for further consideration, the Court of Appeals for the District of Columbia Circuit articulated a two-part standard to be employed in determining Exemption 7(B)'s applicability: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings."[5] Although the D.C. Circuit in Washington Post offered a sin-- gle example of proper Exemption 7(B) applicability -- i.e., when "disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties" -- it did not limit the scope of the exemption to privileged documents only.[6]

EXEMPTION 7(C)

Exemption 7(C) provides protection for personal information in law enforcement records. This exemption is the law enforcement counterpart to Exemption 6, which is the FOIA's fundamental privacy exemption. (See the discussions of the primary privacy-protection principles that apply to both exemptions under Exemption 6, above.) Exemption 7(C) provides protection for law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[1] Despite their similarities in language, though, the relative sweep of the two exemptions can be significantly different.

Whereas Exemption 6 routinely requires an identification and balancing of the relevant privacy and public interests, Exemption 7(C) can be even more "categorized" in its application. Indeed, the Court of Appeals for

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[4](...continued)
able conclusion is that granting the requested relief would harm this court's ability to control the use of discovery materials in the criminal case. That is an unacceptable interference with a law enforcement proceeding as defined by Exemption 7(A). Moreover, disclosure of the material sought under these circumstances would seriously interfere with the fairness of the procedures as defined by Exemption 7(B).").

[5] 863 F.2d at 102; cf. Dow Jones Co. v. FERC, 219 F.R.D. 167, 175 (C.D. Cal. 2002) (finding that there is "no evidence that any trial or adjudication" is pending and that the agency has not demonstrated that release "would generate pretrial publicity that could deprive the companies or any of their employees of their right to a fair trial," and accordingly ruling that the exemption did not apply).

[6] Wash. Post, 863 F.2d at 102.

[1] 5 U.S.C. § 552(b)(7)(C) (2000 & Supp. IV 2004).

the District of Columbia Circuit held in SafeCard Services v. SEC[2] that based upon the traditional recognition of the strong privacy interests inherent in law enforcement records,[3] and the logical ramifications of United States Department of Justice v. Reporters Committee for Freedom of the Press,[4] the "categorical withholding" of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C).[5] (See the discussion of the Supreme Court's Reporters

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[2] 926 F.2d 1197 (D.C. Cir. 1991).

[3] See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (evincing government commitment to enhancing effectiveness of law enforcement agencies).

[4] 489 U.S. 749 (1989); see also Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) (emphasizing the importance of protecting personal privacy among the other interests that are protected by the FOIA's exemptions); FOIA Update, Vol. X, No. 2, at 3-7 (discussing mechanics of privacy-protection decisionmaking process employed under Exemptions 6 and 7(C)).

[5] 926 F.2d at 1206; see, e.g., Blanton v. U.S. Dep't of Justice, 64 F. App'x 787, 789 (D.C. Cir. 2003) (protecting identities of third parties contained in FBI files categorically, including those assumed to be deceased); Fiduccia v. U.S. Dep't of Justice, 185 F.3d 1035, 1047-48 (9th Cir. 1999) (protecting records concerning FBI searches of house of two named individuals categorically); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 896 (D.C. Cir. 1995) (restating that those portions of records in investigatory files which would reveal subjects, witnesses, and informants in law enforcement investigations are categorically exempt (citing SafeCard)); Long v. U.S. Dep't of Justice, 450 F. Supp. 2d 42, 68 (D.D.C.) (finding categorical principle established in Reporters Committee to be "particularly applicable" where information at issue is maintained by government in computerized compilations), 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) (modifying amended order on other grounds), stay granted (D.D.C. Feb. 13, 2007); Mack v. Dep't of the Navy, 259 F. Supp. 2d 99, 106 (D.D.C. 2003) (protecting identities of law enforcement agents, victims, witnesses, subjects of investigative interest, and third parties contained in investigative records categorically); Carp v. IRS, No. 00-5992, 2002 WL 373448, at *4-5 (D.N.J. Jan. 28, 2002) (holding that all information that identifies third parties is categorically exempt); Pusa v. FBI, No. CV-00-12384, slip op. at 8 (C.D. Cal. May 4, 2001) (finding certain information pertaining to third parties to be categorically exempt), aff'd, 31 F. App'x 567 (9th Cir. 2002); Coolman v. IRS, No. 98-6149, 1999 WL 675319, at *5 (W.D. Mo. July 12, 1999) (finding categorical withholding of third-party information in law enforcement records to be proper), summary affirmance

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Committee decision under Exemption 6, The Reporters Committee Decision, above.)

Certain other distinctions between Exemption 6 and Exemption 7(C) are apparent: in contrast with Exemption 6, Exemption 7(C)'s language establishes a lesser burden of proof to justify withholding in two distinct re-

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[5](...continued)
granted, 1999 WL 1419039 (8th Cir. 1999); Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury, 981 F. Supp. 20, 23 (D.D.C. 1997) (stating that "categorical exclusion from release of names in law enforcement reports applies only to subjects, witnesses, or informants in law enforcement investigations"); McNamera v. U.S. Dep't of Justice, 974 F. Supp. 946, 957-60 (W.D. Tex. 1997) (allowing categorical withholding of information concerning criminal investigation of private citizens); Tanks v. Huff, No. 95-568, 1996 U.S. Dist. LEXIS 7266, at *12-13 (D.D.C. May 28, 1996) (holding that absent compelling evidence of agency wrongdoing, criminal histories and other personal information about informants are categorically exempt), appeal dismissed voluntarily, No. 96-5180 (D.C. Cir. Aug. 13, 1996); Straughter v. HHS, No. 94-0567, slip op. at 5 (S.D. W. Va. Mar. 31, 1995) (magistrate's recommendation) (affording per se protection under Exemption 7(C) for witnesses and third parties when requester has identified no public interest), adopted (S.D. W. Va. Apr. 17, 1995); cf. AFL-CIO v. FEC, 177 F. Supp. 2d 48, 61 (D.D.C. 2001) (applying "this Circuit['s]" categorical rule that requires withholding under Exemption 7(C) of names of, and identifying information about, private individuals appearing in law enforcement files, even though action was brought under Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000), and despite questionable standing of plaintiff organization to assert any such privacy interest), aff'd on other grounds, 333 F.3d 168 (D.C. Cir. 2003); Alexander & Alexander Servs. v. SEC, No. 92-1112, 1993 WL 439799, at *10 (D.D.C. Oct. 19, 1993) (requiring categorical withholding of personal information, even when records concern only professional activity of subjects, when no compelling evidence of illegal agency activity exists) ("reverse" FOIA case), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996). But see Kimberlin v. U.S. Dep't of Justice, 139 F.3d 944, 948 (D.C. Cir. 1998) (eschewing the categorical rule of nondisclosure for Office of Professional Responsibility files, and suggesting the use of a case-by-case balancing test involving consideration of the "rank of public official involved and the seriousness of misconduct alleged"); Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1060 (3d Cir. 1995) (ruling that the "government must conduct a document by document fact-specific balancing"); Konigsberg v. FBI, No. 02-2428, slip op. at 5-7 (D.D.C. May 27, 2003) (refusing to apply categorical rule to records on informant who allegedly was protected from prosecution by FBI, based upon exceptional circumstances presented); Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 730 n.5 (D. Md. 2001) (declining to accord categorical protection to third parties who purchased federally forfeited property), appeal dismissed voluntarily, No. 01-1537 (4th Cir. June 25, 2001).

spects.[6] First, it is well established that the omission of the word "clearly" from the language of Exemption 7(C) eases the burden of the agency and stems from the recognition that law enforcement records are inherently more invasive of privacy than "personnel and medical files and similar files."[7] Indeed, the "'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity'" has been repeatedly recognized.[8]

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[6] See NARA v. Favish, 541 U.S. 157, 165-66 (distinguishing between Exemption 6's and Exemption 7(C)'s language), reh'g denied, 541 U.S. 1057 (2004).

[7] See Cong. News Syndicate v. U.S. Dep't of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977) ("[A]n individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo."); see also, e.g., Iglesias v. CIA, 525 F. Supp. 547, 562 (D.D.C. 1981).

[8] Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984)); see also Neely v. FBI, 208 F.3d 461, 464-66 (4th Cir. 2000) (finding that FBI Special Agents and third-party suspects have "substantial interest[s] in nondisclosure of their identities and their connection[s] to particular investigations"); Quiñon v. FBI, 86 F.3d 1222, 1230 (D.C. Cir. 1996) (ruling that "'[p]ersons involved in FBI investigations -- even if they are not the subject of the investigation -- "have a substantial interest in seeing that their participation remains secret"'" (quoting Fitzgibbon, 911 F.2d at 767 (quoting, in turn, King v. U.S. Dep't of Justice, 830 F.2d 210, 233 (D.C. Cir. 1987)))); Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (stating that persons named in FBI files have "strong interest in 'not being associated unwarrantedly with alleged criminal activity'" (quoting Fitzgibbon, 911 F.2d at 767)); Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904 (D.C. Cir. 1996) (finding that release of names of individuals, including nonsuspects, who attended public meeting that attracted attention of law enforcement officials would impinge upon their privacy); Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992) (finding that association of FBI "agent's name with allegations of sexual and professional misconduct could cause the agent great personal and professional embarrassment"); Dunkelberger v. Dep't of Justice, 906 F.2d 779, 781 (D.C. Cir. 1990) (refusing to confirm or deny existence of letter of reprimand or suspension of named FBI Special Agent); Bast v. U.S. Dep't of Justice, 665 F.2d 1251, 1254-55 (D.C. Cir. 1981) (ruling that government officials do not surrender all rights to personal privacy by virtue of public appointment); Leveto v. IRS, No. 98-285E, 2001 U.S. Dist. LEXIS 5791, at *17-18 (W.D. Pa. Apr. 10, 2001) (recognizing privacy interests of suspects, witnesses, interviewees, and investigators); Morales Cozier v. FBI, No. 1:99 CV 0312, slip op. at 16-17 (N.D. Ga. Sept. 25, 2000) (protecting identities of FBI support personnel and individuals who provided information to FBI; citing 'well-recognized and substantial privacy interest' in nondisclosure (quoting Neely, 208 F.3d at 464)); Franklin v. U.S. Dep't of Justice, No. 97-1225, slip op. at 10 (S.D. Fla. June 15, 1998) (magistrate's recommendation) (stating law en-

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Second, the Freedom of Information Reform Act of 1986 further broadened the protection afforded by Exemption 7(C) by lowering the risk-of-harm standard from "would" to "could reasonably be expected to."[9] This amendment to the Act eased the standard for evaluating a threatened privacy invasion through disclosure of law enforcement records.[10] One court, in interpreting the amended language, pointedly observed that it affords the agency "greater latitude in protecting privacy interests" in the law enforcement context.[11] Such information "is now evaluated by the agency under a more elastic standard; exemption 7(C) is now more comprehensive."[12]

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[8](...continued)
forcement officers, suspects, witnesses, innocent third parties, and individuals named in investigative files have substantial privacy interests in nondisclosure (citing Wichlacz v. U.S. Dep't of Interior, 938 F. Supp. 325, 330 (E.D. Va. 1996))), adopted (S.D. Fla. June 26, 1998), aff'd per curiam, 189 F.3d 485 (11th Cir. 1999); Buros v. HHS, No. 93-571, slip op. at 10 (W.D. Wis. Oct. 26, 1994) (refusing to confirm or deny existence of criminal investigatory records concerning county official, even though subject's alleged mishandling of funds already known to public; "confirming . . . federal criminal investigation brushes the subject with an independent and indelible taint of wrongdoing"). But see Davin v. U.S. Dep't of Justice, No. 92-1122, slip op. at 9 (W.D. Pa. Apr. 9, 1998) (concluding that individuals' privacy interests became diluted during more than twenty years that had passed since investigation was conducted), aff'd, 176 F.3d 471 (3d Cir. 1999) (unpublished table decision).

[9] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 9-12 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; see also Favish, 541 U.S. at 169 (evincing the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda).

[10] See Reporters Comm., 489 U.S. at 756 n.9; Stone v. FBI, 727 F. Supp. 662, 665 (D.D.C. 1990) (stating that the 1986 FOIA amendments have "eased the burden of an agency claiming that exemption"), aff'd, No. 90-5065 (D.C. Cir. Sept. 14, 1990).

[11] Wash. Post Co. v. U.S. Dep't of Justice, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at *32 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987), rev'd on other grounds & remanded, 863 F.2d 96 (D.C. Cir. 1988).

[12] Id.; see also Keys v. U.S. Dep't of Justice, 830 F.2d 337, 346 (D.C. Cir. 1987) (finding that the "government need not 'prove to a certainty that release will lead to an unwarranted invasion of personal privacy,'" at least not after the 1986 FOIA amendments (quoting Reporters Comm., 816 F.2d 730, 738 (D.C. Cir. 1987))); Nishnic v. Dep't of Justice, 671 F. Supp. 776, 788 (D.D.C. 1987) (holding phrase "could reasonably be expected to" to be more
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Under the balancing test that traditionally has been applied to both Exemption 6 and Exemption 7(C), the agency must first identify and evaluate the privacy interest(s), if any, implicated in the requested records.[13] But in the case of records related to investigations by criminal law enforcement agencies, the case law has long recognized, either expressly or implicitly, that "'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.'"[14]

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[12](...continued)
easily satisfied standard than phrase "likely to materialize").

[13] See e.g., Straughter, No. 94-0567, slip op. at 5 (S.D. W. Va. Mar. 31, 1995) (observing that agency must first identify and evaluate particular privacy interest implicated); Albuquerque Publ'g Co. v. U.S. Dep't of Justice, 726 F. Supp. 851, 855 (D.D.C. 1989) ("Our preliminary inquiry is whether a personal privacy interest is involved."); see also FOIA Update, Vol. X, No. 2, at 7 (advising that there first must be a viable privacy interest of an identifiable, living person in the requested information for any further consideration of privacy-exemption protection to be appropriate).

[14] Fitzgibbon, 911 F.2d at 767 (quoting Branch v. FBI, 658 F. Supp. 204, 209 (D.D.C. 1987)); see also Massey v. FBI, 3 F.3d 620, 624 (2d Cir. 1993) (same); Miller v. Bell, 661 F.2d 623, 631-32 (7th Cir. 1981) ("real potential for harassment"); Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 488 (D.C. Cir. 1980) ("'It is difficult if not impossible, to anticipate all respects in which disclosure might damage reputation or lead to personal embarrassment and discomfort.'" (quoting Lesar v. U.S. Dep't of Justice, 455 F. Supp. 921, 925 (D.D.C. 1978))); Palacio v. U.S. Dep't of Justice, No. 00-1564, 2002 U.S. Dist. LEXIS 2198, at *9 (D.D.C. Feb. 11, 2002) (finding that release of individual's name in connection with criminal investigation may carry stigma and subject him to unnecessary public attention or harassment), summary affirmance granted, No. 02-5247, 2003 WL 242751 (D.C. Cir. Jan. 31, 2003); Morley v. U.S. CIA, 453 F. Supp. 2d 137, 155 (D.D.C. 2006) (recognizing that D.C. Circuit "has found a considerable stigma inherent in being associated with law enforcement proceedings"); Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002) (deciding that release of names of federal inmates, some of whom had not been charged with or convicted of crimes, would "stigmatize these individuals and cause what could be irreparable damage to their reputations"); Perlman v. U.S. Dep't of Justice, No. 00 Civ. 5842, 2001 WL 910406, at *6 (S.D.N.Y. Aug. 13, 2001) (finding that release of names of individuals who provided information during investigation would subject them to "embarrassment, harassment or threats of reprisal"), aff'd in pertinent part, 312 F.3d 100, 106 (2d Cir. 2002) (recognizing that witnesses and third parties have "strong privacy interests" in not being identified as having been part of law enforcement investigation), vacated & remanded, 541 U.S. 970, on remand, 380 F.3d 110, 111-12 (2d Cir. 2004) (per curiam) (affirming previous holding); Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) (recognizing
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Thus, Exemption 7(C) has been regularly applied to withhold references to persons who are not targets of investigations and who were merely mentioned in law enforcement files,[15] as well as to persons of "investiga-

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[14](...continued)
that a "mug shot's stigmatizing effect can last well beyond the actual criminal proceeding"); Abraham & Rose, P.L.C. v. United States, 36 F. Supp. 2d 955, 957 (E.D. Mich. 1998) (noting that filing of tax lien against individual could cause "comment, speculation and stigma"); Thompson v. U.S. Dep't of Justice, No. 96-1118, slip op. at 24 (D. Kan. July 14, 1998) (finding that release of third-party names could invite harassment, embarrassment, or annoyance); Anderson v. USPS, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (disclosing identities of interviewees and witnesses may result in embarrassment and harassment), aff'd, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision); Cujas v. IRS, No. 1:97-00741, 1998 U.S. Dist. LEXIS 6466, at *9 (M.D.N.C. Apr. 15, 1998) (finding that "third parties named in these law enforcement records have a very strong privacy interest in avoiding the stigma and embarrassment resulting from their identification as a person that is or was under investigation"), summary affirmance granted, No. 98-1641, 1998 WL 539686 (4th Cir. Aug. 25, 1998); Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at *20 (M.D. Fla. Oct. 1, 1997) (protecting third-party names to avoid harassment, embarrassment, and unwanted public attention); McNamera, 974 F. Supp. at 958 (rejecting argument that individual already investigated by one agency cannot be stigmatized by acknowledgment of investigation by another agency); Dayton Newspapers, Inc. v. U.S. Dep't of the Navy, No. C-3-95-328, slip op. at 51 (S.D. Ohio Sept. 13, 1996) (withholding records concerning acquitted criminal defendants because disclosure "can cause not only extreme embarrassment and humiliation, but also severe professional and economic hardship"); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (finding disclosure of identities of individuals excludable from U.S. "would result in derogatory inferences about and possible embarrassment to those individuals"); cf. Cerveny v. CIA, 445 F. Supp. 772, 776 (D. Colo. 1978) (finding mere mention of individual's name as subject of CIA file could be damaging to his or her reputation) (Exemption 6). But see Associated Press v. DOD, No. 05-5468, 2006 WL 2707395, at *4 (S.D.N.Y. Sept. 20, 2006) (concluding that prison detainees have severely diminished expectation of privacy and actually might want their identities publicized in response to FOIA request for any documents pertaining to abuse they are alleged to have suffered) (Exemptions 6 and 7(C)); Blanton v. U.S. Dep't of Justice, No. 93-2398, 1994 U.S. Dist. LEXIS 21444, at *8-12 (W.D. Tenn. July 14, 1993) (holding that there is no privacy interest in mere mention of defense attorney's name in criminal file or in validity of law license when attorney represented requester at criminal trial) (Exemptions 6 and 7(C)).

[15] See SafeCard, 926 F.2d at 1206 (protecting names of third parties); Fabiano v. McIntyre, 146 F. App'x 549, 550 (3d Cir. 2005) (per curiam) (affirming district court decision protecting names of victims in child pornography photographs); Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 552
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[15](...continued)
(6th Cir. 2001) (protecting identifying information about third parties); Shafizadeh v. ATF, No. 99-5727, 2000 WL 1175586, at *2 (6th Cir. Aug. 10, 2000) (protecting names of, and identifying information about, private individuals); Neely, 208 F.3d at 464 (withholding names of third parties mentioned or interviewed in course of investigation); Halpern v. FBI, 181 F.3d 279, 297 (2d Cir. 1999) (same); Johnston v. U.S. Dep't of Justice, No. 97-2173, 1998 U.S. App. LEXIS 18557, at *2 (8th Cir. Aug. 10, 1998) (same); Gabel v. IRS, 134 F.3d 377, 377 (9th Cir. 1998) (protecting third-party names in Department of Motor Vehicles computer printout included in plaintiff's IRS file); Computer Prof'ls, 72 F.3d at 904 (finding that release of names of any individuals who attended public meeting that attracted attention of law enforcement officials would impinge upon their privacy); Sutton v. IRS, No. 05-7177, 2007 WL 30547, at *6 (N.D. Ill. Jan. 4, 2007) (finding that third-party taxpayers and IRS personnel have an interest in maintaining the privacy of their personal information); Romero-Cicle v. U.S. Dep't of Justice, No. 05-2303, 2006 WL 3361747, at *5 (D.D.C. Nov. 20, 2006) (protecting personal information that would identify prison visitors and third-party inmates); Bogan v. FBI, No. 04-C-532-C, 2005 WL 1367214, at *7 (W.D. Wis. June 7, 2005) (protecting names of third parties merely mentioned in investigative file); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588-89 (N.D. W. Va. 2005) (protecting private information about homeowners who were interviewed and whose homes were tested as part of EPA investigation); Chourre v. IRS, 203 F. Supp. 2d 1196, 1201 (W.D. Wash. 2002) (holding that redaction of third-party taxpayer information was proper); Amro v. U.S. Customs Serv., 128 F. Supp. 2d 776, 787 (E.D. Pa. 2001) (withholding names of "non-suspects arising during investigations"); Diaz v. Fed. Bureau of Prisons, No. 01-40070, slip op. at 6 (D. Mass. Dec. 20, 2001) (magistrate's recommendation) (withholding audiotape of monitored telephone conversation between plaintiff (a prison inmate) and his former trial attorney), adopted (D. Mass. Feb. 7, 2002), aff'd, 55 F. App'x 5 (1st Cir. 2003); Morales Cozier, No. 99-CV-0312, slip op. at 17 (N.D. Ga. Sept. 25, 2000) (protecting identities of third parties mentioned in law enforcement documents); Comer v. IRS, No. 97-CV-76329, slip op. at 2 (E.D. Mich. Aug. 17, 2000) (approving withholding of third party's driver's license information); Bartolotta v. FBI, No. 99-1145, slip op. at 6 (D.D.C. July 13, 2000) (withholding personal information regarding potential visitors to inmate-plaintiff); W. Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 12 (D.D.C. 2000) (protecting address of complainant and "unrelated, incidental medical information about a third party"), aff'd, 22 F. App'x 14 (D.C. Cir. 2001); Murphy v. IRS, 79 F. Supp. 2d 1180, 1185 (D. Haw. 1999) (protecting identities of third parties); Crump v. EEOC, No. 97-0275, slip op. at 6 (M.D. Tenn. May 30, 1997) (magistrate's recommendation) (protecting personal information of third parties who filed charges with EEOC), adopted (M.D. Tenn. June 18, 1997); Feshbach v. SEC, 5 F. Supp. 2d 774, 785 (N.D. Cal. 1997) (withholding identities of third parties against whom SEC did not take action); Ajluni v. FBI, 947 F. Supp. 599, 604-05 (N.D.N.Y. 1996) (protecting identities of third parties merely

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tory interest" to a criminal law enforcement agency.[16] Indeed, the Supreme

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[15](...continued)
mentioned in FBI files); Perrone v. FBI, 908 F. Supp. 24, 26-27 (D.D.C. 1995) (holding that release of names of persons mentioned in law enforcement files could lead to "stigmatizing public attention and even harassment"); Fritz v. IRS, 862 F. Supp. 234, 236 (W.D. Wis. 1994) (protecting name and address of person who purchased requester's seized car). But see City of Chicago v. U.S. Dep't of the Treasury, 287 F.3d 628, 636 (7th Cir. 2002) (declining to find "any legitimate privacy concerns" in names and addresses of firearm purchasers), vacated & remanded, 537 U.S. 1229 (2003); Baltimore Sun, 131 F. Supp. 2d at 729 (rejecting protection of names and addresses of purchasers of forfeited property); see also *FOIA Post*, "Supreme Court Vacates and Remands in ATF Database Case" (posted 3/25/03) (discussing impact of vacatur in City of Chicago case).

[16] See, e.g., Neely, 208 F.3d at 464 (withholding names and identifying information of third-party suspects); Halpern, 181 F.3d at 297 (finding strong privacy interest in material that suggests person has at one time been subject to criminal investigation); O'Kane v. U.S. Customs Serv., 169 F.3d 1308, 1309 (11th Cir. 1999) (protecting home addresses of individuals whose possessions were seized by government); Spirko v. USPS, 147 F.3d 992, 998-99 (D.C. Cir. 1998) (protecting suspects' palm- and fingerprints, their interviews and discussions with law enforcement officers, and photographs of former suspects and their criminal histories); Computer Prof'ls, 72 F.3d at 904 (holding potential suspects would have their privacy impinged if names disclosed); Massey, 3 F.3d at 624 (finding third parties' privacy interests in nondisclosure "potentially greater" than those of law enforcement officers); McDonnell v. United States, 4 F.3d 1227, 1255 (3d Cir. 1993) (finding suspects have "obvious privacy interest in not having their identities revealed"); Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993) (reiterating "potential for harassment, reprisal or embarrassment" if names of individuals investigated by FBI disclosed); Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (deciding that "embarrassment and reputational harm" would result from disclosure of taped conversations of individuals with boss of New Orleans organized crime family); Silets v. U.S. Dep't of Justice, 945 F.2d 227, 230 (7th Cir. 1991) (en banc) (protecting associates of Jimmy Hoffa who were subjects of electronic surveillance); Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 861-66 (D.C. Cir. 1981) (withholding identities of persons investigated but not charged, unless "exceptional interests militate in favor of disclosure"); DelTurco v. FAA, No. 04-281, slip op. at 6-7 (D. Ariz. July 11, 2005) (protecting information concerning airline employees who were investigated for safety violations but against whom charges never were brought); Garcia v. U.S. Dep't of Justice, 181 F. Supp. 2d 356, 371 (S.D.N.Y. 2002) (protecting names, identities, addresses, and information pertaining to third parties who were of investigatory interest); Amro, 128 F. Supp. 2d at 784 (finding that disclosure of names of third parties of investigatory interest to Customs Service would "undermine the privacy interests of these individuals"); Willis v. FBI,
(continued...)

Court in Reporters Committee placed strong emphasis on the propriety of broadly protecting the interests of private citizens whose names or identifying information is in a record that the government "happens to be storing."[17] More recently, in NARA v. Favish, the Supreme Court likewise recognized that law enforcement files often contain information on individuals by "mere happenstance," and it strongly reinforced the protection available under Exemption 7(C).[18] Hence, the small minority of older district court decisions that failed to appreciate the strong privacy interests inherent in the association of an individual with a law enforcement investigation should no longer be regarded as authoritative.[19]

The identities of federal, state, and local law enforcement personnel referenced in investigatory files are also routinely withheld, usually for reasons similar to those described quite aptly by the Court of Appeals for the Fourth Circuit:

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[16](...continued)
No. 99-CV-73481, slip op. at 18 (E.D. Mich. July 11, 2000) (magistrate's recommendation) (protecting identifying information concerning subject of FBI investigation), adopted (E.D. Mich. Sept. 26, 2000); Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 68 (D.D.C. 1999) (protecting names of doctors "investigated for -- but not charged with -- Medicare fraud"); Thompson, No. 96-1118, slip op. at 24 (D. Kan. July 14, 1998) (withholding names of complainant, information provided by third-party subject, and names of individuals interviewed); Tawalbeh v. U.S. Dep't of the Air Force, No. 96-6241, slip op. at 7 (C.D. Cal. Aug. 8, 1997) (protecting names of third parties who were potential targets of criminal investigation); Buros, No. 93-571, slip op. at 10 (W.D. Wis. Oct. 26, 1994) (finding that even though subject's alleged mishandling of funds already known to public, confirming federal criminal investigation "brushes the subject with an independent and indelible taint of wrongdoing").

[17] 489 U.S. at 380; see also id. at 774-75 (declaring with no small amount of emphasis that "it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen").

[18] Favish, 541 U.S. at 166 (explicating in full that "law enforcement documents obtained by Government investigators often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance"); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (emphasizing breadth of privacy protection enunciated by Supreme Court in Favish).

[19] See, e.g., Silets v. FBI, 591 F. Supp. 490, 498 (N.D. Ill. 1984); Cunningham v. FBI, 540 F. Supp. 1, 2 (N.D. Ohio 1981), rev'd & remanded with order to vacate, No. 84-3367 (6th Cir. May 9, 1985); Lamont v. Dep't of Justice, 475 F. Supp. 761, 778 (S.D.N.Y. 1979).

EXEMPTION 7(C)

> One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.[20]

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[20] Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978); see FOIA Update, Vol. V, No. 2, at 5; see, e.g., Favish, 541 U.S. at 171 (finding privacy interests to be undiminished by deceased's status as high-level public official); Fabiano, 146 F. App'x at 549 (affirming withholding of names and telephone numbers of FBI Special Agent, FBI support employees, and non-FBI federal employee); Rugiero, 257 F.3d at 552 (upholding nondisclosure of identifying information about DEA agents and personnel); Robert v. Nat'l Archives, 1 F. App'x 85, 86 (2d Cir. 2001) (protecting government employee's name); Shafizadeh, 2000 WL 1175586, at *2 (withholding names of, and identifying information about, federal law enforcement personnel); Neely, 208 F.3d at 464 (withholding FBI Special Agents' names); Fiduccia, 185 F.3d at 1043-45 (withholding DEA and INS agents' names); Halpern, 181 F.3d at 296 (protecting identities of nonfederal law enforcement officers); Johnston, 1998 U.S. App. LEXIS 18557, at *2 (protecting names of DEA agents and personnel and local law enforcement personnel); Manna v. U.S. Dep't of Justice, 51 F.3d 1158, 1166 (3d Cir. 1995) (finding law enforcement officers have substantial privacy interest in nondisclosure of names, particularly when requester held high position in La Cosa Nostra); Jones v. FBI, 41 F.3d 238, 246 (6th Cir. 1994) (protecting names of FBI Special Agents and federal, state, and local law enforcement personnel); Becker v. IRS, 34 F.3d 398, 405 n.23 (7th Cir. 1994) (protecting initials, names, and phone numbers of IRS employees); Church of Scientology Int'l v. IRS, 995 F.2d 916, 920-21 (9th Cir. 1993) (deciding privacy interest exists in handwriting of IRS agents in official documents); Maynard, 986 F.2d at 566 (protecting names and initials of low-level FBI Special Agents and support personnel); Hale v. U.S. Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) (finding FBI employees have substantial privacy interest in concealing their identities), vacated & remanded on other grounds, 509 U.S. 918 (1993); Davis, 968 F.2d at 1281 (holding that "undercover agents" have protectible privacy interests); New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (inspector general investigator has "interest in retaining the capability to perform his tasks effectively by avoiding untoward annoyance or harassment"); Miller, 661 F.2d at 630 ("It is not necessary that harassment rise to the level of endangering physical safety before the protections of 7(C) can be invoked."); Lesar, 636 F.2d at 487-88 (annoyance or harassment); O'Keefe v. DOD, 463 F. Supp. 2d 317, 324 (E.D.N.Y. 2006) (protecting identities of DOD investigators); Mettetal v. U.S. Dep't of Justice, No. 2:04-CV-410, 2006 U.S. Dist. LEXIS 64157, at *10-12 (E.D. Tenn. Sept. 7, 2006) (protecting names of local law enforcement and non-FBI government personnel involved in plaintiff's criminal prosecution) (Exemptions 6 and 7(C)); Trentadue v. Integrity Comm., No. 2:03-CV-339, 2006 WL 1184636, at

(continued...)

It should be noted that prior to the Reporters Committee and Safe-Card decisions, courts ordinarily held that because Exemption 7(C) involves a balancing of the private and public interests on a case-by-case basis, there existed no "blanket exemption for the names of all [law en-

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[20](...continued)
*5-6 (D. Utah May 2, 2006) (protecting identities of mid- and low-level law enforcement personnel); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *5-6 (D. Minn. Oct. 24, 2005) (protecting names of SEC staff involved in investigation); Summers v. U.S. Dep't of Justice, No. 98-1837, slip op. at 15 (D.D.C. Mar. 10, 2003) (approving FBI's decision to distinguish between low-level (or first-line) supervisors and high-level supervisors who may be more knowledgeable about investigation); Aldridge v. U.S. Comm'r of Internal Revenue, No. 7:00-CV-131, 2001 WL 196965, at *2 (N.D. Tex. Feb. 23, 2001) (withholding IRS employees' social security numbers, home addresses, phone numbers, birthdates, and direct dial telephone number of acting chief of IRS's Examinations Division); Times Picayune, 37 F. Supp. 2d at 478 (noting that one's status "as a 'public figure' does not eviscerate" one's privacy interest under the FOIA); Ortiz v. U.S. Dep't of Justice, No. 97-140, slip op. at 5 (M.D. La. Aug. 25, 1998) (magistrate's recommendation) (protecting names and identifying information pertaining to local and foreign law enforcement officers), adopted (M.D. La. Oct. 1, 1998); see also Sosa v. FBI, No. 93-1126, slip op. at 8 (D.D.C. Apr. 9, 1998) (protecting murdered law enforcement officer's autopsy reports). But see Lissner v. U.S. Customs Serv., 241 F.3d 1220, 1224 (9th Cir. 2001) (ordering release of physical description of state law enforcement officers involved in smuggling incident); Lahr v. NTSB, No. 03-8023, 2006 WL 2854314, at *14 (C.D. Cal. Oct. 4, 2006) (concluding that absent aggrieved "target" or defendant, and with ten years having elapsed since investigation, it is unlikely that FBI Special Agents would be subject to harassment or annoyance) (appeal pending); Homick v. U.S. Dep't of Justice, No. 98-00557, slip op. at 19-27 (N.D. Cal. Sept. 16, 2004) (ordering disclosure of identities of FBI Special Agents, government support personnel, and foreign, state, and local law enforcement officers), reconsideration denied (N.D. Cal. Oct. 27, 2004), appeal dismissed voluntarily, No. 04-17568 (9th Cir. July 5, 2005); Trentadue v. President's Council on Integrity & Efficiency, No. 03-339, slip op. at 4 (D. Utah Apr. 26, 2004) (refusing to find any privacy interest and therefore ordering release of names of mid-level government employees involved in investigation of Justice Department IG despite failure of requester to demonstrate any public interest); Darby v. U.S. Dep't of the Air Force, No. CV-S-00-0661, slip op. at 11-12 (D. Nev. Mar. 1, 2002) (ordering release of names of DOD IG investigators and other government employees involved in investigation), aff'd sub nom. Darby v. DOD, 74 F. App'x 813 (9th Cir. 2003); Hardy v. FBI, No. 95-883, slip op. at 21, 28 (D. Ariz. July 29, 1997) (ordering release of names of ATF supervisory agents involved in raid at Waco); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing privacy expectations of individual identified as "public figure").

forcement] personnel in all documents."[21] Nonetheless, absent a demonstration of significant misconduct on the part of law enforcement personnel or other government officials,[22] the overwhelming majority of courts have declared their identities exempt from disclosure pursuant to Exemption 7(C).[23] Those few decisions ordering disclosure of the names of govern-

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[21] Lesar, 636 F.2d at 487.

[22] See, e.g., Perlman, 312 F.3d at 107-09 (ordering release of extensive details concerning IG investigation of former INS general counsel who was implicated in wrongdoing, and enunciating unique five-factor test to balance government employee's privacy interest against public interest in disclosure, including employee's rank, degree of wrongdoing and strength of evidence, availability of information, whether information sheds light on government activity, and whether information is related to job function or is personal in nature); Stern, 737 F.2d at 94 (ordering release of name of FBI Special Agent-in-Charge who directly participated in intentional wrongdoing, while protecting names of two mid-level agents whose negligence incidentally furthered cover-up); Chang v. Dep't of the Navy, 314 F. Supp. 2d 35, 42-45 (D.D.C. 2004) (approving disclosure of details of nonjudicial punishment and letter of reprimand of commander of ship punished for dereliction of duty) (Privacy Act "wrongful disclosure" decision interpreting Exemption 6); Wood v. FBI, 312 F. Supp. 2d 328, 350-51(D. Conn. 2004) (applying Perlman standard in disallowing Exemption 6 protection and ordering release of information identifying FBI Special Agent with supervisory authority who was investigated for wrongdoing, but withholding names of investigators under Exemption 7(C)); see also Jefferson v. U.S. Dep't of Justice, No. 01-1418, slip op. at 11 (D.D.C. Nov. 14, 2003) (protecting details of IG investigation of government attorney-advisor with no decisionmaking authority as employee whose rank was not so high that public interest in disclosure could outweigh personal privacy interest in learning of any investigated alleged misconduct).

[23] See, e.g., Manna, 51 F.3d at 1166 (finding unfounded complaints of government misconduct insufficient to outweigh law enforcement officers' substantial privacy interests); Hale, 973 F.2d at 901 (holding unsubstantiated allegations of government wrongdoing do not justify disclosing law enforcement personnel names); Davis, 968 F.2d at 1281 ("undercover agents"); In re Wade, 969 F.2d 241, 246 (7th Cir. 1992) (FBI Special Agent); Patterson v. FBI, 893 F.2d 595, 601 (3d Cir. 1990) (FBI personnel); Johnson v. U.S. Dep't of Justice, 739 F.2d 1514, 1519 (10th Cir. 1984) (deciding that FBI Special Agents' identities are properly protectible absent evidence of impropriety in undisclosed material); MacLean v. DOD, No. 04-2425, slip op. at 16-17 (S.D. Cal. June 6, 2005) (protecting prosecutor's professional responsibility file because disclosure would associate him with alleged wrongful activity of which he was ultimately cleared); Wolk v. United States, No. 04-832, 2005 WL 465382, at *5-7 (E.D. Pa. Feb. 28, 2005) (protecting personal background information about federal judicial nominee absent proven allegations of wrongdoing); Dorsett v. U.S. Dep't of the

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ment investigators -- other than when demonstrated misconduct has been involved -- either predate Reporters Committee[24] (not to mention Favish) or else find an unusually significant public interest in disclosure.[25]

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[23](...continued)
Treasury, 307 F. Supp. 2d 28, 38-39 (D.D.C. 2004) (withholding names of Secret Service Agents and personnel, FBI Special Agents, and other employees in face of allegations of misconduct); Lopez v. U.S. Dep't of Justice, No. 99-1722, slip op. at 10-12 (D.D.C. Jan. 21, 2003) (protecting names of government employees absent evidence of misconduct), summary affirmance granted in pertinent part, No. 03-5192, 2004 WL 626726 (D.C. Cir. Mar. 29, 2004); Pontecorvo v. FBI, No. 00-1511, slip op. at 41 (D.D.C. Sept. 30, 2001) (withholding identity of FBI Special Agent who conducted plaintiff's background investigation, absent sufficient evidence of misconduct); Robert v. Dep't of Justice, No. 99-CV-3649, slip op. at 16 (E.D.N.Y. Mar. 22, 2001) (withholding employees' names and personal information because disclosure could cause embarrassment in light of "plaintiff's far[-]reaching allegations of departmental wrongdoing"); Ray v. U.S. Dep't of Justice, 778 F. Supp. 1212, 1215 (S.D. Fla. 1991) (affirming government may neither confirm nor deny existence of records concerning results of INS investigation of alleged misconduct of employee); see also Favish, 541 U.S. at 173-75 (holding that requester who asserts a "government misconduct public interest" must produce evidence that would be deemed believable by a "reasonable person" for there to exist a "counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records"); Aldridge, No. 7:00-CV-131, 2001 WL 196965, at *3 (ordering disclosure of recommendation concerning potential disciplinary action against IRS employees, with only their names redacted, based upon public's "interest in knowing how well a particular agency's employees behave on the job").

[24] See, e.g., Castañeda v. United States, 757 F.2d 1010, 1012 (9th Cir. 1985) (treating USDA investigator's privacy interest as "not great," based upon novel reasoning that his "name would be discoverable in any civil case brought [against the agency]"), amended upon denial of panel reh'g, 773 F.2d 251 (9th Cir. 1985); Iglesias, 525 F. Supp. at 563 (disclosing names of government employees involved in conducting investigation); Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898, 904 (D.D.C. 1980) (releasing names of SEC investigators). But see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing viability of Castañeda decision in light of Supreme Court's repudiation of Ninth Circuit's privacy jurisprudence).

[25] See Lissner, 241 F.3d at 1223 (ordering disclosure of physical description of state law enforcement officers, and citing only general public interest in ensuring reliability of government investigations); Hardy, No. 95-883, slip op. at 21 (D. Ariz. July 29, 1997) (releasing identities of supervisory ATF agents and other agents publicly associated with Waco incident, finding that public's interest in Waco raid "is greater than in the normal case
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The history of one case in the District Court for the District of Columbia illustrates the impact of the Reporters Committee decision in this area of law. In Southam News,[26] the district court initially held that the identities of FBI clerical personnel who performed administrative tasks with respect to requested records could not be withheld under Exemption 7(C). Even then, this position was inconsistent with other, contemporaneous decisions.[27] Following the Supreme Court's decision in Reporters Committee, the government sought reconsideration of the Southam News decision. Agreeing that revelation of identities and activities of low-level agency personnel ordinarily will shed no light on government operations, as required by Reporters Committee, the district court reversed its earlier disclosure order and held the names to be properly protected.[28] Significantly, the court also recognized that "the only imaginable contribution that this information could make would be to enable the public to seek out individuals who had been tangentially involved in investigations and to question them for unauthorized access to information as to what the investigation entailed and what other FBI personnel were involved."[29] The same district

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[25](...continued)
where release of agent names affords no insight into an agency's conduct or operations"); Butler, 1994 WL 55621, at *13 (releasing identities of supervisory FBI personnel upon finding of "significant" public interest in protecting requester's due process rights); cf. Weiner v. FBI, No. 83-1720, slip op. at 7 (C.D. Cal. Dec. 6, 1995) (finding public interest in release of names and addresses of agents involved in management and supervision of FBI investigation of music legend John Lennon) (applying FOIA analysis in civil discovery context). But see *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (pointing out that Lissner decision is now "discredit[ed] or effectively overrule[d]" by Supreme Court's repudiation of Ninth Circuit's privacy jurisprudence).

[26] 674 F. Supp. at 888.

[27] See, e.g., Doherty v. U.S. Dep't of Justice, 775 F.2d 49, 52 (2d Cir. 1985) (protecting identities of FBI Special Agents and nonagent personnel); Kirk v. U.S. Dep't of Justice, 704 F. Supp. 288, 292 (D.D.C. 1989) ("Just like FBI [S]pecial [A]gents, administrative and clerical personnel could be subject to harassment, questioning, and publicity, and the Court concludes that the FBI did not need to separate the groups of employees for purposes of explaining why disclosure of their identities was opposed.").

[28] Southam News v. INS, No. 85-2721, slip op. at 3 (D.D.C. Aug. 30, 1989).

[29] Id.; see also Judicial Watch v. United States, 84 F. App'x 335, 339 (4th Cir. 2004) (protecting names and home addresses of lower-level IRS employees absent compelling evidence of agency corruption, in order to avoid potential harassment) (Exemption 6); Halpern, 181 F.3d at 296 (concluding that disclosure of names of law enforcement personnel could subject them to "harassment in the conduct of their official duties"); Manna, 51 F.3d at
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court has strongly reaffirmed that identities of both FBI clerical personnel and low-level FBI Special Agents are properly withheld as a routine matter under Exemption 7(C), even when they take part in a highly publicized investigation.[30]

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[29](...continued)
1166 (holding law enforcement officers involved in La Cosa Nostra investigation have substantial privacy interest in nondisclosure of their names); Cal-Trim, Inc. v. IRS, No. 05-2408, slip op. at 8 (D. Ariz. Feb. 6, 2007) (protecting personal privacy of lower-level IRS employees); Joyce v. FBI, 152 F. Supp. 2d 32, 36 (D.D.C. 2001) (approving the redaction of names of, and identifying information about, law enforcement personnel, given the "potential for harassment and the infringement on the private lives of law-enforcement officials"); Morales Cozier, No. 99-CV-0312, slip op. at 17 (N.D. Ga. Sept. 25, 2000) (withholding identities of FBI Special Agents who investigated requester after her professional contact with Cuban citizen; citing potential for "harassment, surveillance, or [undue] investigation of these [Special A]gents by foreign governments"); Bartolotta, No. 99-1145, slip op. at 9 (D.D.C. July 13, 2000) (accepting that disclosing identities of two Criminal Division attorneys could result in harassment or reprisals, and could make it more difficult for them to perform duties that require low profile); Hambarian v. IRS, No. 99-9000, 2000 U.S. Dist. LEXIS 6317, at *10 (C.D. Cal. Feb. 15, 2000) (protecting names and identification numbers of IRS employees "who participated in the investigation of" the requester); Ortiz, No. 97-140, slip op. at 7 (M.D. La. Aug. 25, 1998) (magistrate's recommendation) (finding that disclosure of names of FBI personnel could subject them to "harassment and annoyance"), adopted (M.D. La. Oct. 1, 1998); Smith v. ATF, 977 F. Supp. 496, 499 (D.D.C. 1997) (finding disclosure of law enforcement officers' names "might seriously prejudice their effectiveness in conduct of investigations"); Harvey v. U.S. Dep't of Justice, No. 96-0509, 1997 WL 669640, at *3 (D.D.C. Oct. 23, 1997) (recognizing that release of names of DEA support personnel could target them for "'harassing inquiries for unauthorized access' to information"); Simon v. U.S. Dep't of Justice, 752 F. Supp. 14, 19 (D.D.C. 1990) (protecting identities of FBI Special Agents and other government personnel involved in processing FOIA request), aff'd, 980 F.2d 782 (D.C. Cir. 1992).

[30] See Stone, 727 F. Supp. at 663 n.1 (protecting identities of FBI Special Agents and clerical employees who participated in investigation of assassination of Robert F. Kennedy); Hoffman v. Brown, No. 97-1145, 1998 WL 279575 (4th Cir. May 19, 1998) (per curiam) (withholding portions of transcript of unauthorized audiotaped conversations of Veterans Administration Medical Center employees made during IG investigation); Wichlacz, 938 F. Supp. at 334 (E.D. Va. 1996) (protecting names of Park Police officers who investigated suicide of Deputy White House Counsel Vincent Foster, as well as psychiatrists who were listed on paper found in Foster's wallet, because disclosure would cause "onslaught of media attention" and could cause camera crews to "besiege" their workplaces and homes), aff'd per curiam, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision); Exner v.
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On the other hand, the Court of Appeals for the Ninth Circuit has twice failed to follow the Reporters Committee decision.[31] In two decisions, Lissner v. United States Customs Service[32] and Favish v. Office of Independent Counsel,[33] the Ninth Circuit inexplicably ignored very well-recognized privacy interests and refused to adhere to the narrowed definition of public interest set forth in Reporters Committee.[34] In Lissner, the Ninth Circuit ordered disclosure of the "general physical description" of two state law enforcement officers who were involved in smuggling steroids.[35] In so doing, it neglected to consider the fact that the physical descriptions of these persons would shed no light on the activities of the United States Customs Service.[36]

Likewise, in Favish v. Office of Independent Counsel, when attempting to balance the interests involved in ten photographs of the scene of Deputy White House Counsel Vincent Foster's suicide, the Ninth Circuit sent the case to the district court for it to view the photographs in camera

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[30](...continued)
U.S. Dep't of Justice, 902 F. Supp. 240, 243-45 (D.D.C. 1995) (protecting identities of deceased former FBI Special Agent and his two sons, one of whom FBI may have observed "in criminally suspect behavior" at requester's apartment, which requester claimed had been searched for political reasons involving her alleged relationship with President Kennedy), appeal dismissed, No. 95-5411, 1997 WL 68352 (D.C. Cir. Jan. 15, 1997); cf. Armstrong v. Executive Office of the President, 97 F.3d 575, 581-82 (D.C. Cir. 1996) (finding that agency had not adequately defended categorical rule for withholding identities of low-level FBI Special Agents) (Exemption 6).

[31] See, e.g., Bibles v. Or. Natural Desert Ass'n, 83 F.3d 1168, 1172 (9th Cir. 1996) (Fernandez, J., dissenting) ("Once again we are asked to bridle at and practically ignore the FOIA teachings of the United States Supreme Court."), summarily rev'd & remanded per curiam, 519 U.S. 355 (1997) (Exemption 6); see also FOIA Update, Vol. XVIII, No. 1, at 1 (discussing Supreme Court's extraordinary action in summarily reversing Ninth Circuit's decision in Bibles).

[32] 241 F.3d 1220 (9th Cir. 2001).

[33] 217 F.3d 1168 (9th Cir. 2000), summary judgment granted on remand, No. CV 97-1479, 2001 WL 770410 (C.D. Cal. Jan. 11, 2001), aff'd, 37 F. App'x 863 (9th Cir. 2002), rev'd sub nom. NARA v. Favish, 541 U.S. 157, reh'g denied, 541 U.S. 1057 (2004).

[34] See FOIA Update, Vol. X, No. 2, at 3 (analyzing Supreme Court's Reporters Committee decision).

[35] 241 F.3d at 1224.

[36] See Reporters Comm., 489 U.S. at 774 ("[T]he FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny . . . .").

and inevitably order disclosure under highly flawed standards[37] -- doing so even though those very photographs had been held to be protected by Exemption 7(C) in a previous case.[38] Further, in analyzing the public interest in disclosure, the Ninth Circuit purported to follow Reporters Committee yet based its finding of public interest in disclosure of the photographs merely upon plaintiff's "doubts" regarding the adequacy of the government's investigation into the suicide[39] -- leading to an order from the district court to disclose five of the death-scene photographs.[40]

The Supreme Court rejected the Ninth Circuit's views of privacy protection, and its acceptance of such public interest arguments, when it unanimously reversed the Ninth Circuit in NARA v. Favish.[41] It ruled that while the Ninth Circuit had recognized the family's privacy interest and the nature of the asserted public interest, the Ninth Circuit had failed to properly balance the two when it required no credible evidence showing actual government wrongdoing.[42] Such a reading of the Reporters Committee public interest standard in this context, the Court said, "leaves Exemption 7(C) with little force or content."[43] So under the Supreme Court's ruling in Favish, and its decision to protect the photographs at issue, a FOIA re-

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[37] See 217 F.3d at 1174.

[38] See Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 122-23 (D.C. Cir. 1999) (finding that the spouse, parents, and children of Deputy White House Counsel Vincent Foster have a discernible privacy interest in not having his death-scene photographs made public; holding that to show that an invasion of privacy is not unwarranted, the plaintiff must produce "'compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photograph] is necessary in order to confirm or refute that evidence'" (quoting SafeCard, 926 F.2d at 1205-06)); see also Accuracy in Media, Inc. v. Office of Indep. Counsel, 61 F. App'x 712, 712-13 (D.C. Cir. 2003) (per curiam) (ruling that requester had "once again failed to demonstrate" that agency engaged in illegal activity, and finding that same privacy interest in nondisclosure of photograph of hand and description of body existed as in Accuracy in Media, 194 F.3d at 122).

[39] 217 F.3d at 1174; see also id. at 1184 (Pregerson, J., dissenting) (observing that "Favish has made no showing that anyone connected with the OIC's investigations . . . engaged in wrongful conduct"; explaining that the requester bears the burden of advancing the public interest, and that this requester "has failed to do so").

[40] Favish, 2001 WL 770410, at *1 (ordering five of ten photographs at issue released to plaintiff).

[41] 541 U.S. 157.

[42] Id. at 173-74.

[43] Id. at 173.

quester's assertion of a public interest based on "government wrongdoing" now must meet a distinctly higher standard.[44] Indeed, the Supreme Court's repudiation of the Ninth Circuit's decision in Favish is sweeping enough to discredit (or effectively overrule) that circuit court's previous aberrational privacy jurisprudence.[45] (See also the further discussions of Favish's fundamental privacy-protection principles under Exemption 6, above.)

In Reporters Committee, the Supreme Court found that substantial privacy interests can exist in personal information such as is contained in "rap sheets," even though the information has been made available to the general public at some place and point in time. Applying a "practical obscurity" standard,[46] 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]."[47] (See Exemption 7(D), below, for a discussion

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[44] Id. at 174-75; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing higher standard, as well as continued need for showing of Reporters Committee-type public interest even when requester successfully alleges government wrongdoing). But cf. Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 97-98 (6th Cir. 1996) (suggesting in dicta that there might be significant public interest in disclosure of "mug shots" in limited circumstances without requester demonstrating with particularity any actual government misconduct); Beacon Journal Publ'g Co. v. Gonzalez, No. 05-1396, slip op. at 2 (N.D. Ohio Nov. 16, 2005) (ordering disclosure of "mug shots" under Sixth Circuit's decision in Detroit Free Press); Detroit Free Press, Inc. v. U.S. Dep't of Justice, No. 05-71601, slip op. at 1 (E.D. Mich. Oct. 7, 2005) (same); Times Picayune, 37 F. Supp. 2d at 477 (pre-Favish decision protecting "mug shot" beyond confines of Sixth Circuit).

[45] See, e.g., Lissner, 241 F.3d at 1224; Rosenfeld, 57 F.3d at 812; Dobronski v. FCC, 17 F.3d 275, 278 (9th Cir. 1994); see Dow Jones Co., Inc. v. FERC, 219 F.R.D. 167, 175-76 (C.D. Cal. 2003) (ordering disclosure of names of individuals who cooperated with investigation, expressly based upon Ninth Circuit's now-repudiated Favish ruling, merely because they were not accused of criminal activity); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (analyzing Favish decision's sweeping impact on Ninth Circuit case law).

[46] 489 U.S. at 762-63, 780.

[47] Id. at 764; see Edwards v. Dep't of Justice, No. 04-5044, 2004 WL 2905342, at *1 (D.C. Cir. 2004) (per curiam) (summarily affirming district court decision withholding information where plaintiff failed to point to specific information in public domain that duplicated withheld information); Fiduccia, 185 F.3d at 1047 (protecting FBI records reflecting information that is also available in "various courthouses"); Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1083 (6th Cir. 1998) (stating that clear privacy interest exists with respect to names, addresses, and other identify-

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of the status of open-court testimony under that exemption.)

All but one court of appeals to have addressed the issue have found protectible privacy interests in conjunction with or in lieu of protection under Exemption 7(D) -- in the identities of individuals who provide information to law enforcement agencies.[48] Consequently, the names of witnesses

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[47](...continued)
ing information, even if already available in publicly recorded filings (citing DOD v. FLRA, 510 U.S. 487, 500 (1994) (Exemption 6))); Harrison v. Executive Office for U.S. Attorneys, 377 F. Supp. 2d 141, 147-48 (D.D.C. 2005) (protecting names and addresses of criminal defendants, case captions and numbers, attorney names and addresses, and case initiation, disposition, and sentencing dates even though information could be found by searches of public records); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257-59 (D.D.C. 2005) (finding privacy interest in information concerning private individuals even though documents were previously distributed in unredacted form to symposium participants); Times Picayune, 37 F. Supp. 2d at 478-79 (holding that public dissemination of "mug shot" after trial would trigger renewed publicity and renewed invasion of privacy of subject); Billington v. U.S. Dep't of Justice, 11 F. Supp. 2d 45, 61 (D.D.C. 1998) (finding that "agency is not compelled to release information just because it may have been disclosed previously"), aff'd in pertinent part, 233 F.3d 581 (D.C. Cir. 2000); Greenberg v. U.S. Dep't of Treasury, No. 87-898, 1998 U.S. Dist. LEXIS 9803, at *55 (D.D.C. July 1, 1998) (finding third party's privacy interest not extinguished because public may be aware he was target of investigation); Baltimore Sun Co. v. U.S. Customs Serv., No. 97-1991, slip op. at 4 (D. Md. Nov. 12, 1997) (holding that inclusion of poor copy of defendant's photograph in publicly available court record did not eliminate privacy interest in photo altogether); Lewis v. USPS, No. 96-3467, slip op. at 2 (D. Md. Apr. 30, 1997) (holding that fact that complainant's name is already known, whether disclosed by investigating agency or otherwise, is irrelevant; declaring that "limited oral disclosure" does not constitute waiver of exemption). But see Lardner v. U.S. Dep't of Justice, No. 03-0180, 2005 U.S. Dist. LEXIS 5465, at *55-61 (D.D.C. Mar. 31, 2005) (ignoring element of "practical obscurity" in ordering release of names of unsuccessful pardon applicants and names of private individuals who supported clemency applications) (Exemption 6).

[48] See, e.g., Hoffman, 1998 WL 279575 (protecting "private citizen identifiers" in VA investigative report); Beard v. Espy, No. 94-16748, 1995 U.S. App. LEXIS 38269, at *2 (9th Cir. Dec. 11, 1995) (protecting complaint letter); Manna, 51 F.3d at 1166 (holding that interviewees and witnesses involved in criminal investigation have substantial privacy interest in nondisclosure of their names, particularly when requester held high position in La Cosa Nostra); McDonnell, 4 F.3d at 1256 (protecting identities of witnesses and third parties involved in criminal investigation of maritime disaster); Massey, 3 F.3d at 624 (declaring that disclosure of names of cooperating witnesses and third parties, including cooperating law enforcement offi-
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and their home and business addresses have been held properly protectible under Exemption 7(C).[49] Additionally, Exemption 7(C) protection has

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[48](...continued)
cials, could subject them to "embarrassment and harassment"); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (withholding interviewees' names as "necessary to avoid harassment and embarrassment"); Cleary v. FBI, 811 F.2d 421, 424 (8th Cir. 1987) (deciding disclosure would subject "sources to unnecessary questioning concerning the investigation [and] to subpoenas issued by private litigants in civil suits incidentally related to the investigation"); Cuccaro v. Sec'y of Labor, 770 F.2d 355, 359 (3d Cir. 1985) ("privacy interest of . . . witnesses who participated in OSHA's investigation outweighs public interest in disclosure"); L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923 (11th Cir. 1984) (reasoning that disclosure of identities of employee-witnesses in OSHA investigation could cause "problems at their jobs and with their livelihoods"); New England Apple, 725 F.2d at 144-45 ("Disclosure could have a significant, adverse effect on this individual's private or professional life."); Kiraly v. FBI, 728 F.2d 273, 279 (6th Cir. 1984) (finding that, in absence of public benefit in disclosure, informant's personal privacy interests do not lapse at death); Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564-65 (D.C. Cir. 1982) (concurring opinion) (citing "risk of harassment" and fear of reprisals); Alirez v. NLRB, 676 F.2d 423, 427 (10th Cir. 1982) (holding that disclosure would result in "embarrassment or reprisals"); Lesar, 636 F.2d at 488 ("'Those cooperating with law enforcement should not now pay the price of full disclosure of personal details.'" (quoting Lesar, 455 F. Supp. at 925)); cf. Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 486 (2d Cir. 1999) (finding that HUD failed to prove that disclosure of documents would identify individuals). But see Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 554 (5th Cir. 2002) (rebuffing idea of retaliation against employees who gave statements to OSHA investigator, and ordering disclosure of source-identifying content of statements despite fact that identifiable employee-witnesses' names already had been released in separate civil proceeding).

[49] See Coulter v. Reno, No. 98-35170, 1998 WL 658835, at *1 (9th Cir. Sept. 17, 1998) (protecting names of witnesses and of requester's accusers); Spirko, 147 F.3d at 998 (protecting notes and phone messages concerning witnesses); Computer Prof'ls, 72 F.3d at 904 (protecting names of witnesses); Manna, 51 F.3d at 1166 (deciding witnesses in La Cosa Nostra case have "substantial" privacy interest in nondisclosure of their names); L&C Marine, 740 F.2d at 922 ("employee-witnesses . . . have a substantial privacy interest"); Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) ("[The requester] has mentioned no legitimate need for the witnesses' phone numbers and we can well imagine the invasions of privacy that would result should he obtain them."); Sinsheimer v. DHS, 437 F. Supp. 2d 50, 54-56 (D.D.C. 2006) (protecting names of witnesses and of plaintiff's coworkers because of public interest in encouraging cooperation and participation of agency employees in investigations of civil rights violations); Brown v. EPA, 384 F. Supp. 2d 271, 278 (D.D.C. 2005) (recognizing that fed-
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been afforded to the identities of informants,[50] even when it was shown

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[49](...continued)
eral employees who were witnesses in an internal investigation have a "broad right to be protected from mischief -- within the workplace and without -- that could follow from the public disclosure of their identit[ies] as witnesses in a criminal investigation"); Dean v. FDIC, 389 F. Supp. 2d 780, 794-96 (E.D. Ky. 2005) (withholding identifying information of third parties and witnesses in IG investigation); Johnson v. Comm'r of Internal Revenue, 239 F. Supp. 2d 1125, 1137 (W.D. Wash. 2002) (protecting identifying information of third parties and witnesses contacted during IRS investigation); Hogan v. Huff, No. 00-6753, 2002 WL 1359722, at *9-10 (S.D.N.Y. June 21, 2002) (protecting identities of witnesses); Wayne's Mech. & Maint. Contractor, Inc. v. U.S. Dep't of Labor, No. 1:00-CV-45, slip op. at 9 (N.D. Ga. May 7, 2001) ("In the context of OSHA investigations, employee-witnesses have a substantial privacy interest regarding statements given about a work-related accident in light of the potential for embarrassment and retaliation that disclosure of their identity could cause."); Heggestad v. U.S. Dep't of Justice, 182 F. Supp. 2d 1, 13 (D.D.C. 2000) (withholding identities of certain grand jury witnesses); Foster v. U.S. Dep't of Justice, 933 F. Supp. 687, 692 (E.D. Mich. 1996) (protecting prospective witnesses); Crooker v. Tax Div. of the U.S. Dep't of Justice, No. 94-30129, 1995 WL 783236, at *18 (D. Mass. Nov. 17, 1995) (magistrate's recommendation) (holding names of witnesses and individuals who cooperated with government protected to prevent "undue embarrassment and harassment"), adopted (D. Mass. Dec. 15, 1995), aff'd per curiam, 94 F.3d 640 (1st Cir. 1996) (unpublished table decision); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1566 (M.D. Fla. 1994) (witnesses, investigators, and other subjects of investigation have "substantial privacy interests"); Farese v. U.S. Dep't of Justice, 683 F. Supp. 273, 275 (D.D.C. 1987) (protecting names and number of family members of participants in Witness Security Program, as well as funds authorized to each, because disclosure "would pose a possible danger to the persons named" or "might subject those persons to harassment"); cf. Brown v. FBI, 658 F.2d 71, 75-76 (2d Cir. 1981) (protecting information concerning witness who testified against requester) (Exemption 6). But see Cooper Cameron, 280 F.3d at 545, 554 (holding names of three employee-witnesses exempt, yet inconsistently ordering release of source-identifying content of their statements); Lahr, 2006 WL 2854314, at *14 (stating "the public interest in uncovering alleged agency malfeasance and wrongdoing in the investigation of the crash of Flight 800 outweighs the privacy interest that conceivably exists in eyewitness names"); Lipman v. United States, No. 3:97-667, slip op. at 3 (M.D. Pa. June 3, 1998) (releasing names of witnesses who testified at trial based upon assumption defendant had already received information under Jencks v. United States, 353 U.S. 657 (1957)), appeal dismissed voluntarily, No. 98-7489 (3d Cir. Feb. 23, 1999).

[50] See Fiduccia, 185 F.3d at 1044 (withholding names of informants); Quiñon, 86 F.3d at 1227, 1231 (protecting informants' identities in absence
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[50](...continued)
of agency misconduct); Schiffer, 78 F.3d at 1410 (protecting names of persons who provided information to FBI); Computer Prof'ls, 72 F.3d at 904-05 (protecting names of informants, including name of company that reported crime to police, because disclosure might permit identification of corporate officer who reported crime); Manna, 51 F.3d at 1162 (safeguarding names of informants in La Cosa Nostra case); Jones, 41 F.3d at 246 (protecting informants' identities); McCutchen v. HHS, 30 F.3d 183, 189 (D.C. Cir. 1994) (protecting names of individuals alleging scientific misconduct); Koch v. USPS, No. 93-1487, 1993 U.S. App. LEXIS 26130, at *2 (8th Cir. Oct. 8, 1993) ("The informant's interest in maintaining confidentiality is considerable [because] the informant risked embarrassment, harassment, and emotional and physical retaliation."); Nadler v. U.S. Dep't of Justice, 955 F.2d 1479, 1490 (11th Cir. 1992) ("Disclosure of the identities of the FBI's sources will disclose a great deal about those sources but in this case will disclose virtually nothing about the conduct of the government."); Coleman v. U.S. Dep't of Justice, No. 02-79-A, slip op. at 11 (E.D. Va. Oct. 7, 2002) (protecting names and identifying information of people who aided in investigation of Ruby Ridge incident); LaRouche v. U.S. Dep't of Justice, No. 90-2753, 2001 U.S. Dist. LEXIS 25416, at *21 (D.D.C. July 5, 2001) (finding that informant's hanwritten drawings could reveal identity); Gonzalez v. FBI, No. CV F 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (finding that privacy interest is not invalidated merely because person is confirmed informant); Unger v. IRS, No. 99-698, 2000 U.S. Dist. LEXIS 5260, at *12 (N.D. Ohio Mar. 28, 2000) (protecting "identities of private citizens who provided information to law enforcement officials"); Petterson v. IRS, No. 98-6020, slip op. at 8 (W.D. Mo. Apr. 22, 1999) (protecting informant's personal data); Pfannenstiel v. FBI, No. 98-0386, slip op. at 7 (D.N.M. Feb. 18, 1999) (withholding identities of confidential informants); Schlabach v. IRS, No. 98-0075, 1998 U.S. Dist. LEXIS 19579, at *2 (E.D. Wash. Nov. 10, 1998) (withholding personal information obtained from private citizens during investigation); Local 32B-32J, Serv. Employees Int'l Union v. GSA, No. 97-8509, 1998 WL 726000, at *9 (S.D.N.Y. Oct. 15, 1998) (finding that disclosure of names of individuals who provided information during investigation may subject them to threats of reprisal); Billington, 11 F. Supp. 2d at 63 (finding that witnesses' privacy interests outweigh public interest, even when witnesses appeared in court or participated in media interview); Thompson, No. 96-1118, slip op. at 24 (D. Kan. July 14, 1998) (protecting names and identifying information about individuals who provided or could provide information concerning investigation); Rosenberg, No. 97-0476, slip op. at 10 (D.D.C. May 13, 1998) (protecting names of individuals who cooperated and actively participated in investigation, as well as of "individuals who provided assistance to the operation because of their occupation or use of their property"); Steinberg v. U.S. Dep't of Justice, 179 F.R.D. 357, 363 (D.D.C. 1998) (withholding informants' names, alias names, and portions of interview regarding terrorist activities); see also Wrenn v. Vanderbilt Univ. Hosp., No. 3:91-1005, slip op. at 14-15 (M.D. Tenn. June 10, 1993) (protect-
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that "the information provided to law enforcement authorities was knowingly false."[51]

Although on occasion a pre-Reporters Committee decision found that an individual's testimony at trial precluded Exemption 7(C) protection,[52] under the Reporters Committee "practical obscurity" standard trial testimony should not diminish Exemption 7(C) protection.[53] Plainly, if a person

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[50](...continued)
ing identity of person who alleged discrimination), aff'd, 16 F.3d 1224 (6th Cir. 1994) (unpublished table decision).

[51] Gabrielli v. U.S. Dep't of Justice, 594 F. Supp. 309, 313 (N.D.N.Y. 1984); see also Block v. FBI, No. 83-813, slip op. at 11 (D.D.C. Nov. 19, 1984) ("[The requester's] personal interest in knowing who wrote letters concerning him . . . is not sufficient to demonstrate a public interest.") (Exemption 6).

[52] Compare Myers, No. 85-1746, 1986 U.S. Dist. LEXIS 20058, at *4-7 (D.D.C. Sept. 22, 1986) ("no privacy interest exists" as to names of law enforcement personnel who testified at requester's trial), with Prows v. U.S. Dep't of Justice, No. 87-1657, 1989 WL 39288, at *3 (D.D.C. Apr. 13, 1989) ("[T]he protection of Exemption 7(C) is not waived by the act of testifying at trial."), summary affirmance granted, No. 89-5185 (D.C. Cir. Feb. 26, 1990).

[53] See Jones, 41 F.3d at 247 (holding fact that law enforcement employee chose to testify or was required to testify or otherwise come forward in other settings does not amount to waiver of personal privacy); Burge v. Eastburn, 934 F.2d 577, 579 (5th Cir. 1991) (affirming refusal, under Exemption 7(C), to confirm or deny existence of information in FBI files regarding individuals who testified at plaintiff's murder trial); Melville v. U.S. Dep't of Justice, No. 05-0645, 2006 WL 2927575, at *9 (D.D.C. Oct. 9, 2006) (emphasizing that privacy interest of law enforcement personnel or other third parties mentioned in responsive records is not diminished by fact they may have testified at trial); McDade v. Executive Office for U.S. Attorneys, No. 03-1946, slip op. at 11 (D.D.C. Sept. 29, 2004) ("A witness who testifies at a trial does not waive personal privacy."), summary affirmance granted, No. 04-5378, 2005 U.S. App. LEXIS 15259 (D.C. Cir. July 25, 2005), cert. denied, 126 S. Ct. 791 (2005); Boyd v. U.S. Marshals Serv., No. 99-2712, slip op. at 5 (D.D.C. Mar. 30, 2001) (finding that plaintiff's assertion that informant and others who testified at his criminal trial waived their right to privacy by testifying is "simply wrong"); Galpine, No. 99-1032, slip op. at 12 (E.D.N.Y. Apr. 28, 2000) (reiterating that Exemption 7(C) protects "identities of individuals who testified at [requester's] criminal trial"); Rivera v. FBI, No. 98-0649, slip op. at 5 (D.D.C. Aug. 31, 1999) ("Individuals who testify at trial do not waive their privacy interest[s] beyond the scope of the trial record."); Robinson v. DEA, No. 97-1578, slip op. at 9 (D.D.C. Apr. 2, 1998) (stating that "[t]he disclosure during a trial of otherwise exempt information does not make the information public for all purposes"); Baltimore Sun, No. 97-
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who actually testifies retains a substantial privacy interest, the privacy of someone who is identified only as a potential witness likewise should be preserved.[54]

Moreover, courts have repeatedly recognized that the passage of time will not ordinarily diminish the applicability of Exemption 7(C).[55] This

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[53](...continued)
1991, slip op. at 5 (D. Md. Nov. 21, 1997) (reasoning that request for original photograph of defendant because court's copy was unreproducible is evidence that "substance of photograph had not been fully disclosed to the public," so defendant retained privacy interest in preventing further dissemination); Dayton Newspapers, No. C-3-95-328, slip op. at 42 (S.D. Ohio Sept. 12, 1996) (finding that victims who testified at trial retain privacy interests in their identities); Tanks, 1996 U.S. Dist. LEXIS 7266, at *10 (holding that requester's knowledge of identities of informants who testified against him does not diminish their privacy interests); cf. Bey v. FBI, No. 01-0299, slip op. at 4 (D.D.C. Aug. 2, 2002) (releasing most of list of telephone numbers (captured on court-ordered "pen register") that were dialed from telephone in plaintiff's house, because numbers were made public in open-court testimony at plaintiff's criminal trial). But see Linn v. U.S. Dep't of Justice, No. 92-1406, 1997 U.S. Dist. LEXIS 9321, at *17 (D.D.C. May 29, 1997) (finding no justification for withholding identities of witnesses who testified against requester at trial) (Exemptions 7(C) and 7(F)), appeal dismissed voluntarily, No. 97-5122 (D.C. Cir. July 14, 1997).

[54] See Rosenglick v. IRS, No. 97-747-18A, 1998 U.S. Dist. LEXIS 3920, at *9 (M.D. Fla. Mar. 10, 1998); Watson v. U.S. Dep't of Justice, 799 F. Supp. 193, 196 (D.D.C. 1992).

[55] See, e.g., Halpern, 181 F.3d at 297 ("Confidentiality interests cannot be waived through . . . the passage of time."); McDonnell, 4 F.3d at 1256 (deciding that passage of forty-nine years does not negate individual's privacy interest); Maynard, 986 F.2d at 566 n.21 (finding effect of passage of time upon individual's privacy interests to be "simply irrelevant"); Fitzgibbon, 911 F.2d at 768 (concluding that passage of more than thirty years irrelevant when records reveal nothing about government activities); Keys, 830 F.2d at 348 (holding that passage of forty years did not "dilute the privacy interest as to tip the balance the other way"); King, 830 F.2d at 234 (rejecting argument that passage of time diminished privacy interests at stake in records more than thirty-five years old); Diamond v. FBI, 707 F.2d 75, 77 (2d Cir. 1983) ("the danger of disclosure may apply to old documents"); Ray v. FBI, 441 F. Supp. 2d 27, 35 (D.D.C. 2006) (rejecting argument that passage of time and retirement of FBI Special Agents diminish their privacy interests); Sinito v. U.S. Dep't of Justice, No. 87-0814, 2000 U.S. Dist. LEXIS 22504, at *35 (D.D.C. July 12, 2000) (concluding that the "passage of time ordinarily does not diminish the applicability of Exemption 7(C)"); Franklin, No. 97-1225, slip op. at 12 (S.D. Fla. June 15, 1998) (magistrate's recommendation) (rejecting argument that passage of time vitiates individual's pri-
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may be especially true in instances in which the information was obtained through questionable law enforcement investigations.[56] In fact, the "practical obscurity" concept expressly recognizes that the passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge but has long since faded from memory.[57]

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[55](...continued)
vacy interest in nondisclosure), adopted (S.D. Fla. June 26, 1998); Stone, 727 F. Supp. at 664 (explaining that FBI Special Agents who participated in an investigation over twenty years earlier, even one as well known as the RFK assassination, "have earned the right to be 'left alone' unless an important public interest outweighs that right"); see also Exner, 902 F. Supp. at 244 n.7 (holding that fact that incidents in question "occurred more than thirty years ago may, but does not necessarily, diminish the privacy interest"); Branch, 658 F. Supp. at 209 (The "privacy interests of the persons mentioned in the investigatory files do not necessarily diminish with the passage of time."); cf. Schrecker v. U.S. Dep't of Justice, 349 F.3d 657, 664-65 (D.C. Cir. 2003) (approving FBI's use of "100-year rule," which presumes that individual is dead if birthdate appeared in documents responsive to request and was more than 100 years old, to determine if subject of requested record is still alive and has privacy interest); Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1183 (D.C. Cir. 1996) (ruling that "mere passage of time is not a per se bar to reliance on [E]xemption 1"). But see Davin, 60 F.3d at 1058 (finding that for some individuals, privacy interest may become diluted by passage of over sixty years, though under certain circumstances potential for embarrassment and harassment may endure); Outlaw v. U.S. Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. Mar. 25, 1993) (ordering release of twenty-five-year-old photographs of murder victim with no known surviving next of kin); Silets, 591 F. Supp. at 498 ("[W]here documents are exceptionally old, it is likely that their age has diminished the privacy interests at stake.").

[56] See, e.g., Dunaway v. Webster, 519 F. Supp. 1059, 1079 (N.D. Cal. 1981) ("[The target of a McCarthy era investigation] may . . . deserve greater protection, because the connection to such an investigation might prove particularly embarrassing or damaging."); see also Campbell v. U.S. Dep't of Justice, 193 F. Supp. 2d 29, 40-41 (D.C. Cir. 2001) (finding that "the persons who were involved in [investigation of 1960s writer and civil rights activist James Baldwin] deserve protection of their reputations as well as recognition that they were simply doing a job that the cultural and political climate at the time dictated").

[57] See Reporters Comm., 489 U.S. at 767 ("[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even when the information may at one time have been public."); Rose v. Dep't of the Air Force, 495 F.2d 261, 267 (2d Cir. 1974) ("[A] person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information.") (Exemption 6), aff'd, 425 U.S. 352 (1976); see
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An individual's Exemption 7(C) privacy interest likewise is not extinguished merely because a requester might on his own be able to "piece together" the identities of third parties whose names have been deleted.[58] Nor do persons mentioned in law enforcement records lose all their rights

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[57](...continued)
also Assassination Archives & Research Ctr. v. CIA, 903 F. Supp. 131, 133 (D.D.C. 1995) (finding that passage of thirty or forty years "may actually increase privacy interests, and that even a modest privacy interest will suffice" to protect identities). See generally Favish, 541 U.S. at 173-74 (according full privacy protection without any hesitation, notwithstanding passage of ten years since Vincent Foster's death).

[58] Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1491 (D.C. Cir. 1984); see also Carpenter v. U.S. Dep't of Justice, 470 F.3d 434, 440 (1st Cir. 2006) (finding that privacy interest of subject is not terminated even if his identity as an informant could arguably be determined from another source); Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) (holding fact that requester obtained some information through other channels does not change privacy protection under FOIA and no waiver of third parties' privacy interests due to "inadequate redactions"); L&C Marine, 740 F.2d at 922 ("An individual does not lose his privacy interest under 7(C) because his identity . . . may be discovered through other means."); Judicial Watch, Inc. v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at *20 (D.D.C. Apr. 20, 2001) ("The fact that the requester might be able to figure out the individuals' identities through other means or that their identities have been disclosed elsewhere does not diminish their privacy interests . . . ."); Voinche v. FBI, No. 99-1931, slip op. at 13 n.4 (D.D.C. Nov. 17, 2000) ("The fact that Mr. Voinche [might have] learned of the identity of these individuals by reading a publication does not impair the privacy rights enjoyed by these three people."); Billington v. Dep't of Justice, 69 F. Supp. 2d 128, 137 (D.D.C. 1999) (deciding that disclosure of unredacted records due to administrative error did not "diminish the magnitude of the privacy interests of the individuals" involved), aff'd in pertinent part, 233 F.3d 581, 583 (D.C. Cir. 2000) (stating there was "nothing to add to the district court's sound reasoning" with respect to the withholdings under Exemption 7(C)); Cujas, 1998 U.S. Dist. LEXIS 6466, at *9 (reiterating that fact that information available elsewhere does not diminish third-party privacy interests in such law enforcement records); Smith, 977 F. Supp. at 500 (finding fact that plaintiff "can guess" names withheld does not waive privacy interest); Master v. FBI, 926 F. Supp. 193, 198-99 (D.D.C. 1996) (protecting subjects of investigative interest even though plaintiffs allegedly know their names), summary affirmance granted, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision). But see Cooper Cameron, 280 F.3d at 553 (refusing to protect the content of three employee-witness statements after release of the witnesses' names, even though disclosure would result in linking each employee to his or her statement).

to privacy merely because their names have been disclosed.[59]

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[59] See, e.g., Fiduccia, 185 F.3d at 1047 (concluding that privacy interests are not lost by reason of earlier publicity); Halpern, 181 F.3d at 297 ("Confidentiality interests cannot be waived through prior public disclosure . . . ."); Kimberlin, 139 F.3d at 949 (finding that even after subject's public acknowledgment of charges and sanction against him, he retained privacy interest in nondisclosure of "'details of investigation, of his misconduct, and of his punishment,'" and in "preventing speculative press reports of his misconduct from receiving authoritative confirmation from official source" (citing Bast, 665 F.2d at 1255)); Schiffer, 78 F.3d at 1410-11 (deciding fact that much of information in requested documents was made public during related civil suit does not reduce privacy interest); Jones, 41 F.3d at 247 (holding fact that law enforcement employee chose to testify or was required to testify or otherwise come forward in other settings does not amount to personal privacy waiver); Hunt, 972 F.2d at 288 ("public availability" of accused FBI Special Agent's name does not defeat privacy protection and "would make redaction of [the agent's name in] the file a pointless exercise"); Fitzgibbon, 911 F.2d at 768 (concluding fact that CIA or FBI may have released information about individual elsewhere does not diminish the individual's "substantial privacy interests"); Bast, 665 F.2d at 1255 (finding that "previous publicity amounting to journalistic speculation cannot vitiate the FOIA privacy exemption"); Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 U.S. Dist. LEXIS 6367, at *21 (D.D.C. Jan. 30, 2007) (deciding fact that identities of third parties were disclosed in a related criminal trial does not diminish privacy interest); Swope v. U.S. Dep't of Justice, 439 F. Supp. 2d 1, 6 (D.D.C. 2006) (stating that individual's awareness that telephone conversation is being monitored does not negate privacy rights in further disclosure of personal information); Odle v. Dep't of Justice, No. 05-2711, 2006 WL 1344813, at *10 (N.D. Cal. May 17, 2006) (finding that public's knowledge of subject's involvement in trial does not eliminate any privacy interest in further disclosure); Shores v. FBI, 185 F. Supp. 2d 77, 83 (D.D.C. 2002) (deciding that privacy interests are not diminished by the fact that plaintiff "may deduce the identities of individuals through other means or that their identities have already been disclosed" (citing Fitzgibbon, 911 F.2d at 768, and Weisberg, 745 F.2d at 1491)); LaRouche, 2001 U.S. Dist. LEXIS 25416, at *30 (holding that "release of similar information in another case does not warrant disclosure of otherwise properly exempted material"); Ponder v. Reno, No. 98-3097, slip op. at 6 (D.D.C. Jan. 22, 2001) (deciding that the fact that the government "failed to fully redact all agents' names does not constitute a waiver of Exemption 7(C)"); McGhghy v. DEA, No. C 97-0185, slip op. at 11 (N.D. Iowa May 29, 1998) (holding that "mere fact that individuals named in withheld documents may have previously waived their confidentiality interests, either voluntarily or involuntarily, does not mandate disclosure of withheld documents"), aff'd per curiam, No. 98-2989, 1999 U.S. App. LEXIS 16709 (8th Cir. July 13, 1999); Thomas v. Office of U.S. Attorney, 928 F. Supp. 245, 250 & n.8 (E.D.N.Y. 1996) (holding that despite public disclosure of some information about attorney's connec-

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Similarly, "[t]he fact that one document does disclose some names . . . does not mean that the privacy rights of these or others are waived; it has been held that [requesters] do not have the right to learn more about the activities and statements of persons merely because they are mentioned once in a public document about the investigation."[60]

Under the traditional Exemption 7(C) analysis, once a privacy interest has been identified and its magnitude has been assessed, it is balanced against the magnitude of any recognized public interest that would be served by disclosure.[61] And under Reporters Committee, the standard of

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[59](...continued)
tion with crime family, he still retains privacy interests in preventing further disclosure), appeal dismissed, No. 93-CV-3128 (2d Cir. Oct. 29, 1996); Crooker, 1995 WL 783236, at *18 (holding that despite fact that requester may have learned identities of third parties through criminal discovery, Exemption 7(C) protection remains); see also 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 publically made comments, that interest is certainly dissipated by the FBI's failure to redact his name from the entirety of the document."). But see Detroit Free Press, 73 F.3d at 98 (finding no unwarranted invasion of privacy in disclosure of "mug shots" of indicted individuals who had already appeared in court and had their names divulged); Steinberg v. U.S. Dep't of Justice, 179 F.R.D. 366, 371 (D.D.C. 1998) (holding content of sources' interviews must be disclosed once agency disclosed their identities); cf. Grove v. CIA, 752 F. Supp. 28, 32 (D.D.C. 1990) (ordering FBI to further explain Exemption 7(C) withholdings in light of highly publicized nature of investigation and fact that CIA and Secret Service released other records pertaining to same individuals).

[60] Kirk, 704 F. Supp. at 292; see also Favish, 541 U.S. at 171 (holding that "the fact that other pictures had been made public [does not] detract[] from the weighty privacy interests" in the remaining pictures); Kimberlin, 139 F.3d at 949 (reasoning that merely because subject of investigation acknowledged existence of investigation -- thus breaking bulwark level of "Glomarization" -- does not constitute waiver of subject's interest in keeping contents of Office of Professional Responsibility report confidential).

[61] See Schiffer, 78 F.3d at 1410 (explaining once agency shows that privacy interest exists, court must balance it against public's interest in disclosure); Computer Prof'ls, 72 F.3d at 904 (finding after privacy interest found, court must identify public interest to be served by disclosure); Massey, 3 F.3d at 624-25 (holding once agency establishes that privacy interest exists, that interest must be balanced against value of information in furthering FOIA's disclosure objectives); Church of Scientology, 995 F.2d at 921 (remanding case because district court failed to determine whether public interest in disclosure outweighed privacy concerns); Grine v. Coombs, No. 95-342, 1997 U.S. Dist. LEXIS 19578, at *19 (W.D. Pa. Oct. 10, 1997) (requiring balancing of privacy interest and extent to which it is in-
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public interest to consider is one specifically limited to the FOIA's "core purpose" of "shed[ding] light on an agency's performance of its statutory duties."[62] Accordingly, for example, the courts have consistently refused to recognize any public interest, as defined by Reporters Committee, in disclosure of information to assist a convict in challenging his conviction.[63]

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[61](...continued)
vaded against public benefit that would result from disclosure); Thomas, 928 F. Supp. at 250 (observing that since personal privacy interest in information is implicated, court must inquire whether any countervailing factors exist that would warrant invasion of that interest); Globe Newspaper Co. v. FBI, No. 91-13257, 1992 WL 396327, at *4 (D. Mass. Dec. 29, 1992) (finding public interest in disclosing amount of money government paid to officially confirmed informant guilty of criminal wrongdoing outweighs informant's de minimis privacy interest); Church of Scientology, 816 F. Supp. at 1160 (concluding while employees have privacy interest in their handwriting, that interest does not outweigh public interest in disclosure of information contained in documents not otherwise exempt); see also Favish, 541 U.S. at 174-75 (holding that "only when the FOIA requester has produced evidence to satisfy [a belief by a reasonable person] will there exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records"); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 571 (S.D.N.Y. 1989) (balancing plaintiff's interest in disclosure of names of individuals listed in INS Lookout Book on basis of ideological exclusion provision against excluded individuals' privacy interests); *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing balancing of privacy interests and public interest); FOIA Update, Vol. X, No. 2, at 7.

[62] 489 U.S. at 773; see also Dayton Newspapers, Inc. v. U.S. Dep't of the Navy, 109 F. Supp. 2d 768, 775 (S.D. Ohio 1999) (concluding that questionnaire responses by court-martial members were properly withheld because the "information contained therein sheds no light on the workings of the government").

[63] See, e.g., Oguaju v. United States, 288 F.3d 448, 450 (D.C. Cir. 2002) (finding that plaintiff's "personal stake in using the requested records to attack his convictions does not count in the calculation of the public interest"), vacated & remanded, 541 U.S. 970, on remand, 378 F.3d 1115 (D.C. Cir.) (reaffirming prior decision), reh'g denied, 386 F.3d 273 (D.C. Cir. 2004), cert. denied, 544 U.S. 983 (2005); Neely, 208 F.3d at 464 (ruling that requester's wish to establish his own innocence does not create FOIA-recognized public interest); Hale, 973 F.2d at 901 (finding no FOIA-recognized public interest in death-row inmate's allegation of unfair trial); Landano v. U.S. Dep't of Justice, 956 F.2d 422, 430 (3d Cir. 1991) (finding no public interest in disclosure of identities of individuals involved in murder investigation because such release would not shed light on how FBI fulfills its responsibilities), cert. denied on Exemption 7(C) grounds, 506 U.S. 868 (1992), rev'd & remanded on other grounds, 508 U.S. 165 (1993); Burge, 934
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Indeed, a FOIA requester's private need for information in connection with litigation plays no part whatsoever in determining whether disclosure is warranted.[64] So in NARA v. Favish, the Supreme Court further reinforced

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[63](...continued)
F.2d at 580 ("requester's need, however significant, does not warrant disclosure"); Trentadue, 2006 WL 1184636, at *6 (reiterating that the reason the FOIA request was made does not govern, but "rather it is whether disclosure would serve the core purpose of FOIA -- letting the citizens know what the[ir] government is up to"); Taylor v. U.S. Dep't of Justice, 257 F. Supp. 2d 101, 110 (D.D.C. 2003) (finding no public interest in disclosure of third-party information that requester asserted might assist him in challenging his conviction), reconsideration denied, 268 F. Supp. 2d 34 (D.D.C. 2003), appeal dismissed sub nom. Taylor v. FBI, No. 03-5111, 2003 WL 22005968 (D.C. Cir. Aug. 19, 2003); Boyd, No. 99-2712, slip op. at 5 (D.D.C. Mar. 30, 2001) (finding requests for Brady material to be outside proper role of FOIA); Galpine, No. 99-1032, slip op. at 13 (E.D.N.Y. Apr. 28, 2000) (restating that requests for exculpatory evidence are "'outside the proper role of FOIA'" (quoting Colon, 1998 WL 695631, at *5)); Fedrick v. U.S. Dep't of Justice, 984 F. Supp. 659, 664 (W.D.N.Y. 1997) (magistrate's recommendation) (finding that requester's personal interest in seeking information for use in collateral challenge to his conviction does not raise "FOIA-recognized interest"), adopted, No. 95-558 (W.D.N.Y. Oct. 28, 1997), aff'd sub nom. Fedrick v. Huff, 165 F.3d 13 (2d Cir. 1998) (unpublished table decision); Trupei, 1998 WL 8986, at *3 (concluding that request for Brady material is not within role of FOIA); Smith, 977 F. Supp. at 499 (holding that requester's personal interest in obtaining exculpatory statements does not give him greater rights under FOIA); Thomas, 928 F. Supp. at 251 (holding that prisoner's personal interest in information to challenge his conviction "does not raise a FOIA-recognized interest that should be weighed against the subject's privacy interests"); Durham v. USPS, No. 91-2234, 1992 WL 700246, at *2 (D.D.C. Nov. 25, 1992) (holding "Glomar" response appropriate even though plaintiff argued that information would prove his innocence), summary affirmance granted, No. 92-5511 (D.C. Cir. July 27, 1993); Johnson, 758 F. Supp. at 5 ("Resort to Brady v. Maryland as grounds for waiving confidentiality [under Exemptions 7(C) and 7(D)] is . . . outside the proper role of the FOIA. Exceptions cannot be made because of the subject matter or [death-row status] of the requester."). But see Lipman, No. 3:97-667, slip op. at 4 (M.D. Pa. June 3, 1998) (making exceptional finding of public interest in plaintiff's quest to discover whether government withheld Brady material).

[64] See Massey, 3 F.3d at 625 ("[The] mere possibility that information may aid an individual in the pursuit of litigation does not give rise to a public interest."); Joslin v. U.S. Dep't of Labor, No. 88-1999, slip op. at 8 (10th Cir. Oct. 20, 1989) (finding no public interest in release of documents sought for use in private tort litigation); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1197 (N.D. Cal. 2006) (finding no public interest in disclosure of documents sought for use in plaintiff's employment discrimination case); Me-
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the FOIA principle that a requester's identity generally is irrelevant in the processing of a FOIA request,[65] but it at the same time made clear that a requester's reason for making a FOIA request, insofar as an evidentiary showing on an asserted "public interest" is required, can of course affect Exemption 7(C) decisionmaking.[66]

It is also important to note that there is a logical distinction between the public interest that can exist in an overall subject that relates to a

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[64](...continued)
serve v. U.S. Dep't of Justice, No. 04-1844, 2006 U.S. Dist. LEXIS 56732, at *23-24 (D.D.C. Aug. 14, 2006) (holding that request seeking information in order to pursue motion for new trial and motion to vacate or set aside sentence does not involve qualifying public interest); Garcia, 181 F. Supp. 2d at 372 (holding that a request seeking information in furtherance of private litigation falls outside "the ambit of FOIA's goal of public disclosure of agency action"); Exner, 902 F. Supp. at 244 & n.8 (explaining requester's interest in pursuing legal remedies against person who entered her apartment does not pertain to workings of government); Bruscino, No. 94-1955, 1995 WL 444406, at *9 (D.D.C. May 12, 1995) (concluding no public interest in release of information concerning other inmates sought for use in private litigation); Andrews v. U.S. Dep't of Justice, 769 F. Supp. 314, 317 (E.D. Mo. 1991) (deciding no public interest in satisfaction of private judgments). But see Butler, No. 86-2255, 1994 WL 55621, at *5-6 (D.D.C. Feb. 3, 1994) (ordering identities of supervisory FBI personnel disclosed because of "significant" public interest in protecting requester's due process rights in his attempt to vacate sentence).

[65] See Favish, 541 U.S. at 170 ("As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester."); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (pointing out that "Favish thus stands as a reminder to all agencies that their 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").

[66] See Favish, 541 U.S. at 172 (stating that when the privacy concerns of Exemption 7(C) apply, an agency can require the requester "to establish a sufficient reason for the disclosure" by having the requester demonstrate both "that the public interest sought to be advanced [by disclosure] is a significant one" and that disclosure of the "information [requested] is likely to advance that interest"); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish (posted 4/9/04) (discussing public interest standard adopted in Favish, as well as required "nexus" between requested information and public interest asserted); cf. CEI Wash. Bureau, Inc. v. Dep't of Justice, No, 05-5446, slip op. at 4-5 (D.C. Cir. Nov. 21, 2006) (remanding for possible "evidentiary hearing[]" needed to resolve "factual disputes" regarding "extent of" both privacy interests and public interests involved).

FOIA request and the public interest that might or might not be served by disclosure of the actual records that are at hand in that particular FOIA request.[67] The term "umbrella issue" is used by agencies and courts alike to make this important distinction when considering public interest issues under the FOIA.[68] This approach of carefully distinguishing the general from the specific has ready application in determining whether particular record portions at hand are of such nature that their disclosure actually would serve an identified general public interest and therefore warrant the overriding of a personal privacy interest in the Exemption 7(C) balancing process.[69]

Furthermore, unsubstantiated allegations of official misconduct are simply insufficient to establish a public interest in disclosure: The Supreme Court in NARA v. Favish made it very clear that "bare suspicion" is completely inadequate and that a requester must produce evidence that would be credible in the eyes of a reasonable person.[70] Now, one who

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[67] 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 that FOIA request) (citing cases).

[68] Id. (discussing meaning of "umbrella issue" under FOIA (citing Elec. Privacy Info. Ctr. v. DOD, 365 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 [it] 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"))).

[69] See, e.g., KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) (rejecting an assertion that "the public interest at stake is the right of the public to know" about a controversial event, because on careful analysis the particular record segments at issue "do not provide information about" that subject).

[70] 541 U.S. at 172; see, e.g., Boyd v. Criminal Div. of the U.S. Dep't of Justice, Nos. 05-5142 & 04-5369, 2007 WL 328064, at *4 (D.C. Cir. Feb. 6, 2007) (stating that an alleged single instance of a Brady violation would not suffice to show a pattern of government wrongdoing); Oguaju, 288 F.3d at 451 (holding that "bald accusations" of prosecutorial misconduct are insufficient to establish public interest); Spirko, 147 F.3d at 999 (finding no public interest in names and information pertaining to suspects and law enforcement officers absent any evidence of alleged misconduct by agency); Enzinna v. U.S. Dep't of Justice, No. 97-5078, 1997 WL 404327, at *1 (D.C. Cir. June 30, 1997) (finding that without evidence that Assistant United States Attorney made misrepresentation at trial, public interest in dis-

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closure is insubstantial); Quiñon, 86 F.3d at 1231 (holding that in absence of evidence FBI engaged in wrongdoing, public interest is "insubstantial"); Schiffer, 78 F.3d at 1410 (finding "little to no" public interest in disclosure when requester made unsubstantiated claim that FBI's decision to investigate him had been affected by "undue influence"); McCutchen, 30 F.3d at 189 (finding "negligible" public interest in disclosure of identities of agency scientists who did not engage in scientific misconduct); Beck v. Dep't of Justice, 997 F.2d 1489, 1492-94 (D.C. Cir. 1993) (holding that agency properly "Glomarized" request for records concerning alleged wrongdoing by two named employees; no public interest absent any evidence of wrongdoing or widespread publicity of investigation); KTVY-TV, 919 F.2d at 1470 (allegations of "possible neglect"); Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice, No. 04-0697, 2006 U.S. Dist. LEXIS 63853, at *14-16 (D.D.C. Sept. 7, 2006) (stating that knowing what, if anything, went wrong in an individual case would not shed any light on the government's operations as a whole); Geronimo v. Executive Office for U.S. Attorneys, No. 05-1057, 2006 WL 1992625, at *6 (D.D.C. July 14, 2006) (stating that the plaintiff did not "contend that the withheld information is necessary to confirm or refute unlawful activity by EOUSA and therefore has failed to trigger the balancing requirement"); Odle, 2006 WL 1344813, at *9 (finding no public interest because the records at issue "would shed little light on the ability of the DOJ and its employees to competently perform their duties"); Butler v. DEA, No. 05-1798, 2005 U.S. Dist. LEXIS 40942, at *13-14 (D.D.C. Feb. 16, 2006) (finding that plaintiff's bald assertions of misconduct were not sufficient to establish public interest), aff'd, No. 06-5084, 2006 U.S. App. LEXIS 20472 (D.C. Cir. Aug. 7, 2006); Brown, 384 F. Supp. 2d at 279-81 (applying Favish and holding that the plaintiff failed to produce "evidence that would warrant a belief by a reasonable person that the alleged [g]overnment impropriety might have occurred"); Peltier v. FBI, No. 03-905, 2005 WL 735964, at *15 (W.D.N.Y. Mar. 31, 2005) (applying Favish and finding "no evidence of any illegality on the part of the FBI," despite opinions from two courts of appeals recognizing government misconduct during the investigation and prosecution of plaintiff's underlying criminal case); Shores, 185 F. Supp. 2d at 83 (finding no public interest in unsubstantiated assertion that certain FBI Special Agents committed unlawful acts); Ligorner, 2 F. Supp. 2d at 405 (when considering privacy interests of person accused of misconduct, public interest is "de minimis"); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 25 (D.D.C. 1998) (rejecting plaintiffs' "post-hoc rationalization of public interest" in FBI investigation because they had not even suggested FBI wrongdoing during investigation); Exner, 902 F. Supp. at 244-45 & n.9 (finding allegation of FBI cover-up of "extremely sensitive political operation" provides "minimal at best" public interest); Triestman v. U.S. Dep't of Justice, 878 F. Supp. 667, 673 (S.D.N.Y. 1995) (finding no substantial public interest in disclosure when request seeks information concerning possible investigations of wrongdoing by named DEA agents); Buros, No. 93-571, slip op. at 10 (W.D. Wis. Oct. 26, 1994) (holding even though subject's po-
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asserts government misconduct as the public interest is held to a higher standard: Such a FOIA requester must make a "meaningful evidentiary showing" in order to provide even a public interest "counterweight" to the privacy interest and require a balancing of the two.[71] Additionally, the requester must establish some "nexus" between the requested documents and the asserted "significant" public interest in disclosure.[72]

It also has been held that no public interest exists in federal records that pertains to alleged misconduct by state officials;[73] such an attenuated

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tential mishandling of funds already known to public, "confirming . . . federal criminal investigation brushes the subject with an independent and indelible taint of wrongdoing"); Williams v. McCausland, No. 90-7563, 1994 WL 18510, at *12 (S.D.N.Y. Jan. 18, 1994) (protecting identities of government employees accused of improper conduct) (Exemptions 6 and 7(C)). But see Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 567-69 (1st Cir. 1992) (making finding of public interest in disclosure of unsubstantiated allegations against two senior officials); ACLU v. DOD, 389 F. Supp. 2d 547, 573 (S.D.N.Y. 2005) (finding "substantial public interest" in release of photos of government misconduct at prison in Iraq) (Exemptions 6 and 7(C)), reconsideration denied, 396 F. Supp. 2d 459 (S.D.N.Y. 2005) (appeal pending); McLaughlin v. Sessions, No. 9244, 1993 U.S. Dist. LEXIS 13817, at *18 (D.D.C. Sept. 22, 1993) (reasoning that because request seeks information to determine whether FBI investigation was improperly terminated, requester's interest in scope and course of investigation constitutes recognized public interest which must be balanced against privacy interests of named individuals).

[71] Favish, 541 U.S. at 173-75 (stating that Court cannot ignore fact that five different investigations into Foster matter reached same conclusion, and noting that Favish failed to produce any evidence of government impropriety that would be believable by reasonable person); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing specific public interest standard as enunciated in Favish).

[72] 541 U.S. at 175; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing necessary nexus between requested information and asserted public interest).

[73] See Landano, 956 F.2d at 430 (discerning "no FOIA-recognized public interest in discovering wrongdoing by a state agency"); Garcia, 181 F. Supp. 2d at 374 ("The discovery of wrongdoing at a state as opposed to a federal agency . . . is not the goal of FOIA."); LaRouche, 2001 U.S. Dist. LEXIS 25416, at *20 ("The possible disclosures of state government misconduct is not information that falls within a public interest FOIA [was] intended to protect."); Thomas, 928 F. Supp. at 251 (recognizing that FOIA cannot serve as basis for requests about conduct of state agency). But see also Lissner, 241 F.3d at 1223 (rationalizing that public interest exists in
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interest "falls outside the ambit of the public interest the FOIA was enacted to serve."[74] Moreover, it should be remembered that any special expertise claimed by the requester is irrelevant in assessing any public interest in disclosure.[75]

It also is important to remember that a requester must do more than identify a public interest that qualifies for consideration under Reporters Committee: The requester must demonstrate that the public interest in disclosure is sufficiently compelling to, on balance, outweigh legitimate privacy interests.[76] Of course, "[w]here the requester fails to assert a public

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[73](...continued)
Custom Service's handling of smuggling incident despite fact that information pertained to actions of state law enforcement officers).

[74] Reporters Comm., 489 U.S. at 775; see also FOIA Update, Vol. XII, No. 2, at 6 (explaining that "government activities" in Reporter's Committee standard means activities of federal government).

[75] See Ford, 1998 WL 317561, at *3 (holding that plaintiff's prior EEO successes against agency do not establish public interest in disclosure of third-party names in this investigation); Massey, 3 F.3d at 625 (finding that the identity of the requesting party and the use that that party plans to make of the requested information have "no bearing on the assessment of the public interest served by disclosure"); Stone, 727 F. Supp. at 668 n.4 (stating that court looks to public interest served by release of information, "not to the highly specialized interests of those individuals who understandably have a greater personal stake in gaining access to that information"). But cf. Manna, 51 F.3d at 1166 (deciding that although court does not usually consider requester's identity, fact that requester held high position in La Cosa Nostra is certainly material to protection of individual privacy).

[76] See Senate of P.R., 823 F.2d at 588 (holding that general interest of legislature in "getting to the bottom" of a controversial investigation is not sufficient to overcome "substantial privacy interests"); Morales Cozier, No. 1:99-CV-0312, slip op. at 18 (N.D. Ga. Sept. 25, 2000) (concluding that public interest in knowing what government is up to in relation to investigation of individuals having contact with Cubans is not furthered by disclosing government employees' names and identifying information); Schrecker v. U.S. Dep't of Justice, 74 F. Supp. 2d 26, 34 (D.D.C. 1999) (finding requester's "own personal curiosity" about names of third parties and agents insufficient to outweigh privacy interests), rev'd on other grounds, 254 F.3d 162, 166 (D.C. Cir. 2001); Times Picayune, 37 F. Supp. 2d at 482 (describing public interest in public figure's "mug shot" as "purely speculative" and therefore readily outweighed by privacy interest); Ajluni, 947 F. Supp. 605 ("In the absence of any strong countervailing public interest in disclosure, the privacy interests of the individuals who are the subjects of the redacted material must prevail."); Fitzgibbon v. U.S. Secret Serv., 747 F. Supp. 51, 59
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interest purpose for disclosure, even a less-than-substantial invasion of another's privacy is unwarranted."[77] In the wake of Reporters Committee, the public interest standard ordinarily will not be satisfied when FOIA requesters seek law enforcement information pertaining to living persons.[78]

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[76](...continued)
(D.D.C. 1990) (holding public interest in alleged plot in United States by agents of now deposed dictatorship insufficient to overcome "strong privacy interests"); Stone, 727 F. Supp. at 667-68 n.4 ("[N]ew information considered significant by zealous students of the RFK assassination investigation would be nothing more than minutia of little or no value in terms of the public interest."); see also Associated Press, 2006 WL 2707395, at *5 (finding minimal privacy interest in identifying detainees at Guantanamo Bay compared to public interest in evaluating allegations of abuse and DOD's response to it); ACLU, 389 F. Supp. 2d at 571-73 (finding possibility of invasion of privacy in redacted photographs to be "no more than speculative" and to be outweighed by "substantial public interest"); Ctr. to Prevent Handgun Violence, 981 F. Supp. at 23-24 (finding "minuscule privacy interest" in identifying sellers in multiple-sales gun reports in comparison to public interest in scrutinizing ATF's performance of its duty to enforce gun control laws and to curtail illegal interstate gun trafficking); Steinberg, 1998 WL 384084, at *3 (finding significant public interest in criminal investigation of alleged counterterrorist activities, which outweighs privacy interests of informants known to plaintiff). But see Cooper Cameron, 280 F.3d at 547, 554 (viewing a "general public interest in monitoring" a specific OSHA investigation as sufficient to overcome employee-witnesses' privacy interests against employer retaliation); Lardner, 2005 U.S. Dist. LEXIS 5465, at *62-64 (finding that release of identities of unsuccessful pardon applicants would shed light on government's exercise of pardon power in "important ways" without establishing required nexus).

[77] King v. U.S. Dep't of Justice, 586 F. Supp. 286, 294 (D.D.C. 1983), aff'd, 830 F.2d 210 (D.C. Cir. 1987); see also Beck, 997 F.2d at 1494 (observing that because request implicates no public interest at all, court "'need not linger over the balance; something . . . outweighs nothing every time'" (quoting Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989)) (Exemptions 6 and 7(C)); Fitzgibbon, 911 F.2d at 768 (same); Shoemaker v. U.S. Dep't of Justice, No. 03-1258, slip op. at 7 (C.D. Ill. May 19, 2004) (concluding that documents were properly withheld where the plaintiff could not identify a public interest, "let alone any substantial public interest to outweigh the privacy concerns claimed by [the government]"), aff'd, 121 F. App'x 127 (7th Cir. 2004); FOIA Update, Vol. X, No. 2, at 7.

[78] See, e.g., Abraham & Rose, 138 F.3d at 1083 (stating that public may have interest in learning how IRS exercises its power over collection of taxes but that this does not mean that identity or other personal information concerning taxpayers will shed light on agency's performance) (Exemption 6); Spirko, 147 F.3d at 999 (recognizing strong privacy interests of
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[78](...continued)
suspects and law enforcement officers when requested documents neither confirm nor refute plaintiff's allegations of government misconduct); Quiñon, 86 F.3d at 1231 (finding insufficient public interest in disclosing individuals mentioned in FBI files when no evidence of wrongdoing; even if individuals had engaged in wrongdoing, such misconduct would have to shed light on agency's action); Schiffer, 78 F.3d at 1410 (recognizing "little to no" public interest in disclosure of persons in FBI file, including some who provided information to FBI, when no evidence of FBI wrongdoing); Schwarz v. INTERPOL, No. 94-4111, 1995 U.S. App. LEXIS 3987, at *7 (10th Cir. Feb. 28, 1995) (ruling that disclosure of any possible information about whereabouts of requester's "alleged husband" is not in public interest); Maynard, 986 F.2d at 566 (disclosing information concerning low-level FBI employees and third parties not in public interest); Fitzgibbon, 911 F.2d at 768 ("[T]here is no reasonably conceivable way in which the release of one individual's name . . . would allow citizens to know 'what their government is up to.'" (quoting Reporters Comm., 489 U.S. at 773)); Pemco Aeroplex, Inc. v. U.S. Dep't of Labor, No. 01-AR-1421, slip op. at 5 (N.D. Ala. Dec. 11, 2001) (finding no public interest in disclosing identities of employees who completed race-discrimination questionnaire); Greenberg, 10 F. Supp. 2d at 29 (holding that privacy interests of individuals mentioned in FBI surveillance tapes and transcripts obtained in arms-for-hostages investigation clearly outweigh any public interest in disclosure); McNamera, 974 F. Supp. at 958-61 (finding, where no evidence of agency wrongdoing, no public interest in disclosure of information concerning criminal investigations of private citizens); Stone, 727 F. Supp. at 666-67 (stating that disclosing identities of low-level FBI Special Agents who participated in RFK assassination investigation is not in public interest); see also KTVY-TV, 919 F.2d at 1470 (stating that disclosing identities of witnesses and third parties would not further plaintiff's unsupported theory that post office shootings could have been prevented by postal authorities); Halloran v. VA, 874 F.2d 315, 323 (5th Cir. 1989) ("[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."); FOIA Update, Vol. X, No. 2, at 6; cf. Nation Magazine, 71 F.3d at 895 (finding that "in some, perhaps many" instances when third party seeks information on named individual in law enforcement files, public interest will be "negligible"; but when individual had publicly offered to help agency, disclosure of records concerning that fact might be in public interest by reflecting "agency activity" in how it responded to offer of assistance); Associated Press, 2006 WL 2707395, at *5 (finding existing public interest to be "great" and ordering release of detainees' names and other identifying information contained within documents regarding abuse at Guantanamo Bay detention facility); ACLU, 389 F. Supp. 2d at 568-74 (finding substantiated public interest in production of redacted photographs concerning abuse of detainees at Abu Ghraib prison). But cf. Favish, 541 U.S. at 166-70 (recognizing "survivor privacy" principle, and holding that family of deceased individual has own
(continued...)

EXEMPTION 7(C)

In order to protect the privacy interest of any individual who might be living, agencies may use many different kinds of tests or research methods to determine whether that person is still living or has died. For instance, the D.C. Circuit approved the Federal Bureau of Investigation's methods for doing this in Schrecker v. U.S. Dep't of Justice.[79] The FBI uses several steps to determine whether an individual mentioned in a record is alive or dead, including looking up the individual's name in Who Was Who, employing its "100-year rule" (which presumes that an individual is dead if his or her birthdate appears in the responsive documents and he or she would be over 100 years old), and using previous FOIA requests (institutional knowledge), a search of the Social Security Death Index (when the Social Security number appears in the responsive documents), and other "internal" sources.[80]

The Schrecker decision, however, now should be viewed together with the D.C. Circuit's subsequent decision in Davis v. Department of Justice.[81] In Davis, the D.C. Circuit was presented with an unusual fact pattern in which the request was for audiotapes, not documents.[82] It accordingly determined that the steps outlined in Schrecker were insufficient

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[78](...continued)
right and interest in personal privacy protection with respect to decedent's death-scene photographs due to their exceptional sensitivity); Accuracy in Media, 194 F.3d at 123 (protecting autopsy and death-scene photographs arising out of the investigation of Deputy White House Counsel Vincent Foster's suicide, and rejecting plaintiff's categorical argument that the "FOIA's protection of personal privacy ends upon the death of the individual depicted"); *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing "survivor privacy" principle and its exceptional contours).

[79] 349 F.3d at 663 (approving FBI's usual method of determining whether individual is living or dead); see also Johnson v. Executive Office for U.S. Attorneys, 310 F.3d 771, 775 (D.C. Cir. 2002) (approving of the agency's inquiries concerning the subject of a request, and refusing to establish a "brightline set of steps for an agency" to determine whether he or she is living or dead). But see also Davis v. Dep't of Justice, 460 F.3d 92, 103 (D.C. Cir. 2006) (clarifying that court's holding in Schrecker did not purport to affirm any set of search methodologies as per se sufficient).

[80] Schrecker, 349 F.3d at 663-66; see also Peltier v. FBI, No. 02-4328, slip op. at 21 (D. Minn. Oct. 24, 2006) (magistrate's recommendation) (finding that FBI properly determined whether individuals were living or deceased by following steps set out in Schrecker), adopted (D. Minn. Feb. 9, 2007); Peltier, 2005 WL 735964, at *14 (same); Piper v. U.S. Dep't of Justice, 428 F. Supp. 2d 1, 3-4 (D.D.C. 2006) (same).

[81] 460 F.3d 92.

[82] Id. at 95.

when analyzing the tapes, as there is "virtually no chance that a speaker will announce" any personal identifiers during an oral conversation.[83] The court concluded that "[i]n determining whether an agency's search is reasonable," courts must consider several factors, specifically "the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives."[84] The court remanded the case in Davis "to permit the agency an opportunity to evaluate the alternatives and either to conduct a further search or to explain satisfactorily why it should not be required to do so."[85]

In Reporters Committee, the Supreme Court also emphasized the propriety and practicability of "categorical balancing" under Exemption 7(C) as a means of achieving "workable rules" for processing FOIA requests.[86] In so doing, it recognized that entire categories of cases can properly receive uniform disposition "without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided."[87] This approach, in conjunction with other elements of Reporters Committee and traditional Exemption 7(C) principles, subsequently led the D.C. Circuit to largely eliminate the need for case-by-case balancing in favor of "categorical" withholding of individuals' identities in law enforcement records.[88]

In SafeCard, the plaintiff sought information pertaining to an SEC investigation of manipulation of SafeCard stock, including "names and addresses of third parties mentioned in witness interviews, of customers listed in stock transaction records obtained from investment companies, and of persons in correspondence with the SEC."[89] Recognizing the fundamentally inherent privacy interest of individuals mentioned in any way in law enforcement files,[90] the D.C. Circuit found that the plaintiff's asserted public interest -- providing the public "with insight into the SEC's conduct with

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[83] Id. at 104.

[84] See id. at 105.

[85] Id.

[86] 489 U.S. at 776-80.

[87] Id. at 780. But see also Cooper Cameron, 280 F.3d at 553 (acknowledging that statements to OSHA by employee-witnesses are "a characteristic genus suitable for categorical treatment," yet declining to use categorical approach).

[88] SafeCard, 926 F.2d at 1206.

[89] Id. at 1205.

[90] Id. (recognizing privacy interests of suspects, witnesses, and investigators).

respect to SafeCard" -- was "not just less substantial [but] insubstantial."[91] Based upon the Supreme Court's endorsement of categorical rules in Reporters Committee, it then further determined that the identities of individuals who appear in law enforcement files would virtually never be "very probative of an agency's behavior or performance."[92] It observed that such information would serve a "significant" public interest only if "there is compelling evidence that the agency . . . is engaged in illegal activity."[93] Con-

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[91] Id.

[92] Id.

[93] Id. at 1206; see also Oguaju, 288 F.3d at 451 (finding that "exposing a single, garden-variety act of misconduct would not serve the FOIA's purpose of showing 'what the Government is up to'" (quoting Reporters Comm., 489 U.S. at 780)); Quiñon, 86 F.3d at 1231 (finding insufficient public interest in revealing individuals mentioned in FBI files absent evidence of wrongdoing; even if individuals had engaged in wrongdoing, such misconduct would have to shed light on agency's action); McCutchen, 30 F.3d at 188 ("Mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by Exemption 7(C)."); Davis, 968 F.2d at 1282 ("[W]hen . . . governmental misconduct is alleged as the justification for disclosure, the 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.'" (quoting SafeCard, 926 F.2d at 1205-06)); Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at *9 (D.D.C. July 29, 1999) (magistrate's recommendation) (finding "significant public interest" in documents relating to FBI's terrorism investigations but concluding that withholding of third-party names is proper absent compelling evidence of illegal activity by FBI); Chasse v. U.S. Dep't of Justice, No. 98-207, slip op. at 11 (D. Vt. Jan. 12, 1999) (magistrate's recommendation) (deciding that Exemption 7(C) does not apply to information regarding job-related activities of high-level INS officials alleged to have deceived members of congressional task force), adopted (D. Vt. Feb. 9, 1999), aff'd, No. 99-6059 (2d Cir. Apr. 6, 2000) (Privacy Act wrongful disclosure case); McGhghy, No. C 97-0185, slip op. at 10 (N.D. Iowa May 29, 1998) (holding that there is "no compelling public interest rationale" for disclosing the names of law enforcement officers, private individuals, investigative details, or suspects' names from DEA files); cf. Nation Magazine, 71 F.3d at 895-96 (noting that when individual had publicly offered to help agency, disclosure of records concerning that fact might be in public interest by reflecting "agency activity" in how it responded to offer of assistance); Dunkelberger, 906 F.2d at 782 (finding some cognizable public interest in "FBI Special Agent's alleged participation in a scheme to entrap a public official and in the manner in which the agent was disciplined"); Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1093-94 (D. Or. 1998) (finding that public interest in

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sequently, the D.C. Circuit held 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 [categorically] exempt from disclosure."[94] This all now should be viewed, though, together with the standard applied by the Supreme Court in NARA v. Favish regarding any specific evaluation of an asserted "agency wrongdoing public interest."[95] In any event, of course, agencies should be sure to redact their law enforcement records so that only identifying information is withheld

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[93](...continued)
knowing how government enforces and punishes violations of land-management laws outweighs privacy interests of cattle trespassers who admitted violations) (Exemptions 6 and 7(C)). But see Detroit Free Press, 73 F.3d at 98 (finding, despite no evidence of government wrongdoing, public interest in disclosure of "mug shots" of indicted individuals who had already appeared in court and had their names divulged) (dicta); Rosenfeld, 57 F.3d at 811-12 (making finding of public interest in disclosure of names of subjects of investigatory interest because disclosure would serve public interest by shedding light on FBI actions and showing whether and to what extent FBI "abused its law enforcement mandate by overzealously investigating a political protest movement"); Providence Journal, 981 F.2d at 567-69 (making finding of public interest in disclosure of unsubstantiated allegations); Homick, No. 98-00557, slip op. at 19-20, 22-23 (N.D. Cal. Sept. 16, 2004) (making finding of public interest in disclosure of names of FBI and DEA Special Agents, and of state, local, and foreign law enforcement officers, on basis that disclosure would show whether government officials acted negligently or perhaps otherwise improperly in performance of their duties); Bennett v. DEA, 55 F. Supp. 2d 36, 41 (D.D.C. 1999) (ordering release of informant's rap sheet after finding "very compelling" evidence of "extensive government misconduct" in handling "career" informant); Davin, No. 92-1122, slip op. at 9 (W.D. Pa. Apr. 9, 1998) (ordering disclosure of names and addresses of individuals in records of FBI investigation of Workers Alliance of America conducted between 1938 and 1964).

[94] SafeCard, 926 F.2d at 1206; see also Neely, 208 F.3d at 464 (adopting SafeCard approach). But see Baltimore Sun, 131 F. Supp. 2d at 730 n.5 (determining that "plaintiff need not provide compelling evidence of government wrongdoing in light of the inapplicability of the categorical rule of SafeCard" to this case; deciding that "[a] more general public interest in what a government agency is up to is sufficient here").

[95] See *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (advising that the Supreme Court "has explained that in seeking to apply some 'clear' or 'compelling' evidence test in such a case an agency now specifically should consider whether the requester has 'produced any evidence that would warrant a belief by a reasonable person that the alleged [g]overnment impropriety might have occurred'" (quoting Favish, 541 U.S. at 174)).

under Exemption 7(C).[96] (See the further discussion of privacy redaction under Exemption 6, The Balancing Process, above.)

Protecting the privacy interests of individuals who are the targets of FOIA requests and are named in investigatory records requires special procedures. Most agencies with criminal law enforcement responsibilities follow the approach of the FBI, which is generally to respond to FOIA requests for records concerning other individuals by refusing to confirm or deny whether such records exist. Such a response is necessary because, as previously discussed, members of the public may draw adverse inferences from the mere fact that an individual is mentioned in the files of a criminal law enforcement agency.[97]

Therefore, the abstract fact that records exist (or not) can be protec-

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[96] See, e.g., Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 230-31 (1st Cir. 1994) (deciding that Vaughn Index must explain why documents entirely withheld under Exemption 7(C) could not have been released with identifying information redacted); Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316, 325 (D.D.C. 2005) (ordering release of prisoner housing unit information, but withholding inmate names and register numbers because agency did not proffer evidence that released information could be used to identify inmates); Canning v. U.S. Dep't of Justice, No. 01-2215, slip op. at 19 (D.D.C. Mar. 9, 2004) (finding application of Exemption 7(C) to entire documents rather than to personally identifying information within documents to be overly broad); Prows v. U.S. Dep't of Justice, No. 90-2561, 1996 WL 228463, at *3 (D.D.C. Apr. 25, 1996) (concluding that rather than withholding documents in full, agency simply can delete identifying information about third-party individuals to eliminate stigma of being associated with law enforcement investigation); Lawyers Comm., 721 F. Supp. at 571 (finding a middle ground in balancing of interest in disclosure of names in INS Lookout Book on basis of "ideological exclusion" provision against individuals' privacy interest by ordering release of only the occupation and country of excluded individuals); see also Aldridge, No. 7:00-CV-131, 2001 WL 196965, at *2-3 (deciding that privacy of IRS employees could be adequately protected by redacting their names from recommendation concerning potential disciplinary action against them).

[97] See Ray, 778 F. Supp. at 1215; FOIA Update, Vol. X, No. 3, at 5; FOIA Update, Vol. VII, No. 1, at 3-4 ("OIP Guidance: Privacy 'Glomarization'"); FOIA Update, Vol. III, No. 4, at 2; see also Antonelli v. FBI, 721 F.2d 615, 617 (7th Cir. 1983) ("even acknowledging that certain records are kept would jeopardize the privacy interests that the FOIA exemptions are intended to protect"); Burke v. U.S. Dep't of Justice, No. 96-1739, 1999 WL 1032814, at *5 (D.D.C. Sept. 30, 1999) (permitting agency to "simply 'Glomarize'" as to portion of request that seeks investigatory records); McNamera, 974 F. Supp. at 957-60 (allowing FBI and INTERPOL to refuse to confirm or deny whether they have criminal investigatory files on private individuals who have "great privacy interest" in not being associated with stigma of criminal investigation).

ted in this context. Except when the third-party subject is deceased or provides a written waiver of his privacy rights, law enforcement agencies ordinarily "Glomarize" such third-party requests -- refusing either to confirm or deny the existence of responsive requests -- in order to protect the personal privacy interests of those who are in fact the subject of or mentioned in investigatory files.[98] Indeed, courts have endorsed this "Glomar" response by an agency in a variety of law enforcement situations: For instance, this response is found appropriate when responding to requests for documents regarding alleged government informants,[99] trial witnesses,[100]

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[98] See, e.g., Antonelli, 721 F.2d at 617 (deciding that "Glomar" response is appropriate for third-party requests when requester has identified no public interest in disclosure); McDade, No. 03-1946, slip op. at 11-12 (D.D.C. Sept. 29, 2004) (holding that agency's "Glomar" response was appropriate for third-party request concerning ten named individuals); Boyd v. DEA, No. 01-0524, slip op. at 3-4 (D.D.C. Mar. 8, 2002) ("The FBI's Glomar response was appropriate because the subject of the FOIA request was a private individual in law enforcement records and plaintiff's claim of his misconduct would not shed light on the agency's conduct."); Daley v. U.S. Dep't of Justice, No. 00-1750, slip op. at 2-3 (D.D.C. Mar. 9, 2001) (holding "Glomar" response proper when request seeks information related to third party who has not waived privacy rights); McNamera, 974 F. Supp. at 954 (deciding that "Glomar" response concerning possible criminal investigatory files on private individuals is appropriate where records would be categorically exempt); see also FOIA Update, Vol. X, No. 3, at 5; FOIA Update, Vol. VII, No. 1, at 3-4. But cf. Jefferson v. Dep't of Justice, 284 F.3d 172, 178-79 (D.C. Cir. 2002) (declining to affirm district court's approval of "Glomar" response to request for Office of Professional Responsibility records pertaining to Assistant United States Attorney, because of possibility that some non-law enforcement records were within scope of request); see also Hidalgo v. FBI, No. 04-0562, slip op. at 4-5 (D.D.C. Sept. 29, 2005) (finding "Glomar" response to be not appropriate when informant is not stigmatized by public confirmation of his FBI file and plaintiff has provided evidence to support allegations of government misconduct).

[99] See, e.g., Butler, 2006 U.S. Dist. LEXIS 40942 (finding that agency properly refused to confirm or deny the existence of records pertaining to alleged DEA informants); Flores v. U.S. Dep't of Justice, No. 03-2105, slip op. at 4-5 (D.D.C. Feb. 7, 2005) (finding that agency properly gave "Glomar" response to third-party request for information on private individuals and alleged informants), summary affirmance granted, No. 05-5074, 2005 U.S. App. LEXIS 24159 (D.C. Cir. Nov. 8, 2005), cert. denied, 126 S. Ct. 2316 (2006); Tanks, 1996 U.S. Dist. LEXIS 7266, at *12-13 (permitting FBI to refuse to confirm or deny existence of any law enforcement records, unrelated to requester's case, concerning informants who testified against requester).

[100] See, e.g., Oguaju, 288 F.3d at 451 (approving the government's use of "Glomar" response for a third-party request for any information on an indi-

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subjects of investigations,[101] or individuals who may merely be mentioned in a law enforcement record.[102]

In employing privacy "Glomarization," however, agencies must be

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[100](...continued)
vidual who testified at the requester's trial when the requester provided no public interest rationale); Enzinna, 1997 WL 404327, at *2 (finding government's "Glomar" response appropriate because acknowledging existence of responsive documents would associate witnesses with criminal investigation); Juste v. U.S. Dep't of Justice, No. 03-723 (D.D.C. Jan. 30, 2004) (finding that agency properly refused to confirm or deny existence of records on third parties who testified at plaintiff's trial); see also Meserve, 2006 U.S. Dist. LEXIS 56732, at *19-22 (concluding that while agency confirmed existence of records relating to third party's participation at public trial, it also properly provided "Glomar" response for any additional documents concerning third party).

[101] See, e.g., Reporters Comm., 489 U.S. at 775 (upholding FBI's refusal to confirm or deny that it maintained "rap sheets" on named individual); Greenberg, 10 F. Supp. 2d at 24 (holding "Glomar" response appropriate when existence of records would link named individuals with taking of American hostages in Iran and disclosure would not shed light on agency's performance); Schwarz, 1995 U.S. App. LEXIS 3987, at *7 (holding "Glomar" response proper for third-party request for file of requester's "alleged husband" when no public interest shown); Massey, 3 F.3d at 624 ("individuals have substantial privacy interests in information that either confirms or suggests that they have been subject to criminal investigations or proceedings"); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) (finding that "Glomar" response is proper in connection with request for third party's law enforcement records); Claudio v. Soc. Sec. Admin., No. H-98-1911, slip op. at 16 (S.D. Tex. May 24, 2000) (holding "Glomar" response proper when request sought any investigatory records about administrative law judge); Early v. Office of Prof'l Responsibility, No. 95-0254, slip op. at 3 (D.D.C. Apr. 30, 1996) (concluding that "Glomar" response concerning possible complaints against or investigations of judge and three named federal employees was proper absent any public interest in disclosure), summary affirmance granted, No. 96-5136, 1997 WL 195523 (D.C. Cir. Mar. 31, 1997); Latshaw v. FBI, No. 93-571, slip op. at 1 (W.D. Pa. Feb. 21, 1994) (deciding that FBI may refuse to confirm or deny existence of any law enforcement records on third party), aff'd, 40 F.3d 1240 (3d Cir. 1994) (unpublished table decision).

[102] See, e.g., Jefferson v. Dep't of Justice, 168 F. App'x 448 (D.C. Cir. 2005) (affirming district court judgment that agency, after processing responsive documents, could refuse to confirm or deny existence of any additional mention of third party in its investigative database); Nation Magazine, 71 F.3d at 894 (stating that privacy interest in keeping secret the fact that individual was subject to law enforcement investigation extends to third parties who might be mentioned in investigatory files).

careful to use it only to the extent that is warranted by the terms of the particular FOIA request at hand.[103] For a request that involves more than just a law enforcement file, the agency must take a "bifurcated" approach to it, distinguishing between the exceptionally sensitive law enforcement part of the request and any part that is not so sensitive as to require "Glomarization."[104] In so doing, agencies apply the following general rules:

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[103] See, e.g., Nation Magazine, 71 F.3d at 894-96 (holding categorical "Glomar" response concerning law enforcement files on individual inappropriate when individual had publicly offered to help agency; records discussing reported offers of assistance to the agency by former presidential candidate H. Ross Perot "may implicate a less substantial privacy interest than any records associating Perot with criminal activity," so conventional processing is required for such records); see also FOIA Update, Vol. XVII, No. 2, at 3-4 ("OIP Guidance: The Bifurcation Requirement for Privacy 'Glomarization'").

[104] See, e.g., Jefferson, 284 F.3d at 178-79 (refusing to allow categorical Exemption 7(C) "Glomar" response to request for Office of Professional Responsibility records concerning Assistant United States Attorney because agency did not bifurcate for separate treatment of its non-law enforcement records); Nation Magazine, 71 F.3d at 894-96 (deciding that "Glomar" response is appropriate only as to existence of records associating former presidential candidate H. Ross Perot with criminal activity), on remand, 937 F. Supp. 39, 45 (D.D.C. 1996) (finding that "Glomar" response as to whether Perot was subject, witness, or informant in law enforcement investigation appropriate after agency searched law enforcement files for records concerning Perot's efforts to assist agency), further proceedings, No. 94-00808, slip op. at 9-11 (D.D.C. Feb. 14, 1997) (ordering agency to file in camera declaration with court explaining whether it ever assigned informant code to named individual and results of any search performed using that code; agency not required to state on record whether individual was ever assigned code number), further proceedings, No. 94-00808, slip op. at 9-10 (D.D.C. May 21, 1997) (accepting agency's in camera declaration that search of its records using code number assigned to named individual uncovered no responsive documents); Manchester v. FBI, No. 96-0137, 2005 WL 3275802, at *6 (D.D.C. Aug. 9, 2005) (finding that agency properly bifurcated request between information related to acknowledged investigation and third-party information outside scope of investigation); Meserve, 2006 U.S. Dist. LEXIS 56732, at *19-22 (concluding that while agency confirmed existence of certain records relating to third party's participation at public trial, it properly provided "Glomar" response for any additional documents concerning third party); Burke, 1999 WL 1032814, at *5 (finding no need to bifurcate request that "specifically and exclusively" sought investigative records on third parties); Tanks, 1996 U.S. Dist. LEXIS 7266, at *4 (upholding privacy "Glomarization" after agency bifurcated between aspects of request); Nation Magazine v. Dep't of State, No. 92-2303, slip op. at 23-24 (D.D.C. Aug. 18, 1995) (requiring FBI to search for any "noninvestigative" files on Perot); Grove, 802 F. Supp. at 510-11 (finding agency conducted

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EXEMPTION 7(C)

(1) FOIA requests that merely seek law enforcement records pertaining to a named individual, without any elaboration, can be given a standard "Glomarization" response; (2) any request that is specifically and exclusively directed to an agency's non-law enforcement files (e.g., one aimed at personnel files only) should receive purely conventional treatment, without "Glomarization"; and (3) FOIA requests that do more than simply seek law enforcement records on a named individual (e.g., ones that encompass personnel or possible administrative files as well) must be bifurcated for conventional as well as "Glomarization" treatment.[105] The "Glomar" response also is appropriate when one government agency has officially acknowledged the existence of an investigation but the agency that received the third-party request has never officially acknowledged undertaking an investigation into that matter.[106]

Prior to Reporters Committee, before an agency could give a "Glomarization" response, it was required to check the requested records, if any existed, for any official acknowledgment of the investigation (e.g., as a result of a prosecution) or for any overriding public interest in disclosure that would render "Glomarization" inapplicable. However, in Reporters Committee, the Supreme Court eliminated the need to consider whether there has been a prior acknowledgment when it expressly "recognized the priva-

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[104](...continued)
search for administrative records sought but "Glomarized" part of request concerning investigatory records); accord Reporters Comm., 489 U.S. at 757 (involving "Glomarization" bifurcation along "public interest" lines); Gardels v. CIA, 689 F.2d 1100, 1102-03 (D.C. Cir. 1982) (approving "Glomarization" bifurcation that acknowledged overt contacts with educational institution but refused to confirm or deny covert contacts) (Exemptions 1 and 3); cf. Jefferson, 284 F.3d at 179 (requiring Office of Professional Responsibility to determine nature of records contained in file pertaining to Assistant United States Attorney before giving categorical "Glomar" response).

[105] Accord FOIA Update, Vol. XVII, No. 2, at 3-4; see, e.g., Nation Magazine, 937 F. Supp. at 45 (finding that "Glomar" response as to whether presidential candidate H. Ross Perot was subject, witness, or informant in law enforcement investigation appropriate after agency searched law enforcement files for less sensitive law enforcement records); Tanks, 1996 U.S. Dist. LEXIS 7266, at *4 (finding that agency properly bifurcated between aspects of request); Grove, 802 F. Supp. at 510-14 (allowing Navy to bifurcate between "administrative documents" and those held by its investigative component, Naval Investigative Service).

[106] See McNamera, 974 F. Supp. at 958 (finding that "Glomar" response is proper so long as agency employing it has not publicly identified individual as subject of investigation); cf. Frugone v. CIA, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (finding that CIA properly "Glomarized" existence of records concerning plaintiff's alleged employment relationship with CIA despite allegation that another government agency seemingly confirmed plaintiff's status as former CIA employee) (Exemptions 1 and 3).

cy interest inherent in the nondisclosure of certain information even when the information may have been at one time public."[107] Further, as the very fact of an arrest and conviction of a person, as reflected in his FBI "rap sheet," creates a cognizable privacy interest, any underlying investigative file, containing a far more detailed account of the subject's activities, gives rise to an even greater privacy interest.[108]

At the litigation stage, the agency must demonstrate to the court, either through a Vaughn affidavit or an in camera submission, that its refusal to confirm or deny the existence of responsive records is appropriate.[109] Although this "refusal to confirm or deny" approach is now widely accepted in the case law,[110] several cases have illustrated the procedural difficulties

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[107] 489 U.S. at 767.

[108] See FOIA Update, Vol. X, No. 3, at 5 (stating that under Reporters Committee, Exemption 7(C) "Glomarization" can be undertaken without review of any responsive records, in response to third-party requests for routine law enforcement records pertaining to living private citizens who have not given consent to disclosure); see also FOIA Update, Vol. XII, No. 2, at 6 (warning agencies not to notify requesters of identities of other agencies to which record referrals are made, in any exceptional case in which doing so would reveal sensitive abstract fact about existence of records).

[109] See Valdez v. Dep't of Justice, No. 05-5184, 2006 U.S. App. LEXIS 1042, at *1-2 (D.C. Cir. Jan. 12, 2006) (per curiam) (denying government's motion for summary affirmance because agency failed to adequately demonstrate need for "Glomar" response); Ely v. FBI, 781 F.2d 1487, 1492 n.4 (11th Cir. 1986) ("the government must first offer evidence, either publicly or in camera to show that there is a legitimate claim"); McNamera, 974 F. Supp. at 957-58 (finding agencies' affidavits sufficient to support "Glomar" response); Nation Magazine, No. 94-00808, slip op. at 9-11 (D.D.C. Feb. 14, 1997) (ordering agency to file in camera declaration with court explaining whether it ever assigned informant code to named individual and results of any search performed using that code); Grove, 752 F. Supp. at 30 (requiring agency to conduct search to properly justify use of "Glomar" response in litigation).

[110] See, e.g., Reporters Comm., 489 U.S. at 757 (request for any "rap sheet" on individual defense contractor); Oguaju, 288 F.3d at 451 (request for information on individual who testified at requester's trial); Schwarz, 1995 U.S. App. LEXIS 3987, at *7 (request for file on "alleged husband"); Beck, 997 F.2d at 1493-94 (request for records concerning alleged wrongdoing by two named DEA agents); Dunkelberger, 906 F.2d at 780, 782 (request for information that could verify alleged misconduct by undercover FBI Special Agent); Freeman v. U.S. Dep't of Justice, No. 86-1073, slip op. at 2 (4th Cir. Dec. 29, 1986) (request for alleged FBI informant file of Teamsters president); Strassman v. U.S. Dep't of Justice, 792 F.2d 1267, 1268 (4th Cir. 1986) (request for records allegedly indicating whether governor of

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involved in defending a "Glomar" response when the requester's "speculation" as to the contents of the records (if any exist) raises a qualifying public interest.[111]

The significantly lessened certainty of harm now required under Exemption 7(C) and the approval of "categorical" withholding of privacy-related law enforcement information in most instances should permit agencies to afford full protection to the personal privacy interests of those mentioned in law enforcement files[112] whenever those interests are threatened

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[110](...continued)
West Virginia threatened to invoke Fifth Amendment); Antonelli, 721 F.2d at 616-19 (request seeking files on eight third parties); Voinche, No. 99-1931, slip op. at 12-13 (D.D.C. Nov. 17, 2000) (request for information on three individuals allegedly involved in Oklahoma City bombing); Greenberg, 10 F. Supp. 2d at 10 (request for information relating to involvement of named individuals in "October Surprise" allegations); Early, No. 95-0254, slip op. at 3 (D.D.C. Apr. 30, 1996) (request for complaints against or investigations of judge and three named federal employees); Triestman, 878 F. Supp. at 669 (request by prisoner seeking records of investigations of misconduct by named DEA agents); Ray, 778 F. Supp. at 1215 (request for any records reflecting results of INS investigation of alleged employee misconduct); Knight Publ'g Co. v. U.S. Dep't of Justice, No. 84-510, slip op. at 1-2 (W.D.N.C. Mar. 28, 1985) (request by newspaper seeking any DEA investigatory file on governor, lieutenant governor, or attorney general of North Carolina); Ray v. U.S. Dep't of Justice, 558 F. Supp. 226, 228-29 (D.D.C. 1982) (request by convicted killer of Dr. Martin Luther King, Jr., seeking any file on requester's former attorney or Congressman Louis Stokes), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (unpublished table decision); Blakey v. Department of Justice, 549 F. Supp. 362, 365-66 (D.D.C. 1982) (request by professor seeking any records relating to minor figure in investigation of assassination of President Kennedy who was indexed under topics other than Kennedy assassination), aff'd in part & vacated in part, 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision).

[111] See Shaw v. FBI, 604 F. Supp. 342, 344-45 (D.D.C. 1985) (seeking any investigatory files on individuals whom requester believed participated in assassination of President Kennedy); Flynn v. U.S. Dep't of Justice, No. 83-2282, slip op. at 1-3 (D.D.C. Feb. 18, 1984) (alleging that documents reflect judicial bias), summary judgment for agency granted (D.D.C. Apr. 6, 1984); see also Knight Publ'g, No. 84-510, slip op. at 2 (W.D.N.C. Mar. 28, 1985) (unsealing of in camera affidavit on motion to compel).

[112] Favish, 541 U.S. at 166 (noting that "law enforcement documents obtained by Government investigators often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance").

by a contemplated FOIA disclosure.[113]

EXEMPTION 7(D)

Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."[1]

It has long been recognized that Exemption 7(D) affords the most comprehensive protection of all of the FOIA's law enforcement exemptions.[2] Indeed, both Congress and the courts have clearly manifested their appreciation that a "robust" Exemption 7(D)[3] is important to ensure that "confidential sources are not lost through retaliation against the sources for past disclosure or because of the sources' fear of future disclosure."[4]

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[113] See Attorney General's 1986 Amendments Memorandum at 9-12; see also Favish, 541 U.S. at 169 (evincing the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda); accord Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) (stressing importance of protecting law enforcement interests).

[1] 5 U.S.C. § 552(b)(7)(D) (2000 & Supp. IV 2004).

[2] Billington v. U.S. Dep't of Justice, 301 F. Supp. 2d 15, 21 (D.D.C. 2004) (stating that "Exemption 7(D) has long been recognized as affording the most comprehensive protection of all FOIA's law enforcement exemptions" (citing Voinche v. FBI, 940 F. Supp. 323, 331 (D.D.C. 1996)); accord Irons v. FBI, 880 F.2d 1446, 1451 (1st Cir. 1989).

[3] See Brant Constr. Co. v. EPA, 778 F.2d 1258, 1262 (7th Cir. 1985) (recognizing that Exemption 7(D) is intended to ensure that law enforcement agencies are not unduly hampered in their investigations).

[4] Id.; see, e.g., Ortiz v. HHS, 70 F.3d 729, 732 (2d Cir. 1995) (stating that "Exemption 7(D) is meant to . . . protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities"); McDonnell v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (finding that the "goal of Exemption 7(D) [is] to protect the ability of law enforcement agencies to obtain the cooperation of persons having relevant information and who expect a degree of confidentiality in return for their cooperation"); Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 563 (1st Cir. 1992) (explaining that Exemption 7(D) is intended to

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