Nos. 06-56717 & 06-56732

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

H. RAY LAHR,

Plaintiff-Cross-Appellant/Appellee,

v.

NATIONAL TRANSPORTATION SAFETY BOARD, ET AL.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

OPENING BRIEF FOR FEDERAL APPELLANTS

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STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court under the Freedom of Information Act, 5 U.S.C. §§ 552, et seq. See 5 U.S.C. § 552(a)(4)(B). On August 31, 2006 and October 4, 2006, the court issued opinions, granting in part and denying in part the government's motions for summary judgment. See Excerpts of Record ("ER") at 543, 598. The court entered final judgment on October 17, 2006, disposing of all claims as to all parties, and ordering disclosure of certain records. Id. at 642.

The government filed a timely notice of appeal on November 29, 2006. Id. at 649. Plaintiff filed a timely cross-appeal on December 4, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the government properly withheld the names of eyewitnesses and FBI agents under the Freedom of Information Act's ("FOIA") Exemptions 6 & 7(C), which excludes certain information from disclosure to protect personal privacy.

STATEMENT OF THE CASE

1. Nature of Case and Disposition Below.

This is a FOIA case related to the tragic crash of TWA Flight 800 in 1996. After an extensive investigation, the government concluded that the crash was caused by accident, an explosion in the plane's center-wing fuel tank. Plaintiff disputes this conclusion, claims that the crash was due to a strike from an errant missile launched by the United States military, and asserts that the government acted improperly and/or negligently in conducting its investigation. Plaintiff filed one hundred-forty five FOIA requests with the National Transportation Safety Board ("NTSB"), and one hundred-five requests with the Central Intelligence Agency ("CIA"). The government provided responsive records to plaintiff, withholding or redacting certain material

under several FOIA exemptions. Dissatisfied with the government's response, plaintiff filed this lawsuit.

On the government's motions for summary judgment, the district court issued two opinions, granting in part and denying in part the government's motions. The court then entered final judgment and ordered disclosure of certain records. The government appealed and plaintiff filed a cross-appeal. In its appeal, the government challenges only one adverse holding of the district court: whether the government properly redacted from the records it provided to plaintiff the names of eyewitnesses and FBI agents under FOIA Exemptions 6 & 7(C) which protect personal privacy.

2. The Statutory Framework.

The Freedom of Information Act, 5 U.S.C. §§ 552, et seq., generally provides that any person has a right of access to federal agency records, except to the extent such records are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. See id. at §§ 552(b) & (c). The exemptions pertinent to the instant appeal are Exemptions 6 and 7(C). See 5 U.S.C. §§ 552(b)(6) & (7)(C).

Exemption 6 permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal

privacy." 5 U.S.C. § 552(b)(6). See generally Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989) ("Reporters Committee"); Department of Defense v. FLRA, 510 U.S. 487, 495-97 (1994) ("DoD"). Under Exemption 6, the court engages in a balancing test to determine whether the privacy interest at stake outweighs the relevant public interest in disclosure. See Reporters Committee, 489 U.S. at 762; DoD, 510 U.S. at 495. See also Bibles v. Oregon Natural Desert Association, 519 U.S. 355 (1997).

Exemption 7(C) also protects personal privacy, but only as to records "compiled for law enforcement purposes," and only to the extent that production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Under Exemption 7(C), the court engages in a similar balancing test as under Exemption 6. See Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004) ("Favish"). However, the protection accorded law enforcement records under Exemption 7(C) is more extensive than that provided under Exemption 6 due to its broader standard, i.e., "could reasonably be expected to constitute an unwarranted invasion of personal privacy," as opposed to the more stringent standard set forth in Exemption 6, i.e., "would constitute a clearly unwarranted invasion of personal privacy" (emphasis added). See Reporters Committee, 489 U.S. at 756.

STATEMENT OF THE FACTS

1. TWA Flight 800 Crash and Investigation.

On July 17, 1996, TWA Flight 800 departed from JFK International Airport en route to Paris. The aircraft, a Boeing 747-131, crashed into the Atlantic off Long Island twelve minutes after departure. There were no survivors and the plane was destroyed. ER at 545.

The crash precipitated a criminal investigation by the FBI and a civil investigation by the NTSB. ER at 21, ¶ 11; 280, ¶ 50. During the criminal investigation, some eyewitnesses reported having seen "a 'flare or firework' ascend and culminate in an explosion." Id. at 280, ¶ 50. Since international terrorism is an authorized CIA area of analysis, the FBI asked the CIA to try to determine whether the "flare or firework" was a missile. Id. & n. 14.

The NTSB conducted an extensive investigation into the crash and appointed several entities to assist in the investigation, including, Boeing, the Air Line Pilots Association, the Federal Aviation Administration, TWA, and the National Air Traffic Controllers Association. ER at 546. The investigation was "by far the most expensive and the most extensive in the history of the Board." Id. at 21, ¶ 11. Public hearings were held and the investigation eventually produced a public docket containing approximately 2,750 documents, totaling 16,230 pages, and 1,350 photographs. Id.

at 23, ¶15. The NTSB issued the "Aircraft Accident Report: In-Flight Breakup Over the Atlantic Ocean" ("the NTSB Accident Report") as the official NTSB report on Flight 800.[1]

The NTSB concluded that the cause of the crash was accidental, resulting from an explosion in the center-wing fuel tank caused by the ignition of the flammable fuel and air mixture in the tank. ER at 22, ¶ 13; 103. In examining the wreckage, the Board found "no evidence" of damage characteristic of a bomb or missile. Id. at 90. In its findings, the Board concluded that "[t]he in-flight breakup of TWA flight 800 was not initiated by a bomb or a missile strike." Id. at 101.

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[1] Portions of the NTSB Accident Report were introduced in the court below. See ER 66-109. The full report is publically available on the NTSB's web site. See http://www.ntsb.gov/publictn/2000/aar0003.pdf. In addition, an extensive portion of the NTSB's public docket regarding its investigation is available on the NTSB's website at http://www.ntsb.gov/events/twa800/exhibits_web.htm. This includes the actual FBI summaries of 755 witness statements with identifying information redacted (available at http://www.ntsb.gov/events/twa800/exhibits_web.htm (Appendices B-I)). The public docket also contains the complete contents of the Witness Group Study Report ("Witness Group Report"), the findings of a group of government and civilian officials tasked with studying the FBI summaries of witness statements (available at http://www.ntsb.gov/events/twa800/exhibits/Ex_4B.pdf). In this case, plaintiff does not seek the actual FBI summaries of witness statements (which are publically available with names redacted), but rather seeks records containing CIA summaries of the FBI summaries of witness statements.

The NTSB report recognized that some witnesses "reported that they observed a streak of light, resembling a flare, moving upward in the sky to the point where a large fireball appeared." ER at 85. The report devoted considerable discussion to these witness reports. Id. at 72 (1.18.4-1.18.4.7.1). It concluded that "[t]he witnesses observations of a streak of light were not related to a missile, and the streak of light reported by most of these witnesses was burning fuel from the airline in crippled flight during some portion of the post-explosion pre-impact breakup sequence. The witnesses' observations of one or more fireballs were of the airplane's burning wreckage falling toward the ocean." Id. at 101, ¶ 8.

Similarly, the CIA analysis found that, about 20 seconds after the explosion, a fireball erupted and the aircraft went into a steep and rapid descent, producing an increasingly visible fire trail. ER at 318, ¶ 5. About 42 seconds after the explosion, the aircraft's left wing separated, releasing unburned fuel which subsequently ignited in a dramatic cascade of flames, and approximately seven seconds later, the burning debris hit the water. Id. The CIA found that the eyewitness sightings of greatest concern - - those that raised the possibility that the aircraft had been struck by a missile - - took place after the aircraft exploded. Id. at 318, ¶ 6. Accordingly, CIA analysts concluded that "the eyewitnesses did not see a missile," but, rather, "the Boeing 747 in various stages of crippled flight." Id.

2. District Court Proceedings.

Plaintiff is skeptical of the government's conclusions and contends that the true cause of the crash of Flight 800 was a strike from an errant missile launched by the United States military, and that the government has engaged in a "massive cover-up" of this matter. ER at 549. In support of his theory, plaintiff primarily focuses upon and challenges what plaintiff refers to as the "zoom climb" conclusion, i.e., the finding by the NTSB and the CIA that during the initial break-up of the aircraft, the forward fuselage detached from the remainder of the aircraft, and the remainder briefly continued to climb in "crippled flight." See id. at 94-97, 317, ¶ 4, 546 & n. 4.[2] Plaintiff filed one hundred-forty five FOIA requests with the NTSB and one hundred-five requests with the CIA. Id. at 6. The district court divided the requests into eleven distinct categories (see id. at 547-48), but all have in common the search for records regarding the "zoom-climb conclusions." Id.

The agencies performed exhaustive searches for the requested records and released certain records to plaintiff, some of which were redacted. ER at 19-65, 245-

[2] Dennis Crider, a National Resource Specialist for Vehicle Simulation in the Vehicle Performance Division of the Office of Research and Engineering, NTSB, prepared a Trajectory Study (ER at 137-153), as well as four studies of the main wreckage flight path (id. at 154-207). Four graphic accident reconstructions ("animations") prepared by the NTSB were shown at the December 8, 1997 public hearing and are part of the public record. Id. at 210-221. A video produced by the CIA was shown to the public by the FBI on November 18, 1997. Id. at 318, ¶ 6.

313, 324-474, 492-538, 539-542. The government withheld or redacted certain records pursuant to FOIA Exemptions 3, 4, 5, 6 & 7(C). See 5 U.S.C. §§ 552(b)(3) (protecting information "specifically exempted from disclosure by statute"), (4) (protecting certain "commercial" records), (5) (exempting, inter alia, "deliberative process" material), (6) & (7)(C) (protecting personal privacy).

Dissatisfied with the agencies' responses, plaintiff filed this FOIA action against the NTSB and the CIA in district court in November, 2003. ER 1. The government filed three motions for summary judgment. On August 31, 2006, the district court (Matz, J.) issued its first opinion, granting one of the government's motion in part and denying it in part. ER at 543-597.

As it relates to the present appeal, in its August 31, 2006 opinion, the court held that the names of eyewitnesses were not protected from disclosure under FOIA Exemptions 6 and 7(C). See ER at 579-84. On the privacy side, the court concluded that the privacy interest was "slight," stating that previous cases which found privacy interests in witnesses' statements "typically involved witnesses in criminal or quasi-criminal cases" where "disclosure of their identities might compromise the case or endanger them." Id. at 581-82. The court also stated that, if the eyewitnesses were contacted in this case, "they could easily decline to be interviewed." Id. at 582.

On the public interest side, the court was of the view that the public interest was "significant," because "even though plaintiff is already privy to the government's version of the [witness] accounts," "[d]isclosure might * * * assist Plaintiff in investigating and uncovering government malfeasance by, for instance, leading to individuals who might repudiate what the government attributed to them." ER at 582. The court recognized that the privacy interest under Exemption 7(C) is "broader" than under Exemption 6, but held that "the public interest in uncovering agency malfeasance and wrongdoing outweighs it." Id. at 584.

On October 4, 2006, the court issued its second opinion, disposing of the government's two remaining motions for summary judgment, granting them in part and denying them in part. ER at 598-641. As it did in its first opinion, and for the same reasons, the court rejected the government's argument that the names of eyewitnesses at issue in this opinion, were protected from disclosure pursuant to FOIA Exemptions 6 & 7(C). See id. at 618-22. The court also held that the names of FBI agents were not protected from disclosure. Id. at 622-24. The court stated that "because Plaintiff has alleged that 'responsible officials acted negligently or otherwise improperly in the performance of their duties,' the agents' privacy interest is diminished," and concluded that the public interest in the agents' names outweighed their privacy interests. Id. at 623-24 (citation omitted).

On October 17, 2006, the court entered final judgment, reflecting the decisions in its August 31 and October 4, 2006 opinions, and ordering disclosure of certain records. ER at 642-48. The court stayed its disclosure orders pending appeal. Id. at 643. The government filed a timely notice of appeal and plaintiff filed a cross-appeal. Id. at 649.[3]

STANDARD OF REVIEW

The standard of reviewing a grant of summary judgment under the circumstances presented in this case is de novo. See Klamath Water Users Protective Assoc. v. Department of Interior, 189 F.3d 1034, 1037 (9th Cir. 1999), aff'd, 532 U.S. 1 (2001) ("where the adequacy of the factual basis is not disputed, the district court's legal conclusion whether the FOIA exempts a document from disclosure is reviewed de novo").

SUMMARY OF ARGUMENT

Over the past quarter century, and in six of its last six decisions in this area of the law, the Supreme Court has protected privacy interests such are at stake in this

[3] In its appeal, the government does not challenge the district court's adverse Exemption 4 and 5 rulings, but limits its appeal to the court's holding that the names of eyewitnesses and FBI agents are not protected from public disclosure under FOIA Exemptions 6 and 7(C). See ER at 579-84 (August 31, 2006 Opinion), 618-24 (October 4, 2006 Opinion), 645-46 (October 17, 2006 Judgment). The records at issue may be found in the Federal Appellant's Excerpts of Record at 298, 299, 307, 310, 313, 328, 335, 430, 470-71, 505-06, 508-11.

case. Its latest decision, National Archives & Records Administration v. Favish, 541 U.S. 157 (2004) - - where the Court once again favored privacy in the face of unsubstantiated allegations of government misconduct - - is dispositive of this case. The courts, including the Supreme Court and this Court, repeatedly and consistently have recognized weighty privacy interests in a person's name in general, and especially the identities of witnesses and FBI agents.

The court below improperly denigrated the privacy interest at stake in this case and failed to come to terms with settled precedent. The court also erred as a matter of law in imposing an undue evidentiary burden upon the government by requiring the government to contact individuals in order for the privacy exemptions to apply. The district court also erred by failing to consider the impact of public release to all (required under FOIA), including intense scrutiny by the media, a critical factor in the Favish decision.

The court also attributed undue weight to the public side of the balancing test. Although plaintiff alleged government impropriety as the basis for the public interest, he failed to meet the threshold evidentiary test for establishing misconduct under Favish. It is not enough for plaintiff broadly to allege government misconduct or negligence with regard to the accident investigation. Rather, plaintiff must establish

a “nexus” between the requested names and government misconduct, and support that claim with a “meaningful evidentiary showing.” Plaintiff did not do so.

Finally, while there is a legitimate public interest in understanding the cause of the crash of Flight 800, such interest has been served in the extensive reports already issued. It is settled that where there are alternative sources of information available to satisfy the public interest, the public interest in disclosure should be "discounted" accordingly. That is precisely what the Favish Court did and the court below failed to do. Disclosing the individual names of private citizens who were cooperating witnesses in a law enforcement investigation and the names of FBI agents will provide no additional information that would shed light on an agency’s performance of its statutory duties.

The tragic crash of Flight 800 has been extensively investigated. What happened has been detailed and publically disclosed. The relevant agencies’ performance of their statutory duties have been made manifest. There are no secrets or conspiracies or hidden government misconduct that needs to be exposed by further FOIA disclosures. The significant privacy interests at stake outweigh any purported public interest in disclosure of the names of third-party eyewitness and FBI agents. The district court’s decision is directly contrary to settled FOIA jurisprudence and should be reversed.

ARGUMENT

I. THE PRIVACY INTERESTS AT STAKE ARE SIGNIFICANT.

A. Over the Past Quarter Century, the Supreme Court Consistently Has Protected Privacy Interests Such as Those at Stake in this Case.

In enacting Exemptions 6 & 7(C), Congress sought to temper FOIA's general policy of public disclosure by protecting "equally important" rights of personal privacy. See S. Rep. No. 89-813, at 3 (1965). The Supreme Court repeatedly and recently has emphasized that "[t]he concept of personal privacy * * * is not some limited or 'cramped notion' of that idea." See National Archives & Records Administration v. Favish, 541 U.S. 157, 165 (2004). On the privacy side of the equation, the Supreme Court has recognized that the term "privacy" encompasses a wide range of interests, and that Congress intended to afford broad protection against the release of information about individual citizens. See Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 763-64 (1989). Under current case law, information need not be "intimate" or "embarrassing" to qualify for Exemption 6 protection. See Dept. of State v. Washington Post Co., 456 U.S. 595, 600 (1982); see also Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D. C. Cir. 1989) ("NARFE"), cert. denied, 494 U.S. 1078 (1990). The district

court in this case incorrectly embraced a "cramped notion" of personal privacy, which the Supreme Court consistently has rejected.

The Supreme Court also has underscored that, in assessing the extent of the privacy invasion, one must consider the ramifications of release not just to the requester at hand, but of public release, to "other parties, such as commercial advertisers and solicitors." Department of Defense v. FLRA, 510 U.S. 487, 501 (1994) ("DoD"). This is because, as the Court underscored, other parties "must have the same access under FOIA as the unions to the employee address lists sought in this case." Id. This Court, and other courts of appeals, have recognized this principle in assessing the privacy interests at stake under Exemption 6 & 7(C)'s balancing test. See Maricopa Audubon Society v. Forest Service, 108 F.3d 1082, 1085 (9th Cir. 1997) (under FOIA, it is not possible, by protective order or otherwise, to limit the disclosure of a document to a smaller universe than the general public); Painting & Drywall Work Preservation Fund, Inc. v. Dept. of Hous. & Urban Dev., 936 F.2d 1300, 1302 (D.C. Cir. 1991) (if the information "must be released to one requester, it must be released to all, regardless of the uses to which it might be put"). Most recently, the Supreme Court factored in the necessity of public release to the media - - a critical element in this case - - in weighing the privacy interest at stake. See Favish, 541 U.S. at167, 174 (stating that "[i]t must be remembered that once there is disclosure, the information

belongs to the general public," and assessing the invasion of privacy by "intense scrutiny by the media"). The court below did not seriously consider this critical factor in assessing the threat to privacy in this case.

In its recent decisions, the Supreme Court has recognized that there are significant privacy interests associated with an individual's name, the privacy interest at stake in this appeal. See Bibles v. Oregon Natural Desert Association, 519 U.S. 355 (1997) (mailing list of recipients of Bureau of Land Management publication); DoD v. FLRA, 510 U.S. at 494-502 (names and home addresses of federal employees in union bargaining units); Dept. of State v. Ray, 502 U.S. 164, 173-79 (1991) (withholding from interview summaries names and addresses of Haitian refugees interviewed by State Department about treatment upon return to Haiti). This Court also has respected the privacy of personal identifying information. See Minnis v. Dept. of Agriculture, 737 F.2d 784 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985) (protecting the names and addresses of applicants to raft on the Rogue River in Oregon); Multnomah County Medical Soc. v. Scott, 825 F.2d 1410, 1416 (9th Cir. 1987) (withholding names of Medicare beneficiaries). As discussed further below, the district court only fleetingly and indistinctly attempted to distinguish one Supreme Court case, and ignored the holdings of this Court.

Moreover, the courts consistently have protected the names of witnesses, which are at issue in this case. See e.g., Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (withholding names of third parties interviewed in course of investigation); Halpern v. FBI, 181 F.3d 279, 297 (2d Cir. 1999) (same). See also Favish, 541 U.S. at 166 (emphasizing that "law enforcement documents obtained by Government investigators often contain information about persons interviewed as witnesses * * * but whose link to the official inquiry may be the result of mere happenstance"). The courts repeatedly have protected the names of FBI agents in law enforcement investigations, which are also at issue here. See, e.g., Maynard v. CIA, 986 F.2d 547, 556 (1st Cir. 1993) (protecting names of FBI Special Agents); In re Wade, 969 F.2d 241, 246 (7th Cir. 1992) (same). Here again, the district court failed to come to terms with settled precedent.

In sum, for a quarter of a century, the Supreme Court repeatedly and consistently has come down on the side of privacy in Exemption 6 & 7(C) cases, many of which involved the withholding of names of witnesses, interviewees, and federal employees. See Favish, 541 U.S. at 172; Bibles, 519 U.S. at 355; DoD v. FLRA, 510 U.S. at 494-502; Dept. of State v. Ray, 502 U.S. at 173-79; Reporters Committee, 489 U.S. at 773 (1989); Dept. of State v. Washington Post Co., 456 U.S. at 600. In fact, in six out of the last six such cases to reach the Court, privacy

prevailed. In its latest decision in this area of the law, Favish, the Supreme Court found the threat to personal privacy of intense media scrutiny outweighed unsubstantiated allegations of government impropriety, precisely the same circumstances as presented here. The district court's judgment is directly contrary to settled Supreme Court jurisprudence and should be reversed.

B. The District Court Incorrectly Denigrated the Privacy Interest at Stake.

1. The District Court Misinterpreted Settled Supreme Court Precedent.

The district court stated that "[t]he cases under Exemption 6 that have found privacy interests in witnesses' names * * * typically involved witnesses in criminal or quasi-criminal cases; the disclosure of their identities might compromise the case or endanger them." ER at 581-82 (citing only Balderrama v. Dept. of Homeland Sec., 2006 U.S. Dist. LEXIS 19,421, at * 25 (D.D.C. March 30, 2006), an unpublished district court opinion). The authority in this area is not as narrow as the lower court stated. As we have shown, the Supreme Court has protected the disclosure of names in a wide range of contexts, both civil and criminal, involving witnesses, non-witnesses, and both government and non-government employees. Contrary to the district court's assumption, the privacy interests protected by Exemptions 6 & 7(C) are not designed solely to protect witnesses in criminal cases from potential physical

harm. Indeed, it is only Exemption 7(C) that references records "compiled for law enforcement purposes." Exemption 6 has no such limitation.[4]

Further, the district court seems to ignore the fact that the eyewitness' names at issue here were originally compiled as part of what, at the time, was considered to be a criminal investigation. See ER at 280, ¶ 50 ("[t]he possibility that the explosion of TWA Flight 800 with the loss of all 230 passengers and crew on board may have been the result of a criminal act precipitated what was at the time the most expensive criminal investigation in U.S. history"). Indeed, the court seems to forget that it determined that the records at issue here were "compiled for law enforcement purposes" so as to fall within the parameter of Exemption 7(C). See id. at 583-84.

In its only attempt to distinguish a long line of Supreme Court precedent finding a significant privacy threat in the public disclosure of individual names, the district court stated that in DoD v. FLRA, where the Supreme Court protected the names and home addresses of federal employees to avoid unwanted contact at home, "the

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[4] Even with regard to Exemption 7(C), the protection of records "compiled for law enforcement purposes" extends not only to criminal records, but also to civil enforcement proceedings (see e.g., Rugiero v. Dept. of Justice, 257 F.3d 534, 550 (6th Cir. 2001), cert. denied, 534 U.S. 1134 (2002)), and regulatory proceedings (see Jefferson v. Department of Justice, Office of Professional Responsibility, 284 F.3d 172, 178 (D.C. Cir. 2002)). Further, "it is not necessary that harassment rise to the level of endangering physical safety before the protections of 7(C) can be invoked." Miller v. Bell, 661 F.2d 623, 630 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

employees made an affirmative decision not to provide the home addresses to the union." ER at 582 (citing 510 U.S. at 500-01). The court faulted the government in the instant action because it had "proffer[ed] no assertions by any of the eyewitnesses, even in camera, that they wish to avoid being asked for information." Id. In this regard, the court erred as a matter of law in its assessment of the burden born by the government.

2. The District Court Improperly Imposed an Undue Evidentiary Burden Upon the Government.

There is no support for the lower court's requirement that the government must proffer assertions by the eyewitnesses that they wish to avoid contact in order for Exemption 6 and/or 7(C) to apply. There is no such requirement. See Blakey v. Dept. of Justice, 549 F. Supp. 362, 365 (D.D.C. 1982) (there is no requirement that the government "track down an individual about whom another has requested information merely to obtain the former's permission to comply with the request"), aff'd, 720 F.2d 215 (D.C. Cir. 1983). Nothing in the text of FOIA requires such individualized invocations of the government's privilege and, in fact, such a particularized inquiry is hard to reconcile with Exemption 7(C)'s objective focus on whether disclosure "could" -- not "would" -- intrude unreasonably on privacy. There is no evidence of individual views being solicited prior to the Supreme Court

according private information protection in Washington Post, Bibles, or Favish. Nor does anything in precedent suggest that the Supreme Court has ever considered such an unwieldy test to be a prerequisite to application of FOIA's privacy exemptions.

DoD v. FLRA, cited by the lower court, does not impose any such burden. See ER at 582 (citing DoD,510 U.S. at 500-01). The DoD Court merely noted in passing that certain employees, who had elected not to join the union, had not shared their addresses with the union. See 510 U.S. at 500 & n.5. The Supreme Court did not require an evidentiary proffer that third-party individuals did not want to be contacted, as the district court did in the instant action.

This is because it is the degree of the invasion of privacy that is the benchmark for determining the weight to be accorded to the privacy side of the equation, not the actual existence of intimidation or reprisal. See Favish, 541 U.S. at 167 (relying, in finding threat to privacy, on expectation of renewed media exploitation if photographs were released); NARFE, 879 F.2d at 879 ("we need not inquire into the extent to which each individual whose name would be disclosed would suffer invasions of his or her privacy"). Neither Favish nor Reporters Committee nor any of the appellate decisions applying these decisions has referred to the need for an individualized evidentiary showing, such as the district court demanded here.

In any event, the government did provide the declaration of Terry Buroker of the CIA who stated that the witnesses have an interest in "not being subjected to unofficial questioning about the * * * investigation at issue and in avoiding annoyance or harassment in their official, business, and private duties." ER at 277-78, ¶ 46. The court countered that "[e]ven assuming these individuals ultimately were contacted, if they were not interested in responding to inquiries, they could easily decline to be interviewed" and, therefore, "any consequences arising from disclosure appear slight." Id. at 582.

This dismissive comment is contrary to the teachings of the Supreme Court and this Court in holding (without the evidentiary showing demanded by the district court) that similar infringements are not "slight," but "would constitute a clearly unwarranted invasion of personal privacy." See Bibles, 519 U.S. at 355-56. See also Minnis, 737 F.2d at 787 (the release of lists of rafting enthusiasts implicates privacy interests by "subjecting the [individuals] to an unwanted barrage of mailings and personal solicitations"); Multnomah, 825 F.2d at 1416 (Medicare beneficiaries "could be subject to mailings and solicitations" if the requested names and addresses were revealed). The lower court's rationale is also contrary to common sense since the sight of reporters staked out at the homes and businesses of newsworthy persons who "decline to be interviewed" is a daily occurrence.

The district court characterization of the witnesses' privacy interest as "slight" because, in the court's view, the witnesses could simply refuse plaintiff's request to talk is also incorrect because disclosure under FOIA entails disclosure to the world at large, not to the particular FOIA plaintiff. So the proper question, which the lower court failed to address, is whether the potential risk of contact by multiple persons, including the media, and other private parties interested in Flight 800, triggers privacy interests. See Favish, 541 U.S. at 170.

Beyond that, it is precisely the risk of contact, intrusion, and disruption, which the district court acknowledged but dismissed, against which Exemptions 6 and 7(C) protect. See Favish, 541 U.S. at 166-167 (recognizing FOIA-protected interest in "personal privacy," and avoiding unwanted contact and intrusion by the media and public); Ray, 502 U.S. at 177 (recognizing a "privacy interest in protecting these individuals from * * *interview[s]" by third parties that disclosure of their names might bring about); DoD v. FLRA, 510 U.S. at 497 (privacy interest in avoiding contact by union); Reporters Committee, 489 U.S. at 769 (recognizing a "privacy interest in keeping personal facts away from the public eye").

The evidentiary showing required by the district court and its disparagement of the privacy interest at stake in this case are inconsistent with settled Supreme Court FOIA jurisprudence and the holdings of this Court.

3. The District Court Incorrectly Viewed Disclosure in a Vacuum and Failed to Consider the Impact of Public Release to All.

The lower court viewed disclosure of the names of eyewitnesses and FBI agents in a vacuum. However, the names requested are contained in law enforcement records and associated with one of the worse tragedies in airline history. The privacy interests of federal employees and individual citizens in their own names, already by itself recognized by the courts, is heightened when placed in the context of this case where disclosing the names would associate them, rightly or wrongly, with the events surrounding a widely- publicized, tragic accident that led to a criminal investigation.

In its most recent decision in this area, the Supreme Court underscored that the privacy interest "is at its apex" when disclosure would associate a private individual with a law enforcement investigation. See Favish, 541 U.S. at 166. Numerous courts of appeals also have recognized that individuals involved in a criminal investigation - - including suspects, witnesses, interviewees, and investigators - - possess privacy interests, cognizable under Exemption 7(C), in not having their names revealed in connection with disclosure of the fact and subject matter of the investigation. See, e.g., Safecard Services, Inc. v. SEC, 926 F.2d 1197, 1205 (D.C. Cir. 1991) ("suspects, witnesses and investigators" have privacy interests implicated by release of their names in connection with a criminal investigation); KTVY-TV v. United States, 919

F.2d 1465, 1469 (10th Cir.1990) (witnesses and persons named by them have privacy interests); McDonnell v. United States, 4 F.3d 1227, 1256 (3d Cir. 1993) (protecting identities of witnesses and third parties involved in criminal investigation of maritime disaster).

The court also failed to take into account - - as it is required to do by settled precedent - - the impact on privacy of release not just to the requester at hand, but of public release to other parties, such as solicitors and the media. See DoD v. FLRA, 510 U.S. at 501; Favish, 541 U.S. at 174. See also Wichlacz v. Dept. of Interior, 938 F. Supp. 325, 333 (E.D. Va. 1996) (emphasizing invasion of privacy that media scrutiny would bring to Vince Foster matter, court stated that "[g]iven the notoriety of this case, including two sets of congressional hearings, countless newspaper and magazine articles, and numerous FOIA suits, it is not unreasonable to conclude * * * that release of the identity of these individuals would subject them to intense media scrutiny and, inevitably the type of invasion of personal privacy envisioned" by the FOIA Exemption), aff'd, 114 F.3d 1178 (4th Cir. 1997).[5]

[5] While plaintiff's purpose or purported need for the requested information cannot be factored into the public interest side of the balancing test (see Reporters Committee, 489 U.S. at 771), a court must take into account "the consequences" of FOIA disclosure upon personal privacy, including "public exploitation" of the records by either the requester or others (see Favish, 541 U.S. at 167-70).

These concerns are particularly applicable here. This is because plaintiff does not seek the names of eyewitnesses and FBI agents merely to compare written statements without further intrusions upon their persons. Rather, as plaintiff and the district court readily acknowledge, plaintiff seeks this information in order to make direct contact with these individuals in order to verify whether eyewitness statements were accurately represented by the government. See ER at 582 ("[d]isclosure might * * * assist Plaintiff in investigating and uncovering government malfeasance by, for instance, leading to individuals who might repudiate what the government attributed to them"). The consequences of FOIA disclosure in this case, therefore, only underscore the degree of invasion of privacy at stake here. See Favish, 541 U.S. at 167 (concern about direct contact in the form of "intense scrutiny by the media" tipped balance in favor of privacy); Painting Industry of Hawaii Market Recovery Fund v. Dept. of Air Force 26 F.3d 1479, 1483 (9th Cir. 1994) (this Court recognized infringement of privacy interest where direct contact with named employees would occur).

This Court's language in Painting Industry of Hawaii is instructive here. In that case, the Court cited with approval the decision in Heights Community Congress v. Veterans Admin., 732 F.2d 526, 630 (6th Cir.), cert. denied, 469 U.S. 1034 (1984), where the Sixth Circuit affirmed the withholding of certain personal identifying information because "its release would subject a veteran, who is not himself suspected

of any wrongdoing, to involuntary personal involvement in [plaintiff]'s investigation of [racial] steering. Holding a person's privacy hostage in this fashion is contrary * * * to the basic right in this nation simply to be left alone." See Painting Industry of Hawaii, 26 F.3d at 1485 (emphasis added). This Court also adopted the view, equally applicable here, of the Community Heights court that "nothing prevents [plaintiff] from publicly advertising its investigation and requesting any VA loan recipient who desires to cooperate with [plaintiff] to come forward if he so elects, or pursuing other less controversial avenues to obtain the information." See Painting Industry of Hawaii, 26 F.3d at 1485-86.

4. The District Court's Order to Disclose the Names of FBI Agents is Against the Great Weight of Authority.

The court's order requiring the public disclosure of the names of FBI agents involved in a criminal investigation is virtually unprecedented, and certainly unwarranted. The courts have stressed that "[o]ne who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties." Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978). See Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984) (disagreeing with the district court that "the status of the individuals in this case as federal employees diminishes their privacy interests * * * because of the

corresponding public interest in knowing how public employees are performing their jobs").

Absent a substantial demonstration of significant misconduct on the part of law enforcement personnel (which, as discussed further below, is lacking in this case), the courts consistently have held the identities of FBI agents to be exempt from disclosure under Exemption 7(C). See Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992) ("FBI agents have a legitimate interest in keeping private matters that could conceivably subject them to annoyance or harassment"). See also Wood v. FBI, 432 F.3d 78, 87-89 (2d Cir. 2005); Manna v. Dept. of Justice, 51 F.3d 1158, 1166 (3d Cir.), cert. denied, 516 U.S. 975 (1995); Jones v. FBI, 41 F.3d 238, 246 (6th Cir. 1994); McDonnell v. United States, 4 F.3d at 1256; Maynard v. CIA, 986 F.2d at 556; In re Wade, 969 F.2d at 246; Miller v. Bell, 661 F.2d at 631; Lesar v. Dept. of Justice, 636 F.2d 472, 487-89 (D. C. Cir. 1980). The district court's order in this case to disclose the identities of FBI agents is against the great weight of authority and unsupported by the record in this case.

The lower court's rationale for departing from settled precedent with regard to the identities of FBI agents lacks merit. First, the court reasoned that because "the investigation ultimately concluded that there was no criminal wrongdoing," there is "no aggrieved target" and, therefore, the court found it "unlikely that the FBI agents

will be subjected to harassment or annoyance." ER 623. The court cited no authority for the proposition that Exemption 7(C) is limited to law enforcement investigations which result in criminal prosecution or where there is an "aggrieved target."[6] The Supreme Court's latest Exemption 7(C) case, Favish, does not support this narrow reading. In that case, there was no criminal prosecution and no "aggrieved target" to threaten personal privacy, but the Court held that the prospect of intense media scrutiny tipped the balance in favor of privacy. See 541 U.S. at 167.

The district court also erred in reasoning that "without revealing other contact information, such as addresses or phone numbers, it is less likely, ten years later, that 'revealing their names will engender an avalanche of inquiries to these officials.'" ER at 623 (citation omitted). The case law cited above protecting the identities of FBI agents is not limited to instances where "other contact information, such as addresses or phone numbers" also is disclosed. Further, it is settled that "[t]he passage of time, without more, does not materially diminish the[] [privacy]interests" protected under Exemption 7(C). Schrecker v. Dept. of Justice, 349 F.3d 657, 666 (D. C. Cir. 2003).

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[6] See n. 4, supra. See also Wood v. FBI, 432 F.3d at 81 (upholding Exemption 7(C) redaction of names of FBI investigators despite decision not to prosecute); Miller v. Bell, 661 F.2d at 629 (upholding Exemption 7(C) redaction of names of FBI investigators that did not involve a criminal prosecution and rejecting trial court's reasoning that privacy interest was minimal "since there was no danger to the agents on the facts of this particular case").

See Jones v. FBI, 41 F.3d at 239 (upholding redaction of names of FBI agents regarding twenty-year old investigation); Stone v. FBI, 727 F. Supp. 662 (D.D.C. 1990) (sustaining the withholding of information, including the identities of FBI agents, pertaining to the decade-old investigation of Robert F. Kennedy's assassination), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990); Maynard v. CIA, 986 F.2d at 566, n. 21 ("the effect of the passage of time upon the individual's privacy interests is simply irrelevant when a FOIA requestor is unable to suggest any public interest in the disclosure of names that would reveal what the government is up to").

II. THERE IS NO COGNIZABLE "PUBLIC INTEREST" IN DISCLOSURE.

Against the privacy interest at stake, the Court must weigh the relevant public interest in disclosure. See Reporters Committee, 489 U.S. at 773. Reporters Committee firmly established the nature of the "public interest" to be factored into the balancing test. In that case, the Supreme Court limited the concept of "public interest" under FOIA to the "core purpose" for which Congress enacted it: "[t]o shed light on an agency's performance of its statutory duties." Id. In other words, the sought-after disclosure must inform the public about "what the[] government is up to." Id. See DoD, 510 U.S. at 495-96. The Court repeatedly and recently has emphasized this as

the only cognizable "public interest" under Exemption 6 and 7(C)'s balancing test. See e.g., Reporters Committee, 489 U.S. at 773; Bibles, 519 U.S. at 355-56.

A. Plaintiff Failed to Meet the Threshold Evidentiary Test for Establishing Misconduct under Favish.

Plaintiff asserted and the lower court credited a "public interest in ferreting out the truth" regarding the crash of TWA Flight 800. ER at 554. The court found the evidence plaintiff presented was "sufficient to permit Plaintiff to proceed based on his claim that the government acted improperly in its investigation of Flight 800, or at least performed in a grossly negligent fashion." Id. at 553-54. In so holding, the district court erred as a matter of law.

The Favish Court made clear that where, as here, "the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the request must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." See 541 U.S. at 174. The Court recognized in language especially applicable here that "allegations of misconduct are 'easy to allege and hard to disprove'" and that courts therefore must require a "meaningful evidentiary showing" by the FOIA requester. See id. at 175 (citation omitted). Thus,

after Favish, a requester who asserts government misconduct as the public interest is held to a higher standard and must make a "meaningful evidentiary showing" in order to provide a public interest "counterweight" to the privacy interest. Id. at 172-74. Plaintiff failed to meet the threshold evidentiary requirement described in Favish.[7]

In the lower court, plaintiff asserted, and the court credited, numerous allegations of government impropriety and/or negligence in the investigation into the crash of Flight 800. See ER at 548-54. Among other things, plaintiff alleged that "the government withheld evidence from the Flight 800 probe," "evidence was removed from the reconstruction hangar," "the government misrepresented radar data," underwater videotapes of the debris from the plane "appear" to have been altered, and "the government concealed the existence of a missile debris field and debris recovery locations." Id. For purposes of this appeal, these general claims are irrelevant since plaintiff did not assert and the court did not find that they had any bearing on the names of eyewitnesses or FBI agents which are the sole subject of this appeal.

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[7] Since Favish was issued, numerous courts of appeals have applied its heightened standard to allegations of government misconduct and found plaintiff failed to meet the requisite evidence required by Favish. See, e.g., Carpenter v. Dept. of Justice, 470 F.3d 434, 442 (1st Cir. 2006); Wood v. FBI, 432 F.3d at 89; Horowitz v. Peace Corps, 428 F.3d 271, 278 (D.C. Cir. 2005), cert. denied, 126 S.Ct. 1627 (2006); Oguaju v. United States, 378 F.3d 1115, 1117 (D.C. Cir. 2004), cert. denied, 544 U.S. 983 (2005).

In Favish, the Supreme Court emphasized the "nexus required between the requested documents and the purported public interest served by disclosure." Favish, 541 U.S. at 174 (emphasis added). As applied to this case, the requisite nexus does not focus on the general issue of interest in the crash of Flight 800, but rather must address the specific alleged government conduct in relation to the requested documents. See Senate of the Commonwealth of Puerto Rico v. Department of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (requestor must show that there is a public interest in the "specific information being withheld"). See also Schrecker v. Dept. of Justice, 349 F.3d at 661 (public interest inquiry "should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld"); Elec. Privacy Info Ctr. v. DOD, 355 F. Supp. 2d 98, 102 (D.D.C. 2004) ("[t]he fact that [requester] has provided evidence that there is some media interest in data mining as an umbrella issue does not satisfy the requirement that [requester] demonstrate interest in the specific subject of [its] FOIA request").

Other courts, including this Court, likewise have stressed the requisite "nexus." In Minnis, this Court recognized a valid public interest in questioning the fairness of an agency lottery system that awarded permits to raft down a river, but found, upon analysis, that the release of the names and addresses of the applicants would not

further that interest. See 737 F.2d at 787. Likewise, in Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991), the court of appeals found a legitimate public interest in monitoring HUD's enforcement of prevailing wage laws generally, but found that disclosure of the names and addresses of workers employed on HUD-assisted public housing projects would shed no light on the agency's performance of that duty in particular.

In this case, plaintiff has failed to establish any nexus between his claims of alleged government impropriety and the records that are the subject of this appeal. The names of eyewitnesses have nothing to do with plaintiff's allegation that the government "removed" evidence from the reconstruction hanger or the existence vel non of a missile debris field nor would disclosing these names shed any light on these matters. The only allegations of plaintiff that even bear upon the records at issue here are that "many eyewitnesses vehemently disagree with the conclusions of the CIA expressed in the video animation" (see ER at 551 & n. 16), and a claim that the "CIA falsely reported that only twenty-one eyewitnesses saw anything prior to the beginning of the fuselage's descent into the water" (id.& n. 17) (emphasis added). Neither of these allegations supports a finding of government impropriety so as to satisfy the Favish threshold.

As to the former claim, that "many" eyewitnesses disagree with the CIA's animation, this assertion does not support any allegation of government impropriety. Rather, the claim amounts to nothing more than that the government considered all the evidence, including the accounts of eyewitnesses, and came up with its own conclusions regarding the crash of TWA Flight 800, as expressed in part in the CIA animation. The fact that the government's ultimate conclusions might differ from the account of any particular eyewitness simply is not evidence of government impropriety to meet the threshold requirement under Favish.

Likewise, the district court's statement that the "CIA falsely reported that only twenty-one eyewitnesses saw anything prior to the beginning of the fuselage's descent into the water" (see ER at 551), is both incorrect and insufficient to satisfy Favish. The court supported this statement with a citation to one of plaintiff's declarants. See id. & n. 17. The court appears to have concluded that the purported CIA statement was "false" on the basis of declarant's reference to a Witness Group Report stating, in the words of the court, "that of 183 witnesses who observed a streak of light, 96 said it originated from the surface." Id. Of course, the court compares apples and

oranges since the purported CIA statement concerns the timing of the sighting, while the referenced report concerns the origin of the sighting.[8]

The only possible nexus between any claim of government impropriety and the records at issue in this appeal involves pure speculation on the part of the district court with no evidentiary support in the record. The court stated that "[p]laintiff already is privy to the government's versions of the accounts these individuals allegedly provided to investigators concerning what they saw, insofar as such information was set forth in the records adjacent to where their names would have appeared had they not been redacted. Disclosure might nevertheless assist Plaintiff in investigating and uncovering government malfeasance by, for instance, leading to individuals who might repudiate what the government attributed to them or might even declare that the government misused or misrepresented the information they provided." ER at 582 (emphasis added).

The court cited nothing in the record to support this speculation. In another part of its opinion, the district court did reference the affidavits of two declarants who

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[8] Moreover, the report, upon which the declarant and the court relied, was an interim report. See http://www.ntsb.gov/events/twa80exhibits/Ex_4A.pdf at 10. In the final report, included on the NTSB's web site, it states that, of 258 witnesses who reported observing a streak of light, "[o]nly 33 witnesses were judged to have reported observing the origin of the streak of light * * * [and] [o]f these, 18 indicated that it originated from the surface." Id. at 23.

stated that the video did not represent what they saw and one declarant who stated that "what was in video did not represent what he had told agent." ER at 551, n. 16. As we have explained, the fact that government experts did not credit the missile theory in preparing the video does not support any allegation of impropriety. Moreover, the court had before it the affidavits of these particular declarants and knew their names and also had before it for in camera review the unredacted records of the government's summaries of the eyewitness statements which are at issue in this appeal. It would have been an easy task to match the affidavits of the declarants with the government's summary to determine if there had been any misrepresentation. The court made no such finding.

Thus, plaintiff failed to meet the threshold test set forth in Favish to establish a public interest based upon government wrongdoing with regard to the specific records requested. See 541 U.S. at 173 (mere allegations of wrongdoing are "insufficient" to satisfy the "public interest" standard required under the FOIA). In language equally applicable here, the Favish Court observed that if "bare allegations" could be sufficient to satisfy the public interest requirement, then the exemption would be "transformed * * * into nothing more than a rule of pleading." See id. at 174. See also Dept. of State v. Ray, 502 U.S. at 179 ("[i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth

justified disclosure of private materials, Government agencies would have no defenses against requests for production of private information"); McCutchen v. U.S. Dep't of Health & Human Servs., 30 F.3d 183, 188 (D. C. Cir.1994) ("[a] mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by Exemption 7(C)"); Miller v. Bell, 661 F.2d at 630 (rejecting purported public interest to "use the information to serve as a watchdog over the adequacy and completeness of an FBI investigation" as "this justification would apparently apply to every FBI criminal investigation, severely vitiating the privacy and confidentiality provisions of exemptions 7(C) and (D)").

There simply is no support in the record that either the NTSB or the CIA (the named parties to this action) or the FBI (not a party) engaged in any improper conduct with regard to the witness statements, at issue in this appeal. In the absence of any substantiated claim of government misconduct, the general "presumption of legitimacy" accorded government records and official conduct is controlling in this case. See Dept. of State v. Ray, 502 U.S. at 179.

B. Disclosing the Requested Names Will Shed no Additional Light on Any Cognizable Public Interest.

While there is a legitimate public interest in understanding the cause of the crash of Flight 800, such interest has been served in the extensive reports already issued. Disclosing the individual names of private citizens who were cooperating witnesses in a law enforcement investigation and the names of FBI agents will provide no additional information with regard to the only relevant public interest to be factored into the balancing test, i.e., "shedding light on an agency's performance of its statutory duties." Reporters Committee, 489 U.S. at 773. See Dept. of State v. Ray, 502 U.S. at 178 (recognizing a legitimate public interest in whether State Department was adequately monitoring Haitians returned to their country, but finding that this interest was adequately served by release of redacted summaries of interviews, and that "[t]he addition of the redacted identifying information [i.e., the names of the interviewees] would not shed any additional light on the Government's conduct of its obligation") (emphasis added). See also Schrecker v. Department of Justice, 349 F.3d at 661 (stressing that the public interest inquiry should focus on "the incremental value of the specific information being withheld" for shedding light on agency action) (emphasis added); Dept. of Defense v. FLRA, 964 F.2d 26, 29-30

(D.C. Cir. 1992)(if there are alternative sources of information available, the public interest in disclosure should be "discounted" accordingly).

This is precisely what the Supreme Court did in its latest privacy decision. In the face of extensive government investigation, such as is also present in the instant action, the Favish Court concluded that further disclosure would not "advance" the public interest. See 541 U.S. at 172-74 (stating that Court cannot ignore the fact that five different investigations into the Foster matter reached the same conclusion, and noting that Favish failed to produce any evidence of government impropriety that would be believable by a reasonable person).

Plaintiff has failed to meet the burden of demonstrating that release of the limited personal identifying information that remains at issue would shed any additional light on TWA Flight 800 above and beyond the extensive records that are already available. See e.g., NTSB Accident Report (ER at 66-109; full report available at http://www.ntsb.gov/publictn/2000/aar0003.pdf); NTSB's Public Docket (available at http://www.ntsb.gov/events/twa800/exhibits_web.htm); FBI summaries of witnesses statements with identifying information redacted (available at http://www.ntsb.gov/events/twa800/exhibits_web.htm (Appendices B-I)); Witness Group Study Report (available at http://www.ntsb.gov/events/twa800/exhibits/Ex_4B.pdf). If there is one thing that

can be said about the tragic crash of Flight 800, it is that it has been extensively investigated, what happened has been detailed and publically disclosed, and the relevant agencies' performance of their statutory duties have been made manifest.[9] There are no secrets or conspiracies or hidden government misconduct that needs to be exposed by further FOIA disclosures. The precise identities of cooperating witnesses or government employees will add nothing further to the "core purpose" of FOIA, i.e., finding out "what the[] government is up to." Reporters Committee, 489 U.S. at 773.

At the end of the day, this case is akin to Miller v. Bell, where the court of appeals stated in language equally applicable here that

> The plaintiff's broad unsupported hints of a government coverup or undercover surveillance fly in the face of the substance of the disclosed documents which reveal this case as one of consequence to only one individual. There is no allegation of wrongdoing by high-ranking government officials or indeed by any FBI personnel to support any public interest in any further probe into the thoroughness of the instant investigation. * * * In the absence of such a showing of special public interest in testing the thoroughness of an investigation, we find it of little weight. We further note that, as the plaintiff concedes, the substance of the information in the FBI files has been exposed in its entirety, and only

[9] In its Accident Report, the Board identified several potential weaknesses in government standards and issued numerous recommendations to the Federal Aviation Administration. See ER at 101-108. These included, for example, recommendations related to ignition risks caused by short circuits, the build up of silver-sulfide deposits in fuel tanks, and maintenance practices. Id. None related to any government misconduct or impropriety.

> the names of the FBI agents deleted. * * * The documents thus reveal the entire course of the investigation and the facts it uncovered. This information should be sufficient to permit the plaintiff to evaluate the thoroughness of the investigation. We find any public interest in pursuing the completeness and adequacy of the investigation beyond this point to be minimal in the extreme.

See 621 F.2d at 630-31 (emphasis added).

Indeed, in this case, non-disclosure of the personal identifying information at issue actually better serves the public interest in general. See Perlman v. Dept. of Justice, 312 F.3d 100, 106 (2d Cir. 2002), vacated and remanded, 541 U.S. 970 (2004), aff'd on reconsideration, 380 F.3d 110 (2d Cir. 2004) ("[t]he strong public interest in encouraging witnesses to participate in future government investigations offsets the weak public interest in learning witness and third party identities"); Flower v. FBI, 448 F. Supp. 567, 571-72 (W.D. Tex. 1978) (nothing that "it is doubtful that individuals would cooperate with law enforcement if their privacy were not protected"). See also Miller v. Bell, 661 F.2d at 631 (finding "substantial public interest in maintaining the integrity of future FBI undercover investigations served by the preservation of the privacy of agents' names").

C. The District Court Erred in Factoring a "Derivative Use" into the Public Interest Side of the Balancing Test.

Finally, plaintiff's intent to make "direct contact" with the subjects of the requested records not only underscores the threat to privacy at issue here, as discussed

above, but it also diminishes the public interest side of the balancing test. This is because plaintiff seeks the names in this case for a "derivative use," i.e., the information itself does not disclose anything about the workings of the government, but plaintiff hopes to obtain such information by directly contacting the eyewitnesses and agents. In Painting Industry of Hawaii, this Court looked with disfavor upon a "derivative use" of FOIA information, such as plaintiff proposes here, where such use involved direct contact with named employees. See 26 F.3d at 1485 (stating that "[a]ny additional public benefit the requesters might realize through those contacts is inextricably intertwined with the invasions of privacy that those contacts will work"). See also Hertzberg v. Veneman, 273 F. Supp. 2d 67, 86-87 (D.D.C. 2003) (rejecting plaintiff's public interest argument that disclosure of names withheld on witness statements would allow him to contact the witnesses, the court stated that "[p]laintiff cites no case recognizing a derivative theory of public interest, and this Court does not understand the FOIA to encompass such a concept").

This is a classic "derivative use" case since it is undisputed that the names of eyewitnesses and FBI agents by themselves will shed no light on the operations on the government. See e.g., ER at 430 (names of FBI agents), 505-06 (names of eyewitnesses). The district court's embrace of this concept as an overriding public interest consideration outweighing significant privacy interests at stake should be

rejected. See ER at 582. See also Bibles, 519 U.S. at 355-56 (desire to contact third parties to provide information not a legitimate public interest under the balancing test); Hopkins v. HUD, 929 F.2d 81 at 88 ("disclosure of this information would serve the public interest only insofar as it would allow the Union to contact individual employees, who may then dispute the accuracy of the data reflected in the records * * * Were we to compel disclosure of personal information with so attenuated a relationship to governmental activity, however, we would open the door to disclosure of virtually all personal information, thereby eviscerating the FOIA privacy exemptions").

In sum, given the substantial invasion of personal privacy that would result from disclosure of the requested names and the lack of any cognizable public interest that would be served by disclosure of records over and above that already produced, the balancing test tips decisively in favor of privacy under both the more stringent standard of FOIA Exemption 6 and the broader standard of FOIA Exemption 7(C). As the District of Columbia Circuit stated in language equally applicable here: where the request implicates no cognizable public interest at all, a court "need not linger over the balance; something * * * outweighs nothing every time." NARFE, 879 F.2d at 879.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court in so far as the court held that the names of third party eyewitnesses and FBI agents are not protected from public disclosure under FOIA Exemptions 6 and 7(C).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type-volume limitations set forth in Rule 32(a)(7) of the Federal Rules of Appellate Procedure and, uses a proportionally spaced font (Times New Roman), has a typeface of 14 point, and contains 10,375 words, according to the word processing system used to produce the text.

_____

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for the appellant are not aware of any related cases pending in this Court.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2007, I filed and served the foregoing opening Brief for Federal Appellant by Federal Express overnight mail with the Court and counsel of record listed below:

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