members. Therefore, under the law of privacy
12 as endorsed by the U.S. Supreme Court, Mr. Foster’s survivors do not
13 have any privacy interest in these photos.⁴²

14 The OIC is not arguing for protection of a privacy interest as that
15 interest is defined in the law. The “privacy” label merely is being used
16 as a cover for another interest, one that is not protected by any FOIA
17 exemption. The OIC’s real argument is that release of the requested
18 photos would cause emotional grief to Mr. Foster’s survivors and the
19 OIC is trying to establish this “family grief” interest as a privacy
20 interest. This is clear from the cases cited by the OIC in support of its
21 position.

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24 ⁴¹ Joseph Declaration, with exhibits I & III, at 17. ER-3.

25 ⁴² There is no claim that Mr. Foster’s right of privacy is at issue. This is
26 because a person’s right of privacy does not survive his or her death.
27 *See Diamond v. F.B.I.*, 707 F.2d 75, 77 (2nd Cir. 1983) (discussing FOIA
28 exemption 7(C)); *Long v. American Red Cross*, 145 F.R.D. 658, 665
(S.D. Ohio 1993); *Cordell v. Detective Publications, Inc.*, 419 F.2d 989,
990-991 (6th Cir. 1969); Restatement of Torts, 2d § 652 I (1977).

1 Without addressing whether such grief would ensue, it is clear that
2 such a situation does not implicate the survivors' right of privacy as that
3 right has been defined and understood by legal scholars and most judges.
4 There is no exemption in the FOIA for information on the grounds that
5 its disclosure might cause emotional grief to a deceased's survivors.
6 There is no evidence in the legislative history of the FOIA that shows
7 Congress gave the word "privacy" a meaning different from its
8 traditional meaning as the right to control information about yourself.
9 There is no evidence that Congress meant to give the word "privacy" a
10 meaning that would render the word useless since it would then subsume
11 any conduct that causes emotional grief.

12 Any judges who have invoked the privacy label to withhold
13 information because it might cause emotional grief to a deceased's
14 survivors, have done so by making their own law. While we may be
15 sympathetic to their efforts in a particular case, we must recognize that
16 they are adding their own exemption to the FOIA and erroneously giving
17 it the label of "privacy" because there is no evidence Congress enacted
18 such an exemption by any name.

19 A. The New York Times Co. v. NASA Litigation

20 In *New York Times Co. v. NASA*,⁴³ the district court considered
21 NASA's refusal to release the voice recording of the doomed Challenger
22 astronauts' last minutes. NASA invoked FOIA exemption 6, which
23 protects the privacy of medical and personnel and similar files.⁴⁴ NASA
24

25 ⁴³ *New York Times Co. v. NASA*, 782 F.Supp. 628 (D.D.C. 1991).

26 ⁴⁴ Exemption 6 of the FOIA provides that an agency shall not disclose
27 "personnel and medical files and similar files the disclosure of which
28 would constitute a clearly unwarranted invasion of personal privacy." 5
U.S.C. § 552(b)(6).

1 contended that the privacy interest of the families of the astronauts was
2 at stake.⁴⁵ NASA characterized the privacy interest “as one that protects
3 against disclosures which would cause the astronauts’ survivors to suffer
4 additional anguish” from “press inquiries...the public’s curiosity” and
5 “exposure to the news accounts.”⁴⁶

6 In *New York Times Co.*, the district court failed to reconcile its
7 definition of “privacy” with the U.S. Supreme Court’s definition in
8 *Reporters Committee*. The district court failed to show how an interest
9 that “encompass the individual’s control of information concerning his
10 or her person,”⁴⁷ is implicated by emotional grief to other individuals.
11 The district court cited the District of Columbia Circuit Court’s opinion
12 in *Badhwar v. United States Dept. of Air Force*⁴⁸ wherein the Circuit
13 Court was considering a FOIA request for autopsy reports of deceased
14 aircraft pilots. But the *Badhwar* opinion simply sent the case back to the
15 district court to address the exemption 6 privacy claim because the
16 district court previously failed to address it.⁴⁹ The Circuit Court in
17 *Badhwar* did not decide the issue of whether there was a valid privacy
18 interest in that case. Although the Circuit Court noted that some autopsy
19 reports could be “of a kind that would shock the sensibilities of
20 surviving kin,”⁵⁰ the Circuit Court did not address the question of
21 whether that would implicate the family members’ right of privacy.

22
23 ⁴⁵ *New York Times Co.*, 782 F.Supp. 628, at 631.

24 ⁴⁶ *Id.*

25 ⁴⁷ *Department of Justice v. Reporters Committee*, 489 U.S. 749, 763, 103
L.Ed.2d 774 (1989).

26 ⁴⁸ 829 F.2d 182, 185-186 (D.C.Cir. 1987), cited at 782 F.Supp. 628, at
27 631.

28 ⁴⁹ *Badhwar*, 829 F.2d 182, at 186.

⁵⁰ *Badhwar*, 829 F.2d 182, at 186.

1 Moreover, if the Circuit Court had ruled in the families’ favor, it would
2 have been inconsistent with the Supreme Court’s definition of privacy.⁵¹

3 Therefore, *Badhwar* did not create the perversion of “privacy” that
4 the OIC seeks to create here; *Badhwar* cited no authority for such a
5 perversion and even if it had, it could not have done so without violating
6 U.S. Supreme Court precedent and the long-established definition of
7 “privacy.”

8 The district court in *New York Times Co. v. NASA* claimed that the
9 D.C. Circuit held in that case that the families had a privacy interest in
10 the voice recordings.⁵² But the D.C. Circuit did not decide that question.
11 The D.C. Circuit noted that exemption 6 of the FOIA provides that an
12 agency shall not disclose “personnel and medical files and similar files
13 the disclosure of which would constitute a clearly unwarranted invasion
14 of personal privacy,”⁵³ and then merely held that the district court
15 erroneously decided the issue of whether the voice recordings
16 constituted “similar files” under the exemption and should now decide
17 the privacy issues.⁵⁴

18
19
20 ⁵¹ *Department of Justice v. Reporters Committee*, 489 U.S. 749, 763, 103
21 L.Ed.2d 774 (1989) (“To begin with, both the common law and the
22 literal understandings of privacy encompass the individual’s control of
23 information concerning his or her person.”) This established definition
24 also has been endorsed by the Third Circuit, which said privacy is
25 “control over knowledge about oneself.” *United States v. Westinghouse*
26 *Electric Corp.*, 638 F.2d 570, 577 n.5 (3d Cir. 1980) (quoting Fried,
27 *Privacy*, 77 Yale L.J. 475, 483 (1968)).

28 ⁵² *New York Times Co. v. NASA*, 782 F.Supp. 628, at 631, citing, *New*
York Times Co. v. NASA, 920 F.2d 1002, 1004 (D.C. Cir. 1990).

⁵³ 920 F.2d 1002, at 1004.

⁵⁴ The D.C. Circuit said:

1 Therefore, the district court was wrong to say that “the Court of
2 Appeals acknowledged such a privacy interest in this very case.”⁵⁵ The
3 Court of Appeals merely said that NASA “is entitled to an opportunity
4 to prove its claim that release of the tape would invade the privacy of the
5 deceased astronauts, or of their families.”⁵⁶ The Court of Appeals did not
6 hold that such a privacy interest existed in the case. It only held that
7 NASA was entitled to make its argument to the district court.

8
9 To come within the protection of Exemption 6, therefore, the
10 tape must first satisfy the threshold requirement of being a
11 “similar file[.]” Because the district court held that the tape did
12 not constitute such a file, it never reached the second stage of the
13 Exemption 6 analysis—whether the release of the file would
14 result in a clearly unwarranted invasion of privacy.

15

16 The only question before this court is whether the tape passes the
17 threshold requirement, not the strength of the private and public
18 interests at stake.

19 Whether disclosure of the Challenger tape in this case would
20 constitute a clearly unwarranted invasion of privacy, we do not
21 know and cannot discern on the record before us. The families
22 of the astronauts attempted to explain in camera the basis for
23 their privacy claims, but the district court rejected their affidavits
24 because it truncated at the threshold its analysis of the
25 Exemption 6 claim. ... Therefore, we remand this case for the
26 district court to determine whether any invasion of the
27 astronauts’ (or their families’) privacy that the disclosure of the
28 Challenger tape would cause is or is not “clearly unwarranted”
when compared to the “citizens’ right to be informed about what
their government is up to.”

920 F.2d 1002, at 1004, 1009-1010.

⁵⁵ 782 F.Supp. 628, at 631.

⁵⁶ 920 F.2d 1002, at 1004.

1 B. The *Katz v. National Archives & Records Administration* Litigation

2 In *Katz v. National Archives & Records Administration*,⁵⁷ the
3 district court considered the National Archives' refusal to release
4 autopsy photographs and x-rays of President John F. Kennedy. The
5 district court cited the Archives' claim that release of the documents
6 would cause the Kennedy family emotional grief and thus were
7 protected from disclosure under exemption 6 of the FOIA.⁵⁸

8 The district court's opinion in *Katz* did not decide the question of
9 whether the privacy interest under the FOIA is implicated by alleged
10 emotional grief of surviving family members that may arise from
11 disclosure of documents about their deceased family member. There
12 was no such question in *Katz* because the plaintiff conceded the issue at
13 the outset.⁵⁹

14 C. *Katz* and *New York Times* as Prelude to *Dow Jones & Co.*

15 Neither the district court opinion in *Katz* or the Circuit Court
16 opinion in *New York Times*, held that the right of privacy is implicated
17 by alleged emotional grief of surviving family members that may arise
18 from disclosure of documents about their deceased family member.
19 Neither case ignored the U.S. Supreme Court's definition of "privacy"
20 as "the individual's control of information concerning his or her
21 person."⁶⁰ Neither case perverted the privacy concept.

22
23 ⁵⁷ 862 F.Supp. 476 (D.D.C. 1994).

24 ⁵⁸ *Katz*, 862 F.Supp. 476, at 484-485.

25 ⁵⁹ 862 F.Supp. 476, at 483 ("Plaintiff does not dispute that the autopsy
26 records qualify as 'similar files' or that the Kennedy family has a
27 privacy interest in the records, limited, however, to preventing public
disclosure that would cause clearly unwarranted anguish or grief.")

28 ⁶⁰ *Department of Justice v. Reporters Committee*, 489 U.S. 749, 763, 103
L.Ed.2d 774 (1989).

1 When the district court in *New York Times* went beyond the
2 established definition of “privacy” to provide protection against
3 emotional grief that Congress did not provide in the FOIA, it committed
4 an abuse of judicial power. It gave the term “privacy” a meaning that it
5 does not have. It did so in contradiction to the meaning of the term as
6 understood by the U.S. Supreme Court and it violated Congressional
7 intent by effectively adding a “family grief” exemption to the FOIA that
8 Congress did not provide. Judicial creation of a “family grief”
9 exemption does not gain legitimacy by disguising it with the name of an
10 existing exemption.

11 In 1995, in *Dow Jones & Co. v. U.S. Dept. of Justice*,⁶¹ the district
12 court held that the Department of Justice’s claim of exemption 7(C)
13 would not prevent disclosure of a photocopy of a torn note allegedly
14 written by Mr. Foster and allegedly found in his briefcase after his
15 death.⁶² Although the district court ordered the note released because it

18 ⁶¹ *Dow Jones & Co. v. U.S. Dept. of Justice*, 880 F.Supp. 145 (S.D.N.Y.
19 1995).

20 ⁶² The word “allegedly” is used because there is evidence that the torn
21 note is a forgery. As noted by the Special Committee to Investigate
22 Whitewater Development Corporation and Related Matters:

23 It has been reported, however, that a panel of experts—including a
24 forensics authority from Oxford University—concluded that the
25 note was not in Mr. Foster's hand. See, e.g., Christopher Ruddy,
26 “Experts Say Foster ‘Suicide’ Note Forged,” *Pittsburgh Tribune-*
27 *Review*, Oct. 25, 1995. Because the White House and the Foster
28 family's attorney did not provide the Special Committee with
obtain [sic] original samples of Mr. Foster's handwriting, the
Special Committee was not able to conduct an investigation into
this matter.

1 found the public interest in disclosure outweighed the privacy interests
2 of Mr. Foster's survivors, the Court treated the privacy exemption as if it
3 were a “family grief” exemption.⁶³

4 However, just as the district court did in *New York Times*, the
5 district court in *Dow Jones*, gave the term “privacy” a meaning that it
6 does not have. It did so in contradiction to the meaning of the term as
7 understood by the U.S. Supreme Court and it violated Congressional
8 intent by effectively adding a “family grief” exemption to the FOIA that
9 Congress did not provide. The only authority cited by the court in *Dow*
10 *Jones* for its bizarre interpretation of the privacy exemption was the
11 district court’s opinion in *New York Times*.⁶⁴

12 Therefore, the only clear authorities for the OIC’s deviation from
13 the U.S. Supreme Court’s definition of privacy are two district court
14

15
16 Final Report of the Special Committee to Investigate Whitewater
17 Development Corporation and Related Matters on the Investigation of
18 Whitewater Development Corp. and Related Matters, S. Rept. 104-280, at
19 85 n. 24 (1996) (exhibit 1).

20 The Special Committee did not explain why it needed “original”
21 samples of Mr. Foster’s handwriting or why it failed to use its subpoena
22 power to obtain such samples. Nor did the Committee explain why the
23 White House and the Foster family’s attorney failed to provide such
24 samples. Given the obvious importance of determining the authenticity of
25 the torn note, the failure of the Committee to use its subpoena power is
26 bizarre, as is the failure of the Foster family’s attorney and the White
27 House to provide the requested samples.

28 ⁶³ *Dow Jones & Co. v. U.S. Dept. of Justice*, 880 F.Supp. 145, 152-153
(S.D.N.Y. 1995).

⁶⁴ The order allowing disclosure of the torn note was later vacated for
reasons unrelated to our present case. *See Dow Jones & Co. v. U.S.*
Dept. of Justice, 907 F.Supp. 79 (S.D.N.Y. 1995).

1 judges who failed to explain why they can override the U.S. Supreme
2 Court and provide a “family grief” exemption that Congress failed to
3 provide. It is expected that the OIC will cite two additional cases, one
4 from the Tenth Circuit and one from the Ninth Circuit, but these cases
5 are even more problematic.

6 D. The Tenth Circuit’s *Hale* Decision Does Not Help The OIC

7 Before the district court, the OIC cited the Tenth Circuit’s opinion
8 in *Hale v. United States Department of Justice*, 973 F.2d 894 (10th Cir.
9 1992), where the Tenth Circuit affirmed a summary judgment against an
10 FOIA requestor who was on death row for murder.⁶⁵ The plaintiff in that
11 case requested “photographs of the deceased victim”⁶⁶ and the district
12 court agreed with the government's claim of a (b)(7)(C) privacy
13 exemption.

14 However, the Tenth Circuit barely discussed the issue, saying only:
15 “Nor can we discern any public interest in the photographs of the
16 deceased victim, let alone one that would outweigh the personal privacy
17 interests of the victim's family.”⁶⁷ There is no indication that the legal
18 authorities and arguments raised by plaintiff in our case were considered
19 in *Hale*. There is no attempt in *Hale* to conform its decision with
20 *Reporters Committee* and the established law of privacy or cite any
21 authority for its holding on this point.

22 The OIC then recounted the subsequent history of the *Hale*
23 decision and in so doing, said that the “Supreme Court’s decision in
24
25

26 ⁶⁵ Defendant's Opposition to Plaintiff's Motion for Summary
27 Adjudication of Issues, at 7:16-24 & n. 3. ER-9.

28 ⁶⁶ *Hale*, 973 F.2d 894, 902.

⁶⁷ *Id.*

1 Hale contradicts” plaintiff’s argument about whether “the decisions in
2 Katz and NY Times are contrary to Reporters Committee....”⁶⁸

3 However, the OIC attributed far too much significance to the
4 Supreme Court’s decision in *Hale*. The Supreme Court did not issue a
5 full opinion in the case and it said the Tenth Circuit’s “judgment is
6 vacated and the case is remanded to the” Tenth Circuit for reasons
7 unrelated to exemption (b)(7)(C).⁶⁹ By vacating the judgment, for
8 whatever reason, the *entire* judgment by the Tenth Circuit was vacated.
9 The Supreme Court did not preserve any of it and it is wrong for the OIC
10 to say that the Supreme Court did something it did not do.

11 However, the Tenth Circuit did implicitly reinstate the exemption
12 (b)(7)(C) part of its first opinion after the remand from the Supreme
13 Court,⁷⁰ but did so without adding any additional explanation about how
14 its decision abides by existing privacy law. In fairness to the Tenth
15 Circuit, before presuming that its decision ran afoul of the established
16 law of privacy, it should be noted that it is unclear from its opinion
17 whether the photos in issue only showed the murder victim’s body after
18 he was dead or whether the photos showed the victim when he was alive
19 along with the victim’s family members and other information about the
20 family members. Therefore, the precedential value of the Tenth
21 Circuit’s opinion on the (b)(7)(C) privacy exemption regarding the
22 photos in that case is zero.

23
24
25 ⁶⁸ Defendant's Opposition to Plaintiff's Motion for Summary
Adjudication of Issues, at 8:24-28. ER-9.

26 ⁶⁹ *Hale v. U.S. Dept. of Justice*, 509 U.S. 918, 113 S.Ct. 3029, 125
27 L.Ed.2d 717 (1993).

28 ⁷⁰ *Hale v. U.S. Department of Justice*, 2 F.3d 1055, 1057-58 (10th Cir.
1993).

1 E. The Ninth Circuit’s *Bowen* Case Does Not Help The OIC

2 The OIC then cited the Ninth Circuit’s opinion in *Bowen v. U.S.*
3 *Food and Drug Administration*, 925 F.2d 1225, 1228 (9th Cir. 1991),
4 where the Ninth Circuit held that medical records and autopsy reports
5 were properly withheld to protect privacy under FOIA exemption 6.⁷¹
6 The OIC said that “the Ninth Circuit necessarily had to find that the
7 surviving family members had privacy interests in the nondisclosure of
8 the medical records and autopsy reports of their deceased family
9 members.”⁷²

10 However, the Ninth Circuit *did not* necessarily have to find that the
11 surviving family members had privacy interests in the medical records
12 and autopsy reports. The opinion does not give sufficient explanation
13 for its holding on this point. It merely said that “the FDA provided an
14 affidavit describing which documents listed in the *Vaughn* index were
15 subject to exemption 6 and why. The FDA has satisfied its burden of
16 showing that these documents were properly withheld under exemption
17 6.”⁷³ We don’t know if the medical records described persons who were
18 dead or alive. We don’t know whether the Ninth Circuit erroneously
19 considered the deceased subjects of the autopsy reports to have privacy
20 rights that were enforceable under exemption 6 or, as the OIC contends,
21 whether the Ninth Circuit was trying to enforce privacy interests it
22 believed were possessed by the surviving family members.
23 Additionally, there is no discussion in the opinion about how its decision

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25 ⁷¹ Defendant's Opposition to Plaintiff's Motion for Summary
26 Adjudication of Issues, at 7:24 - 9:5. ER-9. *See* 5 U.S.C. § 552(b)(6).

27 ⁷² Defendant's Opposition to Plaintiff's Motion for Summary
28 Adjudication of Issues, at 9:2-5. ER-9.

⁷³ *Bowen*, 925 F.2d 1225, 1228.

1 is consistent with *Reporters Committee* and the established law of
2 privacy and no authority cited for its holding on this point. Moreover,
3 the plaintiff in *Bowen* was imprisoned for attempted murder and
4 represented himself and there was no oral argument before the Ninth
5 Circuit.⁷⁴ Therefore, the precedential value of the opinion for our case is
6 zero.

7 F. The *Outlaw* Case Has Something for Both Sides

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

14 The opinion has something for both sides in this case, but more for
15 the plaintiff. The Army claimed that the privacy exemptions in 5 U.S.C.
16 § 552(b)(6) & (b)(7)(C) applied and that release of the photos could
17 violate "the personal privacy of the victim's family members."⁷⁵ Judge
18 Oberdorfer held that the exemptions did not apply, denied the Army's
19 summary judgment motion, granted the plaintiff's summary judgment
20 motion and ordered the photos released.⁷⁶

21 The judge had several reasons. He said that, "there is no showing
22 by defendant that, as of now, there are any surviving relatives of the
23 deceased, or if there are, that they would be offended by the
24 disclosure."⁷⁷ So he subscribed to the idea that any such surviving
25

26 ⁷⁴ *Bowen*, 925 F.2d 1225.

27 ⁷⁵ *Outlaw*, 815 F.Supp. 505, 506.

28 ⁷⁶ *Outlaw*, 815 F.Supp. 505, at 506-07.

⁷⁷ *Id.*, at 506.

1 family members would have a privacy interest in the photos that could
2 protect them from being “offended” by the photos. But there was not
3 any discussion in the opinion about how his decision was consistent with
4 *Reporters Committee* and the established law of privacy and he failed to
5 cite any authority for his holding on this point.

6 However, the real significance of the case lies in how Judge
7 Oberdorfer balanced the competing interests and the value he placed on
8 the interest of preventing government corruption. For even if he found
9 the privacy interest to be “substantial,” he said “that privacy interest is
10 outweighed by the public interest in the contribution to the
11 administration of justice by the Army that disclosure could effect”
12 because “there is an obvious public interest in the disclosure as a check
13 on the administration of justice by the United States Army.”⁷⁸

14 It is important to note that Judge Oberdorfer made his decision in a
15 case that involved the death of an Army Sergeant who apparently had no
16 high level government position or connections and whose death
17 investigation did not involve the FBI, Secret Service, the White House
18 and the U.S. Park Police in Washington, D.C.

19 There is no indication that the deceased Sergeant in *Outlaw* held a
20 position as close to the President of the United States and his wife as did
21 Mr. Foster. Certainly, the potential degree of high level corruption and
22 its significance to the well-being of America is far greater in our case
23 than it was in *Outlaw*. There is no indication in *Outlaw* that the plaintiff
24 in that case had demonstrated, to the degree that plaintiff has in this case,
25 that the official government conclusion was nonsensical.

26
27
28
⁷⁸ *Id.*

1 Even if Judge Oberdorfer were to decide our case and erroneously
2 hold that there is a “family grief” exemption masquerading as a privacy
3 exemption, it would take him a matter of seconds to decide the issue.
4 He would rule that the public interest in this case easily outweighs
5 whatever interest may exist in protecting a relatively small number of
6 people who may wish to avoid—not the disclosure of highly sensitive
7 information about themselves, but something even less substantial—
8 some degree of emotional grief from possibly catching a glimpse of
9 photos of the dead body of their deceased family member.

10 Judge Oberdorfer’s recognition of the FOIA’s importance in
11 ferreting out government corruption is consistent with established law.

12 **II. THE GOVERNMENT INVESTIGATIONS OF THIS DEATH ARE**
13 **GROSSLY INCOMPLETE AND UNTRUSTWORTHY⁷⁹**

14
15 **1. STARR AND FISKE FAILED TO TELL THE PUBLIC ABOUT**
16 **THE OFFICIAL REPORT OF A NECK WOUND THAT CONFLICTS**
17 **WITH THE OFFICIAL AUTOPSY**

18 The only medical doctor to examine Mr. Foster’s body at Fort
19 Marcy Park, Dr. Donald Haut, wrote a two-page report, signed July 20,
20 1993, the day of death, that is internally contradictory. Page one of
21
22
23

24
25 ⁷⁹ There is not enough space in plaintiff’s opening brief to present all of
26 the evidence presented to the district court showing that the
27 government’s investigations are untrustworthy, so plaintiff will present
28 the rest of this evidence in his reply brief in rebuttal to the expected OIC
argument. The full evidentiary argument made to the district court is in
Plaintiff’s Motion for Summary Adjudication of Issues (ER-6).

1 Haut's report says that the death shot was "mouth-head;"⁸⁰ but page two
2 of Haut's report says that the death shot was "mouth to neck."⁸¹

3 The Haut Report has not been officially reproduced in any
4 published government report, but it is available from the National
5 Archives;⁸² however, it was quoted in the Senate Banking Committee's
6 January 1995 report on the Foster investigation. The Senate Report said:
7 "In his report, Dr. Haut wrote that the cause of death was a 'perforating
8 gunshot wound mouth-head' ..." ⁸³ But the Senate Report also said:

9 In the narrative of his report, Dr. Haut wrote the
10 following:

11 JULY 20, 1993 After anonymous call was received at
12 18.04 hours US Park Police officers found 48 yrs
13 Caucasian male with self-inflicted gunshot wound *mouth*
14 *to neck* on a foot path in Marcy Park [sic]. His car was
15 parked in the parking lot but no note was found.

16 MEDICAL HISTORY Unknown.⁸⁴

19
20 ⁸⁰ Report of Investigation by Medical Examiner (July 20, 1993) (Haut
21 Report), at 1 (exhibit 2, at 41). ER-6.

22 ⁸¹ Haut Report, at 2 (exhibit 2, at 42). ER-6.

23 ⁸² The top of each page of the Haut Report says "reproduced at the
24 National Archives." See Haut Report, at 1 & 2 (including an
25 authenticating declaration from Hugh H. Sprunt, one of the men who
26 found it in the National Archives) (exhibit 2, at 39-42). ER-6.

27 ⁸³ Report of the Committee on Banking, Housing, and Urban Affairs
28 United States Senate on the Inquiry into the U.S. Park Police
Investigation of the Death of White House Deputy Counsel Vincent W.
Foster, Jr., S. Rept. 103-433, at 18 (1996) (exhibit 3). ER-6.

⁸⁴ *Id.*, at 18 n. 57 (exhibit 3) (emphasis added). ER-6.

1 Therefore, the Senate Report quoted from both pages of the Haut
2 Report, but failed to note that the quoted language is internally
3 contradictory, i.e., “mouth-head” and “mouth to neck.”

4 A “mouth to neck” description is significant because it contradicts
5 the official autopsy conclusion of “mouth to head” and the conclusions
6 of Fiske and Starr. As noted by Starr, the autopsy report “indicates
7 ‘backward’ and ‘upward’ as the direction of the bullet through the head”
8 and the doctor who performed the autopsy said the exit wound was
9 “three inches from the top of the head.”⁸⁵ Starr said the “autopsy report
10 and the reports of the pathologists retained by the OIC and Mr. Fiske’s
11 office demonstrate that the cause of death was a gunshot wound through
12 the back of Mr. Foster’s mouth and out the back of his head.”⁸⁶ So
13 officially, there was no “mouth to neck” shot.

14 Furthermore, common sense indicates that the difference between
15 a mouth to head shot and a mouth to neck shot is significant. A typical
16

17 ⁸⁵ Report on the Death of Vincent W. Foster, Jr., by the Office of
18 Independent Counsel In Re: Madison Guaranty Savings & Loan
19 Association (Starr Report) (released to the public by order of the U.S.
20 Court of Appeals for the District of Columbia Circuit, Division for the
21 Purpose of Appointing Independent Counsels, October 10, 1997), at 31
22 (exhibit 4, at 56). ER-6. Neither Kenneth Starr’s or any other author’s
23 name appears on the Starr Report. While it is clear that somebody failed
24 to do a proper investigation and report, the actual extent of Starr’s
25 personal familiarity with the facts is not publicly known. Therefore, use
26 of his name to designate the report issued by the office he supervises and
27 my references to him are not meant to imply that he is personally aware
28 of the factual details of the Foster matter.

The autopsy report was published by the Senate Banking Committee.
See S. Hrg. 103-889, vol. 1, at 364-71 (exhibit 5, at 91-98). ER-6.

⁸⁶ Starr Report, at 111 (exhibit 4, at 80). ER-6.

1 gun-in-the-mouth suicide will result in a mouth to head shot—entrance
2 wound in the back of the mouth and exit wound in the back or top of the
3 head—because this insures sufficient blood loss and brain destruction to
4 induce death. A potential gun-in-the-mouth suicide victim does not
5 want to make the exit wound in the back of the neck because that
6 increases the chances of survival, most likely as a quadriplegic.

7 The Haut Report’s mention of a neck wound is even more
8 significant in light of other evidence of a neck wound, although in a
9 different location. As Starr said, paramedic Richard Arthur, “initially
10 said he saw what ‘appeared to be a bullet wound, an entrance wound’ on
11 the neck.”⁸⁷ Unmentioned by Starr, is that Arthur testified he was 2-3
12 feet away from Foster when he observed the apparent bullet neck wound
13 on the right side of Foster’s neck, around the jaw line and underneath the
14 right ear.⁸⁸ But, citing a nonpublic FBI report, Starr said that Arthur told
15 the FBI that autopsy photos Arthur examined were taken from a better
16 angle and a better view than what he had at the park and he may have
17 been mistaken about such a wound.⁸⁹

18 There is one other important fact about the Haut Report. It appears
19 to have been improperly altered. The “mouth-head” language on page
20

21 ⁸⁷ Starr Report, at 33-34 n. 77 (exhibit 4, at 57-58). ER-6. But even
22 Starr’s expert, Dr. Brian Blackbourne, said there was “dried blood” at
23 the neck location cited by Arthur. Starr Report, at 64 n. 188 (exhibit 4,
24 at 67). ER-6. Starr failed to explain why Blackbourne’s interpretation
25 of a photo is more reliable than Arthur’s in-person 2-3 foot view from
26 the body.

27 ⁸⁸ Deposition of Richard M. Arthur In Re S. Res. 229, at 23:14 – 24:3,
28 64:2 – 65:7 (July 14, 1994), reprinted in S. Hrg. 103-889, vol. 1, at 871,
883, 903-904 (exhibit 5, at 113-14, 117-18). ER-6.

⁸⁹ Starr Report, at 33-34 n. 77 (exhibit 4, at 57-58). ER-6.

1 one apparently was altered so as to almost completely conceal what
2 appears to be a four-letter word that was replaced with the word “head”
3 slightly to the right of the concealed word.⁹⁰ Is it possible that such a
4 concealed word is “neck”? Is it proper procedure to make an alteration
5 to a medical record that obscures words? Or is proper alteration of a
6 medical record done by lining out any words that need to be changed so
7 that any changed words can still be recognized and then initialing and
8 dating the change? If the Haut Report was improperly altered, who did
9 it, and why? Was the word “neck” on page two left unaltered because
10 the person who may have altered page one failed to realize that the Haut
11 Report is on what appears to be a two-sided, single-sheet form and the
12 person was unaware of the second side?

13 What do Fiske and Starr do about all this? Fiske completely
14 ignores the Haut Report. Starr quotes from the apparently *altered*
15 language on page one of the Haut Report, well aware that there is a
16 second page to the report, as shown by the OIC document numbers Starr
17 mentions.

18 Starr’s Report said Dr. Haut completed a:

19 “Report of Investigation by Medical Examiner” after the
20 incident; the report is stamped with the date July 30,
21 1993. OIC Doc. No. DC-106A-1 to DC-106A-2. The
22 report states that the cause of death was “ perforating
23 gunshot wound mouth-head” and the means of death was
24 “38 caliber handgun.”⁹¹

25 Therefore, Starr told us that the Haut Report said the death shot
26 was “mouth-head,” but Starr failed to tell us other important information
27

28 ⁹⁰ Haut Report, at 1 (exhibit 2, at 41-42). ER-6.

1 about the Haut Report. Starr failed to tell us that page two of Haut’s
2 report said the death shot was “mouth to neck,” suggesting an exit
3 wound in the back of the neck and directly contradicting the official
4 autopsy report. Additionally, Starr failed to tell us that the “mouth-
5 head” phrase he quoted from page one, appears to have been altered so
6 as to almost completely conceal what appears to be a four-letter word
7 that was replaced with the word “head” just to the right of the concealed
8 word.

9 Starr left vital questions unanswered about the Haut Report that
10 easily could have been answered. Starr failed to tell the public about the
11 apparent alteration and failed to explain why the Haut Report appears to
12 have been altered. If there is an alteration on the Haut Report, Starr
13 failed to say what the original document says underneath the alteration
14 and what Dr. Haut says about all this.

15 If an OIC attorney presented an altered portion of the Haut Report
16 to the Special Division of the D.C. Court of Appeals as if there was no
17 alteration, is it possible that such an attorney violated the District of
18 Columbia Rules of Professional Conduct, Rule 3.3(a)(1), (4) & (d)
19 (exhibit 6)? These rules prohibit lawyers from making false statements
20 of material fact to a tribunal, offering evidence that the lawyer knows to
21 be false, and failing to reveal to a tribunal that a fraud has been
22 perpetrated upon the tribunal. 18 U.S.C. § 1512(b) provides criminal
23 penalties for one who “corruptly persuades another person ... with intent
24 to ... cause or induce any person to ... alter ... an object with intent to
25 impair the object’s integrity or availability for use in an official
26
27
28

⁹¹ Starr Report, at 27 n. 57 (exhibit 4, at 54). ER-6.

1 proceeding.” If the Haut Report was altered, was this section violated,
2 and if so, by whom?

3 Most importantly, Starr failed to justify his refusal to conduct a
4 second autopsy, despite the contradiction between the apparently altered
5 Haut Report and the official autopsy. Is there any justification for
6 failing to conduct a second autopsy under such circumstances, especially
7 when one is drawing taxpayers’ money to conduct an official
8 investigation of a suspicious death? Does the OIC recommend that
9 death investigators all over the country adopt its new practice as
10 standard procedure so that second autopsies are not performed on
11 suspiciously deceased persons when the autopsy significantly conflicts
12 with the initial report by the first doctor to examine the body and that
13 initial report appears to be suspiciously altered? Did Columbo and
14 Quincy just get it wrong all those years?

15 2. STARR FAILED TO EXPLAIN WHY

16 FOSTER’S WIDOW REPORTEDLY IDENTIFIED 17 A BLACK GUN AS SILVER AND WHY THIS INVALID 18 “IDENTIFICATION” WAS TREATED AS VALID

19 In an effort to get Mr. Foster’s widow, Lisa, to identify the official
20 death gun as being Mr. Foster’s, both Fiske and Starr ignored evidence
21 strongly suggesting that Lisa was shown the wrong gun and Fiske used
22 her “identification” of the wrong gun as if it were an identification of the
23 official death gun. Starr and Fiske failed to explain why the FBI
24 reported that Lisa described a gun as silver-colored, as it was being
25 shown to her in May 1994, when the gun allegedly shown to her was
26 black.

27 The evidence suggests that Lisa was accurate in a May 1994
28 interview. The problem is that the evidence suggests she was not shown

1 the black official death gun in this interview, but rather, was shown a
2 silver gun it was known she would recognize.

3 The record shows that the official death gun is black. Indirectly,
4 Starr said that the official death gun is black.⁹² Black and white copies of
5 photos of the official death gun taken by the Park Police show it is
6 black.⁹³ A color photo showing the gun in Foster's hand, broadcast by
7 ABC-TV News in March 1994 and printed in Time magazine's March
8 18, 1996, issue, shows a black gun.⁹⁴

9 This photo was leaked to the news media. Prior to this litigation,
10 the OIC had not officially confirmed its authenticity. I suspected this
11 photo was one of the photos he requested that is listed on an FBI
12 evidence receipt that was reprinted in S. Hrg. 103-889, vol. 2., at 2112
13 (Joseph Declaration, Ex. II, at OIC Bates # 45-46). ER-4. I suspected
14 this photo was the first photo listed in the group of eight Polaroids at the
15 bottom of the receipt.

16 I requested this photo twice: In category 2 of my request I
17 expressly describe it as the ABC News photo and it is included as one of
18 the photos in category 3 of my request in which I cite the photos listed at
19 p. 2112 of the Senate Hearings (Letter from Allan J. Favish to OIC
20 (January 6, 1997), attached to Joseph Declaration, Ex. II, at OIC Bates #
21 1). ER-4. The OIC says its response in the *Vaughn* index to my
22 "category 2" request is found in its response to the request for the photos
23

24
25 ⁹² Starr Report, at 79, n. 229 & accompanying text (exhibit 4, at 72). ER-
26 6.

27 ⁹³ See S. Hrg. 103-889, vol. 2, at 2407-2412, 2436 (Joseph Declaration,
28 Ex. II, at OIC Bates #10-41.) ER-4.

⁹⁴ See Time, March 18, 1996, at 68 (exhibit 7). ER-6. This photo also
was published in Newsweek, March 21, 1994, at 33 (exhibit 8). ER-6.

1 listed on page 2112 of the Hearings (my category 3 request).⁹⁵ This is an
2 admission by the OIC that the ABC/TIME photo, is the first photo listed
3 in the bottom group of 8 Polaroids on page 2112.

4 The OIC is withholding this photo because:

5 Disclosure of this photograph would cause Mr. Foster's
6 surviving family members a great deal of anguish and
7 reasonably can be expected to constitute an unwarranted
8 invasion of their personal privacy. The disclosure of this
9 graphic picture would shed no light on how the
10 government performs its statutory duties. The material is
11 therefore exempt from disclosure under FOIA Exemption
12 (b)(7)(C).⁹⁶

13 According to Starr, on July 29, 1993, nine days after the death,
14 Lisa “was shown a photograph of the gun retrieved from the scene and,
15 according to the Park Police interview report, was unable to identify it
16 from the photograph.”⁹⁷ According to the Park Police interview notes,
17 one reason for her failure to recognize the gun in the photo was because
18 she was expecting to see a “silver” gun.⁹⁸

19 With Lisa unable to identify the black official death gun from a
20 photo nine days after the death, FBI agents showed her an actual gun in
21 ten months later in May 1994, in the presence of Fiske’s deputy,
22
23

24
25 ⁹⁵ Joseph Declaration with exhibits I & III, at 7. ER-3.

26 ⁹⁶ Joseph Declaration, Ex. III, at OIC Bates # 55. ER-3.

27 ⁹⁷ Starr Report, at 81 (exhibit 4, at 73). ER-6.

28 ⁹⁸ S. Hrg. 103-889, vol. 2, at 2227 (exhibit 5, at 149). ER-6. The Park
Police’s handwritten interview notes say: “Not the gun she thought it
must be. Silver six gun, large barrel.” *Id.*

1 Roderick Lankler and her attorney, James Hamilton.⁹⁹ The FBI's report
2 of that interview says she,

3 examined a revolver which had been brought to the
4 interview by the interviewing agents. FOSTER examined
5 the revolver, which had also been found at Fort Marcy
6 Park ... LISA FOSTER believes that the gun found at Fort
7 Marcy Park *may be the silver gun* which she brought up
8 with her other belongings when she permanently moved
9 to Washington.¹⁰⁰

10 This May 1994 interview report does not make sense at first
11 glance. Starr said that at this May 1994 interview "she was shown the
12 actual gun that was recovered."¹⁰¹ We know that the "actual gun that was
13 recovered" is black.¹⁰² However, if Lisa was shown the black official
14 death gun at this 1994 interview, she should not have simultaneously
15 described the gun shown to her at that interview as silver. Yet,
16 according to the FBI report, that is precisely what she did. How can that
17 be?

18 If her description of the gun as it was being shown to her during
19 the 1994 interview was erroneous, her error cannot be explained by a
20

21 ⁹⁹ FBI Interview of Lisa Foster, at 14, reprinted at S. Hrg. 103-889, vol.
22 2, at 1646 (exhibit 5, at 140). ER-6.

23 ¹⁰⁰ FBI Interview of Lisa Foster, at 14, 16-17, reprinted at S. Hrg. 103-
24 889, vol. 2, at 1646, 1648-1649 (exhibit 5, at 140-42) (emphasis added).
25 ER-6.

26 ¹⁰¹ Starr Report, at 81 (exhibit 4, at 73). ER-6.

27 ¹⁰² Starr Report, at 79, n. 229 & accompanying text (exhibit 4, at 72) ER-
28 6; *see* S. Hrg. 103-889, vol. 2, at 2407-2412, 2436 (Joseph Declaration,
Ex. II, at OIC Bates # 10-41) ER-4; *see* Time, March 18, 1996, at 68
(exhibit 7) ER-6.

1 faulty memory. Her perception at that interview had nothing to do with
2 memory. She was reporting her perception of a gun as it was being
3 shown to her during the interview. Any such erroneous description only
4 can be explained by Lisa lacking an ability to tell black from silver, her
5 lying during the interview about her perception or the FBI agent failing
6 to accurately report what Lisa said at the interview.

7 There is no evidence in the public record that Lisa is unable to tell
8 black from silver, that she lied about her perception or that the FBI
9 failed to accurately record what Lisa said. Moreover, had she lied about
10 her perception and characterized a black gun as silver, this should have
11 elicited comment from those present. No such comment appears in the
12 public record.

13 This presented a problem for Fiske. Lisa was supposedly shown
14 the black official death gun in May 1994, but is reported to have
15 simultaneously described it as silver. Yet, Fiske used that
16 “identification” as if it were a valid identification of the black official
17 death gun and did so without mentioning the gun colors!¹⁰³

18 Fiske’s use of Lisa’s statement clearly was deceptive. If she was
19 shown a silver-colored gun at the May 1994 interview, then obviously,
20 she failed to give a valid identification of the *black* official death gun.
21 Likewise, if she was shown the black official death gun at this interview
22 and identified it as being silver-colored, then equally obviously, she
23 failed to give a valid identification of the black official death gun. No
24 matter what color gun Lisa was shown at this interview, given her
25 reported response, it clearly was deceptive for Fiske to use her reported
26

27 ¹⁰³ Report of the Independent Counsel In Re Vincent W. Foster, Jr. (June
28 30, 1994) (Fiske Report), at 38, reprinted in S. Hrg. 103-889, vol. 1, at
181, 213 (exhibit 5, at 83, 86). ER-6.

1 response as if it were a valid identification of the black official death
2 gun.

3 Starr failed to explain why Fiske used Lisa's invalid gun
4 identification. Starr also failed to explain why, if Lisa was shown a
5 black gun in May 1994, she reportedly simultaneously described it as
6 silver.

7 Fiske and Starr's conduct, including Starr's failure to provide a
8 plausible explanation for Lisa's reported description of an allegedly
9 black gun being shown to her, as silver, only serves to strengthen a
10 sinister hypothesis: At the May 1994 interview, Lisa correctly described
11 the color of the gun she was shown at that interview. This is because the
12 gun shown to her at that interview was silver and it was not the black
13 official death gun. Since it was known from her Park Police interview
14 nine days after the death that Lisa expected the official death gun to be
15 the silver gun she brought from Little Rock,¹⁰⁴ she was deceptively
16 shown a silver gun it was known she could recognize so that there would
17 be something in the record that could be presented as a Foster family
18 member's "identification" of the black official death gun to suggest Mr.
19 Foster owned the black official death gun.

20 It is unclear whether the others present at the May 1994, knew the
21 color of the official death gun at that time and would have known that a
22 silver gun shown to Lisa was not the official death gun. However, it is
23 hard to imagine a scenario where they would not have known about the
24 black color of the official death gun by May of 1994.

25 Starr came closest to explaining these issues when he said that in
26 November 1995, Lisa identified "the gun recovered from Mr. Foster's
27
28

1 hand ... although she said she seemed to remember the front of the gun
2 looking lighter in color when she saw it during the move to
3 Washington.”¹⁰⁵ Thus, Starr implied that there never was a silver gun
4 and for some unexplained reason, Lisa just thought all these years that a
5 black gun in her home was silver!

6 But Starr’s implication that Lisa has a faulty memory about the
7 color of the gun she and her husband owned is an inadequate
8 explanation. Starr completely failed to explain how it is possible that
9 Lisa could have been shown a black gun in May 1994 that she reportedly
10 *simultaneously* described as silver. Again, her reported description at
11 the May 1994 interview was not dependent on any memory of what a
12 gun looked like when she saw it in the past. It was dependent on her
13 ability to describe what she was being shown at the time of her
14 description.

15 If Starr wants to believe that Lisa was shown a black gun in May
16 1994 that she simultaneously described as silver, he is free to do so. But
17 since such a belief defies common sense, he owes the public an
18 explanation describing exactly how she could have done so. If she was
19 shown a black gun at this interview, he also must explain why Lankler
20 and Hamilton and at least two FBI agents apparently failed to note that
21 in their presence, Lisa described a black gun as being silver. Starr also
22 must explain why Fiske used that identification as if it were a valid
23 identification.

24 Starr’s failure to explain these matters suggests that the more
25 sinister explanation is true: At the May 1994 interview, Lisa correctly
26

27 ¹⁰⁴ Starr Report, at 81 (exhibit 4, at 73); S. Hrg. 103-889, vol. 2, at 2227
28 (exhibit 5, at 149). ER-6.

¹⁰⁵ Starr Report, at 81 (exhibit 4, at 73-74). ER-6.

1 described the color of the gun she was shown at that interview. This is
2 because the gun shown to her at that interview was silver and it was not
3 the black official death gun. She deceptively was shown a silver gun it
4 was known she could recognize so that there would be something in the
5 record that could be presented as an “identification” of the black official
6 death gun.

7 I do not expect the OIC to provide a plausible and innocent
8 explanation for these events. I expect the OIC will dodge this issue.
9 The OIC probably will deflect attention to Lisa’s November 1995 OIC
10 interview, wherein, according to Starr, Lisa “stated” that “when viewing
11 the gun recovered from Mr. Foster’s hand, that it was the gun she
12 unpacked in Washington but had not subsequently found ...”¹⁰⁶ But a
13 verbatim transcript of this November 1995 interview is not public and
14 therefore cannot be evaluated properly. Moreover, apparently, the
15 interview failed to address what reportedly transpired at her May 1994
16 interview.

17 Attempts to get other Foster family members to identify the black
18 official death gun also failed to provide any credible identification of the
19 black official death gun. Starr said that Mr. Foster’s older son “was
20 unable to conclusively identify the gun recovered on July 20, 1993, from
21 Mr. Foster’s hand as the one he had previously seen.”¹⁰⁷ Starr said that
22 one of Mr. Foster’s sisters, Sheila Anthony, “said she had no personal
23 knowledge about the gun found in Mr. Foster’s hand at Fort Marcy
24 Park.”¹⁰⁸ Starr said that Mr. Foster’s other sister, Sharon Bowman, “was
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27 ¹⁰⁶ Starr Report, at 81 (exhibit 4, at 73). ER-6.

28 ¹⁰⁷ Starr Report, at 83 (exhibit 4, at 75). ER-6.

¹⁰⁸ *Id.*

1 later shown the revolver recovered from Fort Marcy Park ... but she
2 could not positively identify it.”¹⁰⁹

3 Inexplicably, Starr and Fiske failed to mention powerful evidence
4 from a Foster family member strongly suggesting that the black official
5 death gun was *not* previously owned by Mr. Foster. The FBI’s
6 transcribed notes of its June 1994 interview with Mr. Foster’s nephew,
7 Lee Foster Bowman, fail to show an identification of the black official
8 death gun. According to the FBI’s transcribed notes, Bowman went
9 hunting over ten times with his grandfather and was able to describe his
10 grandfather’s gun collection—which was later inherited by Mr. Foster—
11 in significant detail. Mr. Bowman is reported to have said that he could
12 not identify the gun because of its color. The FBI reported:

13 BOWMAN said he knew the difference between a pistol
14 and a revolver.

15

16
17 BOWMAN was shown the .38 caliber colt revolver
18 believed to have been used by VINCENT FOSTER, JR.
19 on July 20, 1993 to kill himself. BOWMAN was asked if
20 he recognized this weapon, BOWMAN said, “The gun
21 does not ring a bell particularly”. BOWMAN said the
22 “.38 caliber” nature of the weapon was familiar, but that
23 he didn’t remember the black handle and the dark color of
24 the metal. He indicated that he was familiar with the

25
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28 ¹⁰⁹ *Id.*

1 cylinder and barrel portion of this size or caliber of a
2 weapon except for the color of the metal.¹¹⁰

3 The Fiske Report was dated June 30, 1994.¹¹¹ Therefore, it is likely
4 that Fiske deliberately wrote his report without waiting for Bowman's
5 observations. While this demonstrates an additional reason for holding
6 the Fiske Report untrustworthy, Starr's omission of Bowman's
7 observations is even more irresponsible. Starr had plenty of time to
8 incorporate Bowman's 1994 observations into his report. But Starr not
9 only failed to do so, he apparently failed to have Bowman re-
10 interviewed, given the lack of any citation in his report to such an
11 interview.

12 Therefore, the Foster family member who appears to be the most
13 familiar with the family's guns, aside from Mr. Foster, cannot identify
14 the black official death gun, largely because of the color, and that report
15 is ignored by Starr. Curiously, the FBI report does not say what color
16 gun Lee Bowman would have recognized. Is this because he would
17 have said, or did say, silver?

18 Starr failed to explain how Lisa could have been shown a black
19 gun in May 1994 that she reportedly simultaneously described as silver
20 and why Fiske used that invalid identification as if it were valid. Starr
21 also failed to demonstrate that any member of the Foster family provided
22 a credible identification of the black official death gun. Yet, according
23 to Starr:

24
25
26 ¹¹⁰ FBI FD-302 Report of Interview with Lee Foster Bowman (interview
27 on June 28, 1994; transcription on July 5, 1994), reprinted in S. Hrg.
28 103-889, vol. 2, at 1806-07 (exhibit 5, at 144-45). ER-6.

¹¹¹ See S. Hrg. 103-889, vol. 1, at 181 (exhibit 5, at 83). ER-6.

1 This combination of *testimonial*, circumstantial, and
2 forensic evidence supports the conclusion that the gun
3 found in Mr. Foster’s hand belonged to Mr. Foster.¹¹²

4 Starr’s conclusion is not supported by the evidence and
5 significantly helps to destroy his credibility.

6 3. STARR FAILED TO EXPLAIN WHY DR. LEE FAILED TO FIND
7 EVIDENCE THAT THE BODY WAS DRAGGED, WHEN IT WAS
8 DRAGGED

9 One of Starr’s experts is Dr. Henry Lee, the discredited expert
10 witness for O.J. Simpson, who submitted a report to Starr about the
11 Foster death.¹¹³ To refute speculation that Mr. Foster’s body was moved
12 to the park after his death (at least by dragging the body), Starr used
13 Lee’s findings to imply that Mr. Foster’s body was not dragged at the
14 park.

15 However, Lee’s conclusions about whether Mr. Foster’s body was
16 dragged in the park conflict with official testimony ignored by Starr that
17 helps destroy Lee’s credibility. Starr said “examination of Mr. Foster’s
18 clothes by Dr. Lee revealed no evidence of a struggle or of dragging.”¹¹⁴
19 Starr said Lee reported that “[n]o dragging-type soil patterns or damage
20 which could have resulted from dragging-type action were observed on
21 these pants.”¹¹⁵ Starr said “Dr. Lee found no ripping, tearing, or scratch
22 or scraping-type marks on the shirt.”¹¹⁶ Therefore, based on Lee’s
23

24 ¹¹² Starr Report, at 84-85 (exhibit 4, at 76-77) (emphasis added). ER-6.

25 ¹¹³ Starr Report, at 3 n. 2 (exhibit 4, at 47). ER-6. Inexplicably, Lee’s
26 report has not been released to the public.

27 ¹¹⁴ Starr Report, at 112 (exhibit 4, at 81). ER-6.

28 ¹¹⁵ Starr Report, at 51 (exhibit 4, at 63). ER-6.

¹¹⁶ Starr Report, at 51 (exhibit 4, at 63). ER-6.

1 findings, Starr strongly implied that Foster's body was not dragged at
2 the park.

3 But Starr failed to tell us that two of the Park Police officers said
4 the body was dragged by the Park Police! Testifying under oath in 1994,
5 the lead investigator at the scene, Park Police officer John Rolla,
6 described how the body slid downhill when he and the Medical
7 Examiner, Dr. Haut, rolled Mr. Foster's body over at the park so that
8 Rolla could take photos of the back side of Mr. Foster's body. Rolla's
9 deposition says:

10 Q Were you there when the medical examiner arrived?

11 A Yes.

12 Q What did he do?

13 A He looked at him, asked me what we had. We told
14 him what we had. Basically pool of blood under his head,
15 gun in his right hand, appeared to be a .38 caliber
16 revolver, no sign of a struggle, no other obvious signs of
17 trauma to the body.

18 At that point we looked at him, myself and he rolled the
19 body, and he had to actually stand downhill at his feet,
20 because as we rolled him, he was starting to slide down
21 the hill on us, and it was very steep¹¹⁷

22 Later in the same deposition, when asked about photos he took that
23 disappeared, Rolla explained that he dragged Mr. Foster's body after it
24 slid down the hill.

25 Rolla's deposition says:

26 _____
27 ¹¹⁷ Deposition of John C. Rolla In Re S. Res. 229, at 11:9-10, 23:18 –
28 24:7 (July 21, 1994), reprinted in S. Hrg. 103-889, vol. 1, at 380, 386,
392 (exhibit 5, at 99-100, 103). ER-6.

1 Q When you turned the body over with Dr. Haut, did you
2 or anyone else take photographs of the area under the
3 body?

4 A You know, we rolled that body and I took Polaroids of
5 the body rolled—and it's not funny, but the reason I
6 remember it is because I pulled his arm up, rolling him,
7 obviously moving the body. I didn't care what position
8 he was in, one arm was pulled up, and he began sliding
9 down the hill. So Dr. Haut stood at his feet while I rolled
10 him over to keep him from sliding all the way down the
11 darn embankment. I pulled one arm up. So when I rolled
12 him, one arm was up, I forget which arm, and I pulled
13 him, he slid down a little bit, so I pulled him back up, so
14 he is actually higher up on the hill now. It looked like he
15 was crawling up the hill and it looked funny, wasn't
16 funny. It's kind of one of these things, but I didn't take
17 pictures because it was funny. I know I took Polaroids of
18 that. I am not sure exactly how many I took, but I don't
19 recall seeing those Polaroids again. I mean I had them in
20 the office that night, I did reports, and I don't know what
21 happened.¹¹⁸

22
23 ¹¹⁸ Deposition of John C. Rolla in re S. Res. 229, at 89:9 – 90:7 (July 21,
24 1994), reprinted in S. Hrg. 103-889, vol. 1, at 380, 425 (exhibit 5, at 99,
25 105). ER-6.

26 Starr implies that in 1996 Rolla changed his story about whether he
27 took Polaroids of the back side of Foster's body. *See* Starr Report, at 73
28 n. 214 (exhibit 4, at 70). ER-6. But the notes and transcripts of that
interview have not been released to the public and Rolla has not been
cross-examined about the issue.

1 Another Park Police investigator, Renee M. Apt, observed Mr.
2 Foster's body being rolled over by Rolla and reported the sliding to the
3 FBI:

4 According to her recollection, she believes that Officer
5 Braun escorted the Medical Examiner to the scene where
6 the Medical Examiner in the presence of herself, John
7 Rolla and possibly Cheryl Braun and Pete Simonello
8 examined the body in detail. This, according to
9 Investigator Apt, included rolling the body over *with the*
10 *body slipping down the hill requiring the officers at the*
11 *scene to assist in stopping the slide.*¹¹⁹

12 While presenting Dr. Lee's failure to find evidence that Mr.
13 Foster's body was dragged at the park, Starr failed to reconcile Lee's
14 conclusion with Park Police descriptions of the body sliding up and
15 down the dirt path. Unless these Park Police officers were being
16 untruthful, or such sliding and dragging left no evidence on Mr. Foster's
17 clothes for Lee to discover with his microscopes (despite Lee's apparent
18 belief that it would do so), Lee failed to see evidence of dragging and
19 sliding that we know occurred. Therefore, why should Dr. Lee be
20 trusted in light of this apparent colossal goof? Does Starr demonstrate
21 good judgment by relying on Dr. Lee?

22 III. THE SUBJECT PHOTOGRAPHS WILL HELP
23 ANSWER SOME OF THE QUESTIONS

24 This brief and plaintiff's upcoming reply brief present extensive
25 evidence demonstrating that the Fiske and Starr reports on the Foster
26

27 ¹¹⁹ FBI FD-302 of Renee M. Apt (interviewed on May 2, 1994;
28 transcribed May 4, 1994), reprinted in S. Hrg. 103-889, vol. 2, at 1588
(exhibit 5, at 139) (emphasis added). ER-6.

1 death are untrustworthy. The subject photographs are central to this case
2 and can help answer important questions.

3 These 11 photos will allow the American public to see if Mr.
4 Foster’s eyeglasses were broken as they laid on the ground at the park,
5 as they appear to be in the photo published by the Senate Whitewater
6 Committee.¹²⁰ There is no mention in the public record of the glasses
7 being broken and if they were broken while on the ground, the public
8 will want to know who broke them and how they broke, especially given
9 the government’s story that Mr. Foster was wearing them when he shot
10 himself and they flew off his head and bounced in the vegetation.¹²¹
11 Does the photo of the eyeglasses on the ground show a footprint that
12 does not belong to Mr. Foster? Does the photo of the eyeglasses on the
13 ground show any of the blood reportedly seen by Henry Lee but missed
14 by the FBI Lab?¹²²

15 These photos will allow the public to see if the “dried blood” on
16 Mr. Foster’s neck reportedly seen by Dr. Blackbourne in an autopsy
17 photo is visible on the body site Polaroids sought here and whether these
18 body site Polaroids fail to show evidence of any neck injury.¹²³ This is
19

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21 ¹²⁰ See S. Hrg. 103-889, vol. 2, at 2448 (Plaintiff’s Summary
22 Adjudication Motion exhibit 5, at 152). ER-6.

23 ¹²¹ Try tossing your own eyeglasses in some vegetation and see if they
24 bounce and break.

25 ¹²² See Plaintiff’s Motion for Summary Adjudication of Issues, at 20:3 –
26 21:17. ER-6. (This will be presented in plaintiff’s reply brief.)

27 ¹²³ Starr said that one of his experts, Dr. Brian Blackbourne, “stated that a
28 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 67). ER-6. As opposed to

1 important given the reports of a neck wound by a paramedic and a
2 medical doctor, both of whom viewed Mr. Foster's body at the park,¹²⁴
3 and an autopsy performed with a mysterious assistant that violated
4 standard procedure by removing Mr. Foster's tongue and parts of his
5 soft palate before the Park Police arrived at the autopsy.¹²⁵

6 These photos will allow the public to see if there are any signs that
7 a gun was put in Mr. Foster's hand after his death, as can be inferred
8 from the testimony of a key witness, the failure of the Foster family to
9 recognize the official death gun and Chief Langston's public deception
10 about the gun.¹²⁶ The gun-in-hand photo currently available is a photo of
11 an ABC News broadcast that shows far less detail than the first
12 generation copy that plaintiff is seeking.

13 These photos will allow the public to see the "possible"
14 bloodstains on vegetation, allegedly seen by Dr. Lee in photos of the
15 body site, that were not seen by those who viewed Mr. Foster's body in
16 the park.¹²⁷

17 In short, these photos will help the public understand what
18 happened to a White House official who the government says drove
19 himself to a park and committed suicide even though the known parking
20

21 the autopsy photos cited by Blackbourne, this suit seeks the body site
22 photos that might shed more light on the neck wound controversy.

23 ¹²⁴ See section II-1, supra.

24 ¹²⁵ See Plaintiff's Motion for Summary Adjudication of Issues, at 21:18 –
25 24:5. ER-6. (This will be presented in plaintiff's reply brief.)

26 ¹²⁶ See section II-2, supra and Plaintiff's Motion for Summary
27 Adjudication of Issues, at 26:3 – 30:10. ER-6. (This will be presented
in plaintiff's reply brief).

28 ¹²⁷ See Plaintiff's Motion for Summary Adjudication of Issues, at 24:6 –
26:2. ER-6. (This will be presented in plaintiff's reply brief.)

1 lot witnesses failed to see his car in the lot after the evidence shows he
2 was already dead.¹²⁸

3 **CONCLUSION**

4 The photos should be released.

5 **STATEMENT OF RELATED CASES**

6 Appellant is unaware of any related cases.

7 **CERTIFICATE OF COMPLIANCE**

8 The text of this brief is double spaced. The text of this brief is
9 proportionately spaced, using Times New Roman typeface, 16 point.
10 The text of this brief contains less than 14,000 words, after making the
11 exclusions allowed pursuant to Circuit Rule 32(e)(3). The brief averages
12 275 words per page.

13
14 Dated: April 9, 1998

15 _____
16 Allan J. Favish
17 Plaintiff/Appellant, in pro per
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25 _____
26 ¹²⁸ See Plaintiff's Motion for Summary Adjudication of Issues, at 31:7 –
27 34:9. ER-6. (This will be presented in plaintiff's reply brief.) This fact
28 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.