

Application No. 02A370

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Applicant

v.

ALLAN J. FAVISH

**RESPONSE TO APPLICATION FOR AN EXTENSION OF TIME WITHIN
WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT**

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This reply is being submitted because the Solicitor General of the United States made false and misleading statements to this Court.

On or about November 4, 2002, Theodore B. Olson, Solicitor General of the United States, submitted a document entitled “Application For An Extension Of Time Within Which To File A Petition For A Writ Of Certiorari To The United State Court Of Appeals For The Ninth Circuit” (“Application”) to this Court. In a letter dated November 5, 2002, addressed to Allan J. Favish, the Clerk of this Court stated that the application was “presented to Justice O’Connor, who on November 5, 2002, extended the time to and including December 14, 2002.”

In the Application, the Solicitor General cited the case of *Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), which was a Freedom of Information Act action seeking autopsy and death-scene photographs of Vincent Foster’s body.¹ After explaining that the D.C. Circuit affirmed the withholding of death-scene photographs of Mr. Foster’s body in *Accuracy in Media*, the Solicitor General stated:

Allan Favish, counsel of record for Accuracy in Media in the D.C. Circuit case, then filed a second FOIA request for the ten death-scene photographs, seeking them from the Office of Independent Counsel. The Office withheld them under Exemption 7(C). Favish then filed this suit in California.²

Referring to *Favish v. OIC*, 217 F.3d 1168 (9th Cir. 2000), which is the subject of two petitions for certiorari,³ the Solicitor General then stated: “The court of appeals’

¹ Application at 2.

² Application at 2-3.

³ *Favish v. OIC*, No. 02-409; *Sheila Foster Anthony, et al. v. Favish*, No. 02-599.

decision squarely conflicts with the decision of the D.C. Circuit exempting from disclosure the same photographs that the Ninth Circuit in this case has ordered released.”⁴

Contrary to the Solicitor General’s statement, my FOIA request was *not* filed after the appellate decision in *Accuracy in Media*. In fact, my FOIA request and my FOIA lawsuit were filed before *Accuracy in Media* filed its FOIA request. My FOIA request was filed January 6, 1997.⁵ My lawsuit was filed March 6, 1997.⁶ *Accuracy in Media*’s FOIA request was dated June 6, 1997.⁷ *Accuracy in Media*’s lawsuit was not filed until September 12, 1997.⁸

To the extent that the Solicitor General’s description of me as “counsel of record” for *Accuracy in Media* implies that I was the sole or leading attorney representing *Accuracy in Media* throughout the litigation, the description is misleading. The *Accuracy in Media* case was already being litigated in the district court when I first joined *Accuracy in Media*’s counsel of record, Judicial Watch, Inc., as an employee, with no power to exercise final control over the litigation. I was not in charge of the litigation because I was not the General Counsel of Judicial Watch. I was merely an associate attorney who helped write the briefs. I did not have final control over the content of the briefs. By the time *Accuracy in Media* was orally argued before the D.C. Circuit, I had resigned and departed from Judicial Watch. I did not participate in, or have any control over the oral argument.

⁴ Application at 5.

⁵ *Favish v. OIC*, 217 F.3d at 1170.

⁶ *Id.*

⁷ I know this because I helped write the appellate briefs in *Accuracy in Media* and saw the request, which was part of the appellate record in that case.

⁸ I know this because I helped write the appellate briefs in *Accuracy in Media* and saw the complaint, which was part of the appellate record in that case.

In *Favish v. OIC*, the OIC argued that I was collaterally estopped from bringing my FOIA case because of my work on the *Accuracy in Media* case, but that argument was rejected by the Ninth Circuit.⁹

Lastly, the Polaroid photographs at issue before the Ninth Circuit in *Favish v. OIC* and the two petitions for certiorari in that case, are the original Polaroid death-scene photographs.¹⁰ The death-scene Polaroid photographs at issue in *Accuracy in Media* were not the originals, but rather, were copies.

Respectfully submitted.

Dated: November 11, 2002

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⁹ *Favish v. OIC*, 217 F.3d at 1171.

¹⁰ No autopsy photographs are at issue in *Favish v. OIC*.