

**No. 25-4280**

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

FOIACONSCIOUSNESS.COM LLC,

*Plaintiff-Appellant,*

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,

*Defendant-Appellee*

Appeal of Order Granting Defendant's Motion for Summary Judgment  
and Denying Plaintiff's Cross Motion for Summary Judgment  
from the United States District Court  
for the Northern District of California  
No. 3:24-CV-00997-JD  
Hon. James Donato

---

**APPELLANT'S OPENING BRIEF**

---

MARK L. JAVITCH  
Javitch Law Office  
3 East 3rd Ave. Ste. 200  
San Mateo, CA 94401  
(650) 781-8000  
(650) 300-0343 (fax)  
mark@javitchlawoffice.com

*Attorney for Appellant*  
FoiaConsciousness.com LLC.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure,  
Plaintiff/Appellant FoiaConsciousness.com LLC, makes the following disclosures:

1. It has no parent corporation.
2. It issues no stock, therefore no publicly held corporation owns 10 percent or more of its stock.

Dated: August 20, 2025

/s/ Mark L. Javitch

Mark L. Javitch

## TABLE OF CONTENTS

|                                                                                                                                                                 |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| TABLE OF AUTHORITIES .....                                                                                                                                      | 3  |
| INTRODUCTION .....                                                                                                                                              | 4  |
| JURISDICTIONAL STATEMENT .....                                                                                                                                  | 5  |
| ISSUES PRESENTED.....                                                                                                                                           | 6  |
| STATEMENT OF THE CASE.....                                                                                                                                      | 6  |
| A.    Background .....                                                                                                                                          | 6  |
| B.    Plaintiff’s FOIA Requests to NARA .....                                                                                                                   | 7  |
| C.    The District Court Holds Defendant Does Not Have to Disclose<br>the Records Because Plaintiff Did Not Seek Copyright<br>Permission.....                   | 8  |
| SUMMARY OF THE ARGUMENT .....                                                                                                                                   | 8  |
| STANDARD OF REVIEW .....                                                                                                                                        | 8  |
| ARGUMENT .....                                                                                                                                                  | 9  |
| I.    THE DISTRICT COURT ERRED IN HOLDING THAT<br>DEFENDANT WAS NOT REQUIRED TO MAKE COPIES UNDER<br>FOIA.....                                                  | 9  |
| A.    Plaintiff Properly Requested Copies of VHS Tapes.....                                                                                                     | 9  |
| B.    NARA Failed to Make Copies as Required.....                                                                                                               | 9  |
| C.    A Requester Does Not Have to Request Permission from a<br>Third Party Prior to Making a FOIA Request Even if the<br>Desired Records are Copyrighted ..... | 11 |

|                  |                                                                                           |    |
|------------------|-------------------------------------------------------------------------------------------|----|
| D.               | The Court Applied the Wrong Standard .....                                                | 12 |
| II.              | THE DISTRICT COURT ERRED IN HOLDING THAT THE FILMS<br>WERE NOT READILY REPRODUCIBLE ..... | 15 |
| CONCLUSION ..... |                                                                                           | 16 |

## TABLE OF AUTHORITIES

### Cases

|                                                                                                      |              |
|------------------------------------------------------------------------------------------------------|--------------|
| <i>Animal Legal Def. Fund v. FDA</i> , 836 F.3d 987, 988–89 (9th Cir. 2016).....                     | 9            |
| <i>In re Steele</i> , 799 F.2d 461, 464 (9th Cir. 1986).....                                         | 6            |
| <i>Mandel Grunfeld and Herrick v. U.S. Customs Serv.</i> , 709 F.2d 41, 42-43 (11th Cir. 1983) ..... | 14           |
| <i>Morley v. CIA</i> , 894 F.3d 389, 394 (D.C. Cir. 2018).....                                       | 13-14        |
| <i>SDC Development Corp. v. Mathews</i> , 542 F.2d 1116 (9th Cir. 1976).....                         | 16           |
| <i>Long v. Immigr. &amp; Customs Enf’t</i> , 149 F. Supp. 3d 39, 55 (D.D.C. 2015).....               | 16           |
| <i>Nat’l Sec. Counselors v. CIA</i> , 960 F. Supp. 2d 101, 150-51 (D.D.C. 2013).....                 | 16           |
| <i>Shannahan v. IRS</i> , 672 F.3d 1142, 1148 (9th Cir. 2012).....                                   | 12           |
| <i>Tax Analysts v. U.S. Dep’t of Just.</i> , 845 F.2d 1060, 1067 (D.C. Cir. 1988).....               | 13-14        |
| <i>U.S. Fish &amp; Wildlife Serv. v. Sierra Club, Inc.</i> , 592 U.S. 261, 263 (2021).....           | 12           |
| <i>Weisberg v. United States Dep’t of Justice</i> , 631 F.2d 824, 828–29 (D.C. Cir. 1980)<br>.....   | 5, 13, 15-16 |
| <i>Yonemoto v. Department of Veterans Affairs</i> , 686 F.3d 681, 687 (9th Cir. 2012)..              | 12           |

### Statutes

|                               |    |
|-------------------------------|----|
| 28 U.S.C. § 1291 .....        | 6  |
| 28 U.S.C. § 1331 .....        | 6  |
| 36 C.F.R. § 1254.62 .....     | 14 |
| 5 U.S.C. § 552(a)(3)(B) ..... | 16 |
| 5 U.S.C. § 552(a)(4)(B) ..... | 6  |

### Rules

|                                  |   |
|----------------------------------|---|
| Fed. R. App. P. 26(a)(1).....    | 6 |
| Fed. R. App. P. 4(a)(1)(A) ..... | 6 |

## INTRODUCTION

Conspiracy theories have long persisted because of secrecy over the Zapruder film, and yet that secrecy continues today. Most viewers conclude that the Zapruder film was concealed from the American public for 12 years because the “back and to the left” head movement could have been used to undermine the Warren Commission’s primary conclusion that Lee Harvey Oswald killed President Kennedy by firing shots from behind.

Regardless of the reason, NARA is improperly refusing to make copies or permit vendors to make copies of agency records. The district court erred in holding that Plaintiff’s request for agency records was defective because Plaintiff did not first request permission from the private copyright holder of those records. That reasoning is contrary to FOIA’s statutory scheme.

FOIA establishes a simple framework: an agency must disclose requested materials if they are “agency records” and no exemption applies. There was no dispute that the requests sought agency records.

Nothing in FOIA conditions access on the requester obtaining advance consent from a copyright owner. Indeed, it is well established that agency records are subject to disclosure regardless of copyright status. *Weisberg v. United States Dep’t of Justice*, 631 F.2d 824, 828–29 (D.C. Cir. 1980). The fact that a record may be copyrighted affects how the requester may use the record *once obtained*, but it

does not strip the record of its character as an agency record or impose a precondition to disclosure.

By grafting a novel “permission” requirement onto FOIA, the district court effectively created a barrier to public access that Congress never enacted and that courts have repeatedly rejected. Because FOIA requires agencies themselves to determine whether the requested materials qualify as agency records and whether any statutory exemption applies, the judgment below should be reversed.

### **JURISDICTIONAL STATEMENT**

The district court had jurisdiction over Plaintiff’s FOIA claims pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. On June 30, 2025, the district court issued its order on the parties’ cross motions for summary judgment. ER-003. Final judgment was also entered on June 30, 2025. ER-008. Appellant timely appealed under Fed. R. App. P. 4(a)(1)(A) and Fed. R. App. P. 26(a)(1) on July 10, 2025. ER-266.

This Court has jurisdiction because the district court’s order is a final appealable order under 28 U.S.C. § 1291. A “final decision” in a FOIA case [is] an order by the District Court requiring release of documents by the Government to the plaintiff, or order denying the plaintiff’s right to such release.” *In re Steele*, 799 F.2d 461, 464 (9th Cir. 1986) (internal citation omitted). “[A]n order compelling disclosure is [therefore] appealable as a final decision under [28 U.S.C.] § 1291.” *Id.*

The district court's order denied the full relief sought by Plaintiff and granted all relief sought by Defendant.

### **ISSUES PRESENTED**

- Whether the district court erred in ruling that Plaintiff must seek permission from a third-party prior to requesting agency records under FOIA;
- Whether the district court erred in holding that the requested records were not “readily reproducible.”

### **STATEMENT OF THE CASE**

#### **A. Background**

Abraham Zapruder is said to have made the most complete visual record of the JFK assassination in the form of an amateur home video. ER-257. Dkt. 1 (“Complaint”) ¶¶ 29-34.

The Zapruder film was held out by the government as the key piece of evidence in resolving the assassination of President Kennedy. *Id.* at ¶ 36. Heavily relying on the film, the Warren Commission concluded that the shots came from behind. *Id.* But the public was not allowed to see the film. *Id.* at ¶ 39. The film was hidden as a motion picture until it was played on television without permission in 1975. *Id.*

Attempting to withdraw from the controversy, Time, Inc. gave the film to the Zapruder heirs. ER-090-091. The film was taken under eminent domain for public

use by the JFK Act in 1992. *Id.* After the taking, the Zapruder family asserted that they still retained the copyright. *Id.* The family claimed to donate the copyright to the Sixth Floor Museum in Dallas, Texas. (“Museum”). *Id.*

## **B. Plaintiff’s FOIA Requests to NARA**

On December 11, 2023, Plaintiff requested copies of two versions of the Zapruder film. ER-116-117. The films requested by Plaintiff are listed in the National Archives catalog in VHS Format. ER-150-154. NARA’s response indicated that the films are available on DVD and VHS. ER-198.

On December 22, 2023, the National Archives responded by stating that copies are only permitted with permission from the copyright holder. ER-122. On December 24, 2023, Plaintiff appealed the denial of the decision. ER-127. On December 27, 2023, the appeal was acknowledged. ER-132. NARA failed to respond further to the appeal. ER-092.

On February 20, 2024, Plaintiff filed its Complaint for one violation of failing to comply with FOIA. ER-253-265. Plaintiff also named the Museum as Respondent, the purported copyright holder. *Id.* On April 24, 2024, the Museum moved to dismiss for lack of personal jurisdiction. On June 6, 2024, the Court granted the Museum’s motion to dismiss. On September 5, 2024, the Parties filed cross motions for summary judgment.

**C. The District Court Holds Defendant Does Not Have to Disclose the Records Because Plaintiff Did Not Seek Copyright Permission**

On June 30, 2025, the district court granted Defendant’s motion for summary judgment and denied Plaintiff’s cross-motion for summary judgment. ER-003-007. The court rejected Plaintiff’s argument that Defendant was required to produce copies of the requested films in response to its FOIA request. *Id.* The court entered judgment against Plaintiff. ER-008.

**SUMMARY OF THE ARGUMENT**

The decision below should be reversed because FOIA requires agencies to make copies of agency records unless an exemption applies. Plaintiff made a request for copies of agency records. Defendant denied the request because of a third-party copyright. The court determined that Defendant was not required to satisfy Plaintiff’s request because Plaintiff did not seek permission from the third-party copyright holder. This holding ignores that records are required to be produced unless an exemption applies, and copyright is not one of those exemptions.

**STANDARD OF REVIEW**

This Court reviews a district court’s grant of summary judgment in a FOIA case de novo. *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 988–89 (9th Cir. 2016) (en banc). In doing so, this Court employs the same standard used by the district court in adjudicating the summary judgment motion and must “view the evidence in the light most favorable to the nonmoving party, determine whether there are any

genuine issues of material fact, and decide whether the district court correctly applied the relevant substantive law.” *Id.* at 989.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN HOLDING THAT DEFENDANT WAS NOT REQUIRED TO MAKE COPIES UNDER FOIA**

#### **A. Plaintiff Properly Requested Copies of VHS Tapes**

On December 11, 2023, Plaintiff requested copies of two versions of the Zapruder film. ER-116-117. The films requested by Plaintiff are listed in the National Archives catalog in VHS Format. ER-150-154. NARA’s response indicated that the films are available on DVD and VHS. ER-198.

#### **B. NARA Failed to Make Copies as Required**

On December 22, 2023, the National Archives responded by stating that copies are only permitted with permission from the copyright holder, the Museum. ER-122. The response also admits that a DVD reference copy exists. *Id.* On December 24, 2023, Plaintiff appealed the denial of the decision. ER-127. On December 27, 2023, the appeal was acknowledged. ER-132. NARA failed to respond further to the appeal. ER-092; ER-112.

NARA’s response failed to provide copies on DVD or VHS and in fact said such copies could not be made unless permission was obtained from the Museum. ER-122-123. This is contrary to well established FOIA law. An agency must “provide the record in any form or format requested by the person if the record is

readily reproducible by the agency in that form or format.” 5 U.S.C. § 552(a)(3)(B). Federal agencies are also required to “make reasonable efforts to maintain [their] records in forms or formats that are reproducible for purposes of this section.” *Id.* NARA is required to keep videos in readily reproducible format whenever possible and VHS tapes are readily reproducible. *See Long v. Immigr. & Customs Enf’t*, 149 F. Supp. 3d 39, 55 (D.D.C. 2015) (“[A]n agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”) (citing 5 U.S.C. § 552(a)(3)(B)).

NARA violated this provision by failing to make copies. ER-122-123. Plaintiff had ordered copies in the past and was familiar with how NARA normally responds when a request to order copies is made. ER-025-029. Plaintiff sought to have the National Archives make copies or a vendor make copies. NARA appeared to gaslight Plaintiff by pretending it did not know what was a “fair use copy” (ER-061, n. 2, “What precisely Plaintiff means by a “fair use copy” is unclear”) while at the same time using that exact term on its website with regards to the Zapruder film:<sup>1</sup>

Where is the Zapruder film? Can I get a copy of it? The original Zapruder film is part of the Collection and is in the custody of the Moving Image and Sound Branch at the National Archives at College Park, MD. ***NARA may make a single fair-use copy of the film and sell it to any researcher.*** However, the copyright for the film is owned by the Sixth Floor Museum in Dallas, TX. If a researcher chooses to publish the film in any way, he or she will need to obtain permission from the copyright holder.

---

<sup>1</sup> <https://www.archives.gov/research/jfk/faqs>

(emphasis added).

Plaintiff sought to have NARA make a copy or hire a vendor to make a copy, (ER-094, ER-116-117, ER-245-251) which NARA says is permitted on its website, but NARA refused because of lack of permission from the purported copyright holder. ER-094. Despite this, NARA claimed it was not obstructing Plaintiff from obtaining a copy, but it was doing exactly that. ER-058. To avoid making a copy, NARA argued that it did not even know what a “fair use copy” was. ER-094-095.

**C. A Requester Does Not Have to Request Permission from a Third Party Prior to Making a FOIA Request Even if the Desired Records are Copyrighted**

A requester seeking records asserted to be copyright-protected by a third party does not need to request permission from the third party prior to making a FOIA request for copies. FOIA requires federal agencies to make records available to the public, unless they fall within one of the nine exemptions enumerated in the statute. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 263 (2021). “The 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.’” *Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012); *see Yonemoto v. Department of Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012) (the “core purpose” of the FOIA is to inform citizens about “what their government is up to”).

There is no authority (Plaintiff is aware of) that dictates that NARA can deny Plaintiff's FOIA request on copyright grounds alone. The proper way to object on copyright grounds is under the exemptions to FOIA. *See Weisberg*, 631 F.2d at 825 (“[T]he mere existence of copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records.”). ER-017.

#### **D. The Court Applied the Wrong Standard**

The district court made its decision based on whether granting the request would expose Defendant to liability for infringement. ER-005-006 (“FC did not identify anything in FOIA or the caselaw to indicate that Congress intended a records designation to trump copyrights held by third parties. FC also did not say why FOIA would require agencies to produce copies in a manner that would open them up to liability under the copyright laws.”)

The district court rejected Plaintiff's argument that Defendant was required to provide copies, citing *Morley v. CIA*, 894 F.3d 389, 394 (D.C. Cir. 2018) (“[A]n agency need not respond to a FOIA request for copies of documents where the agency itself has provided an alternative form of access.” (citation omitted)); *Tax Analysts v. U.S. Dep't of Just.*, 845 F.2d 1060, 1067 (D.C. Cir. 1988) (“The Department is not required by statute to mail copies of all such decisions to Tax Analysis nor even to provide the requester-convenient location for access.”)

(emphasis in original)); *Mandel Grunfeld and Herrick v. U.S. Customs Serv.*, 709 F.2d 41, 42-43 (11th Cir. 1983).

However, the district court's reliance on *Morley* was misplaced. In *Morley*, the court held it was reasonable for the CIA to direct the requestor to send the request to the National Archives because the CIA had already turned over the requested records to the National Archives. *Morley*, 894 F.3d at 394. Here, there is no dispute that the National Archives had the requested records because they were listed in its catalog. Further, *Morley* was in the context of a motion for attorneys' fees, under factors not applicable here.

The district court's reliance on *Tax Analysts*, 845 F.2d at 1067 and *Mandel Grunfeld*, 709 F.2d at 42-43 is also misplaced. Those courts were considering the plaintiff's requests to require the agency to mail future records to Plaintiff on a regular basis as they are created. Here, the issue is the standard for whether an agency must make a copy of a readily reproducible record. Indeed, it does.

Lastly, the district court cited 36 C.F.R. § 1254.62, which states:

§ 1254.62 Does NARA have archival materials protected by copyright? Yes, although many of our holdings are in the public domain as products of employees or agents of the Federal Government, some records and donated historical materials do have copyright protection. Particularly in the case of some special media records, Federal agencies may have obtained materials from private commercial sources, and these may carry publication restrictions in addition to copyright protection. Presidential records may also contain copyrighted materials. You are responsible for obtaining any necessary permission for use, copying, and publication from copyright holders and for any other

applicable provisions of the Copyright Act (Title 17, United States Code).

ER-005. This provision generally states that people who obtain items from the National Archives should be aware that they may be copyrighted. It does not impose an additional requirement onto FOIA requesters.

*Weisberg* is similar to the present case and provides sufficient guidance. 631 F.2d at 829. Researcher Harold Weisberg requested photos of Martin Luther King from the FBI under FOIA, but his request was rejected because Time, Inc. held a copyright to the photos. *Id.* at 825-26. Mr. Weisberg filed suit against the FBI for a FOIA violation, and on summary judgment, the FBI was ordered to produce the photos. *Id.* at 827. On appeal, the D.C. Circuit reversed and remanded because “the district court should have sought the presence of the alleged copyright holder under Rule 19 before deciding this case. Because Time, Inc. was not a party, the district court has subjected the Government to a substantial risk of incurring . . . inconsistent obligations.” *Id.* at 829.

Despite the reversal, the Circuit Court affirmed the part of the district court’s decision holding that Weisberg was entitled to seek copies of photos under FOIA even if they were copyrighted by Time, Inc., rejecting the same argument the government makes today:

Here the requested materials plainly “reflect the . . . operation, or decision-making functions of the agency,” because they will permit evaluation of the FBI's performance in investigating the King

assassination. Further, absent a FOIA request, there is no guarantee that the photos would be disclosed. Indeed, interpreting FOIA as the Government urges would allow an agency "to mask its processes or functions from public scrutiny" simply by asserting a third party's copyright.

*Id.* at 829. (citing *SDC Development Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976)). The district court order should be reversed under the same reasoning as in *Weisberg*.

## **II. THE DISTRICT COURT ERRED IN HOLDING THAT THE FILMS WERE NOT READILY REPRODUCIBLE**

The district court agreed with NARA that the films are not “readily reproducible,” but this was an error. ER-005-006. NARA’s argument was based entirely on copyright (ER-200), not on the difficulty of making copies, which is what “readily reproducible” actually refers to. NARA’s declaration fails to state anything about the technical feasibility of making the requested copies. *See Nat’l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 150-51 (D.D.C. 2013).

Further, NARA is required to keep videos in readily reproducible format whenever possible and VHS tapes are readily reproducible. *See Long v. Immigr. & Customs Enf’t*, 149 F. Supp. 3d 39, 55 (D.D.C. 2015) (“[A]n agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”) (citing 5 U.S.C. § 552(a)(3)(B)). NARA cannot satisfy the readily reproducible standard by making a copyright argument. The standard must be met by arguing that satisfying the request is an

undue burden. But NARA did not argue that, nor could it, because replicating DVDs and VHS tapes is not a burden.

### **CONCLUSION**

For the foregoing reasons, Plaintiff requests that the Court reverse the district court's order granting summary judgment for Defendant and denying summary judgment for Plaintiff on the basis described herein.

Date: August 20, 2025

Javitch Law Office

/s/ Mark L. Javitch

Mark L. Javitch (CA #323729)

Javitch Law Office

3 East 3rd Ave. Ste. 200

San Mateo, CA 94401

Telephone: (650) 781-8000

Fax: (650) 300-0343

*Attorney for Appellant*

*FoiaConsciousness.com LLC*

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6**

*Instructions for this form:* <http://www.ca9.uscourts.gov/forms/form17instructions.pdf>

**9th Cir. Case Number(s) No. 25-4280**

The undersigned attorney states the following:

☒ I am unaware of any related cases currently pending in this court.

☐ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

☐ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

**Signature** /s/ Mark L. Javitch **Date:** August 20, 2025

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 8. Certificate of Compliance for Briefs**

*Instructions for this form:* <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

**9th Cir. Case Number(s) No. 25-4280**

I am the attorney for Plaintiff/Appellant.

**This brief contains 3,715 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

☒ [x] complies with the word limit of Cir. R. 32-1.

**Signature** /s/ Mark L. Javitch **Date:** August 20, 2025

### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Dated: August 20, 2025

/s/ Mark L. Javitch  
Mark L. Javitch