



OLR RESEARCH REPORT

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SUMMARY OF NATIONAL ARCHIVES V. FAVISH

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You asked for a summary of the U.S. Supreme Court's ruling in *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004).

SUMMARY

In this case, family members of a deceased individual argued that the federal government should not disclose photos of the deceased's body under an exemption to the federal Freedom of Information Act (FOIA). Under FOIA, the federal government can withhold disclosure of "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (5 USC § 552(b)(7)(C)).

In a prior case, the U.S. Supreme Court ruled that the subject of a record could object to disclosure of a record about himself or herself under this exemption. In *Favish*, the Court ruled that FOIA also allows a surviving family member to object to disclosure based on the family member's right to personal privacy.

The Court stated that the exemption requires protecting "in the proper degree, the personal privacy interest of citizens against the uncontrolled release of information compiled through the power of the state." When this FOIA exemption is raised, the Court ruled that a person requesting information must provide a sufficient reason for disclosure. The person must show that the public interest sought to be advanced is a significant

one and that the information sought is likely to advance that interest. Otherwise, the Court stated disclosure is an unwarranted invasion of privacy. If a person presents sufficient evidence, the Court stated it would balance the public interest against the privacy interests to determine if disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

For photos and other data about someone who died under mysterious circumstances, the Court stated that requesting information to show that an investigating agency or official acted negligently or improperly in performing their duties most likely satisfies the public interest requirement. But the requester must produce enough evidence to “warrant a belief by a reasonable person that the alleged government impropriety might have occurred.” The Court denied access to the death scene photos in this case stating that the requester presented no evidence to support his argument of government impropriety.

FACTS

This case involved the death of Vincent Foster, Jr., deputy counsel to President Clinton. The initial police investigation, which included pictures of the death scene, ruled his death a suicide. Later investigations by the Federal Bureau of Investigation, Senate and House committees, and independent counsels reached the same conclusion. Some people remained skeptical of these investigations, which led to FOIA requests for disclosure of death scene photos.

Two federal courts of appeals reached different conclusions on the release of the photos and how the personal privacy exemption to disclosure applied to this situation. The Supreme Court agreed to resolve the conflict in interpreting the exemption.

ANALYSIS

In this case, the Court considered an exemption from FOIA that allows the federal government to withhold disclosure of “records or information compiled for law enforcement purposes” if their production “could reasonably be expected to constitute and unwarranted invasion of personal privacy” (5 USC § 552(b)(7)(C)). Justice Kennedy wrote the opinion for a unanimous court.

In an earlier case, the Court ruled that the exemption applied when someone objected to disclosure of a record about himself or herself (*Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)). In *Favish*, the Court considered whether the exemption applies when someone objects to disclosure of photos of a deceased family member.

The parties agreed that the photos were compiled for law enforcement purposes and the Court addressed the question of whether disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

The Court stated that the family did not invoke the exemption on behalf of the deceased because the photos might reveal private information about him to the detriment of his reputation or other personal interests. Instead, they invoked their own rights and interests to personal privacy in order to “secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility...”.

The Court concluded that the statute intended to “permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions.” The Court stated that a family is not in the same position as the subject of a document, but case law and cultural traditions show the right of family members to direct and control disposition of the deceased’s body and to limit attempts to exploit pictures of the deceased for public purposes. The Court cited rulings from various other courts protecting photos from disclosure.

The Court assumed that Congress adopted the exemption with knowledge of this background of law, scholarship, and history. In addition, the U.S. attorney general consistently interpreted the FOIA exemption to protect family members of the person to whom the information pertains.

The Court ruled narrowly that “FOIA recognizes surviving family members’ right to personal privacy with respect to their close relative’s death-scene images.” The Court found the deceased’s former status as a public official and the fact that other pictures might have become public did not change the privacy interests involved.

The statute only allows the government to withhold information that “could reasonably be expected to constitute an unwarranted invasion” of the family’s personal privacy. The Court stated that determining if an invasion of privacy is unwarranted requires balancing the privacy interest with the public interest in disclosure.

The Court stated that generally citizens should not be required to explain why they seek information under FOIA and the identity of the requestor does not matter because information that is subject to disclosure “belongs to all.” But the statutory exemptions create limitations that compete with the general interest in disclosure and the usual rules do not apply. According to the Court, the exemption at issue in this case requires protecting “in the proper degree, the personal privacy interest of citizens against the uncontrolled release of information compiled through the power of the state.”

When this exemption is raised, the person requesting information must provide a sufficient reason for disclosure and show that the public interest sought to be advanced is a significant one. The requestor must then show that the information requested is “likely to advance that interest.” Otherwise disclosure would be considered an unwarranted invasion of privacy.

For photos and other data about someone who died under mysterious circumstances, the Court stated that requesting information to show that an investigating agency or official acted negligently or improperly in performing their duties most likely satisfies the public interest requirement. But the requester must establish more than a “bare suspicion” to obtain disclosure; otherwise the exemption’s protections would be meaningless. The requester must produce enough evidence to “warrant a belief by a reasonable person that the alleged government impropriety might have occurred.” Because allegations of government misconduct are easy to make and hard to disprove, courts must require a meaningful evidentiary showing. When a requester presents sufficient evidence, there is an interest to balance against the privacy interests.

In this case, the Court concluded, “it would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion.” The Court found no evidence to warrant a belief by a reasonable person that alleged government impropriety might have occurred to balance against the family’s privacy interests. But the Court stated that other cases might require a more precise determination of the public interest’s significance, the historical importance of the events in question, and the nexus between the documents and purported public interest.

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