



## Exemption 6

Personal privacy interests are protected by two provisions of the Freedom of Information Act, Exemptions 6 and 7(C).<sup>1</sup> Under the FOIA, "privacy encompass[es] the individual's control of information concerning his or her person."<sup>2</sup> Exemption 6 protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."<sup>3</sup> Exemption 7(C), discussed below, is limited to information compiled for law enforcement purposes, and protects personal information when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>4</sup>

### Introduction

In order to determine whether Exemption 6 protects against disclosure, an agency should engage in the following two lines of inquiry: first, determine whether the information at issue is contained in a personnel, medical, or "similar" file covered by Exemption 6; and, if so, determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy" by balancing the privacy interest that would be compromised by disclosure against any public interest in the requested information.<sup>5</sup> When engaging in this analysis, it is important to remember that the Court of Appeals for the District of Columbia Circuit has declared that "under Exemption 6, the presumption in favor of disclosure is as strong as can

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<sup>1</sup> 5 U.S.C. § 552(b)(6), (7)(C) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

<sup>2</sup> DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).

<sup>3</sup> 5 U.S.C. § 552(b)(6).

<sup>4</sup> 5 U.S.C. § 552(b)(7)(C).

<sup>5</sup> See Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1228 (D.C. Cir. 2008); News-Press v. DHS, 489 F.3d 1173, 1196-97 (11th Cir. 2007).

be found anywhere in the Act."<sup>6</sup> Additionally, it is important to keep in mind that Exemption 6 cannot be invoked to withhold from a requester information pertaining only to himself.<sup>7</sup>

To warrant protection under Exemption 6, information must first meet its threshold requirement; in other words, it must fall within the category of "personnel and medical files and similar files."<sup>8</sup> Once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue "would constitute a clearly unwarranted invasion of personal privacy."<sup>9</sup> This requires a balancing of the public's right to disclosure against the individual's right to privacy.<sup>10</sup> First, it must be ascertained whether a protectible privacy interest exists that would be threatened by disclosure.<sup>11</sup> If no privacy interest is found, further analysis is unnecessary and the

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<sup>6</sup> Multi Ag, 515 F.3d at 1227 (quoting Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 32 (D.C. Cir. 2002)); see also Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1057 (D.C. Cir. 2009) (stating that FOIA's "presumption favoring disclosure . . . is at its zenith under Exemption 6"); Lawyers' Comm. for Civil Rights of S.F. Bay Area v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at \*20 (N.D. Cal. Sept. 30, 2008) ("The burden remains on the agency to justify any withholdings under Exemption 6 since the presumption in favor of disclosure under this exemption is as strong as that with other exemptions.").

<sup>7</sup> See Reporters Comm., 489 U.S. at 771 (citing DOJ v. Julian, 486 U.S. 1, 13-14 (1988)); Dean v. FDIC, 389 F. Supp. 2d 780, 794 (E.D. Ky. 2005) (stating that "to the extent that the defendants have redacted the 'name, address, and other identifying information' of the plaintiff himself in these documents . . . reliance on Exemption 6 or 7(C) would be improper"); H.R. Rep. No. 93-1380, at 13 (1974); see also FOIA Update, Vol. X, No. 2, at 5 ("Privacy Protection Under the Supreme Court's Reporters Committee Decision") (advising that, as a matter of sound administrative practice, "[a]n agency will not invoke an exemption to protect a requester from himself").

<sup>8</sup> 5 U.S.C. § 552(b)(6).

<sup>9</sup> Id.

<sup>10</sup> See Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Berger v. IRS, 288 F. App'x 829, 832 (3d Cir. 2008) ("To determine whether the exemption applies, courts balance the public interest in disclosure against the privacy interest protected by the exemption."); Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 862 (D.C. Cir. 1981); see also Seized Prop. Recovery, Corp. v. U.S. Customs and Border Prot., 502 F. Supp. 2d 50, 56 (D.D.C. 2007) ("In determining whether the release of requested information constitutes a 'clearly unwarranted invasion of personal privacy,' the court must balance the individual's right to privacy against the public's interest in disclosure.") (Exemptions 6 and 7(C)), appeal dismissed, No. 07-5287, 2007 WL 2910069 (D.C. Cir. Oct. 5, 2007).

<sup>11</sup> Multi Ag, 515 F.3d at 1229 ("The balancing analysis for FOIA Exemption 6 requires that we first determine whether disclosure of the files 'would compromise a substantial, as opposed to de minimis, privacy interest[.]'" (quoting Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989))).

information at issue must be disclosed.<sup>12</sup>

On the other hand, if a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure.<sup>13</sup> If no public interest exists, the information should be protected; as the D.C. Circuit has observed, "something, even a modest privacy interest, outweighs nothing every time."<sup>14</sup> If there is a public interest in disclosure that outweighs the privacy interest, the information should be disclosed; if the opposite is found to be the case, the information should be withheld.<sup>15</sup>

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<sup>12</sup> See Multi Ag, 515 F.3d at 1229 (stating that "[i]f no significant privacy interest is implicated . . . FOIA demands disclosure" (quoting Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989))); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); Finkel v. Dep't of Labor, No. 05-5525, 2007 WL 1963163, at \*9 (D.N.J. June 29, 2007) (concluding that no balancing analysis was required "due to the Court's determination that the [defendant] has failed to meet its heavy burden on the issue of whether disclosure will invade the inspectors' privacy"); Trentadue v. President's Council on Integrity & Efficiency, No. 03-CV-339, slip op. at 4 (D. Utah Apr. 26, 2004) (stating that agency made no showing of privacy interest, so names of government employees should be released) (Exemptions 6 and 7(C)); Holland v. CIA, No. 91-1233, 1992 WL 233820, at \*16 (D.D.C. Aug. 31, 1992) (stating that information must be disclosed when there is no significant privacy interest, even if public interest is also de minimis).

<sup>13</sup> See Associated Press v. DOD, 554 F.3d 274, 291 (2d Cir. 2009) ("Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests." (quoting FLRA v. VA, 958 F.2d 503, 509 (2d Cir. 1992))); see also NARA v. Favish, 541 U.S. 157, 171 (2004) ("The term 'unwarranted' requires us to balance the family's privacy interest against the public interest in disclosure.") (Exemption 7(C)); see also Ripskis, 746 F.2d at 3.

<sup>14</sup> Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989); see also Int'l Bhd. of Elec. Workers Local No. 5 v. HUD, 852 F.2d 87, 89 (3d Cir. 1988) (perceiving no public interest in disclosure and therefore protecting employees' social security numbers); Schoenman v. FBI, 573 F. Supp. 2d 119, 149 (D.D.C. 2008); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 144-45 (D.D.C. 2007); Seized Prop. Recovery, 502 F. Supp. 2d at 56 ("If no public interest is found, then withholding the information is proper, even if the privacy interest is only modest.") (Exemptions 6 and 7(C)).

<sup>15</sup> See DOD v. FLRA, 510 U.S. 487, 497 (1994) ("We must weigh the privacy interest . . . in nondisclosure . . . against the only relevant public interest in the FOIA balancing analysis – the extent to which disclosure of the information sought would 'sh[e]d light on an agency's performance of its statutory duties' or otherwise let citizens 'know what their government is up to.'" (quoting Reporters Comm., 489 U.S. at 773); Multi Ag, 515 F.3d at 1228 (noting that if requested information falls within Exemption 6, the next step in the analysis is to determine whether "disclosure would constitute a clearly unwarranted invasion of personal privacy . . . [by] balanc[ing] the privacy interest that would be compromised by disclosure against any public interest in the requested information"); News-Press, 489 F.3d at 1205 ("In order to affirm withholding the addresses, we would have to find that the privacy interests against disclosure are greater than the public interest in disclosure."); see also FOIA Update, Vol. X,

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Threshold: Personnel, Medical and Similar Files

Information meets the threshold requirement of Exemption 6 if it falls within the category of "personnel and medical files and similar files."<sup>16</sup> Personnel and medical files are easily identified, but what constitutes a "similar file" warrants more analysis. In United States Department of State v. Washington Post Co.,<sup>17</sup> the United States Supreme Court held, based upon a review of the legislative history of the FOIA, that Congress intended the term "similar files" to be interpreted broadly, rather than narrowly.<sup>18</sup> The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information."<sup>19</sup> Rather, the Court made clear that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection.<sup>20</sup> Conversely, the threshold of Exemption 6 has been found not to be met when the

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<sup>15</sup>(...continued)

No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decision-making") (outlining mechanics of balancing process).

<sup>16</sup> 5 U.S.C. § 552(b)(6).

<sup>17</sup> 456 U.S. 595 (1982).

<sup>18</sup> Id. at 599-603 (citing H.R. Rep. No. 89-1497, at 11 (1966); S. Rep. No. 89-813, at 9 (1965); S. Rep. No. 88-1219, at 14 (1964)).

<sup>19</sup> Id. at 601 (citing H.R. Rep. No. 89-1497, at 11 (1966)); see Judicial Watch, Inc. v. FDA, 449 F.3d 141, 152 (D.C. Cir. 2006) ("The Supreme Court has read Exemption 6 broadly, concluding the propriety of an agency's decision to withhold information does not 'turn upon the label of the file which contains the damaging information.'" (quoting Wash. Post, 456 U.S. at 601)).

<sup>20</sup> 456 U.S. at 602; see, e.g., Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1050 (D.C. Cir. 2009) ("It is undisputed that the requested Medicare records are personnel, medical, or 'similar files.'"); Associated Press v. DOD, 554 F.3d 274, 291 (2d Cir. 2009) (finding that records applying to detainees whose family members seek protection are "similar files," explaining that "[t]he phrase 'similar files' has a broad meaning and encompasses the government's records on an individual which can be identified as applying to that individual"); Berger v. IRS, 288 F. App'x 829 (3d Cir. Aug. 11, 2008) ("[Revenue Officer's] time records are a personal recording of the time expended as an employee and therefore can be identified as applying to her."); Forest Serv. Employees for Env'tl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1024 (9th Cir. 2008) (stating that the threshold test of Exemption 6 is satisfied when government records contain information applying to particular individuals); Pierce v. U.S. Air Force, 512 F.3d 184, 191 (5th Cir. 2007) ("To qualify as a 'similar file' under Exemption 6 . . . the information need only 'appl[y]' to the individual."), cert. denied, 128 S. Ct. 2092 (2008); Wood v. FBI, 432 F.3d 78, 86-87 (2d Cir. 2005) (recognizing that personal information about government investigators appearing in investigative records are "similar files"); Lakin Law Firm, P.C. v. FTC, 352 F.3d 1122, 1123 (7th Cir. 2003) (finding that consumer complaints filed with the FTC "clearly fall[] within the exemption"); Nat'l Sec. News Serv. v. U.S. Dep't of Navy, 584 F. Supp. 2d 94, 96 (D.D.C. 2008) (finding that patient admission records clearly qualify as "similar files"); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d at 144-45 (D.D.C. 2007)

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information cannot be linked to a particular individual,<sup>21</sup> or when the information pertains to federal government employees but is not personal in nature.<sup>22</sup>

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<sup>20</sup>(...continued)

(concluding that the FTC met the threshold requirement for Exemption 6 protection regarding the names, addresses, and phone numbers of consumers who filed complaints "[s]ince each piece of information withheld by defendants applies to specific individuals"); Yonemoto v. VA, No 06-328, 2007 WL 1310165, at \*2 (D. Haw. May 2, 2007) (stating that "[i]ntra-agency emails often qualify as 'similar files' under Exemption 6," but concluding that records are not "similar files" when they have "an essentially business nature" or pertain to business relationships), appeal dismissed and remanded, 305 F. App'x 333 (9th Cir. 2008); Bigwood v. USAID, 484 F. Supp. 2d 68, 76 (D.D.C. 2007) ("[T]he organizational identity of USAID grantees is information which the Court concludes in this case 'applies to a particular individual,' and thus the records requested are 'similar files' which may be protected from disclosure by Exemption 6 of the FOIA."); Associated Press v. DOJ, No. 06-1758, 2007 WL 737476, at \*6 (S.D.N.Y. Mar. 7, 2007) (finding that petition for reduction in sentence "contains personal information in which [Requester] has a privacy interest under the 'similar files' requirement of Exemption 6"), order aff'd, 549 F.3d 62 (2d Cir. 2008) (Exemptions 6 and 7(C)); MacLean v. U.S. Dep't of Army, No. 05-1519, 2007 WL 935604, at \*14 (S.D. Cal. Mar. 6, 2007) ("The phrase, 'similar files,' is to be given a broad meaning, and it may apply even if the files at issue 'are likely to contain much information about a particular individual that is not intimate.'" (quoting Wash. Post, 456 U.S. at 598-600)); In Def. of Animals v. HHS, No. 99-3024, 2001 WL 34871354, at \*4 (D.D.C. Sept. 28, 2001) (recognizing that names of research foundation members are "similar files"); Hecht v. USAID, No. 95-263, 1996 WL 33502232, at \*12 (D. Del. Dec. 18, 1996) ("We do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information.").

<sup>21</sup> See, e.g., Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (finding no protection under Exemption 6 for list of drugs ordered for use by some members of large group); In Def. of Animals v. NIH, 543 F. Supp. 2d 70, 80 (D.D.C. 2008) (concluding that information related to a primate facility building does not meet the threshold of Exemption 6 because it "is not associated with any particular individual"); Na Iwi O Na Kupuna v. Dalton, 894 F. Supp. 1397, 1413 (D. Haw. 1995) (same for records pertaining to large group of Native Hawaiian human remains) (reverse FOIA case).

<sup>22</sup> Aguirre v. SEC, 551 F. Supp. 2d 33, 54 (D.D.C. 2008) ("Correspondence does not become personal solely because it identifies government employees."); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding that the names and work telephone numbers of Justice Department paralegals do not meet the threshold for Exemption 6 on the basis that information is not "similar to a 'personnel' or 'medical' file"), motion to amend denied, 421 F. Supp. 2d 104, 107-10 (D.D.C. 2006), appeal dismissed voluntarily, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006); Gordon v. FBI, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (deciding that names of agency employees are not personal information about those employees that meets Exemption 6 threshold), summary judgment granted, 388 F. Supp. 2d 1028, 1040-42 (N.D. Cal. 2005) (concluding that Exemption 6 does not apply to the names of agency's "lower-level" employees, and likewise opining that "[t]he [agency] still has not demonstrated that an employee's name alone makes a document a personnel, medical or 'similar file'"); Darby v. U.S. Dep't of the Air Force, No. 00-0661, slip op. at 10-11 (D. Nev. Mar.

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The D.C. Circuit, sitting en banc, subsequently reinforced the Supreme Court's broad interpretation of this term by holding that a tape recording of the last words of the Space Shuttle Challenger crew, which "reveal[ed] the sound and inflection of the crew's voices during the last seconds of their lives . . . contains personal information the release of which is subject to the balancing of the public gain against the private harm at which it is purchased."<sup>23</sup> Not only did the D.C. Circuit determine that "lexical" and "non-lexical" information are subject to identical treatment under the FOIA,<sup>24</sup> it also concluded that Exemption 6 is equally applicable to the "author" and the "subject" of a file.<sup>25</sup>

Once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue "would constitute a clearly unwarranted invasion of personal privacy" which requires a balancing of the privacy interest that would be compromised by disclosure against any public interest in the requested information.<sup>26</sup> Thus, the next step in the Exemption 6 analysis is determining the privacy interests at issue.<sup>27</sup>

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<sup>22</sup>(...continued)

1, 2002) (rejecting redaction of names in IG report on basis that such documents "are not 'personnel or medical files[,] nor are they 'similar' to such files"), aff'd on other grounds sub nom. Darby v. DOD, 74 F. App'x 813 (9th Cir. 2003); Providence Journal Co. v. U.S. Dep't of the Army, 781 F. Supp. 878, 883 (D.R.I. 1991) (finding investigative report of criminal charges not to be "similar file," on basis that it was "created in response to specific criminal allegations" rather than as "regularly compiled administrative record"), modified & aff'd on other grounds, 981 F.2d 552 (1st Cir. 1992); Greenpeace USA, Inc. v. EPA, 735 F. Supp. 13, 14 (D.D.C. 1990) (opining that information pertaining to an employee's compliance with agency regulations regarding outside employment "does not go to personal information . . . [e]ven in view of the broad interpretation [of Exemption 6] enunciated by the Supreme Court").

<sup>23</sup> N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc); see Forest Guardians v. FEMA, 410 F.3d 1214, 1218 (10th Cir. 2005) (finding that electronic Geographic Information System files containing "specific geographic location" of structures are "similar files"); Judicial Watch, Inc. v. USPS, No. 03-655, slip op. at 6 (D.D.C. Feb. 23, 2004) (assuming that audio portions of videotape are "similar files"), appeal dismissed voluntarily, No. 04-5153 (D.C. Cir. Aug. 25, 2004); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 85 n.11 (D.D.C. 2003) (finding that requested videotapes "contain identifiable audio and video images of individual residents," and concluding that they are "similar files").

<sup>24</sup> N.Y. Times Co., 920 F.2d at 1005; see also Webster's II New Riverside University Dictionary 689 (1994) (defining the term lexical as "[o]f or pertaining to the vocabulary, words, or morphemes of a language").

<sup>25</sup> Id. at 1007-08.

<sup>26</sup> See Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1228 (D.C. Cir. 2008); News-Press v. DHS, 489 F.3d 1173, 1196-97 (11th Cir. 2007).

<sup>27</sup> See FOIA Update, Vol. X, No. 2, at 7 ("Exemption 6 and Exemption 7(C): Step by Step Decisionmaking").

Privacy Interest

The relevant inquiry regarding the assessment of privacy interests at issue is whether public access to the information at issue would violate a viable privacy interest of the subject of such information.<sup>28</sup> It is important to note at the outset that the Supreme Court has declared that the privacy interest inherent in Exemption 6 "belongs to the individual, not the agency holding the information."<sup>29</sup> In the landmark FOIA decision in United States Department of Justice v. Reporters Committee for Freedom of the Press, which governs all privacy-protection Decision making under the FOIA, the Supreme Court stressed that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."<sup>30</sup> In NARA v. Favish the Court likewise drew upon the common law to find the principle of "survivor privacy" encompassed within the Act's privacy exemptions.<sup>31</sup> Indeed, in Reporters Committee the Court found a "strong privacy interest" in the nondisclosure of records of a private citizen's criminal history, "even where the information may have been at one time public."<sup>32</sup> The Supreme Court has also held that information need

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<sup>28</sup> See Schell v. HHS, 843 F.2d 933, 938 (6th Cir. 1988); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984).

<sup>29</sup> See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763-65 (1989) (emphasizing that privacy interest belongs to individual, not agency holding information pertaining to individual); Joseph W. Diemert, Jr. and Assocs. Co., L.P.A. v. FAA, 218 F. App'x 479, 482 (6th Cir. 2007) ("[S]ome courts have concluded that where personal privacy interests are implicated, only the individual who owns such interest may validly waive it."); Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 363-64 (5th Cir. 2001) (protecting social security numbers of soldiers even though Army publicly disclosed SSNs in some circumstances, because individuals rather than government hold privacy interest in that information); Amuso v. DOJ, 600 F. Supp. 2d 78, 93 (D.D.C. 2009) ("The privacy interest at stake belongs to the individual, not the agency."); Cozen O'Connor v. Dep't of Treasury, 570 F. Supp. 2d 749, 781 (E.D. Pa. 2008) ("The focus of the exemption is the individual's interest, not the government's").

<sup>30</sup> 489 U.S. at 763 (holding "rap sheets" are entitled to protection under Exemption 7(C) and setting forth five guiding principles that govern the process by which determinations are made under both Exemptions 6 and 7(C)).

<sup>31</sup> 541 U.S. 157, 165-70 (2004) ([T]he concept of personal privacy . . . is not some limited or 'cramped notion' of that idea.) (Exemption 7(C)); see also FOIA Post, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (highlighting breadth of privacy protection principles in Supreme Court's decision).

<sup>32</sup> 489 U.S. at 762, 764, 767, 780 (establishing a "practical obscurity" standard, observing that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to" them); see also DOD v. FLRA, 510 U.S. 487, 500 (1994) (finding privacy interest in federal employees' home addresses even though they "often are publicly available through sources such as telephone directories and voter registration lists"); FOIA Update, Vol. X, No. 2, at 4 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision").

not be intimate or embarrassing to qualify for Exemption 6 protection.<sup>33</sup> Generally, privacy interests cognizable under the FOIA are found to exist in such personally identifying information as a person's name, address, phone number, date of birth, criminal history, medical history, and social security number.<sup>34</sup>

In some circumstances a FOIA request can be narrowly targeted so that by its very terms it is limited to privacy-sensitive information pertaining to an identified or identifiable individual. In such circumstances, redaction would not be adequate to protect the personal privacy interests at risk,<sup>35</sup> and an agency may have to invoke the "Glomar" response, i.e.,

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<sup>33</sup> See Dep't of State v. Wash. Post Co., 456 U.S. 595, 600 (1982); Horowitz v. Peace Corps, 428 F.3d 271, 279 (D.C. Cir. 2005) ("Even seemingly innocuous information can be enough to trigger the protections of Exemption 6."); Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989) [hereinafter NARFE]; People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 304 (D.D.C. 2007) ("The privacy interest in nondisclosure encompasses an individual's control of personal information and is not limited to that of an embarrassing or intimate nature."); Knight v. NASA, No. 2:04-2054, 2006 WL 3780901, at \*5 (E.D. Cal. Dec. 21, 2006) ("Information need not be intimate or embarrassing to qualify for exemption under subdivision (b)(6)."); Appleton v. FDA, 451 F. Supp. 2d 129, 145 (D.D.C. 2006) ("Individuals have a privacy interest in personal information even if it is not of an embarrassing or intimate nature.").

<sup>34</sup> See Wash. Post Co., 456 U.S. at 600 (finding that "[i]nformation such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet . . . such information . . . would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy"); Associated Press v. DOJ, 549 F.3d 62, 65 (2d Cir. 2008) ("Personal information, including a citizen's name, address, and criminal history, has been found to implicate a privacy interest cognizable under the FOIA exemptions.") (Exemptions 6 and 7(C)); Nat'l Sec. News Serv. v. U.S. Dep't of Navy, 584 F. Supp. 2d 94, 96 (D.D.C. 2008) ("Records . . . indicating that individuals sought medical treatment at a hospital are particularly sensitive."); Yelder v. DOD, 577 F. Supp. 2d 342, 346 (D.D.C. 2008) (noting that information such as names, addresses, and other personally identifying information creates a palpable threat to privacy); People for the Am. Way Found., 503 F. Supp. 2d at 304, 306 (stating that "[f]ederal courts have previously recognized a privacy interest in a person's name and address" and concluding that "[g]enerally, there is a stronger case to be made for the applicability of Exemption 6 to phone numbers and addresses"); Seized Prop. Recovery, Corp. v. U.S. Customs and Border Prot., 502 F. Supp. 2d 50, 58 (D.D.C. 2007) (finding that individuals have a privacy interest in the nondisclosure of their names and addresses when release "would automatically associate the individuals" with seizures conducted by Customs and the information is linked to financial information) (Exemptions 6 and 7(C)).

<sup>35</sup> See, e.g., Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992) (holding that "public availability" of an accused FBI agent's name does not defeat privacy protection and "would make redactions of [the agent's name in] the file a pointless exercise"); MacLean v. DOD, No. 04-2425, slip op. at 18 (S.D. Cal. June 2, 2005) (pointing out that deletion of identity of named subject of request from professional responsibility file "would be pointless") (Exemptions 6 and 7(C)); Buckley v. Schaul, No. 03-03233, slip op. at 9 (W.D. Wash. Mar. 8, 2004) (finding that even with redactions, the "disclosure of investigative files coupled with the public availability

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neither confirm nor deny the existence of any responsive records.<sup>36</sup> (For a detailed explanation of the Glomar response and its use in protecting privacy interests in law enforcement records, see the discussion under Exemption 7(C), below.)

Initially, it must be determined "whether disclosure of the files 'would compromise a substantial, as opposed to de minimis, privacy interest,' because 'if no significant privacy interest is implicated . . . FOIA demands disclosure."<sup>37</sup> The Court of Appeals for the District of Columbia Circuit has explained that, in the FOIA context, when assessing the weight of a protectible privacy interest, "[a] substantial privacy interest is anything greater than a de minimis privacy interest."<sup>38</sup> When a substantial privacy interest is found, the inquiry under the privacy exemptions is not finished, it is only advanced to "address the question whether

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<sup>35</sup>(...continued)

of Plaintiff's FOIA request naming [regional counsel]" would not adequately protect privacy interests) (Exemptions 6 and 7(C)); Claudio v. SSA, No. H-98-1911, 2000 WL 33379041, at \*8 (S.D. Tex. May 24, 2000) (observing that redaction of documents concerning named subject "would prove meaningless"); Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 744 (E.D. Va. 1999) (noting that when requested documents relate to a specific individual, "deleting [her] name from the disclosed documents, when it is known that she was the subject of the investigation, would be pointless"); Chin v. U.S. Dep't of the Air Force, No. 97-2176, slip op. at 5 (W.D. La. June 24, 1999) (observing that deletion of identifying information "fails to protect the identity of [the individual] who is named in the FOIA request"), aff'd per curiam, No. 99-31237 (5th Cir. June 15, 2000); Cotton v. Adams, 798 F. Supp. 22, 27 (D.D.C. 1992) (determining that releasing any portion of the documents would "abrogate the privacy interests" when the request is for documents pertaining to two named individuals); Schonberger v. Nat'l Transp. Safety Bd., 508 F. Supp. 941, 945 (D.D.C. 1981) (stating that no segregation was possible when request was for one employee's file), aff'd, 672 F.2d 896 (D.C. Cir. 1981) (unpublished table decision).

<sup>36</sup> See Claudio, 2000 WL 33379041, at \*8-9 (affirming agency's refusal to confirm or deny existence of any record reflecting any investigation of administrative law judge) (Exemption 6).

<sup>37</sup> Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (quoting NARFE, 879 F.2d at 874); see, e.g., Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1050 (D.C. Cir. 2009) ("[W]e must determine whether 'disclosure would compromise a substantial, as opposed to a de minimis, privacy interest.'" (quoting NARFE, 879 F.2d at 874)); Associated Press v. DOD, 554 F.3d 274, 285 (2d Cir. 2009) ("Thus, 'once a more than de minimis privacy interest is implicated the competing interests at stake must be balanced in order to decide whether disclosure is permitted under FOIA.'" (quoting FLRA v. VA, 958 F.2d 503, 510 (2d Cir. 1992))).

<sup>38</sup> Multi Ag, 515 F.3d at 1229-30; see, e.g., Barnard v. DHS, 598 F. Supp. 2d 1, 11 (D.D.C. 2009); Schoenman v. FBI, 576 F. Supp. 2d 3, 9 (D.D.C. 2008); Unidad Latina En Accion v. DHS, 253 F.R.D. 44, 48 (D. Conn. 2008); Schoenman v. FBI, 573 F. Supp. 2d 119, 148 (D.D.C. 2008); Schoenman v. FBI, 575 F. Supp. 2d 136, 160 (D.D.C. 2008).

the public interest in disclosure outweighs the individual privacy concerns."<sup>39</sup> Thus, as the D.C. Circuit has held, "a privacy interest may be substantial -- more than de minimis -- and yet be insufficient to overcome the public interest in disclosure."<sup>40</sup>

The D.C. Circuit has also emphasized the practical analytical point that under the FOIA's privacy-protection exemptions, "[t]he threat to privacy . . . need not be patent or obvious to be relevant."<sup>41</sup> At the same time, courts have found that the threat to privacy must be real rather than speculative.<sup>42</sup> In National Ass'n of Retired Federal Employees v. Horner [hereinafter NARFE], the D.C. Circuit explained that the "relevant point" of its prior holding in Arieff v. United States Department of the Navy was that "mere speculation" of an invasion of privacy "is not itself part of the invasion of privacy contemplated by Exemption 6."<sup>43</sup> The

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<sup>39</sup> Multi Ag, 515 F.3d at 1230 (quoting Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 35 (D.C. Cir. 2002)); see, e.g., Consumers' Checkbook, 554 F.3d at 1050 ("If a substantial privacy interest is at stake, then we must balance the privacy interest in nondisclosure against the public interest."); Associated Press v. DOJ, 549 F.3d at 66 ("Notwithstanding a document's private nature, FOIA may nevertheless require disclosure if the requester can show that revelation of the contents of the requested document would serve the public interest."); Scales v. EOUSA, 594 F. Supp. 2d 87, 90 (D.D.C. 2009) ("Given the significant individual privacy interest, disclosure of 7(C) material is warranted only when the individual's interest in privacy is outweighed by the public's interest in disclosure.") (Exemption 7(C)).

<sup>40</sup> Multi Ag, 515 F.3d at 1230-33 (finding that the significant public interest in disclosure of the databases outweighs the "greater than de minimis" privacy interest of individual farmers).

<sup>41</sup> Pub. Citizen Health Research Group v. U.S. Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978) (per curiam) (ruling that district court improperly refused to look beyond face of document at issue (i.e., to proffered in camera explanation of harm), which led it to fail to recognize underlying sensitivity).

<sup>42</sup> See Dep't of the Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976) ("The legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities."); ACLU v. DOD, 543 F.3d 59, 85-86 (2d Cir. 2008) ("Even accepting [defendants'] argument that it may be 'possible' to identify the detainees in spite of the district court's redactions, or that there remains a 'chance' that the detainees could identify themselves . . . such speculation does not establish a privacy interest that surpasses a de minimis level for the purposes of a FOIA inquiry.") (Exemptions 6 and 7(C)), application to extend time to file petition for cert. granted, No. 08A1068 (J. Ginsburg, May 29, 2009); Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987) (stating that "[w]ithholding information to prevent speculative harm" is contrary to the FOIA's pro-disclosure policy); Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (finding that Exemption 6 did not apply when there was only a "mere possibility" that the medical condition of a particular individual would be disclosed by releasing a list of pharmaceuticals supplied to a congressional doctor (quoting Rose, 425 U.S. at 380 n.19)); Cawthon v. DOJ, No. 05-0567, 2006 WL 581250, at \*3 (D.D.C. Mar. 9, 2006) ("To justify its exemption 6 withholdings, the defendant must show that the threat to employees' privacy is real rather than speculative.").

<sup>43</sup> 879 F.2d at 878 (citing Arieff, 712 F.2d at 1468); see also ACLU v. DOD, 543 F.3d at 86 (continued...)

NARFE court went on to explain that "[f]or the Exemption 6 balance to be implicated, there must, of course, be a causal relationship between the disclosure and the threatened invasion of privacy."<sup>44</sup>

In Favish, the Supreme Court unanimously found that the surviving family members of a former Deputy White House Counsel had a protectible privacy interest in his death-scene photographs, based in part on the family's fears of "intense scrutiny by the media."<sup>45</sup> Pointing out that the surviving relatives invoked their own "right and interest to personal privacy,"<sup>46</sup> the Court held "that FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images."<sup>47</sup> Relying upon case law and cultural traditions, the Court concentrated on "the right of family members to direct and control disposition of the body of the deceased" and noted the right of family members "to limit

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<sup>43</sup>(...continued)

(stating that "because the district court has redacted the Army photos to remove all identifying features, there is no cognizable privacy interest at issue in the release of the Army photos"); Hall v. DOJ, 552 F. Supp. 2d 23, 30 (D.D.C. 2008) (finding that DOJ failed to demonstrate that there is a real threat to employees' privacy, concluding that "DOJ merely asserts, in vague and conclusory fashion, that the redacted information relates to a small group of employees and that release of the redacted information will lead to identification and harassment"); United Am. Fin., Inc. v. Potter, 531 F. Supp. 2d 29, 47 (D.D.C. 2008) ("A 'bare conclusory assessment' that public disclosure of an employee's name would constitute an invasion of personal privacy is insufficient to support the existence of a privacy interest."); Finkel v. Dep't of Labor, No. 05-5525, 2007 WL 1963163, at \*9 (D.N.J. June 29, 2007) (concluding that defendant failed to meet its burden of showing that release of inspectors' "coded ID numbers" would constitute a clearly unwarranted invasion of privacy because defendant "has 'established no more than a mere possibility that the medical condition of a particular individual might be disclosed - which the Supreme Court has told us is not enough'" (quoting Arieff, 712 F.2d at 1467)); Fortson v. Harvey, 407 F. Supp. 2d 13, 17 (D.D.C. 2005) (deciding that potential harm to witnesses of unfavorable personnel evaluations and workplace harassment was "pure speculation"); Dayton Newspapers, Inc. v. Dep't of the Air Force, 107 F. Supp. 2d 912, 919 (S.D. Ohio 1999) (declining to protect medical malpractice settlement figures based upon "mere possibility that factual information might be pieced together to supply 'missing link' and lead to personal identification" of claimants); Chi. Tribune Co. v. HHS, No. 95-3917, 1997 WL 1137641, at \*10-11 (N.D. Ill. Feb. 26, 1997) (magistrate's recommendation) (finding "speculative at best" agency's argument that release of breast cancer patient data forms that identify patients only by nine-digit encoded "Study Numbers" could result in identification of individual patients), adopted, (N.D. Ill. Mar. 28, 1997).

<sup>44</sup> 879 F.2d at 878.

<sup>45</sup> 541 U.S. at 167.

<sup>46</sup> Id. at 166.

<sup>47</sup> Id. at 170.

attempts to exploit pictures of the deceased family member's remains for public purposes."<sup>48</sup> Analyzing what recipients of the death scene photos may do with them, the Court found that the surviving family members had a protectible privacy interest in seeking to limit the attempts by the requester, as well as the public and media, to exploit the deceased's photos.<sup>49</sup> As the D.C. Circuit has held, "[w]here there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain."<sup>50</sup> One court has pragmatically observed that to distinguish between

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<sup>48</sup> Id. at 168.

<sup>49</sup> Id. at 167.

<sup>50</sup> NARFE, 879 F.2d at 878; see, e.g., Favish, 541 U.S. at 167-70 (specifically taking into account "the consequences" of FOIA disclosure, including "public exploitation" of the records by either the requester or others); Forest Serv. Employees for Env'tl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1026 (9th Cir. 2008) (finding that "the public association of the employees with [the Cramer Fire] would subject them to the risk of embarrassment in their official capacities and in their personal lives"); Moore v. Bush, 601 F. Supp. 2d 2, 14 (D.D.C. 2009) (concluding that release of name and phone number of an FBI support employee and the name of a Special Agent "could subject the Agent and employee to harassment") (Exemptions 6 and 7(C)); Hall, 552 F. Supp. 2d at 30 ("Pursuant to Exemption 6, individuals have a privacy interest in avoiding disclosure of identifying information if disclosure would subject them to harassment."); Reilly v. DOE, No. 07-995, 2007 WL 4548300, at \*6 (N.D. Ill. Dec. 18, 2007) ("If the names of the [Merit Review Committee] members were disclosed to the public, they would be subject to harassment from disgruntled applicants whose proposals were denied."); George v. IRS, No. 05-955, 2007 WL 1450309, at \*11 (N.D. Cal. May 14, 2007) ("IRS employees have a strong right to privacy in order to fulfill their obligations without fear that taxpayers will attempt to harass or contact employees directly instead of using the administrative and judicial processes for appeal."); Bigwood v. USAID, 484 F. Supp. 2d 68, 77 (D.D.C. 2007) ("Defendant has presented declarations that detail the potential harm to the employees if the identities of the grantee organizations at issue in this case are released."); Long v. OPM, No. 05-1522, 2007 WL 2903924, at \*15 (N.D.N.Y. Sept. 30, 2007) ("[W]hether the disclosure of names of government employees threatens a significant privacy interest depends on the consequences likely to ensue from disclosure."); O'Keefe v. DOD, 463 F. Supp. 2d 317, 324 (E.D.N.Y. 2006) ("Government employees, and specifically law enforcement personnel, have a significant privacy interest in their identities, as the release of their identities may subject them to embarrassment and harassment.") (Exemption 7(C)); Judicial Watch, Inc. v. Dep't of the Army, 402 F. Supp. 2d 241, 251 (D.D.C. 2005) (granting defendant's motion for summary judgment as to information withheld pursuant to Exemption 6; finding that it is "likely" that the documents would be published on the Internet and that media reporters would seek out employees, and stating "[t]his contact is the very type of privacy invasion that Exemption 6 is designed to prevent"). But see U.S. Dep't of State v. Ray, 502 U.S. 164, 179-82 (1991) (Scalia, J., concurring in part) (suggesting that "derivative" privacy harm should not be relied upon in evaluating privacy interests); Associated Press v. DOD, 410 F. Supp. 2d 147, 151 (D.D.C. 2006) (suggesting that "derivative" harms might not be cognizable under Exemption 6, based on Justice Scalia's concurring opinion in Ray); Forest Guardians v. U.S. Dep't of the Interior, No. 02-1003, 2004 WL 3426434, at \*16-17 (D.N.M. Feb. 28, 2004) (deciding that agency did not meet its burden of establishing that names of financial institutions and amounts of individual loans in lienholder

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the initial disclosure and unwanted intrusions as a result of that disclosure would be "to honor form over substance."<sup>51</sup>

Along this line of reasoning, the D.C. Circuit in Multi Ag Media LLC v. USDA concluded that the disclosure of two databases containing information on crops and field acreage, and farm data on a digitized aerial photograph, would compromise a greater than de minimis privacy interest of individual farmers.<sup>52</sup> Although "not persuaded that the privacy interest that may exist is particularly strong," the court found that "[t]elling the public how many crops are on how much land or letting the public look at photographs of farmland with accompanying data will in some cases allow for an inference to be drawn about the financial situation of an individual farmer."<sup>53</sup>

Similarly, the Court of Appeals for the Tenth Circuit, in Forest Guardians v. FEMA, decided that the release of "electronic mapping files" would invade the privacy interest of homeowners.<sup>54</sup> The files contained the specific locations of insured structures that "could easily lead to the discovery of an individual's name and home address," as well as "unwanted and unsolicited mail, if not more."<sup>55</sup>

In some instances, the disclosure of information might involve no invasion of privacy because, fundamentally, the information is of such a nature that no expectation of privacy exists.<sup>56</sup> For example, FOIA requesters (except those making requests for records on

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<sup>50</sup>(...continued)

agreements could be used to trace individual permittees); Dayton Newspapers, Inc. v. VA, 257 F. Supp. 2d 988, 1001-05 (S.D. Ohio 2003) (rejecting argument based upon agency's concern that names of judges and attorneys could be used to search through databases to identify claimants and thereby invade privacy of claimants).

<sup>51</sup> Hudson v. Dep't of the Army, No. 86-1114, 1987 WL 46755, at \*3 (D.D.C. Jan. 29, 1987) (protecting personal identifying information on the basis that its disclosure under the FOIA could ultimately lead to physical harm), aff'd, 926 F.2d 1215 (D.C. Cir. 1991) (unpublished table decision); see also, e.g., Hemenway v. Hughes, 601 F. Supp. 1002, 1006-07 (D.D.C. 1985) (same).

<sup>52</sup> 515 F.3d at 1230.

<sup>53</sup> Id. (concluding, ultimately, that despite this privacy interest, information should be disclosed due to strong public interest); see, e.g., Seized Prop. Recovery., 502 F. Supp. 2d at 58 ("[I]ndividuals have a privacy interest in the nondisclosure of their names and addresses when linked to financial information, especially when this information could be used for solicitation purposes.") (Exemption 6 and 7(C)).

<sup>54</sup> 410 F.3d 1214, 1220-21 (10th Cir. 2005).

<sup>55</sup> Id. (finding that additional information, such as individual's decision to buy flood insurance, could be revealed through disclosure of requested files and thus also invade privacy).

<sup>56</sup> See, e.g., People for the Am. Way Found., 503 F. Supp. 2d at 306 ("Disclosing the mere  
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themselves) do not ordinarily expect that their names will be kept private; therefore, release of their names would not cause even the minimal invasion of privacy necessary to trigger the balancing test.<sup>57</sup>

Similarly, civilian federal employees who are not involved in law enforcement generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees<sup>58</sup> or regarding the parts of their successful employment applications

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<sup>56</sup>(...continued)

identity of individuals who voluntarily submitted comments regarding the Lincoln video does not raise the kind of privacy concerns protected by Exemption 6."); Fuller v. CIA, No. 04-253, 2007 WL 666586, at \*4 (D.D.C. Feb. 28, 2007) (finding that information reflecting only professional and business judgments and relationships "cannot fairly be characterized as personal information that exemption (b)(6) was meant to protect"); Alliance for the Wild Rockies v. Dep't of the Interior, 53 F. Supp. 2d 32, 37 (D.D.C. 1999) (finding that commenters to proposed rulemaking could have no expectation of privacy when agency made clear that their identities would not be concealed).

<sup>57</sup> See Holland v. CIA, No. 91-1233, 1992 WL 233820, at \*15-16 (D.D.C. Aug. 31, 1992) (holding that researcher who sought assistance of presidential advisor in obtaining CIA files he had requested is comparable to FOIA requester whose identity is not protected by Exemption 6); Martinez v. FBI, No. 82-1547, slip op. at 7 (D.D.C. Dec. 19, 1985) (denying protection for identities of news reporters seeking information concerning criminal investigation) (Exemption 7(C)); see also FOIA Update, Vol. VI, No. 1, at 6 (advising agencies that the identities of first-party requesters under the Privacy Act of 1974, 5 U.S.C. § 552a (2006), should be protected because, unlike under the FOIA, an expectation of privacy can fairly be inferred from the personal nature of the records involved in those requests). But see Silets v. DOJ, 945 F.2d 227, 230 (7th Cir. 1991) (en banc) (protecting name of high school student who requested information about wiretaps on Jimmy Hoffa).

<sup>58</sup> See OPM Regulation, 5 C.F.R. § 293.311 (2009) (specifying that certain information contained in federal employee personnel files is available to public); see also FLRA v. U.S. Dep't of Commerce, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992) (noting that performance awards "have traditionally been subject to disclosure"); Core v. USPS, 730 F.2d 946, 948 (4th Cir. 1984) (finding no substantial invasion of privacy in information identifying successful federal job applicants); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (noting that Justice Department paralegals' names and work numbers "are already publicly available from [OPM]"), appeal dismissed voluntarily, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (stating that "disclosure [of names of State Department's officers and staff members involved in highly publicized case] merely establishes State [Department] employees' professional relationships or associates these employees with agency business"); Nat'l W. Life Ins. v. United States, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (discerning no expectation of privacy in names and duty stations of Postal Service employees); FOIA Update, Vol. III, No. 4, at 3 ("Privacy Protection Considerations") (discussing extent to which privacy of federal employees can be protected); cf. Tomscha v. GSA, No. 03-6755, 2004 WL 1234043, at \*4-5 (S.D.N.Y. June 3, 2004) (deciding without discussion that amount of performance award was properly redacted when agency showed that there could be "mathematical

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that show their qualifications for their positions.<sup>59</sup> However, federal civilian employees do have a protectible privacy interest in purely personal details that do not shed light on agency functions.<sup>60</sup> Indeed, courts generally have recognized the sensitivity of information contained

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<sup>58</sup>(...continued)

linkage" between award and performance evaluation), aff'd, 158 F. App'x 329, 329 (2d Cir. 2005) (agreeing with the district court's finding that "the release of the justifications for [low-ranking GSA employee's] awards would constitute more than a de minimis invasion of privacy"). But see Rogers v. Davis, No. 08-177, 2009 WL 213034, at \*3 (E.D. Mo. Jan. 28, 2009) ("Government employees have a privacy interest in their names and phone numbers, especially when associated with a complaint of misconduct."); United Am. Fin., Inc., 531 F. Supp. 2d at 42-43 (concluding that Exemption 6 protects against disclosure of names of USPS employees regarding information pertaining to their financial choices).

<sup>59</sup> See Habeas Corpus Resource Ctr. v. DOJ, No. 08-2649, 2008 WL 5000224, at \*4 (N.D. Cal. Nov. 21, 2008) (ordering release of email chains regarding the decision to hire a DOJ attorney because "[p]laintiff's interest - and the public's interest - in determining whether [attorney's] hiring was improper is sufficient to outweigh any minimal privacy interest [the attorney] may have in keeping these opinions from the public"); Cowdery, Ecker & Murphy, LLC v. Dep't of Interior, 511 F. Supp. 2d 215, 219 (D. Conn. 2007) ("Because exemption 6 seeks to protect government employees from unwarranted invasions of privacy, it makes sense that FOIA should protect an employee's personal information, but not information related to job function."); Barvick v. Cisneros, 941 F. Supp. 1015, 1020 n.4 (D. Kan. 1996) (noting that the agency had "released information pertaining to the successful candidates' educational and professional qualifications, including letters of commendation and awards, as well as their prior work history, including federal positions, grades, salaries, and duty stations"); Samble v. U.S. Dep't of Commerce, No. 1:92-225, slip op. at 11 (S.D. Ga. Sept. 22, 1994) (requiring disclosure of successful job applicant's "undergraduate grades; private sector performance awards; foreign language abilities; and his answers to questions concerning prior firings, etc., convictions, delinquencies on federal debt, and pending charges against him"); Associated Gen. Contractors, Inc. v. EPA, 488 F. Supp. 861, 863 (D. Nev. 1980) (education, former employment, academic achievements, and employee qualifications). But see People for Ethical Treatment of Animals v. USDA, No. 06-930, 2007 WL 1720136, at \*4 (D.D.C. June 11, 2007) ("[A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures." (quoting Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984))) (Exemption 7(C)).

<sup>60</sup> See, e.g., DOD v. FLRA, 510 U.S. at 500 (federal employees' home addresses); Kidd v. DOJ, 362 F. Supp. 2d 291, 296-97 (D.D.C. 2005) (home telephone number); Barvick, 941 F. Supp. at 1020-21 (personal information such as home addresses and telephone numbers, social security numbers, dates of birth, insurance and retirement information, reasons for leaving prior employment, and performance appraisals); Stabasefski v. United States, 919 F. Supp. 1570, 1575 (M.D. Ga. 1996) (names of FAA employees who received Hurricane Andrew assistance payments); Plain Dealer Publ'g Co. v. U.S. Dep't of Labor, 471 F. Supp. 1023, 1028-30 (D.D.C. 1979) (medical, personnel, and related documents of employees filing claims under Federal Employees Compensation Act); Info. Acquisition Corp. v. DOJ, 444 F. Supp. 458, 463-64 (D.D.C. 1978) ("core" personal information such as marital status and college grades). But see Wash. (continued...)

in personnel-related files and have accorded protection to the personal details of a federal employee's service.<sup>61</sup> In addition, the identities of persons who apply but are not selected for federal government employment may be protected.<sup>62</sup> Even suggestions submitted to an

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<sup>60</sup>(...continued)

Post Co. v. HHS, 690 F.2d 252, 258-65 (D.C. Cir. 1982) (holding personal financial information required for appointment as HHS scientific consultant not exempt when balanced against need for oversight of awarding of government grants); Trupei v. DEA, No. 04-1481, slip op. at 3-5 (D.D.C. Sept. 27, 2005) (ordering disclosure of signature where name of retired DEA agent was already released, because "speculative" possibility of misuse of signature did not establish cognizable privacy interest); Husek v. IRS, No. 90-CV-923, 1991 U.S. Dist. LEXIS 20971, at \*1 (N.D.N.Y. Aug. 16, 1991) (holding citizenship, date of birth, educational background, and veteran's preference of federal employees not exempt), aff'd, 956 F.2d 1161 (2d Cir. 1992) (unpublished table decision).

<sup>61</sup> See, e.g., Ripskis, 746 F.2d at 3-4 (names and identifying data contained on evaluation forms of HUD employees who received outstanding performance ratings); Warren v. Soc. Sec. Admin., No. 98-CV-0116E, 2000 WL 1209383, at \*4 (W.D.N.Y. Aug. 22, 2000) (award nomination forms for specific employees), aff'd, 10 F. App'x 20 (2d Cir. 2001); Rothman v. USDA, No. 94-8151, slip op. at 6 (C.D. Cal. June 17, 1996) (settlement agreement related to charge of employment discrimination that "could conceivably lead to embarrassment or friction with fellow employees or supervisors"); Resendez v. Runyon, No. 94-434F, slip op. at 6-7 (W.D. Tex. Aug. 11, 1995) (names of applicants for supervisory training who have not yet been accepted or rejected); McLeod v. U.S. Coast Guard, No. 94-1924, slip op. at 8-10 (D.D.C. July 25, 1995) (Coast Guard officer's evaluation report), summary affirmance granted, No. 96-5071, 1997 WL 150096 (D.C. Cir. Feb. 10, 1997); Putnam v. DOJ, 873 F. Supp. 705, 712-13 (D.D.C. 1995) (names of FBI employees mentioned in "circumstances outside of their official duties," such as attending training classes and as job applicants); Ferri v. DOJ, 573 F. Supp. 852, 862-63 (W.D. Pa. 1983) (FBI background investigation of Assistant United States Attorney); Dubin v. Dep't of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981) (studies of supervisors' performance and recommendations for performance awards), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision); see also FLRA v. U.S. Dep't of Commerce, 962 F.2d at 1060 (distinguishing personnel "ratings," which traditionally have not been disclosed, from "performance awards," which ordinarily are disclosed); cf. Prof'l Review Org., Inc. v. HHS, 607 F. Supp. 423, 427 (D.D.C. 1985) (résumé data of proposed staff of government contract bidder).

<sup>62</sup> See Core, 730 F.2d at 948-49 (protecting identities and qualifications of unsuccessful applicants for federal employment); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 177 (D.D.C. 2004) (holding that résumé of individual interested in project that never "got out of the embryonic stages" was properly withheld); Warren, 2000 WL 1209383, at \*4 (protecting identities of unsuccessful job applicants); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 38 (D.D.C. 2000) (protecting résumés of individuals whose applications for insurance were withdrawn or denied); Judicial Watch, Inc. v. Comm'n on U.S. Pac. Trade & Inv. Policy, No. 97-0099, 1999 WL 33944413, at \*11-12 (D.D.C. Sept. 30, 1999) (protecting identities of individuals considered for but not appointed to Commission); Rothman, No. 94-8151, slip op. at 8-9 (C.D. Cal. June 17, 1996) ("Disclosure of information in the applications of persons who failed to get a job may 'embarrass or harm' them."); Barvick, 941

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Employee Suggestion Program have been withheld to protect employees with whom the suggestions are identifiable from the embarrassment that might occur from disclosure.<sup>63</sup>

Federal employees involved in law enforcement, as well as military personnel and Internal Revenue Service employees, do possess, by virtue of the nature of their work, protectible privacy interests in their identities and work addresses.<sup>64</sup> In light of this privacy

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<sup>62</sup>(...continued)

F. Supp. at 1021-22 (protecting all information about unsuccessful federal job applicants because any information about members of "select group" that applies for such jobs could identify them); Voinche v. FBI, 940 F. Supp. 323, 329-30 (D.D.C. 1996) (protecting identities of possible candidates for Supreme Court vacancies), aff'd per curiam, No. 96-5304, 1997 WL 411685 (D.C. Cir. June 19, 1997); Putnam, 873 F. Supp. at 712-13 (protecting identities of FBI personnel who were job candidates); Holland, 1992 WL 233820, at \*13-15 (protecting identity of person not selected as CIA general counsel).

<sup>63</sup> See Matthews v. USPS, No. 92-1208-CV-W-8, slip op. at 5 (W.D. Mo. Apr. 15, 1994).

<sup>64</sup> See Lahr v. NTSB, No. 06-56717, 2009 WL 1740752, at \*9-10 (9th Cir. June 22, 2009) (reversing district court and holding that FBI agents have cognizable privacy interest in withholding their names because release of FBI agents' identity would most likely subject agents "to unwanted contact by the media and others, including [plaintiff], who are skeptical of the government's conclusion" in investigation of crash of TWA Flight 800); Wood v. FBI, 432 F.3d 78, 87-89 (2d Cir. 2005) (protecting investigative personnel of FBI's Office of Professional Responsibility); Judicial Watch, Inc. v. United States, 84 F. App'x 335, 338-39 (4th Cir. 2004) (protecting names of lower-level clerical workers at IRS); New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (protecting identities of nonsupervisory Inspector General investigators who participated in grand jury investigation of requester) (Exemption 7(C)); Moore, 601 F. Supp. 2d at 14 (protecting the name and phone number of an FBI support employee and the name of a Special Agent because release "could subject the Agent and employee to harassment") (Exemptions 6 and 7(C)); Cal-Trim Inc. v. IRS, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting names of lower-level IRS employees in internal IRS correspondence so as not to expose them to unreasonable annoyance or harassment) (Exemptions 6 and 7(C)); Clemmons v. U.S. Army Crime Records Ctr., No. 05-02353, 2007 WL 1020827, at \*6 (D.D.C. Mar. 30, 2007) (withholding the identities of U.S. Army Criminal Investigation Division special agents and military police (Exemptions 6 and 7(C)); Elec. Privacy Info. Ctr. v. DHS, No. 04-1625, 2006 U.S. Dist. LEXIS 94615, at \*30 (D.D.C. Dec. 22, 2006) (protecting names of employees from United States Customs and Border Protection and DHS involved in anti-terrorism efforts); Van Mechelen v. U.S. Dep't of the Interior, No. 05-5393, 2005 WL 3007121, at \*4-5 (W.D. Wash. Nov. 9, 2005) (protecting identifying information of lower-level Office of Inspector General and Bureau of Indian Affairs employees in report of investigation) (Exemptions 6 and 7(C)), aff'd, 230 F. App'x 705 (9th Cir. 2007); Judicial Watch, Inc. v. FDA, 407 F. Supp. 2d 70, 76-77 (D.D.C. 2005) (finding that HHS employees named in records concerning abortion drug testing of mifepristone (also referred to as Mifeprex or RU-486) were properly protected pursuant to Exemption 6 in order to ensure employees' safety), aff'd in pertinent part, 449 F.3d 141, 152-54 (D.C. Cir. 2006); Davy v. CIA, 357 F. Supp. 2d 76, 87-88 (D.D.C. 2004) (protecting CIA employee names). But see Stonehill v. IRS, 534 F. Supp. 2d 1, 12 (D.D.C. 2008) (ordering release of an IRS agent's name because defendant did not

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interest, the Department of Defense now regularly withholds personally identifying information about all military and civilian employees with respect to whom disclosure would "raise security or privacy concerns."<sup>65</sup> For law enforcement personnel in particular, these privacy interests are generally protected under Exemption 7(C).<sup>66</sup> (For a more detailed

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<sup>64</sup>(...continued)

provide satisfactory response to plaintiff's argument that names of other IRS agents involved in underlying case had been released in thousands of documents and there was no reason identified by defendant as to why redacted agent's name should be withheld) (Exemptions 6 and 7(C)).

<sup>65</sup> Department of Defense Director for Administration and Management Memorandum for DOD FOIA Offices 1-2 (Nov. 9, 2001), available at [www.defenselink.mil/pubs/foi/withhold.pdf](http://www.defenselink.mil/pubs/foi/withhold.pdf) (noting that certain personnel's names can be released due to "the nature of their positions and duties," including public affairs officers and flag officers); see also Schoenman, 575 F. Supp. 2d at 160 (stating that "since the attacks, as a matter of official policy, the DoD carefully considers and limits the release of all names and other personal information concerning military and civilian personnel, based on a conclusion that they are at increased risk regardless of their duties or assignment to such a unit"); Los Angeles Times Commc'ns LLC v. U.S. Dep't of Labor, 483 F. Supp. 2d 975, 985-86 (C.D. Cal. 2007) (concluding that defendant properly withheld information revealing the identity of all civilian contractors supporting Allied military operations in Iraq and Afghanistan because "the privacy life or death interest of the individual whose records are requested" outweighs "the public interest in disclosure"); Long, 2007 WL 2903924, at \*16 n.8 (finding that certain DOD and non-DOD government employees "have a privacy interest in their names and duty stations" when revelation of their identities could possibly make them subject to harassment or embarrassment in their occupation or personal lives); Hiken v. DOD, 521 F. Supp. 2d 1047, 1065 (N.D. Cal. 2007) (finding that redactions of names of military personnel proper because "defendants present a strong argument that the privacy interests at stake are significant where the disclosure of these names would risk harm or retaliation"); Clemmons, 2007 WL 1020827, at \*6 ("The identities of [U.S. Army Criminal Investigation Division] special agents, military police, other government personnel and [third-party] witnesses were all properly withheld under Exemptions (b)(6) and (b)(7)(C)."); O'Keefe, 463 F. Supp. 2d at 327 (upholding DOD's withholding of personal information of investigators as well as subjects of investigation found in United States Central Command Report); Ctr. for Pub. Integrity v. OPM, No. 04-1274, 2006 WL 3498089, at \*6 (D.D.C. Dec. 12, 2006) (finding that OPM properly withheld the names and duty stations of DOD and certain non-DOD federal personnel in sensitive occupations under Exemption 6); Deichman v. United States, No. 05-680, 2006 WL 3000448, at \*7 (E.D. Va. Oct. 20, 2006) (upholding United States Joint Forces Command's withholding of employee names and discussions of personnel matters relating to other employees under Exemption 6); MacLean v. DOD, No. 04-2425, slip op. at 18 (S.D. Cal. June 2, 2005) (protecting "names, initials, and other personal information" about Defense Hotline Investigators and other DOD personnel) (Exemptions 6 and 7(C)).

<sup>66</sup> See Keys v. DHS, 570 F. Supp. 2d 59, 68 (D.D.C. 2008) (stating that "[o]ne who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the

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discussion of the privacy protection accorded law enforcement personnel, see Exemption 7(C), below.)

Unless the information has become "practicably obscure," as discussed below, there is generally no expectation of privacy regarding information that is particularly well known or is widely available within the public domain.<sup>67</sup> Likewise, an individual generally does not have any expectation of privacy with respect to information that he or she has made public.<sup>68</sup> The D.C. Circuit has held that under the public domain doctrine, information that would otherwise be subject to a valid FOIA exemption must be disclosed if that information is preserved in a permanent public record or is otherwise easily accessible by the public.<sup>69</sup> In

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<sup>66</sup>(...continued)

conduct of their official duties and in their private lives" (quoting Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978)) (Exemption 7(C)).

<sup>67</sup> See, e.g., Trentadue v. Integrity Comm., 501 F.3d 1215, 1234 (10th Cir. 2007) (concluding that the Inspector General's substantive response to the Integrity Committee's questions should be released because "those portions answer Trentadue's allegations with respect to specific individuals" and Trentadue's complaint filed with the Integrity Committee is a public document included in the record of the appeal; therefore, the "[Inspector General's] response to these accusations, by necessity, mentions the names of these individuals" and "[d]isclosure of these names, when the allegations made against the individuals are already part of the public record, would not invade the accused's privacy at all"); Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 96-97 (6th Cir. 1996) (finding no privacy rights in mug shots of defendants in ongoing criminal proceedings when names are public and defendants have appeared in open court) (Exemption 7(C)); Blanton v. DOJ, No. 93-2398, 1994 U.S. Dist. LEXIS 21444, at \*11-12 (W.D. Tenn. July 14, 1994) ("The fact of [requester's former counsel's] representation is a matter of public record . . . . Whether an individual possesses a valid license to practice law is also a matter of public record and cannot be protected by any privacy interest."). But see Times Picayune Publ'g Corp. v. DOJ, 37 F. Supp. 2d 472, 477-82 (E.D. La. 1999) (protecting the mug shot of a prominent individual despite wide publicity prior to his guilty plea, and observing that a "mug is more than just another photograph of a person") (Exemption 7(C)).

<sup>68</sup> See Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 896 (D.C. Cir. 1995) (finding no privacy interest in documents concerning presidential candidate's offer to aid federal government in drug interdiction, a subject about which the candidate had made several public statements); see also Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (noting that government lawyer investigated by DOJ's Office of Professional Responsibility diminished his privacy interest by acknowledging existence of investigation but that he still retains privacy interest in nondisclosure of any details of investigation) (Exemption 7(C)); Billington v. DOJ, 245 F. Supp. 2d 79, 85-86 (D.D.C. 2003) (finding that information about two persons contained in a reporter's notes given to the State Department was not protected by Exemption 6, because these persons "knew that they were speaking to a reporter on the record and therefore could not expect to keep private the substance of the interview").

<sup>69</sup> See Niagara Mohawk Power Corp. v. DOJ, 169 F.3d 16, 19 (D.C. Cir. 1999); Davis v. DOJ, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (Exemptions 7(C) & 7(D)); Avondale Indus. v. NLRB, 90 F.3d 955, 961 (5th Cir. 1996) (finding that names and addresses of voters in union election

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order for the public domain doctrine to apply, a requester must be able to point "to specific information in the public domain that appears to duplicate that being withheld."<sup>70</sup>

While as a general rule individuals have no privacy interest in information that has been previously disclosed, the Supreme Court's decision in Reporters Committee and its progeny have recognized that individuals have a privacy interest in information that at one time may have been disclosed or made publicly available, but is now difficult to obtain.<sup>71</sup> That is, such individuals may have a privacy interest in maintaining the information's "practical obscurity."<sup>72</sup>

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<sup>69</sup>(...continued)

were already disclosed in voluminous public record and that there was no showing that public record was compiled in such a way as to effectively obscure that information); Hall, 552 F. Supp. 2d at 30-31 (stating that "[t]he court agrees that, to the extent that the non-redacted portions specifically identify the names of individuals in specific redacted portions of the documents, DOJ cannot redact these names" because "[t]he FOIA exemptions do not apply once the information is in the public domain"); Aguirre v. SEC, 551 F. Supp. 2d 33, 58 (D.D.C. 2008) ("Given the extent to which plaintiff's allegations have been found to be credible by the Senate Report, and the strong public interest in ferreting out possible improprieties at the SEC, disclosure is clearly warranted in situations where the person has already been identified in the Senate Report."); Hidalgo v. FBI, 541 F. Supp. 2d 250, 255 (D.D.C. 2008) (finding government informant's personal privacy at stake, "but his interest is far more limited than that of the typical confidential informant" because "status as a government informant is open and notorious") (Exemptions 6 and 7(C)); O'Neill v. DOJ, No. 05-306, 2007 WL 983143, at \*9 (E.D. Wis. Mar. 26, 2007) ("Under the public domain doctrine, materials not normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record."); Nat'l W. Life Ins., 512 F. Supp. at 461 (noting that names and duty stations of most federal employees are routinely published and available through Government Printing Office).

<sup>70</sup> Afshar v. U.S. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983); see, e.g., Edwards v. DOJ, No. 04-5044, 2004 WL 2905342, at \*1 (D.C. Cir. Dec. 15, 2004) (per curiam) (summarily affirming district court's decision to bar release of any responsive documents pursuant to Exemption 7(C); finding that appellant's argument that release of the documents was required because government officially acknowledged the information contained therein, fails because appellant "has failed to point to 'specific information in the public domain that appears to duplicate that being withheld'" (quoting Davis, 968 F.2d at 1279)); Grandison v. DOJ, 600 F. Supp. 2d 103, 117 (D.D.C. 2009) (finding that plaintiff failed to show that requested information is publicly available because he "does not show that complete copies of the depositions and answers to interrogatories requested under the FOIA have been disclosed and are preserved in a permanent public court record").

<sup>71</sup> See Reporters Comm., 489 U.S. at 780.

<sup>72</sup> Id. (recognizing privacy interest in maintaining "practical obscurity" of "rap sheets" and observing that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to" them); see, e.g., Associated Press v. DOJ, 549 F.3d at 65 (applying "practical obscurity" concept and noting that "[t]his [privacy] protection extends even to information previously made public") (Exemptions 6 and 7(C)); Isley v. EOUSA,

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As the Supreme Court found, individuals can have a cognizable privacy interest in identifying information "that might be found after a diligent search of courthouse files, county archives, [ . . . ] local police stations," and other publicly available sources of information, but otherwise is not readily available to the public.<sup>73</sup>

Similarly, courts have found that the mere fact that some of the information may be known to some members of the public does not negate the individual's privacy interest in preventing further dissemination to the public at large.<sup>74</sup> For example, the Supreme Court in

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<sup>72</sup>(...continued)

No. 98-5098, 1999 WL 1021934, at \*4 (D.C. Cir. Oct. 21, 1999) (finding no evidence that previously disclosed documents "continue to be 'freely available' in any 'permanent public record'" (Exemption 7(C)); Fiduccia v. DOJ, 185 F.3d 1035, 1046-47 (9th Cir. 1999) (finding privacy interest based on "practical obscurity" justified and protecting information about two individuals whose homes were searched ten years previously despite publicity at that time and fact that some information might be public in various courthouses) (Exemption 7(C)); Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1083 (6th Cir. 1998) (holding that there may be privacy interest in personal information even if "available on publicly recorded filings"); Lawyers' Comm. for Civil Rights v. Dep't of Transp., No. 07-2590, 2008 WL 4482855, at \*21 (N.D. Cal. Sept. 30, 2008) (noting, consistent with "practical obscurity" principles, that "the Ninth Circuit has held that simply because certain documents that would normally be subject to Exemptions 7(C) and Exemption 6 have already been publicized does not mean they must be disclosed by the agency"); Jarvis v. ATF, No. 07-111, 2008 WL 2620741, at \*12 (N.D. Fla. June 30, 2008) (stating that "[a] document previously disclosed may have 'practical obscurity' and might not again become public without a diligent search[;]" consequently, "the individual privacy exemption in the FOIA is not necessarily vitiated by prior disclosures"); Canaday v. ICE, 545 F. Supp. 2d 113, 117 (D.D.C. 2008) (relying on "practical obscurity" and recognizing "a privacy interest in the identifying information of the Federal employees even though the information may have been public at one time."); Leadership Conference on Civil Rights, 404 F. Supp. 2d at 257-59 (holding, under Exemption 6, that law enforcement records that were previously given to symposium members fall within "practical obscurity" rule); Dayton Newspapers, Inc., 257 F. Supp. 2d at 1010 (reasoning that although modern search engines might make even otherwise obscure personal information more widely available, that "does not mean that [individuals] have lost all traits of privacy" in that information); Linn v. DOJ, No. 92-1406, 1995 WL 417810, at \*31 (D.D.C. June 6, 1995) (declaring that even if "some of the names at issue were at one time released to the general public, individuals are entitled to maintaining the 'practical obscurity' of personal information that is developed through the passage of time"). But see CNA Holdings, Inc. v. DOJ, No. 07-2084, 2008 WL 2002050, at \*6 (N.D. Tex. May 9, 2008) (finding court documents to be in the public domain due to defendant's failure to meet its "burden to show that the documents that were clearly public and should be in the court's files, according to PACER and the common record retention practice of federal courts, are for some reason not actually still publicly available").

<sup>73</sup> Reporters Comm., 489 U.S. at 764.

<sup>74</sup> See Forest Serv. Employees for Envtl. Ethics, 524 F.3d at 1025 n.3 ("As a preliminary matter, we reject [plaintiff's] contention that the unauthorized leak of the unredacted Cramer Fire Report or OSHA's decision to identify certain employees in its own report diminishes the  
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Favish held that the fact that one photograph of the death scene had been leaked to the media did not detract from the weighty privacy interests of the surviving relatives to be secure from intrusions by a "sensation-seeking culture" and in limiting further disclosure of the death scene images, "for their own piece of mind and tranquility."<sup>75</sup>

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<sup>74</sup>(...continued)

Forest Service's ability to apply Exemption 6 to redact the identities from the Report."); Horowitz, 428 F.3d at 280 ("Even though the student did reveal his allegation to two Peace Corps workers . . . he still has an interest in avoiding further dissemination of his identity."); Barnard, 598 F. Supp. 2d at 12 ("Plaintiff's argument is foreclosed by a long line of cases recognizing that individuals maintain an interest in their privacy even where some information is known about them publicly."); Lawyers' Comm. for Civil Rights, 2008 WL 4482855, at \*21 (stating that "a person may still have a privacy interest in information that has already been publicized" and explaining that "[n]or is one's privacy interest in potentially embarrassing information lost by the possibility that someone could reconstruct that data from public files"); Schoenman, 573 F. Supp. 2d at 149 ("[E]ven if Plaintiff is correct that he can guess the individual's identity, 'the fact that Plaintiff may deduce the identities of individuals through other means . . . does not diminish their privacy interests.'" (quoting Shores v. FBI, 185 F. Supp. 2d 77, 83 (D.D.C. 2002))); Thomas v. DOJ, 531 F. Supp. 2d 102, 109 (D.D.C. 2008) ("Third parties' privacy interests are not lost because a requester knows or can determine from a redacted record their identities . . . . Nor do third parties lose their privacy interests because their names already have been disclosed.") (Exemption 7(C)); Summers v. DOJ, 517 F. Supp. 2d 231, 240 (D.D.C. 2007) ("The possibility that plaintiff has determined the identity of the agent, however, does not undermine that agent's privacy interests."); Lee v. DOJ, No. 05-1665, 2007 WL 744731, at \*2 (D.D.C. Mar. 6, 2007) ("[A]lthough the documents may contain information that has already been made public at one time, given that the information would disclose incidents of prior criminal conduct by third parties, those individuals certainly have privacy interests in keeping the information from renewed public scrutiny.") (Exemptions 6 and 7(C)); Pendergrass v. DOJ, No. 04-112, 2005 WL 1378724, at \*4 (D.D.C. June 7, 2005) (reasoning that individual does not lose all privacy interest in telephone conversation even if she knew of potential for monitoring of such calls); Edmonds v. FBI, 272 F. Supp. 2d 35, 53 (D.D.C. 2003) (finding that media identification of persons mentioned in a law enforcement file "does not lessen their privacy interests or 'defeat the exemption,' for prior disclosure of personal information does not eliminate an individual's privacy interest in avoiding subsequent disclosure by the government") (Exemptions 6 and 7(C)), appeal dismissed voluntarily, No. 03-5364, 2004 WL 2806508 (D.C. Cir. Dec. 7, 2004); Mueller, 63 F. Supp. 2d at 743 (stating that existence of publicity surrounding events does not eliminate privacy interest) (Exemptions 6 and 7(C)); Chin, No. 97-2176, slip op. at 5 (W.D. La. June 24, 1999) (concluding that although "some of the events are known to certain members of the public . . . this fact is insufficient to place this record for dissemination into the public domain"), aff'd per curiam, No. 99-31237 (5th Cir. June 15, 2000); cf. Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) (treating requester's personal knowledge as irrelevant in assessing privacy interests).

<sup>75</sup> 541 U.S. at 166-71; see also Baltimore Sun v. U.S. Customs Serv., No. 97-1991, slip op. at 5 (D. Md. Nov. 21, 1997) (finding that subject of photograph introduced into court record "retained at least some privacy interest in preventing the further dissemination of the photographic image" when "[t]he photocopy in the Court record was of such poor quality as to severely limit its dissemination") (Exemption 7(C)).

However, the District Court for the Southern District of New York decided that military detainees at Guantanamo Bay had no privacy interest in their identifying information because they provided the information at formal legal proceedings before a tribunal and there was no evidence that the detainees "were informed that the proceedings would remain confidential in any respect."<sup>76</sup> Indeed, even though the tribunal records were not made available to the general public and press attendees had to agree to confidentiality requirements, the court concluded that the detainees had no privacy interest in stopping further dissemination of their identifying information.<sup>77</sup> On reconsideration, the court went even further by stating, in dicta, that third parties had "even less of an expectation" of privacy in the disclosure of their identifying information by detainees at the tribunals.<sup>78</sup>

The District Court for the Southern District of New York has also held that height and weight information concerning Guantanamo Bay detainees was not exempt from disclosure under Exemption 6.<sup>79</sup> Finding at best only a "modest" privacy interest in the nondisclosure of the information, the court acknowledged that prior cases involving height and weight information frequently resulted in decisions concluding that the privacy interest in the nondisclosure of such information is "quite weak."<sup>80</sup> After analyzing the privacy interest at issue, the court concluded that DOD had failed to make "any particularized showing that disclosure of this information is likely to lead to retaliation, harassment, or embarrassment."<sup>81</sup> Moreover, the court went further by suggesting that "at least some detainees would welcome having this information disclosed" due to the fact that the "immediate impetus" for the FOIA request concerned an investigation by the Associated Press of hunger strikes by detainees.<sup>82</sup> As for the public interest in disclosure of the information, the court stated that "there is a clear public interest in obtaining this information so as to assess, not only DOD's conduct with respect to the hunger strikes at Guantanamo, but more generally DOD's care and (literally) feeding of the detainees."<sup>83</sup> Weighing this public interest in disclosure against the privacy interest in nondisclosure, the court concluded that the height and weight information contributes significantly to public understanding of the operations or activities of the

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<sup>76</sup> Associated Press, 410 F. Supp. 2d at 150 (distinguishing privacy interests involved with Guantanamo Bay detainees from those involved in Ray, based upon express promises of confidentiality that had been granted to Haitian "boat people").

<sup>77</sup> Id. at 156 & n.2 (opining that the testifying detainees had no privacy interest in their testimony before tribunals because they did not know of confidentiality requirements, nor did government require such confidentiality in order to protect any privacy interest of detainees).

<sup>78</sup> Id. at 154.

<sup>79</sup> Associated Press v. DOD, 462 F. Supp. 2d 573, 577-78 (S.D.N.Y. 2006).

<sup>80</sup> Id. at 577 (citing cases).

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id. (clarifying that information pertaining to both the height and weight of the detainees is necessary because "weight information only takes on significance when paired with the corresponding information on height").

government and this public interest in disclosure "more than outweighs the modest privacy interest, if any, here proffered by DOD."<sup>84</sup>

Recently, the Court of Appeals for the Second Circuit decided that Guantanamo Bay detainees and their family members have a "measurable privacy interest" in the nondisclosure of their names and identifying information contained in records regarding allegations of abuse by military personnel and other detainees.<sup>85</sup> Relying upon Exemption 7(C), the Court concluded that identifying information about detainees, including those detainees who allegedly have been abused by military personnel and those detainees who are alleged to have abused other detainees, is entitled to protection because "the privacy interest of the detainees in nondisclosure of their names and identifying information is not outweighed by any minimal public interest that might be served by such disclosure."<sup>86</sup> Regarding the identifying information of detainees' family members, the Second Circuit concluded that the information was exempt from disclosure pursuant to Exemption 6.<sup>87</sup> Analyzing the privacy interest of the family members' identifying information, the Second Circuit found that "[i]f disclosed, the information would also reveal that the family members are relatives of certain Guantanamo Bay detainees who testified about the Taliban before the [Administrative Review Boards]."<sup>88</sup> After balancing the privacy interest and public interest in the identifying information, the court concluded "that disclosing the names and addresses of the family members would constitute a clearly unwarranted invasion of the family members' privacy interest because such disclosure would not shed any light on DOD's action in connection with the detainees' claims at issue here."<sup>89</sup>

The majority of courts to have considered the issue have held that individuals who write to the government expressing personal opinions generally do so with some expectation of confidentiality unless they are advised to the contrary in advance;<sup>90</sup> their identities, but not

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<sup>84</sup> Id. at 578.

<sup>85</sup> Associated Press v. DOD, 554 F.3d at 286.

<sup>86</sup> Id. at 290.

<sup>87</sup> Id. at 293.

<sup>88</sup> Id. at 292.

<sup>89</sup> Id. at 293.

<sup>90</sup> Alliance for the Wild Rockies v. Dep't of the Interior, 53 F. Supp. 2d at 36-37 (concluding that the agency "made it abundantly clear in its notice that the individuals submitting comments to its rulemaking would not have their identities concealed" when the rulemaking notice "specified that '[t]he complete file for this proposed rule is available for inspection"); see also U.S. Government, Regulations.gov, The Privacy and Use Notice Regarding Comment Submission, available at <http://www.regulations.gov/search/footer/privacyanduse.jsp> (last visited Apr. 30, 2009) (establishing a government portal facilitating the location, review, and submission of comments on federal regulations published in the Federal Register that are open for public comment; and providing that "The comments you provide to a Federal Department or Agency through Regulations.gov are collected voluntarily and may be publicly

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necessarily the substance of their letters, ordinarily have been withheld.<sup>91</sup> For instance, the Court of Appeals for the Fourth Circuit protected under Exemption 7(C) the names and addresses of people who wrote to the IRS expressing concerns about an organization's tax-exempt status.<sup>92</sup> The District Court for the District of Columbia reached the same conclusion as the Fourth Circuit for the names and addresses of people who wrote to the IRS to comment on the same organization's tax-exempt status, both pro and con.<sup>93</sup> The United States District Court for the Northern District of California found that the names of persons who complained to the TSA and FBI about the TSA "watch list" were properly protected, as long as those individuals had not otherwise made their complaints public.<sup>94</sup> Nevertheless, in some circumstances courts have refused to accord privacy protection to such government correspondents.<sup>95</sup>

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<sup>90</sup>(...continued)

disclosed in a rulemaking docket or on the Internet.").

<sup>91</sup> See, e.g., Lakin Law Firm, P.C. v. FTC, 352 F.3d 1122, 1125 (7th Cir. 2003) (finding that the "core purposes" of the FOIA would not be served by the release of the names and addresses of persons who complained to the FTC about "cramming"); Strout v. U.S. Parole Comm'n, 40 F.3d 136, 139 (6th Cir. 1994) (articulating public policy against disclosure of names and addresses of people who write Parole Commission opposing convict's parole); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 145 n.4 (D.D.C. 2007) ("Consumers making complaints with the FTC have an expectation that it will protect their personal information."); Kidd v. DOJ, 362 F. Supp. 2d at 297 (protecting names and addresses of constituents in letters written to their congressman); Butler v. SSA, No. 03-0810, slip op. at 5 (W.D. La. June 25, 2004) (finding that persons making complaints against an administrative law judge "have a privacy interest" in their complaints), aff'd on other grounds, 146 F. App'x 752 (5th Cir. 2005); Voinche, 940 F. Supp. at 329-30 ("There is no reason to believe that the public will obtain a better understanding of the workings of various agencies by learning the identities of . . . private citizens who wrote to government officials . . ."), aff'd per curiam, No. 96-5304, 1997 WL 411685 (D.C. Cir. June 19, 1997); Holy Spirit Ass'n v. U.S. Dep't of State, 526 F. Supp. 1022, 1032-34 (S.D.N.Y. 1981) (finding that "strong public interest in encouraging citizens to communicate their concerns regarding their communities" is fostered by protecting identities of writers); see also Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564 (D.C. Cir. 1982) (MacKinnon, J., concurring) (concurring with the nondisclosure of correspondence because communications from citizens to their government "will frequently contain information of an intensely personal sort") (Exemptions 6 and 7(C)).

<sup>92</sup> Judicial Watch, Inc. v. United States, 84 F. App'x at 337.

<sup>93</sup> Judicial Watch, Inc. v. Rossotti, 285 F. Supp. 2d 17, 28 (D.D.C. 2003) (Exemption 7(C)).

<sup>94</sup> Gordon v. FBI, 388 F. Supp. 2d 1028, 1041-42, 1045 (N.D. Cal. 2005) (Exemptions 6 and 7(C)).

<sup>95</sup> See People for the Am. Way Found., 503 F. Supp. 2d at 306 ("Disclosing the mere identity of individuals who voluntarily submitted comments regarding the Lincoln video does not raise the kind of privacy concerns protected by Exemption 6 . . . . Moreover, the public interest in knowing who may be exerting influence on [agency] officials sufficient to convince them to

(continued...)

Since the privacy interest under Exemption 6 only pertains to individuals, neither corporations nor business associations possess protectible privacy interests.<sup>96</sup> The closely held corporation or similar business entity, however, is an exception to this principle: "Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and the records would necessarily reveal at least a portion of the owner's personal finances."<sup>97</sup> Moreover, when a record reflects personal details

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<sup>95</sup>(...continued)

change the video outweighs any privacy interest in one's name."); Lardner, 2005 WL 758267, at \*17, \*19 (requiring release of identities of unsuccessful pardon applicants, as well as individuals mentioned in pardon documents, because they wrote letters in support of pardon applications or were listed as character references on pardon applications); Landmark Legal Found. v. IRS, 87 F. Supp. 2d 21, 27-28 (D.D.C. 2000) (granting Exemption 3 protection under 26 U.S.C. § 6103, but declining to grant Exemption 6 protection to citizens who wrote to IRS to express opinions or provide information; noting that "IRS has suggested no reason why existing laws are insufficient to deter any criminal or tortious conduct targeted at persons who would be identified"), aff'd on Exemption 3 grounds, 267 F.3d 1132 (D.C. Cir. 2001); Judicial Watch v. DOJ, 102 F. Supp. 2d 6, 17-18 (D.D.C. 2000) (allowing deletion of home addresses and telephone numbers but ordering release of identities of individuals who wrote to Attorney General about campaign finance or Independent Counsel issues); Cardona v. INS, No. 93-3912, 1995 WL 68747, at \*3 (N.D. Ill. Feb. 15, 1995) (finding only "de minimis invasion of privacy" in release of name and address of individual who wrote letter to INS complaining about private agency that offered assistance to immigrants).

<sup>96</sup> See, e.g., Sims v. CIA, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); Nat'l Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 686 n.44 (D.C. Cir. 1976) ("The sixth exemption has not been extended to protect the privacy interests of businesses or corporations."); Hodes v. HUD, 532 F. Supp. 2d 108, 119 (D.D.C. 2008) ("As a threshold matter, both Parties fail . . . to acknowledge that only individuals (not commercial entities) may possess protectible privacy interests under Exemption 6."); Maydak v. DOJ, 362 F. Supp. 2d 316, 324-25 (D.D.C. 2005) (stating that Exemption 6 applies "only to individuals" (quoting Sims, 642 F.2d at 572 n.47)); cf. Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 952 n.10 (S.D. Iowa 2002) (dictum) (noting that "[i]t is not clear to this Court that a trust, any more than a corporation, has a privacy interest worthy of protection under the FOIA").

<sup>97</sup> Multi Ag, 515 F.3d at 1228-29 (quoting Nat'l Parks, 547 F.2d at 685); see, e.g., Consumers' Checkbook, 554 F.3d at 1051 ("We have . . . recognized substantial privacy interests in business-related financial information for individually owned or closely held businesses."); Providence Journal Co. v. FBI, 460 F. Supp. 778, 785 (D.R.I. 1978) ("While corporations have no privacy, personal financial information is protected, including information about small businesses when the individual and corporation are identical.") rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979); see also Beard v. Espy, No. 94-16748, 1995 WL 792071, at \*1 (9th Cir. Dec. 11, 1995); Nat'l Parks, 547 F.2d at 685-86; Okla. Publ'g Co. v. HUD, No. CIV-87-1935-P, 1988 U.S. Dist. LEXIS 18643, at \*4-5 (W.D. Okla. June 17, 1988); FOIA Update, Vol. III, No. 4, at 5 ("FOIA Counselor: Questions & Answers") (advising that corporations do not have privacy, but that personal financial information is protectible when individual and corporation are identical). But see Long v. DOJ, 450 F. Supp. 2d 42, 72 (D.D.C. 2006) ("At most, [the

(continued...)

regarding an individual, albeit within the context of a business record, the individual's privacy interest is not diminished and courts have permitted agency withholding of such information.<sup>98</sup> Courts have found, however, that such an individual's expectation of privacy is diminished with regard to matters in which he or she is acting in a business capacity.<sup>99</sup> In Doe v. Veneman, on the other hand, the District Court for the Western District of Texas ruled that the Department of Agriculture had erroneously labeled individuals (who were taking part in a USDA program) as "businesses" based on either the number of livestock they owned or the fact that they had a name for their ranch, and it found that personally identifying information about those individuals was exempt from disclosure.<sup>100</sup>

When analyzing the privacy interest in nondisclosure under the FOIA, courts have found that the privacy interest of an individual may be diminished if that individual is

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<sup>97</sup>(...continued)

Department of Justice] ha[s] shown that disclosure of one record would reveal that an individual is associated with a business that in turn is a party to a legal proceeding. That fact, standing alone, does not implicate the FOIA's personal privacy concerns.", amended by 457 F. Supp. 2d 30 (D.D.C. 2006), amended further on reconsideration, 479 F. Supp. 2d 23 (D.D.C. 2007).

<sup>98</sup> See Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187-89 (8th Cir. 2000) (protecting identities of pork producers who signed petition calling for abolishment of mandatory contributions to fund for marketing and advertising pork, because release would reveal position on referendum and "would vitiate petitioners' privacy interest in secret ballot") (reverse FOIA suit); Forest Guardians v. U.S. Forest Serv., No. 99-0615, slip op. at 39-45 (D.N.M. Jan. 29, 2001) (finding "substantial" privacy interest" in personal loan information contained on escrow waiver forms that record ranchers' use of federal grazing permits as loan collateral) (reverse FOIA suit); Hill v. USDA, 77 F. Supp. 2d 6, 8 (D.D.C. 1999) (finding privacy interest in records of business transactions between borrowers and partly owned family corporation relating to loans made by Farmers Home Administration to individual borrowers), summary affirmance granted, No. 99-5365, 2000 WL 520724, at \*1 (D.C. Cir. Mar. 7, 2000).

<sup>99</sup> See, e.g., Hersh & Hersh v. HHS, No. 06-4234, 2008 WL 901539, at \*8 (N.D. Cal. Mar. 31, 2008) (finding that business addresses, phone numbers, and job titles of non-federal corporate employees do not implicate the same type of heightened concerns as "private citizens' identities, home addresses, home telephone numbers, social security numbers, medical information, etc."); Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1089 (D. Or. 1998) (concluding that cattle owners who violated federal grazing laws have "diminished expectation of privacy" in their names when such information relates to commercial interests) (Exemption 7(C)); Wash. Post Co. v. USDA, 943 F. Supp. 31, 34-36 (D.D.C. Oct. 18, 1996) (finding that farmers who received subsidies under cotton price-support program have only minimal privacy interests in home addresses from which they also operate businesses), appeal dismissed voluntarily, No. 96-5373 (D.C. Cir. May 19, 1997); Ackerson & Bishop Chartered v. USDA, No. 92-1068, slip op. at 1 (D.D.C. July 15, 1992) (concluding that commercial mushroom growers operating under individual names have no expectation of privacy).

<sup>100</sup> Doe v. Veneman, 230 F. Supp. 2d 739, 748-51 (W.D. Tex. 2002), aff'd in pertinent part on other grounds, 380 F.3d 807, 818 n.39 (5th Cir. 2004).

deceased.<sup>101</sup> While courts have not established a bright-line rule regarding the extent to which an agency must go in determining whether an individual has died, the D.C. Circuit has held that an agency must take certain "basic steps," which can vary depending on the specific circumstances of a particular case, to investigate whether disclosure would violate a living person's privacy interests.<sup>102</sup> An agency must take these basic steps to determine life status before invoking a privacy interest under Exemptions 6 or 7(C).<sup>103</sup> The D.C. Circuit has upheld the use of the FBI's "100-year rule," in making its privacy protection determinations whereby the FBI assumes that an individual is alive unless his or her birthdate is more than 100 years

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<sup>101</sup> See Davis v. DOJ, 460 F.3d 92, 97-98 (D.C. Cir. 2007) ("We have recognized 'that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased.'" (quoting Schrecker v. DOJ, 349 F.3d 657, 661 (D.C. Cir. 2003) ("The fact of death, therefore, while not requiring the release of identifying information, is a relevant factor to be taken into account in the balancing decision whether to release information."))) (Exemption 7(C)); Grandison, 600 F. Supp. 2d at 114 ("However, 'the death of the subject of personal information does diminish to some extent the privacy interest in that information, though it by no means extinguishes that interest; one's own and one's relations' interests in privacy ordinarily extend beyond one's death'" (quoting Schrecker v. DOJ, 254 F.3d 162, 166 (D.C. Cir. 2001))); Schoenman, 575 F. Supp. 2d at 176 ("Significantly, the D.C. Circuit also recognizes 'that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased,' and has explained that '[t]he fact of death, therefore, while not requiring the release of information, is a relevant factor to be taken into account in the balancing decision whether to release information.'" (quoting Schrecker v. DOJ, 349 F.3d at 661)); Summers, 517 F. Supp. 2d at 241 ("This Circuit has 'recognized that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased.'" (quoting Davis, 460 F.3d at 98)).

<sup>102</sup> See Johnson v. EOUSA, 310 F.3d 771, 775-76 (D.C. Cir. 2002) (finding that agency's efforts to determine if individuals were alive or dead met "basic steps" necessary to determine information that could affect privacy interests, and concluding that "[w]e will not attempt to establish a brightline set of steps for agency to take" in determining whether an individual is dead); see also, e.g., Manna v. DOJ, No. 92-1840, slip op. at 8 (D.N.J. Aug. 27, 1993) (finding government's obligation fulfilled by search of computerized index system and index cards for evidence of death of witness relocated more than twenty years ago), aff'd, 51 F.3d 1158 (3d Cir. 1995); Williams v. DOJ, 556 F. Supp. 63, 66 (D.D.C. 1982) (finding agency's good-faith processing, rather than extensive research for public disclosures, sufficient in lengthy, multifaceted judicial proceedings).

<sup>103</sup> See Schrecker v. DOJ, 254 F.3d 162, 167 (D.C. Cir. 2001) ("Without confirmation that the Government took certain basic steps to ascertain whether an individual was dead or alive, we are unable to say whether the Government reasonably balanced the interests in personal privacy against the public interest in release of the information at issue."); Schoenman, 576 F. Supp. 2d at 9-10, 13-14 (declaring that an agency must make reasonable effort to determine an individual's life status prior to invoking privacy interest under Exemptions 6 and 7(C), and finding that "agencies must take pains to ascertain life status in the first instance, i.e., in initially balancing the privacy and public interests at issue").

ago.<sup>104</sup>

When analyzing protectible privacy interests, "survivor privacy" warrants discussion. The Supreme Court held unanimously in Favish that the "FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images."<sup>105</sup> This case involved a request for several death-scene photographs of a former Deputy White House Counsel.<sup>106</sup> The government protected the photographs under the FOIA, but the lower courts ordered them disclosed.<sup>107</sup> Favish argued, relying on particular language in Reporters Committee, that only the individual who was the direct "subject" of the records could have a privacy interest in those records.<sup>108</sup> The Court rejected this argument, stating that "[t]he right to personal privacy is not confined, as Favish argues, to the 'right to control information about oneself.' Favish misreads [our opinion] in Reporters Committee and adopts too narrow an interpretation of the case's holding."<sup>109</sup>

The Court then decided that "survivor privacy" was a valid privacy interest protected by Exemption 7(C), based on three factors. First, Reporters Committee did not restrict

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<sup>104</sup> Schrecker, 349 F.3d at 662-65 (holding that the FBI's administrative process of using its "100-year rule," searching the Social Security Death Index if an individual's birthdate is in records, and using its institutional knowledge, is reasonable and sufficient in determining whether individuals mentioned in requested records are deceased); see Davis, 460 F.3d at 101-05 (acknowledging FBI's use of "100-year rule"; finding that use of the rule was destined to fail when applied to audiotapes, as opposed to documents, and stating that "[t]he reasonableness of [the "100-year rule"] depends upon the probability that the responsive records will contain the individual's birth date . . . . [I]t seems highly unlikely that the participants in an audiotaped conversation would have announced their ages or dates of birth") (Exemption 7(C)); see also Schoenman, 576 F. Supp. 2d at 10 ("The D.C. Circuit has concluded that the 100-year rule is, as a general matter, a reasonable prophylactic presumption."); Summers, 517 F. Supp. 2d at 242 (concluding that defendants adequately "determined the life status of named agents by using the agency's '100-year rule,' the Who Was Who publication, the institutional knowledge of employees, and prior FOIA requests" given that "there are over 1100 responsive documents, and there are likely many third-party named individuals whose privacy is at issue"); Piper v. DOJ, 428 F. Supp. 2d 1, 3 (D.D.C. Apr. 12, 2006) (observing that D.C. Circuit in Schrecker, 349 F.3d at 665, concluded that use of "100-year rule" was reasonable), aff'd, 222 F. App'x 1 (D.C. Cir. 2007).

<sup>105</sup> 541 U.S. at 170; see also FOIA Post, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04).

<sup>106</sup> 541 U.S. at 161.

<sup>107</sup> Id. at 161-64; see FOIA Post, "Supreme Court Decides to Hear 'Survivor Privacy' Case" (posted 5/13/03; supplemented 10/10/03) (chronicling case's history).

<sup>108</sup> 541 U.S. at 165.

<sup>109</sup> Id.

personal privacy as "some limited or 'cramped notion' of that idea,"<sup>110</sup> so personal privacy is broad enough to protect surviving family members' "own privacy rights against public intrusions."<sup>111</sup> Second, the Court reviewed the long tradition at common law of "acknowledging a family's control over the body and death images of the deceased."<sup>112</sup> Third, the Court reasoned that Congress used that background in creating Exemption 7(C), including the fact that the governmentwide FOIA policy memoranda of two Attorneys General had specifically extended privacy protection to families.<sup>113</sup>

Thus, the Supreme Court endorsed the holdings of several lower courts in recognizing that surviving family members have a protectible privacy interest in sensitive, often graphic, personal details about the circumstances surrounding an individual's death.<sup>114</sup>

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<sup>110</sup> Id. at 165.

<sup>111</sup> Id. at 167.

<sup>112</sup> Id. at 168. But cf. Showler v. Harper's Magazine Found., No. 05-178, slip op. at 6 (E.D. Okla. Dec. 22, 2005) (finding that a photograph of a deceased individual was distinguishable from the death-scene photographs in Favish because, inter alia, the photograph "was taken at a public, newsworthy event" and "was the same scene the funeral attendees observed").

<sup>113</sup> 541 U.S. at 169 (citing Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (FOIA) 36 (June 1967) and Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 9-10 (Feb. 1975)).

<sup>114</sup> See, e.g., Hale v. DOJ, 973 F.2d 894, 902 (10th Cir. 1992) (perceiving "no public interest in photographs of the deceased victim, let alone one that would outweigh the personal privacy interests of the victim's family") (Exemption 7(C)), cert. granted, vacated & remanded on other grounds, 509 U.S. 918 (1993); Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (affirming nondisclosure of autopsy reports of individuals killed by cyanide-contaminated products); Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 186 (D.C. Cir. 1987) (noting that some autopsy reports might "shock the sensibilities of surviving kin"); Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (holding deceased infant's medical records exempt because their release "would almost certainly cause . . . parents more anguish"); Isley v. EOUSA, No. 96-0123, slip op. at 3-4 (D.D.C. Feb. 25, 1998) (approving the withholding of "medical records, autopsy reports and inmate injury reports pertaining to a murder victim as a way of protecting surviving family members"), aff'd on other grounds, 203 F.3d 52 (D.C. Cir. 1999) (unpublished table decision); Katz v. NARA, 862 F. Supp. 476, 483-86 (D.D.C. 1994) (holding that Kennedy family's privacy interests would be invaded by disclosure of "graphic and explicit" JFK autopsy photographs), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995); N.Y. Times Co. v. NASA, 782 F. Supp. 628, 631-32 (D.D.C. 1991) (withholding audiotape of voices of Space Shuttle Challenger astronauts recorded immediately before their deaths, to protect family members from pain of hearing final words of loved ones); Cowles Publ'g Co. v. United States, No. 90-349, slip op. at 6-7 (E.D. Wash. Dec. 20, 1990) (withholding identities of individuals who became ill or died from radiation exposure, in order to protect living victims and family members of deceased persons from intrusive contacts and inquiries). But see Journal-Gazette Co. v. U.S. Dep't of the Army, No. F89-147, slip op. at 8-9 (N.D. Ind. Jan. 8, 1990) (holding that because autopsy report of Air National Guard pilot killed in training exercise contained "concise

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Although courts have found that one's status as a public figure might in some circumstances factor into the privacy balance, a public figure does not, by virtue of his status, forfeit all rights of privacy.<sup>115</sup> Indeed, in Favish, the deceased former Deputy White House Counsel's status as both a public figure and a high-level government official did not, in the

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<sup>114</sup>(...continued)

medical descriptions of the cause of death," not "graphic, morbid descriptions," survivors' minimal privacy interest was outweighed by public interest); cf. Outlaw v. U.S. Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. 1993) (ordering disclosure in absence of evidence of existence of any survivor whose privacy would be invaded by release of murder-scene photographs of man murdered twenty-five years earlier); Rabbitt v. Dep't of the Air Force, 401 F. Supp. 1206, 1210 (S.D.N.Y. 1974) (ordering disclosure of medical records of two Air Force personnel who died in airplane accident).

<sup>115</sup> See Forest Serv. Employees for Env'tl. Ethics, 524 F.3d at 1025 (noting that "while the privacy interests of public officials are 'somewhat reduced' when compared to those of private citizens, 'individuals do not waive all privacy interests . . . simply by taking an oath of public office.'" (quoting Lissner v. U.S. Customs Serv., 241 F.3d 1220, 1223 (9th Cir. 2001))); Kimberlin, 139 F.3d at 949 (stating that "although government officials, as we have stated before, may have a 'somewhat diminished' privacy interest, they 'do not surrender all rights to personal privacy when they accept a public appointment'" (quoting Quinon v. FBI, 86 F.3d 1222, 1230 (D.C. Cir. 1996))) (Exemption 7(C)); Fund for Constitutional Gov't v. NARA, 656 F.2d 856, 865 (D.C. Cir. 1981); Nat'l Sec. News Serv., 584 F. Supp. 2d at 96 (finding that "[d]isclosure of the requested patient admission records only would reveal who was admitted to the Naval Medical Center; it would reveal nothing about the Navy's own conduct" and "[t]his is so irrespective of whether one of the persons then admitted to the hospital is now a public figure"); Canaday, 545 F. Supp. 2d at 118 (stating that public figures "do not forfeit all vestiges of privacy"); Phillips v. ICE, 385 F. Supp. 2d 296, 305 (S.D.N.Y. 2005) (disregarding requester's unsupported claim that former foreign government officials have no "legitimate privacy interest[s]"); Wolk v. United States, No. 04-832, 2005 WL 465382, at \*5 (E.D. Pa. Feb. 28, 2005) ("[O]fficials do not surrender all of their rights to personal privacy when they accept a public appointment.") (Exemptions 6 and 7(C)); Elec. Privacy Info. Ctr. v. DOJ, No. 02-0063, slip op. at 10 n.7 (D.D.C. Mar. 11, 2004) (concluding that "government officials do not lose all personal private rights when they accept a public appointment"); Billington v. DOJ, 11 F. Supp. 2d 45, 62 (D.D.C. 1998) (finding that although public officials in some circumstances have diminished privacy, residual privacy interests militate against disclosure of nonpublic details), aff'd in pertinent part, 233 F.3d 581 (D.C. Cir. 2000); cf. McNamera v. DOJ, 974 F. Supp. 946, 959 (W.D. Tex. 1997) (stating that "[s]imply because an individual was once a public official does not mean that he retains that status throughout his life," and holding that three years after a disgraced sheriff resigned he was "a private, not a public figure") (Exemption 7(C)); Steinberg v. DOJ, No. 93-2409, slip op. at 11 (D.D.C. July 14, 1997) ("[E]ven widespread knowledge about a person's business dealings cannot serve to diminish his or her privacy interests in matters that are truly personal.") (Exemption 7(C)). But cf. Judicial Watch, Inc. v. DOJ, No. 00-745, 2001 U.S. Dist. LEXIS 25731, at \*13 (D.D.C. Feb. 12, 2001) (suggesting that pardoned prisoners lost any privacy interests since they "arguably bec[ame] public figures through their well-publicized pleas for clemency and [given] the speeches some have made since their release") (Exemption 7(C)).

Supreme Court's opinion, "detract" at all from the "weighty privacy interests involved."<sup>116</sup> Likewise, a candidate for a political office, either federal or nonfederal, does not forfeit all rights to privacy.<sup>117</sup> Notably, courts afford foreign nationals the same basic privacy rights under the FOIA as they afford U.S. citizens.<sup>118</sup>

Individuals do not waive their privacy rights merely by signing a document that states that information may be released pursuant to the FOIA.<sup>119</sup> As one court has observed, such a statement is not a waiver of the right to confidentiality, it is merely a warning by the agency and corresponding acknowledgment by the signers "that the information they were providing could be subject to release."<sup>120</sup> Similarly, the Court of Appeals for the Eighth Circuit has held that individuals who sign a petition, knowing that those who sign afterward will observe their

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<sup>116</sup> 541 U.S. at 171.

<sup>117</sup> See Nation Magazine, 71 F.3d at 894 & n.9 ("Although candidacy for federal office may diminish an individual's right to privacy . . . it does not eliminate it[.]"); Hunt v. U.S. Marine Corps, 935 F. Supp. 46, 54 (D.D.C. 1996) (finding that senatorial candidate has unquestionable privacy interest in his military service personnel records and medical records); Nation Magazine v. Dep't of State, No. 92-2303, 1995 WL 17660254, at \*10 (D.D.C. Aug. 18, 1995) (upholding refusal to confirm or deny existence of investigative records pertaining to presidential candidate); cf. Iowa Citizens, 256 F. Supp. 2d at 954 (ruling that nominee for position of Undersecretary of Agriculture for Rural Development does not forfeit all privacy rights).

<sup>118</sup> See Ray, 502 U.S. at 175-79 (applying traditional analysis of privacy interests under FOIA to Haitian nationals); Judicial Watch, Inc. v. DHS, 514 F. Supp. 2d 7, 10 n.4 (D.D.C. 2007) (stating that "courts in our Circuit have held that foreign nationals are entitled to the same privacy rights under FOIA as United States citizens"); Ctr. for Nat'l Sec. Studies v. DOJ, 215 F. Supp. 2d 94, 105-06 (D.D.C. 2002) (recognizing, without discussion, the privacy rights of post-9/11 detainees who were unlawfully in the United States) (Exemption 7(C)), aff'd on other grounds, 331 F.3d 918 (D.C. Cir. 2003); Schiller v. INS, 205 F. Supp. 2d 648, 662 (W.D. Tex. 2002) (finding that "[a]liens [and] their families . . . have a strong privacy interest in nondisclosure of their names, addresses, and other information which could lead to revelation of their identities") (Exemption 7(C)); Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at \*8 (D.D.C. Mar. 30, 2001) (protecting asylum application filed on behalf of Cuban émigré); Hemenway, 601 F. Supp. at 1005-07 (accordng Exemption 6 protection to citizenship information regarding news correspondents accredited to attend State Department press briefings).

<sup>119</sup> See Lakin Law Firm, 352 F.3d at 1124-25 (explaining that a warning on Federal Trade Commission website that "information provided may be subject to release under the FOIA" cannot be construed as a waiver by consumers) (emphasis added); Hill, 77 F. Supp. 2d at 8 (noting that disclosure warning in loan documents was "a warning, not a waiver," and that "[t]he statement does not say that the government will not attempt to protect privacy rights by asserting them, and indeed the government is expected to do so.").

<sup>120</sup> Hill, 77 F. Supp. 2d at 8 (holding borrowers of Farmers Home Administration loans did not waive their privacy interests by signing loan-application documents that contained a mere warning information supplied could be released).



signatures, do not waive their privacy interests.<sup>121</sup> While such persons "would have no reason to be concerned that a limited number of like-minded individuals may have seen their names," they may well be concerned "that the petition not become available to the general public, including those opposing [the petitioners' position]."<sup>122</sup>

In addition, individuals who testify at criminal trials do not forfeit their rights to privacy except on those very matters that become part of the public record.<sup>123</sup> Nor do individuals who plead guilty to criminal charges lose all rights to privacy with regard to the proceedings against them.<sup>124</sup> Similarly, individuals who provide law enforcement agencies with reports of illegal conduct have well-recognized privacy interests, particularly when such persons reasonably fear reprisals for their assistance.<sup>125</sup> Even absent any evidence of fear of reprisals,

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<sup>121</sup> See Campaign for Family Farms, 200 F.3d at 1188.

<sup>122</sup> Id.

<sup>123</sup> See Isley, 1999 WL 1021934, at \*4; Kiraly v. FBI, 728 F.2d 273, 279 (6th Cir. 1984); Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981); see also Scales, 594 F. Supp. 2d at 91 ("The mere fact that Hubbard testified at trial, or that she acknowledged at trial that there were forgery charges pending against her at that time, does not constitute a waiver of her privacy rights to all other related information, as requested by the plaintiff."); Jarvis, 2008 WL 2620741, at \*13 ("That the individual testified in a public trial, however, is not necessarily a waiver.") (Exemption 7(C)); Valdez v. DOJ, 474 F. Supp. 2d 128, 133 (D.D.C. 2007) ("The fact that a third party testified publicly at trial does not diminish or waive his privacy interest.") (Exemption 7(C)); Meserve v. DOJ, No. 04-1844, 2006 WL 2366427, at \*7 (D.D.C. Aug. 14, 2006) ("[A] witness who testifies at trial does not waive her personal privacy."); Butler v. DOJ, 368 F. Supp. 2d 776, 783-84 (E.D. Mich. 2005) (protecting information about "informant who gave grand jury testimony implicating Plaintiff in crimes") (Exemptions 6 and 7(C)); Coleman v. FBI, 13 F. Supp. 2d 75, 80 (D.D.C. 1998); cf. Irons v. FBI, 880 F.2d 1446, 1454 (1st Cir. 1989) (en banc) (holding that disclosure of any source information beyond that actually testified to by confidential source is not required) (Exemption 7(D)).

<sup>124</sup> See Times Picayune, 37 F. Supp. 2d at 477-78 (refusing to order release of a mug shot, which with its "unflattering facial expressions" and "stigmatizing effect [that] can last well beyond the actual criminal proceedings . . . preserves, in its unique and visually powerful way, the subject individual's brush with the law for posterity"); see also McNamera, 974 F. Supp. at 959 (holding that convict's privacy rights are diminished only with respect to information made public during criminal proceedings against him) (Exemption 7(C)).

<sup>125</sup> See McCutchen v. HHS, 30 F.3d 183, 189 (D.C. Cir. 1994) ("The complainants [alleging scientific misconduct] have a strong privacy interest in remaining anonymous because, as 'whistle-blowers,' they might face retaliation if their identities were revealed.") (Exemption 7(C)); Holy Spirit, 683 F.2d at 564-65 (concurring opinion) (recognizing that writers of letters to authorities describing "'bizarre' and possibly illegal activities . . . could reasonably have feared reprisals against themselves or their family members") (Exemptions 6 and 7(C)); Amuso, 600 F. Supp. 2d at 93 ("Disclosure of the interviewee's identity could result in harassment, intimidation, or threats of reprisal or physical harm to the interviewee."); Clemmons, 2007 WL 1020827, at \*6 (stating that "there is a significant interest in maintaining

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however, witnesses who provide information to investigative bodies -- administrative and civil, as well as criminal -- ordinarily are accorded privacy protection.<sup>126</sup> (For a more

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<sup>125</sup>(...continued)

the secrecy of the identity of witnesses and third party interviewees so that law enforcement can continue to gather information through these interviews while assuring that the interviewees will not be subject to harassment or reprisal") (Exemptions 6 and 7(C)); Balderrama v. DHS, No. 04-1617, 2006 WL 889778, at \*9 (D.D.C. Mar. 30, 2006) ("[T]he individuals whose identities have been protected -- witnesses, undercover officers, informants -- maintain a substantial privacy interest in not being identified with law enforcement proceedings.") (Exemptions 6 and 7(C)); Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., No. 05-6015, 2005 WL 3488453, at \*3 (D. Or. Dec. 21, 2005) (protecting identities of low-level and mid-level Forest Service employees who cooperated with accident investigation, because "these employees could face harassment"), aff'd, 524 F.3d 1021 (9th Cir. 2008); Billington v. DOJ, 301 F. Supp. 2d 15, 19-21 (D.D.C. 2004) (protecting identity of reporter who furnished interview notes to State Department, partly based upon existence of "substantial" fear of reprisal by Lyndon LaRouche followers); McQueen v. United States, 264 F. Supp. 2d 502, 519-20 (S.D. Tex. 2003) (protecting names and identifying information of grand jury witnesses and other sources when suspect had made previous threats against witnesses) (Exemption 7(C)), aff'd per curiam, 100 F. App'x 964 (5th Cir. 2004); Summers v. DOJ, No. 87-3168, slip op. at 4-15 (D.D.C. Apr. 19, 2000) (protecting identities of individuals who provided information to FBI Director J. Edgar Hoover concerning well-known people "because persons who make allegations against public figures are often subject to public scrutiny"); Ortiz v. HHS, 874 F. Supp. 570, 573-75 (S.D.N.Y. 1995) (noting that probable close relationship between plaintiff and author of letter about her to HHS was likely to lead to retaliation); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1564-65 (M.D. Fla. 1994) (finding that the "opportunity for harassment or embarrassment is very strong" in a case involving the investigation of "allegations of harassment and retaliation for cooperation in a prior investigation") (Exemptions 6 and 7(C)).

<sup>126</sup> See, e.g., Perlman v. DOJ, 312 F.3d 100, 106 (2d Cir. 2002) (concluding that "[t]he public's interest in learning the identities of witnesses and other third parties is minimal because the information tells little or nothing about either the administration of the INS program or the Inspector General's conduct of its investigation") (Exemptions 6 and 7(C)), vacated & remanded, 541 U.S. 970, on remand, 380 F.3d 110 (2d Cir. 2004) (per curiam); Ford v. West, No. 97-1342, 1998 WL 317561, at \*1-2 (10th Cir. June 12, 1998) (finding thoughts, sentiments, and emotions of co-workers questioned in investigation of racial harassment claim to be within protections of Exemptions 6 and 7(C)); Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, 467 F. Supp. 2d 40, 53 (D.D.C. 2006) ("The fact that an individual supplied information to assist [National Indian Gaming Commission] in its investigations is exempt from disclosure under FOIA, regardless of the nature of the information supplied.") (Exemptions 6 and 7(C)); Brown v. EPA, 384 F. Supp. 2d 271, 278-80 (D.D.C. 2005) (protecting government employee-witnesses and informants because "[t]here are important principles at stake in the general rule that employees may come forward to law enforcement officials with allegations of government wrongdoing and not fear that their identities will be exposed through FOIA") (Exemption 7(C)); Wolk, 2005 WL 465382, at \*5 n.7 (recognizing that "interviewees who participate in FBI background investigations have a substantial privacy interest") (Exemptions 6 and 7(C)); Hayes v. U.S. Dep't of Labor, No. 96-1149, slip op. at 9-10

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detailed discussion of the privacy protection accorded such law enforcement sources, see Exemption 7(C), below.)

Faced with reverse FOIA challenges, several courts have had to consider whether to order agencies not to release records pertaining to individuals that agencies had determined should be disclosed.<sup>127</sup> These privacy reverse FOIA cases are similar in posture to the more common reverse FOIA cases that are based upon a submitter's claim that information falls within Exemption 4, cases which ordinarily involve the agency conducting "submitter notice"

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<sup>126</sup>(...continued)

(S.D. Ala. June 18, 1998) (magistrate's recommendation) (protecting information that "would have divulged personal information or disclosed the identity of a confidential source" in an OSHA investigation) (Exemption 7(C)), adopted, (S.D. Ala. Aug. 10, 1998); Tenaska Wash. Partners v. DOE, No. 8:96-128, slip op. at 6-8 (D. Neb. Feb. 19, 1997) (protecting information that would "readily identify" individuals who provided information during routine IG audit); McLeod v. Peña, No. 94-1924, slip op. at 4 (D.D.C. Feb. 9, 1996) (protecting in their entireties memoranda and witness statements concerning investigation of plaintiff's former commanding officer when unit consisted of eight officers and twenty enlisted personnel) (Exemption 7(C)), summary affirmance granted sub nom. McLeod v. U.S. Coast Guard, No. 96-5071, 1997 WL 150096 (D.C. Cir. Feb. 10, 1997). But see Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 553-54 (5th Cir. 2002) (ordering disclosure of information that could link witnesses to their OSHA investigation statements, because agency presented no evidence of "possibility of employer retaliation") (Exemption 7(C)); Fortson, 407 F. Supp. 2d at 17 (deciding that witness statements compiled during an investigation of an equal employment opportunity complaint filed by the plaintiff must be released due to the following: the government previously released the names of persons who gave statements during the investigation; the agency offered only "pure speculation" of potential for harm to be caused by disclosure of the statements; and "witness statements made during a discrimination investigation are not the type of information that exemption 6 is designed to protect"); Fine v. DOE, 823 F. Supp. 888, 896 (D.N.M. 1993) (ordering disclosure based partly upon the fact that the plaintiff no longer was employed by the agency and was "not in a position on-the-job to harass or intimidate employees of DOE/OIG and/or its contractors").

<sup>127</sup> See, e.g., Nat'l Org. for Women v. SSA, 736 F.2d 727, 728 (D.C. Cir. 1984) (per curiam) (affirming district court's decision to enjoin release of affirmative action plans submitted to SSA) (Exemptions 4 and 6); Schmidt v. U.S. Dep't of the Air Force, No. 06-3069, 2007 WL 2812148, at \*11 (C.D. Ill. Sept. 20, 2007) (finding that plaintiff has a valid privacy interest regarding information about his discipline; however, disclosure of records regarding disciplinary actions against plaintiff is proper because "[i]t is undisputed that the friendly-fire incident garnered significant public and media attention" and "[t]he release of Schmidt's reprimand gave the public, in the United States and around the world, insight into the way in which the United States government was holding its pilot accountable") (Reverse FOIA/Privacy Act "wrongful disclosure" suit); Sonderegger v. U.S. Dep't of the Interior, 424 F. Supp. 847, 853-56 (D. Idaho 1976) (ordering temporary injunction of release of claimant names and amount claimed for victims of Teton Dam disaster, while allowing release of amount paid and category of payment with all personal identifying information deleted) (Exemptions 4 and 6).

pursuant to the requirements of Executive Order 12,600.<sup>128</sup> (See the further discussion of this point under Reverse FOIA, below.) Despite this similarity, though, courts have generally not found any requirement that an agency notify record subjects of their intent to disclose personal information about them or that it "track down an individual about whom another has requested information merely to obtain the former's permission to comply with the request."<sup>129</sup>

In a reverse FOIA case that reached the Court of Appeals for the Eighth Circuit, the signers of a petition requesting a referendum to abolish a mandatory payment by pork producers sued to prevent the Department of Agriculture from releasing their names pursuant to a FOIA request.<sup>130</sup> The Eighth Circuit agreed that, under the standards of the Administrative Procedure Act,<sup>131</sup> the Department of Agriculture's initial disclosure determination was not in accordance with law and the names must be withheld.<sup>132</sup>

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<sup>128</sup> 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (2006), and in FOIA Update, Vol. VIII, No. 2, at 2-3; see also FOIA Post, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (comparing the operation of the "submitter notice" provision to cases involving personal privacy, where the individuals whose privacy "interests are being protected under the FOIA rarely are aware of th[e FOIA] process, let alone involved in it").

<sup>129</sup> Blakey v. DOJ, 549 F. Supp. 362, 365 (D.D.C. 1982) (Exemption 7(C)), aff'd in part & vacated in part, 720 F.2d 215 (D.C. Cir. 1983); see Halpern v. FBI, No. 94-CV-365A, 2002 WL 31012157, at \*10 (W.D.N.Y. Sept. 1, 2001) (magistrate's recommendation) (finding that there exists "no authority requiring the Government to contact [individuals mentioned in documents] for Exemption 6 to apply"), adopted, (W.D.N.Y. Oct. 17, 2001); cf. Hemenway, 601 F. Supp. at 1007 (placing burden on requester, not agency, to contact foreign correspondents for requested citizenship information after receiving list of correspondents with office telephone numbers and addresses, and noting that correspondents are "free to decline to respond"). But see Associated Press v. DOD, 395 F. Supp. 2d 15, 16-17 & n.1 (S.D.N.Y. 2005) (requiring agency to ask Guantanamo Bay detainees whether they wished their identifying information to be released to plaintiff, based on fact that "detainees are in custody and therefore readily available"); cf. War Babes v. Wilson, 770 F. Supp. 1, 4-5 (D.D.C. 1990) (allowing agency sixty days to meet burden of establishing privacy interest by obtaining affidavits from World War II servicemembers who objected to release of their addresses to British citizens seeking to locate their fathers).

<sup>130</sup> Campaign for Family Farms, 200 F.3d at 1182-84.

<sup>131</sup> 5 U.S.C. §§ 701-706 (2006) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."); see Chrysler v. Brown, 441 U.S. 281, 318 (1979) (deciding that judicial review based on administrative record according to "arbitrary, capricious, or not in accordance with law" standard applies to reverse FOIA cases).

<sup>132</sup> Campaign for Family Farms, 200 F.3d at 1184-89; see also AFL-CIO v. Fed. Election Comm'n, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001) (finding agency's refusal to invoke Exemption 7(C) to withhold identities of individuals in its investigative files to be "arbitrary, capricious and contrary to law"), aff'd on other grounds, 333 F.3d 168 (D.C. Cir. 2003); Forest Guardians v. U.S. Forest Serv., No. 99-0615, slip op. at 39-45 (D.N.M. Jan. 29, 2001) (setting aside agency's

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In another decision involving the Department of Agriculture, arising in a reverse FOIA context, the District Court for the Southern District of Texas found that an agency decision to release identifying information about farmers and ranchers was incorrect and that this information must be withheld.<sup>133</sup> However, it went much further by issuing a permanent injunction that prohibited the agency from releasing this sort of information in any form.<sup>134</sup> On appeal, the Court of Appeals for the Fifth Circuit concluded that the district court lacked the jurisdiction to issue such a broad injunction because the Department of Agriculture had already agreed to not release the information at issue;<sup>135</sup> moreover, that injunction was found to be overbroad because it prohibited disclosures outside the context of the FOIA request that was at issue in that case.<sup>136</sup>

By contrast, a Native Hawaiian group brought suit to enjoin the Department of the Navy from making public certain information concerning a large group of Native Hawaiian human remains that had been inventoried pursuant to the Native American Graves Protection and Repatriation Act.<sup>137</sup> The court in that case held that the agency properly had determined that the information did not qualify for Exemption 6 protection and that it could be released.<sup>138</sup>

Taking all of the aforementioned information into consideration when assessing whether there is a protectible privacy interest, it is important to remember that if no protectible privacy interest is ascertained, further analysis is unnecessary and the information at issue must be disclosed.<sup>139</sup> If a protectible privacy interest is found to exist, the public

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<sup>132</sup>(...continued)

decision to disclose personal financial information on escrow waiver forms that are used by banks to record use of federal grazing permits as loan collateral) (reverse FOIA suit).

<sup>133</sup> Doe v. Veneman, 230 F. Supp. 2d at 749-51.

<sup>134</sup> Doe v. Veneman, No. 99-335, slip op. at 4-5 (W.D. Tex. Feb. 14, 2003).

<sup>135</sup> Doe v. Veneman, 380 F.3d 807, 813-16 (5th Cir. 2004) ("Even though [the agency] decided not to release personal . . . information [about participants in a livestock protection program], the district court enjoined the release of personal information contained in the . . . [management information system] database. By doing so, the district court acted without an actual controversy and exceeded the legal basis for review under the APA.").

<sup>136</sup> Id. at 818-20 (finding district court's injunction to be overbroad on several grounds).

<sup>137</sup> Na Iwi O Na Kupuna v. Dalton, 894 F. Supp. 1397, 1402-04 (D. Haw. 1995).

<sup>138</sup> Id. at 1412-13 (concluding that Exemption 6 was not intended to protect information pertaining to human remains, nor to protect information pertaining to large groups in which individuals are not identifiable).

<sup>139</sup> See Multi Ag, 515 F.3d at 1229 (stating that "[i]f no significant privacy interest is implicated . . . FOIA demands disclosure" (quoting NARFE, 879 F.2d at 874)); Ripskis, 746 F.2d at 3; Finkel, 2007 WL 1963163, at \*9 (concluding that no balancing analysis was required "due to the Court's determination that the [defendant] has failed to meet its heavy burden on the issue of whether disclosure will invade the inspectors' privacy"); Holland, 1992 WL 233820, at

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interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure.<sup>140</sup>

### Public Interest

Once it has been determined that a substantial privacy interest is threatened by a requested disclosure, the second step in the balancing process comes into play; this stage of the analysis requires an assessment of the public interest in disclosure.<sup>141</sup> The burden of establishing that disclosure would serve the public interest is on the requester.<sup>142</sup> In DOJ v. Reporters Committee for Freedom of the Press, the Supreme Court limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: To "shed[] light on an agency's performance of its statutory duties."<sup>143</sup> Information that does not directly

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<sup>139</sup>(...continued)

\*16 (stating that information must be disclosed when there is no significant privacy interest, even if public interest is also de minimis).

<sup>140</sup> See Ripskis, 746 F.2d at 3; Favish, 541 U.S. at 171 ("The term 'unwarranted' requires us to balance the family's privacy interest against the public interest in disclosure.") (Exemption 7(C)).

<sup>141</sup> See FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking").

<sup>142</sup> See Associated Press v. DOD, 549 F.3d 62, 66 (2d Cir. 2008) ("The requesting party bears the burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA."); Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 391 nn.8 & 13 (D.C. Cir. 1987); see also NARA v. Favish, 541 U.S. 157, 175 (2004) (instructing that the balance does not even come "into play" when a requester has produced no evidence to "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred") (Exemption 7(C)); Rogers v. Davis, No. 08-177, 2009 WL 213034, at \*2 (E.D. Mo. Jan. 28, 2009) ("The burden of establishing that the disclosure would serve the public interest . . . is on the requester."); Salas v. Office of Inspector General, 577 F. Supp. 2d 105, 112 (D.D.C. 2008) ("It is the requester's obligation to articulate a public interest sufficient to outweigh an individual's privacy interest, and the public interest must be significant."); Lipsey v. EOUSA, No. 06-423, 2007 WL 842956, at \*5 (D.D.C. Mar. 19, 2007) ("Once a privacy interest is identified under Exemption 7(C), the FOIA records requester must establish that (1) the public interest is a significant one; and (2) the information is likely to advance that interest."); Prison Legal News v. Lappin, 436 F. Supp. 2d 17, 22 (D.D.C. 2006) ("The burden of satisfying the 'public interest standard' is on the requester.").

<sup>143</sup> 489 U.S. 749, 773 (1989); see Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1051 (D.C. Cir. 2009) ("The requested information must 'shed[] light on an agency's performance of its statutory duties.'" (quoting Reporters Comm., 489 U.S. at 773)); see also O'Kane v. U.S. Customs Serv., 169 F.3d 1308, 1310 (11th Cir. 1999) (per curiam) (affirming that Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, do not overrule Reporters Committee definition of "public interest"); cf. Favish, 541 U.S. at 172 (reiterating the Reporters Committee "public interest" standard, and characterizing it as "a structural necessity in a real democracy" that "should not be dismissed" – despite

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reveal the operations or activities of the federal government,<sup>144</sup> the Supreme Court repeatedly has stressed, "falls outside the ambit of the public interest that the FOIA was enacted to serve."<sup>145</sup> If an asserted public interest is found to qualify under this standard, it then must

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<sup>143</sup>(...continued)

arguments by amici in the case that Reporters Committee had been "overruled" by the Electronic FOIA amendments since 1996).

<sup>144</sup> See Landano v. DOJ, 956 F.2d 422, 430 (3d Cir. 1992) (stating that there is "no FOIA-recognized public interest in discovering wrongdoing by a state agency") (Exemption 7(C)), cert. denied on Exemption 7(C) question, 506 U.S. 868 (1992), & rev'd & remanded on other grounds, 508 U.S. 165 (1993); Phillips v. Immigration & Customs Enforcement, 385 F. Supp. 2d 296, 305 (S.D.N.Y. 2005) (observing that, although privacy interests of government officials may be lessened by countervailing public interest, that idea "would appear to be inapplicable to former foreign government officials"); McMillian v. BOP, No. 03-1210, 2004 WL 4953170, at 7 n.11 (D.D.C. July 23, 2004) (ruling that the plaintiff's argument that an audiotape would show the misconduct of the District of Columbia Board of Parole was irrelevant because "the FOIA is designed to support the public interest in how agencies of the federal government conduct business"); Garcia v. DOJ, 181 F. Supp. 2d 356, 374 (S.D.N.Y. 2002) (recognizing that the "discovery of wrongdoing at a state as opposed to a federal agency . . . is not a goal of FOIA") (Exemption 7(C)); see also FOIA Update, Vol. XII, No. 2, at 6 (advising that "government" should mean federal government); cf. Lissner v. U.S. Customs Serv., 241 F.3d 1220, 1223 & n.2 (9th Cir. 2001) (finding a public interest in the agency's treatment of city police officers arrested for smuggling steroids, but declining to "address the issue of whether opening up state and local governments to scrutiny also raises a cognizable public interest under the FOIA") (Exemption 7(C)).

<sup>145</sup> Reporters Committee 489 U.S. at 775; see Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 355-56 (1997); DOD v. FLRA, 510 U.S. 487, 497 (1994); see also, e.g., Consumers' Checkbook, 554 F.3d at 1051 ("[I]nformation about private citizens . . . that reveals little or nothing about an agency's own conduct' does not serve a relevant public interest under FOIA." (quoting Reporters Comm., 489 U.S. at 773)); Kishore v. DOJ, 575 F. Supp. 2d 243, 257 (D.D.C. 2008) ("Information about individuals that does not directly reveal the operations or activities of the government-which is the focus of FOIA-'falls outside the ambit of the public interest that the FOIA was enacted to serve' and may be protected under Exemption 7(C)." (quoting Reporters Comm., 489 U.S. at 775)); Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. DOJ, 503 F. Supp. 2d 373, 382 (D.D.C. 2007) ("When the material in the government's control is a compilation of information about private citizens, rather than a record of government actions, there is little legitimate public interest that would outweigh the invasion of privacy because the information reveals little or nothing about an agency's own conduct."); Piper v. DOJ, 428 F. Supp. 2d 1, 3 (D.D.C. 2006) (reasoning that "the public interest in knowing how the Department of Justice . . . handles its investigations 'is served whether or not the names and identifying information of third parties are redacted'"); Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 951 (S.D. Iowa 2002) (declaring that while a presidential nominee's "fitness for public office may be of great popular concern to the public," such concern "does not translate into a real public interest that is cognizable . . . [under] the FOIA"); Gallant v. NLRB, No. 92-873, slip op. at 8-10 (D.D.C. Nov. 6, 1992) (concluding that disclosure of names of individuals to whom NLRB Member sent letters in attempt to secure reappointment would not add to

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be accorded some measure of value so that it can be weighed against the threat to privacy.<sup>146</sup> And, as the Supreme Court in Favish emphasized, "the public interest sought to be advanced [must be] a significant one."<sup>147</sup>

In Reporters Committee, the Supreme Court held that the requester's personal interest is irrelevant to the public interest analysis. First, as the Court emphasized, the requester's identity can have "no bearing on the merits of his or her FOIA request."<sup>148</sup> In so declaring, the

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<sup>145</sup>(...continued)

understanding of NLRB's performance of its duties), aff'd on other grounds, 26 F.3d 168 (D.C. Cir. 1994); Andrews v. DOJ, 769 F. Supp. 314, 316-17 (E.D. Mo. 1991) (finding that although release of an individual's address, telephone number, and place of employment might serve a general public interest in the satisfaction of monetary judgments, "it does not implicate a public interest cognizable under the FOIA"); FOIA Update, Vol. XVIII, No. 1, at 1; ("Supreme Court Rules in Mailing List Case"); FOIA Update, Vol. X, No. 2, at 4, 6 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision").

<sup>146</sup> See, e.g., Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1981); Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 862 (D.C. Cir. 1981).

<sup>147</sup> 541 U.S. at 172; see also Martin v. DOJ, 488 F.3d 446, 458 (D.C. Cir. 2007) ("In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest." (quoting Boyd v. DOJ, 475 F.3d 381, 387 (D.C. Cir. 2007))); Carpenter v. DOJ, 470 F.3d 434, 440 (1st Cir. 2006) ("Because there is a valid privacy interest, the requested documents will only be revealed where 'the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake.'" (quoting Favish, 541 U.S. at 172)); Piper, 428 F. Supp. 2d at 3 ("The requester must demonstrate that (1) the 'public interest sought to be advanced is a significant one' and (2) the information requested 'is likely to advance that interest.'" (quoting Favish, 541 U.S. at 172)).

<sup>148</sup> 489 U.S. at 771; see also Favish, 541 U.S. at 170-72 (reiterating that "[a]s a general rule, withholding information under FOIA cannot be predicated on the identity of the requester," but adding that this does not mean that a requester seeking to establish an overriding "public interest" in disclosure of requested information "need not offer a reason for requesting the information"); DOD v. FLRA, 510 U.S. at 496-501; Associated Press v. DOD, 554 F.3d 274, 285 (2d Cir. 2009) ("The public interest 'cannot turn on the purposes for which the request for information is made,' and 'the identity of the requesting party has no bearing on the merits of his or her FOIA request.'" (quoting Reporters Comm., 489 U.S. at 771)); Carpenter, 470 F.3d at 440 ("Neither the specific purpose for which the information is requested nor the identity of the requesting party has any bearing on the evaluation."); EduCap Inc. v. IRS, No. 07-2106, 2009 WL 416428, at \*4 (D.D.C. Feb. 18, 2009) ("But under the FOIA, '[e]xcept for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request.'" (quoting Reporters Comm., 489 U.S. at 771)); O'Neill v. DOJ, No. 05-0306, 2007 WL 983143, at \*8 (E.D. Wis. Mar. 26, 2007) ("The

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Court ruled that agencies should treat all requesters alike in making FOIA disclosure decisions; the only exception to this, the Court specifically noted, is that of course an agency should not withhold from a requester any information that implicates only that requester's own interest.<sup>149</sup> Furthermore, the "public interest" balancing required under the privacy exemptions should not include consideration of the requester's "particular purpose" in making the request.<sup>150</sup> Instead, the Court has instructed, the proper approach to the balancing process is to focus on "the nature of the requested document" and to consider "its relationship to" the public interest generally.<sup>151</sup> This approach thus does not permit attention to the special

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<sup>148</sup>(...continued)

requester's identity, purpose in making the request, and proposed use of the requested information have no bearing on this balancing test.").

<sup>149</sup> 489 U.S. at 771; see, e.g., FOIA Update, Vol. X, No. 2, at 5 ("Privacy Protection Under the Supreme Court's Reporters Committee Decision").

<sup>150</sup> 489 U.S. at 771-72; see also Favish, 541 U.S. at 172 (reiterating the Reporters Committee principle that "citizens should not be required to explain why they seek the information" at issue, but further elucidating that in a case where the requester's purported public interest revolves around an allegation of government wrongdoing, "the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable"); DOD v. FLRA, 510 U.S. at 496 (holding that "except in certain cases involving claims of privilege, 'the identity of the requesting party has no bearing on the merits of his or her FOIA request'" (quoting Reporters Comm., 489 U.S. at 773); Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1231 n.2 (D.C. Cir. 2008) ("Although Multi Ag may not want the information to check up on the government itself, the use for which the requester seeks the information is not relevant for purposes of determining the public interest under FOIA Exemption 6."); Consumers' Checkbook, 554 F.3d at 1051 ("The requesting party's intended use for the information is irrelevant to our analysis."); Moore v. United States, 602 F. Supp. 2d 189, 194 (D.D.C. 2009) ("The plaintiff's personal interest is, no doubt, of paramount importance to him, but it is irrelevant to the FOIA, which by law is sensitive only to a public interest."); Rogers, 2009 WL 213034, at \*2 ("[T]he purposes for which the FOIA request is made is irrelevant to whether an invasion of privacy is warranted."); Thomas v. DOJ, 531 F. Supp. 2d 102, 108 (D.D.C. 2008) ("The purpose for which a requester seeks federal government records is not relevant in a FOIA case.") (Exemption 7(C)). But see Seized Prop. Recovery, Corp. v. Customs & Border Prot., 502 F. Supp. 2d 50, 56 (D.D.C. 2007) ("The Court cannot ignore that Plaintiff's principal reason in seeking the disclosure of the names and addresses of those persons whose property has been seized by Customs is to solicit their business.") (Exemptions 6 and 7(C)).

<sup>151</sup> 489 U.S. at 772; see, e.g., Carpenter, 470 F.3d at 440 (observing that nature of requested document and its relationship to opening agency action to light of public scrutiny determines whether invasion of privacy is warranted); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 304 (D.D.C. 2007) ("Accordingly, to assess the public interest, the Court must examine 'the nature of the requested document and its relationship to the basic purpose of [FOIA] to open agency action to the light of public scrutiny.'" (quoting Judicial Watch of Florida, Inc. v. DOJ, 102 F. Supp. 2d 6, 17 (D.D.C. 2002))).

circumstances of any particular FOIA requester.<sup>152</sup> As the Supreme Court stated in its Reporters Committee decision, whether disclosure of a private document "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' rather than on the particular purpose for which the document is being requested."<sup>153</sup>

Accordingly, a request made for the purpose of challenging a criminal conviction does not further the public interest,<sup>154</sup> nor does a request made in order to obtain or supplement

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<sup>152</sup> See 489 U.S. at 771-72 & n.20; see also Joseph W. Diemert, Jr. and Assocs. Co., L.P.A. v. FAA, 218 Fed. App'x 479, 482 (6th Cir. 2007) (concluding that "the release of the requested information is clearly an unwarranted invasion of personal privacy" because "[t]he disclosure of such information would only serve the private interests of Diemert"); Schiffer v. FBI, 78 F.3d 1405, 1410-11 (9th Cir. 1996) (noting that individual interest in obtaining information about oneself does not constitute public interest); Ubungen v. ICE, 600 F. Supp. 2d 9, 12 (D.D.C. 2009) (concluding that plaintiff's request for information about the whereabouts or fate of her sister is "purely personal" and there is no public interest under the FOIA); Salas, 577 F. Supp. 2d at 111 (finding that plaintiff's argument that release of redacted information will expose an agency's action pertaining to an incident involving plaintiff is insufficient because "[t]his one incident, though of obvious importance to plaintiff, is not one of such magnitude that it outweighs the agency employees' substantial privacy interest"); Summers v. DOJ, 517 F. Supp. 2d 231, 240 (D.D.C. 2007) (finding plaintiff's argument "that knowing the names of the FBI agents in question would enable him to contact them and seek more information about [a former agent]" insufficient since "the operative inquiry in determining whether disclosure of a document implicating privacy issues is warranted is the nature of the requested document itself, not the purpose for which the document is being requested"); Berger v. IRS, 487 F. Supp. 2d 482, 505 (D.N.J. 2007) (stating that disclosure of IRS employee's time sheets "would primarily serve Plaintiffs' particular private interests as individual taxpayers. Disclosure would not be 'instrumental in shedding light on the operations of government.'" (quoting Lewis v. EPA, No. 06-2660, 2006 WL 3227787, at \*6 (E.D. Pa. Nov. 3, 2006))); Los Angeles Times Commc'ns LLC v. Dep't of Labor, 483 F. Supp. 2d 975, 981 (C.D. Cal. 2007) ("Courts weigh the public interest by considering the interest of the general public, not the private motives, interests, or needs of a litigant."). But see Finkel v. Dep't of Labor, No. 05-5525, 2007 WL 1963163, at \*9 (D.N.J. June 29, 2007) (noting that "plaintiff raises a legitimate public interest in the information sought because his proposed research concerns OSHA's response to beryllium sensitization amongst its own inspectors and the general workforce").

<sup>153</sup> 489 U.S. at 772 (quoting Rose, 425 U.S. at 372).

<sup>154</sup> See Cole v. DOJ, No. 04-5329, 2005 U.S. App. LEXIS 7358, at \*2-3 (D.C. Cir. Apr. 27, 2005) (holding that requester's asserted public interest "that disclosure of the records is necessary to show prosecutorial misconduct is insufficient to overcome Exemption 7(C), because appellant has failed to put forward a 'meaningful evidentiary showing' that would 'warrant a belief by a reasonable person that the alleged Government impropriety might have occurred'" (quoting Favish, 541 U.S. at 174)); Amuso v. DOJ, 600 F. Supp. 2d 78, 93 (D.D.C. 2009) ("Any interest in the information for purposes of proving his innocence or proving that government witnesses perjured testimony at his criminal trial does not overcome the individual's privacy interest."); Lopez v. EOUSA, 598 F. Supp. 2d 83, 88 (D.D.C. 2009) (rejecting plaintiff's argument

(continued...)

discovery in a private lawsuit serve the public interest.<sup>155</sup> In fact, one court has observed that if the requester truly had a great need for the records for purposes of litigation, he or she should seek them in that forum, where it would be possible to provide them under an appropriate protective order.<sup>156</sup> Likewise, in Davy v. CIA, the requester's "personal crusade to unearth . . . information" that was the subject of a book that he wrote was found not to relate "in any way to a cognizable public interest."<sup>157</sup> Furthermore, the Supreme Court has found that requesters seeking to vindicate the policies of certain federal statutes, such as the Federal Service Labor-Management Relations Statute, do not assert a valid public interest in disclosure, as a requester's purposes are "irrelevant to the FOIA analysis."<sup>158</sup>

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<sup>154</sup>(...continued)

that "the personal privacy exemptions must yield in the face of the plaintiff's belief that a Brady violation infected his criminal trial"); Scales v. EOUSA, 594 F. Supp. 2d 87, 91 (D.D.C. 2009) (stating "that a bald assertion of a Brady violation is insufficient to overcome the individual's privacy interests in the records at issue"); Thomas v. DOJ, No. 04-112, 2006 WL 722141, at \*3 (E.D. Tex. Mar. 15, 2006) ("[T]he interest of a private litigant is not a significant public interest."); Billington v. DOJ, 11 F. Supp. 2d 45, 63 (D.D.C. 1998) (noting that "requests for Brady material are 'outside the proper role of FOIA'" (quoting Johnson v. DOJ, 758 F. Supp. 2, 5 (D.D.C. 1991))), aff'd in pertinent part, 233 F.3d 581 (D.C. Cir. 2000).

<sup>155</sup> See Carpenter, 470 F.3d at 441 ("There is no public interest in supplementing an individual's request for discovery.") (criminal trial) (Exemption 7(C)); Horowitz v. Peace Corps, 428 F.3d 271, 278-79 (D.C. Cir. 2005) (civil litigation); Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981) (private litigation); Ebersole v. United States, No. 06-2219, 2007 WL 2908725, at \*6 (D. Md. Sept. 24, 2007) ("Thus, FOIA requests are not meant to displace discovery rules.") (Exemption 7(C)); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1197 (N.D. Cal. 2006) ("Here, plaintiff expressly acknowledges that she wants the discrimination complaint files to use as possible evidence in her employment discrimination case . . . [which is] not a significant public interest warranting disclosure of private information."); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (seeking records for job-related causes of action insufficient); Harry v. Dep't of the Army, No. 92-1654, slip op. at 7-8 (D.D.C. Sept. 10, 1993) (seeking records to appeal negative officer efficiency report insufficient); NTEU v. U.S. Dep't of the Treasury, 3 Gov't Disclosure Serv. (P-H) ¶ 83,224, at 83,948 (D.D.C. June 17, 1983) (requesting records for grievance proceeding insufficient).

<sup>156</sup> Gilbey v. Dep't of the Interior, No. 89-0801, 1990 WL 174889, at \*2 (D.D.C. Oct. 22, 1990); see also Billington, 11 F. Supp. 2d at 64 (noting that proper forum for challenging alleged illegal warrantless search is in district court where case was prosecuted); Bongiorno v. Reno, No. 95-72143, 1996 WL 426451, at \*4 (E.D. Mich. Mar. 19, 1996) (observing that the proper place for a noncustodial parent to seek information about his child is the "state court that has jurisdiction over the parties, not a FOIA request or the federal court system"); cf. Favish, 541 U.S. at 174 ("There is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination.").

<sup>157</sup> 357 F. Supp. 2d at 88.

<sup>158</sup> DOD v. FLRA, 510 U.S. at 499. But cf. Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 (continued...)

Similarly, the Courts of Appeals for the District of Columbia, Second, Third, and Tenth Circuits have also found that the public interest derived from monitoring compliance with the Davis-Bacon Act<sup>159</sup> is not a public interest whose significance outweighs competing privacy interests of third parties.<sup>160</sup> These four circuit courts have held that although there may be a minimal public interest in facilitating the monitoring of compliance with federal labor statutes, disclosure of personal information that reveals nothing "directly about the character of a government agency or official" bears only an "attenuated . . . relationship to governmental activity."<sup>161</sup> Accordingly, it has been held that such an "attenuated public interest in disclosure does not outweigh the construction workers' significant privacy interest in [their names and addresses]."<sup>162</sup> Faced with the same public interest question, the Ninth Circuit took a different approach but reached the same result.<sup>163</sup> The Court of Appeals for the Ninth Circuit found a public interest in monitoring the agency's "diligence in enforcing Davis-Bacon," but found the weight to be given that interest weakened when the public benefit was derived neither directly from the release of the information itself nor from mere tabulation of data or further research, but rather, from personal contact with the individuals whose privacy was at issue.<sup>164</sup>

A central purpose of the FOIA is to "check against corruption and to hold the governors accountable to the governed."<sup>165</sup> Indeed, disclosure of information that would inform the public of violations of the public trust serves a strong public interest and is accorded great

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<sup>158</sup>(...continued)

F.3d 539, 548-49 (5th Cir. 2002) (finding a "public interest in monitoring agencies' enforcement of the law in specific instances") (Exemption 7(C)).

<sup>159</sup> 40 U.S.C. §§ 3141-3144, 3146-3147 (2006) (requiring federal contractors to pay their laborers no less than the prevailing wages for comparable work in their geographical area).

<sup>160</sup> See Sheet Metal Workers Int'l Ass'n, Local No. 19 v. VA, 135 F.3d 891, 903-05 (3d Cir. 1998); Sheet Metal Workers Int'l Ass'n, Local No. 9 v. U.S. Air Force, 63 F.3d 994, 997-98 (10th Cir. 1995); Painting & Drywall Work Pres. Fund, Inc. v. HUD, 936 F.2d 1300, 1303 (D.C. Cir. 1991); Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991).

<sup>161</sup> Hopkins, 929 F.2d at 88; see Sheet Metal Workers Int'l Ass'n, Local No. 19, 135 F.3d at 903-05; Sheet Metal Workers Int'l Ass'n, Local No. 9, 63 F.3d at 997-98; Painting & Drywall Work Pres. Fund, Inc., 936 F.2d at 1303.

<sup>162</sup> Painting & Drywall Work Pres. Fund., Inc., 936 F.2d at 1303; see Sheet Metal Workers Int'l Ass'n, Local No. 9, 63 F.3d at 997-98; Hopkins, 929 F.2d at 88.

<sup>163</sup> Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of the Air Force, 26 F.3d 1479, 1484-86 (9th Cir. 1994).

<sup>164</sup> Id. at 1485; see also Sheet Metal Workers Int'l Ass'n, Local No. 9, 63 F.3d at 997-98.

<sup>165</sup> NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); see also ACLU v. DOD, 543 F.3d 59, 66 (2d Cir. 2008), application to extend time to file petition for cert. granted, No. 08A1068 (J. Ginsburg, May 29, 2009); Multi Ag, 515 F.3d at 1232; News-Press v. DHS, 489 F.3d 1173, 1190 (11th Cir. 2007); Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983); Wash. Post Co. v. HHS, 690 F.2d 252, 264 (D.C. Cir. 1982); Nat'l Ass'n of Atomic Veterans, Inc. v. Dir., Def. Nuclear Agency, 583 F. Supp. 1483, 1487 (D.D.C. 1984).

weight in the balancing process.<sup>166</sup> As the Tenth Circuit has held, "[t]he public interest in learning of a government employee's misconduct increases as one moves up an agency's hierarchical ladder."<sup>167</sup> As a general rule, demonstrated wrongdoing of a serious and intentional nature by a high-level government official is of sufficient public interest to outweigh almost any privacy interest of that official.<sup>168</sup>

By contrast, both serious and less serious misconduct by low-level agency employees generally have not been considered of sufficient public interest to outweigh the privacy

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<sup>166</sup> See Favish, 541 U.S. at 172-73 (stressing that there should be a "necessary nexus between the requested information and the asserted public interest that would be advanced by disclosure"); see also FOIA Post, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing the importance of establishing an "actual connection" between the particular information at issue and the qualifying public interest articulated by the requester).

<sup>167</sup> Trentadue v. Integrity Comm., 501 F.3d 1215, 1234 (10th Cir. 2007); see, e.g., Cowdery, Ecker & Murphy, LLC v. Dep't of Interior, 511 F. Supp. 2d 215, 218 (D. Conn. 2007) ("[T]he Second Circuit found that the official in question's 'high rank, combined with his direct responsibility for the serious allegations examined . . . tilts strongly in favor of disclosure.'" (quoting Perlman v. DOJ, 312 F.3d 100, 107 (2d Cir. 2002))).

<sup>168</sup> See, e.g., Perlman v. DOJ, 312 F.3d 100, 107 (2d Cir. 2002) (noting subject of request involved INS general counsel investigated for allegedly granting improper access and preferential treatment to former INS officials with financial interests in various visa investment firms, and finding that government employee's high rank and responsibility for serious allegations tilted the balance strongly in favor of disclosure), cert. granted, vacated & remanded, 541 U.S. 970 (2004), reinstated after remand, 380 F.3d 110 (2d Cir. 2004); Stern v. FBI, 737 F.2d 84, 93-94 (D.C. Cir. 1984) (name of high-level FBI official censured for deliberate and knowing misrepresentation) (Exemption 7(C)); Ferri v. Bell, 645 F.2d 1213, 1218 (3d Cir. 1981) (finding attempt to expose alleged deal between prosecutor and witness to be in public interest) (Exemption 7(C)), vacated & reinstated in part on reh'g, 671 F.2d 769 (3d Cir. 1982); Columbia Packing Co. v. USDA, 563 F.2d 495, 499 (1st Cir. 1977) (information about federal employees found guilty of accepting bribes); Cowdery, 511 F. Supp. 2d at 221 (D. Conn. 2007) (performance evaluation information pertaining to high ranking federal employee charged with wrongdoing); Chang v. Dep't of the Navy, 314 F. Supp. 2d 35, 42-45 (D.D.C. 2004) (information about Naval Commander's nonjudicial punishment for involvement in accident at sea) (Privacy Act "wrongful disclosure" suit); Wood v. FBI, 312 F. Supp. 2d 328, 345-51 (D. Conn. 2004) (identifying information linking FBI Supervisory Special Agent's name with specific findings and disciplinary action taken against him), aff'd in part & rev'd in part, 432 F.3d 78 (2d Cir. 2005); Lurie v. Dep't of the Army, 970 F. Supp. 19, 39-40 (D.D.C. 1997) (information concerning "mid- to high-level" Army medical researcher whose apparent misrepresentation and misconduct contributed to appropriation of \$20,000,000 for particular form of AIDS research); Sullivan v. VA, 617 F. Supp. 258, 260-61 (D.D.C. 1985) (reprimand of senior official for misuse of government vehicle and failure to report accident) (Privacy Act "wrongful disclosure" suit/Exemption 7(C)); Cong. News Syndicate v. DOJ, 438 F. Supp. 538, 544 (D.D.C. 1977) (misconduct by White House staffers).

interest of the employee.<sup>169</sup> The D.C. Circuit has held that there is not likely to be strong public interest in disclosure of the names of censured employees when the case has not "occurred against the backdrop of a well-publicized scandal" that has resulted in "widespread

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<sup>169</sup> See, e.g., Rose, 425 U.S. at 381 (protecting names of cadets found to have violated Academy honor code); Forest Serv. Employees for Env'tl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1025 (9th Cir. 2008) ("[W]e have placed emphasis on the employee's position in her employer's hierarchical structure as 'lower level officials . . . generally have a stronger interest in personal privacy than do senior officials.'") (quoting Dobronski v. FCC, 17 F.3d 275, 280 n.4 (9th Cir. 1994)); Trentadue, 501 F.3d at 1234 (concluding that agency properly withheld identifying information about employees because "[e]ach of these individuals was a low-level employee who committed serious acts of misconduct" and even though "[t]he public interest in learning how law enforcement agencies dealt with these individuals is very high," the "[d]isclos[ure of] the names of the employees . . . would shed little light on the operation of government"); Hoyos v. United States, No. 98-4178, slip op. at 3 (11th Cir. Feb. 1, 1999) (finding "little public interest in access to [identities of individuals fired from the VA], especially when the reasons for removal -- the information that truly bears upon the agency's conduct, which is the focus of FOIA's concern -- were readily made available"); Beck v. DOJ, 997 F.2d 1489, 1493 (D.C. Cir. 1993) ("The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct.") (Exemptions 6 and 7(C)); Stern, 737 F.2d at 94 (protecting names of mid-level employees censured for negligence); Chamberlain v. Kurtz, 589 F.2d 827, 842 (5th Cir. 1979) (protecting names of disciplined IRS agents); MacLean v. U.S. Dep't of Army, No. 05-1519, 2007 WL 935604, at \*13 (S.D. Cal. Mar. 6, 2007) ("Moreover, 'lower level officials' . . . generally have a stronger interest in personal privacy than do senior officials,' . . . the public's interest in misconduct by a lower level official is weaker than its interest in misconduct by a senior official" (quoting Dobronski v. FCC, 17 F.3d 275, 280 n.4 (9th Cir. 1994))) (Exemptions 6 and 7(C)); Kimmel v. DOD, No. 04-1551, 2006 WL 1126812, at \*3 (D.D.C. Mar. 31, 2006) (protecting names of civilian personnel below level of office director and of military personnel below rank of colonel (or captain in Navy); finding that disclosure of names would not shed any light on subject matter of FOIA request seeking release of documents related to posthumous advancement of Rear Admiral Husband E. Kimmel to rank of admiral on retired list of Navy); Buckley v. Schaul, No. 03-03233, slip op. at 8-9 (W.D. Wash. Mar. 8, 2004) (protecting identity of regional counsel alleged to have violated Privacy Act) (Exemptions 6 and 7(C)), aff'd, 135 F. App'x 929 (9th Cir. 2005); Chang, 314 F. Supp. 2d at 44-45 (protecting names and results of punishment of lower-level officers involved in collision of Navy vessel with another ship); Jefferson v. DOJ Office of the Inspector General, No. 01-1418, slip op. at 11 (D.D.C. Nov. 14, 2003) ("A [nonsupervisory] Attorney-Advisor is not a government employee whose rank is so high that the public interest in disclosure of information pertaining to her performance of official government functions outweighs her personal privacy interest in protecting information about the details of a law enforcement investigation of her alleged misconduct.") (Exemption 7(C)); Butler v. DOJ, No. 86-2255, 1994 WL 55621, at \*10 (D.D.C. Feb. 3, 1994) (protecting identity of FBI Special Agent who received "mild admonishment" for conduct that "was not particularly egregious"); Cotton v. Adams, 798 F. Supp. 22, 26-27 (D.D.C. 1992) (finding that release of IG reports on conduct of low-level Smithsonian Institution employees would not allow public to evaluate Smithsonian's performance of mission); Heller v. U.S. Marshals Serv., 655 F. Supp. 1088, 1091 (D.D.C. 1987) (protecting names of agency personnel found to have committed "only minor, if any, wrongdoing") (Exemption 7(C)).

knowledge" that certain employees were disciplined.<sup>170</sup> As such, courts customarily have extended protection to the identities of mid- and low-level federal employees accused of misconduct, as well as to the details and results of any internal investigations into such allegations of impropriety.<sup>171</sup> The D.C. Circuit reaffirmed this position in Dunkelberger v.

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<sup>170</sup> Beck, 997 F.2d at 1493-94; see Chin v. U.S. Dep't of the Air Force, No. 97-2176, slip op. at 3 (W.D. La. June 24, 1999) (finding a significant privacy interest in records that "document[] personal and intimate incidents of misconduct [that have] not previously been a part of the public domain"), aff'd per curiam, No. 99-31237 (5th Cir. June 15, 2000).

<sup>171</sup> See, e.g., Stern, 737 F.2d at 94 (protecting identities of mid-level employees censured for negligence, but requiring disclosure of identity of high-level employee found guilty of serious, intentional misconduct) (Exemption 7(C)); Chamberlain, 589 F.2d at 841-42 (protecting names of disciplined IRS agents); MacLean, 2007 WL 935604, at \*10-12 (protecting identity of military attorneys who issued illegal subpoenas in court marshal proceedings); Cawthon v. DOJ, No. 05-0567, 2006 WL 581250, at \*2-4 (D.D.C. Mar. 9, 2006) (protecting information about two Federal Bureau of Prisons doctors, including records pertaining to malpractice and disciplinary matters); Forest Serv. Employees for Env'tl. Ethics v. U.S. Forest Serv., No. 05-6015, 2005 WL 3488453, at \*4 (D. Or. Dec. 21, 2005) ("USFS employees are publically employed . . . [and] the names of the employees . . . holds little or no expectation of privacy. The expectation, however, increases when attached to stigmatizing events."), aff'd, 524 F.3d 1021 (9th Cir. 2008); Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 743-45 (E.D. Va. 1999) (unsubstantiated allegations of prosecutorial misconduct) (Exemptions 6 and 7(C)); Chin, No. 97-2176, slip op. at 3-5 (W.D. La. June 24, 1999) (investigations of fraternization), aff'd per curiam, No. 99-31237 (5th Cir. June 15, 2000); Lurie, 970 F. Supp. at 40 (identities of HIV researchers who played minor role in possible scientific misconduct), appeal dismissed voluntarily, No. 97-5248 (D.C. Cir. Oct. 22, 1997); McLeod v. Peña, No. 94-1924, slip op. at 4-6 (D.D.C. Feb. 9, 1996) (investigation of Coast Guard officer for alleged use of government resources for personal religious activities) (Exemption 7(C)), summary affirmance granted sub nom. McLeod v. U.S. Coast Guard, No. 96-5071, 1997 WL 150096 (D.C. Cir. Feb. 10, 1997); Cotton, 798 F. Supp. at 25-28 (report of Inspector General's investigation of low-level employees of Smithsonian Institution museum shops); Schonberger v. NTSB, 508 F. Supp. 941, 944-45 (D.D.C.) (results of complaint by employee against supervisor), aff'd, 672 F.2d 896 (D.C. Cir. 1981) (unpublished table decision); Iglesias v. CIA, 525 F. Supp. 547, 561 (D.D.C. 1981) (agency attorney's response to Office of Professional Responsibility misconduct allegations); see also McCutchen v. HHS, 30 F.3d 183, 187-89 (D.C. Cir. 1994) (identities of both federally and privately employed scientists investigated for possible scientific misconduct protected) (Exemption 7(C)); cf. Heller, 655 F. Supp. at 1091 ("extremely strong interest" in protecting privacy of individual who cooperated with internal investigation of possible criminal activity by fellow employees). But see Schmidt v. U.S. Air Force, 2007 WL 2812148, at \*11 (C.D. Ill. Sept. 20, 2007) (finding that although Air Force officer had a privacy interest in keeping information about his discipline confidential, competing public interest in deadly friendly-fire incident with international effects outweighed that privacy interest and shed light on how the United States government was holding its pilot accountable); Gannett River States Publ'g Corp. v. Bureau of the Nat'l Guard, No. J91-0455, 1992 WL 175235, at \*5-6 (S.D. Miss. Mar. 2, 1992) (holding that given previous disclosure of investigative report of helocasting accident, disclosure of actual discipline received would result in "insignificant burden" on soldiers' privacy interests).

DOJ<sup>172</sup> in which it held that, even post-Reporters Committee, the D.C. Circuit's decision in Stern v. FBI provides guidance for the balancing of the privacy interests of federal employees found to have committed wrongdoing against the public interest in shedding light on agency activities.<sup>173</sup>

Additionally, any asserted "public interest" in the disclosure of mere allegations of wrongdoing cannot outweigh an individual's privacy interest in avoiding unwarranted association with such allegations.<sup>174</sup> Indeed, in Favish, the Supreme Court held that mere

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<sup>172</sup> 906 F.2d 779, 782 (D.C. Cir. 1990) (upholding FBI's refusal to confirm or deny existence of letters of reprimand or suspension for alleged misconduct by undercover agent) (Exemption 7(C)); Favish, 541 U.S. at 175 (noting that "[a]llegations of government misconduct are 'easy to allege and hard to disprove'" (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998))).

<sup>173</sup> Dunkelberger, 906 F.2d at 781; see also Ford v. West, No. 97-1342, 1998 WL 317561, at \*2-3 (10th Cir. June 12, 1998) (protecting information about discipline of coworker and finding that redacted information would not inform public about agency's response to racial harassment claim); Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (protecting information about investigation of staff-level attorney for allegations of unauthorized disclosure of information to media) (Exemption 7(C)); Beck, 997 F.2d at 1494 (upholding agency's refusal to either confirm or deny existence of records concerning alleged wrongdoing of named DEA agents) (Exemptions 6 and 7(C)); Hunt v. FBI, 972 F.2d 288-90 (9th Cir. 1992) (protecting contents of investigative file of nonsupervisory FBI agent accused of unsubstantiated misconduct) (Exemption 7(C)); Early v. OPR, No. 95-0254, slip op. at 2-3 (D.D.C. Apr. 30, 1996) (upholding OPR's refusal to confirm or deny existence of complaints or investigations concerning performance of professional duties of one United States district court judge and two AUSAs) (Exemption 7(C)), summary affirmance granted, No. 96-5136, 1997 WL 195523 (D.C. Cir. Mar. 31, 1997).

<sup>174</sup> See, e.g., Sussman v. USMS, 494 F.3d 1106, 1115 (D.C. Cir. 2007) (finding that USMS properly protected the privacy of various individuals stressing that "[w]hile we find [plaintiff] did in fact allege misconduct, his bare and undeveloped allegations would not warrant a belief by a reasonable person that impropriety might have occurred") (Exemption 7(C)); McCutchen, 30 F.3d at 187-89 (protecting identities of scientists found not to have engaged in alleged scientific misconduct) (Exemption 7(C)); Hunt, 972 F.2d at 288-90 (protecting investigation of named FBI agent cleared of charges of misconduct) (Exemption 7(C)); Dunkelberger, 906 F.2d at 781-82 (same) (Exemption 7(C)); Carter, 830 F.2d at 391 (protecting identities of attorneys subject to disciplinary proceedings, which were later dismissed); Bullock v. FBI, 587 F. Supp. 2d 250, 253 (D.D.C. 2008) ("Absent strong evidence of official misconduct, the identities of law enforcement officials are protected by Exemption 7(C) . . . Plaintiff's unsupported allegations of official misconduct do not outweigh the privacy interests of these law enforcement officials.") (Exemption 7(C)); Barbosa v. DEA, 541 F. Supp. 2d 108, 111-12 (D.D.C. 2008) (stating that plaintiff must present "'more than a bare suspicion' of official misconduct; '[r]ather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred' . . . For it is '[o]nly when [such evidence is] produced [that] there [will] exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records'" (quoting Favish, 541 U.S. at 174-75)); Buckley, No. 03-03233, slip op. at 10-11 (W.D. Wash. Mar. 8, 2004) ("If these files

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allegations of wrongdoing are "insufficient" to satisfy the "public interest" standard required under the FOIA.<sup>175</sup> The Court observed that if "bare allegations" could be sufficient to satisfy the public interest requirement, then the exemption would be "transformed . . . into nothing more than a rule of pleading."<sup>176</sup> Indeed, the Supreme Court has opined that if mere allegations were all that were necessary to override a personal privacy interest, then that privacy interest would become worthless.<sup>177</sup> Moreover, the Supreme Court in Favish pointedly recognized that "allegations of misconduct are 'easy to allege and hard to disprove'"<sup>178</sup> and that

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<sup>174</sup>(...continued)

were released, the public disclosure of allegations of impropriety against [regional counsel] and whomever else, without any findings of actual misconduct, could scar employees' personal and professional reputations." (Exemptions 6 and 7(C)), aff'd, 135 F. App'x 929 (9th Cir. 2005); Edmonds v. FBI, 272 F. Supp. 2d 35, 52 (D.D.C. 2003) (protecting identities of FBI clerical employees and FBI Special Agents because there was no reason to believe that their identities would shed light on alleged misconduct in FBI's language division) (Exemptions 6 and 7(C)), appeal dismissed voluntarily, No. 03-5364, 2004 WL 2806508 (D.C. Cir. Dec. 7, 2004); McQueen v. United States, 264 F. Supp. 2d 502, 533-34 (S.D. Tex. 2003) (deciding that public interest would not be served by "disclosure of information regarding unsubstantiated allegations" made against three government employees) (Exemptions 6 and 7(C)), aff'd, 100 F. App'x 964 (5th Cir. 2004) (per curiam); Pontecorvo v. FBI, No. 00-1511, slip op. at 40 (D.D.C. Sept. 30, 2001) (declining to order disclosure of the identity of an FBI Special Agent under investigation by the FBI Office of Professional Responsibility when the investigation was instituted solely "because of Plaintiff's own written request, not the independent determination of the Bureau") (Exemption 7(C)). But see Dobronski v. FCC, 17 F.3d 275, 278-80 (9th Cir. 1994) (ordering release of employee's sick leave slips despite fact that requester's allegations of abuse of leave time were wholly based upon unsubstantiated tips).

<sup>175</sup> 541 U.S. at 173; see also Harrison v. BOP, No. 07-1543, 2009 WL 1163909, \*8 (D.D.C. May 1, 2009) ("Plaintiff's vague allegations of 'fabricated' charges, 'illegal and conspiratorial conduct' between a prison counselor and the BOP officer who screened [plaintiff's] telephone call, his non-specific reference to 'corrupt acts and practices of federal employees,' and his implied suspicions as to the qualifications of the disciplinary hearing officer, do not rise to the level required by the rule articulated in Favish." (quoting plaintiff's filing) (internal citations omitted)); Aguirre v. SEC, 551 F. Supp. 2d 33, 56 (D.D.C. 2008) ("A 'bare suspicion' of agency misconduct is insufficient; the FOIA requester 'must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.'" (quoting Favish, 541 U.S. at 174)).

<sup>176</sup> 541 U.S. at 174.

<sup>177</sup> See U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991) ("If a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defenses against requests for production of private information."); see also Favish, 541 U.S. at 173 (emphasizing importance of "practical[ity]" in privacy-protection decisionmaking).

<sup>178</sup> 541 U.S. at 175 (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998)); see also Ray, 502 U.S. at 178-79 (holding that there is presumption of legitimacy given to government (continued...))

courts therefore must require a "meaningful evidentiary showing" by the FOIA requester.<sup>179</sup> Therefore, the Court adopted a higher standard for evaluation of "agency wrongdoing" claims and held that "the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."<sup>180</sup> Indeed, several courts have applied this heightened standard to allegations of government misconduct and repeatedly have found that plaintiffs have not provided the requisite evidence required by Favish.<sup>181</sup>

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<sup>178</sup>(...continued)

conduct, and noting that privacy interests would be worthless if only bare allegations could overcome these interests); O'Neill, 2007 WL 983143, at \*9 (stating that "court must insist on a meaningful evidentiary showing").

<sup>179</sup> 541 U.S. at 175; Martin, 488 F.3d at 458 (concluding that "[u]nsubstantiated assertions of government wrongdoing . . . do not establish a meaningful evidentiary showing" (quoting Boyd v. DOJ, 475 F.3d 381, 388 (D.C. Cir. 2007))); Jarvis v. ATF, No. 07-111, 2008 WL 2620741, at \*13 (N.D. Fla. June 30, 2008) ("When the significant asserted public interest is to uncover Government misfeasance, there must be a meaningful evidentiary showing.").

<sup>180</sup> 541 U.S. at 174; Associated Press v. DOD, 554 F.3d at 289 (Exemptions 6 and 7(C)); Lane v. Department of Interior, 523 F.3d 1128, 1138 (9th Cir. 2008) (finding that because interest in disclosure involved government employee's alleged misconduct, requester was required to "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" (quoting Favish, 541 U.S. at 174)); Judicial Watch v. DHS, 598 F. Supp. 2d 93, 97 (D.D.C. 2009) ("The extra burden established by Favish only applies when the requester asserts government negligence or improper conduct."); Martin, 488 F.3d at 458 (stating that "[i]f the public interest is government wrongdoing, then the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" (quoting Boyd, 475 F.3d at 387)); Aguirre, 551 F. Supp. 2d at 56 ("A 'bare suspicion' of agency misconduct is insufficient." (quoting Favish, 541 U.S. at 174)).

<sup>181</sup> See Associated Press v. DOD, 554 F.3d at 289-92 (concluding that redactions of the detainees' identifying information was proper because plaintiff failed to produce sufficient evidence of impropriety by DOD) (Exemption 7(C)); Carpenter, 470 F.3d at 442 (declaring that valid public interest in disclosure of information relating to allegations of impropriety on part of government officials must be supported by more than mere suspicion improper actions occurred) (Exemption 7(C)); Wood v. FBI, 432 F.3d 78, 89 (2d Cir. 2005) (finding that plaintiff's "unsupported allegations" do not overcome "presumption of legitimacy . . . [of] government actions"); Horowitz, 428 F.3d at 278 & n.1 (finding that the plaintiff offered "no further details to support these extremely speculative allegations" and did not "overcome the presumption that the Peace Corps' [ ] official conduct was proper"); Oguaju v. United States, 378 F.3d 1115, 1117 (D.C. Cir. 2004) (ruling that plaintiff "failed to make the requisite showing" required by Favish), reh'g denied & amended, 386 F.3d 273 (D.C. Cir. 2004) (per curiam); Long v. OPM, No. 05-1522, 2007 WL 2903924, at \*18 (N.D.N.Y. Sept. 30, 2007) ("Although plaintiffs have submitted declarations from reporters who . . . have uncovered government wrongdoing, plaintiffs submit no actual evidence of wrongdoing, thus this factor weighs against  
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Moreover, even when the existence of an investigation of misconduct has become publicly known, the accused individual ordinarily has an overriding privacy interest in not having the further details of the matter disclosed.<sup>182</sup> And even where misconduct actually is found, the agency is not necessarily required to disclose every piece of information pertaining to the investigation.<sup>183</sup>

Public oversight of government operations is the essence of public interest under the FOIA. Courts have found that requesters claiming such an interest must support their claim by more than mere allegation and must show how the public interest would be served by disclosure in the particular case.<sup>184</sup>

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<sup>181</sup>(...continued)  
disclosure.").

<sup>182</sup> See Forest Serv. Employees, 524 F.3d at 1025 (protecting identities of low-level and mid-level employees because "the public association of the employees with this tragedy would subject them to the risk of embarrassment in their official capacities and in their personal lives"); Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (concluding that AUSA "did not, merely by acknowledging the investigation and making a vague references to its conclusion, waive all his interest in keeping the contents of the OPR file confidential") (Exemption 7(C)); Mueller, 63 F. Supp. 2d at 743 (declaring that even given pre-existing publicity, "individuals have a strong interest in not being associated with alleged wrongful activity, particularly where, as here, the subject of the investigation is ultimately exonerated") (Exemptions 6 and 7(C)); see also Bast v. FBI, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (explaining that publicity over an alleged transcript-alteration incident actually could exacerbate the harm to a privacy interest because "[t]he authoritative nature of such findings threatens much greater damage to an individual's reputation than newspaper articles or editorial columns" and "renewed publicity brings with it a renewed invasion of privacy"); Chin, No. 97-2176, slip op. at 5 (W.D. La. June 24, 1999) (finding that the fact "that some of the events are known to certain members of the public . . . is insufficient to place this record for dissemination into the public domain").

<sup>183</sup> See, e.g., Office of Capital Collateral Counsel, N. Region of Fla. v. DOJ, 331 F.3d 799, 803-04 (11th Cir. 2003) (protecting AUSA's "private thoughts and feelings concerning her misconduct . . . and its effect on her, her family, and her career"); see also Kimberlin, 139 F.3d at 949 (finding that an AUSA "still has a privacy interest . . . in avoiding disclosure of the details of the investigation," despite the AUSA's acknowledgment that he was disciplined after the investigation); Halloran v. VA, 874 F.2d 315, 320-22 (5th Cir. 1989) (noting that employees of government contractor investigated by government for fraud did not lose privacy interests in comments transcribed in government investigatory files) (Exemption 7(C)).

<sup>184</sup> See Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 124 (D.C. Cir. 1999) (discounting inconsistencies in multiple agency reports from complex crime scene as "hardly so shocking as to suggest illegality or deliberate government falsification") (Exemption 7(C)); Schiffer, 78 F.3d at 1410 (rejecting public interest argument absent evidence suggesting wrongdoing by FBI); Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904-05 (D.C. Cir. 1996) ("[T]he public interest is insubstantial unless the requester puts forward compelling evidence that the agency denying the FOIA request is engaged in illegal  
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Accordingly, assertions of "public interest" are scrutinized by the courts to ensure that they legitimately warrant the overriding of important privacy interests.<sup>185</sup> As is discussed in more detail below, sometimes the courts do find that the public interest warrants overriding the privacy interest at stake.<sup>186</sup> As stated by the Second Circuit in Hopkins v. HUD, "[t]he

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<sup>184</sup>(...continued)

activity and shows that the information sought is necessary in order to confirm or refute that evidence.") (Exemption 7(C)); Halloran, 874 F.2d at 323 (finding that while there is general public interest in the government's interaction with federal contractors, "merely stating that the interest exists in the abstract is not enough"; requesters must show how that interest would be served by compelling disclosure); LaRouche v. DOJ, No. 90-2753, slip op. at 22-23 (D.D.C. Nov. 17, 2000) ("[W]hile the public interest in possible corruption is great, mere inferences of a violation carry little weight."); Wichlacz v. Dep't of Interior, 938 F. Supp. 325, 333 (E.D. Va. 1996) (observing that plaintiff "has set forth no evidence to buttress his bald allegations" of cover-up in investigation of death of former Deputy White House Counsel, a theory substantially undercut by then-ongoing Independent Counsel investigation), aff'd, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision); Allard v. HHS, No. 4:90-CV-156, slip op. at 10-11 (W.D. Mich. Feb. 14, 1992) (finding that "conclusory allegations" of plaintiff -- a prisoner with violent tendencies -- concerning ex-wife's misuse of children's social security benefits do not establish public interest), aff'd, 972 F.2d 346 (6th Cir. 1992) (unpublished table decision).

<sup>185</sup> See, e.g., Favish, 541 U.S. at 172 (stressing the requirement that "the public interest sought to be advanced [be] a significant one"); Consumers' Checkbook, 554 F.3d at 1056 (concluding after careful scrutinizing of the various assertions of public interest asserted by plaintiff, that "the requested data does not serve any FOIA-related public interest in disclosure").

<sup>186</sup> See Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 97-98 (6th Cir. 1996) (finding that the agency's disclosure of the mug shots of indicted individuals during the course of an ongoing criminal proceeding could reveal an "error in detaining the wrong person for an offense" or the "circumstances surrounding an arrest and initial incarceration"); Rosenfeld v. DOJ, 57 F.3d 803, 811-12 (9th Cir. 1995) (concluding that disclosure of the identities of individuals investigated would reveal whether the "FBI abused its law enforcement mandate by overzealously investigating a political protest movement to which some members of the government may then have objected") (Exemption 7(C)); Gordon v. FBI, 388 F. Supp. 2d 1028, 1041 (N.D. Cal. 2005) (finding public interest served by disclosure of individual agency employee names because their names show "who are making important government policy") (Exemptions 6 and 7(C)); Lardner v. DOJ, No. 03-0180, 2005 WL 758267, at \*17 (D.D.C. Mar. 31, 2005) (finding that the public interest in analyzing the "circumstances in which the executive chooses to grant or deny a pardon and the factors that bear on that decision" would be served by the release of the names of unsuccessful pardon applicants); Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 729-30 (D. Md. 2001) (declaring that "[a]ccess to the names and addresses [of purchasers of seized property] would enable the public to assess law enforcement agencies' exercise of the substantial power to seize property, as well as USMS's performance of its duties regarding disposal of forfeited property") (Exemption 7(C)), appeal dismissed voluntarily, No. 01-1537 (4th Cir. June 25, 2001); Judicial Watch v. DOJ, 102 F. Supp. 2d 6, 17-18 (D.D.C. 2000) (allowing deletion of home addresses and telephone numbers, but ordering

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simple invocation of a legitimate public interest . . . cannot itself justify the release of personal information. Rather, a court must first ascertain whether that interest would be served by disclosure."<sup>187</sup> The Second Circuit in Hopkins found a legitimate public interest in monitoring HUD's enforcement of prevailing wage laws generally, but found that disclosure of the names and addresses of workers employed on HUD-assisted public housing projects would shed no light on the agency's performance of that duty in particular.<sup>188</sup> The Ninth Circuit in Minnis v.

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<sup>186</sup>(...continued)

release of identities of individuals who wrote to Attorney General about campaign finance or Independent Counsel issues); Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1093 (D. Or. 1998) (finding that public interest in knowing how agency is enforcing land-management laws is served by release of names of cattle owners who violated federal grazing laws) (Exemption 7(C)); Maples v. USDA, No. F 97-5663, slip op. at 14 (E.D. Cal. Jan. 13, 1998) (finding that release of names and addresses of permit holders would show public how permit process works and eliminate "suspicions of favoritism in giving out permits" for use of federal lands).

<sup>187</sup> 929 F.2d at 88 (citing Halloran, 874 F.2d at 323 (observing that "merely stating that the interest exists in the abstract is not enough; rather, the court should have analyzed how that interest would be served by compelling disclosure")); see also Favish, 541 U.S. at 172-73 (highlighting "the nexus required between the requested documents and the purported public interest served by disclosure"); Berger, 487 F. Supp. 2d at 505 (finding that disclosure of an IRS agent's time sheets would do little to serve plaintiff's asserted public interest that the records would shed light on the operations of the IRS in conducting investigations of taxpayers).

<sup>188</sup> 929 F.2d at 88; see also Associated Press v. DOD, 554 F.3d at 293 ("We conclude that the public interest in evaluating whether DOD properly followed-up on the detainees' claims of mistaken identity have been adequately served by the disclosure of the redacted information and that disclosing names and addresses of the family members would constitute a clearly unwarranted invasion of the family members' privacy interest because such disclosure would not shed any light on DOD's action in connection with the detainees' claims at issue here."); Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1083 (6th Cir. 1998) (finding that information about individual taxpayers does not serve any possible public interest in "how the IRS exercises its power over the collection of taxes"); Grandison v. DOJ, 600 F. Supp. 2d 109, 117 (D.D.C. 2009) ("Release of the names of law enforcement personnel, witnesses, experts, targets of investigation, court reporters and other court personnel, sheds no light on the working of the government."); Anderson v. DOJ, 518 F. Supp. 2d 1, 14 (D.D.C. 2007) (protecting retired DEA Special Agent's home address because release of the address "in no way would further FOIA's basic purpose"); Sutton v. IRS, No. 05-7177, 2007 WL 30547, at \*6 (N.D. Ill. Jan. 4, 2007) (protecting personal information of third-party taxpayers and IRS personnel because "none of their personal information will give Plaintiff a greater understanding of how the agency is performing its duties"); Forest Guardians v. U.S. Dep't of the Interior, No. 02-1003, 2004 WL 3426434, at \*17 (D.N.M. Feb. 28, 2004) (finding public interest served by release of financial value of loans and names of financial institutions that issued loans, but "protecting any arguably private personal financial or other information concerning individual [Bureau of Land Management] grazing permittees"); Hecht v. USAID, No. 95-263, 1996 WL 33502232, at \*12 (D. Del. Dec. 18, 1996) (determining that the public interest is served by release of redacted contractor's employee data sheets without the names, addresses, and other  
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USDA recognized a valid public interest in questioning the fairness of an agency lottery system that awarded permits to raft down the Rogue River, but found, upon careful analysis, that the release of the names and addresses of the applicants would in no way further that interest.<sup>189</sup> Similarly, in Heights Community Congress v. VA, the Court of Appeals for the Sixth Circuit found that the release of names and home addresses would result only in the "involuntary personal involvement" of innocent purchasers rather than appreciably furthering a concededly valid public interest in determining whether anyone had engaged in "racial steering."<sup>190</sup>

Several courts, moreover, have observed that the minimal amount of information of interest to the public revealed by a single incident or investigation does not shed enough light

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<sup>188</sup>(...continued)

identifying information of employees); Stabasefski v. United States, 919 F. Supp. 1570, 1575 (M.D. Ga. 1996) (finding that public interest is served by release of redacted vouchers showing amounts of Hurricane Andrew subsistence payment to FAA employees; disclosure of names of employees would shed no additional light on agency activities); Gannett Satellite Info. Network, Inc. v. U.S. Dep't of Educ., No. 90-1392, 1990 WL 251480, at \*6 (D.D.C. Dec. 21, 1990) ("If in fact a student has defaulted, [his] name, address, and social security number would reveal nothing about the Department's attempts to collect on those defaulted loans. Nor would [they] reveal anything about the potential misuse of public funds.").

<sup>189</sup> 737 F.2d 784, 787 (9th Cir. 1984); see Wood, 432 F.3d at 89 ("Given that the FBI has already revealed the substance of the investigation and subsequent adjudication, knowledge of the names of the investigators would add little, if anything, to the public's analysis of whether the FBI dealt with the accused agents in an appropriate manner."); Larson v. Dep't of State, No. 02-01937, 2005 WL 3276303, at \*29 (D.D.C. Aug. 10, 2005) (stating that the plaintiff did "not . . . adequately explain how disclosure of the identities of these particular sources would shed much, if any, light on the operations of [the Department of State]"); Kelly v. CIA, No. 00-2498, slip op. at 49-50 (D.D.C. Sept. 25, 2002) (finding that although the "public interest in [the CIA's former] MKULTRA [program] is certainly very high," plaintiff had not demonstrated how disclosing the names of individual test subjects would shed light on the MKULTRA program or CIA activities), appeal on adequacy of search dismissed on procedural grounds, No. 02-5384, 2003 WL 21804101 (D.C. Cir. July 31, 2003); Times Picayune Publ'g Corp. v. DOJ, 37 F. Supp. 2d 472, 480-81 (E.D. La. 1999) (concluding that release of mug shot would not inform members of public about "activities of their government") (Exemption 7(C)); Baltimore Sun Co. v. U.S. Customs Serv., No. 97-1991, slip op. at 7 (D. Md. Nov. 21, 1997) (finding that the photograph of an individual who pled guilty to trafficking in child pornography was not "sufficiently probative of the fairness of [his] sentence that its disclosure [would] inform[] the public of 'what the government is up to'" (Exemption 7(C)); N.Y. Times Co. v. NASA, 782 F. Supp. 628, 632-33 (D.D.C. 1991) (finding that release of the audiotape of the Challenger astronauts' voices just prior to the explosion would not serve the "undeniable interest in learning about NASA's conduct before, during and after the Challenger disaster").

<sup>190</sup> 732 F.2d 526, 530 (6th Cir. 1984); see Painting Indus., 26 F.3d at 1484-85 (protecting names and addresses of employees on payroll records, and stating that the "additional public benefit the requesters might realize through [contacting the employees] is inextricably intertwined with the invasions of privacy that those contacts will work").

on an agency's conduct to overcome the subject's privacy interest in his records.<sup>191</sup> Courts have distinguished between showing public interest in only the general subject area of the request, as opposed to the public interest in the specific subject area of the disclosable portions of the requested records.<sup>192</sup>

Linking the requested records with the asserted public interest is required by the Supreme Court's holding in *Favish*, which emphasized that there must be a "nexus between the requested information and the asserted public interest that would be advanced by disclosure."<sup>193</sup> Likewise, the Supreme Court in *Reporters Committee* held that the "rap sheet" of a defense contractor, if such existed, would reveal nothing directly about the behavior of

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<sup>191</sup> See *Tomscha v. GSA*, 158 F. App'x 329, 331 (2d Cir. 2005) (finding that disclosure of the justification for awards given to "a single low-ranking employee of the GSA . . . would not 'contribute significantly to the public understanding of the operations or activities of the government'" (quoting *DOD v. FLRA*, 510 U.S. at 495)); *Oguaju v. United States*, 288 F.3d 448, 451 (D.C. Cir. 2002) (declaring that "even if the records Oguaju seeks would reveal wrongdoing in his case, exposing a single, garden-variety act of misconduct would not serve the FOIA's purpose of showing 'what the Government is up to'" (Exemption 7(C)), *vacated & remanded*, 541 U.S. 970, *on remand*, 378 F.3d 1115 (D.C. Cir.), *reh'g denied & amended*, 386 F.3d 273 (D.C. Cir. 2004) (per curiam); *Needy v. FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (observing that "courts have refused to recognize, for purposes of FOIA, a public interest in nothing more than the fairness of a criminal defendant's own trial") (Exemption 7(C)); *Hunt*, 972 F.2d at 289 (observing that disclosure of single internal investigation file "will not shed any light on whether all such FBI investigations are comprehensive or whether sexual misconduct by agents is common"); *Salas*, 577 F. Supp. 2d at 112 (finding that OIG properly redacted personally identifying information about Border Patrol employees mentioned in investigative records about a complaint by plaintiff concluding that "[t]his one incident, though of obvious importance to plaintiff, is not one of such magnitude that it outweighs the agency employees' substantial privacy interest"); *Berger*, 487 F. Supp. 2d at 505 (finding that disclosure of one IRS employee's time sheets would not serve the public interest); *Mueller*, 63 F. Supp. 2d at 745 ("[T]he interest of the public in the personnel file of one Air Force prosecutor is attenuated because information concerning a single isolated investigation reveals relatively little about the conduct of the Air Force as an agency.") (Exemptions 6 and 7(C)); *Chin*, No. 97-2176, slip op. at 5 (W.D. La. June 24, 1999) (finding only "marginal benefit to the public interest" in release of the facts of a single case, particularly "where alternative means exist -- such as statistical samples or generalized accounts -- to satisfy the public interest").

<sup>192</sup> See, e.g., *ACLU of N. Cal. v. DOJ*, No. 04-4447, 2005 WL 588354, at \*13 (N.D. Cal. Mar. 11, 2005) (ruling that "it was not sufficient for the plaintiffs to show [public] interest in only the general subject area of the request"); *Elec. Privacy Info. Ctr. v. DOD*, 355 F. Supp. 2d 98, 102 (D.D.C. 2004) (stating that "[t]he fact that [the requester] has provided evidence that there is some media interest in data mining as an umbrella issue does not satisfy the requirement that [the requester] demonstrate interest in the specific subject of [its] FOIA request"); see also *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (stating that an inquiry regarding the public interest "should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld") (Exemption 7(C)).

<sup>193</sup> 541 U.S. at 172-73.

the Congressman with whom the contractor allegedly had an improper relationship, nor would it reveal anything about the conduct of the DOD.<sup>194</sup> Courts have generally found that the information must clearly reveal official government activities, and that it is not enough that the information would permit speculative inferences about the conduct of an agency or a government official,<sup>195</sup> or that it might aid the requester in lobbying efforts that would result

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<sup>194</sup> 489 U.S. at 774; see also Associated Press v. DOD, 554 F.3d at 288 ("This Court has similarly said that 'disclosure of information affecting privacy interests is permissible only if the information reveals something directly about the character of a government agency or official.'" (quoting Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991))); Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989) [hereinafter NARFE] (finding that names and home addresses of federal annuitants reveal nothing directly about workings of government); Halloran, 874 F.2d at 323 ("[M]erely stating that the interest exists in the abstract is not enough; rather, the court should have analyzed how that interest would be served by compelling disclosure."); Kimberlin v. Dep't of the Treasury, 774 F.2d 204, 208 (7th Cir. 1985) ("The record fails to reflect any benefit which would accrue to the public from disclosure and [the requester's] self-serving assertions of government wrongdoing and coverup do not rise to the level of justifying disclosure.") (Exemption 7(C)); Stern, 737 F.2d at 92 (finding that certain specified public interests "would not be satiated in any way" by disclosure) (Exemption 7(C)); Barnard v. DHS, 598 F. Supp. 2d 1, 9 (D.D.C. 2009) ("Where, as here, the nexus between the information sought and the asserted public interest is lacking, the asserted public interests will not outweigh legitimate privacy interests."); Long v. OPM, 2007 WL 2903924, at \*18 (concluding that "[t]he link between the disclosure of the names and duty station of these federal employees - which reveals nothing directly about an employee's job function or the agency he or she works for - and the conduct of the . . . federal agencies . . . is too attenuated to weigh in favor of disclosure"); Seized Prop. Recovery, 502 F. Supp. 2d at 59 (stating that there must be a nexus between the information sought under FOIA and the public's ability to learn about the agency's operations) (Exemptions 6 and 7(C)); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 117-18 (D.D.C. 2005) ("Names alone will not shed any light on how the agencies worked with the airlines."); Nation Magazine v. Dep't of State, No. 92-2303, 1995 WL 17660254, at \*10 & n.15 (D.D.C. Aug. 18, 1995) ("[T]he public interest in knowing more about [presidential candidate H. Ross] Perot's dealings with the government is also not the type of public interest protected by the FOIA."). But see Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 895 (D.C. Cir. 1995) (finding that agency's response to presidential candidate H. Ross Perot's offer to assist in drug interdiction would serve public interest in knowing about agency's plans to privatize government functions).

<sup>195</sup> See Reporters Comm., 489 U.S. at 774, 766 n.18; see also Cozen O'Connor v. Dep't of Treasury, 570 F. Supp. 2d 749, 781 (E.D. Pa. 2008) (stating that "[d]uring information gathering and compilation, government agencies may coincidentally receive personal and private information that has no bearing on their decision-making or operations[,] and "[i]n those instances, the relationship of the information to the individual is not pertinent to the government's workings"); Robbins v. HHS, No. 1:95-cv-3258, slip op. at 8-9 (N.D. Ga. Aug. 12, 1996) (ruling that the possibility that release of names and addresses of rejected social security disability claimants could ultimately reveal the agency's wrongful denial is "too attenuated to outweigh the significant invasion of privacy"), aff'd per curiam, No. 96-9000 (11th Cir. July 8, 1997). But see Avondale Indus. v. NLRB, 90 F.3d 955, 961-62 (5th Cir. 1996) (declaring that disclosure of marked unredacted voting lists in union representation election

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in passage of laws and thus benefit the public in that respect.<sup>196</sup>

A very significant development concerning this issue occurred in U.S. Department of State v. Ray,<sup>197</sup> when the Supreme Court recognized that although there was a legitimate public interest in whether the State Department was adequately monitoring Haiti's promise not to prosecute Haitians who were returned to their country after failed attempts to enter the United States, the Court determined that this public interest had been "adequately served" by release of redacted summaries of the agency's interviews with the returnees and that "[t]he addition of the redacted identifying information would not shed any additional light on the Government's conduct of its obligation."<sup>198</sup> Although the plaintiff claimed that disclosure of the identities of the unsuccessful emigrants would allow him to reinterview them and elicit further information concerning their treatment, the Court found "nothing in the record to suggest that a second set of interviews with the already-interviewed returnees would produce any relevant information . . . . Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy."<sup>199</sup>

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<sup>195</sup>(...continued)

would give plaintiff information it needs to determine whether NLRB conducted election tainted with fraud and corruption); Int'l Diatomite Producers Ass'n v. SSA, No. 92-1634, 1993 WL 137286, at \*5 (N.D. Cal. Apr. 28, 1993) (finding that release of vital status information concerning diatomite industry workers serves "public interest in evaluating whether public agencies . . . carry out their statutory duties to protect the public from the potential health hazards from crystalline silica exposure").

<sup>196</sup> See NARFE, 879 F.2d at 875.

<sup>197</sup> 502 U.S. 164 (1991).

<sup>198</sup> Id. at 178; see also Associated Press, 554 F.2d at 293 (concluding that "the public interest in evaluating whether DOD properly followed-up on the detainees' claims of mistaken identity have been adequately served by the disclosure of the redacted information and that disclosing names and addresses of the family members would constitute a clearly unwarranted invasion of the family members' privacy interest because such disclosure would not shed any light on DOD's action in connection with the detainees' claims at issue here"); Seized Prop. Recovery, 502 F. Supp. 2d at 60 (noting that "any documents containing information about Custom's performance or behavior would advance [the public interest of informing the citizenry of how Customs operates] regardless of whether they contained the names and addresses of individuals whose property was subject to forfeiture") (Exemptions 6 and 7(C)); Pub. Citizen, Inc. v. RTC, No. 92-0010, 1993 WL 1617868, at \*3-4 (D.D.C. Mar. 19, 1993) (adjudging public interest in agency's compliance with Affordable Housing Disposition Program to be served by release of information with identities of bidders and purchasers redacted). But see Rosenfeld, 57 F.3d at 811-12 (concluding that disclosure of names of investigative subjects would serve public interest in knowing whether FBI "overzealously" investigated political protest group by allowing comparison of investigative subjects to group's leadership roster) (Exemption 7(C)).

<sup>199</sup> 502 U.S. at 178-79; see also Forest Serv. Employees, 524 F.3d at 1027-28 (finding that plaintiff, who admitted that "the identities of the employees alone will shed no new light on the Forest Service's performance of its duties beyond that which is already publicly known[,]"

(continued...)

The Supreme Court expressly declined in Ray to decide whether a public interest that stems not from the documents themselves but rather from a "derivative use" to which the documents could be put could ever be weighed in the balancing process against a privacy interest.<sup>200</sup> Subsequently, however, several lower courts faced the "derivative use" issue and ordered the release of names and home addresses of private individuals in certain contexts despite the fact that the public benefit to be derived from release of the information depended upon the requesters' use of the lists to question those individuals concerning the government's diligence in performing its duties. These courts have found a "derivative use" public interest in the following contexts:

- (1) a list of individuals who sold land to the Fish and Wildlife Service, which could be used to contact the individuals to determine how the agency acquires property throughout the United States;<sup>201</sup>
- (2) a list of Haitian nationals returned to Haiti, which could be used for follow-up interviews with the Haitians to learn "whether the INS is fulfilling its duties not to turn away Haitians who may have valid claims for political asylum;"<sup>202</sup>
- (3) a list of citizens who reported wolf sightings, which could be used to monitor the Fish and Wildlife Service's enforcement of the Endangered Species Act;<sup>203</sup>
- (4) the names of agents involved in the management and supervision of the FBI's 1972 investigation of John Lennon, which could be used to help determine whether the

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<sup>199</sup>(...continued)

did not persuade the court that "direct contact with the employees would produce any information that has not already been revealed to the public through the four investigations that have already occurred and the three reports that have been publicly released"); Navigator Publ'g v. DOT, 146 F. Supp. 2d 68, 71 (D. Me. 2001) (concluding that release of addresses of merchant mariners licensed by United States would serve only "hypothetical 'derivative use'" that is far outweighed by "demonstrably significant invasion of privacy"), appeal dismissed, No. 01-1939 (1st Cir. Sept. 19, 2001).

<sup>200</sup> 502 U.S. at 178-79; Associated Press, 554 F.3d at 290 (explaining that the "derivative use" theory "posits that the public interest can be read more broadly to include the ability to use redacted information to obtain additional as yet undiscovered information outside the government files").

<sup>201</sup> Thott v. U.S. Dep't of the Interior, No. 93-0177-B, slip op. at 5-6 (D. Me. Apr. 14, 1994).

<sup>202</sup> Ray v. DOJ, 852 F. Supp. 1558, 1564-65 (S.D. Fla. 1994) (distinguishing Ray, 502 U.S. 164, on the basis that "in the instant case . . . the public interest is not adequately served by release of the redacted logs [and] this Court cannot say that interviewing the returnees would not produce any information concerning our government's conduct during the interdiction process").

<sup>203</sup> Urbigkit v. U.S. Dep't of the Interior, No. 93-CV-0232-J, slip op. at 13 (D. Wyo. May 31, 1994).

investigation was politically motivated;<sup>204</sup>

(5) the name and address of an individual who wrote a letter complaining about an immigration assistance company, which could be used to determine whether the INS acted upon the complaint;<sup>205</sup>

(6) the names and addresses of individuals who received property seized under federal law, which could enable the public to assess the government's exercise of its power to seize and dispose of property;<sup>206</sup> and

(7) the addresses of claimants awarded disaster assistance by FEMA based upon claims of damages from various hurricanes in Florida in 2004, which could be used to uncover further information pertaining to allegations of fraud and wasteful spending in the distribution of disaster assistance by FEMA.<sup>207</sup>

However, the Second Circuit and the Ninth Circuit have expressed skepticism as to whether "derivative use" can support a public interest under the FOIA. In Associated Press v. DOD, the Second Circuit stated that "[a]lthough this Court has not addressed the issue of whether a 'derivative use' theory is cognizable under FOIA as a valid way by which to assert that a public interest is furthered, we have indicated that it may not be."<sup>208</sup> Similarly, in Forest Service Employees the Ninth Circuit observed that "[w]e have previously expressed skepticism at the notion that such derivative use of information can justify disclosure under Exemption 6," and concluded that the plaintiff's theory that "the only way the release of the identities of the Forest Service employees can benefit the public is if the public uses such information to contact the employees directly" is an unjustified reason to release their identities.<sup>209</sup> Other courts have been skeptical of the derivative use theory as well.<sup>210</sup>

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<sup>204</sup> Weiner v. FBI, No. 83-1720, slip op. at 5-7 (C.D. Cal. Dec. 6, 1995) (Exemptions 6 and 7(C)).

<sup>205</sup> Cardona v. INS, No. 93-3912, 1995 WL 68747, at \*3 (N.D. Ill. Feb. 15, 1995).

<sup>206</sup> Baltimore Sun, 131 F. Supp. 2d at 729-30.

<sup>207</sup> Sun-Sentinel v. DHS, 431 F. Supp. 2d 1258, 1269-73 (S.D. Fla. 2006), aff'd sub nom. News-Press v. DHS, 489 F.3d 1173 (11th Cir. 2007).

<sup>208</sup> 554 F.3d at 290.

<sup>209</sup> 524 F.3d at 1027-28.

<sup>210</sup> See, e.g., Painting Indus., 26 F.3d at 1484-85 (concluding that the public interest in monitoring an agency's enforcement of the Davis-Bacon Act is not served by disclosure of names and addresses on payroll records because an additional step of contacting employees is required and the "additional public benefit the requester might realize through these contacts is inextricably intertwined with the invasions of privacy that those contacts will work," but also reasoning that if yielding a public interest required only some further research by the requester, then the fact that the use is a "derivative" one should not detract from the strength of that public benefit); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 86-87 (D.D.C. 2003)

(continued...)

Finally, if alternative, less intrusive means are available to obtain information that would serve the public interest, there is less need to require disclosure of information that would cause an invasion of someone's privacy. Accordingly, the D.C. Circuit has found that "[w]hile [this is] certainly not a *per se* defense to a FOIA request," it is appropriate, when assessing the public interest side of the balancing equation, to consider "the extent to which there are alternative sources of information available that could serve the public interest in disclosure."<sup>211</sup>

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<sup>210</sup>(...continued)

(holding that "disclosure is not compelled under the FOIA because the link between the request and the potential illumination of agency action is too attenuated . . . and this Court does not understand the FOIA to encompass" a derivative theory of public interest); Sammis v. Barnhardt, No. C01-3973, 2002 WL 1285050, at \*2 (N.D. Cal. June 6, 2002) ("If this court allowed disclosure, plaintiff would have to obtain the information, use it to contact applicants directly, and cause them to take action . . . This derivative type of benefit is too tenuous to merit invading individuals' privacy."); Horsehead Indus. v. EPA, No. 94-1299, slip op. at 6 (D.D.C. Mar. 13, 1997) (acknowledging that disclosure of the identities of homeowners who volunteered to participate in a Superfund study might "provide a glimpse into EPA's activities," but finding that "this interest pales in comparison to the potential harm to the privacy" of study participants, based in part upon "reports of trespassers taking environmental samples"); Upper Peninsula Env'tl. Coal. v. Forest Serv., No. 2:94-cv-021, slip op. at 10 (W.D. Mich. Sept. 28, 1994) (finding the "derivative" public interest in gathering information that might assist the Forest Service in managing a wilderness area to be only "negligible," because "[i]t is not the purpose of the FOIA to allow private citizens to do the work of government agencies").

<sup>211</sup> DOD v. FLRA, 964 F.2d 26, 29-30 (D.C. Cir. 1992); see Forest Serv. Employees, 524 F.3d at 1028 ("As a result of the substantial information already in the public domain, we must conclude that the release of the identities of the employees who participated in the Forest Service's response to the Cramer Fire would not appreciably further the public's important interest in monitoring the agency's performance during that tragic event."); Office of the Capital Collateral Counsel, 331 F.3d at 804 (finding that there is substantial public information available about the AUSA's misconduct and that therefore any "public interest in knowing how DOJ responded to [the AUSA's] misconduct can be satisfied by this other public information"); Painting Indus., 26 F.3d at 1485 (union may "pass out fliers" or "post signs or advertisements soliciting information from workers about possible violations of the Davis-Bacon Act"); FLRA v. U.S. Dep't of Commerce, 962 F.2d 1055, 1060 n.2 (D.C. Cir. 1992) (union may "distribute questionnaires or conduct confidential face-to-face interviews" to obtain rating information about employees); Painting & Drywall, 936 F.2d at 1303 (contact at workplace is alternative to disclosing home addresses of employees); Multnomah County Med. Soc'y, 825 F.2d 1410, 1416 (9th Cir. 1987) (medical society can have members send literature to their patients as alternative to disclosure of identities of all Medicare beneficiaries); Chin, No. 97-2176, slip op. at 4-5 (W.D. La. June 24, 1999) (release of "statistical data and/or general accounts of incidents" would be an alternative to releasing investigative records of named individual to show whether government policies were "administered in an arbitrary manner"); cf. Cowdery, 511 F. Supp. 2d at 219 (stating that "it is not clear from the Department's arguments that other means could adequately provide such information and such an assessment," and so concluding that "this factor weighs in favor of disclosure"); Heat & Frost Insulators & Asbestos Workers, Local 16 v. U.S. Dep't of the Air Force, No. S92-2173, slip op. at 3-4 (E.D. Cal. Oct. 4, 1992) (continued...)

This principle was taken into account in Favish where, considering the public interest in disclosure, the Supreme Court recognized that the government had thoroughly investigated the suicide at issue and that "[i]t would be quite extraordinary to say we must ignore the fact that five different inquiries into the . . . matter reached the same conclusion."<sup>212</sup> Likewise, the Tenth Circuit found no public interest in a request to FEMA for "electronic map files" showing the locations of federally insured structures, because the electronic files were "merely cumulative of the information" that FEMA already had released in "hard copies" of the maps and because the requester already had a "plethora of information" with which "to evaluate FEMA's activities."<sup>213</sup>

Similarly, although courts ordinarily discuss the "public interest" as weighing in favor of disclosure, several courts including the D.C. Circuit have implicitly recognized that there can be a public interest in the nondisclosure of personal privacy information -- particularly, the public interest in avoiding the impairment of ongoing and future law enforcement investigations.<sup>214</sup>

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<sup>211</sup>(...continued)

1993) (no alternative to union's request for payroll records -- with names, addresses, and social security numbers redacted -- would allow union to monitor agency's collection of records in compliance with federal regulations); Cotton, 798 F. Supp. at 27 n.9 (suggesting that request for all inspector general reports, from which identifying information could be redacted, would better serve public interest in overseeing discharge of inspector general duties than does request for only two specific investigative reports involving known individuals).

<sup>212</sup> 541 U.S. at 175; see Forest Serv. Employees, 524 F.3d at 102 (noting that four federal agencies investigated the Cramer Fire incident and "the Forest Service conducted its own investigation and produced an accident report . . . [containing] a detailed narrative of the agency's response to the fire as well as findings that the Forest Service's own management failings contributed to the tragedy").

<sup>213</sup> Forest Guardians v. FEMA, 410 F.3d 1214, 1219 & n.3 (10th Cir. 2005).

<sup>214</sup> See, e.g., Perlman, 312 F.3d at 106 ("The strong public interest in encouraging witnesses to participate in future government investigations offsets the weak public interest in learning witness and third party identities.") (Exemptions 6 and 7(C)); Strout v. U.S. Parole Comm'n, 40 F.3d 136, 139 (6th Cir. 1994) ("[T]here would appear to be a public policy interest against such disclosure, as the fear of disclosure to a convicted criminal could have a chilling effect on persons, particularly victims, who would otherwise provide the Commission with information relevant to a parole decision."); Miller v. Bell, 661 F.2d 623, 631 (7th Cir. 1981) (observing that the district court failed to consider "the substantial public interest in maintaining the integrity of future FBI undercover investigations") (Exemption 7(C)); Fund for Constitutional Gov't, 656 F.2d at 865-66 (recognizing that "public interest properly factors into both sides of the balance," and finding that agency properly withheld the identities of government officials investigated but not charged with any crime in "Watergate" investigation) (Exemption 7(C)); Amuso, 600 F. Supp. 2d at 97 (stating that "[i]ndividuals involved in law enforcement investigations" and suspects have a "substantial interest" in the nondisclosure of their identities and connection to a particular investigation"); Diaz, No. 01-40070, slip op. at 10 (D. Mass. Dec. 20, 2001) (deciding that there would be "chilling" effect if conversations between

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In conclusion, the public interest analysis is only part of the overall process for determining whether personal privacy interests should be protected under the FOIA. If an agency determines that no legitimate FOIA public interest exists, and there is a privacy interest in the information, then the information should be protected.<sup>215</sup> If, on the other hand, a FOIA public interest is found to exist, the next step of the analysis requires the public interest in disclosure to be weighed against the privacy interest in nondisclosure.<sup>216</sup>

### Balancing Process

If an agency determined that there is a substantial (i.e., more than de minimis) privacy interest in nondisclosure of requested information and there is also a FOIA public interest in disclosure (i.e., the information reveals the operations or activities of the government) the two competing interests must be weighed against one another in order to determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy.<sup>217</sup> In other words, identifying a substantial privacy interest and the existence of a FOIA public interest "does not conclude the inquiry; it only moves it along to the point where [the agency] can 'address the question whether the public interest in disclosure outweighs the individual privacy concerns.'"<sup>218</sup> If the privacy interests against disclosure are greater than the public interests in disclosure, the information may be properly withheld; alternatively, if the balance

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<sup>214</sup>(...continued)

inmates and their attorneys were disclosed to public anytime they spoke on monitored prison telephones).

<sup>215</sup> See Int'l Bhd. of Elec. Workers Local No. 5 v. HUD, 852 F.2d 87, 89 (3d Cir. 1988) (perceiving no public interest in disclosure of employees' social security numbers); Schoenman v. FBI, 573 F. Supp. 2d 119, 149 (D.D.C. 2008); Seized Prop. Recovery, 502 F. Supp. 2d at 56 ("If no public interest is found, then withholding the information is proper, even if the privacy interest is only modest."); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 144-45 (D.D.C. 2007) (Exemptions 6 and 7(C)).

<sup>216</sup> See Associated Press v. DOD, 554 F.3d at 291 ("Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests." (quoting FLRA v. VA, 958 F.2d 503, 509 (1992))); see also Ripskis, 746 F.2d at 3; Favish, 541 U.S. at 171 ("The term 'unwarranted' requires us to balance the family's privacy interest against the public interest in disclosure.") (Exemption 7(C)).

<sup>217</sup> See DOD v. FLRA, 510 U.S. 487, 495 (1994); DOJ v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 762 (1989)(discussing balancing in Exemption 7(C) context, which generally employs same balancing test applicable in Exemption 6 cases); Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); see also FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decision making").

<sup>218</sup> Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1229-30 (D.C. Cir. 2008) (quoting Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 35 (D.C. Cir. 2002)); see Reporters Comm., 489 U.S. at 749 (a "court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect"); FLRA, 510 U.S. at 495 (same); Dep't of State v. Ray, 502 U.S. 164, 175 (1991) (same); Rose 425 U.S. at 372 (same).

is in favor of disclosure the information should be released.<sup>219</sup>

Some courts apply a four-part balancing test created by the Court of Appeals for the Ninth Circuit in Church of Scientology v. U.S. Dep't of Army,<sup>220</sup> which, although not expressly overturned, has been impliedly superseded in favor of the two-factor test, as evidenced by the majority of subsequent case law.<sup>221</sup>

As the Supreme Court has held: "Exemption 6 does not protect against disclosure every incidental invasion of privacy, only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy."<sup>222</sup> In balancing these interests, "the 'clearly unwarranted' language of Exemption 6 weights the scales in favor of disclosure"<sup>223</sup> and "creates a 'heavy burden' for an agency invoking Exemption 6."<sup>224</sup>

Although "the presumption in favor of disclosure is as strong [under Exemption 6] as

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<sup>219</sup> See, e.g., Rose, 502 U.S. at 177 (noting that "unless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail"); News-Press v. DHS, 489 F.3d 1173, 1205 (11th Cir. 2007) ("In order to affirm withholding the addresses, we would have to find that the privacy interests against disclosure are greater than the public interest in disclosure."); see also Pub. Citizen Health Research Group v. U.S. Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978) (finding that "[s]ince this is a balancing test, any invasion of privacy can prevail, so long as the public interest balanced against it is sufficiently weaker").

<sup>220</sup> 611 F.2d 738 (9th Cir. 1979); see Habeas Corpus Res. Ctr. v. DOJ, No. 08-2649, 2008 WL 5000224 at \*4 (N.D. Cal. Nov. 21, 2008) (applying a four-part balancing test); MacLean v. U.S. Dep't of Army, No. 05-CV-1519, 2007 WL 935604 at \*15 (S.D. Cal. Mar. 6, 2007) (applying a four-part balancing test).

<sup>221</sup> See Painting Industry of Haw. Market Recovery Fund v. U.S. Dep't of Air Force, 26 F.3d 1479, 1482 (9th Cir.1994) ("Exemption 6 requires that courts balance the public interests in disclosure against the privacy interests that would be harmed by disclosure."); Hunt v. FBI, 972 F.2d 286, 290 (9th Cir.1992) (recognizing that Exemption 6 requires "a balancing of the public interest in disclosure against the possible invasion of privacy caused by the disclosure"); Or. Natural Desert Ass'n v. U.S. Dep't of Interior, 24 F. Supp. 2d 1088, 1089 (D. Or. 1998) (noting that four-factor test "has been effectively superseded by the exclusive two-factor test").

<sup>222</sup> Rose, 425 U.S. at 382; see, e.g., Associated Press v. DOD, 554 F.3d 274, 291 (2d Cir. 2009) (same).

<sup>223</sup> Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); see, e.g., Morley v. CIA, 508 F.3d 1108, 1127 (D.C. Cir. 2007) ("Exemption 6's requirement that disclosure be clearly unwarranted instructs us to tilt the balance (of disclosure interests against privacy interests) in favor of disclosure." (quoting Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982))).

<sup>224</sup> Morley, 508 F.3d at 1127, (quoting Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982)).

can be found anywhere in the Act,<sup>225</sup> courts have readily protected personal, intimate details of an individual's life. For example, as the Court of Appeals for the District of Columbia Circuit has noted, courts have traditionally upheld the nondisclosure of information concerning "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation" and similarly personal information.<sup>226</sup> Furthermore, courts have consistently upheld protection for:

- (1) birth dates;<sup>227</sup>
- (2) religious affiliations;<sup>228</sup>
- (3) citizenship data;<sup>229</sup>

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<sup>225</sup> Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

<sup>226</sup> Rural Hous. Alliance v. USDA, 498 F.2d 73, 77 (D.C. Cir. 1974); see Hardison v. Sec'y of VA, 159 F. App'x 93, 94 (11th Cir. 2005) (dates of marriage and spouses' names); McDonnell v. United States, 4 F.3d 1227, 1254 (3d Cir. 1993) ("living individual has a strong privacy interest in withholding his medical records"); Nat'l Sec. News Serv. v. U.S. Dep't of Navy, 584 F. Supp. 2d 94, 97 (D.D.C. 2008) (upholding nondisclosure of hospital patient admission records); Pub. Employees for Envtl. Responsibility v. U.S. Dep't of the Interior, No. 06-182, 2006 WL 3422484, at \*4 n.4 (D.D.C. Nov. 28, 2006) (withholding information detailing employee's physical ailments and medical advice regarding those ailments); Sousa v. DOJ, No. 95-375, 1997 U.S. Dist. LEXIS 9010, at \*22 (D.D.C. June 18, 1997) (withholding co-defendant's medical records); Robbins v. HHS, No. 1:95-cv-3258, slip op. at 8-9 (N.D. Ga. Aug. 12, 1996) (upholding nondisclosure of names, addresses, and claim denial letters of rejected social security disability claimants), aff'd per curiam, No. 96-9000 (11th Cir. July 8, 1997); Hunt v. U.S. Marine Corps, 935 F. Supp. 46, 54 (D.D.C. 1996) (observing that although public may have interest in a political candidate's fitness for office, disclosure of candidate's medical records would not shed light on conduct of Marine Corps).

<sup>227</sup> See, e.g., Hardison, 159 F. App'x at 93; In Defense of Animals v. NIH, 543 F. Supp. 2d 70, 80 (D.D.C. 2008) ("Exemption 6 allows an agency to withhold documents if they contain personal identifying information, such as 'place of birth, date of birth, date of marriage, employment history, and comparable data.'" (quoting U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 600)); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 83 F. Supp. 2d 105, 112 (D.D.C. 1999), appeal dismissed voluntarily, No. 99-5054 (D.C. Cir. Sept. 10, 1999).

<sup>228</sup> See, e.g., Church of Scientology, 611 F.2d at 747.

<sup>229</sup> See U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982) (passport information); Hemenway v. Hughes, 601 F. Supp. 1002, 1006 (D.D.C. 1985) ("Nationals from some countries face persistent discrimination . . . [and] are potential targets for terrorist attacks."); cf. Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at \*8 (D.D.C. Mar. 30, 2001) (asylum application); Judicial Watch, Inc., 83 F. Supp. 2d at 112 (visa and passport data).



- (4) genealogical history establishing membership in a Native American Tribe;<sup>230</sup>
- (5) social security numbers;<sup>231</sup>
- (6) criminal history records;<sup>232</sup>
- (7) incarceration of United States citizens in foreign prisons;<sup>233</sup>
- (8) identities of crime victims;<sup>234</sup> and
- (9) financial information.<sup>235</sup>

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<sup>230</sup> Quinault Indian Nation v. Gover, No. C97-5625, transcript at 52-57 (W.D. Wash. Oct. 19, 1998), aff'd sub nom. Quinault Indian Nation v. Deer, 232 F.3d 896 (9th Cir. 2000) (unpublished table decision).

<sup>231</sup> See, e.g., Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 365-66 (5th Cir. 2001); Norwood v. FAA, 993 F.2d 570, 575 (6th Cir. 1993); Schoenman v. FBI, 575 F. Supp. 2d 136, 164 (D.D.C. 2008) (concluding that "the Army has properly invoked FOIA Exemption 6 to withhold the names, birthdates, and social security numbers of government personnel and third parties"); Peay v. DOJ, No. 04-1859, 2006 WL 1805616, at \*2 (D.D.C. June 29, 2006) ("The IRS properly applied exemption 6 to the social security numbers of IRS personnel."); Dayton Newspapers, Inc. v. U.S. Dep't of the Navy, No. C-3-95-328, slip op. at 31-38 (S.D. Ohio Sept. 12, 1996) (same); Fid. Nat'l Title Ins. Co. v. HHS, No. 91-5484, slip op. at 6-7 (C.D. Cal. Feb. 13, 1992) (same).

<sup>232</sup> See, e.g., Reporters Comm., 489 U.S. at 780; Associated Press v. DOJ, 549 F.3d 62, 66 (2d Cir. 2008) (per curiam) (holding commutation petition exempt from disclosure under Exemptions 6 and 7(C)); Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1124-26 (D.C. Cir. 2004) (protecting pardon applications, which include information about crimes committed); Lee v. DOJ, No. 05-1665, 2007 WL 744731, at \*2 (D.D.C. Mar. 6, 2007) (withholding list of individuals convicted of serious criminal activity from whom the government attempted to collect restitution).

<sup>233</sup> See Harbolt v. Dep't of State, 616 F.2d 772, 774 (5th Cir. 1980).

<sup>234</sup> See, e.g., Horowitz v. Peace Corps, 428 F.3d 271, 279-80 (D.C. Cir. 2005) ("Our law uniformly recognizes that strong privacy interests are implicated when . . . [an] individual has reported a sexual assault."); Elliott v. FBI, No. 06-1244, 2007 WL 1302595, at \*6 (D.D.C. May 2, 2007) (upholding FBI's withholding of identity of juvenile victim of sexual assault) (Exemption 7(C)).

<sup>235</sup> See, e.g., Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1056 (D.C. Cir. 2009) (concluding that HHS properly withheld information that could reveal total payments received by physicians from Medicare for covered services); Beard v. Espy, No. 94-16748, 1995 WL 792071, at \*1 (9th Cir. Dec. 11, 1995); Hill v. USDA, 77 F. Supp. 2d 6, 8-9 (D.D.C. 1999), summary affirmance granted, No. 99-5365, 2000 WL 520724, at \*1 (D.C. Cir. Mar. 7, 2000); Green v. United States, 8 F. Supp. 2d 983, 998 (W.D. Mich. 1998), appeal dismissed, No. 98-

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Even "favorable information," such as details of an employee's outstanding performance evaluation, can be protected on the basis that it "may well embarrass an individual or incite jealousy" among coworkers.<sup>236</sup> Moreover, release of such information "reveals by omission the identities of employees who did not receive high ratings, creating an invasion of their privacy."<sup>237</sup>

### Balancing Process for Names & Addresses

Requests for the names and home addresses of individuals has generated much litigation over the years. Because agencies may neither distinguish between requesters nor limit the use to which disclosed information is put,<sup>238</sup> courts have found that an analysis of the consequences of disclosure of names and addresses cannot turn on the identity or purpose of the requester.<sup>239</sup> The Supreme Court has held that compilations of names and home

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<sup>235</sup>(...continued)

1568 (6th Cir. Aug. 11, 1998); Stabasefski v. United States, 919 F. Supp. 1570, 1575 (M.D. Ga. 1996); Biase v. Office of Thrift Supervision, No. 93-2521, slip op. at 8-10 (D.N.J. Dec. 10, 1993); Okla. Publ'g Co. v. HUD, No. 87-1935-P, 1988 U.S. Dist. LEXIS 18643, at \*4-5 (W.D. Okla. June 17, 1988).

<sup>236</sup> Ripskis, 746 F.2d at 3; see Hardison, 159 F. App'x at 93 (performance appraisals); FLRA v. U.S. Dep't of Commerce, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992) (performance appraisals); Lewis v. EPA, No. 06-2660, 2006 WL 3227787, at \*6 (E.D. Pa. Nov. 3, 2006) (employee or candidate rankings and evaluations); Vunder v. Potter, No. 05-142, 2006 WL 162985, at \*2-3 (D. Utah Jan. 20, 2006) (narrative of accomplishments submitted to superiors for consideration in performance evaluation); Tomscha v. GSA, No. 03-6755, 2004 WL 1234043, at \*4 (S.D.N.Y. June 3, 2004) ("Both favorable and unfavorable assessments trigger a privacy interest."), aff'd, 158 F. App'x 329, 331 (2d Cir. 2005) ("[W]e agree with the district court's finding that the release of the justifications for [plaintiff's] awards would constitute more than a de minimis invasion of privacy, as they necessarily include private, albeit positive, information regarding his job performance."). But see also Hardy v. DOD, No. CV-99-523, 2001 WL 34354945, at \*9 (D. Ariz. Aug. 27, 2001) (finding concern with jealousy on parts of co-workers diminished by fact that subject employee had since retired).

<sup>237</sup> FLRA, 962 F.2d at 1059.

<sup>238</sup> See NARA v. Favish, 541 U.S. 157, 174 (2004) ("It must be remembered that once there is disclosure, the information belongs to the general public. There is no mechanism under FOIA for a protective order allowing only the requester to see . . . the information . . . or for proscribing its general dissemination."); Forest Serv. Employees for Env'tl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1025 (9th Cir. 2008) ("FOIA provides every member of the public with equal access to public documents and, as such, information released in response to one FOIA request must be released to the public at large.").

<sup>239</sup> See Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 356 (1997) (finding irrelevant requester's claimed purpose for seeking mailing list in order to disseminate information); Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989) [hereinafter NARFE] (finding irrelevant requester's claimed purpose to use list of federal retirees to aid in

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addresses are protectible under Exemption 6,<sup>240</sup> and that specific lists may reveal sensitive information beyond the mere names and addresses of the individuals found on the list.<sup>241</sup> The D.C. Circuit addressed the question of whether disclosure of mailing lists constituted a clearly unwarranted invasion of personal privacy in National Ass'n of Retired Federal Employees v. Horner, and, while stopping short of creating a nondisclosure category for all mailing lists, the D.C. Circuit held that mailing lists consisting of names and home addresses of federal annuitants are categorically withholdable under Exemption 6.<sup>242</sup>

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<sup>239</sup>(...continued)

its lobbying efforts on behalf of those retirees); Schwarz v. Dep't of State, No. 97-1342, slip op. at 5 (D.D.C. Mar. 20, 1998) (holding, despite plaintiff's claim that she needed address of third party to assist her, that the "merits of an agency's FOIA determinations do not rest on the identity of the requester or the purpose for which the information is intended to be used"), aff'd per curiam, 172 F.3d 921 (D.C. Cir. 1998) (unpublished table decision); see also Robbins v. HHS, No. 1:95-cv-3258, slip op. at 8-9 (N.D. Ga. Aug. 12, 1996) (rejecting as "too attenuated" plaintiff's claim of intent to use names and addresses of rejected social security disability claimants as means to represent them and "thereby 'promote the effective uniform administration of the disability program,'" and ultimately reveal alleged wrongful denials (quoting plaintiff's papers)); Bongiorno v. Reno, No. 95-72143, 1996 WL 426451, at \*14 (E.D. Mich. Mar. 19, 1996) (noting that requester sought personal information concerning his adopted daughter "for his own purposes, [and] as understandable as they may be, [those purpose are] not to shine a public light into the recesses of the federal bureaucracy"); Andrews v. DOJ, 769 F. Supp. 314, 316-17 (E.D. Mo. 1991) (declining to release individual's address, telephone number, and place of employment to requester seeking it for purpose of satisfying monetary judgment).

<sup>240</sup> See Bibles, 519 U.S. at 355-56 (protecting mailing list of recipients of Bureau of Land Management publication); DOD v. FLRA, 510 U.S. 487, 494-502 (1994) (protecting names and home addresses of federal employees in union bargaining units); Dep't of State v. Ray, 502 U.S. 164, 173-79 (1991) (withholding from interview summaries the names and addresses of Haitian refugees interviewed by State Department about treatment upon return to Haiti).

<sup>241</sup> See Ray, 502 U.S. at 176 (observing that disclosure of a list of Haitian refugees interviewed by the State Department about their treatment upon return to Haiti "would publicly identify the interviewees as people who cooperated with a State Department investigation"); Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187-88 (8th Cir. 2000) (protecting list of pork producers who signed petition that declared their position on referendum that was sought by petition) (reverse FOIA suit); NARFE, 879 F.2d at 876 (characterizing the list at issue as revealing that each individual on it "is retired or disabled (or the survivor of such a person) and receives a monthly annuity check from the federal Government"); Minnis v. USDA, 737 F.2d 784, 787 (9th Cir. 1984) ("Disclosure would reveal not only the applicants' names and addresses, but also their personal interests in water sports and the out-of-doors.").

<sup>242</sup> NARFE, 879 F.2d at 879; see also Retired Officers Ass'n v. Dep't of the Navy, 744 F. Supp. 1, 2-3 (D.D.C. May 14, 1990) (holding names and home addresses of retired military officers exempt); cf. Reed v. NLRB, 927 F.2d 1249, 1251-52 (D.C. Cir. 1991) (categorically protecting "Excelsior" list (names and addresses of employees eligible to vote in union representation

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In these types of cases, courts have frequently found the asserted public interest too attenuated to overcome the clear privacy interest an individual has in his name and home address. Nevertheless, several lower courts have ordered the disclosure of such information in certain contexts. Some of these courts have found little or no privacy interest in the names and addresses at issue.<sup>243</sup> Other courts have ordered the release of such personal information on the rationale that the names and addresses themselves would reveal (or lead to other information that would reveal) how an agency conducted some aspect of its business.<sup>244</sup>

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<sup>242</sup>(...continued)  
elections)).

<sup>243</sup> See Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 36 (D.C. Cir. 2002) (finding privacy interest "relatively weak," and determining that public interest in learning about agency's use of owl data is served by release of lot numbers of parcels of land where owls have been spotted, even while acknowledging that the identities of landowners could be determined by use of this information); Avondale Indus. v. NLRB, 90 F.3d 955, 961 (5th Cir. 1996) (finding that names and addresses of voters in union election already were disclosed in voluminous public record); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 306 (D.D.C. 2007) (ordering release of names of those who voluntarily submitted comments regarding informational video shown at Lincoln Memorial because "the public interest in knowing who may be exerting influence on National Park Service officials sufficient to convince them to change the video outweighs any privacy interest in one's name."); Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 729 (D. Md. 2001) (declaring that purchasers of property previously seized by the government "voluntarily choose to participate in . . . a wholly legal commercial transaction" and "have little to fear in the way of 'harassment, annoyance, or embarrassment'" (Exemption 7(C))); Alliance for the Wild Rockies v. Dep't of the Interior, 53 F. Supp. 2d 32, 36-37 (D.D.C. 1999) (concluding that commenters to proposed rulemaking could have little expectation of privacy when rulemaking notice stated that complete file would be publicly available); Wash. Post Co. v. USDA, 943 F. Supp. 31, 34-36 (D.D.C. Oct. 18, 1996) (finding minimal privacy interest in home addresses at which farmers receiving subsidies under cotton price support program operate their businesses), appeal dismissed voluntarily, No. 96-5373 (D.C. Cir. May 19, 1997); Ackerson & Bishop Chartered v. USDA, No. 92-1068, slip op. at 1 (D.D.C. July 15, 1992) (finding no privacy interest in names of commercial mushroom growers operating under own names).

<sup>244</sup> See Baltimore Sun, 131 F. Supp. 2d at 729-30 (names and addresses of purchasers of property seized by government found to allow public to assess agencies' exercise of their power to seize property and their duty to dispose of such property) (Exemption 7(C)); Or. Natural Desert Ass'n v. U.S. Dep't of Interior, 24 F. Supp. 2d 1088, 1093 (D. Or. 1998) (names of cattle owners who violated federal grazing laws found to reveal "how government is enforcing and punishing violations of land management laws") (Exemption 7(C)); Maples v. USDA, No. 97-5663, slip op. at 14 (E.D. Cal. Jan. 13, 1998) (names and addresses of permit holders for use of federal lands "would provide the public with an understanding of how the permit process works"); Urbigkit v. U.S. Dep't of the Interior, No. 93-CV-0232-J, slip op. at 13 (D. Wyo. May 31, 1994) (list of citizens who reported wolf sightings found to show agency activities "with respect to the duties imposed upon it by the Endangered Species Act"); Ray v. DOJ, 852 F. Supp. 1558, 1564-65 (S.D. Fla. 1994) (names and addresses of interdicted Haitians might reveal "information concerning our government's conduct during the  
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For example, the Court of Appeals for the Eleventh Circuit concluded in News-Press v. DHS that disclosure of the addresses of buildings that received disaster assistance from FEMA should be released, but that the names of aid recipients were properly withheld.<sup>245</sup> The court recognized that the public had a legitimate interest in knowing whether FEMA appropriately handled billions of dollars in disaster relief claims, especially in light of evidence submitted by the requesters of wasteful or fraudulent spending of disaster assistance funds.<sup>246</sup> The court went on to find that the addresses of those structures allegedly damaged would shed light directly on the allegations of impropriety, as those addresses that received disaster relief which were located outside the path of the natural disasters "plainly would raise red flags" regarding FEMA's effectiveness in properly distributing disaster assistance.<sup>247</sup>

Against this "powerful public interest,"<sup>248</sup> the court weighed the privacy interests of aid recipients in the nondisclosure of their home addresses. The Court identified a number of privacy interests threatened by disclosure of the home addresses, including the fact that disclosure of the addresses would allow the public to "link certain information already disclosed by FEMA to particular individuals."<sup>249</sup> However, the court found that these privacy interests were not substantial enough to warrant protection under Exemption 6.<sup>250</sup> In summary, the court stated that "[q]uite simply, the disclosure of the addresses serves a powerful public interest, and the privacy interests extant cannot be said even to rival this public interest, let alone exceed it, so that disclosure would constitute a 'clearly unwarranted' invasion of personal privacy."<sup>251</sup> The court remarked that in this case it did "not find the balancing calculus to be particularly hard."<sup>252</sup>

By contrast, the court held that disclosure of the names of the aid recipients would constitute a "clearly unwarranted invasion of personal privacy."<sup>253</sup> Whereas the addresses would shed light directly on whether FEMA improperly disbursed funds, the names of those

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<sup>244</sup>(...continued)

interdiction process"); Thott v. U.S. Dep't of the Interior, No. 93-0177-B, slip op. at 5-6 (D. Me. Apr. 14, 1994) (list of individuals who sold land to Fish and Wildlife Service found to inform the public "about the methods used by FWS in acquiring property throughout the United States").

<sup>245</sup> 489 F.3d 1173, 1205-06 (11th Cir. 2007).

<sup>246</sup> Id. at 1192.

<sup>247</sup> Id. at 1192-96.

<sup>248</sup> Id. at 1196.

<sup>249</sup> Id. at 1199.

<sup>250</sup> Id. at 1200.

<sup>251</sup> Id. at 1205.

<sup>252</sup> Id.

<sup>253</sup> Id.

aid recipients "would provide no further insight into the operations of FEMA."<sup>254</sup> As such, the court found that the public's interest in the aid recipient names was "outweighed by the increased privacy risks" posed by disclosure of those names.<sup>255</sup>

In certain circumstances, an individual may have an interest in having his or her personal information disclosed rather than withheld. In Lepelletier v. FDIC, the D.C. Circuit remanded the case back to the district court to determine whether some of the names of individual depositors with unclaimed funds at banks for which the FDIC was then the receiver should be released to a professional money finder.<sup>256</sup> Introducing a new element into the balancing test for this particular type of information, the D.C. Circuit held that the standard test "is inapposite here, i.e., where the individuals whom the government seeks to protect have a clear interest in the release of the requested information."<sup>257</sup> As guidance to the lower court charged with addressing this novel set of circumstances, the D.C. Circuit ordered, first, that "release of names associated with unclaimed deposits should not be matched with the amount owed to that individual" and, second, that "on remand, the District Court must determine the dollar amount below which an individual's privacy interest should be deemed to outweigh his or her interest in discovering his or her money, such that the names of depositors with lesser amounts may be redacted."<sup>258</sup>

#### Partial Disclosures

In some contexts, deletion of the identities of the individuals mentioned in a document, with release of the remaining material, provides protection for personal privacy while at the same time allows for the disclosure of information regarding government activities. For example, in Department of the Air Force v. Rose, the Supreme Court ordered the release of case summaries of disciplinary proceedings, provided that personal identifying information was deleted.<sup>259</sup> Similarly, courts have ordered the disclosure of computerized lists of numbers and types of drugs routinely ordered by the congressional pharmacy after deletion of any item

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<sup>254</sup> Id. at 1205 (quoting Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1271 (S.D. Fla. 2006)).

<sup>255</sup> Id.

<sup>256</sup> 164 F.3d 37, 48-49 (D.C. Cir. 1999).

<sup>257</sup> Id. at 48.

<sup>258</sup> Id.

<sup>259</sup> 425 U.S. 352, 380-81 (1976); see Ripskis v. HUD, 746 F.2d 1, 4 (D.C. Cir. 1984)(noting that agency voluntarily released outstanding performance rating forms with identifying information deleted); Aldridge v. U.S. Comm'r of Internal Revenue, No. 7:00-CV-131, 2001 WL 196965, at \*3 (N.D. Tex. Feb. 23, 2001) (determining that privacy interests of employees recommended for discipline could be protected by redacting their names); Hecht v. USAID, No. 95-263, 1996 WL 33502232, at \*12 (D. Del. Dec. 18, 1996) (finding that privacy interests of government contractor's employees could be protected by withholding their names and addresses from biographical data sheets); Church of Scientology v. IRS, 816 F. Supp. 1138, 1160 (W.D. Tex. 1993) (ordering agency to protect employees' privacy interests in their handwriting by typing handwritten records at requester's expense).

identifiable to a specific individual,<sup>260</sup> and have ordered the disclosure of documents concerning disciplined IRS employees, provided that all names and other identifying information were deleted.<sup>261</sup> Similarly, documents voluntarily submitted to the government by private citizens have been held releasable, as long as redactions are made of personally identifying information.<sup>262</sup> For example, in Carter, Fullerton & Hayes LLC v. FTC, the FTC released the text of all responsive documents located in its consumer complaint database except for personal information pertaining to individual consumers.<sup>263</sup>

Nevertheless, in some situations the deletion of personal identifying information may not be adequate to provide necessary privacy protection.<sup>264</sup> As such, in Rose, the Supreme Court specifically held that if it were determined on remand that the deletions of personal references were not sufficient to safeguard privacy, then the summaries of disciplinary hearings should not be released.<sup>265</sup>

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<sup>260</sup> See Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1468-69 (D.C. Cir. 1983); see also Dayton Newspapers, Inc. v. Dep't of the Air Force, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998) (ordering release of militarywide medical tort-claims database with "claimants' names, social security numbers, home addresses, home/work telephone numbers and places of employment" redacted); Chi. Tribune Co. v. HHS, No. 95 C 3917, 1997 WL 1137641, at \*18-19 (N.D. Ill. Feb. 26, 1997) (magistrate's recommendation) (ordering release of patient data forms that identify patients only by nine-digit encoded "Study Numbers"), adopted, (N.D. Ill. Mar. 28, 1997); Minntech Corp. v. HHS, No. 92-2720, slip op. at 5 (D.D.C. Nov. 17, 1993) (ordering release of FDA studies concerning mortality rates and use of kidney dialyzers with names, addresses, places of birth, and last four digits of social security numbers deleted); Frets v. Dep't of Transp., No. 88-404-W-9, 1989 WL 222608, at \*5 (W.D. Mo. Dec. 14, 1989) (ordering disclosure of drug reports of air traffic controllers with identities deleted); Citizens for Env'tl. Quality v. USDA, 602 F. Supp. 534, 538-39 (D.D.C. 1984) (ordering disclosure of health test results because identity of single agency employee tested could not, after deletion of his name, be ascertained from any information known outside appropriate part of agency (citing Rose, 425 U.S. at 380 n.19 (dicta))).

<sup>261</sup> See Chamberlain v. Kurtz, 589 F.2d 827, 841-42 (5th Cir. 1979); cf. Senate of P.R. v. DOJ, No. 84-1829, 1993 WL 364696, at \*10-11 (D.D.C. Aug. 24, 1993) (ordering release of information concerning cooperating inmate after redaction of identifying details).

<sup>262</sup> See Billington v. DOJ, 258 F. App'x 348, 349 (D.C. Cir. 2007).

<sup>263</sup> 520 F. Supp. 2d 134, 148 (D.D.C. 2007).

<sup>264</sup> See, e.g., Harry v. Dep't of the Army, No. 92-1654, slip op. at 9 (D.D.C. Sept. 13, 1993) (concluding that redaction of ROTC personnel records was not possible because "intimate character" of ROTC corps at university would make records recognizable to requester who was in charge of university's ROTC program); see also Alirez v. NLRB, 676 F.2d 423, 428 (10th Cir. 1982) (finding that deletion of names and other identifying data pertaining to small group of co-workers was simply inadequate to protect them from embarrassment or reprisals because requester could still possibly identify individuals) (Exemption 7(C)).

<sup>265</sup> 425 U.S. at 381; see also, e.g., ACLU v. DOD, 389 F. Supp. 2d 547, 572 (S.D.N.Y. 2005)

In another example, to protect those persons who were the subjects of disciplinary actions that were later dismissed, Court of Appeals for the District of Columbia Circuit upheld the nondisclosure of public information contained in such disciplinary files when the redaction of personal information would not be adequate to protect the privacy of the subjects because the requester could easily obtain and compare unredacted copies of the documents from public sources.<sup>266</sup> Similarly, when the information in question concerns a small group of individuals who are known to each other and easily identifiable from the details contained in the information, redaction might not adequately protect privacy interests.<sup>267</sup>

Furthermore, when requested information is "unique and specific" to the subjects of a

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<sup>265</sup>(...continued)

(declaring that for certain photographic and video images, "where the context compelled the conclusion that individual recognition could not be prevented without redaction so extensive as to render the images meaningless, [the court orders] those images not to be produced").

<sup>266</sup> Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987); see also, e.g., Marzen v. HHS, 825 F.2d 1148, 1152 (7th Cir. 1987) (concluding that redaction of "identifying characteristics" would not protect the privacy of a deceased infant's family because others could ascertain the identity and "would learn the intimate details connected with the family's ordeal"); Campaign for Family Farms v. Veneman, No. 99-1165, 2001 WL 1631459, at \*3 (D. Minn. July 19, 2001) (finding that disclosure of zip codes and dates of signatures could identify signers of petition); Ligornier v. Reno, 2 F. Supp. 2d 400, 405 (S.D.N.Y. 1998) (finding that redaction of a complaint letter to the Office of Professional Responsibility would be inadequate to protect the identities of the individual accused of misconduct and of the accuser, because "public could deduce the identities of the individuals whose names appear in the document from its context").

<sup>267</sup> See, e.g., Alirez, 676 F.2d at 428 (finding that mere deletion of names and other identifying data concerning small group of co-workers inadequate to protect them from embarrassment or reprisals because requester could still possibly identify individuals) (Exemption 7(C)); Karantsalis v. U.S. Dep't of Educ., No. 05-22088, slip op. at 4 n.4 (S.D. Fla. Dec. 19, 2005) (reasoning that because the requested document dealt "with a particular, small workplace, and since the contents of the report deal exclusively with confidential personnel matters, it is not possible, as in some cases, merely to excise personally identifying information"); Butler v. SSA, No. 03-0810, slip op. at 6 (W.D. La. June 25, 2004) (protecting complaints made against the requester, "because the employee or employees who complained could have been easily identified by the fact scenarios described in the documents"), aff'd on other grounds, 146 F. App'x 752 (5th Cir. 2005); Rothman v. Dep't of Agric., No. 94-8151, slip op. at 8-9 (C.D. Cal. June 17, 1996) (protecting information in employment applications that pertains to knowledge, skills, and abilities of unsuccessful applicants, because the "field of candidates for this particular position (canine officer) is specialized and is limited to about forty persons who work in same agency and may know each other personally"); McLeod v. Pena, No. 94-1924, slip op. at 6 (D.D.C. Feb. 9, 1996) (concluding that redaction of investigative memoranda and witness statements would not protect privacy when "community of possible witnesses and investigators is very small" -- eight officers and twenty enlisted personnel) (Exemption 7(C)); Barvick v. Cisneros, 941 F. Supp. 1015, 1021-22 (D. Kan. 1996) (protecting all information about unsuccessful federal job applicants because any information about members of "select group" that applies for such job could identify them).



record, "individual identities may become apparent from the specific details set forth in [the] documents," so that "deletion of personal identifying information . . . may not be adequate to provide the necessary privacy protection."<sup>268</sup> Indeed, a determination of what constitutes identifying information requires both an objective analysis and an analysis "from the vantage point of those familiar with the mentioned individuals."<sup>269</sup>

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<sup>268</sup> Rashid v. DOJ, No. 99-2461, slip op. at 15-16 (D.D.C. June 12, 2001); see Whitehouse v. U.S. Dep't of Labor, 997 F. Supp. 172, 175 (D. Mass. 1998) (discerning "no practical way" to sanitize "personal and unique" medical evaluation reports to prevent identification by knowledgeable reader); Ortiz v. HHS, 874 F. Supp. 570, 573-75 (S.D.N.Y. 1995) (finding that factors such as type style, grammar, syntax, language usage, writing style, and mention of facts "that would reasonably be known only by a few persons" could lead to identification of the author if an anonymous letter were released) (Exemptions 7(C) and 7(D)), aff'd on Exemption 7(D) grounds, 70 F.3d 729 (2d Cir. 1995).

<sup>269</sup> Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1565 (M.D. Fla. 1994). But see also ACLU v. DOD, 389 F. Supp. 2d at 572 ("If, because someone sees the redacted pictures and remembers from earlier versions leaked to, or otherwise obtained by, the media that his image, or someone else's, may have been redacted from the picture, the intrusion into personal privacy is marginal and speculative, arising from the event itself and not the redacted image.").