mediation privilege.[329]

Lastly, while it is evident that courts will continue to apply such civil discovery privileges under Exemption 5 of the FOIA, the mere fact that a particular privilege has been recognized by state law will not necessarily mean that it will be recognized by a federal court.[330]

EXEMPTION 6

Personal privacy interests are protected by two provisions of the FOIA, Exemptions 6 and 7(C). While the application of Exemption 7(C), discussed below, is limited to information compiled for law enforcement purposes, Exemption 6 permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."[1] These exemptions are a vitally important part of the FOIA's statutory scheme,[2] but of course they cannot be invoked to withhold from a requester information pertaining only to himself.[3]

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[329] See Sheldone v. Pa. Turnpike Comm'n, 104 F. Supp. 2d 511, 515 (W.D. Pa. 2000) (recognizing, in non-FOIA case, privilege for communications arising from mediation process); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1180-81 (C.D. Cal. 1998) (holding, in non-FOIA case, that federal mediation privilege protects all communications exchanged in course of formal mediation proceeding), aff'd, 216 F.3d 1082 (9th Cir. 2000) (unpublished table decision); cf. 28 U.S.C. § 652(d) (2000) (requiring district courts to provide by local rule for confidentiality of alternative dispute resolution proceedings); 5 U.S.C. § 574(j) (2000) ("A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).").

[330] See, e.g., Sneirson v. Chem. Bank, 108 F.R.D. 159, 162 (D. Del. 1985) (non-FOIA case); Cincotta v. City of New York, No. 83-7506, 1984 WL 1210, at *1-2 (S.D.N.Y. Nov. 14, 1984) (non-FOIA case); cf. Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 931 (C.D. Ill. 2002) (declining to order release under state law of any records that would be protected under FOIA).

[1] 5 U.S.C. § 552(b)(6) (2000 & Supp. IV 2004).

[2] See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (placing particular emphasis on the importance of "preserving personal privacy" among the other interests that are protected by the FOIA's exemptions).

[3] See H.R. Rep. No. 93-1380, at 13 (1974); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) (citing U.S.

(continued...)

Initial Considerations

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."[4] Personnel and medical files are easily identified, but there has not always been universal agreement about the meaning of the term "similar files." Prior to 1982, judicial interpretations of that phrase varied considerably and included a troublesome line of cases in the Court of Appeals for the District of Columbia Circuit, commencing with Board of Trade v. Commodity Futures Trading Commission,[5] which narrowly construed the term to encompass only "intimate" personal details.

In 1982, the Supreme Court acted decisively to resolve this controversy once and for all. In United States Department of State v. Washington Post Co.,[6] it firmly held, based upon a review of the legislative history of the FOIA, that Congress intended the term to be interpreted broadly, rather than narrowly.[7] 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."[8] Rather, the Court made clear that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection.[9] This means, of course, that this

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[3](...continued)
Dep't of Justice v. Julian, 486 U.S. 1, 13-14 (1988)); Dean v. FDIC, 389 F. Supp. 2d 780, 794 (E.D. Ky. 2005) ("[T]o 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."); see also FOIA Update, Vol. X, No. 2, at 5 (advising that, as a matter of sound administrative practice, "[a]n agency will not invoke an exemption to protect a requester from himself").

[4] 5 U.S.C. § 552(b)(6).

[5] 627 F.2d 392, 400 (D.C. Cir. 1980).

[6] 456 U.S. 595 (1982).

[7] 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)).

[8] Id. at 601 (citing H.R. Rep. No. 89-1497, at 11 (1966)); 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)).

[9] Id. at 602; see, e.g., Wood v. FBI, 432 F.3d 78, 86-87 (2d Cir. 2005) (overturning mistaken district court ruling by recognizing that personal information about government investigators appearing in investigative records are
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[9](...continued)
indeed "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"), reh'g denied, No. 03-1689 (7th Cir. 2004); Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 361 (5th Cir. 2001) (recognizing that the "Supreme Court has interpreted exemption 6 'files' broadly to include any 'information which applies to a particular individual'" (quoting Wash. Post, 456 U.S. at 601)); Strout v. U.S. Parole Comm'n, 40 F.3d 136, 139 (6th Cir. 1994) (protecting names and addresses of persons opposing parole of individual, without explicit discussion of threshold requirement); O'Keefe v. DOD, 463 F. Supp. 2d 317, 326 (D.D.C. 2006) (concluding that investigative records at issue met threshold requirement for Exemption 6 protection); Balderrama v. DHS, No. 04-1617, 2006 WL 889778, at *9 (D.D.C. Mar. 30, 2006) ("The Supreme Court has made clear that all information that 'applies to a particular individual' meets the threshold requirement for protection under Exemption 6."); Hornbeck Offshore Transp., LLC v. U.S. Coast Guard, No. 04-1724, 2006 WL 696053, at *22 (D.D.C. Mar. 20, 2006) ("Courts have broadly interpreted the term 'similar files' to include most information applying to a particular individual."); Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., No. 05-6015, 2005 WL 3488453, at *2 (D. Or. Dec. 21, 2005) (explaining that the Supreme Court "has given a broad definition to 'similar file'"); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at *15 (D.D.C. Sept. 28, 2001) (recognizing that names of research foundation members are "similar files"); Hecht v. U.S. Agency for Int'l Dev., 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."). But see Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding erroneously 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) (denying defendants' motion to alter or amend judgment; reaffirming erroneous conclusion that Exemption 6 is inapplicable on basis that names and telephone numbers of Justice Department paralegals are not similar to "personnel" or "medical" files), 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 mistakenly 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. 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
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threshold is met if the information applies to any particular, identifiable individual -- which makes it readily satisfied in all but the most unusual cases of questionable identifiability.[10]

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."[11] Not only did the D.C. Circuit determine that "lexi

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[9](...continued)
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); see also Judicial Watch, Inc. v. United States, 84 F. App'x 335, 340-41 (4th Cir. 2004) (opining that IRS employee names do not meet Exemption 6 threshold) (Luttig, J., dissenting).

[10] 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); VoteHemp, Inc. v. DEA, No. 02-985, slip op. at 13-16 (D.D.C. Oct. 15, 2004) (concluding without explication that redacted names of DEA employees who authored or received documents are not "similar files," but that names and addresses of third parties contained in documents constitute "similar files"); 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); see also FOIA Update, Vol. III, No. 4, at 1 (explaining that the Washington Post decision "revitalized the commonsense, practical approach of giving privacy considerations their full weight in the delicate balancing process"). But see Greenpeace USA, Inc. v. EPA, 735 F. Supp. 13, 14 (D.D.C. 1990) (opining narrowly 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").

[11] 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
(continued...)

cal" and "non-lexical" information are subject to identical treatment under the FOIA,[12] it also concluded that Exemption 6 is equally applicable to the "author" and the "subject" of a file.[13]

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."[14] This requires a balancing of the public's right to disclosure against the individual's right to privacy.[15] First, it must be ascertained whether a protectible privacy interest exists that would be threatened by disclosure. If no privacy interest is found, further analysis is unnecessary and the information at issue must be disclosed.[16]

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.[17] 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."[18] Similarly, if the privacy interest outweighs the public interest, the information should be withheld; if

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[11](...continued)
"contain identifiable audio and video images of individual residents," and concluding that they of course are "similar files").

[12] 920 F.2d at 1005.

[13] Id. at 1007-08.

[14] 5 U.S.C. § 552(b)(6).

[15] See Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 862 (D.C. Cir. 1981).

[16] See Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); Trentadue v. President's Council on Integrity & Efficiency, No. 2:03-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).

[17] See Ripskis, 746 F.2d at 3; NARA v. Favish, 541 U.S. 157, 171 ("The term 'unwarranted' requires us to balance the family's privacy interest against the public interest in disclosure.") (Exemption 7(C)), reh'g denied, 541 U.S. 1057 (2004).

[18] 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 of employees' social security numbers).

the opposite is found to be the case, the information should be released.[19]

The Reporters Committee Decision

In 1989, the Supreme Court issued a landmark FOIA decision in United States Department of Justice v. Reporters Committee for Freedom of the Press,[20] which for the past eighteen years has governed all privacy-protection decisionmaking under the Act. The Reporters Committee case involved FOIA requests from members of the news media for access to any criminal history records -- known as "rap sheets" -- maintained by the FBI regarding certain persons alleged to have been involved in organized crime and improper dealings with a corrupt Congressman.[21] In holding "rap sheets" entitled to protection under Exemption 7(C), the Supreme Court set forth five guiding principles that govern the process by which determinations are made under both Exemptions 6 and 7(C) alike.

First, the Supreme Court made clear in Reporters Committee that substantial privacy interests can exist in personal information even though the information has been made available to the general public at some place and point in time. Establishing a "practical obscurity" standard,[22] the Court observed that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to" them.[23]

Second, the Court articulated the general rule that the identity of a FOIA requester cannot be taken into consideration in determining what should be released under the Act. With the single exception that of course an agency will not invoke an exemption when the particular interest to be protected is the requester's own interest, the Court declared, "the identity of the requesting party has no bearing on the merits of his or her FOIA request."[24]

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[19] See FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking") (outlining mechanics of balancing process).

[20] 489 U.S. 749 (1989); see also FOIA Update, Vol. X, No. 2, at 3-6 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision").

[21] 489 U.S. at 757.

[22] Id. at 762, 780.

[23] Id. at 764.

[24] Id. at 771; see also NARA v. Favish, 541 U.S. 157, 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 of course does not mean that a requester seeking to establish an overriding "public

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Third, the Court declared that in determining whether any public interest would be served by a requested disclosure, one should no longer consider "the purposes for which the request for information is made."[25] Rather than turn on a requester's "particular purpose," circumstances, or proposed use, the Court ruled, such determinations "must turn on the nature of the requested document and its relationship to" the public interest overall.[26] (See the further discussions of this point under Exemption 6, Factoring in the Public Interest, and Exemption 7(C), below.)

Fourth, the Court narrowed the scope of the public interest to be considered under the Act's privacy exemptions, declaring for the first time that it is limited to "the kind of public interest for which Congress enacted the FOIA."[27] This "core purpose of the FOIA," as the Court termed it,[28] is to "shed[] light on an agency's performance of its statutory duties."[29]

Fifth, the Court established the proposition, under Exemption 7(C),

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[24](...continued)
interest" in the disclosure of requested information "need not offer a reason for requesting the information") (Exemption 7(C)), reh'g denied, 541 U.S. 1057 (2004); Bassiouni v. CIA, 392 F.3d 244, 245-46 (7th Cir. 2004) (observing that "any member of the public may invoke FOIA, and the agency must disregard the requester's identity") (Exemption 1), cert. denied, 545 U.S. 1129 (2005).

[25] 489 U.S. at 771.

[26] Id. at 772; see also Favish, 541 U.S. at 175 (discussing "the nexus required between the requested documents and the purported public interest served by disclosure"); Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1269-70 (S.D. Fla. 2006) (requiring nexus between information disclosable under FOIA and serving public interest); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (elaborating on "nexus requirement"); *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (explaining distinction between generalized public interest in broad subject area of FOIA request as opposed to specific public interest in particular documents at issue in FOIA request) (citing cases).

[27] 489 U.S. at 774.

[28] Id. at 775.

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

that agencies may engage in "categorical balancing" in favor of nondisclosure.[30] Under this approach, which builds upon the above principles, it may be determined, "as a categorical matter," that a certain type of information always is protectible under an exemption, "without regard to individual circumstances."[31]

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[30] 489 U.S. at 776-80 & n.22; see also Favish, 541 U.S. at 173 (stressing need for "stability" in privacy balancing, lest balancing be too "ad hoc").

[31] 489 U.S. at 780; see, e.g., Reed v. NLRB, 927 F.2d 1249, 1252 (D.C. Cir. 1991) ("Exemption 6 protects 'Excelsior' lists [names and addresses of employees eligible to vote in union representation elections] as a category."); SafeCard Servs. v. SEC, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (holding "categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure"); Johnson v. Comm'r, 239 F. Supp. 2d 1125, 1137 (W.D. Wash. 2002) (allowing categorical withholding of any identifying information about third parties and witnesses, as well as any information that they provided to IRS) (Exemption 7(C)), aff'd on other grounds, 68 F. App'x 839 (9th Cir. 2003); Grove v. Dep't of Justice, 802 F. Supp. 506, 511 (D.D.C. 1992) (Categorical balancing is appropriate for "information concerning criminal investigations of private citizens.") (Exemption 7(C)). But see Armstrong v. Executive Office of the President, 97 F.3d 575, 581-82 (D.C. Cir. 1996) (finding that agency had not adequately established basis for categorical rule for withholding identities of low-level FBI agents); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 893-96 (D.C. Cir. 1995) (rejecting categorical issuance of "Glomar" response in case involving request for information concerning presidential candidate H. Ross Perot's offer "to help a federal agency fulfill its statutory duties to interdict drugs") (Exemption 7(C)); Associated Press v. DOD, 395 F. Supp. 2d 15, 20 (S.D.N.Y. 2005) (declining to take categorical approach to withholding of Guantanamo Bay detainees' identifying information), reconsideration denied, 395 F. Supp. 2d 17 (S.D.N.Y. 2005), subsequent decision, 410 F. Supp. 2d 147 (S.D.N.Y. 2006); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 116 (D.D.C. 2005) ("The fact that federal employees have an identifiable privacy interest in avoiding disclosures of information that could lead to annoyance or harassment, does not authorize a 'blanket exemption' for the names of all government employees in all records."); Konigsberg v. FBI, No. 02-2428, slip op. at 6 (D.D.C. May 27, 2003) (rejecting categorical withholding for records based on insufficient "eviden[tiary]" support); see also FOIA Update, Vol. XVII, No. 2, at 3-4 ("OIP Guidance: The Bifurcation Requirement for Privacy 'Glomarization'") (discussing need to bifurcate requests that ask for more than law enforcement records on a third party -- i.e., employing "Glomar" response for law enforcement records and treating non-law enforcement records under Exemption 6 in ordinary fashion).

EXEMPTION 6

Privacy Considerations

The first step in the Exemption 6 balancing process requires an assessment of the privacy interests at issue.[32] The relevant inquiry is whether public access to the information at issue would violate a viable privacy interest of the subject of such information.[33] In its Reporters Committee decision, 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,"[34] just as in National Archives & Records Administration v. Favish the Court drew upon the common law to find the principle of "survivor privacy" encompassed within the Act's privacy exemptions.[35] 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."[36] Of course, information need not be intimate or embarrassing to qualify for Exemption 6 protection.[37]

And for its part, the Court of Appeals for the District of Columbia Circuit has emphasized the practical analytical point that under the FOIA's privacy-protection exemptions, "[t]he threat to privacy . . . need not be pa-

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[32] See FOIA Update, Vol. X, No. 2, at 7.

[33] See Schell v. HHS, 843 F.2d 933, 938 (6th Cir. 1988); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984).

[34] 489 U.S. 749, 763 (1989).

[35] 541 U.S. 157, 165-70 ("[T]he concept of personal privacy . . . is not some limited or 'cramped notion' of that idea.") (Exemption 7(C)), reh'g denied, 541 U.S. 1057 (2004); 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).

[36] 489 U.S. at 767; 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.

[37] 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."), cert. denied, 126 S. Ct. 1627 (2006); Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989); 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.").

tent or obvious to be relevant."[38] Therefore, as a general rule, the threat to privacy need only be real rather than speculative.[39] In some cases, this principle formerly was interpreted to mean that the privacy interest must be threatened by the very disclosure of information and not by any possible "secondary effects" of such release.[40] The D.C. Circuit, however, subsequently clarified its holding in Arieff v. United States Department of the Navy,[41] which had been read as stating that "secondary effects" were not cognizable under Exemption 6. In National Association of Retired Federal Employees v. Horner [hereinafter NARFE], the D.C. Circuit explained that the point in Arieff was that Exemption 6 was inapplicable because there was only "mere speculation" of a privacy invasion, i.e., only a slight possibility that the information, if disclosed, would be linked to a specific individual.[42]

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[38] 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).

[39] 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."); 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. U.S. Dep't of Justice, 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.").

[40] See, e.g., S. Utah Wilderness Alliance, Inc. v. Hodel, 680 F. Supp. 37, 39 (D.D.C. 1988), vacated as moot, No. 88-5142 (D.C. Cir. Nov. 15, 1988).

[41] 712 F.2d at 1468.

[42] 879 F.2d at 878; see also ACLU v. DOD, 389 F. Supp. 2d 547, 571-72 (S.D.N.Y.) (concluding that possibility that Abu Ghraib prison detainees might recognize themselves or be recognized by members of public, despite redaction of requested photographs and videos, was "no more than speculati[on]"), reconsideration denied, 396 F. Supp. 2d 459 (S.D.N.Y. 2005), relief from judgment denied, 406 F. Supp. 2d 330 (S.D.N.Y. 2006); 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 medi-

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Most recently, the Supreme Court did not at all concern itself with any issue of "secondary effects" or "derivative privacy interest" in Favish.[43] Rather, a unanimous Court in Favish readily found that the surviving family members of former Deputy White House Counsel Vincent Foster had a protectible privacy interest in his death-scene photographs, based in part on the family's fears of "intense scrutiny by the media."[44] In doing so, the Court did not view a privacy interest based on "limit[ing] attempts to exploit pictures of the deceased family member's remains for public purposes" as in any way too attenuated to qualify as a protectible privacy interest in the first place.[45] This means that any consideration of potential privacy invasions must include both what the requester might do with the information at hand and also what any other requester, or ultimate recipient, might do with it as well.[46]

Indeed, it has explicitly been recognized by the D.C. Circuit that "[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."[47] Even prior to the D.C. Circuit's clarifica-

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[42](...continued)
cal 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 C 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).

[43] 541 U.S. at 166.

[44] Id. at 167.

[45] Id.

[46] Id. at 174 ("It must be remembered that once there is disclosure, the information belongs to the general public."); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (emphasizing that agencies must of course consider full range of potential privacy invasions).

[47] NARFE, 879 F.2d at 878; see, e.g., Favish v. Office of Indep. Counsel, 217 F.3d 1168, 1173 (9th Cir. 2000) (declaring that "it is not 'the production' of the records that would cause the harms, . . . but their exploitation by the media," a "probable consequence[] of the release" that is encompassed by "the statutory reference to what may 'reasonably be expected'"), rev'd on other grounds sub nom. NARA v. Favish, 541 U.S. 157, 167-70 (specifically taking into account "the consequences" of FOIA disclosure, including "public exploitation" of the records by either the requester or others), reh'g denied, 541 U.S. 1057 (2004); Judicial Watch, Inc. v. Dep't of the Army, 402 F.

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tion in NARFE, much less the Supreme Court's subsequent illustration of this point in Favish, one court pragmatically observed that to distinguish between the initial disclosure and unwanted intrusions as a result of that disclosure would be "to honor form over substance."[48]

Recently, the Court of Appeals for the Tenth Circuit, in Forest Guardians v. FEMA, decided that release of "electronic mapping files" would in-

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[47](...continued)
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"); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 117 (D.D.C. 2005) (finding that "DHS and TSA employees are likely to experience annoyance or harassment following disclosure of their involvement with the [Computer Assisted Passenger Prescreening System] program"); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at *18-20 (D.D.C. Sept. 28, 2001) (accepting that "threats and harassment . . . may reasonably be expected to be made" to members of research foundation); Hougan & Denton v. U.S. Dep't of Justice, No. 90-1312, slip op. at 3 (D.D.C. July 3, 1991) (concluding that solicitation by employers would invade privacy of participants in union's training program). 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, a position subsequently rejected sub silentio by a unanimous Supreme Court in Favish); Ctr. for Public Integrity v. OPM, No. 04-1274, 2006 WL 3498089, at *5 (D.D.C. Dec. 4, 2006) (finding that plaintiff's derivative theory of public interest was fatally flawed); 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 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), reconsideration granted on other claims, No. 00-235, 2005 WL 2405992 (S.D. Ohio Sept. 29, 2005).

[48] 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).

vade the privacy interest of homeowners.[49] 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."[50] Notably, the Tenth Circuit, like the Supreme Court and the D.C. Circuit, did not concern itself that these invasions of privacy might not occur immediately upon release of the mapping files.[51]

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.[52] For example, civilian federal employees generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees[53] or regarding the

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[49] 410 F.3d 1214, 1220-21 (10th Cir. 2005).

[50] 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).

[51] See id.

[52] See, e.g., 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); see also Memorandum for the President's Management Council 1 (Mar. 1, 2004) (providing guidance for federal agencies in implementing "E-Government initiative" and attaching NARA template for "Addresses" section of regulatory preambles that includes new policy that "[a]ll comments received will be posted without change . . . including any personal information provided"), available at www.whitehouse.gov/omb/inforeg/memo_pmc_egov.pdf.

[53] See 5 C.F.R. § 293.311 (2007) (OPM regulation 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, 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]"), 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); The News-Press v. DHS, No. 05-102, 2005 WL 2921952, at *11 (M.D. Fla. Nov. 4, 2005) (opining that "there is nothing about employment at FEMA or concurrence/non-concurrence in a [disaster relief] request that would invoke 'personal' privacy") (appeal pending); 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);

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parts of their successful employment applications that show their qualifications for their positions.[54] Historically, the Department of Defense, as a matter of policy, in most circumstances disclosed the name, rank, gross salary, duty assignments, duty phone numbers, source of commission, promotion sequence number, awards and decorations, professional military education, duty status, and other nonsensitive details of individual military personnel, as well as comparable information concerning individual civilian employees.[55] And by regulation, the Department of the Army discloses substantially the same information concerning its military and civilian personnel.[56] However, in light of recent terrorist activities around the world, the Department of Defense now regularly withholds personally identifying information about all particular military and civilian employees with re-

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[53](...continued)
see also FOIA Update, Vol. III, No. 4, at 3 (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 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 Ctr. for Pub. Integrity, 2006 WL 3498089, at *6 (finding that OPM properly withheld the names and duty stations of DOD and certain non-DOD federal personnel in sensitive occupations under Exemption 6).

[54] See 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").

[55] See Department of Defense Freedom of Information Act Program Regulation, DOD 5400.7-R, 37-39 (Sept. 1998); see also Memorandum from Department of Defense Directorate for Freedom of Information and Security Review 1 (Oct. 26, 1999) (applying same analysis as in DOD 5400.7-R to electronic mail addresses, and authorizing withholding only for "personnel assigned to units that are sensitive, routinely deployable or stationed in foreign territories"); cf. 10 U.S.C. § 130b (2000 & Supp. IV 2004) (Department of Defense-wide provision); Department of Defense Freedom of Information Act Program Regulations, 32 C.F.R. § 286.12(f)(2)(ii) (2006) ("Names and duty addresses (postal and/or e-mail) . . . for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under [Exemption 6].").

[56] See Army Reg. 340-21, ¶ 3-3a(1), b(1), 5 July 1985; see also Army Reg. 25-55, ¶ 3-200, No. 6(b), 1 Nov. 1997 (providing for withholding of names and duty addresses of military personnel assigned to units that are "sensitive, routinely deployable or stationed in foreign territories").

spect to whom disclosure would "raise security or privacy concerns."[57]

Additionally, if the information at issue is particularly well known or is widely available within the public domain, there generally is no expectation of privacy.[58] Nor does an individual have any expectation of privacy

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[57] Department of Defense Director for Administration and Management Memorandum 1-2 (Nov. 9, 2001), available at 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 O'Keefe v. DOD, 463 F. Supp. 2d 317, 327 (D.D.C. 2006) (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, 2006 WL 3498089, at *6 (protecting all information pertaining to DOD employees); 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)).

[58] See, e.g., Avondale Indus. v. NLRB, 90 F.3d 955, 961 (5th Cir. 1996) (finding that names and addresses of voters in union election 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); Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 96-97 (6th Cir. 1996) (finding in singular decision 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)); Billington v. U.S. Dep't of Justice, 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"); Blanton v. U.S. Dep't of Justice, 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."); 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); cf. Doe v. FBI, 218 F.R.D. 256, 259-60 (D. Colo. 2003) (refusing to allow plaintiff to proceed with a case under a pseudonym or under seal, on the basis that his particular reputational interest does not "outweigh the public's interest in an open court system"). But see Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 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

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with respect to information that she herself has made public.[59] On the other hand, if the information in question was at some time or place available to the public, but now is "hard-to-obtain information," the individual to whom it pertains may have a privacy interest in maintaining its "practical obscurity."[60]

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[58](...continued)
guilty plea, and observing that a "mug is more than just another photograph of a person") (Exemption 7(C)); cf. Lakin Law Firm, P.C. v. FTC, 352 F.3d 1122, 1124-25 (7th Cir. 2003) (explaining that posting complaint advisory on Web site that warned consumers that "information provided may be subject to release under the FOIA" does not waive the privacy interests of consumer complainants) (emphasis added), reh'g denied, No. 03-1689 (7th Cir. 2004).

[59] 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 H. Ross Perot's offer to aid federal government in drug interdiction, a subject about which Perot had made several public statements); see also Kimberlin v. Dep't of Justice, 139 F.3d 944, 949 (D.C. Cir 1998) (noting that government lawyer investigated by Department of Justice'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)); Judicial Watch, Inc. v. USPS, No. 03-655, slip op. at 7-8 (D.D.C. Feb. 23, 2004) (deciding that individuals had "minimal" privacy interests in their names when they identified themselves into microphones at "a public community meeting" attended by "'readily identifiable members of the local, regional and national media'"); cf. Showler v. Harper's Magazine Found., No. 05-178, slip op. at 5-8, 12-14 (E.D. Okla. Dec. 22, 2005) (finding no invasion of privacy of the family or First Amendment protection for a reporter who took a photograph of an open casket of a reservist killed in Iraq, because the family opened the funeral to the public, the funeral was attended by over 1200 people, including the governor of Oklahoma and members of the press, and the "photograph was the same scene the funeral attendees observed") (non-FOIA case).

[60] Reporters Comm., 489 U.S. at 780; see also Wash. Post, 456 U.S. at 603 n.5; Edwards v. Dep't of Justice, 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); stating that the appellant's argument that the release of the documents was required because the government officially acknowledged the information contained therein fails because he "has failed to point to 'specific information in the public domain that appears to duplicate that being withheld'" (quoting Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992))); Fiduccia v. U.S. Dep't of Justice, 185 F.3d 1035, 1046-47 (9th Cir. 1999) (protecting information about two individuals whose homes were searched ten years previously despite publicity at that time and fact
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Similarly, 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.[61] For exam-

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[60](...continued)
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) (noting that there may be privacy interest in personal information even if "available on publicly recorded filings"); 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. U.S. Dep't of Justice, 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 Lardner v. U.S. Dep't of Justice, No. 03-0180, 2005 WL 758267, at *17 (D.D.C. Mar. 31, 2005) (ignoring Reporters Committee's "practical obscurity" rule in stating that "[t]he conviction that the pardon applicant is seeking to annul was itself public," and concluding that the "additional embarrassment beyond the original conviction" in an unsuccessful pardon application did not warrant Exemption 6 protection).

[61] See Isley v. Executive Office for U.S. Attorneys, 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)); ACLU v. FBI, 429 F. Supp. 2d 179, 193 (D.D.C. 2006) ("To the extent that a person may have retained a privacy interest in publicly made comments, that interest is certainly dissipated by the FBI's failure to redact his name from the entirety of the document."); 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."); Pendergrass v. U.S. Dep't of Justice, 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 v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 743 (E.D. Va. 1999) (stating that existence of publicity surrounding events does not eliminate privacy interest) (Exemptions 6 and 7(C)); Chin v. U.S. Dep't of the Air Force,
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ple, the Supreme Court in Favish did not diminish its estimation of "the weighty privacy interests involved" just because Vincent Foster's death occurred on national parkland and thus was "in public."[62] And one court has found that the subject of a photograph introduced into the 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."[63]

However, the District Court for the Southern District of New York recently 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."[64] Indeed, even though the tribunal records were not made available to the general public and press attendees had to agree to confidentiality requirements, it concluded that the detainees had no privacy interest in stopping further dissemination of their identifying information.[65] 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.[66]

Along these same lines, that same court recently ordered the release

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[61](...continued)
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).

[62] 541 U.S. at 171; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (advising that "the Favish decision illustrates that the occurrence of an event in a public place is no disqualifying factor for privacy protection under the FOIA").

[63] Baltimore Sun v. U.S. Customs Serv., No. 97-1991, slip op. at 5 (D. Md. Nov. 21, 1997) (Exemption 7(C)).

[64] 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").

[65] Id. at 156 & n.2 (opining that 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).

[66] Id. at 154.

of such detainees' names and other identifying information contained within documents regarding alleged abuse at Guantanamo Bay.[67] Finding the privacy interests of the detainees to be "minimal," the court concluded that the public interest in disclosing government malfeasance was great and, therefore, far outweighed any such minimal privacy interest.[68] The only piece of information that the court permitted to be withheld was the identifying information of a detainee's wife.[69] The court concluded that the detainee's wife "had a reasonable expectation of privacy that was not wholly eliminated by her husband's reluctant offer of the letter to the [Administrative Review Board] and that the competing interest of the Associated Press in obtaining her identity is modest."[70]

Most recently, the District Court for the Southern District of New York held that height and weight information concerning Guantanamo Bay detainees was not exempt from disclosure under Exemption 6.[71] 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."[72] 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."[73] 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.[74] 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."[75] Weighing

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[67] Associated Press v. DOD, No. 05-5468, 2006 WL 2707395, at *12 (S.D.N.Y. Sept. 20, 2006) (Exemptions 6 and 7(C)).

[68] Id. at *3-12.

[69] Id. at *11-12.

[70] Id. at *11.

[71] Associated Press v. DOD, 462 F. Supp. 2d 573, 577-78 (S.D.N.Y. 2006).

[72] Id. at 577 (citing cases).

[73] Id.

[74] Id.

[75] Id. (clarifying that information pertaining to both the height and weight of the detainees is necessary because "weight information only

(continued...)

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 government and this public interest in disclosure "more than outweighs the modest privacy interest, if any, here proffered by DOD."[76]

As another example, FOIA requesters, except when they are making first-party requests, 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.[77] Personal information about FOIA requesters, however, such as home addresses and home telephone numbers, should not be disclosed.[78] However, the identities of first-party requesters under the Privacy Act of 1974[79] 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.[80]

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; their identities, but not necessarily the

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[75](...continued)
takes on significance when paired with the corresponding information on height").

[76] Id. at 578.

[77] See FOIA Update, Vol. VI, No. 1, at 6; see also Holland v. CIA, No. 91-1233, 1992 WL 233829, 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)). But see Silets v. U.S. Dep't of Justice, 945 F.2d 227, 230 (7th Cir. 1991) (en banc) (protecting name of high school student who requested information about wiretaps on Jimmy Hoffa); see also FOIA Update, Vol. VII, No. 1, at 1 ("Surrogate FOIA Requests Increasing") (discussing the increasing popularity of surrogate FOIA requests -- "those made by persons or entities seeking federal records on behalf of others" -- whereby a corporation might want to be anonymous when seeking information about a competitor or a corporation, or an organization seeks to verify or disprove its suspicions that it might currently be under federal scrutiny).

[78] See FOIA Update, Vol. VI, No. 1, at 6.

[79] 5 U.S.C. § 552a (2000 & Supp. IV 2004).

[80] See FOIA Update, Vol. VI, No. 1, at 6.

substance of their letters, ordinarily should be withheld.[81] For instance, the Court of Appeals for the Fourth Circuit protected under Exemption 7(C) the

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[81] See, e.g., Lakin Law Firm, 352 F.3d at 1125 (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); Kidd v. Dep't of Justice, 362 F. Supp. 2d 291, 297 (D.D.C. 2005) (protecting names and addresses of constituents in letters written to their congressman); Butler v. Soc. Sec. Admin., 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, No. 04-30854, 2005 WL 2055928 (5th Cir. Aug. 26, 2005); Save Our Springs Alliance v. Babbitt, No. A-97-CA-259, slip op. at 7-8 (W.D. Tex. Nov. 19, 1997) (concluding that release of home addresses and telephone numbers of government correspondents would not shed light on whether agency improperly considered writers' comments); Voinche v. FBI, 940 F. Supp. 323, 329-30 (D.D.C. 1996) ("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) (concurring with the nondisclosure of correspondence because communications from citizens to their government "will frequently contain information of an intensely personal sort") (MacKinnon, J., concurring) (Exemptions 6 and 7(C)); cf. Ortiz v. HHS, 874 F. Supp. 570, 573-75 (S.D.N.Y.) (protecting letter to HHS alleging social security fraud) (Exemptions 7(C) and 7(D)), aff'd on Exemption 7(D) grounds, 70 F.3d 729 (2d Cir. 1995). But see also Memorandum for the President's Management Council 1 (Mar. 1, 2004) (providing guidance for federal agencies in implementing "E-Government initiative," and attaching NARA template for "Addresses" section of new regulatory preambles that includes new policy that "[a]ll comments received will be posted without change . . . including any personal information provided"), available at http://www.whitehouse.gov/omb/inforeg/memo_pmc_egov.pdf; see also U.S. Government, Regulations.gov, The Privacy and Use Notice Regarding Comment Submission, available at http://www.regulations.gov/fdmspublic/component/main (last visited Mar. 19, 2007) (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; stating that "[t]he general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet as they are received and without change, including any personal identifiers or contact information").

names and addresses of people who wrote to the IRS expressing concerns about an organization's tax-exempt status.[82] Likewise, 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.[83] More recently, the District Court for the District of Columbia 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.[84] Nevertheless, in some circumstances courts have refused to accord privacy protection to such government correspondents.[85]

Additionally, neither corporations nor business associations possess

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[82] Judicial Watch, Inc. v. United States, 84 F. App'x 335, 337 (4th Cir. 2004) (Exemption 7(C)).

[83] Judicial Watch, Inc. v. Rossotti, 285 F. Supp. 2d 17, 28 (D.D.C. 2003) (Exemption 7(C)).

[84] Gordon v. FBI, 388 F. Supp. 2d 1028, 1041-42, 1045 (N.D. Cal. 2005) (Exemptions 6 and 7(C)).

[85] See Lardner, 2005 WL 758267, at *17, *19 (requiring release of identities of unsuccessful pardon applicants, as well as of 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. U.S. Dep't of Justice, 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), reconsideration denied temporarily pending in camera review, No. 97-CV-2869 (D.D.C. Aug. 17, 2000); Alliance for the Wild Rockies v. Dep't of the Interior, 53 F. Supp. 2d 32, 36-37 (D.D.C. 1999) (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'"); 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).

protectible privacy interests.[86] The closely held corporation or similar business entity, however, is an exception to this principle: "While corporations have no privacy, personal financial information is protected, including information about small businesses when the individual and corporation are identical."[87] Such an individual's expectation of privacy is, however, diminished with regard to matters in which he or she is acting in a business capacity.[88] In Doe v. Veneman, on the other hand, the District Court for the

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[86] See, e.g., Sims v. CIA, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976); Maydak v. U.S. Dep't of Justice, 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. Forest Guardians v. U.S. Dep't of the Interior, 2004 WL 3426434, at *17 (reasoning that the identities of banks must be released because "that information is in the public domain"); Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560, 1567 (D.D.C. 1985); see also Iowa Citizens for Cmty. Improvement v. USDA, No. 4-02-CV-10114, 2002 WL 32078275, at *5 n.10 (S.D. Iowa Aug. 13, 2002) (noting in dicta 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").

[87] Providence Journal Co. v. FBI, 460 F. Supp. 778, 785 (D.R.I. 1978), 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; Multi Ag Media LLC v. USDA, No. 05-1908, 2006 WL 2320941, at *2-3 (D.D.C. Aug. 9, 2006) ("[I]nformation withheld by the USDA pertains overwhelmingly to family-owed farms . . . the release of which would reveal personal information about those farms' owners."); 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); Atkinson v. FDIC, No. 79-1113, 1980 WL 355660, at *3 (D.D.C. Feb. 13, 1980) (protecting "personal financial information" of third parties), appeal dismissed voluntarily, No. 80-1409, 1980 WL 355810 (D.C. Cir. June 12, 1980); FOIA Update, Vol. III, No. 4, at 5 (advising that corporations do not have privacy, but that personal financial information is protectible when individual and corporation are identical). But see Long v. U.S. Dep't of Justice, 450 F. Supp. 2d 42, 72 (D.D.C.) ("At most, [the 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, Nos. 00-0211 & 02-2467, 2007 WL 293508 (D.D.C. Feb. 2, 2007), stay granted (D.D.C. Feb. 13, 2007).

[88] See, e.g., 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

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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.[89]

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."[90] This case involved a request for several death-scene photographs of Deputy White House Counsel Vincent Foster.[91] The government protected the photographs under the FOIA,

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[88](...continued)
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); 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"). But 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), appeal dismissed voluntarily, No. 01-2296 (10th Cir. Nov. 21, 2001); 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).

[89] 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).

[90] 541 U.S. at 170; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (highlighting full implications of Supreme Court's decision).

[91] 541 U.S. at 161.

but the lower courts ordered them disclosed.[92] Favish argued, relying on particular language in Reporter's Committee, that only the individual who was the direct "subject" of the records could have a privacy interest in those records.[93] The Court flatly 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 Reporter's Committee and adopts too narrow an interpretation of the case's holding."[94]

The Court then decided that "survivor privacy" was a valid privacy interest protected by Exemption 7(C), based on three factors. First, Reporter's Committee did not restrict personal privacy as "some limited or 'cramped notion' of that idea,"[95] so personal privacy is broad enough to protect surviving family members' "own privacy rights against public intrusions."[96] 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."[97] Third, the Court reasoned that Congress used that background in creating Exemption 7(C), including the fact that the government-wide FOIA policy memoranda of two Attorneys General had specifically extended privacy protection to families.[98]

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 circum-

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[92] 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).

[93] 541 U.S. at 165.

[94] Id.

[95] Id. at 165.

[96] Id. at 167.

[97] Id. at 168. But cf. Showler, 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").

[98] Id. 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)); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (noting that Supreme Court "dr[ew] additional support from two successive Attorney General memoranda on FOIA that specifically extended privacy protection to 'family members'").

stances surrounding an individual's death.[99] Further, while the Favish case involved graphic photographs, the Court's decision also supported the holdings of other courts that even information that is not so graphically sensitive in and of itself may be withheld to protect the privacy interests of surviving family members if disclosure would cause "'a disruption of their

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[99] See, e.g., Hale v. U.S. Dep't of Justice, 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. Executive Office for U.S. Attorneys, 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). 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 medical descriptions of the cause of death," not "graphic, morbid descriptions," survivors' minimal privacy interest was were outweighed by public interest); see also *FOIA Post,* "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (cautioning that "agencies applying this important principle must be mindful that it logically requires reasonable certainty that a survivor actually exists to merit such protection"); 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); Kyle v. United States, No. 80-1038E, 1987 WL 13874, at *1-2 (W.D.N.Y. July 16, 1987) (ordering disclosure of medical records of all servicemen involved in accident alike, including two who died and one who was still alive); 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 involved in accident alike, including one who died and one who was still alive).

peace of minds.'"[100]

Also of significance is the fact that the Supreme Court's decision in Favish made it quite clear that the Court was not recognizing the "survivor privacy" principle on the basis of any surviving privacy interest of Mr. Foster, i.e., his "own posthumous reputation or some other interest personal to him."[101] Instead, the principle was applied based upon the Foster family's "own right and interest" in personal privacy protection.[102] The Court characterized this interest as the privacy interest of the family members in being "secure [in] their own refuge from a sensation-seeking culture[,] for their own peace of mind and tranquility."[103] Thus, the Court's adoption of "survivor privacy" does not alter the longstanding FOIA rule that death extinguishes one's privacy rights.[104] Most specifically, the Court in Favish

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[100] 541 U.S. at 170-71 (quoting N.Y. Times Co., 782 F. Supp. at 631-32); see also 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); *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing protection of records of Dr. Martin Luther King, Jr. assassination investigation); FOIA Update, Vol. III, No. 4, at 5 (advising more than twenty-five years ago that while privacy rights cannot be inherited, sensitive personal information pertaining to or affecting deceased persons may threaten privacy interests of surviving family members).

[101] 541 U.S. at 166; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (advising that "the Court's 'survivor privacy' analysis in Favish eschewed" any such decedent-based approach).

[102] 541 U.S. at 166.

[103] Id.

[104] See, e.g., Na Iwi O Na Kupuna v. Dalton, 894 F. Supp. 1397, 1413 (D. Haw. 1995) (reverse FOIA suit); Tigar & Buffone v. U.S. Dep't of Justice, No. 80-2382, slip op. at 9-10 (D.D.C. Sept. 30, 1983) (Exemption 7(C)); Diamond v. FBI, 532 F. Supp. 216, 227 (S.D.N.Y. 1981), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04); *FOIA Post*, "Supreme Court Decides to Hear 'Survivor Privacy' Case" (posted 5/13/03; supplemented 10/10/03); FOIA Update, Vol. III, No. 4, at 5 (advising that "[a]fter death, a person no longer possesses privacy rights . . . [and that] privacy rights cannot be inherited by one heirs, [though] the disclosure of particularly sensitive personal information pertaining to a deceased person may well threaten the privacy interests of surviving family members or other close associates"); cf. United States v. Schlette, 842 F.2d 1574, 1581 (9th Cir.) (ordering disclosure of presentence report of deceased person pursuant to Rule 32(c) of Federal Rules of Criminal Procedure), amended, 854 F.2d 359 (9th Cir.

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did not place any reliance on a recent potential variant of the concept that "focuse[d] on the interests of the deceased person even apart from the interests of his or her survivors."[105] That decedent-based approach has never been embraced as a matter of policy by the Department of Justice, and the Supreme Court likewise did not embrace it in Favish.[106]

On another point involved in Favish, public figures do not surrender all rights to privacy by placing themselves in the public eye, though certainly their expectations of privacy in general may be diminished. In some instances, "[t]he degree of intrusion is indeed potentially augmented by the fact that the individual is a well known figure."[107] It has been held that disclosure of sensitive personal information contained in investigative records about a public figure is appropriate "only where exceptional interests militate in favor of disclosure."[108] Thus, although one's status as a public figure

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[104](...continued)
1988). But see Kiraly v. FBI, 728 F.2d 273, 277-78 (6th Cir. 1984) (adopting the district court's rationale, "which held: '. . . that the right to recovery for invasion of privacy lapses upon the person's death does not mean that the government must disclose inherently private information as soon as the individual dies'") (Exemption 7(C)).

[105] *FOIA Post*, "Supreme Court Decides to Hear 'Survivor Privacy' Case" (posted 5/13/03; supplemented 10/10/03) (discussing line of D.C. Circuit cases that suggested protecting post-mortem "reputational" interests).

[106] See 541 U.S. at 166 (distinguishing "survivor privacy" basis from any "reputation[al]" basis for privacy protection); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (advising that "the proper application of [the 'survivor privacy'] principle involves protection of the interests of a decedent's survivors themselves").

[107] Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 865 (D.C. Cir. 1981) (emphasis added) (Exemption 7(C)); see Times Picayune, 37 F. Supp. 2d at 478-79 (noting that prominence of person "may well exacerbate the privacy intrusions") (Exemption 7(C)); cf. Wichlacz v. Dep't of Interior, 938 F. Supp. 325, 333-34 (E.D. Va. 1996) (recognizing that intense media scrutiny of death of Deputy White House Counsel Vincent Foster enhances privacy interests of individuals connected even remotely with investigation), aff'd, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision).

[108] Fund, 656 F.2d at 866; see also Nation Magazine v. Dep't of State, No. 92-2303, 1995 WL 17660254, at *8-11 & n.15 (D.D.C. Aug. 18, 1995) (holding that public interest in information about presidential candidate H. Ross Perot's dealings with government or whether he ever was investigated by FBI is not kind of public interest recognized by FOIA); Wilson v. Dep't of Justice, No. 87-2415, 1991 WL 111457, at *6 (D.D.C. June 13, 1991) (stating that even well-known Iran-Contra figure Richard Secord had privacy inter-
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might in some circumstances factor into the privacy balance, a public figure does not, by virtue of his status, forfeit all rights of privacy.[109]

Indeed, in Favish, former Deputy White House Counsel Vincent Foster's status as both a public figure in the "Whitewater" matter and a high-level government official did not, in the Supreme Court's opinion, "detract"

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[108](...continued)
est in fact that he was investigated; such investigation would reveal "little about 'what government is up to'"); cf. In re Espy, 259 F.3d 725, 729-30 (D.C. Cir. 2001) (granting motion, pursuant to Independent Counsel Statute, 28 U.S.C. § 594(h) (2000), to release final report concerning former Secretary of Agriculture). But see Wilson v. Dep't of Justice, No. 87-2415, 1991 WL 120052, at *4 (D.D.C. June 18, 1991) (ordering further declarations to determine whether any of the individuals investigated "are 'public figures' like the plaintiff whose involvement in Government operations would be of interest to the public").

[109] See Fund, 656 F.2d at 865; Phillips v. Immigration & Customs Enforcement, 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. U.S. Dep't of Justice, 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. Dep't of Justice, 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); see also FOIA Update, Vol. III, No. 4, at 5 (advising on extent to which public figures are entitled to privacy protections); cf. Strassman v. U.S. Dep't of Justice, 792 F.2d 1267, 1268 (4th Cir. 1986) (protecting privacy interest of governor alleged to have invoked Fifth Amendment before grand jury) (Exemption 7(C)); McNamera v. U.S. Dep't of Justice, 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. U.S. Dep't of Justice, 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. U.S. Dep't of Justice, 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[a]me public figures through their well-publicized pleas for clemency and [given] the speeches some have made since their release") (Exemption 7(C)).

at all from the "weighty privacy interests involved."[110] Likewise, a candidate for a political office, either federal or nonfederal, does not forfeit all rights to privacy.[111] It also should be noted in this regard that, unlike under the Privacy Act, foreign nationals are entitled to the same basic privacy rights under the FOIA as are U.S. citizens.[112]

Individuals do not waive their privacy rights merely by signing a document that states that information may be released to third parties under the FOIA.[113] As one court has observed, such a statement is not a waiver

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[110] 541 U.S. at 171; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (advising that the "fact that [Mr. Foster's] status did not at all 'detract' from those [privacy] interests in the Court's estimation means that they stood entirely undiminished despite it" and that "[i]n the future, other potential beneficiaries of the FOIA's privacy exemptions should be no less entitled to such treatment and commensurate privacy protection").

[111] 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 Oliver North has unquestionable privacy interest in his military service personnel records and medical records); Nation Magazine, 1995 WL 17660254, at *10 (upholding refusal to confirm or deny existence of investigative records pertaining to presidential candidate H. Ross Perot); cf. Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 954 (S.D. Iowa 2002) (ruling that nominee for position of Undersecretary of Agriculture for Rural Development does not forfeit all privacy rights).

[112] See Shaw v. U.S. Dep't of State, 559 F. Supp. 1053, 1067 (D.D.C. 1983); see also Ray, 502 U.S. at 175-79 (applying traditional analysis of privacy interests under FOIA to Haitian nationals); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 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 emigré Elian Gonzalez); Hemenway, 601 F. Supp. at 1005-07 (according Exemption 6 protection to citizenship information regarding news correspondents accredited to attend State Department press briefings); FOIA Update, Vol. VI, No. 3, at 5.

[113] See Hill, 77 F. Supp. 2d at 8; see also Lakin Law Firm, 352 F.3d at 1124-25 (explaining that a warning on Federal Trade Commission Web site

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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."[114] Similarly, individuals who sign a petition, knowing that those who sign afterward will observe their signatures, do not waive their privacy interests.[115] 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]."[116]

It also is important to remember that while the government may voluntarily or involuntarily waive its right to an exemption when its own interests are at stake, it cannot waive an individual's privacy interests under the FOIA by unilaterally publicizing information about that person.[117] The privacy interest inherent in Exemption 6 "belongs to the individual, not the agency holding the information," and "the fact that otherwise private information at one time or in some way may have been placed in the public domain does not mean that a person irretrievably loses his or her privacy interest in the information."[118]

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[113](...continued)
that "information provided may be subject to release under the FOIA" cannot be construed as a waiver by consumers) (emphasis added).

[114] Hill, 77 F. Supp. 2d at 8 (rejecting argument that borrowers of Farmers Home Administration loans waived their privacy interests by signing loan-application documents that warned that information supplied could be subject to release to third parties). But cf. Associated Press, 410 F. Supp. 2d at 149-51 (finding that 317 Guantanamo Bay detainees had no cognizable privacy interests in their identifying information despite the fact that only sixty-three of them stated that they wanted their identifying information released when responding to a court-ordered survey that purportedly "aid[ed] the Court in resolving" its Exemption 6 analysis).

[115] See Campaign for Family Farms, 200 F.3d at 1188.

[116] Id.

[117] See 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); see also Reporters Comm., 489 U.S. at 763-65 (emphasizing that privacy interest belongs to individual, not agency holding information pertaining to individual).

[118] Sherman, 244 F.3d at 363-64; accord Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (emphasizing importance of "preserving personal privacy" under FOIA); *FOIA Post*, "New Attorney General FOIA Memorandum Issued"
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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.[119] Nor do individuals who plead guilty to criminal charges lose all rights to privacy with regard to the proceedings against them.[120] 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.[121] Even absent

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[118](...continued)
(posted 10/15/01) (noting that the Ashcroft FOIA Memorandum "places particular emphasis on the right to privacy among the other interests that are protected by the FOIA's exemptions").

[119] See Isley, 1999 WL 1021934, at *4; Kiraly, 728 F.2d at 279; Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981); see also Meserve v. U.S. Dep't of Justice, 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. U.S. Dep't of Justice, 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)).

[120] 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)).

[121] 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)); 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"); Billington v. U.S. Dep't of Justice, 301 F.

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any evidence of fear of reprisals, however, witnesses who provide information to investigative bodies -- administrative and civil, as well as criminal -- ordinarily are accorded privacy protection.[122] (For a more detailed discus-

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[121](...continued)
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); Givner v. Executive Office for U.S. Attorneys, No. 99-3454, slip op. at 12-13 (D.D.C. Mar. 1, 2001) (finding withholding of juror and witness information "particularly appropriate" when "codefendents are either still fugitives or seeking a new trial"); Summers v. U.S. Dep't of Justice, 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, 874 F. Supp. at 573-75 (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)); Manna v. U.S. Dep't of Justice, 815 F. Supp. 798, 809 (D.N.J. 1993) (concluding that because La Cosa Nostra "is so violent and retaliatory, the names of interviewees, informants, witnesses, victims and law enforcement personnel must be safeguarded") (Exemption 7(C)), aff'd, 51 F.3d 1158 (3d Cir. 1995).

[122] See, e.g., Perlman v. U.S. Dep't of Justice, 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, No. 05-0806, 2006 U.S. Dist. LEXIS 89614, at *29 (D.D.C. Dec. 12, 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 (continued...)

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

An agency ordinarily is not required to conduct research to determine whether an individual has died or whether his activities have sufficiently become the subject of public knowledge so as to bar the application of Exemption 6.[123] The D.C. Circuit upheld the use of the FBI's "100-year rule,"

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[122](...continued)
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 (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. U.S. Dep't of Energy, 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. 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. U.S. Dep't of Energy, 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").

[123] See FOIA Update, Vol. V, No. 1, at 5; see also Davis v. Dep't of Justice, No. 04-5406, 2006 WL 2411393, at *10 (D.C. Cir. Aug. 22, 2006) ("In determining whether an agency's search is reasonable, a court must consider the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.") (Exemption 7(C)); see also, e.g., Johnson v. Executive Office for U.S.
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whereby the FBI assumes that an individual is alive unless his or her birthdate is more than 100 years ago, in making its privacy protection determinations.[124] This general rule is further strengthened by the Supreme Court's observations in Reporters Committee that "without regard to individual circumstances" certain categories of records will always warrant privacy protection and that "the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided."[125] Before the D.C. Circuit's decision in that case several courts, faced with very old documents, refused to accept the presumption that all

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[123](...continued)
Attorneys, 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); Manna v. U.S. Dep't of Justice, 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. U.S. Dep't of Justice, 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); cf. McGehee v. Casey, 718 F.2d 1137, 1141 n.9 (D.C. Cir. 1983) (recognizing that CIA cannot reasonably bear burden of conducting exhaustive search to prove that particular items of classified information have never been published) (non-FOIA case).

[124] Schrecker v. U.S. Dep't of Justice, 349 F.3d 657, 662-65 (D.C. Cir. 2003) (holding decisively at long last 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 entirely sufficient in determining whether individuals mentioned in requested records are deceased); see Davis, 2006 WL 2411393, at *5-6 (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 Piper v. U.S. Dep't of Justice, 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).

[125] 489 U.S. at 780; see also Favish, 541 U.S. at 173 (discussing the need for "stability with respect to both the specific category of privacy interests . . . and . . . public interests," because "[o]therwise, courts will be left to balance in an ad hoc manner"); accord Halloran v. VA, 874 F.2d 315, 322 (5th Cir. 1989); see also FOIA Update, Vol. X, No. 2, at 4 (advising on "categorical balancing" principle that was enunciated in Reporters Committee).

individuals mentioned in such documents were alive.[126]

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.[127] In a 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.[128] The Eighth Circuit agreed that,

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[126] See Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1059 (3d Cir. 1995) ("[A]fter a sufficient passage of time . . . it would be unreasonable . . . not to assume that many of the individuals named in the requested records have died."); Diamond, 707 F.2d at 77 (requiring agency to review 200,000 pages outside scope of request to search for evidence as to whether subjects' privacy had been waived through death or prior public disclosure) (Exemption 7(C)); Outlaw, 815 F. Supp. at 506 (declining to withhold photographs of a victim murdered twenty-five years ago to protect the privacy of relatives when "[d]efendant's concern for the privacy of the decedent's surviving relatives has not extended to an effort to locate them . . . [and] there is no showing by defendant that, as of now, there are any surviving relatives of the deceased, or if there are, that they would be offended by the disclosure"); Wilkinson v. FBI, No. 80-1048, slip op. at 12-13 (C.D. Cal. June 17, 1987) (holding Exemption 7(C) inapplicable to documents more than thirty years old because the government relied on a presumption that "all persons [who are] the subject of FOIA requests are . . . living"); see also Summers v. Dep't of Justice, 140 F.3d 1077, 1085 (D.C. Cir. 1998) (Williams, J., concurring) (suggesting that "taking death into account only if the fact has happened to swim into their line of vision" might not be adequate if the FBI has access to "data bases that could resolve the issue") (Exemptions 6 and 7(C)); cf. Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 813 (9th Cir. 1995) (ordering disclosure of information based upon belief that it was not likely that anyone could be identified twenty-five years later) (Exemption 7(C)). But see Assassination Archives & Research Ctr. v. CIA, 903 F. Supp. 131, 133 (D.D.C. 1995) (protecting the identities of third parties in thirty-to-forty-year-old records based upon its finding "that the passage of time may actually increase privacy interests") (Exemption 7(C)).

[127] See, e.g., Nat'l Org. for Women v. Soc. Sec. Admin., 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); 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).

[128] Campaign for Family Farms, 200 F.3d at 1182-84.

under the standards of the Administrative Procedure Act,[129] the Department of Agriculture's initial disclosure determination was not in accordance with law and the names must be withheld.[130]

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.[131] However, it went much further by issuing a permanent injunction that prohibited the agency from releasing this sort of information in any form.[132] 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;[133] 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.[134]

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[129] 5 U.S.C. §§ 701-706 (2000) ("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).

[130] Campaign for Family Farms, 200 F.3d at 1184-89; see also Doe v. Veneman, 230 F. Supp. 2d at 749-51 (enjoining USDA from releasing ranch names and home addresses of ranchers, but mistakenly including within injunction releases through future FOIA requests and through non-FOIA matters); AFL-CIO v. Fed. Election Comm'n, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001) (finding, despite questionable standing of requester organization, 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 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).

[131] Doe v. Veneman, 230 F. Supp. 2d at 749-51.

[132] Doe v. Veneman, No. 99-335, slip op. at 4-5 (W.D. Tex. Feb. 14, 2003).

[133] Doe v. Veneman, 380 F.3d 807, 813-16 (5th Cir. 2004) ("Even though APHIS 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.").

[134] Id. at 818-20 (finding district court's injunction to be overbroad on

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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.[135] 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.[136]

These privacy "reverse" FOIA cases are similar in posture to the more common "reverse" FOIA cases that are based upon a business submitter's claim that information falls within Exemption 4, cases which ordinarily are triggered by the "submitter notice" requirements of Executive Order 12,600.[137] (See the further discussion of this point under "Reverse" FOIA, below.) Despite this similarity, though, there is no requirement that an agency notify record subjects of the 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."[138] Of course, a party seeking to protect his or her own

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[134](...continued)
several grounds).

[135] Na Iwi O Na Kupuna, 894 F. Supp. at 1402-04.

[136] 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).

[137] 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (2000), 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").

[138] Blakey v. Dep't of Justice, 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); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (noting that no formal objection is necessary for agencies to invoke FOIA's privacy exemptions to protect individuals); 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) (re-
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privacy interest always can move to intervene in an ongoing lawsuit between an agency and a FOIA requester.[139]

Factoring in the Public Interest

Once it has been determined that a personal 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.[140] The burden of establishing that disclosure would serve the public interest is on the requester.[141] In its Reporters Committee decision, the Supreme Court limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted

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[138](...continued)
quiring agency to ask (through unprecedented survey mechanism) Guantanamo Bay detainees whether they wished their identifying information to be released to plaintiff, based on exceptional 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 object to release of their addresses to British citizens seeking to locate their natural fathers).

[139] See, e.g., Jefferson v. U.S. Dep't of Justice, Office of the Inspector General, No. 01-1418, slip op. at 4-5 (D.D.C. Nov. 14, 2003) (allowing Department of Justice attorney to intervene to protect her personal privacy interests, on basis that she was at odds with plaintiff over release of information about her and that there was a question of the Department's ability to adequately represent her interests given past and ongoing employment discrimination matters) (Exemption 7(C)); cf. Doe v. Glickman, 256 F.3d 371, 375-81 (5th Cir. 2001) (holding that requester could intervene in "reverse" FOIA suit brought by individuals, in order to seek to block release of personally identifying information that requester sought in related FOIA suit); Pub. Citizen Health Research Group v. U.S. Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978) (same, in FOIA suit).

[140] See FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking").

[141] See 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 (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)), reh'g denied, 541 U.S. 1057 (2004); 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.").

it: To "shed[] light on an agency's performance of its statutory duties."[142] Information that does not directly reveal the operations or activities of the federal government,[143] the Supreme Court repeatedly has stressed, "falls outside the ambit of the public interest that the FOIA was enacted to serve."[144] If an asserted public interest is found to qualify under this stand-

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[142] 489 U.S. 749, 773 (1989); 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"). But cf. Voinche v. FBI, 940 F. Supp. 323, 330 n.4 (D.D.C. 1996) (dictum) (speculating, based upon mere newspaper report of legislative action, that Electronic FOIA amendments would "effectively overrule" Reporters Committee), aff'd on other grounds per curiam, No. 96-5304, 1997 U.S. App. LEXIS 19089 (D.C. Cir. June 19, 1997).

[143] See Landano v. U.S. Dep't of Justice, 956 F.2d 422, 430 (3d Cir.) (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. Fed. Bureau of Prisons, 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. U.S. Dep't of Justice, 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)); Dollinger v. USPS, No. 95-CV-6174T, slip op. at 3-4 (W.D.N.Y. Aug. 24, 1995) (finding "that the term 'government' as used in § 552(a)(4)(A)(iii) [i.e., the fee waiver provision] of the statute refers to the federal government").

[144] 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., Piper v. U.S. Dep't of Justice, 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

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ard, it then must be accorded some measure of value so that it can be weighed against the threat to privacy.[145] And, as the Supreme Court in Favish pointedly emphasized, "the public interest sought to be advanced [must be] a significant one."[146]

Even prior to Reporters Committee the law was clear that disclosure must benefit the public overall and not just the requester himself. For example, a number of courts determined that a request made for purely commercial purposes does not further a public interest.[147] The Court of Appeals for the Ninth Circuit alone had adopted an approach that specifically factored the requester's personal interest in disclosure into the balancing

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[144](...continued)
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 understanding of NLRB's performance of its duties), aff'd on other grounds, 26 F.3d 168 (D.C. Cir. 1994); Andrews v. U.S. Dep't of Justice, 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"); see also FOIA Update, Vol. XVIII, No. 1, at 1; FOIA Update, Vol. X, No. 2, at 4, 6; cf. *FOIA Post*, "Supreme Court Vacates and Remands in ATF Database Case" (posted 3/25/03) (discussing the Supreme Court's decision to vacate the Seventh Circuit opinion that erroneously found that "[t]he effectiveness of ATF's performance [of its statutory duties] impacts the City's interests" (citing City of Chicago v. U.S. Dep't of Treasury, 286 F.3d 628, 637 (7th Cir. 2002))).

[145] 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).

[146] 541 U.S. at 172; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (noting that the Supreme Court "emphasized" the requirement of "significan[ce]").

[147] See, e.g., Multnomah County Med. Soc'y v. Scott, 825 F.2d 1410, 1413 (9th Cir. 1987) (commercial solicitation of Medicare recipients); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974) (individuals licensed to produce wine at home requested by distributor of amateur wine-making equipment); see also Aronson v. HUD, 822 F.2d 182, 185-86 (1st Cir. 1987) (Plaintiff's "commercial motivations are irrelevant for determining the public interest served by disclosure; they do, however, suggest one of the ways in which private interests could be harmed by disclosure and a reason why individuals would wish to keep the information confidential.").

process.[148]

In Reporters Committee, the Supreme Court approved the majority view that the requester's personal interest is irrelevant. First, as the Court emphasized, the requester's identity can have "no bearing on the merits of his or her FOIA request."[149] In so declaring, the Court ruled unequivocally 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.[150] Furthermore, the "public interest" balancing required under the privacy exemptions should not include consideration of the requester's "particular purpose" in making the request.[151] 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.[152] This approach thus does not permit attention to the special circumstances of any particular FOIA requester.[153] Rather, it necessarily involves a more

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[148] See, e.g., Multnomah County Med. Soc'y, 825 F.2d at 1413; Van Bourg, Allen, Weinberg & Roger v. NLRB, 728 F.2d 1270, 1273 (9th Cir. 1984), vacated, 756 F.2d 692 (9th Cir.), reinstated, 762 F.2d 831 (9th Cir. 1985). But see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (noting a similar Ninth Circuit misinterpretation of Exemption 7(C) that had "left it alone among all circuit courts of appeals" until the Supreme Court repudiated its approach in Favish).

[149] 489 U.S. at 771; see also DOD v. FLRA, 510 U.S. at 496-501; Lowry v. Soc. Sec. Admin., No. 00-1616, 2001 U.S. Dist. LEXIS 23474, at *34 (D. Or. Aug. 29, 2001) (stating that "the identity of the requester and the purpose for which the records are sought cannot be taken into consideration in determining what should be released"); FOIA Update, Vol. X, No. 2, at 5-6.

[150] 489 U.S. at 771; see FOIA Update, Vol. X, No. 2, at 5; see also, e.g., Frets v. Dep't of Transp., No. 88-404-W-9, 1989 WL 222608, at *5-6 (W.D. Mo. Dec. 14, 1989) (withholding names of third parties mentioned in plaintiffs' own statements).

[151] 489 U.S. at 772; 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 496-501.

[152] 489 U.S. at 772.

[153] See id. at 771-72 & n.20; see also 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); Schwarz v. U.S. Dep't of

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general "public interest" assessment based upon the contents and context of the records sought and their connection to any "public interest" that would be served by disclosure. In making such assessments, agencies should look to the possible effects of disclosure to the public in general.[154]

Accordingly, a request made for the purpose of obtaining "impeachment evidence, such as that required to be produced pursuant to Brady v. Maryland" does not further the public interest;[155] nor does a request made

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[153](...continued)
State, No. 97-1342, slip op. at 1-5 (D.D.C. Mar. 20, 1998) (protecting address of individual despite prolific FOIA plaintiff's claim that she sought imagined "missing" husband's address so that she might "testify on his behalf and win his release from prison"), aff'd per curiam, 172 F.3d 921 (D.C. Cir. 1998) (unpublished table decision).

[154] See FOIA Update, Vol. X, No. 2, at 5-6; see also Favish, 541 U.S. at 174 ("It must be remembered that once there is a disclosure, the information belongs to the general public.").

[155] Curry v. DEA, No. 97-1359, slip op. at 5 (D.D.C. Mar. 30, 1998) (citing Brady v. Maryland, 373 U.S. 83 (1963)); see Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (stating that "courts have sensibly refused to recognize, for purposes of FOIA, a public interest in nothing more than the fairness of a criminal defendant's own trial"); Cano v. DEA, No. 04-935, 2006 WL 1441383, at *4 (D.D.C. May 24, 2006) ("When weighing the privacy interests against plaintiff's purely personal interests in challenging his conviction, the balance clearly favors non-disclosure."); Cole-El v. U.S. Dep't of Justice, No. 03-1013, slip op. at 10 (D.D.C. Aug. 26, 2004) ("[Plaintiff's] interest in attacking his conviction does not constitute a public interest sufficient to overcome [a third party's] privacy interests.") (Exemption 7(C)), aff'd, No. 04-5329, 2005 U.S. App. LEXIS 7358, at *2-3 (D.C. Cir. Apr. 27, 2005) ("As appellant has not demonstrated a public interest in disclosure, the countervailing interest in privacy defeated his request for documents under the Freedom of Information Act."); Lora v. U.S. Dep't of Justice, No. 00-3072, slip op. at 13 (D.D.C. Apr. 9, 2004) ("Plaintiff's interest in attacking his conviction does not constitute a public interest sufficient to overcome the privacy interests of [third parties]."); Diaz v. Fed. Bureau of Prisons, No. 01-40070, slip op. at 10 (D. Mass. Dec. 20, 2001) (magistrate's recommendation) (finding that the public interest is not served by "the mere claim that disclosure would raise questions about the fairness" of the requester's trial), adopted (D. Mass. Feb. 7, 2002), aff'd, 55 F. App'x 5 (1st Cir. 2003); Martin v. U.S. Dep't of Justice, No. 96-2866, slip op. at 10 (D.D.C. Dec. 15, 1999) (noting that "courts have consistently found Brady violations to be outside the scope of the FOIA"); Billington v. Dep't of Justice, 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. Dep't of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991))), aff'd in pertinent part, 233 F.3d 581 (D.C. Cir. 2000); cf. Hale v. U.S. Dep't of Justice, 226 F.3d 1200, 1204 n.4 (10th Cir. 2000) (finding that (continued...)

in order to obtain or supplement discovery in a private lawsuit serve the public interest.[156] 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.[157] 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."[158]

One purpose that the FOIA was designed for is to "check against corruption and to hold the governors accountable to the governed."[159] Indeed, information that would inform the public of violations of the public trust has a strong public interest and is accorded great weight in the balancing

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[155](...continued)
plaintiff's Brady claim is irrelevant to Exemption 7(D) analysis).

[156] See Carpenter v. U.S. Dep't of Justice, 470 F.3d 434, 442 (1st Cir. 2006) (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); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (job-related causes of action); Harry v. Dep't of the Army, No. 92-1654, slip op. at 7-8 (D.D.C. Sept. 10, 1993) (to appeal negative officer efficiency report); 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) (grievance proceeding); FOIA Update, Vol. III, No. 4, at 6 (advising that requests from requesters who have clear personal interest in disclosure should be subject to careful scrutiny).

[157] 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.").

[158] 357 F. Supp. 2d 76, 88 (D.D.C. 2004).

[159] Multnomah County Med. Soc'y, 825 F.2d at 1415 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)); see also 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).

process.[160] 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.[161]

By contrast, less serious misconduct by low-level agency employees generally is not considered of sufficient public interest to outweigh the pri-

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[160] 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).

[161] See, e.g., Cochran v. United States, 770 F.2d 949, 956-57 (11th Cir. 1985) (nonjudicial punishment findings and discipline imposed on Army major general for misuse of government personnel and facilities) (Privacy Act "wrongful disclosure" suit); 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)); Columbia Packing Co. v. USDA, 563 F.2d 495, 499 (1st Cir. 1977) (information about federal employees found guilty of accepting bribes); 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), appeal dismissed voluntarily, No. 97-5248 (D.C. Cir. Oct. 22, 1997); 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. U.S. Dep't of Justice, 438 F. Supp. 538, 544 (D.D.C. 1977) (misconduct by White House staffers); cf. Perlman v. U.S. Dep't of Justice, 312 F.3d 100, 107-08 (2d Cir. 2002) (finding public interest, even though misconduct was not proven, because "a substantial amount of evidence shows [that former INS General Counsel] allowed former INS officials . . . to exercise improper influence" and "the degree of wrongdoing alleged is fairly serious") (Exemptions 6 and 7(C)), vacated & remanded, 541 U.S. 970, on remand, 380 F.3d 110, 111 (2d Cir. 2004) (per curiam); 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).

vacy interest of the employee.[162] Nor is there 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 knowledge" that certain employees were disci-

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[162] See, e.g., Rose, 425 U.S. at 381 (protecting names of cadets found to have violated Academy honor code); 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. Dep't of Justice, 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); 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. U.S. Dep't of Justice, 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)); Gonzalez v. FBI, No. 99-5789, slip op. at 13-15 (E.D. Cal. Aug. 11, 2000) (declining to order agency to confirm or deny existence of records concerning any misconduct investigations against named federal employees) (Exemptions 6 and 7(C)), aff'd, 14 F. App'x 916 (9th Cir. 2001); Butler v. U.S. Dep't of Justice, 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"), appeal dismissed, No. 94-5078 (D.C. Cir. Sept. 8, 1994); 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)).

plined.[163]

And any asserted "public interest" in resolving mere allegations of wrongdoing cannot outweigh an individual's privacy interest in avoiding unwarranted association with such allegations.[164] Indeed, in Favish, the Supreme Court firmly held that mere allegations of wrongdoing are "insufficient" to satisfy the "public interest" standard required under the FOIA.[165]

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[163] 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).

[164] See, e.g., McCutchen v. HHS, 30 F.3d 183, 187-89 (D.C. Cir. 1994) (protecting identities of scientists found not to have engaged in alleged scientific misconduct) (Exemption 7(C)); Hunt v. FBI, 972 F.2d 286, 288-90 (9th Cir. 1992) (protecting investigation of named FBI agent cleared of charges of misconduct) (Exemption 7(C)); Dunkelberger v. Dep't of Justice, 906 F.2d 779, 781-82 (D.C. Cir. 1990) (same) (Exemption 7(C)); Carter, 830 F.2d at 391 (protecting identities of attorneys subject to disciplinary proceedings that were later dismissed); Buckley, No. 03-03233, slip op. at 10-11 (W.D. Wash. Mar. 8, 2004) ("If these files 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)); 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); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (advising that Dobronksi is now discredited, if not effectively overruled, by Favish decision's total repudiation of Ninth Circuit's disclosure rationales).

[165] 541 U.S. at 173; see also Summers v. U.S. Dep't of Justice, No. 98-1837, (continued...)

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."[166] Indeed, if mere allegations were all that were necessary to override a personal privacy interest, then that privacy interest would become worthless.[167]

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.[168] And even where misconduct actually is found, the agency is not

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[165](...continued)
slip op. at 19 (D.D.C. Apr. 13, 2004) (citing Favish and finding no merit to plaintiff's allegation that the FBI did not thoroughly investigate a case, because "plaintiff has not provided any evidence that the FBI acted improperly") (Exemption 7(C)); *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing insufficiency of "mere allegations").

[166] 541 U.S. at 174; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing how privacy exemptions "could be swallowed whole" unless requesters alleging government wrongdoing are held to higher standards, because "[u]nfortunately, the government's decades of experience with FOIA administration teaches that there is no shortage of potential FOIA requesters who might be willing to make such allegations (even in what they would swear to be good faith, subjectively speaking) if that were all that it would take to gain disclosure").

[167] See U.S. Dep't of Justice 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).

[168] See Kimberlin v. Dep't of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998) (concluding that Assistant United States Attorney "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)); Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., No. 05-6015, 2005 WL 3488453, at *3-4 (D. Or. Dec. 21, 2005) (protecting identities of low-level and mid-level employees facing discipline, because release "could subject them to embarrassment, shame, stigma and harassment," despite publicity given to fatalities caused by forest fire); MacLean v. DOD, No. 04-2425, slip op. at 16-17 (S.D. Cal. June 2, 2005) (finding that "substantial privacy interests" of individual found not to have committed professional misconduct outweighed any public interest) (Exemptions 6 and 7(C)); Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d
(continued...)

necessarily required to disclose every piece of information pertaining to the investigation.[169]

Prior to Reporters Committee, some courts held that the public interest in disclosure may be embodied in other federal statutes.[170] In light of Reporters Committee and National Association of Retired Federal Employ-

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[168](...continued)
738, 743 (E.D. Va. 1999) (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").

[169] See, e.g., Office of Capital Collateral Counsel, Northern Region of Fla. v. Dep't of Justice, 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)); cf. LaRouche v. U.S. Dep't of Justice, No. 90-2753, slip op. at 14 (D.D.C. Aug. 8, 2002) (observing that the FBI "need not make a wholesale disclosure about an individual just because he is a publicly acknowledged FBI source") (Exemption 7(C)).

[170] See, e.g., Int'l Bhd. of Elec. Workers Local No. 5 v. HUD, 852 F.2d 87, 90 (3d Cir. 1988) (wage rates payable by federal contractors regulated by Davis-Bacon Act, 40 U.S.C. §§ 3141-3144, 3146-3147 (Supp. III 2003); USDA v. FLRA, 836 F.2d 1139, 1143 (8th Cir.) (names and addresses of federal employees under federal labor relations statute), cert. granted & remanded, 488 U.S. 1025 (1988), vacated, 876 F.2d 50 (8th Cir. 1989); Common Cause v. Nat'l Archives & Records Serv., 628 F.2d 179, 183-85 (D.C. Cir. 1980) (political campaign activities under Federal Corrupt Practices Act, 2 U.S.C. §§ 241-248, 252-256 (1970) (repealed 1972)) (Exemption 7(C)); Wash. Post, 690 F.2d at 265 (public disclosure of financial statements required by Ethics in Government Act of 1978, as amended, 28 U.S.C. § 591-599 (2000); see also Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (finding nondisclosure proper upon consideration of state statute mandating same).

ees v. Horner [hereinafter NARFE],[171] the Courts of Appeals for the District of Columbia, First, Second, Sixth, Seventh, Tenth, and Eleventh Circuits flatly rejected this approach, refusing to order disclosure of the home addresses of government employees on the explicit basis that the public interest in disclosure evidenced in the Federal Service Labor-Management Relations Act[172] [hereinafter FSLMRA] cannot be factored into the balance under the FOIA.[173] On the other hand, the Third, Fifth, and Ninth Circuit Courts of Appeals reached the opposite conclusion and ordered disclosure of the home addresses of bargaining unit employees to unions that requested them under the FSLMRA.[174] These circuit courts all declared that the Supreme Court had not considered specifically whether the public policy favoring collective bargaining embodied in the FSLMRA could be considered in balancing under the FOIA; consequently, none of these courts found an inconsistency between its holding and the teachings of Reporters Committee.[175]

Because of this split in the circuits, the Supreme Court granted certiorari in the Fifth Circuit case and finally resolved this issue in 1994.[176] The Court decisively reiterated the principles laid down in Reporters Committee and said the fact that it was looking at Exemption 6 rather than Exemption 7(C) in this case was "of little import"; the two exemptions differ in the "magnitude of the public interest that is required," not in the "identifi-

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[171] 879 F.2d 873 (D.C. Cir. 1989).

[172] 5 U.S.C. §§ 7101-7106, 7111-7123, 7131-7135 (2000 & Supp. IV 2004).

[173] D.C. Circuit: FLRA v. U.S. Dep't of the Treasury, 884 F.2d 1446, 1453 (D.C. Cir. 1989); First Circuit: FLRA v. U.S. Dep't of the Navy, 941 F.2d 49, 56-57 (1st Cir. 1991); Second Circuit: FLRA v. VA, 958 F.2d 503, 511-12 (2d Cir. 1992); Sixth Circuit: FLRA v. Dep't of the Navy, 963 F.2d 124, 125 (6th Cir. 1992); Seventh Circuit: FLRA v. U.S. Dep't of the Navy, 975 F.2d 348, 354-55 (7th Cir. 1992); Tenth Circuit: FLRA v. DOD, 984 F.2d 370, 375 (10th Cir. 1993); Eleventh Circuit: FLRA v. DOD, 977 F.2d 545, 548 (11th Cir. 1992). See also Reed v. NLRB, 927 F.2d 1249, 1251 (D.C. Cir. 1991) (concluding that disclosure of "Excelsior" list (names and addresses of employees eligible to vote in union representation elections) would not reveal anything about NLRB's operations).

[174] Third Circuit: FLRA v. U.S. Dep't of the Navy, 966 F.2d 747, 758-59 (3d Cir. 1992) (en banc) (alternative holding); Fifth Circuit: FLRA v. DOD, 975 F.2d 1105, 1113-15 (5th Cir.), rev'd, 510 U.S. 487 (1994); Ninth Circuit: FLRA v. U.S. Dep't of the Navy, 958 F.2d 1490, 1497 (9th Cir. 1992), reh'g granted & opinion withdrawn, No. 90-70511 (9th Cir. Apr. 18, 1994); see also FLRA v. Dep't of Commerce, 954 F.2d 994, 997 (4th Cir. 1992), appeal dismissed per stipulation, No. 90-1852 (4th Cir. Apr. 6, 1995).

[175] FLRA v. U.S. Dep't of the Navy, 966 F.2d at 757-59; FLRA v. U.S. Dep't of the Navy, 958 F.2d at 1496-97.

[176] DOD v. FLRA, 510 U.S. 487 (1994).

cation of the relevant public interest."[177] The Court concluded that "because all FOIA requestors have an equal, and equally qualified, right to information, the fact that [FOIA requesters] are seeking to vindicate the policies behind the Labor Statute is irrelevant to the FOIA analysis."[178] The only relevant public interest under the FOIA remains, as set forth in Reporters Committee, "'the citizens' right to be informed about what their government is up to.'"[179]

On a related question concerning another federal statute -- the Davis-Bacon Act,[180] which requires that contractors on federal projects pay to their laborers no less than the wages prevailing for comparable work in their geographical area -- the D.C. and Second Circuits were the first post-Reporters Committee courts of appeals to confront this issue, and the Third and Tenth Circuits subsequently addressed it as well. These four courts have firmly 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."[181] 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]."[182]

Overturning the decisions of two lower courts,[183] the Ninth Circuit characteristically took a different approach, but properly reached the same result.[184] The Ninth Circuit found a public interest in monitoring the agen-

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[177] Id. at 496-97 & n.6.

[178] Id. at 499.

[179] Id. at 497 (quoting Reporters Comm., 489 U.S. at 773).

[180] 40 U.S.C. §§ 3141-3144, 3146-3147.

[181] Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991); 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).

[182] Painting & Drywall, 936 F.2d at 1303; see Sheet Metal Workers, 63 F.3d at 997-98; Hopkins, 929 F.2d at 88.

[183] Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of the Air Force, 751 F. Supp. 1410, 1417 (D. Haw.), reconsideration denied, 756 F. Supp. 452 (D. Haw. 1990); Seattle Bldg. & Constr. Trades Council v. HUD, No. C89-1346C, slip op. at 10-11 (W.D. Wash. Oct. 30, 1990).

[184] Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of the Air

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cy'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 is at issue.[185]

Public oversight of government operations is the essence of public interest under the FOIA, and in the past courts have found that one who claims such a purpose must support his claim by more than mere allegation; he must show that the information in question is "of sufficient importance to warrant such" oversight,[186] and he had to show how the public interest would be served by disclosure in the particular case.[187] Moreover, the Supreme Court in Favish found the Ninth Circuit's reliance on mere allegations of government wrongdoing to be simply "insufficient."[188] The Court pointedly recognized that "allegations of misconduct are 'easy to al-

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[184](...continued)
Force, 26 F.3d 1479, 1484-86 (9th Cir. 1994).

[185] Id. at 1485; see also Sheet Metal Workers, 63 F.3d at 997-98.

[186] Miller v. Bell, 661 F.2d 623, 630 (7th Cir. 1981); see also 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 activity and shows that the information sought is necessary in order to confirm or refute that evidence.") (Exemption 7(C)); LaRouche v. U.S. Dep't of Justice, 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 Deputy White House Counsel Vincent Foster, 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).

[187] See Halloran, 874 F.2d at 323; Rashid v. U.S. Dep't of Justice, No. 99-2461, slip op. at 16-17 (D.D.C. June 12, 2001).

[188] 541 U.S. at 173.

lege and hard to disprove'"[189] and that courts therefore must require a "meaningful evidentiary showing" by the FOIA requester.[190] 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."[191] And in such cases, this higher standard applies above and beyond the "qualifying public interest" standard of Reporters Committee.[192]

Accordingly, assertions of "public interest" should be scrutinized carefully to ensure that they legitimately warrant the overriding of important privacy interests.[193] Indeed, in the past two years, several courts have applied this heightened standard to allegations of government misconduct and overwhelmingly have found that plaintiffs have not provided the requisite evidence required by Favish.[194]

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[189] Id. 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 conduct, and noting that privacy interests would be worthless if only bare allegations could overcome these interests).

[190] 541 U.S. at 175.

[191] Id. at 174.

[192] See *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (advising that Favish's "additional new standard for determining the existence and magnitude of a public interest in 'agency wrongdoing' cases does not replace the basic Reporters Committee standard for determining the existence of any 'public interest' generally"); see also FOIA Update, Vol. X, No. 2, at 6-7.

[193] See, e.g., Favish, 541 U.S. at 172 (stressing the requirement that "the public interest sought to be advanced [be] a significant one"); see also FOIA Update, Vol. III, No. 4, at 6; accord Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (placing particular emphasis on the right to privacy among the other interests that are protected by the FOIA's exemptions).

[194] See Carpenter, 470 F.3d at 442 (concluding that "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have 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's

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As stated by the Second Circuit in Hopkins v. HUD, "[t]he 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."[195] 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.[196] Even the Ninth Circuit in Minnis v. USDA recognized a valid public

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[194](...continued)
[sic] official conduct was proper"); Oguaju v. United States, 378 F.3d 1115, 1117 (D.C. Cir.) (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), cert. denied, 544 U.S. 983 (2005); Sonds v. Huff, 391 F. Supp. 2d 152, 159 (D.D.C. 2005) (finding that requester did not produce any "evidence of unlawful conduct or impropriety by government officials") (Exemption 7(C)); Brown v. EPA, 384 F. Supp. 2d 271, 279-80 (D.D.C. 2005) ("[P]laintiff can provide no evidence of agency wrongdoing.") (Exemption 7(C)); Manchester v. FBI, No. 96-0137, 2005 WL 3275802, at *7 (D.D.C. Aug. 9, 2005) ("The court finds that [requester] failed to make a specific allegation that government impropriety occurred.") (Exemptions 6 and 7(C)). But see also Homick v. U.S. Dep't of Justice, No. 98-00557, slip op. at 20 (N.D. Cal. Sept. 15, 2004) (finding that plaintiff provided requisite evidence required by Favish to support public interest assertion that government failed to provide him with impeachment and exculpatory evidence during prosecutions).

[195] 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 (reminding agencies and courts alike of "the nexus required between the requested documents and the purported public interest served by disclosure"); *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (emphasizing that "Favish serves as a reminder of that requirement").

[196] Id.; see also 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"); Sutton v. IRS, No. 05-7177, 2007 WL 30547, at *6 (N.D. Ill. Jan. 4, 2007) (upholding the IRS's withholding of 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 indi-
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[196](...continued)
vidual [Bureau of Land Management] grazing permittees"); Idaho v. U.S. Forest Serv., No. 97-0230-S, slip op. at 6 (D. Idaho Dec. 9, 1997) (determining that while disclosure of names and cities of residence of Forest Service land permit holders will show whether permits are being granted properly, disclosure of home addresses will provide no "additional insight into agency activities"); Save Our Springs Alliance v. Babbitt, No. A-97-CA-259, slip op. at 7-8 (W.D. Tex. Nov. 19, 1997) (finding that "context of the letters" shows nature of correspondents who commented on issue before agency; release of home addresses and telephone numbers would add nothing to understanding of agency's process); Hecht v. U.S. Agency for Int'l Dev., 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 identifying information of the 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."). But see Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 256-57 (D.D.C. 2005) (failing to explain how "strong public interest in . . . protecting minorities against voter intimidation" would be served by release of Justice Department paralegal names and phone numbers merely listed as contacts for federal prosecutors to send materials for Attorney General voting integrity initiative); Gordon v. FBI, 388 F. Supp. 2d 1028, 1041 (N.D. Cal. 2005) (deciding that public interest is 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. U.S. Dep't of Justice, No. 03-0180, 2005 WL 758267, at *17 (D.D.C. Mar. 31, 2005) (finding, without explanation, 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); Homick, No. 98-00557, slip op. at 20-21 (N.D. Cal. Sept. 15, 2004) (ruling that plaintiff failed to establish any connection between release of personal information of third parties and public interest asserted) (Exemption 7(C)); Judicial Watch v. U.S. Dep't of Justice, 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), reconsideration denied temporarily pending in camera review, No. 97-CV-2869 (D.D.C. Aug. 17, 2000); Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1093 (D. Or. 1998) (finding that

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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.[197] Similarly, in Heights Community Congress v.

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[196](...continued)
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).

[197] 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]"); Summers, No. 98-1837, slip op. at 13 (D.D.C. Apr. 13, 2004) (concluding that "plaintiff has not established that disclosing the redacted names [of the FBI employees] will provide any substantial additional information about the adequacy of the FBI's conduct"); 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. U.S. Dep't of Justice, 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"). But see Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 97-98 (6th Cir. 1996) (saying 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. Dep't of Jus-
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VA,[198] 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."

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 on an agency's conduct to overcome the subject's privacy interest in his records.[199] In this vein, it is also important

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[197](...continued)
tice, 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)); 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).

[198] 732 F.2d 526, 530 (6th Cir. 1984); 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"); The News-Press v. DHS, No. 05-102, 2005 WL 2921952, at *18-19 (M.D. Fla. Nov. 4, 2005) (deciding to protect the names and addresses of thousands of disaster relief claimants because the prospective utilization of this information by the plaintiff to find and interview the claimants "tips the scale towards the privacy invasion side").

[199] 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), cert. denied, 544 U.S. 983 (2005); Neely 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
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to note that there is a logical distinction between the public interest that can exist within an overall subject that relates to a FOIA request, on the one hand, and the interest that might or might not be served by disclosure of the particular records that are responsive to that FOIA request, on the other.[200] The term "umbrella issue" has been utilized by agencies and courts when referring to this important distinction 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.[201] As a matter of sound policy, agencies should be aware of and address any "umbrella issue" in order to accurately weigh the public interest within applicable areas of FOIA decisionmaking, particularly in the balancing processes of both Exemption 6 and Exemption 7(C).[202]

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[199](...continued)
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"); 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"). But see Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 548-49 (5th Cir. 2002) (perceiving a "public interest in monitoring agencies' enforcement of the law in specific instances") (Exemption 7(C)).

[200] See *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (explaining distinction between generalized public interest in broad subject area of FOIA request as opposed to specific public interest in particular documents at issue in FOIA request) (citing cases).

[201] Id. (identifying significance of "umbrella issue" under FOIA) (citing 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"), and ACLU of N. Cal. v. Dep't of Justice, 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")); see also Schrecker v. Dep't of Justice, 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)).

[202] *FOIA Post*, "FOIA Counselor Q&A" (posted 1/24/06) (citing KTVY-TV
(continued...)

Such approaches fully comport with the Supreme Court's emphasis on the required "nexus between the requested information and the asserted public interest that would be advanced by disclosure" in Favish,[203] and they are entirely consistent with the Court's determination in Reporters Committee that the "rap sheet" of a defense contractor, if such existed, would reveal nothing directly about the behavior of the Congressman with whom the contractor allegedly had an improper relationship, nor would it reveal anything about the conduct of the DOD.[204] The information must

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[202](...continued)
v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) (Exemption 7(C)), NTEU v. Griffin, 811 F.2d 644, 648 (D.C. Cir. 1987) (fee waiver), and Cotton v. Heyman, 63 F.3d 1115, 1120 (D.C. Cir. 1995) (applying comparable approach to award of attorney fees)); see Morley v. CIA, 453 F. Supp. 2d 137, 155 (D.D.C. 2006) ("While plaintiff, in his FOIA request, claims that there is a public interest in the materials he seeks generally, he fails to establish that there is a public interest in the personal information claimed to be exempt here.") (Exemption 7(C)) (appeal pending); Long v. U.S. Dep't of Justice, 450 F. Supp. 2d 42, 69 (D.D.C.) (requiring that plaintiffs credibly demonstrate with sufficient specificity that disclosure of requested records would shed light on agency conduct), amended by 457 F. Supp. 2d 30, 31-32 (D.D.C. 2006), amended further on reconsideration, Nos. 00-0211 & 02-2467, 2007 WL 293508, at *1-5 (D.D.C. Feb. 2, 2007), stay granted (D.D.C. Feb. 13, 2007); PETA v. USDA, No. 03-195, 2006 WL 508332, at *3-4 (D.D.C. Mar. 3, 2006) (attorney fees); see also Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) (urging "careful" decisionmaking), reprinted in *FOIA Post* (posted 10/15/01).

[203] 541 U.S. at 172-73.

[204] 489 U.S. at 774; see also NARFE, 879 F.2d at 879 (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)); Johnson v. U.S. Dep't of Justice, 739 F.2d 1514, 1519 (10th Cir. 1984) (finding that because allegations of improper use of law enforcement authority were not at all supported in requested records, disclosure of FBI special agent names would not serve public interest) (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)); Miller, 661 F.2d at 630 (noting that plaintiff's broad assertions of government cover-up were unfounded as investigation was of consequence to plaintiff only and therefore did not "warrant probe of FBI efficiency") (Ex-
(continued...)

clearly reveal official government activities; it is not enough that the information would permit speculative inferences about the conduct of an agency or a government official,[205] or that it might aid the requester in lobbying efforts that would result in passage of laws and thus benefit the public in that respect.[206]

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[204](...continued)
emption 7(C)); Brown v. EPA, 384 F. Supp. 2d at 279 (rejecting the "suggestion that the disclosure of names in government investigative files can somehow provide insight into the workings of the government") (Exemption 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 agency's plans regarding "'privatization of government functions'").

[205] See Reporters Comm., 489 U.S. at 774, 766 n.18; see also 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); Gannett Satellite, No. 90-1392, slip op. at 12 (D.D.C. Dec. 21, 1990) (finding that names, addresses, and social security numbers of student loan defaulters would reveal nothing directly about Department of Education's administration of student loan program); *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (pointing out that "Favish now stands as a further bulwark against" speculation-wielding FOIA requesters). 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 would give plaintiff information it needs to determine whether NLRB conducted election tainted with fraud and corruption); Int'l Diatomite Producers Ass'n v. U.S. Soc. Sec. Admin., No. C-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 (OSHA, [Mine Safety and Health Administration], and EPA) carry out their statutory duties to protect the public from the potential health hazards from crystalline silica exposure"), appeal dismissed, No. 93-16723 (9th Cir. Nov. 1, 1993).

[206] See NARFE, 879 F.2d at 875; see also FOIA Update, Vol. X, No. 2, at 6 (discussing the narrowed "public interest" concept under Reporters Committee).

A very significant development concerning this issue occurred in United States Department of State v. Ray,[207] when the Supreme Court recognized 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, but 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."[208] 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."[209]

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.[210] 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:

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[207] 502 U.S. 164 (1991).

[208] Id. at 178; see also 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)).

[209] 502 U.S. at 178-79; see also Navigator Publ'g v. U.S. Dep't of Transp., 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).

[210] 502 U.S. at 178-79.

(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;[211]

(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";[212]

(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;[213]

(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 investigation was politically motivated;[214]

(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;[215]

(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;[216] 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

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[211] Thott v. U.S. Dep't of the Interior, No. 93-0177-B, slip op. at 5-6 (D. Me. Apr. 14, 1994).

[212] Ray v. U.S. Dep't of Justice, 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").

[213] Urbigkit v. U.S. Dep't of the Interior, No. 93-CV-0232-J, slip op. at 13 (D. Wyo. May 31, 1994).

[214] Weiner v. FBI, No. 83-1720, slip op. at 5-7 (C.D. Cal. Dec. 6, 1995) (Exemptions 6 and 7(C)).

[215] Cardona v. INS, No. 93-3912, 1995 WL 68747, at *3 (N.D. Ill. Feb. 15, 1995).

[216] Baltimore Sun, 131 F. Supp. 2d at 729-30.

assistance by FEMA.[217]

However, the District Court for the District of Columbia reached a different result, with more cogent reasoning, in Hertzberg v. Veneman.[218] In that case, the plaintiff argued that disclosure of the names and identifying information that were withheld on witness statements would serve the public interest because, he said, it would allow him to contact the witnesses.[219] The court disagreed with this argument and it stated that "disclosure is not compelled under the FOIA [just] because the link between the request and the potential illumination of agency action is too attenuated. Plaintiff cites no case recognizing a derivative theory of public interest, and this Court does not understand the FOIA to encompass such a concept."[220] And now the Supreme Court's recent emphasis in Favish on "the necessary nexus between" the information requested and the "public interest" to be served, at a minimum, calls this "derivative use" notion into even greater question.[221]

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[217] Sun-Sentinel, 431 F. Supp. 2d at 1269-73.

[218] 273 F. Supp. 2d 67, 86-87 (D.D.C. 2003).

[219] Id. at 87.

[220] Id.

[221] 541 U.S. at 172-73; see also Painting Indus., 26 F.3d at 1484-85 (finding 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); The News-Press, 2005 WL 2921952, at *18 (considering the possibility of a "derivative" public interest but ultimately concluding that "it does not tip the balance in favor of disclosure" and that it actually "does the opposite"); 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 Envtl. Coal. v. Forest Serv., No. 2:94-cv-021, slip op. at 10 (W.D. Mich. Sept. 28, 1994) (finding the

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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, "[w]hile [this is] certainly not a per se defense to a FOIA request," it is entirely 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."[222]

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[221](...continued)
"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").

[222] DOD v. FLRA, 964 F.2d 26, 29-30 (D.C. Cir. 1992); see 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 at 1416 (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"); Cowles Publ'g Co. v. United States, No. 90-349, slip op. at 8-9 (E.D. Wash. Dec. 20, 1990) (advertisements soliciting injured persons and their physicians, or direct contact with physicians, in region are viable alternatives to agency's releasing identities of persons injured by radiation exposure); Hemenway v. Hughes, 601 F. Supp. 1002, 1007 (D.D.C. 1985) (personal contact with individuals whose names and work addresses were released to plaintiff is alternative to agency's releasing personal information he seeks); cf. 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, 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

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In Favish, the Supreme Court recognized that the government had thoroughly investigated the suicide of Vincent Foster and that "[i]t would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion."[223] Indeed, if there are alternative sources, the D.C. Circuit has firmly ruled, the public interest in disclosure should be "discounted" accordingly.[224] Likewise, the Court of Appeals for the Tenth Circuit properly assigned no public interest value to 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."[225]

Similarly, although courts ordinarily discuss the "public interest" as weighing in favor of disclosure, several courts 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.[226] Most explicitly, the

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[222](...continued)
reports involving known individuals).

[223] 541 U.S. at 175.

[224] DOD v. FLRA, 964 F.2d at 29-30.

[225] Forest Guardians v. FEMA, 410 F.3d 1214, 1219 & n.3 (10th Cir. 2005).

[226] 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, 656 F.2d at 865-66 (protecting identities of government officials investigated but not charged with any crime in "Watergate" investigation) (Exemption 7(C)); Diaz, No. 01-40070, slip op. at 10 (D. Mass. Dec. 20, 2001) (deciding that there would be "chilling" effect if conversations between inmates and their attorneys were disclosed to public anytime they spoke on monitored prison telephones); Church of Scientology v. Dep't of State, 493 F. Supp. 418, 421 (D.D.C. 1980) (finding that Church of Scientology offered no public interest and that it had "practice of harassing its 'suppressors'") (Exemptions 6 and 7(C)); Flower v. FBI, 448 F. Supp. 567, 571-72 (W.D. Tex. 1978) (noting that "it is doubtful" that individuals would
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D.C. Circuit, in Fund for Constitutional Government v. National Archives & Records Service, has recognized that the "public interest properly factors into both sides of the balance."[227]

The Balancing Process

Once both the privacy interest at stake and the public interest in disclosure have been ascertained, the two competing interests must be weighed against one another.[228] In other words, it must be determined which is the greater result of disclosure: the harm to personal privacy or the benefit to the public.[229] In balancing these interests, "the 'clearly unwarranted' language of Exemption 6 weights the scales in favor of disclosure,"[230] but if the public benefit is weaker than the threat to privacy, the

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[226](...continued)
cooperate with law enforcement if their privacy were not protected) (Exemption 7(C)); see also Favish, 541 U.S. at 170 (implying that nondisclosure result necessarily serves society's strong interest in denying "gruesome requests" made by "convicted felons" for photos of their victims); Tomscha v. GSA, No. 03-6755, 2004 WL 1234043, at *5 (S.D.N.Y. June 3, 2004) (finding that the agency has an interest "in encouraging managers and supervisors to comment candidly on an employee without fear their statements will become public," but assigning this interest to the privacy side of the balance); Kelly v. CIA, No. 00-2498, slip op. at 15 (D.D.C. Aug. 8, 2002) (observing that agency should factor in public interest at time that classification decision is made, and further noting that requester's asserted public interest in disclosure of requested information will not undermine proper classification because it certainly is in public interest to withhold information that would damage national security) (Exemption 1), modified in other respects, No. 00-2498, slip op. at 1 (D.D.C. Sept. 25, 2002), appeal on adequacy of search dismissed on procedural grounds, No. 02-5384, 2003 WL 21804101 (D.C. Cir. July 31, 2003).

[227] 656 F.2d at 865; see also FOIA Update, Vol. III, No. 4, at 5 (advising that there is a "sound basis" for agencies to look at the public interest in nondisclosure in order to "determine the 'net' public interest involved").

[228] See Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Cawthon v. U.S. Dep't of Justice, No. 05-0567, 2006 WL 581250, at *4 (D.D.C. Mar. 9, 2006) (finding that the plaintiff's bare allegations fail to establish a public interest, and stating that "[a]bsent any evidence of agency impropriety, the balancing inquiry does not come 'into play'" (quoting NARA v. Favish, 541 U.S. 157, 175, reh'g denied, 541 U.S. 1057 (2004))).

[229] See Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); see FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking").

[230] Ripskis, 746 F.2d at 3.

latter will prevail and the information should be withheld.[231] The threat to privacy need not be immediate or direct;[232] it need only outweigh the public interest.[233]

Although "the presumption in favor of disclosure is as strong [under Exemption 6] as can be found anywhere in the Act,"[234] the courts have most vigorously protected the personal, intimate details of an individual's life -- consistently protecting personal information that, if disclosed, is likely to cause the individual who is involved personal distress or embarrassment. Courts regularly uphold the nondisclosure of information concerning such things as:

(1) marital status;

(2) legitimacy of children;

(3) welfare payments;

(4) family fights and reputation;[235]

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[231] See FOIA Update, Vol. X, No. 2, at 6 (emphasizing possible applicability of Privacy Act's disclosure prohibitions, particularly in light of Reporters Committee); see also Judicial Watch v. FDA, 449 F.3d 141, 153 (D.C. Cir. 2006) (upholding FDA's withholding names of agency personnel, private individuals, and companies who worked on approval of mifepristone (RU-486 abortion drug), as well as addresses of intervenors and all business partners associated with manufacturing of mifepristone; concluding that "[i]n the absence of a legitimate public interest, the private interest in avoiding harassment or violence tilts the scales"). But cf. Lahr v. NTSB, 453 F. Supp. 2d 1153, 1183-84 (C.D. Cal. 2006) (ordering the disclosure of names and identification numbers of eyewitnesses to TWA Flight 800 crash; concluding that eyewitnesses' privacy interests are outweighed by significant public interest in getting to the bottom of alleged "massive cover-up" by the government of alleged missile strike on Flight 800) (Exemptions 6 and 7(C)) (appeal pending).

[232] See Favish, 541 U.S. at 167 (relying, in finding threat to privacy, on expectation of renewed media exploitation if photographs were to be released).

[233] See 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," and noting that the threat to privacy does not have to be "obvious").

[234] Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

[235] See, e.g., Rural Hous. Alliance v. USDA, 498 F.2d 73, 77 (D.C. Cir.

(continued...)

(5) medical condition;[236]

(6) date of birth;[237]

(7) religious affiliation;[238]

(8) citizenship data;[239]

(9) genealogical history establishing membership in a Native Ameri-

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[235](...continued)
1974); see also Hardison v. Sec'y of VA, 159 F. App'x 93, 94 (11th Cir. 2005) (dates of marriage and spouses' names).

[236] See, e.g., McDonnell v. United States, 4 F.3d 1227, 1254 (3d Cir. 1993) ("living individual has a strong privacy interest in withholding his medical records"); Rural Hous. Alliance, 498 F.2d at 77; Pub. Employees for Envtl. Responsibility v. U.S. Dep't of the Interior, No. 06-182, 2006 U.S. Dist. LEXIS 85787, at *15 n.4 (D.D.C. Nov. 28, 2006) (noting that Department of the Interior properly invoked Exemption 6 in withholding information detailing employee's physical ailments and medical advice regarding those ailments); Sousa v. U.S. Dep't of Justice, 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 Oliver North's medical records would not shed light on conduct of Marine Corps).

[237] See, e.g., Hardison, 159 F. App'x at 93; 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).

[238] See, e.g., Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 747 (9th Cir. 1979). But cf. Tangerine Rd. Assocs. v. U.S. Fish & Wildlife Serv., No. 02-614, slip op. at 3 (D. Ariz. May 5, 2004) (requiring release of pygmy owl locations because although Indian tribe considered pygmy owls sacred, defendant did not offer evidence showing that specific locations of the owls are sacred).

[239] 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. v. U.S. Dep't of Commerce, 83 F. Supp. 2d at 112 (visa and passport data).

can Tribe;[240]

(10) social security numbers;[241]

(11) criminal history records (commonly referred to as "rap sheets");[242]

(12) incarceration of United States citizens in foreign prisons;[243]

(13) sexual inclinations or associations;[244] and

(14) financial status.[245]

Even "favorable information," such as details of an employee's outstanding performance evaluation, can be protected on the basis that it "may well

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[240] 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).

[241] 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); Peay v. Dep't of Justice, 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); Kuffel v. U.S. Bureau of Prisons, 882 F. Supp. 1116, 1122 (D.D.C. 1995) (Exemption 7(C)); Fid. Nat'l Title Ins. Co. v. HHS, No. 91-5484, slip op. at 6-7 (C.D. Cal. Feb. 13, 1992).

[242] See, e.g., U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989); Judicial Watch, Inc. v. U.S. Dep't of Justice, 365 F.3d 1108, 1124-26 (D.C. Cir. 2004) (protecting pardon applications, which include information about crimes committed).

[243] See Harbolt v. Dep't of State, 616 F.2d 772, 774 (5th Cir. 1980).

[244] See, e.g., Horowitz v. Peace Corps, 428 F.3d 271, 279-80 (D.C. Cir. 2005) (recognizing that "strong privacy interests are implicated when dealing with an individual's sexual activity, especially when the individual has reported a sexual assault"); Siminoski v. FBI, No. 83-6499, slip op. at 28 (C.D. Cal. Jan. 16, 1990).

[245] See, e.g., 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. 98-1568 (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).

embarrass an individual or incite jealousy" among co-workers.[246] Moreover, release of such information "reveals by omission the identities of employees who did not receive high ratings, creating an invasion of their privacy."[247]

A subject that has generated extensive litigation and that warrants special discussion is requests for compilations of names and home addresses of individuals. Prior to the Reporters Committee decision, the courts' analyses in "mailing list" cases ordinarily turned on the requester's purpose, or the "use" to which the requested information was intended to be put.[248] The Supreme Court in Reporters Committee, however, firmly repudiated any analysis based on the identity, circumstances, or intended

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[246] Ripskis, 746 F.2d at 3; see Hardison, 159 F. App'x at 93 (performance appraisals); Tomscha v. GSA, 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."); 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 U.S. Dist. LEXIS 80936, at *17 (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."); Peralta v. U.S. Attorney's Office, 69 F. Supp. 2d 21, 33 (D.D.C. 1999) (letters of commendation for work on investigation of plaintiff). 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).

[247] FLRA v. U.S. Dep't of Commerce, 962 F.2d at 1059.

[248] See, e.g., Aronson v. HUD, 822 F.2d 182, 185-87 (1st Cir. 1987) (holding that public interest in "the disbursement of funds the government owes its citizens" outweighs the privacy interest of such citizens to be free from others' attempts "to secure a share of that sum" when the government's efforts at disbursal are inadequate); Van Bourg, Allen, Weinberg & Roger v. NLRB, 728 F.2d 1270, 1273 (9th Cir. 1984) (identifying strong public interest in determining whether election fairly conducted), vacated, 756 F.2d 692 (9th Cir.), reinstated, 762 F.2d 831 (9th Cir. 1985); Getman v. NLRB, 450 F.2d 670, 675-76 (D.C. Cir. 1971) (holding public interest in need for study of union elections sufficient to warrant release to professor); Nat'l Ass'n of Atomic Veterans, Inc. v. Dir., Def. Nuclear Agency, 583 F. Supp. 1483, 1487-88 (D.D.C. 1984) (ordering disclosure of names and addresses of veterans involved in atomic testing because of public interest in increasing their knowledge of benefits and possible future health testing).

purpose of the particular FOIA requester at hand.[249] Rather, it said, the analysis must turn on the nature of the document and its relationship to the basic purpose of the FOIA.[250] Following Reporters Committee, the Court of Appeals for the District of Columbia Circuit found that those cases relying on the stated "beneficial" purpose of the requester were grounded on the now-disapproved proposition that "Exemption 6 carries with it an implicit limitation that the information, once disclosed, [may] be used only by the requesting party and for the public interest purpose upon which the balancing was based."[251]

Because agencies may neither distinguish between requesters nor limit the use to which disclosed information is put,[252] an analysis of the

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[249] 489 U.S. at 771-72; see also Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 355-56 (1997) (summarily rejecting argument that there is public interest in knowing to whom government is sending information so that those persons can receive information from other sources).

[250] 489 U.S. at 772; see also FOIA Update, Vol. X, No. 2, at 5-6 (advising that old "use" test has been overruled and should no longer be followed).

[251] Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989) [hereinafter NARFE]; see also Prof'l Programs Group v. Dep't of Commerce, 29 F.3d 1349, 1353-55 (9th Cir. 1994) (withholding names and addresses of persons registered to take patent bar examination); Gannett Satellite Info. Network, Inc. v. U.S. Dep't of Educ., No. 90-1392, 1990 WL 251480, at *6-7 (D.D.C. Dec. 21, 1990) (denying access to names, social security numbers, and addresses of individuals who have defaulted on government-backed student loans); Schoettle v. Kemp, 733 F. Supp. 1395, 1397-98 (D. Haw. 1990) (relying upon both Reporters Committee's observation that "public interest" is not equivalent to "interesting or socially beneficial in some broad sense" and HUD's improved methods of tracing people, to withhold identities of mortgagors eligible for distributions of money); cf. Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) (ruling that FOIA does not authorize limited access to only one individual based upon that individual's personal knowledge of information contained in records). But see ACLU v. DOD, 389 F. Supp. 2d 547, 573 (S.D.N.Y.) (relying, in part, on the requester's desire "to inform and educate the public, and to spark debate" as relevant to the public interest found in the disclosure of photographs and videos of Abu Ghraib prison detainees), reconsideration denied, 396 F. Supp. 2d 459 (S.D.N.Y. 2005), relief from judgment denied, 406 F. Supp. 2d 330 (S.D.N.Y. 2006) (appeal pending); Aronson v. HUD, No. 88-1524, slip op. at 1 (1st Cir. Apr. 6, 1989) (affirming award of attorney fees to plaintiff on basis that disclosure of list of mortgagors to whom HUD owes money sheds light on agency's performance of its duty to reimburse those mortgagors).

[252] See Favish, 541 U.S. at 174 ("It must be remembered that once there is disclosure, the information belongs to the general public. There is no

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consequences of disclosure of a mailing list cannot turn on the identity or purpose of the requester.[253] Thus, it was found to be irrelevant by the Supreme Court in Bibles v. Oregon Natural Desert Ass'n that the requester's purpose was to use the Bureau of Land Management mailing list to send information reflecting another viewpoint to people who had received newsletters reflecting the government's viewpoint.[254] In NARFE, it was found to be irrelevant that the requester's purpose was to use the list of federal retirees to aid in its lobbying efforts on behalf of those retirees.[255] While stopping short of creating a nondisclosure category encompassing all mailing lists, the D.C. Circuit in NARFE did hold that mailing lists consisting of names and home addresses of federal annuitants are categorically withholdable under Exemption 6.[256] (See discussion of "derivative use" theory under Exemption 6, Factoring in the Public Interest, above.)

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[252](...continued)
mechanism under FOIA for a protective order allowing only the requester to see . . . the information . . . or for proscribing its general dissemination."); Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004) (stating that "any information available to [the requester] is available to North Korea's secret police and Iran's counterintelligence service too") (Exemption 1); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (advising that "[i]n Favish, of course, this meant that the expected 'public exploitation' of the requested records through 'attempts to exploit pictures of the deceased family member's remains for public purposes' by the media . . . were properly taken into consideration").

[253] See NARFE, 879 F.2d at 875; see also Favish, 541 U.S. at 172 (explaining that "[a]s a general rule, if the information is subject to disclosure, it belongs to all").

[254] 519 U.S. at 355-56; see also FOIA Update, Vol. XVIII, No. 1, at 1.

[255] 879 F.2d at 879; see also Robbins, No. 1:95-cv-3258, slip op. at 8-9 (N.D. Ga. Aug. 12, 1996) (rejecting plaintiff's claim of intent to use the names and addresses of rejected social security disability claimants to represent them and "thereby 'promote the effective uniform administration of the disability program'" and ultimately reveal the agency's wrongful denials as "too attenuated" to outweigh a significant invasion of privacy (quoting plaintiff's papers)); Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 809 F. Supp. 148, 150 (D.D.C. 1993) (finding that requester's function as "significant consumer rights advocate" does not imply a right to "take over the functions of NHTSA").

[256] 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 elections)).

Although the Supreme Court twice has specifically considered the issue and, without dissent, held that compilations of names and home addresses of United States residents are protectible under Exemption 6,[257] several lower courts nonetheless subsequently have ordered the disclosure of such lists. Some of these courts have found little or no privacy interest in the names and addresses.[258] 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 the agency conducted some aspect of its business.[259] One court, in a parti-

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

[258] See Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 36 (D.C. Cir. 2002) (finding the privacy interest "relatively weak," and determining that the public interest in learning about an agency's use of owl data is served by release of the lot numbers of parcels of land where the owls have been spotted, even while acknowledging that the identities of landowners could be determined by use of this information), reconsideration denied, No. 01-5283 (D.C. Cir. Feb. 3, 2003) (per curiam); 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); 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)), appeal dismissed voluntarily, No. 01-1537 (4th Cir. June 25, 2001); 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). But cf. Dream Palace v. County of Maricopa, 384 F.3d 990, 1010-12 (9th Cir. 2004) (recognizing privacy interest of exotic dancers in their names, addresses, and telephone numbers appearing on work-permit applications, due to potential harassment that could arise from public disclosure of such information) (non-FOIA case).

[259] 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 as-

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cularly unusual decision, ordered disclosure of the names and cities of residence of individuals granted permits to use Forest Service lands to "aid in determining whether improper influence is used to obtain permits or whether permits are being granted to those with a past history of environmental abuses," but affirmed the withholding of street addresses because there was "no showing that knowledge of the street addresses will provide additional insight into agency activities that would not be revealed with disclosure of names and cities of residence alone."[260]

Another recently decided case, Sun-Sentinel Co. v. United States Department of Homeland Security, contains a useful delineation between what should be withheld and what should be disclosed.[261] In Sun-Sentinel, the District Court for the Southern District of Florida ordered the disclosure of the addresses of claimants awarded disaster relief by FEMA, but found

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[259](...continued)
sess 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 the 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. U.S. Dep't of Justice, 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 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").

[260] Idaho v. U.S. Forest Serv., No. 97-0230-S, slip op. at 6 (D. Idaho Dec. 9, 1997); see Judicial Watch v. U.S. Dep't of Justice, 102 F. Supp. 2d 6, 17-18 (D.D.C. 2000) (allowing withholding of home addresses and telephone numbers of individuals who wrote to Attorney General about campaign finance or Independent Counsel issues, but concluding that in the event any individuals were elected officials their identities might possibly reveal information to the public "which could suggest that their Justice Department had been steered by political pressure rather than by relevant facts and law"), reconsideration denied temporarily pending in camera review, No. 97-CV-2869 (D.D.C. Aug. 17, 2000).

[261] 431 F. Supp. 2d at 1267-75 (involving records pertaining to FEMA's recovery activities during 2004 hurricane season in Florida).

that the names of the recipients deserved privacy.[262] It also ordered the release of the names and identification numbers of FEMA inspectors.[263]

In Sun-Sentinel, noting that there is "a substantial privacy interest in a home address,"[264] the court found that "there is a substantial and legitimate public interest in FEMA's handling of disaster assistance in the wake of recent hurricanes."[265] Upon balancing the two interests, it permitted the release of the disaster claimants' addresses because the public interest outweighed the privacy interest as "[t]he release of these addresses will shed light on the activities and operations of FEMA; namely, the extent to which ineffective quality controls and processing of aid applications may have resulted in wasteful spending of taxpayer dollars by FEMA."[266] The court went on to state that "[m]erely knowing the number of claimants and the amount of relief awarded to claimants within a geographic area as large as a zip code does not provide sufficient data for an interested citizen to evaluate the manner in which FEMA carried out its statutory responsibilities."[267] Finding that "the privacy interest in names equals the privacy interest in home addresses,"[268] the court did not permit the release of the names of disaster claimants, concluding that "that the release of names would not serve the public interest of demonstrating the operations and activities of FEMA" because "the possibility of finding fraud through the release of names is speculative."[269] Explaining its reasoning, the court stated that "[w]hereas the addresses go to the heart of whether FEMA improperly disbursed funds to property that sustained no damage, the names of disaster claimants are not as probative."[270]

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[262] Id. at 1267-73.

[263] Id. at 1273-75.

[264] Id. at 1269.

[265] Id. ("As a result of the 2004 hurricane season, FEMA disbursed billions of dollars to approximately 1.2 million applicants . . . . [S]everal investigations unearthed that FEMA's disbursement of assistance was rife with fraud and waste.").

[266] Id. at 1270, 1273 n.12 (stating that the court "believes that the release of the these addresses, despite the substantial privacy interest, is uniquely important under the facts of this case").

[267] Id. at 1270.

[268] Id.

[269] Id. at 1271-72.

[270] Id. at 1271 (reasoning that "[o]nce the addresses are released, the inquiry would concern whether the property sustained the damage claimed and the name of the disaster claimant would not shed additional

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Then, the court in Sun-Sentinel addressed the release of the names and identification numbers of FEMA inspectors, concluding that the public interest outweighed privacy.[271] It found that "the record demonstrates that there is a strong public interest in the disclosure of the identities of the FEMA inspectors."[272] The court concluded that the release of the names and identification numbers of FEMA inspectors would be in the public interest because it would "allow the public to examine fully whether the process of selecting FEMA inspectors should be improved and whether these inspectors violated the public's trust in awarding disaster assistance."[273] On the privacy side of the balance, the court also specifically noted FEMA's failure to provide any case law showing that the release would constitute a "clearly unwarranted" invasion of privacy.[274] In fact, the court was "hard pressed to understand how revealing that an individual works for a government contractor would constitute an invasion of privacy."[275]

In another exceptional decision, the D.C. Circuit remanded a case to the district court to determine whether some of the names of individual depositors with unclaimed funds at banks for which the FDIC is now the receiver should be released to a professional money finder.[276] 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."[277] As guidance to the lower court charged with applying this novel approach, the D.C. Circuit ordered, first, that "release of names associated with unclaimed deposits

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[270](...continued)
light on this inquiry").

[271] Id. at 1274.

[272] Id. at 1273-74 (pointing to record evidence consisting of findings by Inspector General and Homeland Security and Government Affairs Committee showing that FEMA inspectors were poorly trained, lacked oversight, and filled out forms without examining purportedly damaged property; finding further that record evidence showed that significant number of inspectors had criminal records); cf. CEI Wash. Bureau, Inc. v. Dep't of Justice, No. 05-5446, slip op. at 2-5 (D.C. Cir. Nov. 21, 2006) (remanding and vacating lower court decision for "affidavits [or] evidentiary hearings sufficient to resolve the factual disputes" on existing privacy-protection record).

[273] Id. at 1274.

[274] Id.

[275] Id.

[276] Lepelletier v. FDIC, 164 F.3d 37, 48-49 (D.C. Cir. 1999).

[277] Id. at 48.

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."[278] It is unclear, however, whether this highly unconventional privacy balancing analysis can be squared with the subsequent analysis of personal privacy protection that was adopted by the Supreme Court in Favish.[279]

Other courts, more in line with the teachings of the Supreme Court, have protected compilations of names and addresses. For example, when the request clearly is for the purpose of soliciting business or for other commercial purposes, most courts readily have found mailing lists to be protectible.[280] Even when there is no apparent commercial interest at stake, other courts have found the possible public interest too attenuated to overcome the clear privacy interest an individual has in his name and home ad-

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[278] Id.; see also Pub. Citizen, Inc. v. Dep't of Educ., No. 01-2351, slip op. at 5-12 (D.D.C. June 17, 2002) (relying on Lepelletier and finding both "substantial benefits" to borrowers by disclosure and a public interest benefit in showing the extent of compliance with statutory duties). But see Reporters Comm., 489 U.S. at 772 n.20 (noting that Congress made no statement that the FOIA was designed for broader uses to serve the "social good"); Schoettle, 733 F. Supp. at 1397-98 (relying on Reporters Committee's observation that "public interest" is not equivalent to "interesting or socially beneficial in some broad sense," in protecting identities of mortgagors eligible for distributions of money); cf. Doe v. FBI, 218 F.R.D. 256, 259 (D. Colo. 2003) (rejecting plaintiff's argument that even if his own privacy interest is not compelling the court should consider other parties' privacy interests, and concluding that "the Court will not allow Plaintiff to piggyback on their privacy interests" in order to achieve an unconventional nondisclosure result) (non-FOIA case).

[279] See 541 U.S. at 174-75 (instructing that "counterweight" necessary to balance against privacy interest exists only when requester provides sufficient evidence); cf. *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (explaining that Favish discredits "or effectively overrules" several prior decisions that ordered disclosure based on allegations of wrongdoing).

[280] See, e.g., Prof'l Programs, 29 F.3d at 1353-55 (withholding names and addresses of persons registered to take patent bar examination from business offering patent bar exam preparation courses to lawyers); Robbins, No. 1:95-cv-3258, slip op. at 8-9 (N.D. Ga. Aug. 12, 1996) (withholding names and addresses of rejected social security disability claimants from attorney hoping to solicit business); Schoettle, 733 F. Supp. at 1397-98 (declining to order release of identities of mortgagors eligible for distributions of money).

dress.[281] Yet other courts have protected mailing lists, emphasizing the increased privacy interest inherent in a list that reveals sensitive information beyond the mere names and addresses of the individuals found on the list.[282] And when a requester seeks the address of a named individual for a

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[281] See Reed, 927 F.2d at 1252 (protecting names and addresses of employees eligible to vote in union representation elections); Navigator Publ'g v. U.S. Dep't of Transp., 146 F. Supp. 2d 68, 71 (D. Me. 2001) (concluding that "significant" privacy interest in mariners' addresses outweighs "hypothetical" public interest in matching addresses against criminal records to permit evaluation of Coast Guard performance of its licensing duties), appeal dismissed, No. 01-1939 (1st Cir. Sept. 19, 2001); Judicial Watch v. Reno, 2001 WL 1902811, at *8 (discerning no public interest in disclosure of names and telephone numbers of nongovernment attendees at meeting with federal immigration officials); Fort Hall Landowners Alliance, Inc. v. Bureau of Indian Affairs, No. 99-00052, slip op. at 13 (D. Idaho Mar. 17, 2000) (protecting list of landowner names, addresses, and ownership interests on basis that there is no qualifying public interest in facilitating attorney representation of landowners in right-of-way negotiations); Dayton Newspapers, Inc. v. Dep't of the Air Force, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998) (redacting "claimants' names, social security numbers, home addresses, home/work telephone numbers and places of employment" from militarywide medical tort-claims database), reh'g denied in pertinent part, No. C-97-78, slip op. at 13-14 (S.D. Ohio Mar. 26, 1999); Horsehead Indus. v. EPA, No. 94-1299, slip op. at 6 (D.D.C. Mar. 13, 1997) (finding that the possible "glimpse into EPA's activities" that would accrue from disclosure of identities of homeowners who volunteered to participate in a Superfund study "pales in comparison to the potential harm to the privacy" of study participants); Stabasefski, 919 F. Supp. at 1575 (determining that disclosure of names of FAA employees who received Hurricane Andrew subsistence payments would shed no brighter light on agency activities than vouchers that were released showing amounts of payments); Upper Peninsula Envtl. Coal. v. Forest Serv., No. 2:94-cv-021, slip op. at 9-10 (W.D. Mich. Sept. 28, 1994) (concluding that information already provided about wilderness campers (i.e., dates, campsite, number in party, state of auto registration) sheds sufficient light on agency's performance of duties without disclosure of names and addresses of campers); Gannett Satellite, 1990 WL 251480, at *6-7 (concluding that names, social security numbers, and addresses of individuals who defaulted on government-backed student loans do not themselves directly reveal anything about student loan programs).

[282] 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

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purely private purpose, courts have found the privacy interest to be at its zenith and the public interest to be at its nadir.[283]

Another area that merits particular discussion is the applicability of Exemption 6 to requests for information about civilian and military federal employees. Generally, civilian employees' names, present and past position titles, grades, salaries, and duty stations are releasable as no viable privacy interest exists in such data.[284] The Department of Justice recommends the release of additional items, particularly those relating to professional qualifications for federal employment.[285] By regulation, the Department of the Army discloses the name, rank, date of rank, gross salary, duty assignments, office telephone number, source of commission, promotion sequence number, awards and decorations, educational level, and duty status of most of its military personnel and the name, past and present position titles, grades, salaries, and duty stations of its civilian employ-

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[282](...continued)
"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.").

[283] See, e.g., Schwarz v. Dep't of State, No. 97-1342, slip op. at 5 (D.D.C. Mar. 20, 1998) (stating, despite plaintiff's claim that she needed the address of a 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); Bongiorno v. Reno, No. 95-72143, 1996 WL 426451, at *14 (E.D. Mich. Mar. 19, 1996) (noting that the requester sought personal information concerning his adopted daughter "for his own purposes, as understandable as they may be, and not to shine a public light into the recesses of the federal bureaucracy"); Andrews v. U.S. Dep't of Justice, 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).

[284] See 5 C.F.R. § 293.311 (2007); see also FOIA Update, Vol. VII, No. 3, at 3.

[285] See FOIA Update, Vol. III, No. 4, at 3; see also Core v. USPS, 730 F.2d 946, 948 (4th Cir. 1984) (qualifications of successful federal applicants); Samble v. U.S. Dep't of Commerce, No. 1:92-225, slip op. at 11 (S.D. Ga. Sept. 22, 1994) (far-reaching decision 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).

ees.[286] Historically, the entire Department of Defense disclosed the same information and other nonsensitive data concerning most of its servicemembers and civilian employees.[287]

By statutory enactment as well as by regulation, certain military personnel throughout the Department of Defense are properly afforded greater privacy protection than other servicemembers and nonmilitary employees.[288] Even prior to enactment of such special statutory protection, courts had found that because of the threat of terrorism, military servicemembers stationed outside the United States have a greater expectation of privacy.[289] Courts have, however, ordered the release of names of military personnel stationed in the United States.[290] In light of terrorist activities with

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[286] Army Reg. 340-21, ¶ 3-3a(1), b(1), 5 July 1985; see also Army Reg. 25-55, ¶ 3-200, No. 6(b), 1 Nov. 1997 (providing for withholding of names and duty addresses of military personnel assigned to units that are "sensitive, routinely deployable or stationed in foreign territories").

[287] See Department of Defense Freedom of Information Act Program Regulation, DOD 5400.7-R, 37-39 (Sept. 1998); Memorandum from Department of Defense Directorate for Freedom of Information and Security Review 1 (Oct. 26, 1999) (applying same analysis as DOD 5400.7-R to electronic mail addresses, and authorizing withholding only for "personnel assigned to units that are sensitive, routinely deployable or stationed in foreign territories").

[288] See 10 U.S.C. § 130b (2000 & Supp. IV 2004); Department of Defense Freedom of Information Act Program Regulations, 32 C.F.R. § 286.12(f)(2)(ii) (2006) ("Names and duty addresses (postal and/or e-mail) . . . for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under [Exemption 6].").

[289] See Jernigan v. Dep't of the Air Force, No. 97-35930, 1998 WL 658662, at *1 (9th Cir. Sept. 17, 1998) (agreeing with the Air Force that "'[i]dentifying [its] personnel overseas increases the threat of terrorism and the likelihood that they will be targeted for attack'"); Hudson v. Dep't of the Army, No. 86-1114, 1987 WL 46755, at *3-4 (D.D.C. Jan. 29, 1987) (finding threat of terrorism creates privacy interest in names, ranks, and addresses of Army personnel stationed in Europe, Middle East, and Africa), aff'd, 926 F.2d 1215 (D.C. Cir. 1991) (unpublished table decision); Falzone v. Dep't of the Navy, No. 85-3862, 1988 WL 128474, at *1-2 (D.D.C. Nov. 21, 1988) (finding same with respect to names and addresses of naval officers serving overseas or in classified, sensitive, or readily deployable positions).

[290] See Hopkins v. Dep't of the Navy, No. 84-1868, 1985 WL 17673, at *2 (D.D.C. Feb. 5, 1985) (ordering disclosure of "names, ranks and official duty stations of servicemen stationed at Quantico" to life insurance salesman); Jafari v. Dep't of the Navy, 3 Gov't Disclosure Serv. (P-H) ¶ 83,250, at 84,014 (E.D. Va. May 11, 1983) (finding no privacy interest in "duty status" or at-

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in the United States and the resulting heightened security awareness nationwide, however, the Department of Defense now withholds personally identifying information concerning its military and civilian personnel stationed within the United States whenever release would "raise security or privacy concerns."[291]

This new practice now has been upheld by the District Court for the District of Columbia: In Judicial Watch, Inc. v. Department of the Army, that court protected the names and duty stations of DOD employees named in documents concerning no-bid contracts awarded following the 2003 invasion of Iraq.[292] Additionally, certain other federal employees such as law enforcement personnel and Internal Revenue Service employees possess, by virtue of the nature of their work, protectible privacy interests in their identities and work addresses.[293] (See the further discussions of these is-

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[290](...continued)
tendance records of reserve military personnel) (Privacy Act "wrongful disclosure" suit), aff'd on other grounds, 728 F.2d 247 (4th Cir. 1984).

[291] See Department of Defense Director for Administration and Management Memorandum 1-2 (Nov. 9, 2001), available at www.defenselink.mil/pubs/foi/withhold.pdf.

[292] 402 F. Supp. 2d at 250-52 (finding that "[t]he privacy interest of civilian federal employees includes the right to control information related to themselves"); see also 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)).

[293] See 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)); Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 487-88 (D.C. Cir. 1980) (protecting identities of FBI Special Agents) (Exemption 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); Voinche v. FBI, 412 F. Supp. 2d 60, 66-69 (D.D.C.) (protecting identities of FBI Special Agents, nonagent FBI personnel, and state and local law enforcement officials) (Exemptions 6 and 7(C)), summary judgment granted, 425 F. Supp. 2d 134 (D.D.C. 2006) (Exemption 7(C)); Gonzalez v. ATF, No. 04-2281, 2005 WL 3201009, at *7-8 (D.D.C. Nov. 9, 2005) (same) (Exemptions 6 and 7(C)); 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 In-
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sues under Exemption 2, "Low 2": Trivial Matters, above, and Exemption 7(C), below.)

Purely personal details pertaining to government employees are protectible under Exemption 6.[294] Indeed, courts generally have recognized

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[293](...continued)
spector General and Bureau of Indian Affairs employees in report of investigation) (Exemptions 6 and 7(C)); 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 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); Pons v. U.S. Customs Serv., No. 93-2094, 1998 U.S. Dist. LEXIS 6084, at *13-14 (D.D.C. Apr. 27, 1998) (protecting identities of lower- and mid-level agency employees who worked on asset forfeiture documents); Lampkin v. IRS, No. 1:96-138, 1997 WL 373717, at *2 (W.D.N.C. Feb. 24, 1997) (protecting identities of IRS employees who, by nature of employment, are subject to harassment and annoyance) (Exemption 7(C)); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 565, 569 (S.D.N.Y. 1989) (permitting withholding of the identities of FBI agents and support staff, who "have a particularly strong interest in maintaining their privacy in the present action due to the divided public opinion and heightened interest in [this] case") (Exemptions 6 and 7(C)); see also FOIA Update, Vol. VII, No. 3, at 3-4. But see Lahr v. NSTB, No. 03-8023, 2006 WL 2854314, at *14-15 (C.D. Cal. Oct. 4, 2006) (ordering the release of the names of FBI Special Agents involved in the investigation of the crash of TWA Flight 800 on the basis that it is "unlikely that the FBI Special Agents will be subjected to harassment or annoyance" inasmuch as there is "no aggrieved 'target' or defendant" due to the investigation's conclusion that there was no criminal wrongdoing) (Exemptions 6 and 7(C)).

[294] See, e.g., DOD v. FLRA, 510 U.S. 487, 500 (1994) (employees' home addresses); Am. Fed'n of Gov't Employees v. United States, 712 F.2d 931, 932-33 (4th Cir. 1983) (same); Singleton v. Executive Office for United States Attorneys, No. 05-2413, slip op. at 4 (D.D.C. Nov. 1, 2006) ("Disclosure of the [Assistant United States Attorneys'] home addresses would constitute a clearly unwarranted invasion of personal privacy."); Brannum v. Dominguez, 377 F. Supp. 2d 75, 84 (D.D.C. 2005) (names and signatures of Air Force Personnel Board members); Kidd v. Dep't of Justice, 362 F. Supp. 2d 291, 296-97 (D.D.C. 2005) (home telephone number); Barvick v. Cisneros, 941 F. Supp. 1015, 1020-21 (D. Kan. 1996) (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, 919 F. Supp. at 1575 (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 em-
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the sensitivity of information contained in personnel-related files and have accorded protection to the personal details of a federal employee's service.[295] In addition, the identities of persons who apply but are not selected for federal government employment may be protected.[296] Even sugges-

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[294](...continued)
ployees filing claims under Federal Employees Compensation Act); Info. Acquisition Corp. v. Dep't of Justice, 444 F. Supp. 458, 463-64 (D.D.C. 1978) ("core" personal information such as marital status and college grades). But see Wash. Post v. HHS, 690 F.2d at 258-65 (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).

[295] 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. U.S. Dep't of Justice, 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. U.S. Dep't of Justice, 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).

[296] See Core, 730 F.2d at 948-49 (protecting identities and qualifications
(continued...)

tions submitted to an Employee Suggestion Program may be withheld to protect employees with whom the suggestions are identifiable from the embarrassment that might occur from disclosure.[297]

Similarly, the 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.[298] The D.C. Circuit has reaffirmed this position

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[296](...continued)
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 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 U.S. App. LEXIS 19089 (D.C. Cir. June 19, 1997); Putnam, 873 F. Supp. at 712-13 (protecting identities of FBI personnel who were job candidates); Holland v. CIA, No. 91-1233, 1992 WL 233820, at *13-15 (D.D.C. Aug. 31, 1992) (protecting identity of person not selected as CIA general counsel).

[297] See Matthews v. USPS, No. 92-1208-CV-W-8, slip op. at 5 (W.D. Mo. Apr. 15, 1994).

[298] See, e.g., Stern v. FBI, 737 F.2d 84, 94 (D.C. Cir. 1984) (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 v. Kurtz, 589 F.2d 827, 841-42 (5th Cir. 1979) (names of disciplined IRS agents); Cawthon, 2006 WL 581250, at *2-4 (protecting information about two Federal Bureau of Prisons doctors, including records pertaining to malpractice and disciplinary matters); Forest Serv. Employees for Envtl. 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."); Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 743-45 (E.D. Va. 1999) (unsubstantiated allegations of (continued...)

in Dunkelberger v. Department of Justice.[299] It made very clear in Dunkelberger that, even post-Reporters Committee, the D.C. Circuit's decision in Stern v. FBI remains solid 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.[300]

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[298](...continued)
prosecutorial misconduct) (Exemptions 6 and 7(C)); Chin v. U.S. Dep't of the Air Force, 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 v. Dep't of the Army, 970 F. Supp. 19, 40 (D.D.C. 1997) (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 v. Adams, 798 F. Supp. 22, 25-28 (D.D.C. 1992) (report of Inspector General's investigation of low-level employees of Smithsonian Institution museum shops); Schonberger v. Nat'l Transp. Safety Bd., 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 v. U.S. Marshals Serv., 655 F. Supp. 1088, 1091 (D.D.C. 1987) ("extremely strong interest" in protecting privacy of individual who cooperated with internal investigation of possible criminal activity by fellow employees). But see 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) (given previous disclosure of investigative report of helocasting accident, disclosure of actual discipline received would result in "insignificant burden" on soldiers' privacy interests).

[299] 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 realistically 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)).

[300] Id. 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. Dep't of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998) (protecting information about investigation of staff-level attorney for allegations of unauthorized disclosure
(continued...)

During the 1980s, a peculiar line of cases began to develop within the D.C. Circuit regarding the professional or business conduct of an individual. Specifically, the courts began to require the disclosure of information concerning an individual's business dealings with the federal government; indeed, even embarrassing information, if related to an individual's professional life, was subject to disclosure.[301] Similarly, the Court of Appeals for the Sixth Circuit suggested that the disclosure of a document prepared by a government employee during the course of his employment "will not constitute a clearly unwarranted invasion of personal privacy simply because it would invite a negative reaction or cause embarrassment in the sense that a position is thought by others to be wrong or inadequate."[302]

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[300](...continued)
of information to media) (Exemption 7(C)); Beck v. Dep't of Justice, 997 F.2d 1489, 1494 (D.C. Cir. 1993) (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 286, 288-90 (9th Cir. 1992) (protecting contents of investigative file of nonsupervisory FBI agent accused of unsubstantiated misconduct) (Exemption 7(C)); Early v. Office of Prof'l Responsibility, No. 95-0254, slip op. at 2-3 (D.D.C. Apr. 30, 1996) (upholding Office of Professional Responsibility'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 Assistant United States Attorneys) (Exemption 7(C)), summary affirmance granted, No. 96-5136, 1997 WL 195523 (D.C. Cir. Mar. 31, 1997).

[301] See, e.g., Wash. Post Co. v. U.S. Dep't of Justice, 863 F.2d 96, 100-01 (D.C. Cir. 1988) (information relating to business judgments and decisions made during development of pharmaceutical) (Exemption 7(C)); Sims v. CIA, 642 F.2d 562, 574 (D.C. Cir. 1980) (names of persons who conducted scientific and behavioral research under contracts with or funded by CIA); Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 399-400 (D.C. Cir. 1980) (identities of trade sources who supplied information to Commission); Cohen v. EPA, 575 F. Supp. 425, 430 (D.D.C. 1983) (names of suspected EPA "Superfund" violators) (Exemption 7(C)); Stern v. SBA, 516 F. Supp. 145, 149 (D.D.C. 1980) (names of agency personnel accused of discriminatory practices); see also Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d at 37-38 (résumés of executives of businesses approved for insurance by Export-Import Bank); Or. Natural Desert Ass'n, 24 F. Supp. 2d at 1093-94 (names of cattle owners who violated federal grazing laws; concluding that "the [professional or business] relationship of the individual and the government does weigh in favor of disclosure") (Exemption 7(C)).

[302] Schell v. HHS, 843 F.2d 933, 939 (6th Cir. 1988); see also Kurzon v. HHS, No. 00-395, 2001 WL 821531, at *7-11 (D.N.H. July 17, 2001) (ordering disclosure of names and business addresses of unsuccessful National Institute of Mental Health grant applicants, relying in part upon privacy analysis in Kurzon v. HHS, 649 F.2d 65, 69 (1st Cir. 1981), which court found "instructive" despite fact that First Circuit's "similar files" holding is no longer
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In five later cases, however, the D.C. Circuit reached firm nondisclosure decisions, with no discussion of this consideration at all.[303] Then it clarified that any such lack of privacy an individual has in his business dealings applies only to purely "'business judgments and relationships.'"[304] Indeed, an individual has a very strong interest in allegations of wrongdoing or in the fact that he or she was a target of a law enforcement investigation, even when the alleged wrongdoing occurred in the course of the

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[302](...continued)
good law post-Washington Post, 456 U.S. 595), appeal dismissed voluntarily, No. 01-2319 (1st Cir. Oct. 5, 2001); Physicians Comm. for Responsible Med. v. Glickman, 117 F. Supp. 2d 1, 5-6 (D.D.C. 2000) (finding that "asserted stigma of rejection is significantly diluted when shared among approximately 140" nonappointed applicants for membership in federal advisory committee); Lawyers Comm. for Human Rights, 721 F. Supp. at 569 (finding 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" because agency provided "no substantial evidence of . . . security or privacy interests"; however, protecting the names of FBI Special Agents and support staff from other documents because of "strong" privacy interests) (Exemptions 6 and 7(C)).

[303] Beck, 997 F.2d at 1492 (finding that when no evidence of wrongdoing exists, there is "no public interest to be balanced against the two [DEA] agents' obvious interest in the continued confidentiality of their personnel records"); Dunkelberger, 906 F.2d at 781-82 (recognizing that FBI Special Agent has privacy interest in protecting his employment records against public disclosure); Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 391-92 (D.C. Cir. 1987) (withholding identities of private-sector attorneys subject to Patent and Trademark Office disciplinary investigations); Stern, 737 F.2d at 91 (recognizing that federal employees have privacy interest in information about their employment); Ripskis, 746 F.2d at 3-4 (identifying "substantial privacy interests" in performance appraisals of federal employees); see also Hill, 77 F. Supp. 2d at 7-8 (shielding business information related to Farmers Home Administration loans to individuals); Prof'l Review Org., 607 F. Supp. at 427 (finding protectible privacy interests in résumés of professional staff of successful government contract applicant sought by unsuccessful bidder); Hemenway, 601 F. Supp. at 1006 (protecting citizenship information on journalists accredited to attend press briefings).

[304] McCutchen, 30 F.3d at 187-88 (quoting Wash. Post, 863 F.2d at 100); see also Fortson v. Harvey, 407 F. Supp. 2d 13, 17-18 (D.D.C. 2005) (finding no privacy interest in witness statements made during discrimination investigation, and relying on Sims v. CIA, 642 F.2d at 574, for proposition that Exemption 6 does not protect business-related information). But see Campaign for Family Farms, 200 F.3d at 1187-89 (finding privacy interest in pork producers' signatures on petition that declared signers' intended voting positions on controversial pork-production issue).

individual's professional activities.[305] Moreover, under Reporters Committee, an individual doing business with the federal government certainly may have some protectible privacy interest, and such dealings with the government do not alone necessarily implicate a public interest that furthers the purpose of the FOIA.[306]

In applying Exemption 6, it must be remembered that all reasonably segregable, nonexempt portions of requested records must be released.[307]

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[305] See, e.g., McCutchen, 30 F.3d at 187-88; Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 865-66 (D.C. Cir. 1981) (protecting identities of government officials investigated but not prosecuted in "Watergate" investigation) (Exemption 7(C)); cf. *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing "public figure" status and its realistic effect on privacy considerations).

[306] See 489 U.S. at 774 (ruling that information concerning a defense contractor, if such exists, would reveal nothing directly about the behavior of the congressman with whom he allegedly dealt or about the conduct of the Department of Defense in awarding contracts to his company); accord Halloran v. VA, 874 F.2d 315, 324 (5th Cir. 1989) (finding that public interest in learning about VA's relationship with its contractor is served by release of documents with redactions of identities of company employees suspected of fraud). But cf. Or. Natural Desert Ass'n, 24 F. Supp. 2d at 1093 (holding that privacy interests of cattle owners who violated federal grazing laws are outweighed by public interest in knowing how government enforces land-management laws) (Exemption 7(C)); Commodity News Serv. v. Farm Credit Admin., No. 88-3146, 1989 WL 910244, at *2 (D.D.C. July 31, 1989) (declining to protect personal résumé of appointed receiver of failed bank under Exemption 6).

[307] See 5 U.S.C. § 552(b) (2000 & Supp. IV 2004) (sentence immediately following exemptions); see, e.g., Kimberlin, 139 F.3d at 949-50 (declining to affirm withholding of the entire file pertaining to an Office of Professional Responsibility investigation of an Assistant United States Attorney without "more specification of the types of material in the file" and specific findings on segregability by the district court); Patterson v. IRS, 56 F.3d 832, 838-40 (7th Cir. 1995) (refusing to permit agency to withhold entire document under Exemption 6 if only "portions" are exempt); Hronek v. DEA, 16 F. Supp. 2d 1260, 1270, 1278 (D. Or. 1998) ("Blanket explanations . . . do not meet FOIA's [segregability] requirements and do not permit the court to make the necessary findings . . . . The government fails to indicate why the privacy interests at stake could not be protected simply by redacting particular identifying information."), aff'd, 7 F. App'x 591 (9th Cir. 2001); see also Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1026-29 (D.C. Cir. 1999) (imposing upon district courts "an affirmative duty to consider the segregability issue sua sponte" even if not raised by the requester) (Exemption 4); Krikorian v. Dep't of State, 984 F.2d 461, 466-67 (D.C. Cir. 1993) (""The "segregability" requirement applies to all documents

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(See the discussions of this issue under Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, below.) 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.[308] Likewise, circuit courts of appeals have upheld the nondisclosure of the names and identifying information of employee-witnesses when disclosure would link each witness to a particular previously disclosed statement,[309] have ordered the disclosure of computerized lists of numbers and types of drugs routinely ordered by the congressional

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[307](...continued)
and all exemptions in the FOIA.'" (quoting Ctr. for Auto Safety v. EPA, 731 F.2d 16, 21 (D.C. Cir. 1984))) (Exemptions 1, 3, and 5); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 83 F. Supp. 2d at 109 ("[D]istrict courts are required to consider segregability issues even when the parties have not specifically raised such claims."); Lowry v. Soc. Sec. Admin., No. 00-1616, 2001 U.S. Dist. LEXIS 23474, at *34-36 (D. Or. Aug. 29, 2001) (requiring the agency to "provide copies of the hearing tapes up to the point of the first question to the claimant" because those portions of the tapes take place "before any personal information about a claimant is revealed"); FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation").

[308] 425 U.S. at 380-81; see also FOIA Update, Vol. VII, No. 1, at 6; cf. Ripskis, 746 F.2d at 4 (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. U.S. Agency for Int'l Dev., 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); cf. 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).

[309] See L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923 (11th Cir. 1984) (Exemption 7(C)); cf. Ray, 502 U.S. at 175-76 (concluding that de minimis privacy invasion from release of personal information about unidentified person becomes significant when information is linked to particular individual). But see also 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)).

pharmacy after deletion of any item identifiable to a specific individual,[310] and have ordered the disclosure of documents concerning disciplined IRS employees, provided that all names and other identifying information were deleted.[311]

Nevertheless, in some situations the deletion of personal identifying information may not be adequate to provide necessary privacy protection.[312] It is significant in this regard that in Department of the Air Force v. Rose, the Supreme Court specifically admonished 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.[313]

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[310] See Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1468-69 (D.C. Cir. 1983); cf. Dayton Newspapers, 35 F. Supp. 2d at 1035 (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 breast cancer 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 urinalysis reports of air traffic controllers with identities deleted); Citizens for Envtl. 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))).

[311] See Chamberlain, 589 F.2d at 841-42; cf. Senate of P.R. v. Dep't of Justice, 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).

[312] 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)).

[313] 425 U.S. at 381; see also, e.g., ACLU v. DOD, 389 F. Supp. 2d at 572

(continued...)

Despite the admonition of the Supreme Court in Rose, though, a few isolated courts later permitted redaction only of information that directly identified the individuals to whom it pertains. In ordering the disclosure of information pertaining to air traffic controllers who were reinstated in their jobs shortly after their 1982 strike, the Sixth Circuit, in Norwood v. FAA, held that only items that "by themselves" would identify the individual -- names, present and pre-removal locations, and social security numbers -- could be withheld.[314] It later modified its opinion to state that, although there might be instances in which an agency could justify the withholding of "information other than 'those items which "by themselves" would identify the individuals,'" the FAA in this case had "made no such particularized effort, relying generally on the claim that 'fragments of information' might be able to be pieced together into an identifiable set of circumstances."[315]

Similarly, the District Court for the Northern District of California ordered the disclosure of application packages for candidates for an Air Force graduate degree program with the redaction of only the applicants' names, addresses, and social security numbers.[316] Although the packets regularly contained detailed descriptions of the applicants' education, careers, projects, and achievements, the court concluded that it could not "discern how there is anything more than a 'mere possibility' that [the requester] or others will be able to discern to which particular applicant each redacted application corresponds."[317] And more recently, the District Court for the Southern District of Ohio found "much too speculative" the Air Force's argument that disclosure of medical malpractice settlement figures could permit researchers to "comb local news articles, possibly discovering

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[313](...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, I [am] order[ing] those images not to be produced").

[314] 993 F.2d 570, 575 (6th Cir. 1993), modified, No. 92-5820 (6th Cir. July 9, 1993), reh'g denied (6th Cir. Aug. 12, 1993); see also Dayton Newspapers, Inc. v. VA, 257 F. Supp. 2d 988, 1006 (S.D. Ohio 2003) (ordering release of birthdates of individuals in claims database on basis that birthdates alone cannot be used to identify individuals).

[315] Norwood v. FAA, No. 92-5820, slip op. at 1 (6th Cir. July 9, 1993).

[316] Manos v. U.S. Dep't of the Air Force, No. C-92-3986, slip op. at 2-5 (N.D. Cal. Mar. 24, 1993), reconsideration denied (N.D. Cal. Apr. 9, 1993).

[317] Id. at 3; cf. Heat & Frost Insulators & Asbestos Workers, Local 16 v. U.S. Dep't of the Air Force, No. S92-2173, slip op. at 2-4 (E.D. Cal. Oct. 4, 1993) (ordering release of certified payroll records -- with names, addresses, social security numbers, race, and gender deleted -- even though number of characteristics revealed and small number of workers would make it likely that knowledgeable person could identify workers).

the identity of claimants and interfering with their privacy rights."[318] That court concluded that "[t]he mere possibility that factual information might be pieced together to supply the 'missing link,' and lead to personal identification, does not exempt such information from disclosure" under Exemption 6.[319] The same court, in a different case brought by the same FOIA requester, even went so far as to rule that the government cannot rely on the sophistication of modern online search engines as a justification to withhold information under Exemption 6.[320]

The Supreme Court recognized the power of "computer[ization]" as itself a powerful privacy-protection factor in Reporters Committee.[321] Indeed the overwhelming majority of courts take a much broader view of the redaction process.[322] For example, to protect those persons who were the subjects of disciplinary actions that were later dismissed, the D.C. Circuit has 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.[323] 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

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[318] Dayton Newspapers, Inc. v. Dep't of the Air Force, 107 F. Supp. 2d 912, 919 (S.D. Ohio 1999).

[319] Id.

[320] Dayton Newspapers, Inc., 257 F. Supp. 2d at 1001-05 & n.19 (rejecting government's argument that names could be used as search terms in online databases in order to learn identities of claimants).

[321] Reporters Comm., 489 U.S. at 765, 770-71 (recognizing threats to privacy from data stored in computerized databases).

[322] See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 178 (recognizing realistically that "[i]nformation beyond a person's name can identify that person").

[323] Carter, 830 F.2d at 391; 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); Ligorner 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").

privacy interests.[324]

Likewise, when the information is "unique and specific" to the subjects of a 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."[325] Indeed, a determination of what constitutes identifying

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[324] 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. Soc. Sec. Admin., 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, 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, 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, 941 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 job could identify them); Harry, No. 92-1654, slip op. at 9 (D.D.C. Sept. 13, 1993) (concluding that removal of all identifying marks from university's ROTC personnel records was impossible because of "intimate character" of ROTC corps); Frets, 1989 WL 222608, at *4 (determining that disclosure of handwritten statements would identify those who came forward with information concerning drug use by air traffic controllers even if names were redacted); see also Forest Guardians v. U.S. Dep't of the Interior, 2004 WL 3426434, at *16 ("minimiz[ing] the risk" identified by agency that the release of nonidentifying information for each individual grazing allotment could still identify individual permittees due to the small number of permittees on each allotment, and saying the same about requiring the release of information at the field office level, based upon the fact that "no field office will have only one permittee").

[325] Rashid v. U.S. Dep't of Justice, 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 (continued...)

information requires both an objective analysis and an analysis "from the vantage point of those familiar with the mentioned individuals."[326] Of course, when a FOIA request is of such character that by its very terms it is limited to privacy-sensitive information pertaining to an identified or identifiable individual, redaction is not possible.[327]

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[325](...continued)
(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.) (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); cf. Schulte v. VA, No. 86-6251, slip op. at 11 (S.D. Fla. Feb. 2, 1996) (finding that disclosure of mortality data for cardiac surgery programs compiled by VA as part of medical quality assurance program would be identified with head cardiac surgeon at any VA facility with only one attending head surgeon) (Exemption 3 (38 U.S.C. § 5705 (2000 & Supp. III 2003))).

[326] 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.").

[327] See, e.g., Hunt, 972 F.2d at 288 (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, 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 of Plaintiff's FOIA request naming [regional counsel]" would not adequately protect privacy interests) (Exemptions 6 and 7(C)); Claudio v. Soc. Sec. Admin., 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, 63 F. Supp. 2d at 744 (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, 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"); Cotton, 798 F. Supp. at 27 (determining that releasing any portion of the documents would "abrogate the privacy
(continued...)

EXEMPTION 6

When a request is focused on records concerning an identifiable individual and the records are of a particularly sensitive nature, it may be necessary to go a step further than withholding in full without segregation: It may be necessary to follow special "Glomarization" procedures to protect the "targeted" individual's privacy. (See the discussion of the use and origin of the "Glomar" response under Exemption 1, In Camera Submissions, above.) If a request is formulated in such a way that even acknowledgment of the existence of responsive records would cause harm, then the subject's privacy can be protected only by refusing to confirm or deny that responsive records exist. This special procedure is a widely accepted method of protecting, for example, even the mere mention of a person in law enforcement records.[328] (For a more detailed explanation of such privacy "Glomarization," see the discussion under Exemption 7(C), below.)

This procedure is equally applicable to protect an individual's privacy interest in sensitive non-law enforcement records.[329] For example, many agencies maintain an employee assistance program for their employees, operating it on a confidential basis in which privacy is assured. An agency would release neither a list of the employees who participate in such a program nor any other information concerning the program without redacting the names of participants. Logically, then, in responding to a request for any employee assistance counseling records pertaining to a named employee, the agency could protect the privacy of that individual only by refusing to confirm or deny the existence of responsive records.[330]

Similarly, the "Glomarization" approach would be appropriate in responding to a request targeting such matters as a particular citizen's welfare records or the disciplinary records of an employee accused of relatively minor misconduct.[331] Generally, this approach is proper whenever mere

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[327](...continued)
interests" when the request is for documents pertaining to two named individuals); Schonberger, 508 F. Supp. at 945 (stating that no segregation was possible when request was for one employee's file).

[328] See, e.g., Reporters Comm., 489 U.S. at 757, 780; Dunkelberger, 906 F.2d at 782; Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983); see also FOIA Update, Vol. VII, No. 1, at 3.

[329] See FOIA Update, Vol. VII, No. 2, at 2 (discussing "Glomarization" in context of non-law enforcement records).

[330] See, e.g., U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 596 (1982) (describing agency's denial of request for any documentation of any United States citizenship status of two Iranian nationals, which amounted to "Glomarization").

[331] See, e.g., Beck, 997 F.2d at 1493 (refusing to confirm or deny existence of disciplinary records pertaining to named DEA agents) (Exemptions (continued...)

acknowledgment of the existence of records would be tantamount to disclosing an actual record the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy."[332] It must be remembered, however, that this response is effective only so long as it is given consistently for a distinct category of requests.[333] If it were to become known that an agency gave a "Glomar" response only when records do exist and gave a "no records" response otherwise, then the purpose of this special approach would be defeated.[334]

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[331](...continued)
6 and 7(C)); Dunkelberger, 906 F.2d at 782 (refusing to confirm or deny existence of letter of reprimand or suspension of FBI agent) (Exemption 7(C)); Jefferson v. U.S. Dep't of Justice, Office of Inspector General, No. 01-1418, slip op. at 11-13 (D.D.C. Nov. 14, 2003) (deciding that although OIG had released documents about officially confirmed investigation into employee, agency correctly refused to confirm or deny existence of any other OIG record about employee) (Exemption 7(C)); 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); Early, No. 95-0254, slip op. at 2-3 (D.D.C. Apr. 30, 1996) (upholding Office of Professional Responsibility'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 Assistant United States Attorneys) (Exemption 7(C)); Cotton, 798 F. Supp. at 26 n.8 (suggesting that "the better course would have been for the Government to refuse to confirm or deny the existence of responsive materials"); Ray v. U.S. Dep't of Justice, 778 F. Supp. 1212, 1213-15 (S.D. Fla. 1991) (upholding agency's refusal to confirm or deny existence of investigative records concerning federal immigration officer) (Exemptions 6 and 7(C)). But see Jefferson v. Dep't of Justice, 284 F.3d 172, 174 (D.C. Cir. 2002) (declining to uphold OPR's use of the "Glomar response as to all of its files in the absence of an evidentiary showing" that it maintained no "non-law enforcement files regarding" the subject of the request); Kimberlin, 139 F.3d at 946-47 (regarding "Glomar" response as inapplicable once subject publicly acknowledges investigation).

[332] See FOIA Update, Vol. VII, No. 2, at 2; see also Ray v. U.S. Dep't of Justice, 558 F. Supp. 226, 228 (D.D.C. 1982) (dicta) (upholding agency's refusal to confirm or deny existence of records pertaining to plaintiff's former attorney), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (unpublished table decision).

[333] See FOIA Update, Vol. VII, No. 1, at 3 (explaining that "only through the consistent application of this masked response to third-party requests . . . can the privacy of those who are in fact mentioned in [particularly sensitive agency] files be protected").

[334] See id.