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Case at a Glance

California attorney Allan Favish seeks the disclosure of government photos of former Deputy White House Counsel Vincent Foster's body because Favish believes they indicate that Foster did not commit suicide but was, in fact, murdered. The Supreme Court is now asked to determine whether the privacy interests of Vincent Foster's family members can prevent the disclosure of these photographs taken at the scene of Foster's death.

Must the Independent Counsel's Office Disclose Photographs of Vincent Foster's Body?

by Jay E. Grenig

PREVIEW of *United States Supreme Court Cases*, pages 112-115. © 2003 American Bar Association.

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He filed a 14-page report agreeing with the conclusions reached by the other investigations that Foster had committed "suicide by gunshot."

The case led to the filing of numerous Freedom of Information requests for records pertaining to the investigation, including records held by the FBI, the Office of Independent Counsel, and the National Park Service. In January 1997, Allan Favish filed a Freedom of Information Act (FOIA) request with the Office of Independent Counsel (OIC) for 150 photocopies of photographs of Foster compiled for law enforcement purposes. On January 24, 1997, the OIC denied his request, stating that the photographs were exempt under 5 U.S.C. § 552(b)(7)(A) (records whose "release could reasonably be expected to interfere with enforcement proceedings") and 5 U.S.C. § 552(b)(7)(C) (relating to personal privacy). Favish appealed this decision to a higher level of the OIC. On February 19, 1997, the OIC denied

ISSUE

The question in this case is whether the Office of Independent Counsel properly withheld, under Exemption 7(C) of the Freedom of Information Act, photographs of former Deputy White House Counsel Vincent Foster taken at the scene of his death.

FACTS

In July 1993, Vincent W. Foster, Jr., former Deputy White House Counsel, was found dead from a gunshot wound in a Virginia park administered by the National Park Service. Foster's death became the object of much speculation, generated, in part, by the Whitewater-related scandals of the Clinton Administration. Five different official investigations were conducted, including investigations by two independent counsels. At the time of Foster's death, Kenneth Starr, as independent counsel, was investigating the Madison Guaranty Savings and Loan matter. As part of that investigation, Starr conducted an investigation of Foster's death.

OFFICE OF INDEPENDENT COUNSEL
V. FAVISH ET AL.
DOCKET NO. 02-954

ARGUMENT DATE:
DECEMBER 3, 2003
FROM: THE NINTH CIRCUIT

his appeal, repeating the exemptions asserted but not explaining how they applied.

On March 6, 1997, Favish, who believes the photos cast doubt on the government's conclusion that Foster committed suicide, filed suit. In March 1998, the district court granted judgment to Favish as to his request for color photographs and a photograph of Foster's eyeglasses. As to the 10 remaining photographs (out of 118), the court balanced the privacy interest of the members of Foster's family against the public interest served by new copies of the photographs. The district court concluded that the public interest was outweighed by the privacy interest and gave judgment for the OIC.

In addition to Favish's request, an organization known as Accuracy in Media, Inc., sought copies of 10 color photographs taken of Foster's body at the place of his death. Favish also served as counsel to Accuracy in Media. As custodian of the record at the time of the request, the National Park Service withheld the photographs under Exemption 7(C) of the Freedom of Information Act because of their exceptional sensitivity and consequent ability to injure the personal privacy interests of Foster's surviving family. The withholding was upheld by the U.S. Court of Appeals for the District of Columbia Circuit, which found that Exemption 7(C) applied to the photographs. *Accuracy in Media, Inc.*, 194 F.3d 120, 122-23 (D.C.Cir. 1999), cert. denied, 529 U.S. 111 (2000).

With respect to Favish's request for release of the photographs, the U.S. Court of Appeals for the Ninth Circuit ruled that the district court was required to view the disputed photographs in camera (outside the presence of the parties or their attorneys). *Favish v. Office of*

Independent Council, 217 F.3d 1168 (9th Cir.2000). The Ninth Circuit ordered the district court to balance the "public purpose to be served by disclosure" against the degree to which disclosure would "violate" the "memory of the deceased loved one" held by "a spouse, a parent, a child, a brother or a sister" or constitute an "invasion" of the "survivor's memory of the beloved dead."

On remand, the district court reviewed the 10 photographs and decided that four of them should be disclosed to Favish on the ground of "overriding public interest." 2001 WL 770410 (C.D.Cal. Jan. 11, 2001) (not selected for publication).

Sheila Foster Anthony and Lisa Foster Moody, Foster's widow and sister, intervened to oppose disclosure. Foster's widow submitted a declaration in which she explained that Foster's "death and the manner in which he died totally devastated our family" and that, "[i]f these photographs are released, we will again be thrust into the public eye and forced to endure the pain and invasion of privacy all over again." She explained that the family has tried to "deal[] with our grief in private and ... [t]he privacy we have sought to maintain has been our salvation." Disclosure of the photographs, she continued, would "cause us no end of pain and sorrow," especially if "my children have to see pictures of their dead father on the nightly news, on the Internet, and on the supermarket shelves."

The Ninth Circuit affirmed the district court's decision but held that one photograph ordered released by the district court—of Foster's body, as seen by looking down from the top of the berm of the slope where his body lay—had been properly withheld by the OIC. 37 Fed.Appx.

863 (9th Cir. 2002) (Pregerson, J., dissenting) (not selected for publication in the Federal Reporter). The Supreme Court thereafter granted the OIC's petition for certiorari. 123 S.Ct. 1928 (2003).

CASE ANALYSIS

The FOIA provides that the disclosure requirements of FOIA do not apply "to matters that are ... records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy. ..." 5 U.S.C. § 552(b)(7)(C) (Exemption 7(C)).

The OIC argues that it properly withheld photographs of Foster's body at his death scene under Exemption 7(C). According to the OIC, disclosure of the photographs could reasonably be expected to intrude upon the surviving family member's privacy. It stresses that FOIA's privacy protection extends to control by close family members over sensitive matters and personal decisions concerning the death of a loved one. The OIC explains that after determining that the documents at issue are law enforcement records, the applicability of Exemption 7(C) turns upon weighing the public interest in disclosure of the documents against the invasion of privacy that disclosure would cause. OIC contends that Congress used the modifier "personal" not to limit the protection to particular individuals, but to restrict it to natural persons rather than corporations or other entities.

Favish rejects this argument, claiming that Supreme Court precedent and congressional intent establish that Foster's survivors have no privacy interest in the photographs.

(Continued on Page 114)

Therefore, Favish contends, there is no privacy interest to be weighed.

It is the OIC's position that releasing the photographs of Foster's body would not significantly advance the general public interest in understanding governmental activity. The OIC argues there is no general public interest in further probing unsubstantiated or already refused allegations of government misconduct. It claims that the photographs lack any substantial nexus to the asserted public interest.

Disagreeing with the OIC, Favish contends that the photographs would help the public determine how the government investigated and reported on Foster's death. Even if a privacy interest is found, Favish argues that it is outweighed by the public's interest in disclosure. It is Favish's position that, among other things, the OIC concealed the lack of blood splatter, concealed evidence that initially there was no gun in Foster's hand, failed to report that the Park Police Chief made a false statement about the alleged identification of the gun, failed to report information about a report, misled the public about police observance of the autopsy, and failed to report evidence that Foster's car was not at the park shortly after his death.

Favish states that any privacy interest Foster's family members may have in the photographs is diminished by the fact that Foster was a high-ranking government employee. Favish claims that the public has an obvious interest in examining how its employees investigate deaths and that interest is greater when the deceased is a person of Foster's position. According to Favish, Foster's family has been denied the closure that any family would desire. He contends that the blame for this lack of closure "does not lie

with those who are seeking the truth in order to keep their government honest. It lies with government officials who have produced reports about the death that have no credibility."

Favish also asserts that if any portion of a photograph is to be withheld because of the survivors' privacy interest, then those portions should be redacted and the remaining portions released. He explains that the Government is authorized only to withhold those portions of a photograph that would violate the survivors' privacy interest. By failing to consider partial redaction of the withheld photographs, Favish says that the district court and the Ninth Circuit wrongfully denied disclosure of the nonexempt information in those photographs in violation of the FOIA.

Foster's family responds that "Favish does not claim that his morbid curiosity about Mr. Foster's death constitutes a separate private interest that would outweigh the Foster family's privacy interest." The family notes that the "only interest Favish asserts is the public interest in Mr. Foster's death and the ensuing government investigations." The family says that interest is insufficient to outweigh the Foster family's significant privacy interest against public release of the photographs.

SIGNIFICANCE

According to the Supreme Court, the basic purpose of FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The Supreme Court has declared that, to ensure maximum disclosure, FOIA's exemptions should be narrowly con-

strued. *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). The Court has also stated, however, that the exemptions from disclosure "are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Exemption 7 of the FOIA requires the government to demonstrate that a record is compiled for law enforcement purposes and that disclosure would effectuate one or more of the six specified harms. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156 (1989).

"Privacy" did not originally appear in Exemption 7(C) when the FOIA was enacted in 1966. The word was added when the FOIA was amended in 1974. Interpreting the word "privacy" as used in exemption 7(c), the Supreme Court has held that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Department of Justice v. Reporters Committee*, 489 U.S. 749, 762-63, 764 n.16 (1989). In *Reporters Committee*, the Supreme Court described two definitions of privacy: "One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions."

The concept of "survivor privacy" under the FOIA can be traced back to the late 1970s when personal information about Dr. Martin Luther King, Jr., in the files of the investigation of his assassination was withheld by the Department of Justice under Exemption 7(C) out of respect for the privacy interests of his surviving family members. *Lesar v. U.S. Dept. of Justice*, 455 F.Supp. 921, 925 (D.D.C. 1978.), *aff'd*, 636 F.2d 472, 486-88 (D.C. Cir. 1980) (apparently the information sought

also included information about the family members and associates whose privacy was being protected).

“Survivor privacy” was also used to protect NASA’s audiotape of the *Challenger* space shuttle disaster in 1987. After litigation, and a release of the full transcript, NASA’s recording of the voices of the *Challenger* crew was found properly withheld from disclosure on the basis that “[e]xposure to the voice of a beloved family member immediately prior to that family member’s death is what would cause the *Challenger* families pain ... a disruption of their peace of mind.” *N.Y. Times Co. v. NASA*, 782 F.Supp. 628, 631-32 (D.D.C. 1991). However, even the most gruesome records cannot be withheld unless it is determined there actually does exist a surviving family member whose interests warrant such protection. See, e.g., *Outlaw v. United States Dept. of the Army*, 815 F.Supp. 505, 506 (D.D.C. 1993) (refusing to protect murder scene photographs when the government agency could not point to any surviving family member who would be harmed by their disclosure).

While these lower courts, as well as some state courts, have considered the question of survivor privacy, until now the Supreme Court itself has not. This case thus presents the Supreme Court with the opportunity to determine whether the term “personal privacy” as used in Exemption 7(C) includes survivor privacy.

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