

Nos. 01-55487, 01-55788, 01-55789
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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ALLAN J. FAVISH,
Plaintiff-Appellant/Cross-Appellee,

v.

OFFICE OF INDEPENDENT COUNSEL,
Defendant-Appellee/Cross-Appellant, and

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY,
Defendants-in-Intervention-Appellees/Cross-Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE WILLIAM D. KELLER, PRESIDING**

REPLY/ANSWERING BRIEF OF FAVISH

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1. INTRODUCTION

The OIC has no credible rebuttal to the facts establishing: 1) Fiske and Starr failed to tell the public the content of the witness reports detailing the lack of any blood at the park that would indicate that there was a .38 high velocity shot into the mouth and out the back of the head;¹ 2) The OIC cannot reconcile its statements with the Starr report about whether the 35-millimeter photos were useless;² 3) The Starr report deceived the public about the witness who testified there was no gun in Foster's hand when he found the body;³ 4) Fiske and Starr used an invalid gun identification by Moody as if it were valid;⁴ 5) Fiske and Starr failed to tell the public that the Park Police Chief made a false statement to the public about alleged identification of the gun;⁵ 6) Fiske and Starr failed to tell the public that the Haut report contradicts the official government story and that the OIC's copy of the Haut report is so materially different from the original that it appears to have been fraudulently altered;⁶ 7) Starr falsely implied Park Police observance of the entire

¹ OBA 15-16 ("OBA").

² OBA 16-18

³ OBA 18-20.

⁴ OBA 20-27.

⁵ OBA 27-29.

⁶ OBA 29-31, 40-45.

autopsy;⁷ 8) Fiske and Starr’s falsely implied that Foster’s car was in the park when he died;⁸ 9) Starr’s failed to report evidence destroying the credibility of Dr. Henry Lee’s conclusion about Foster’s clothing showing signs of dragging;⁹ and 10) Fiske and Starr failed to tell the public about the FBI memo that contradicts the official autopsy results.¹⁰

2. ARGUMENT

A. This Court Should Review The Photos *In Camera* After Testimony

From Rodriguez And Rambusch

Intervenors state that this court should review the photographs *in camera*.¹¹

Favish agrees, as long as the photographs reviewed are the original pristine photographs. However, that review should not occur until testimony is taken from Miquel Rodriguez and Lucia Rambusch, as requested in the Opening Brief of

⁷ OBA 31-32.

⁸ OBA 32-35.

⁹ OBA 36-38.

¹⁰ OBA 38-40.

¹¹ Intervenors’ Opening/Answering Brief 19 (“IB”). The OIC agrees and states that it “stands ready to provide this Court with copies of photographs, or the Court may elect to view the originals (as the district court did).” OIC Opening Brief 21, 27, 30 (“OICOB”).

Appellant at pages 46-56 and before the district court,¹² in order to insure the integrity of the photos presented to the court and to the public.

The OIC states that the district court was shown the original photographs, citing the declaration of OIC associate independent counsel Karl Gellert.¹³ However, while Mr. Gellert's declaration may have been made in good faith, it does not establish that he has any expertise in distinguishing an original Polaroid photo from a Polaroid photo of a Polaroid photo, as is described in the book excerpts.¹⁴ Nor does his declaration establish any chain of custody for the photos from the time they were taken to the time Mr. Gellert saw them. Nor does it state that Mr. Gellert personally placed the photos in the "binder" or "transferred" the photos to the FBI agent. There is no declaration from the FBI agent about what he did with the photos he was given. Additionally, conspicuously absent are declarations from Miquel Rodriguez and Lucia Rambusch discussing their alleged experience with an enhanced version of at least one of the original photos.

¹² ER 423-453.

¹³ OICOB 47.

¹⁴ ER 423-453.

The OIC states that Favish's request for the testimony of Rodriguez and Rambusch was untimely.¹⁵ However, the request was timely. It was not until July 12, 2000 that this court ordered the OIC to produce the photographs to the district court for in camera review.¹⁶ The first hearing in the district court after that ruling was October 13, 2000.¹⁷ Favish raised the issue at that hearing.¹⁸ The court stated that it was *premature* to make the motion at that time and stated that Favish should wait until after the court had seen the photos and made its ruling.¹⁹

It would have been premature for Favish to make the motion any earlier than he did because the OIC was not offering to show the photos to the public or to any court. As soon as it became clear that the OIC would have to produce the original pristine Polaroids, Favish made the request. Even then, the district court stated that it was premature.

¹⁵ OICOB 47.

¹⁶ *Favish v. Office of Independent Counsel*, 217 F.3d 1168 (9th Cir. 2000).

¹⁷ ER 209.

¹⁸ ER 220.

¹⁹ ER 220-226.

B. Proof Of Illegal Activity Is Not Required

Intervenors and the OIC erroneously state that Favish must provide proof of illegal activity by the government.²⁰ However, in this case, this court stated:

Nothing in the statutory command conditions agency compliance on the requesting party showing that he has knowledge of misfeasance by the agency, although at times evidence of such knowledge has been referred to as enhancing the urgency of the request.²¹

Instead, the OIC and Intervenors cite several cases from other circuits that have no application here. For example, they cite cases for the proposition that a FOIA requester must produce “compelling evidence that the agency denying the FOIA request is engaged in illegal activity”²² However, that is not the standard in the Ninth Circuit and it is an improper standard. Exemption 7(C) states that disclosure may be denied when it would lead to an “unwarranted” invasion of personal privacy.²³ The exemption does not say anything about having to produce “compelling evidence” in order to make the invasion “warranted” or that it must be evidence of “illegal activity” in order to make the invasion “warranted.”

²⁰ IB 21-22; OICOB 40-41.

²¹ *Favish v. OIC*, 217 F.3d at 1172-1173 (citation omitted).

²² IB 21; OICOB 30, 40-41.

²³ *Favish v. OIC*, 217 F.3d at 1172 (citing 5 U.S.C. § 552(b)(7)(C)).

The Supreme Court says the FOIA's exemptions must be narrowly construed to promote the FOIA's purpose of government disclosure.²⁴ By imposing the additional burdens of "compelling evidence" and "illegal activity" for those trying to show that the public interest in disclosure of a particular document is paramount to the privacy interest of a single person or a few persons, the OIC and Intervenors and the misguided cases they cite are giving the privacy exemption a broad construction that has no basis in the statutory language or Congressional intent. The OIC and Intervenors and these cases do this without explaining why or how it is consistent with the FOIA as interpreted by the Supreme Court. For example, why require evidence of illegal activity when the public also has an interest in discovering negligent government activity?

The OIC and Intervenors cite *Silets v. U.S. Dep't of Justice*, 945 F.2d 227, 231 (7th Cir. 1991) in support of their claim.²⁵ However, *Silets* did not state any rule that allegations of government wrongdoing and misconduct are always insufficient to undermine the veracity of the agency's Exemption 7(C) redactions unless

²⁴ *Van Bourg, Allen, Weinberg & Roger v. National Labor Relations Board*, 751 F.2d 982, 984 (9th Cir. 1985) (citing *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-361, 96 S.Ct. 1592, 1598-1599, 48 L.Ed.2d 11 (1976)).

²⁵ IB 21; OICOB 40-41.

illegality is shown. Rather, *Silets* merely provided a description of what occurred in that case, which is far different from the solid factual showing made here that goes far beyond mere “allegations.”

The OIC and Intervenors cite *Schiffer v. FBI*, 78 F.3d 1405, 1410 (9th Cir. 1996), which stated that the “public’s interest in disclosure is diminished where there is no evidence of government wrongdoing.”²⁶ However, here there is evidence of government wrongdoing, that is at least negligent, if not intentional. Moreover, it is better to say, as this court did, that evidence of government misfeasance enhances the public’s interest in disclosure, rather than the public’s interest is diminished in the absence of such evidence. This is especially appropriate given that the government will always argue, as it does here that “there is no evidence of wrongdoing” while refusing to release documents that may contain such evidence.

C. The “Privacy” Interest Of Foster’s Survivors Is Greatly Overstated

The OIC discusses the declarations submitted by Intervenors.²⁷ However, only two members of Foster’s family have submitted declarations and are seeking to stop release of the photos, his former wife, and one of his sisters. Foster had

²⁶ IB 21; OICOB 30, 40.

²⁷ OICOB 22-25.

another sister, Sharon Bowman.²⁸ He also had three children.²⁹ When Foster died in 1993, the youngest of the children was about 17 years of age.³⁰ Therefore, all of his children are now adults at least in their mid-twenties. Additionally, Anthony refers to Foster's "86 year old mother."³¹ Although it is understandable that the family may feel it is too much of an imposition to have the elderly mother bothered with formally being represented in these legal proceedings, it is less understandable why the other sister and the adult children are not formally objecting to the release of the photos.

The declarations of Intervenors speak about media attention that would be so undesirable.³² Unstated in the declarations is that Moody gave an extensive interview to The New Yorker magazine in 1995 that resulted in an article filled with quotes from her in its September 11, 1995 issue.³³ Contrary to the impression left by the declarations, Moody has been a willing participant in the public

²⁸ ER 298, 363.

²⁹ ER 298.

³⁰ ER 612, 615.

³¹ ER 528.

³² ER 528-531 & Intervenors' Supplemental Excerpts of Record at tab # 2.

³³ ER 651-653 (only the magazine's cover page, the table of contents and the first page of the article were submitted to the district court).

discussion about one of the most controversial deaths of a United States government public official in history.

Moody has every right to control her contacts with the media. If her New Yorker interview was her only media presentation, and that's what she wants, that is her decision and it should be respected. Obviously, any rude interruptions by media personnel who refuse to take "no" for an answer should be condemned. However, now she is trying to block release of evidence that is part of the public discussion in which she has participated, with a claim that she wants the public discussion to end. She is using "media attention" that she helped generate to block the public from examining how its public servants performed their jobs in investigating this death.

Moreover, any privacy interest Intervenors may have in photos of Foster is diminished by the fact that he was a public official. Obviously the public has an interest in examining how its servants investigate deaths. But that interest is greater when the deceased is a public official. When a high government official dies a violent death, the public has a right to know if their servant has been murdered.

The declarations discuss how the photos might be disseminated in the media. It is unlikely that the declarants will be in a situation where they will have to see

any of these photos for any period of time longer than it takes to turn their head or change a channel. Moreover, there is no evidence that anybody will force them to look at the photos. This does not mean that they won't experience an invasion of their memory of Foster should accidental exposure occur, but it does mean that any such exposure will be extremely brief. This is especially true given that it is over eight years since the death and if the photos are as supportive of the government's official story as the OIC contends, it is almost impossible to imagine what media organization that might be seen or heard by any member of the Foster family would even report that the photos have been released, much less show them. The dominant media's present interest in the story is best exemplified by the fact that it failed to present the public with the facts submitted to this court and failed to tell the public that a federal district court ordered some of the photos released.

Moreover, if the photos are redacted, there would be even less of an alleged effect on their memories of Foster. The OIC's argument against redaction of the alleged neck wound photo by partially blocking out the face is that the "release of this photograph, redacted in part or not, would devastate that privacy interest."³⁴

The OIC offers no further explanation about how a photograph that does not show

Foster's face would "devastate" any privacy interest. The OIC's refusal to recognize that there is a difference between a photograph showing Foster's face and one that does not show his face further diminishes the OIC's credibility.

At most, some people from the media may contact Intervenors for a comment. This would be a nuisance and upsetting, but not significant enough to outweigh the public's interest in examining these photos to answer the important questions that remain in the wake of the government's untrustworthy investigations. Moreover, media contact is highly unlikely if the photos are consistent with the government's official story, as is claimed by the OIC. If the photos are not consistent with that story, the possibility of media contact increases. However, is there a single judge on the Ninth Circuit who would rule that Intervenors' interest in not being bothered by the media outweighs the public's interest in photos inconsistent with the government's story?

D. The Congressional "Investigations" Were Incomplete

The OIC states: "Two extensive congressional inquiries into the Park Police's investigation of Foster's death were also conducted."³⁵ Intervenors state

³⁴ OICOB 32 n. 5.

³⁵ OICOB 6.

that there have been “five separate investigations – by the Park Police, two independent counsels, and Congressional committees of both houses of Congress”³⁶

However, the OIC and Intervenors ignore the following sentence from Favish’s opening brief: “The Congressional investigations involving this death were so limited that they did not investigate the issue of whether Foster was murdered or committed suicide at the park.”³⁷

The Senate Banking Committee’s “investigation” into the Foster death was limited to the issue of whether the United States Park Police’s investigation was proper. The Banking Committee did not conduct a full investigation to determine whether Foster was murdered or committed suicide in the park. Committee Chairman Sen. Donald Riegle (D-MI) said that the Committee was operating “under specific legislative instructions from the full Senate.”³⁸ He said:

The scope of our present effort was carefully defined by the Senate Resolution 229 to pursue only three specific matters in order to not interfere or compromise in any way the full-scale inquiry being directed by Independent Counsel, Robert B. Fiske, Jr.

³⁶ ER 503, 507; *see* IB 4-5.

³⁷ ER 602-609, 277, 288.

³⁸ ER 602-603.

....

Now, Senate Resolution 229 directed this Committee to conduct hearings on three specific matters in this phase . . .

....

No. 2, I quote again:

The Park Service Police investigation into the death of White House Deputy Counsel Vincent Foster.³⁹

Several Senators, both Democrat and Republican, said in their opening statements on July 29, 1994 that they were not investigating whether Foster was murdered or committed suicide in the park. Sen. Robert Bennett (R-Utah) said:

No. 2, I will be happy to stipulate that Vincent Foster committed suicide. There was a time when the rumors in the press led me to believe there was some credence to an additional theory. I find no possible justification for that now. I am one Senator who is willing to say that this hearing should not be about whether or not Vincent Foster committed suicide. He committed suicide. I will so stipulate.

I will not stipulate that the investigation of that suicide was handled in a proper fashion. I think that's a legitimate thing for us to go into.⁴⁰

Sen. Pete Domenici (R-NM) said: "I don't think anyone on our side is challenging whether or not it was a suicide. So perhaps we can get rid of that rather quickly."⁴¹

³⁹ ER 602-604.

⁴⁰ ER 602, 605.

⁴¹ ER 602, 606.

Sen. Orrin Hatch (R-UT) said:

Accordingly, I want to be clear on one point. There is absolutely no credible evidence to contradict the Fiske Report's conclusion that Vincent Foster took his own life and it happened at Fort Marcy Park. There is no credible evidence to the contrary.⁴²

Sen. Carol Moseley-Braun (D-IL) said:

At the outset, let me say, Mr. Chairman, I would like to associate myself with the remarks of Senators Bennett and Boxer regarding the Vincent Foster issue. We are not conducting an investigation into a suicide. Our investigation is only into the propriety of the investigation surrounding his tragic and untimely death. . . . However, we do have an obligation, nonetheless, to the public to ensure that no untoward or inappropriate activities occurred that would reflect on the remaining issues before this Committee. The first part of this hearing, I believe, will rightfully look into the process by which that investigation took place.⁴³

No committee in the House of Representatives conducted an investigation of Foster's death. As the OIC states on page 7 in its report on Foster's death, Rep. William Clinger, then the ranking Republican member of the Committee on Government Operations, wrote a six-page "Summary Report" of his investigation into the death.⁴⁴ It was not a committee investigation. There are no transcripts of any questioning he might have done. There is nothing to indicate that it was

⁴² ER 602, 607-608.

⁴³ ER 602, 609.

anything more than a rubber-stamp of the Fiske report. Clinger's report does not answer the questions Favish raises in this case.

E. The OIC's Discussion Of The *AIM* Case Is Misleading

The OIC states that this court held "that even though Mr. Favish was counsel for the plaintiff that sought the same photographs in Accuracy in Media v. National Park Service, 194 F.3d 120, 122-123 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000), and thought the FOIA claim was for the photographs rejected by the D.C. Circuit, he could again pursue a FOIA claim himself in this Circuit. Favish, 217 F.3d at 1171."⁴⁵

The OIC's description is misleading because the "could again" phrase implies that Favish began the instant lawsuit after the appellate decision in the *AIM* suit. However, the OIC provides no evidence for such a conclusion. The record in the instant lawsuit shows that Favish began the instant lawsuit before he became an associate counsel of the law firm that represented the plaintiff in the *AIM* suit.⁴⁶

⁴⁴ ER 277, 288.

⁴⁵ OICOB 8.

⁴⁶ Prior to this court's opinion on July 12, 2000 in the instant case, Favish filed an "Appellant's Opposition Memorandum Of Authorities Regarding Collateral Estoppel; Declaration Of Allan J. Favish" that is not part of the Excerpts of Record in the instant case, but is on file with this court.

Moreover, the OIC states that the photographs at issue in *AIM* and the instant case are “the same.”⁴⁷ However, the photos at issue in this case are the original photos and the photos at issue in *AIM* were less detailed copies, as is evident from the fact that both agencies could not have the originals.

The OIC states: “This Court, like the D.C. Circuit in Accuracy in Media, rejected the argument that the surviving family members do not have a privacy right protected by Exemption 7(c).”⁴⁸ However, rather than rejecting the argument that the surviving family members do not have a privacy right, the confused *AIM* opinion appears to rest on the determination that Foster’s right of privacy survives his death.⁴⁹ The D.C. Circuit’s brief discussion of *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), was not a basis for its decision.⁵⁰ Indeed, the D.C. Circuit stated:

We need not here explore whether the interest belongs to living close survivors (in which case it might end at their deaths), or alternatively may inhere posthumously in the subject himself (in which case it would seem to be of indefinite duration), or both.⁵¹

⁴⁷ OICOB 26 n. 3.

⁴⁸ OICOB 9.

⁴⁹ *AIM v. NPS*, 194 F.3d at 123 (D.C. Cir. 1999).

⁵⁰ *AIM v. NPS*, 194 F.3d at 122-123.

⁵¹ *AIM v. NPS*, 194 F.3d at 123.

Therefore, the D.C. Circuit stated that its decision did not decide whether Foster's survivors or even Foster himself had a privacy interest in the photos! So even the issue of whether Foster had a privacy interest that survives his death was not necessarily decided. In any event, the only issue that may have been necessarily decided in *AIM*, is an issue that is not present in our case because in our case, the OIC is not claiming that Foster's right of privacy survives his death.

F. The OIC's Description Of What It Contends Is An "Alleged Conspiracy" Is Inaccurate

The OIC states:

Here, the alleged conspiracy theories relied upon by plaintiff posit a cover-up being perpetrated by, at a minimum, the National Park Service, the United States Park Police, the FBI, the six persons present at the autopsy (including the Deputy Chief Medical Examiner of Virginia), two Independent Counsels and their staffs, two congressional committees, the Department of Justice, and two Presidential administrations. Such baseless speculation of a massive government cover-up cannot support a claim of "public interest" under FOIA.⁵²

The OIC's use of the pejorative "conspiracy theories" is no substitute for a persuasive fact-specific refutation of the facts presented in Favish's opening brief. Lacking such a refutation, the OIC is reduced to spending our tax dollars on name-

calling. Contrary to the OIC's characterization, nothing relied upon by Favish necessarily posits an intentional cover-up by the grand array of individuals and organizations listed by the OIC. For starters, the four Park Police at the autopsy did not arrive until after significant work had already begun, like the removal of Foster's tongue and parts of the soft tissue from the soft palate,⁵³ a fact the OIC failed to tell the public in its report.⁵⁴ Moreover, as established above, there were not two congressional committees, but only one committee (whose key members stated at the outset that they accepted the finding of suicide) and a single member of another committee. The publicly available evidence does not show what Fiske's and Starr's personal involvement was in writing the reports that came from the offices they headed. It is conceivable that the reports were written by a multitude of staff members who looked at discrete areas and that the final reports were written by people who did not look at all of the evidence themselves.

In any event, playing games with "alleged conspiracy theories" is a waste of time when there are undisputed facts that prove the government reports are not

⁵² OICOB 15.

⁵³ ER 154.

⁵⁴ OBA 31-32.

credible. The “how” which caused that to occur cannot be solved until all the evidence is released and somebody conducts a credible investigation.

G. The District Court’s Use Of The “Graphic, Explicit and Extremely Upsetting” Standard Is Consistent With This Court’s Opinion

The district court ruled: “In this case, the appellate court appears to have defined the zone of privacy protection as those photographs that are ‘graphic, explicit and extremely upsetting.’ See the decision at page 1174.”⁵⁵ The OIC and Intervenors argue that this court did not set this as the standard for determining whether there was a privacy interest that could justify withholding information under the FOIA.⁵⁶

While not free from doubt, the district court’s interpretation of this court’s opinion does seem correct. The “graphic, explicit and extremely upsetting” standard is the only standard that is described by this court other than the extremely general language about a FOIA release that would “violate” a person’s “memory of the deceased loved one” or constitute an “invasion” of “the survivor’s

⁵⁵ ER 409.

⁵⁶ OICOB 17-20; IB 13-17.

memory of the beloved dead.”⁵⁷ Given that any document released about a person under the FOIA can affect the memory of that person held by that person’s survivors, the OIC’s interpretation would make every FOIA case involving information about a deceased person a “privacy” case under this court’s new definition of privacy. It is highly unlikely that this court intended to make such a broad new addition to the privacy exemption that could threaten what would otherwise be legitimate disclosures. It is much more likely that this court intended to limit the reach of its new expansion of the privacy exemption to those cases where the threshold standard has been achieved, i.e., that the information is “graphic, explicit and extremely upsetting.”

In any case, the analysis presented in Favish’s opening brief does not depend on whether the photos are deemed “graphic, explicit and extremely upsetting.” The public’s interest in disclosure is paramount to any privacy interest of the survivors in preserving their memories of Foster, no matter what standard is used.

H. The Public Interest Would Be Served By Release Of The Photos

The OIC states that “as Judge Pregerson recognized, the public interest cannot be supported by the claim that ‘the OIC’s investigation was ‘grossly

⁵⁷ *Favish v. OIC*, 217 F.3d at 1173.

incomplete and untrustworthy.’’⁵⁸ It is true that the public interest cannot be supported by the claim alone. That is why Favish set forth specific unrefuted facts establishing that the government reports are not credible. Neither Judge Pregerson or the OIC has refuted those facts. Given that the government has been proven to have produced reports that contain brazen examples of deceit by omission, the public interest in release of additional material evidence on the issue of whether it was a murder or a suicide and whether the government has failed to report additional material facts to the public is extremely high.

The OIC claims that release of the photos would not serve the public interest.⁵⁹ The OIC uses a false premise when making its argument. The OIC refers to some of the specific issues Favish has presented as proof of the deception in the government reports. However, contrary to the OIC’s argument, to serve the public interest, the photos do not have to contain information that would solve any of the specific proven areas of deception (largely by omission) in the Fiske and Starr reports. Rather, it is sufficient that the government reports have been proven to be deceptively written so as to create the impression that the cause of death was

⁵⁸ OICOB 31.

⁵⁹ OICOB 30-36.

suicide in the park. Because that threshold has been crossed, all of the government's conduct in this case is a matter of the highest public interest because the government has deceived the public. This means that the public cannot trust the government to accurately report all of the material facts about the case. Therefore, the public must see the evidence for itself, without it being filtered by government officials who are either negligently or intentionally deceiving the public.

i. The OIC's Attempts To Rehabilitate The Government Reports Fail

a. The Neck Wound Controversy

The OIC states that the photograph showing blood on Foster's neck "would add nothing to the public's knowledge of this matter or the investigations thereof" because the "Fiske and Starr reports describe and discuss the blood found on Foster's neck."⁶⁰ However, the point is that the Fiske and Starr discussions are incomplete, deceptive and cannot be trusted.

The OIC fails to specifically address the details presented in Favish's opening brief about the importance of the alleged neck wound photo because there is no logical opposition that can be made. The author Ambrose Evans-Pritchard stated in a declaration, "I have seen the photograph showing an apparent neck

wound to Foster's neck"⁶¹ It is undisputed that one of Starr's experts reported seeing dried blood on Foster's neck in an autopsy photo, supposedly taken after the body was washed, and the location of that dried blood coincided with the location of the alleged neck wound reportedly seen by a paramedic at the park and visible in an enhanced copy of the original photo.⁶² It is undisputed that another of Starr's experts, Dr. Henry Lee reported that after a mysterious blood stain was made on Foster's cheek, supposedly after having come in contact with his blood-stained shoulder when some unidentified person moved Foster's head after his death, additional blood flowed from Foster's mouth over the pre-existing stain on the cheek.⁶³ It is undisputed that neither Fiske or Starr provide any explanation for how this additional blood came to flow over the stain on the cheek when presumably, Foster's blood flow had ceased and his mouth had already been emptied of blood by the turning of the head that supposedly caused the stain.

⁶⁰ OICOB 32.

⁶¹ ER 601, 656, 662.

⁶² OBA 52-55.

⁶³ OBA 60-65.

b. The Confidential Witness Who Testified He Saw No Gun

The OIC refers to “the statements of the confidential witness who stated that, when he found Foster’s body, Foster’s hands were facing palms up and that he did not see a gun in Foster’s hand.”⁶⁴ The OIC states that its “report discusses the matter in depth.”⁶⁵ However, whether the Starr report’s discussion was “in depth” is immaterial. The issue is whether the discussion was deceptive. It is undisputed that because of the “gun-in-hand” photo, the only possible condition which the witness agreed would account for his not seeing the gun, is a condition that did not occur, and that Starr failed to tell this to the public.⁶⁶ It also is undisputed that Starr failed to tell the public that after being shown the “gun-in-hand” photo, the witness testified that it does not depict the empty hand that he saw.⁶⁷ The Starr report was deceptive on this issue and the OIC’s statement that the “record on the witness statement and the OIC’s discussion of it are thorough”⁶⁸ is so false as to be an insult to the intelligence of the court.

⁶⁴ OICOB 32.

⁶⁵ *Id.*

⁶⁶ OBA 18-20.

⁶⁷ OBA 19-20.

⁶⁸ OICOB 33.

c. Moody's Invalid Alleged Gun Identification

The OIC has no explanation for the FBI's report that Moody told them that the gun she was being shown by them 10 months after the death looked silver when the official death gun is black, when 9 days after the death she was shown a photo of the official death gun and she disclaimed knowledge of it because it wasn't silver. The OIC has no explanation for why it was proper for Fiske to use Moody's statement 10 months after the death as if it were a credible identification of the official death gun. Instead, the OIC states that she "described the gun as she did in the wake of the trauma of her husband's death,"⁶⁹ as if to imply that her trauma can explain the reported facts. Her trauma cannot explain the reported facts and the OIC fails to explain how it can.

d. The Absence Of Foster's Car At The Time Of His Death

The OIC continues its deception in its opening brief when it repeats a trick it used in the district court by stating: "The OIC Report analyzes each of the private citizen statements as to the car, including one citizen who saw a dark metallic grey Japanese sedan (ER 301-302)"⁷⁰ Contrary to the OIC's implication to this

⁶⁹ OICOB 33.

⁷⁰ OICOB 35 n. 6.

court (and to the district court) that this witness saw Foster's car, as established in Favish's opening brief,⁷¹ the Starr report stated that this citizen "was shown photographs of Foster's car" and "that the license plate on it differed from that which he recalled."⁷² Therefore, in its opening brief, just as in its motion to alter the judgment in the district court, the OIC implies that this citizen saw Foster's car, but fails to tell this court that the Starr report itself reports evidence that this citizen did not see Foster's car.

ii. The Photos Ordered Released

a. The Leaked Gun-In-Hand Photo

The district court ordered that the photo entitled "1 – Right hand showing gun & thumb in guard" should be released.⁷³ This is the only photo that the this court has seen a copy of, describing it as not "graphic, explicit, and extremely upsetting."⁷⁴ Therefore, any argument to the contrary must be rejected.

The original of this photo is important because there is controversy about why the gun would have remained in Foster's hand had he shot himself. Both Fiske

⁷¹ OBA 34.

⁷² ER 277, 302.

⁷³ ER 410. The photo is at ER 178 & 179.

⁷⁴ *Favish v. OIC*, 217 F.3d at 1174.

and Starr said that the gun remained in his hand because Foster's thumb was trapped and compressed between the trigger and the trigger guard of the gun.⁷⁵ The publicly available "leaked" copy of the photo is too degraded to make a definitive evaluation of whether Foster's thumb was extended through the trigger area past the joint on his thumb to cause the gun to stay in his hand. The original of this photo would provide a much better view of his thumb and the trigger area.

Also, common sense tells us that the explosion of supersonic gasses from a .38 high velocity gunshot into the mouth is likely to cause a "blowback" of blood and other organic matter out of the mouth and onto Foster's gun, hand and sleeve. Indeed, Starr quotes Dr. Henry Lee as saying that he examined the photos taken at the park and found "blood spatters" on Foster's hands and shirt.⁷⁶ Starr quotes Lee as saying that this "backspatter" is typical.⁷⁷ The original photo will allow the public to see if there is any such backspatter.

There also is a question about why the gun appears to be partially lodged under Foster's leg. If he shot himself with that gun how did it get under his leg?

⁷⁵ ER 610-611, 616, 620.

⁷⁶ ER 616, 621.

⁷⁷ ER 616, 621.

The original photo will provide a more detailed view and allow a better evaluation of whether the gun is lodged under his leg.

Although the degraded public version of the photo was not officially released, the fact remains that any privacy interest in the original is virtually nil because ABC, Time and Newsweek have given the public version far greater exposure than Favish could ever give any version he might receive.

b. The Photograph Entitled “3 – VF’s body looking down from top of berm”

The district court ordered that the photo entitled “3 – VF’s body looking down from top of berm” should be released.⁷⁸ In its motion to alter the judgment, the OIC stated that this photo shows “blood stains and/or blood” and that “Foster’s face is clearly visible”⁷⁹ This photo is important because even the Starr report could not explain the reported blood patterns on Foster and Starr’s speculation about the blood patterns appears to be inconsistent with statements by Dr. Lee that were not reported by Starr, as explained at pages 60-65 of Favish’s opening brief.

⁷⁸ ER 409.

⁷⁹ ER 482.

Additionally, if this photo shows the gun, then it might provide more information about how Foster's thumb was set in the trigger and whether the gun was under the leg.

c. The Photograph Entitled "5 – VF's body – focusing on the Rt. side shoulder/arm"

The district court ordered that the photo entitled "5 – VF's body – focusing on the Rt. side shoulder/arm" should be released.⁸⁰ In its motion to alter the judgment, the OIC stated that this photo shows "blood stains and/or blood"⁸¹ This photo also may help solve the mystery about the blood flow patterns discussed above.

d. The Photograph Entitled "4 – VF's body focusing on right side and arm"

The district court ordered that the photo entitled "4 – VF's body focusing on right side and arm" should be released.⁸² In its motion to alter the judgment, the

⁸⁰ ER 409.

⁸¹ ER 482.

⁸² ER 410.

OIC stated that this photo shows “blood stains and/or blood”⁸³ This photo also may help solve the mystery about the blood flow patterns discussed above.

e. The Photograph Entitled “5 – VF’s body – focus on top of head thru heavy foliage”

The district court ordered that the photo entitled “5 – VF’s body – focus on top of head thru heavy foliage” should be released.⁸⁴ In its motion to alter the judgment, the OIC stated that in this photo “Foster’s face is clearly visible”⁸⁵ This photo also may help solve the mystery about the blood flow patterns discussed above.

iii. The Photos Ordered Withheld

The photos ordered withheld are listed at page 5 of Favish’s opening brief.⁸⁶ The OIC states that these photos “show Foster’s face and body at somewhat closer range” than the photos ordered released.⁸⁷ Accordingly, these photos would likely contain more detail that could help solve the mystery about the alleged neck wound and the undisputed mystery of the blood flow patterns on Foster.

⁸³ ER 482.

⁸⁴ ER 410.

⁸⁵ ER 482.

⁸⁶ ER 409-410.

I. Fiske and Starr Concealed Important Evidence About The X-Rays

Additional documents released by the OIC prove that both the Fiske and Starr reports concealed evidence establishing that their conclusions about the lack of x-rays are not trustworthy. Moreover, the documents raise serious questions about whether the autopsy doctor and his assistant have been lying about the lack of readable x-rays. Although the documents do not conclusively resolve the matter or conclusively prove that anybody lied, the documents prove that the Fiske and Starr reports withheld critical information from the public and the three-judge panel overseeing the OIC.

If readable x-rays of Foster's body had been taken after his death and preserved, as would be routinely done under these circumstances, many of the questions about his wounds might be answered. For example, if Foster had been shot with a .22 in the neck, that bullet may have remained in the head to be seen on x-rays. However, officially, no readable x-rays were made although Starr's report stated that, "the gunshot wound chart in the autopsy report has a mark next to 'x-rays made.'"⁸⁸

⁸⁷ OICOB 22.

⁸⁸ ER 356.

Starr's report stated that the autopsy doctor, Dr. Beyer, "stated that he checked that box before the autopsy while completing preliminary information on the form and that he mistakenly did not erase that check mark when the report was finalized."⁸⁹

Dr. Beyer's claim that there were no readable x-rays is contradicted by the report of a Park Police officer who attended a portion of the autopsy, and who was quoted by Starr: "Officer Morrissette's report, prepared after the autopsy, stated that 'Dr. Byer [sic] stated that X-rays indicated that there was no evidence of bullet fragments in the head.' USPP Report (Morrissette) at 1."⁹⁰

Starr's report then stated: "[H]owever, Dr. Beyer made that statement and reached that conclusion without x-rays."⁹¹

Starr implied that the reason for the lack of readable x-rays is that the x-ray machine was not functioning properly. Starr's report quoted Dr. Beyer as stating that "our x-ray machine was not functioning properly that day"⁹² Starr's report stated that Dr. Beyer's assistant "recalled that, at the time of the Foster autopsy, the

⁸⁹ ER 357.

⁹⁰ ER 357.

⁹¹ ER 357.

⁹² ER 356.

laboratory had recently obtained a new x-ray machine and that it was not functioning properly.”⁹³ Starr’s report stated, “the administrative manager of the Medical Examiner’s Office recalled ‘numerous problems’ with the x-ray machine in 1993 (which, according to records, had been delivered in June 1993).”⁹⁴

In response to a FOIA lawsuit by Accuracy in Media, the OIC recently released partially redacted copies of invoices for service work on the x-ray machine.⁹⁵ The invoices show service calls on October 29, 1993 and November 8 and 12 of 1993. No invoices were produced showing any service work prior to Foster’s date of death, July 20, 1993, despite the fact that AIM’s FOIA request asked for all 1993 service records.⁹⁶ According to these invoices, the first service call was made more than *three months after* Foster’s death.⁹⁷

⁹³ ER 356.

⁹⁴ ER 357.

⁹⁵ The court is requested to take judicial notice of these invoices and other documents pursuant to Federal Rule of Evidence 201 because they were filed in August 2001 in the case entitled *Accuracy in Media, Inc. v. Office of Independent Counsel*, no. 99CV3448 (ESH) (D.D.C.). The invoices, an excerpt from the *Vaughn* index in that case and an authenticating declaration from AIM’s attorney, are attached hereto as an Addendum.

⁹⁶ The request was for: “Any and all service records for the x-ray machine at the Medical Examiners Office, Northern Virginia Division located in Medical Examiners suite (1993).” Addendum, Clarke exhibit 2, page 3.

⁹⁷ Addendum, Clarke exhibit 1, pages 1-3.

These invoices were not disclosed in the Fiske or Starr reports. These invoices undermine the claims that the x-ray machine was malfunctioning around July 20, 1993. If the x-ray machine was malfunctioning around the time of Foster's death, then where are the invoices for service work at that time? If Dr. Beyer knew before Foster died that the x-ray machine was not working properly, why did he put a mark next to "x-rays made" on the gunshot wound chart in the autopsy report and why didn't he obtain a properly working x-ray machine for this exceptionally important case? Why would the Medical Examiner's office wait more than three months after it supposedly knew its x-ray machine was malfunctioning to have service performed on the machine? Why don't the Fiske or Starr reports discuss whether other autopsies by the Virginia Office Of Medical Examiner during 1993 had any x-ray problems?

A legitimate question exists about whether the x-ray machine was functioning properly when Foster died and whether a cover story has been concocted to hide the fact that x-rays were taken, but later destroyed because they showed something inconsistent with the government's official story of the death.

3. CONCLUSION

The pristine originals of all the photos should be made available for public inspection and copying, and testimony should be taken from the former OIC prosecutor and his former assistant.

Date: October 6, 2001

Allan J. Favish
Plaintiff-Appellant, in pro se

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply/Answering Brief Of Favish is proportionally spaced, has a typeface of 14 points and contains 6,999 words.

Date: October 6, 2001

Allan J. Favish
Plaintiff-Appellant, in pro se

ADDENDUM

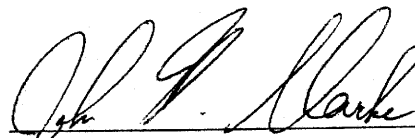
DECLARATION OF JOHN H. CLARKE

1. I am over 18 years of age. I am an attorney licensed to practice law in the District of Columbia. I represent Accuracy in Media in its Freedom of Information Act lawsuit in Washington, D.C., entitled *Accuracy in Media, Inc. v. Office of Independent Counsel*, No. 99-CV-3448 (ESH).

2. Attached hereto as Exhibit 1 is a true and correct copy of the invoices for the service work done on the x-ray machine at the Virginia Office of Medical Examiner that I received from the Office of Independent Counsel in response to AIM's FOIA request. In August of 2001, I filed copies of these invoices with the district court in case no. 99-CV-3448 (ESH).

3. Attached hereto as Exhibit 2 is a true and correct copy of the face page and two other pages from AIM's Notice of Filing its *Vaughn* index that I filed with the district court in the same case.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed in Washington, D.C., on October 1, 2001.



John H. Clarke

EXHIBIT 1

BILL

NAME FAIRFAX MEDICAL EXAMINER'S OFFICE			SERVICE REQUESTED			REPLENISHMENT			
ADDRESS 9797 BRADDOCK RD. SUITE 100			<input checked="" type="checkbox"/> SERVICE			cc Developer			
CITY FAIRFAX STATE VA ZIP 22032			<input type="checkbox"/> INSTALLATION			cc Fisher			
EQUIPMENT GENDEV ROOM NO. MOBILE 10RF			<input type="checkbox"/> MAJOR CLEANING			Developer			
			<input type="checkbox"/> MINOR CLEANING			Water			
DATE		CUSTOMER ORDER NO.		DATE INSTALLED		WARRANTY STARTS		ARRIVAL TIME	
Mo 11 Day 12 Yr 93				Mo Day Yr		Mo Day Yr		<input type="checkbox"/> AM <input type="checkbox"/> PM	
QUAN.	PART NO. OR CATALOG NO.	MATERIAL USED DESCRIPTION				UNIT COST	AMOUNT		
1	112-0482G1	TRANSFORMER; HIGH VOLTAGE							
1	645-0027P1	RELAY; 24VDC COIL							
FOR PROFESSIONAL USE ONLY CONTENTS NOT TO BE DUPLICATED									
MATERIAL SUB TOTAL									
TROUBLE REPORTED REPLACE LEAKING TANK & BAD RELAY.				LABOR					
SOLUTION REPLACED HIGH VOLTAGE TRANSFORMER WITH NEW DUE TO LEAK IN CATHODE WELL. REPLACED RELAY (KI) WITH NEW. CHECKED CALIBRATION AND FOUND SATISFACTORY.				HRS. 3.5 Standard Time at					
				HRS. Overtime at					
				HRS. 2 Travel Std. Time at					
				HRS. Travel Overtime at					
				5.5 TOTAL HOURS					
3.5 TOTAL LABOR						WARRANTY SERVICE			
						TOTAL MATERIAL			
						TAX			
REMARKS						TOTAL LABOR			
						TRANSPORTATION CHARGES			
						BILLING TOTAL			

SERVICE PERFORMED BY [**7c**] CUSTOMER'S COPY [**7c**] SERVICE ACCEPTED BY **63**

SERVICE ENGINEER _____ CUSTOMER SIGNATURE _____

SERVICE AND REPAIR WORK CARRY A THIRTY (30) DAY PARTS AND LABOR GUARANTEE BUT SUCH GUARANTEE DOES NOT COVER ACCESSORIES AND LABOR AND NO OTHER LIABILITY SHALL BE IMPLIED OR ASSUMED. **63**

EXHIBIT 2

RECEIVED
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA MAR 16 PM 4:10

ACCURACY IN MEDIA, INC.,)
)
 Plaintiff,)
)
 v.)
)
 OFFICE OF INDEPENDENT COUNSEL,)
)
 Defendant.)
)
 _____)

NANCY M.
MAYER-WHITTINGTON
CLERK

No. 99CV3448 (ESH)

NOTICE OF FILING

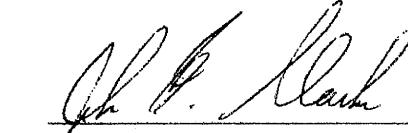
In accordance with the Court's instructions, plaintiff respectfully files the parties' completed Vaughn index. For the Court's convenience, a second version of this index is submitted herewith, excluding those FOIA requests no longer at issue.

For simplicity, plaintiff made a minor edit on the form of the index as ordered by the Court – under the heading of column 7, asking whether plaintiff challenges defendant's response. Plaintiff added a single asterisk* to denote a "Challenge [to] 7(c) redactions [of] FBI agents' names."

And plaintiff denoted that a double asterisk in its response in that column means that plaintiff challenges defendant's response that it "could not identify" the document, or that it could not find any "responsive documents," or that the document "does not appear to be an OIC document, and no such document was found." Plaintiff's added language in heading 7 is "***Refusal to include in Declaration [that defendant] complied with the record keeping safeguards [mandated by the Ethics in Government Act]" – and plaintiff inserted the double asterisk only where it has evidence that the requested record exists.

The issue of defendant's failure to produce those requested records is addressed in an accompanying memorandum.

Respectfully submitted,

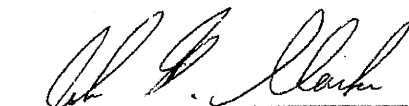


John H. Clarke
Bar # 388599
Attorney for Plaintiff
1730 K Street, NW
Suite 304
Washington, DC 20006
(202) 332-3030

CERTIFICATE OF SERVICE

I hereby certify and affirm that on March 16, 2001 a copy of the foregoing and index hand delivered to:

Karl N. Gellert, Esquire
Associate Independent Counsel
OFFICE OF INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, NW
Suite 490 North
Washington, DC 20004



John H. Clarke

FOIA Request List

1 FOIA No.	2 Description of Document	3 Bates OIC No., if any	4 Has the document been produced in full, withheld in part, or withheld in full?	5 What exemption(s) has/have been invoked? Explain the basis for each exemption.	6 If the document has not been produced at all, explain why not.	Plaintiff challenge defendant response? <small>*Challenge 7(c) redaction FBI agents' names. **Refusal to include in Declaration complied with Act's record keeping safeguards.</small>	8 If so, explain the basis of the challenge.
582	FBI 302 interview w/ Webster Hubbell (July 20, thru August 10, 1993).		No responsive documents found.		No		
583	Any and all service records for the x-ray machine at the Medical Examiners Office, Northern Virginia Division located in Medical Examiners suite (1993).		Withheld in part.	3 -- Information regarding the investigative acts of the grand jury and its scope and direction withheld. 7(c) -- Third party names and identifying information withheld.	Yes	7(b)(3): (1) having been presented to grand jury not exempt from disclosure -- sought for intrinsic value, (2) loss of protective character by defendant's release of materials, (3) would not elucidate matters occurring before the grand jury, (4) reasons for grand jury secrecy moot. Also, paper covering portion of photocopied document.	

PROOF OF SERVICE

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

On October 6, 2001, I served the document entitled **REPLY/ANSWERING BRIEF OF FAVISH**, by placing a true copy thereof enclosed in a sealed envelope(s) addressed to each of those identified in the service list, below.

(XX) BY MAIL

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope(s) was mailed with first class postage thereon fully prepaid as follows: I am “readily familiar” with the office's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

() BY FACSIMILE MACHINE

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

() BY PERSONAL SERVICE

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

() BY EXPRESS MAIL OR OTHER OVERNIGHT SERVICE

I caused such envelopes(s), designated by _____ [name of overnight service], to be delivered to an authorized _____ [name of overnight service] carrier or deposited in a facility regularly maintained by _____ [name of overnight service], with delivery fees provided for.

Executed on October 6, 2001, at Los Angeles, California. I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Allan J. Favish

SERVICE LIST

<p>Robert M. Loeb Leonard Schaitman Department of Justice, Civil Division Appellate Staff Room 9136 PHB, 601 "D" Street, N.W. Washington, DC 20530-0001 (202) 514-4332 (202) 514-3441 (2 copies)</p>	<p>Attorneys for defendant Office of Independent Counsel</p>
<p>G. Andrew Lundberg Belinda S. Lee Latham & Watkins 633 West Fifth Street, Suite 4000 Los Angeles, CA 90071-2007 (213) 485-1234 (2 copies)</p>	<p>Attorney for defendants-in-intervention Sheila Foster Anthony and Lisa Foster Moody</p>
<p>James Hamilton Swidler, Berlin, Shereff & Friedman 3000 K. Street, N.W., Suite 300 Washington, D.C. 20007 (202) 424-7500 (2 copies)</p>	<p>Attorney for defendants-in-intervention Sheila Foster Anthony and Lisa Foster Moody</p>