Blethen Maine Newspapers, Inc. v. State: Balancing the Public's Right to Know Against the Privacy Rights of Victims of Sexual Abuse

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BLETHEN MAINE NEWSPAPERS, INC. V. STATE:
BALANCING THE PUBLIC’S RIGHT TO KNOW AGAINST THE PRIVACY RIGHTS OF VICTIMS OF SEXUAL ABUSE

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BLETHEN MAINE NEWSPAPERS, INC. V. STATE: BALANCING THE PUBLIC’S RIGHT TO KNOW AGAINST THE PRIVACY RIGHTS OF VICTIMS OF SEXUAL ABUSE

Kenleigh Nicoletta*

I. INTRODUCTION

In Blethen Maine Newspapers, Inc. v. State,\(^1\) a sharply divided Maine Supreme Judicial Court, sitting as the Law Court, held that release of records relating to Attorney General G. Steven Rowe’s investigation of alleged sexual abuse by Catholic priests was warranted under Maine’s Freedom of Access Act (FOAA).\(^2\) Although such investigative records are designated confidential by statute,\(^3\) the majority held that the public’s interest in the contents of the records mandated their disclosure after all information identifying persons other than the deceased priests had been redacted.\(^4\) The concurrence asserted that the majority had reached the correct conclusion, but in so doing had unnecessarily expanded the underlying purpose of the FOAA.\(^5\) The two dissents both found, however, that release of the records was not warranted in this case, both because it compromised the personal privacy interests of the victims, deceased priests, and their families, and because there was no public interest falling within the purpose of the FOAA compelling disclosure.\(^6\) The dissents also found fault with the redaction standard adopted by the majority.\(^7\)

This case required the Law Court to interpret for the first time the personal privacy exemption of the FOAA relating to investigative records. In so doing, the Law Court was confronted with unique legal, political, and cultural issues relating to crimes of sexual abuse in the context of a priest abuse scandal. The Law Court determined that the public had a right to view the records, once the identifying information of the victims and witnesses named in the reports had been redacted, as a way of understanding the Attorney General’s response to the numerous reports of sexual abuse by Maine priests. The question now becomes: did the Law Court craft a holding that

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3. ME. REV. STAT. ANN. tit. 6, § 614(1)(C) (1989) (“Reports or records that contain intelligence and investigative information and that are prepared by, prepared at the direction of or kept in the custody of ... the Department of the Attorney General ... are confidential.”).
5. See id. ¶ 41, 871 A.2d at 536 (Sauflay, C.J., concurring).
6. Id. ¶ 51, 871 A.2d at 538 (Clifford, J., dissenting); Id. ¶ 70, 871 A.2d at 542 (Alexander, J., dissenting).
7. Id. ¶ 58, 871 A.2d at 540 (Clifford, J., dissenting); Id. ¶ 75, 871 A.2d at 543 (Alexander, J., dissenting).
would adequately protect the privacy interests of victims and alleged perpetrators of crimes while also preserving the public's right to access government records?

This Note first explains the history of the Maine FOAA as well as the Federal Freedom of Information Act (FOIA), and the public policies underlying each Act. The Note examines the provisions in both the FOAA and the FOIA that exempt investigative records from disclosure where such disclosure would constitute an invasion of personal privacy. Through an analysis of the landmark federal cases interpreting this personal privacy exemption, this Note explains the difficult and conflicting interests implicated by this exemption, and the divergent views of courts in the application of these precedents. This Note shows how the conflicting interests of private individuals and the general public came into play in the Blethen decision, and how the Law Court balanced these interests in reaching its decision to release the records. After examining the conclusions reached by the various opinions in the case, this Note concludes that the Law Court reached the right decision in releasing the records and declining to adopt a more rigorous test for public interest. However, the court failed to craft a redaction standard that would adequately ensure, in future cases, that any personal privacy interests of those named in such records would be protected from unwarranted public disclosure.

II. HISTORY OF MAINE'S FOAA AND THE FEDERAL FOIA

Maine's original freedom of information act was passed in 1959 and was commonly known as the Right to Know Act. 8 Under this act, access to public records in Maine was expansive and included only limited statutory exceptions to disclosure. 9 However, in 1975, the Right to Know Act was drastically amended; the result was the first version of Maine's current Freedom of Access Act (FOAA). 10 The FOAA contains a declaration of the public policy behind the act as well as rules of construction. 11 The first section of the FOAA provides:

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly . . . . This [Act] shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent. 12

In addition, the FOAA also provides that "[e]xcept as otherwise provided by statute, every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record." 13 These sections of the FOAA establish a presumption in favor of disclosure of public records,
with the burden of establishing that a document fits within an exception to disclosure falling upon the agency seeking to withhold the information. The FOAA therefore recognizes that a democracy functions best when the general public is informed about the actions of its government.\textsuperscript{14}

However, since its enactment, it has become clear that this right to view government records under the FOAA is not absolute. There are more than one hundred statutory exceptions to disclosure found within either the FOAA itself or within state statutes that designate specific records confidential.\textsuperscript{15} In light of the liberal rules of construction contained in the first section of the Act, however, Maine courts have acknowledged that any exceptions to disclosure must be interpreted narrowly in order to further the Act’s policy of disclosure.\textsuperscript{16}

The first Federal Freedom of Information Act (FOIA) was passed on July 4, 1966, seven years after Maine’s Right to Know Act.\textsuperscript{17} Although the FOIA does not contain a broad statement of legislative intent, the legislative history of the Act is replete with statements exalting “a broad policy of full disclosure based on American democratic theory and a philosophy of open government.”\textsuperscript{18} Therefore, like the FOAA, the FOIA favors disclosure of public records. However, the original 1966 FOIA was extremely weak and “might almost have [been] written off as a paper tiger” had it not been strengthened by later amendments.\textsuperscript{19}

In 1974, in the wake of the Watergate scandal,\textsuperscript{20} Congress made three substantial changes to the FOIA meant to allow citizens greater access to government records.\textsuperscript{21}


\textsuperscript{15} Lucey, supra note 8, at 169. The Maine Freedom of Access Act provides that the term “public records,” and hence the Act itself, does not apply to any “[r]ecords that have been designated confidential by statute.” ME. REV. STAT. ANN. tit. 1, § 402(3)(A) (Supp. 2005).

\textsuperscript{16} See Moffett v. Portland, 400 A.2d 340, 348 (Me. 1979) (“[A] corollary to such liberal construction of the [FOAA] is necessarily a strict construction of any exceptions to the required public disclosure.”). See also Guy Gannet Publ’g Co. v. Univ. of Me., 555 A.2d 470, 471 (Me. 1989) (citing the Moffett rule); Bangor Publ’g Co. v. City of Bangor, 544 A.2d 733, 736 (Me. 1988) (same); Wiggins v. McDevitt, 473 A.2d 420, 423 (Me. 1984) (same).


\textsuperscript{18} Martin E. Halstuk & Charles N. Davis, The Public Interest be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation, 54 ADMIN. L. REV. 983, 991 (2002). See also Wald, supra note 14, at 652 (“A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty.” (quoting Edward V. Long, 110 Cong. Rec. 17087 (1964))).

\textsuperscript{19} Wald, supra note 14, at 658.

\textsuperscript{20} Id. at 659. The Watergate scandal exposed high-level government cover-ups, covert activities and numerous invocations by President Nixon of the executive privilege, all resulting in public indignation against secrecy in government. Id. As a result, “Watergate created a vacuum into which demands for FOIA reform flooded.” Id.

Most notable was the change to the investigatory record exemption.\(^{22}\) Whereas the earlier version of the FOIA provided that the prohibition against release of investigatory records was all but absolute,\(^{23}\) the 1974 FOIA provided that the exemption applied only when certain harmful consequences, such as an unwarranted invasion of personal privacy, would result from disclosure.\(^{24}\) The amended FOIA resulted in a flood of FOIA demands upon government, and the accrual of resultant costs, leading Antonin Scalia to call the Act "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored."\(^{25}\) However, although Congress has sought to make government records more accessible with these later amendments to the FOIA, the Act is still full of oft-invoked exemptions to disclosure.\(^{26}\)

Both the FOAA and the FOIA were passed with the broad acknowledgement that, in a democracy, the public must have the right to examine the activities of its government and hold it accountable.\(^{27}\) However, such broad disclosure of government activities was not meant to interfere with the equally fundamental right of private citizens to their personal privacy.\(^{28}\) It is in light of this tension that all FOAA and FOIA cases must be decided.

### III. PERSONAL PRIVACY EXEMPTIONS AND THE CENTRAL PURPOSE DOCTRINE

#### A. The Personal Privacy Exemptions of the FOAA and FOIA and the Reporters Committee Case

Both the FOAA and the FOIA contain provisions exempting from disclosure records held by a law enforcement agency where disclosure might constitute an unwarranted invasion of personal privacy.\(^{29}\) The Federal Act's personal privacy

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22. \textit{Id.} Investigatory records are defined in the FOIA as "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7) (2000).

23. Freedom of Information Act, Pub. L. No. 90-23, 81 Stat. 55 (1967). This amendment to the 1966 version of the FOIA specified that the Act did not apply to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

24. \textit{Id.} § 552(b)(7). The two other amendments passed in 1974 imposed mandatory time limits of ten to thirty days upon agencies to respond to FOIA requests and authorized courts to review the propriety of the classification of documents by government agencies and to review such documents in camera when making this determination. Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974).


26. \textit{See, e.g., id.} at 679 n.124 (discussing the "convoluted history" of Exemption 3, which allows other statutes to trump FOIA's policy of disclosure under certain circumstances).

27. \textit{See Federal Freedom of Information Act's bill-signing statement of President Lyndon B. Johnson on July 4, 1966, quoted in H.R. REP. NO. 92-1419, 92d Cong., 2d Sess., pt. 1 at 1 ("[A] democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest."). Like the FOIA, Maine's FOAA was “intended to address the public’s right to hold the government accountable." Blethen Maine Newspapers, Inc. v. State, 2005 ME 56, ¶ 31, 871 A.2d 523, 533 (citing ME. REV. STAT. ANN. tit. 1, § 401 (1989)).

28. \textit{See U.S. Dep't of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772 (stating that the purpose of the FOIA is “not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct").}

exemption provides that the disclosure rules do not apply to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." The Maine counterpart to this exemption is found in the Maine Criminal History Record Information Act (Criminal Record Act), which provides, in pertinent part:

Reports or records that contain intelligence and investigative information and that are prepared by, prepared at the direction of or kept in the custody of . . . the Department of the Attorney General . . . are confidential and may not be disseminated if there is a reasonable possibility that public release or inspection of the reports or records would: . . . C. Constitute an unwarranted invasion of personal privacy.

Exactly what constitutes an unwarranted invasion of privacy lies at the heart of all cases addressing the privacy exemptions of both the Maine and Federal Acts. Maine courts have acknowledged that where a provision of the FOAA contains the same or similar language as a provision in the FOIA, such as the personal privacy exemption, Maine courts should use the framework laid down by Federal case law on the subject. Accordingly, an examination of Federal case law interpreting the personal privacy exemption is necessary prior to an examination of the Blethen decision.

The landmark Supreme Court case addressing the personal privacy exemption of the FOIA (Exemption 7(C)) is United States Department of Justice v. Reporters Committee for Freedom of the Press. In this case, a CBS news correspondent and the Reporters Committee for Freedom of the Press requested disclosure by the FBI of the criminal identification records, commonly known as "rap sheets," of members of a notorious organized crime family, the Medicos. The FBI originally denied the requests, but then released the rap sheets of the three deceased members of the Medico

31. ME. REV. STAT. ANN. tit. 16, § 614(1)(C) (1989). The privacy exemption of the Criminal History Record Information Act is applicable to the FOAA based upon 1 M.R.S.A. § 402(3)(A), the confidential records exemption to disclosure. See supra note 15.
34. Criminal identification records compiled by the FBI include "certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject." Id. at 752. The Court further explained that because of the volume of these records, they often contain incorrect or incomplete information. Id.
35. Id. at 757. The Medicos operated Medico Industries, an allegedly legitimate Pennsylvania business dominated by organized crime figures. Id. The reporters sought disclosure of information concerning the Medicos, including their rap sheets, as part of an investigation of allegations of corruption against former Pennsylvania Congressman Daniel J. Flood. Halstuk & Davis, supra note 18, at 988. Specifically, the journalists believed that Medico Industries obtained a number of defense contracts in exchange for illegal political contributions they allegedly gave to Representative Flood. Id. Representative Flood eventually resigned from office while under indictment in 1980, pleaded guilty to conspiracy to violate federal campaign laws, and was convicted of conspiracy to solicit campaign contributions from persons seeking federal government contracts. Id.
family. However, the FBI declined to release information pertaining to Charles Medico because he was still alive and the Bureau believed that disclosure of his rap sheet was not required under the FOIA because it would constitute an unwarranted invasion of personal privacy.

In upholding the FBI's conclusion that dissemination of Medico's rap sheet would constitute an unwarranted invasion of personal privacy, the Court enunciated a number of guidelines that continue to be the bedrock of case law interpreting Exemption 7(C). First, in response to the Reporters Committee's argument that prior public disclosure of the information in the records extinguished any privacy right Medico had in the information, the Court made a distinction between scattered disclosure of the individual bits of information that make up an FBI rap sheet and disclosure of an FBI rap sheet as a whole. Although bits of information concerning a private individual's criminal history may have, at one time, been public, they usually cease to be "freely available" shortly thereafter. The Court therefore concluded that the FOIA was not intended to transform government agencies into "clearinghouses" of information about private citizens, and to hold that disclosure of government compilations of information about private citizens such as rap sheets was warranted in this case would do just that.

Next, the Court articulated a simple, yet enduring, balancing test to determine whether disclosure of the records was warranted. The Court found that application of Exemption 7(C) required it to "balance the privacy interest in maintaining ... the 'practical obscurity' of the rap sheets against the public interest in their release." Only when the public interest in disclosure of such records outweights the privacy interests of individuals would disclosure be warranted.

In working through this balancing test, the Court laid down three principles that have been used by federal courts ever since to evaluate whether disclosure of records falling under the Exemption 7(C) is warranted. First, "whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" Second, the Court explained:

[W]hen the subject of a [record] is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the

37. See Halstuk & Davis, supra note 18, at 988 (citing Reporters Comm., 489 U.S. at 757).
39. Id. at 764.
40. Id.
41. See id.
42. Id. at 762.
43. Id. The term "practical obscurity" refers to the Court's view that despite the fact that the individual pieces of information that make up a rap sheet may all be available to the public, the process of tracking all such information down and compiling it often would have been extremely difficult. See id. at 764.
44. Id. at 772-80. See Christopher P. Beall, The Exaltation of Privacy Doctrines Over Public Information Law, 45 DUKE L.J. 1249, 1255 (1996); Fred H. Cate et al., The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act, 46 ADMIN. L. REV. 41, 44-45 (1994); Halstuk & Davis, supra note 18, at 987.
45. Reporters Comm., 489 U.S. at 772 (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976)).
Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.\textsuperscript{46} Finally, the Court held that, "as a categorical matter," when a request does not seek information about the actions of a government agency but only records that the government happens to be storing that pertain to private individuals, the invasion of privacy is unwarranted.\textsuperscript{47} Thus, in Reporters Committee, because the journalists were not seeking information pertaining to government action, but only information about a private citizen, release of Medico's rap sheet would clearly constitute an unwarranted invasion of privacy.\textsuperscript{48}

B. The Central Purpose Doctrine

The three principles established in Reporters Committee addressing when disclosure is warranted gave rise to what is now known as the "central purpose doctrine."\textsuperscript{49} This doctrine has become a "unifying ideology" for courts in interpreting the FOIA and has come to stand for the proposition that the FOIA is meant to protect citizens' rights to know "what their government is up to," in order to find out whether their government is acting according to their wishes.\textsuperscript{50} However, according to Reporters Committee, the Act was not meant to include the right of a citizen to gain access to information about private individuals that just happens to be in government files.\textsuperscript{51} In other words, the Act should be viewed as a means to an end, but not an end itself.\textsuperscript{52} Although some scholars argue for a broader applicability,\textsuperscript{53} the central purpose doctrine has only been applied in cases addressing the two personal privacy exemptions of the FOIA: Exemption 7(C) and Exemption 6, which provides an exemption from disclosure for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."\textsuperscript{54}

\textsuperscript{46.} Id. at 780.
\textsuperscript{47.} Id.
\textsuperscript{48.} Id.
\textsuperscript{49.} For a detailed discussion of how the Reporters Committee case gave rise to the "central purpose doctrine" and its resultant effects, see Beall, supra note 44. Beall explains that although the Court in Reporters Committee never specifically identified the doctrine by this name, it did intend that the three principles outlined in the opinion were meant to be "a way of interpreting the asserted congressional intentions underlying the FOIA." Id. at 1255.
\textsuperscript{50.} Id. at 1255, 1258.
\textsuperscript{51.} Reporters Comm., 489 U.S. at 765.
\textsuperscript{52.} Beall, supra note 44, at 1258.
\textsuperscript{53.} Compare Cate et al., supra note 44, at 45-46 (arguing that the central purpose analysis should be extended to all records held by the government and thus only those records that would serve the central purpose of the FOIA should ever be subject to disclosure under the act), with Beall, supra note 44, at 1262 (arguing that expanding the central purpose doctrine to areas outside of the privacy exemptions "would work a dramatic volte face from the principles of FOIA, improperly shifting the Act from one that favors disclosure to one that favors secrecy"), and Halstuk & Davis, supra note 18, at 1024 (indicating that use by lower courts of the central purpose doctrine in contexts other than the privacy exemptions circumvents the legislative intent of presumptive openness that is the basic principle of the FOIA and "substitutes judicial prerogative for legislative fact-finding").
\textsuperscript{54.} 5 U.S.C. § 552(b)(6) (2000). Subsequent to Reporters Committee, the Supreme Court has noted that the only substantive difference in analysis between Exemption 7(C) and Exemption 6 is that Exemption 6 places a higher burden upon the government in denying disclosure. See, e.g., U. S. Dep't of State v. Ray,
The central purpose doctrine effected a drastic change in the way courts interpreted the FOIA, especially with respect to the personal privacy exemptions. Although the FOIA had previously been regarded as a statute that established a presumption in favor of disclosure of government records, the central purpose doctrine served to reverse the burden of proof in those cases falling under Exemptions 6 and 7(C) of the FOIA, putting it upon the party seeking disclosure of such records.

C. Cases Applying the Central Purpose Doctrine

Subsequent to Reporters Committee, the United States Supreme Court has had three opportunities to revisit, and reaffirm, the applicability of the central purpose doctrine to cases falling under the FOIA’s personal privacy exemptions. In United States Department of State v. Ray, respondents, who were Haitian nationals, sought the release of reports of interviews conducted by State Department personnel with other Haitians who had been involuntarily returned to Haiti by the United States. The reports were released with the names of interviewees and identifying information redacted. In reversing the lower court’s decision that it was improper for the State Department to have redacted identifying information of interviewees in the documents they released, the Supreme Court stated that the FOIA explicitly authorized redaction in such situations where identifying information would not serve to further inform citizens about the operation of government. Thus, redaction was one way that the legislature sought to enable government to “balance the public’s right to know with the private citizen’s right to be secure in his personal affairs which have no bearing or effect on the general public.”

Respondents argued that release of the identifying information of individual interviewees would allow them to pursue additional information that might shed light on government action; thus, the identifying information could be used derivatively to inform citizens about the government’s performance. This, argued respondents,
would increase the public interest in release of the information and bring it more squarely within the central purpose of the FOIA, a contention the Court found unsupportable in this case. Although the Court did not find such an argument compelling in this case, it did not adopt a rigid rule against such a “derivative use” theory to justify the release of the identifying information in such documents.

Similarly, in United States Department of Defense v. Federal Labor Relations Authority, the Supreme Court upheld redaction of employees’ home addresses in reports released by federal employment agencies. In this case, two unions sought the names and addresses of Army, Navy, and Air Force employees in order to contact them as potential union members. According to the Court, release of the addresses would serve only to “allow the unions to communicate more effectively with employees,” but would not provide the unions with information about the actions or performance of the government agency. Thus, because the unions’ request did not advance the central purpose of the FOIA, the employees’ privacy interests in their personal information clearly outweighed the public interest in disclosure of the documents.

The Supreme Court’s most recent decision involving the central purpose doctrine came in National Archives and Records Administration v. Favish, where the Court for the first time addressed whether the personal privacy interest under Exemption 7(C) extended to a decedent’s family members who objected to release of photographs showing the decedent’s body. In Favish, an attorney for Accuracy in Media, Allan Favish, sought release of photographs showing the corpse of Vincent Foster, Jr., deputy counsel to President Clinton, at the scene of his death. Favish was skeptical of the finding by five different government agencies (including the United States Park Police and the FBI) that Foster had committed suicide. The Court first sought to determine, in accordance with Reporters Committee, whether there was even a personal privacy evaluating the personal privacy interest at stake in the case. Id. at 180-81 (Scalia, J., concurring). In so finding, Justice Scalia stated that “it is unavoidable that the focus, in assessing a claim under Exemption 6, must be solely upon what the requested information reveals, not upon what it might lead to.” Id. at 180. Thus, according to Justice Scalia, the majority erred when it failed to reject the derivative use theory on the public-benefits side, but then considered the derivative effects disclosure of identifying information might have on the personal-privacy side. Id. at 181. These derivative effects included the risk that interviewees might face retaliation by the Haitian government if identified, or that their personal privacy may be invaded by further unauthorized requests for interviews. Id. at 176-77. For further discussion of the “derivative use” theory in Exemptions 6 and 7(C) cases and its use or rejection in district court cases, see Beall, supra note 44, at 1264-84.

62. Id. at 178.
63. Id. at 178-79.
65. Id. at 503.
66. Id. at 490 & nn.1-2.
67. Id. at 497.
68. See id. at 497-98.
69. 541 U.S. 157 (2004). Favish was decided prior to the Law Court’s decision in Blethen, but subsequent to the filing of briefs by the parties. Blethen Me. Newspapers, Inc. v. State, 2005 ME 56, ¶ 47, 871 A.2d 523, 537 (Saufley, C.J., concurring). Therefore, the parties did not present arguments addressing the applicability of Favish to the issues in Blethen. Id.
70. Favish, 541 U.S. at 160.
71. Id. at 160-61.
72. Id. at 161.
interest at stake in the case. The Court acknowledged that Foster's family was not seeking to assert the personal privacy right on Foster's behalf; instead, Foster's relatives claimed that the personal privacy Exemption in 7(C) secured their own right to be shielded "from a sensation-seeking culture for their own peace of mind and tranquility." The Court agreed with the family's interpretation of "personal privacy," stating that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."

After finding a personal privacy interest cognizable under Exemption 7(C), the Court proceeded to determine whether Favish's request implicated any significant public interest in disclosure under the FOIA. The Court concluded that it did not. In making this determination, the Court clarified what was required of a requestor in seeking to establish the existence of a public interest cognizable under the FOIA: first, the requestor must show that the public interest to be advanced was more specific and important than just general public interest or curiosity in a matter, and second, the requestor must show that the information is likely to advance that interest. The Court declined to list the reasons that would suffice to meet the first standard, but did state that where the facts were similar to those of Pavish, "the justification most likely to satisfy Exemption 7(C)'s public interest requirement is that the information is necessary to show the investigative agency . . . acted negligently or otherwise improperly in the performance of their duties." The Court then held that where this was the justification for release of information, the requestor would need to "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." To hold otherwise would render Exemption 7(C) "nothing more than a rule of pleading."

Pavish therefore clarified two issues pertaining to Exemption 7(C) that had previously been unclear from or unaddressed by earlier cases. First, it established that family members of deceased individuals named in government records could assert a privacy interest under Exemption 7(C). Second, it explicitly outlined what was required of a requestor to establish a public interest in disclosure.

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73. Id. at 164.
74. Id. at 166.
75. Id. at 168.
76. Id. at 172.
77. Id. at 175.
78. Id. at 172. The Court explained that usually, when information is requested by citizens pursuant to the FOIA, they need not articulate a reason for disclosure. Id. However, when information falls within an exemption such as 7(C), the presumption switches to that of nondisclosure, with the burden now falling upon the requestor to establish a sufficient reason for disclosure. Id.
79. Id. at 172-73. The Court never specifically mentions the central purpose doctrine in its opinion, but this statement reaffirms that doctrine's applicability. Specifically, where a citizen requests disclosure of information by the government under the FOIA, that information should serve the central purpose of the FOIA as articulated in Reporters Committee: it should shed light on government activity and should not simply reveal information about private citizens held by government agencies. See supra Part III.B.
81. Id. at 174.
82. Id. at 170.
required of a requestor seeking disclosure of records falling under Exemption 7(C): a complaint containing clear evidence that the records requested would directly reveal government conduct of interest to the public for more than just mere curiosity's sake. 83 Only after the requestor had made this affirmative showing would application of the balancing test established in the Reporters Committee case be triggered. 84 However, a number of issues were left unclear by Favish as well. First, the Court was not required to address what steps short of complete nondisclosure of the records, such as redaction, would be sufficient to protect the privacy interests of family members of deceased individuals. 85 Further, the Court declined to address whether anything short of an allegation of government misconduct would suffice as a public interest warranting disclosure under Exemption 7(C). 86 Finally, the Court did not consider the likelihood that future requestors would be able to successfully clear the evidentiary hurdle established by the Court in Favish, especially in cases where the only clear evidence of government misconduct was the requested documents themselves. 87

In addition to this line of Supreme Court decisions, numerous federal district courts have, in the years since Reporters Committee, applied and expounded on the principles outlined in that case. 88 For the most part, district courts have interpreted and applied the central purpose doctrine as a tool for preventing disclosure, requiring evidence that release of the documents will directly reveal government misconduct in order to find that release is warranted. 89 However, a limited few have found that the central purpose doctrine can be used to compel disclosure. 90 In so doing, these courts have argued that release of certain records containing information about private citizens may nevertheless allow individuals to determine whether government has acted properly, thus endorsing the derivative use theory discussed in Ray. 91 In other words,

83. Id. at 174-75.
84. Id.
85. The Court did not address this issue because it found that Favish had not proffered any credible evidence of government misconduct, and therefore held the records to be exempt from disclosure solely for this reason. Id. at 175.
86. Id. at 172-73.
87. Id. The only guidance the Court gave on this point was its statement that "[a]llegations of government misconduct are 'easy to allege and hard to disprove,' so courts must insist on a meaningful evidentiary showing." Id. (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998)).
88. See Halstuk & Davis, supra note 18, at 996 n.76 (collecting cases); see, e.g., Sheet Metal Workers Int'l Ass'n, Local 19 v. U.S. Dep't of Veteran Affairs, 135 F.3d 891 (3d Cir. 1998); Kimberlin v. U.S. Dep't of Justice, 139 F.3d 944 (D.C. Cir. 1998); McQueen v. United States, 179 F.R.D. 522 (S.D. Tex. 1998); Ligomen v. Reno, 2 F. Supp. 2d 400 (S.D.N.Y. 1998); Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury, 981 F. Supp. 20 (D.D.C. Cir. 1997); Sheet Metal Workers Int'l Ass'n, Local 9 v. U.S. Air Force, 63 F.3d 994 (10th Cir. 1995); Manna v. U.S. Dep't of Justice, 51 F.3d 1158 (3d Cir. 1994); Exner v. U.S. Dep't of Justice, 902 F. Supp. 240 (D.D.C. 1995); Jones v. FBI, 41 F.3d 238 (6th Cir. 1994); U.S. Dep't of the Navy v. Fed. Labor Relations Auth., 975 F.2d 348 (7th Cir. 1992); Hunt v. FBI, 972 F.2d 286 (9th Cir. 1992); Hale v. U.S. Dep't of Justice, 973 F.2d 894 (10th Cir. 1992).
89. Beall, supra note 44, at 1280.
90. Id.
91. Id.; see Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 812 (9th Cir. 1995) (holding that release of FBI investigation records without redacting names of investigation subjects might make it possible to determine whether FBI acted improperly); Detroit Free Press, Inc. v. U.S. Dep't of Justice, 73 F.3d 93, 98 (6th Cir. 1996) (arguing that release of a mug shot "can more clearly reveal the government's glaring error in detaining the wrong person for an offense" than can a written record and thus finding that the requested mug shots should be released).
this minority of courts has not found that the information itself must be sought to reveal government misconduct, but rather that the records might contain information that could lead to such a conclusion. Such a view has found little favor in most courts.

Despite this extensive case law under the FOIA, prior to the *Blethen* case, courts in Maine had yet to address whether the central purpose doctrine was applicable to cases falling under the FOAA’s own personal privacy exemption. Only in limited circumstances had Maine even addressed, albeit indirectly, whether personal privacy interests could ever trump the FOAA’s policy favoring disclosure.92

IV. THE BLETHEN DECISION

In *Blethen Maine Newspapers, Inc. v. State*,93 Blethen, the publisher of several Maine newspapers, sought judicial review of the decision by the state Attorney General, G. Steven Rowe, not to release records pertaining to his investigation of alleged sexual abuse by eighteen deceased priests.94 In June 2002, Blethen filed a request, pursuant to the FOAA to view these records.95 The Attorney General denied the request, concluding that the records were designated confidential under the Maine Criminal History Record Information Act (Criminal Record Act) because they would both “[i]nterfere with law enforcement proceedings” and “[c]onstitute an unwarranted invasion of personal privacy.”96 Therefore, the Attorney General concluded that the records Blethen sought were exempt from disclosure under the FOAA.97

Blethen subsequently appealed to the Maine Superior Court (Kennebec County, Studstrup, J.),98 which agreed with the Attorney General’s argument that “release of these documents would interfere with law enforcement” because the Attorney General’s office had only had the documents for a short period of time and investigation into the records was ongoing.99 However, the court declined to address the Attorney General’s second contention under the Criminal Record Act that the records constituted an “unwarranted invasion of privacy.”100 The Superior Court retained jurisdiction of the matter and entered an order providing for reexamination of the status

92. See Guy Gannett Publ’g Co. v. Univ. of Me., 555 A.2d 470, 471 (Me. 1989) (addressing ME. REV. STAT. ANN. tit. 5 § 7070Q(A)(2002), a statute designating confidential medical files of public employees, thus exempting such information from disclosure under the FOAA).


94. Id. ¶ 2, 871 A.2d at 525. The records at issue in this case were handed over to Attorney General Rowe in May 2002 by the Roman Catholic Diocese of Portland. Kevin Wack, *Paper Prevails in Lawsuit Over Priests’ Names*, PORTLAND PRESS HERALD, Apr. 23, 2005, at A1. The Diocese had been collecting allegations of abuse against priests and other clergy members for seventy-five years, but in most cases had never reported these allegations to the Attorney General. Gregory D. Kesich, *Court Questions Ruling on Abuse Records*, PORTLAND PRESS HERALD, May 14, 2004, at B1.


96. Id. ¶ 5, 871 A.2d at 526 (applying ME. REV. STAT. ANN. tit. 16, § 614(A), (C) (2006)). See supra text accompanying note 31.

97. Id.


99. Id. at *1. Although it appeared from the records that all the priests named were deceased, and thus could not be prosecuted, the Attorney General explained that information in the records could possibly lead to viable prosecutions or influence an ongoing investigation. Id.

100. Id.
of the documents for law enforcement purposes six months from the date of the order to determine whether the investigation was still ongoing.\textsuperscript{101} Although the Superior Court declined to decide whether release of the documents would constitute an unwarranted invasion of privacy, the court did note that a decision on that point was inevitable.\textsuperscript{102} The court acknowledged that the decision would rest on a balancing test which would weigh the privacy interests of the victims and perpetrators against the public’s right to be informed.\textsuperscript{103} The court also acknowledged that the question of whose privacy interests were at stake was a complicated one, as case law was not entirely clear on whether privacy rights are extinguished upon death.\textsuperscript{104}

Subsequently, the Attorney General reported to the Superior Court that disclosure of the records would no longer negatively affect the investigations.\textsuperscript{105} Thus, the parties turned their attention to the personal privacy exemption issue that the court had not reached in its earlier decision: whether release of the records would constitute an “unwarranted invasion of personal privacy” under the Criminal Record Act.\textsuperscript{106} After a nontestimonial hearing, the Superior Court concluded that the records should be fully disclosed.\textsuperscript{107} The State appealed to the Maine Law Court, which affirmed the lower court’s judgment to the extent that it ordered disclosure of the records, but vacated the lower court’s decision not to redact the names and identifying information of the witnesses and victims contained in the records.\textsuperscript{108} The court expressly held, however, that the names of the deceased priests were not to be redacted.\textsuperscript{109}

On appeal, the State argued that there was clearly “a reasonable possibility’ that disclosure of [the records] would result ‘in an unwarranted invasion of personal privacy’ of both the victims, their families and other witnesses\textsuperscript{110} and the alleged perpetrators.\textsuperscript{111} The State asserted that the applicable federal case law on the subject of the FOIA’s personal privacy exemption established that persons involved in investigations have a substantial privacy interest in their involvement remaining confidential, “even if they are not the subject of the investigation.”\textsuperscript{112} Further, the State argued that where an investigation does not result in a public prosecution, the targets of that investigation retain a privacy interest in the records remaining confidential, which interest can extend after death.\textsuperscript{113}

The State also argued that the privacy interest encompassed by the Criminal Record Act extends to close family members of deceased individuals whose names

\begin{thebibliography}{113}
\bibitem{} Id. at *2.
\bibitem{} Id. at *1.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} Id. ¶ 40, 871 A.2d at 535.
\bibitem{} Id. ¶ 2, 698 A.2d at 535.
\bibitem{} Id.
\bibitem{} Brief of Appellants at 5-6, Blethen Me. Newspapers, Inc. v. State, 2005 ME 56, 871 A.2d 523 (No. KEN-03-697).
\bibitem{} Id. at 12.
\bibitem{} Id. at 8 (quoting Davis v. U.S. Dep’t of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992)).
\bibitem{} Id. at 13-14 (citing Campbell v. U.S. Dep’t of Justice, 164 F.2d 20, 33-34 (D.C. Cir. 1998)).
\end{thebibliography}
appear in government files. Therefore, the State argued that the release of the reports containing the identities of the deceased priests accused of child sexual abuse would be an unwarranted invasion of both the deceased priests' and their family members' personal privacy rights.

The State finally argued that the court below had erred in its application of the FOAA balancing test as articulated in the Reporters Committee case, in that it misconstrued the public policy goals behind the FOAA. The State contended that the lower court was misguided in its belief that the Catholic Church and the general public had an interest in learning how the Diocese dealt with the allegations of child sexual abuse and how to prevent similar incidents in the future, and that such interests substantially outweighed any privacy right of named individuals. Instead, the State maintained that the public policy behind Maine's FOAA, like the federal FOIA, focused "on the citizens' right to be informed with 'what their government is up to,'" and that such a policy was not furthered by "disclosure of information about private citizens that has accumulated in various governmental files but reveals nothing about an agency's own conduct." Because Blethen was not claiming any misconduct or mismanagement on the part of law enforcement officials or the Attorney General's office, the public policy concern was not as strong as the lower court had found, and was thus unable to outweigh the personal privacy concerns of the victims, witnesses, alleged perpetrators, and their families.

Blethen, on appeal, argued that based upon the FOAA's underlying public policy and liberal rules of construction, exceptions to disclosure are to be interpreted narrowly. Thus, interpretation of "personal privacy" by the Court required a narrow reading falling within traditional notions of the concept. Blethen contended that under Maine law, personal privacy had been interpreted according to the standard for the invasion of that right as outlined in the Restatement (Second) of Torts, which provides that "an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded," and not "by other persons such as members of the individual's family." Blethen maintained that the Legislature could not have intended to expand the common law meaning of personal privacy when it used that term in the Criminal Record Act. Thus, Blethen argued that a deceased person has no

114. Id. at 14. (citing Favish v. Office of Indep. Counsel, 217 F.3d 1168, 1173 (9th Cir. 2000), rev'd sub nom. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 1057 (2004)) ("[T]he personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love.").
115. Id. at 15.
116. Id. at 15-16. For an explanation of the Reporters Committee balancing test, see supra text accompanying notes 42-48.
117. Id. at 15.
118. Id. at 16 (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)).
119. Id. at 17.
121. Id. at 7-8 (citing Doe v. Dep't of Mental Health, 1997 ME 195, ¶ 12, 699 A.2d 422, and Guy Gannett Publ'g Co. v. Univ. of Maine, 55 A.2d 470, 471 (Me. 1989)).
122. Id. at 8.
123. Id. at 9 (quoting RESTATEMENT (SECOND) OF TORTS § 625(1) cmt. a (1977)).
right to personal privacy, nor can such an invasion be claimed on his behalf by family members.\textsuperscript{124} Blethen also cited authority from other jurisdictions similarly holding that one's personal privacy interest is eliminated or at least greatly diminished by death.\textsuperscript{125}

Blethen argued that, in light of the extinguished or greatly reduced interest that a deceased person has in his personal privacy rights, as well as the long-standing concept that right could not be asserted by family members, any such personal privacy interest was greatly outweighed by the overwhelming interests in public disclosure.\textsuperscript{126} In contrast to the State's argument that there was no compelling public interest within the meaning of the FOAA, Blethen contended that the public's "interest in knowing the extent to which information regarding alleged abusers was disclosed to the State, the nature of the State's knowledge, the State's investigation, and the record on which the State based the conclusions reached in its Report" far outweighed any existing privacy interest.\textsuperscript{127} Blethen did not specifically allege that it sought information that might reveal government misconduct; however, this failure was most likely due to the fact that \textit{Favish} was decided subsequent to the filing of briefs by the parties in \textit{Blethen}.\textsuperscript{128} Instead, Blethen contended that a "public accounting" of the abuse scandal, including a release of the names of those accused and what was done about the accusations, would provide victims with some amount of vindication and closure and could encourage other victims to come forward.\textsuperscript{129} Thus, Blethen concluded that because of these compelling public interests, the lower court correctly applied the FOAA balancing test. Blethen argued in the alternative that, should the Law Court find that any of the information contained in the records was exempt from disclosure under the personal privacy exemption of the Criminal Record Act, that information should be appropriately redacted allowing the remainder to be disclosed to the public.\textsuperscript{130} The majority in the \textit{Blethen} decision considered three factors in reaching its decision: "(1) the personal privacy interests of the alleged victims, witnesses, and deceased priests in maintaining the confidentiality of the records sought by Blethen; (2) the public interest supporting disclosure of the records; and (3) the balancing of the private and public interests."\textsuperscript{131} Citing \textit{Reporters Committee},\textsuperscript{132} and \textit{U.S. Department of Defense v. Federal Labor Relations Authority},\textsuperscript{133} the court found that the personal privacy concerns of the Criminal Record Act included an individual's interest in avoiding public disclosure of personal matters as well as an interest in controlling how

\begin{itemize}
  \item \textsuperscript{124} \textit{Id.} at 9-11.
  \item \textsuperscript{126} \textit{Id.} at 14.
  \item \textsuperscript{127} \textit{Id.} at 15.
  \item \textsuperscript{128} See \textit{Blethen Me. Newspapers, Inc. v. State}, 2005 ME 56, ¶ 47, 871 A.2d 523, 537 (Saufley, C.J., concurring).
  \item \textsuperscript{129} Brief of Appellee, \textit{supra} note 120, at 16-17.
  \item \textsuperscript{130} \textit{Id.} at 25.
  \item \textsuperscript{131} \textit{Blethen}, 2005 ME 56, ¶ 14, 871 A.2d at 529.
  \item \textsuperscript{132} 489 U.S. 749 (1989).
  \item \textsuperscript{133} 510 U.S. 487 (1994).
\end{itemize}
personal information is disseminated to the public. In considering the privacy interests of the living persons (victims and witnesses) contained in the records, the court reasoned that although many names had already been disclosed and none of the information was obtained under the protection of the confessional or in another manner that would lead the disseminator to have an expectation of complete confidentiality, all personal privacy interests had not been extinguished. The court further acknowledged that where private individuals are named in a criminal investigation report, “the privacy interest protected by the privacy exception is at its apex.”

As for the privacy interests of the deceased priests and their family members, the court acknowledged that it had “not previously considered whether the privacy interests protected by the Criminal History Record Information Act continue after a person’s death.” The court noted, however, that the two federal circuit courts of appeal that had considered the question had reached conflicting conclusions. The court then acknowledged that *Favish* had very recently settled the dispute between the circuits by establishing that family members could assert their own privacy interests in information about deceased relatives. In evaluating the continuing privacy interests of both the deceased priests and their living family members, the court concluded that “[o]ur in camera inspection of the records reveals that the passage of time has substantially dissipated or extinguished the privacy interests of the deceased priests, if any, and of their relatives.” Concluding that because the length of time from both the alleged misconduct and the deaths of the priests was measured in decades, “any residual privacy interests of the deceased priests and their immediate family members in this case are, at most, minimal.” The court further emphasized that the unique cultural interests implicated by grieving family members, which was central to the holding in *Favish*, was not present here, and thus the court was not bound to find that the priests’ family members retained a strong privacy interest in the records remaining confidential so many years after the deaths of the priests.

In examining the public interest in disclosure of the records, the court used the central purpose doctrine developed in *Reporters Committee*. Under the central purpose doctrine, and mindful of the liberal construction to be given the FOAA, the court found that the public’s interest in understanding the Attorney General’s decision not to bring criminal charges during his investigation of child sexual abuse by priests was encompassed by the “central purpose” of the FOAA. In so doing, the court

135. *Id.*, ¶¶ 19-21, 871 A.2d at 530.
136. *Id.*, ¶ 15, 871 A.2d at 529.
137. *Id.*, ¶ 23, 871 A.2d at 531.
138. *Id.* (Comparing *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 33 (D.C. Cir. 1998) (concluding that deceased persons do have residual reputation and family-related privacy interests) with *McDonnell v. United States*, 4 F.3d 1227, 1261 (3d Cir. 1993) (concluding that deceased persons have “no privacy interest subject to invasion by disclosure”)).
140. *Id.*, ¶ 24, 871 A.2d at 531.
141. *Id.*, ¶¶ 24, 25, 871 A.2d at 531-32.
142. *Id.*, ¶ 31, 871 A.2d at 533.
143. *Id.*, ¶ 28, 871 A.2d at 532.
144. *Id.*, ¶ 32, 871 A.2d at 533.
expressly declined to find that the holding in Favish was applicable to the facts of this case, stating that “[t]here is . . . no basis in the text of the FOAA or the public policy it implements to cause us to engraft Favish’s requirement of evidentiary proof of governmental impropriety to justify the public disclosure of photographic images of a corpse onto a request for written investigative files.” Further, the court emphasized that the FOAA was to “be liberally construed and applied” to promote its underlying policy of providing the public with information about what its government is up to, and “[a]bsent the unique cultural and familial interests confronted in Favish, the public’s interest in knowing what its government is up to encompasses a broader universe of concerns than simply the possibility of governmental wrongdoing.” The court therefore concluded that Blethen’s request would further a substantial public interest, falling within the central purpose of the FOAA, and thus would warrant any resultant invasion of personal privacy.

The final step taken by the court was to balance the private and public interests it had found in the case. The court found that the privacy interests of the deceased priests and their families were minimal at most, but that the other individuals named in the reports retained a substantial privacy interest in nondisclosure. In an effort to protect this interest, the court determined that all the identifying information of the other private individuals could be effectively redacted from the records, thus greatly reducing these individuals’ privacy interests. The court concluded that once this redaction had been accomplished, the substantial public interest in disclosure would outweigh any remaining personal privacy interests.

Chief Justice Saufley concurred, agreeing with the result reached by the court in the majority opinion, but specifically disagreeing with the majority’s refusal to apply the evidentiary requirements crafted by the Supreme Court in Favish. Instead, under Chief Justice Saufley’s assessment, Favish had set out the correct standard for the treatment of requests for investigatory records under both the FOIA and the FOAA: there should be a “prohibition on their release unless there are allegations and evidence of government misconduct that warrant disclosure of the information.” In failing to apply Favish, the concurrence argued that the court had improperly minimized the historic distinction between general public records and criminal investigation records. Chief Justice Saufley emphasized that the Legislature did not intend that investigatory records were to be presumed accessible to the public under Maine’s FOAA, as most other governmental records are.

Therefore, according to the concurrence, the real issue in the case was whether Blethen had asserted a “credible allegation of governmental misconduct” on the part

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145. Id. ¶ 31, 871 A.2d at 533.
146. Id. ¶ 32, 871 A.2d at 533-34.
147. Id. ¶ 35, 871 A.2d at 534.
148. Id. ¶ 36, 871 A.2d at 534.
149. Id. ¶ 36, 871 A.2d at 534-35.
150. Id. ¶ 37, 871 A.2d at 535.
151. Id. ¶ 40, 871 A.2d at 535.
152. Id. ¶ 41, 871 A.2d at 536 (Saufley, C.J., concurring).
153. Id. ¶ 45, 871 A.2d at 536.
154. Id. ¶ 42, 871 A.2d at 536.
155. Id. ¶ 43, 871 A.2d at 535.
of the Attorney General for not pursuing criminal prosecution of the alleged perpetra­tors because under the Favish standard, the party urging disclosure must make a good faith allegation of governmental misconduct supported by evidence.\textsuperscript{156} Although the concurrence acknowledged that Blethen had not specifically articulated such an allegation in its complaint and briefs, it concluded that "the serious allegations of child sexual abuse, involving many children, made or alleged to have occurred over decades, without prosecution, is equivalent to an allegation of governmental misconduct in the present case."\textsuperscript{157}

In so finding, the concurrence explained that because of the unique factual circumstances of the case, such as the number of alleged victims and perpetrators and the fact that all the priests named in the reports were deceased, this case "pose[d] special circumstances warranting greater flexibility in applying the FOAA analysis."\textsuperscript{158} Chief Justice Saufley therefore found application of the Exemption 7(C) balancing test appropriate in this case based on her view that Blethen had made a de facto assertion of governmental misconduct and because of the unique circumstances of the case. In working through this balancing test, the concurrence concluded that after redaction of all identifying information of witnesses and alleged victims, the public’s interest in the records outweighed any remaining privacy interests.\textsuperscript{159} The concurrence did emphasize, however, that the unique facts of the case meant that the court’s holding had limited precedential force and would therefore not have a "chilling effect" on future prosecutorial investigations.\textsuperscript{160} It therefore appears that Chief Justice Saufley believed Blethen had complied with the Favish evidentiary requirements implicitly, but not explicitly, most likely as a result of the timing of the decision in Favish.\textsuperscript{161} However, in the future, the concurrence would require faithful compliance with the Favish standards in order for a party to adequately assert a public interest cognizable under the FOAA.\textsuperscript{162}

Justice Clifford’s dissent, joined by Justices Rudman and Alexander, argued that both the majority and the concurrence had dramatically relaxed the standard for when public dissemination of criminal investigative records was warranted.\textsuperscript{163} First, the dissenters emphasized that the language of the Criminal Record Act expressly exempts criminal investigative records from disclosure pursuant to the FOAA as long as there is a "reasonable possibility" that public release will "[c]onstitute an unwarranted invasion of privacy."\textsuperscript{164} Under this statutory framework, the dissenters argued that the majority had erred in its assessment of what personal privacy interests still existed in the information contained in the reports.\textsuperscript{165} Second, the dissenters found that the privacy interests of the witnesses and victims had not been greatly diminished or

\textsuperscript{156} Id. ¶ 47 n.13, 871 A.2d at 537 n.13 (citing Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004)).

\textsuperscript{157} Id. ¶ 47, 871 A.2d at 537.

\textsuperscript{158} Id. ¶ 47 n.13, 871 A.2d at 537 n.13.

\textsuperscript{159} Id. ¶ 48, 871 A.2d at 537.

\textsuperscript{160} Id. ¶ 49, 871 A.2d at 537.

\textsuperscript{161} See supra note 129 and accompanying text.

\textsuperscript{162} See id. ¶¶ 45-46, 871 A.2d at 536-37.

\textsuperscript{163} Id. ¶ 52, 871 A.2d at 538 (Clifford, J., dissenting).

\textsuperscript{164} Id. ¶ 53, 871 A.2d at 538-39 (citing ME. REV. STAT. ANN. tit. 16, § 614(1)(C) (2006)).

\textsuperscript{165} Id. ¶¶ 58-59, 871 A.2d at 540.
extinguished by the passage of time and the manner in which the incidents were reported. Instead, because much of the information contained in the reports had not yet been publicly disclosed and most reports were made to the Diocese and not to prosecutors, thus diminishing the likelihood that the disclosures were made with the expectation of criminal prosecutions, the victims and witnesses whose statements appeared in the reports retained strong personal privacy interests in non-disclosure of this information. Finally, the dissenters also found that the immediate family members of the deceased priests did have residual privacy interests that had been greatly reduced, but not completely extinguished, by the passage of time.

Because of these significant privacy interests, the dissent argued that disclosure of the records was warranted only if there was a "significant public interest" in such disclosure; otherwise, there was no balancing of interests to be done by the court. The dissenters found that no such substantial public interest was present in this case. According to Justice Clifford's dissent, because the central purpose of the FOAA is to serve the public interest in determining governmental impropriety, "disclosure of private information that implicates no wrongdoing on the part of a governmental entity generates insufficient public interest and therefore falls well outside the scope and application of FOAA." Therefore, the dissent felt that the Favish requirements should have been applied to this case; specifically, Blethen should have been required "to produce evidence 'that would warrant a belief by a reasonable person that ... alleged Government impropriety might have occurred.'" The dissent also sought to make it clear that general public interest in a criminal investigation does not fall within the FOAA's central purpose. The dissent therefore concluded that because Blethen did not specifically allege any governmental wrongdoing and because general public curiosity does not meet the significant public interest standard warranting disclosure of private records, the Attorney General should have prevailed.

Finally, the dissent found fault with the majority's decision to redact these names simply because "it [was] neither impractical nor onerous to do so" and because "the public interest [would] not be undermined by the redaction." The dissent aired concerns that such a holding would have serious implications for future police investigations of crimes. Specifically, the dissent feared that leaving the decision to redact the names of witnesses and victims to "the broad discretion of a trial court" to assess how impractical or onerous redaction would be, would have "the effect of deterring the reporting of criminal activity out of fear that, even if prosecution is not

166. Id. ¶ 58, 871 A.2d at 540.
167. Id.
168. Id. ¶ 59, 871 A.2d at 540.
169. Id.
170. Id. ¶ 60, 871 A.2d at 540.
171. Id. ¶ 63, 871 A.2d at 541 (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1999)).
172. See id. ¶ 65, 871 A.2d at 542 (quoting Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004)).
173. Id. ¶ 64, 871 A.2d at 541.
174. Id. ¶¶ 66, 69, 871 A.2d at 542.
175. Id.
176. Id. ¶ 67, 871 A.2d at 542.
initiated, humiliating and embarrassing events in personal lives may be revealed years later. Thus, the court’s decision in this case to redact the names of victims and witnesses was not enough to ensure that the privacy interests of those making such reports in the future would be protected because the standard the majority set for redaction was overly subjective and vague.

In a separate dissent, Justice Alexander emphasized his view that the court’s holding would cause serious changes in practices regarding the confidentiality of criminal investigations. Specifically, Alexander’s dissent urged that the court’s holding implied that whenever a decision not to prosecute is made by the Attorney General, “the ‘public interest’ may be invoked to justify turnover of investigative records to the press, and anyone else who asks.” This release would be made “regardless of the risk of harm or embarrassment to victims, to individuals who may have been wrongly or mistakenly accused, or to witnesses who have reported relevant information.” The dissent therefore concluded that Blethen’s success would, in fact, work against the public interest and deter others from reporting crimes, especially those of sexual abuse, because the protections afforded by court-ordered redaction were “illusory” at best.

V. AN UNEASY BALANCE

None of the approaches utilized by the four opinions in Blethen strike an ideal balance between protecting the privacy interests of victims and alleged perpetrators of sexual abuse crimes and the public’s right to know “what their government is up to.” The majority reached the correct conclusion in this case and came closest to accomplishing this balance, yet its approach risks sending the message that the guarantees of privacy to those reporting sexual abuse crimes are illusory at best.

First, the majority explained that in this case, because the victims voluntarily reported their complaints and were not under the protection of the confessional, they had a reasonable expectation that investigation, and thus disclosure of their identities, would ensue. In light of this, the majority concluded that the victims’ interests in continued privacy were reduced. However, this conclusion failed to recognize that many victims, especially of domestic or sexual abuse, voluntarily report their allegations but do not wish for their identities and status as a victim to become an item of public knowledge. The majority therefore discounts the fact that although a victim who

177. Id. ¶¶ 67-68, 871 A.2d at 542.
178. Id. ¶ 70, 871 A.2d at 542 (Alexander, J., dissenting).
179. Id. ¶ 72, 871 A.2d at 543.
180. Id.
181. Id. ¶ 73, 75, 871 A.2d at 543.
182. See id. ¶ 75, 871 A.2d at 543.
183. Id. ¶¶ 20-21, 871 A.2d at 530 (majority opinion).
184. Id.
185. For an explanation of why protecting the identities of victims of crimes of sexual assault is important, see Kimberly Kelley Blackburn, Identity Protection for Sexual Assault Victims: Exploring Alternatives to the Publication of Private Facts Tort, 55 S.C. L. Rev. 619, 621-22 (2004). The author explains that policies in favor of protecting the identities of victims of sexual assault include the desire to protect victims from further humiliation, sparing victims from the prevalent stigma that they contributed to their attack, the idea that it is not a victims’ responsibility to educate the public about the realities of
reports sexual abuse may know that his identity will be contained in government investigative files, he still maintains an interest in that information not being disseminated by the government to the general public, especially through media disclosure.\textsuperscript{186} In the case of crimes of sexual abuse, victims often have a greater fear of retaliation or public stigma.\textsuperscript{187} The fear that such consequences will result may deter victims from coming forward to report crimes of sexual abuse. The majority, in not recognizing the substantiality of this privacy interest, failed to adequately protect the profound government interest in encouraging the prompt and open reporting of crimes and the need to protect victims and witnesses from harm for so doing.

The failure of the majority to give sufficient weight to the profound privacy interests of victims of sexual abuse would not, however, be so troublesome had it also adopted a stronger standard for redaction that would more adequately protect victims and witnesses reporting sexual abuse. This it failed to do. The majority stated that although the victims and witnesses named in the investigative reports retained strong privacy interests, those interests could be significantly reduced by redacting all identifying information from the records sought.\textsuperscript{188} The majority, however, qualified this statement by saying that redaction was appropriate here because it would be neither "impractical nor onerous."\textsuperscript{189} However, as both dissents asserted,\textsuperscript{190} such a subjective standard leaves victims and witnesses who report crimes with absolutely no assurance that their names will not soon become matters of public knowledge. Instead, the majority should have taken this opportunity in \textit{Blethen} to establish a presumption in favor of redaction of the names of sexual assault victims, making redaction mandatory in all but the exceptional case.\textsuperscript{191}

Both dissents adequately stated the dangers of such subjective and vague criteria for court-ordered redaction. First, the dissents asserted that the "impractical nor onerous" standard would have the effect of chilling reporting of crimes.\textsuperscript{192} This risk

\textsuperscript{186} See Blackburn, supra note 185, at 639 (advocating the enactment of legislation that prevents disclosure by the government of a sexual assault victim's identity to the press).

\textsuperscript{187} Blackburn, supra note 185, at 621-22.

\textsuperscript{188} \textit{Blethen}, 2005 ME 56, ¶ 39, 871 A.2d at 535.

\textsuperscript{189} \textit{Id}.

\textsuperscript{190} \textit{Id}, ¶ 67, 871 A.2d at 542 (Clifford, J., dissenting); ¶ 75, 871 A.2d at 543 (Alexander, J., dissenting).

\textsuperscript{191} For the view that legislatures should enact statutory measures, such as consistent use of pseudonyms in court room documents and proceedings and systematic redaction of names from police and court documents, in order to protect sexual assault victims' identity, see Blackburn, supra note 185, at 637-38.

\textsuperscript{192} \textit{Blethen}, 2005 ME 56, ¶ 64, 871 A.2d at 541 (Clifford, J., dissenting); ¶ 73, 871 A.2d at 543 (Alexander, J., dissenting).
of quelling the reporting and investigation of crimes as heinous as sexual abuse should not be taken lightly. Also, in arguing that this redaction standard would fail to adequately protect the privacy interests of all those named in investigative records,193 the dissenters recognized the true value at stake in cases addressing the personal privacy exemption of the FOAA in relation to victims of sexual abuse: the power to disclose information should lie with the victim; thus, only those victims who have voluntarily reported their allegations to the public should have a reduced or extinguished privacy interest in nondisclosure of investigative records concerning such allegations.194 Therefore, the dissent was correct in arguing that personal information appearing in investigative records should be redacted as a matter of course prior to disclosure, no matter how impractical or onerous.

However, the majority did establish a commendable and novel standard for evaluating what public interests fall within the FOAA's central purpose and thus weigh in favor of disclosure.195 The majority found no reason to graft the requirements established in Favish, regarding the need for the requestor to produce evidence of governmental misconduct, onto Maine's FOAA.196 The majority declared that the central purpose of the FOAA encompassed more than the public's right to learn of governmental misconduct; instead, it included the right of the public to know about governmental activity in general, good or bad, especially when that activity was one of significant interest to an informed citizenry.197 Thus, the majority sets a lower bar than federal law in defining the standard requestors must meet to establish a substantial public interest in disclosure of records. The majority implicitly recognized that citizens may have a legitimate interest in all the workings of their government, not just those that are corrupt or questionable. Although the majority does not intimate whether evidence of such government activity must appear in the complaint, or whether such a standard would permit claims for information based on a derivative use argument, the majority did take an important step in strengthening the public's right to be informed about the workings of its government.

The concurrence criticized the majority's rejection of the requirements of Favish, stating that "in the absence of an allegation of governmental wrongdoing, the interests in protection of the witnesses, alleged victims, informants, and others who have been the subject of investigation would outweigh the public's interest in disclosure."198 Although the concurrence concluded that Blethen's complaint contained the equivalent of such an allegation of government misconduct,199 this standard is unduly restrictive of the public's right to be informed about the actions of the government in other, less sensational instances.

Both dissents also strongly questioned the wisdom of expanding the concept of public interest under the FOAA, as the majority arguably did in finding the Favish

193. Id. ¶ 67, 871 A.2d at 542 (Clifford, J., dissenting); ¶ 75, 871 A.2d at 543 (Alexander, J., dissenting).
194. See id. ¶ 56, 871 A.2d at 539.
195. Id. ¶ 32, 871 A.2d at 533 (majority opinion).
196. Id.
197. Id.
198. Id. ¶ 46, 871 A.2d at 536-37 (Saufley, C.J., concurring).
199. Id. ¶ 47, 871 A.2d at 537.
principles inapplicable. However, their approaches misinterpreted the majority's analysis. The majority did not assert that when "the subject [of an investigation] has become the focus of public attention or concern" disclosure of investigative records would be automatically compelled. The dissents' fears that the majority's interpretation of public interest would render the personal privacy exemption ineffective was misplaced because the dissents failed to recognize that the requestors must still be seeking information about government activity, and not just matters of "general public interest." Further, the dissenters failed to consider that the majority's only mistake might have been its failure to craft a stronger redaction standard, and not its expansion of the concept of public interest under the FOAA. In other words, the dissent did not acknowledge that a more protective redaction standard could serve as a valuable counter-weight to the expanded concept of public interest found by the majority when the court is called upon to balance the public and private interests at stake under the personal privacy exemption to the FOAA.

Although all four opinions asserted divergent and conflicting views, together they illustrate that in Maine and Federal courts alike, the balancing act that must be done under freedom of information laws is a high-wire one. The task of weighing the public's right to be informed against the general citizen's right to privacy is a crucial one and defines the very nature of democracy. The complexity of this issue is clear from numerous opinions issued by the court in Blethen, and will undoubtedly continue to be so in the near future as similar cases enter the courthouse.

200. Id. ¶ 64, 871 A.2d at 541 (Clifford, J., dissenting); ¶ 72, 871 A.2d at 543 (Alexander, J., dissenting).
201. Id.
202. Id. ¶ 64, 871 A.2d at 541 (Clifford, J., dissenting).