



Exemption 6

Personal privacy interests are protected by two provisions of the Freedom of Information Act, Exemptions 6 and 7(C).¹ Exemption 6 protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."² Exemption 7(C) is limited to information compiled for law enforcement purposes, and protects personal information when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."³ Under both personal privacy exemptions of the FOIA, the concept of privacy not only encompasses that which is inherently private, but also includes an "individual's control of information concerning his or her person."⁴

In order to determine whether Exemption 6 protects against disclosure, courts require that agencies engage in the following four-step analysis: first, determine whether the information at issue is a personnel, medical, or "similar" file;⁵ second, determine whether there is a significant privacy interest in the requested information;⁶ third,

¹ [5 U.S.C. § 552\(b\)\(6\), \(7\)\(C\) \(2012 & Supp. V 2017\)](#).

² [5 U.S.C. § 552\(b\)\(6\)](#).

³ [5 U.S.C. § 552\(b\)\(7\)\(C\)](#).

⁴ [DOJ v. Reporters Comm. for Freedom of the Press](#), 489 U.S. 749, 763 (1989).

⁵ [5 U.S.C. § 552\(b\)\(6\)](#).

⁶ See [Multi Ag Media LLC v. USDA](#), 515 F.3d 1224, 1229 (D.C. Cir. 2008) ("The balancing analysis for FOIA Exemption 6 requires that we first determine whether disclosure of the files 'would compromise a substantial, as opposed to de minimis, privacy interest,' because '[i]f no significant privacy interest is implicated . . . FOIA demands disclosure.'" (quoting [Nat'l Ass'n of Retired Fed. Employees v. Horner](#), 879 F.2d 873, 874 (D.C. Cir. 1989))).

evaluate the requester's asserted FOIA public interest in disclosure;⁷ and finally, if there is a significant privacy interest in nondisclosure and a FOIA public interest in disclosure, balance those competing interests to determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy."⁸ When engaging in this analysis, it is important to remember that the Court of Appeals for the District of Columbia Circuit has declared that "'under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.'"⁹

Each step of the Exemption 6 analysis is dependent upon the prior step being satisfied. For example, if the information in question does not satisfy the threshold requirement, it is unnecessary to evaluate privacy interests because Exemption 6 is inapplicable.¹⁰ Similarly, if significant privacy interests are not threatened by disclosure, further analysis is unnecessary and the information at issue must be disclosed.¹¹

⁷ See NARA v. Favish, 541 U.S. 157, 172 (2004) ("Where the privacy concerns . . . are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure.") (Exemption 7(C)).

⁸ 5 U.S.C. § 552(b)(6); see also Favish, 541 U.S. at 172 ("The term 'unwarranted' requires us to balance the . . . privacy interest against the public interest in disclosure."); Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982) ("Finally, we balance the competing interests to determine whether the invasion of privacy is clearly unwarranted.").

⁹ Multi Ag, 515 F.3d at 1227 (quoting Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 32 (D.C. Cir. 2002)); see also Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1057 (D.C. Cir. 2009) (stating that FOIA's "presumption favoring disclosure . . . is at its zenith under Exemption 6"); Hunton & Williams LLP v. EPA, 346 F. Supp. 3d 61, 86 (D.D.C. 2018) (finding that certain names must be disclosed as no explanation for withholdings was provided); Lawyers' Comm. for Civil Rights of S.F. Bay Area v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *20 (N.D. Cal. Sept. 30, 2008) ("The burden remains on the agency to justify any withholdings under Exemption 6 since the presumption in favor of disclosure under this exemption is as strong as that with other exemptions.").

¹⁰ See, e.g., Schonberger v. NTSB, 508 F. Supp. 941, 942 (D.D.C. 1981) ("To satisfy exemption six, the defendants must meet both aspects of the statutory test, showing that the material requested 1) is part of a personnel, medical, or similar file, and if so 2) would, if disclosed publicly, constitute a clearly unwarranted invasion of personal privacy."); Stern v. SBA, 516 F. Supp. 145, 148-49 (D.D.C. 1980) ("In order for an agency to justify nondisclosure under Exemption 6, it must first establish that the requested information is in fact properly classified as a 'personnel,' 'medical' or 'similar' file.").

¹¹ See, e.g., Multi Ag, 515 F.3d at 1229 (stating that "'[i]f no significant privacy interest is implicated . . . FOIA demands disclosure'" (quoting Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989))); Finkel v. Dep't of Labor, No. 05-5525, 2007 WL 1963163, at *9 (D.N.J. June 29, 2007) (concluding that no balancing analysis was required "due to the Court's determination that the [defendant] has failed to meet its heavy burden on the issue of whether disclosure will invade the inspectors' privacy").

Alternatively, if a significant privacy interest is found to exist, but there is no FOIA public interest in disclosure, the information should be protected; as the D.C. Circuit has observed, "something, even a modest privacy interest, outweighs nothing every time."¹² The balancing of competing interests is required when there is both a significant privacy interest that would be infringed by disclosure and there is also a FOIA public interest that weighs in favor of disclosure.¹³ If the FOIA public interest in disclosure outweighs the attendant privacy interests, the information should be disclosed; if the opposite is found to be the case, the information should be withheld.¹⁴

¹² Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989); see also Favish, 541 U.S. at 175 (finding that requester had not shown existence of public interest "to put the balance into play") (Exemption 7(C)); Wadhwa v. VA, 707 F. App'x 61, 63-64 (3d Cir. 2017) (protecting identifying information concerning individuals involved in adjudication of discrimination complaints and individuals' financial information in absence of any FOIA public interest); Int'l Bhd. of Elec. Workers Local Union No. 5 v. HUD, 852 F.2d 87, 89 (3d Cir. 1988) (perceiving no public interest in disclosure and therefore protecting employees' social security numbers); Maryland v. VA, 130 F. Supp. 3d 342, 353 (D.D.C. 2015) (protecting identifying portions of email addresses of individuals whose businesses were not selected for inclusion in veteran's small business database because public interest in such information was "practically nonexistent"); Schoenman v. FBI, 573 F. Supp. 2d 119, 149 (D.D.C. 2008) (concluding individuals' name was properly withheld where requester's alleged public interest "is simply not the public interest cognizable under FOIA Exemption [6]"); Seized Prop. Recovery, Corp. v. Customs and Border Protection, 502 F. Supp. 2d 50, 56 (D.D.C. 2007) ("If no public interest is found, then withholding the information is proper, even if the privacy interest is only modest.") (Exemptions 6 and 7(C)).

¹³ See Associated Press v. DOD, 554 F.3d 274, 291 (2d Cir. 2009) ("Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests" (quoting FLRA v. VA, 958 F.2d 503, 509 (2d Cir. 1992))); see also Favish, 541 U.S. at 171 ("The term 'unwarranted' requires us to balance the family's privacy interest against the public interest in disclosure"); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984) ("Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act" (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976))).

¹⁴ See DOD v. FLRA, 510 U.S. 487, 497 (1994) ("We must weigh the privacy interest . . . in nondisclosure . . . against the only relevant public interest in the FOIA balancing analysis – the extent to which disclosure of the information sought would 'sh[e]d light on an agency's performance of its statutory duties' or otherwise let citizens 'know what their government is up to'" (quoting Reporters Comm., 489 U.S. at 773)); Multi Ag, 515 F.3d at 1228 (noting that if requested information falls within Exemption 6, the next step in the analysis is to determine whether "disclosure would constitute a clearly unwarranted invasion of personal privacy . . . [by] balanc[ing] the privacy interest that would be compromised by disclosure against any public interest in the requested information"); News-Press v. DHS, 489 F.3d 1173, 1205 (11th Cir. 2007) ("In order to affirm withholding the addresses, we would have to find that the privacy interests against disclosure are greater than the public interest in

Threshold: Personnel, Medical and Similar Files

Information meets the threshold requirement of Exemption 6 if it is contained in "personnel and medical files and similar files."¹⁵ Personnel and medical files are easily identified, but what constitutes a "similar file" was established by the Supreme Court in U.S. Dep't of State v. Wash. Post Co.¹⁶ There the Supreme Court held, based upon a review of the legislative history of the FOIA, that Congress intended the term "similar files" to be interpreted broadly, rather than narrowly.¹⁷ The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information."¹⁸ Rather, the Court made clear that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection.¹⁹ Conversely, the threshold of Exemption 6 has been found not to be

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

¹⁵ [5 U.S.C. § 552\(b\)\(6\) \(2012 & Supp. V 2017\)](#).

¹⁶ 456 U.S. 595 (1982).

¹⁷ Id. at 599-603 (citing H.R. Rep. No. 89-1497, at 11 (1966); S. Rep. No. 89-813, at 9 (1965); S. Rep. No. 88-1219, at 14 (1964)).

¹⁸ Id. at 601 (citing H.R. Rep. No. 89-1497, at 11 (1966)); see Cook v. NARA, 758 F.3d 168, 174 (2d Cir. 2014) (stating that "similar files" need not relate to medical or personnel issues and need not even constitute a "file"); Judicial Watch, Inc. v. FDA, 449 F.3d 141, 152 (D.C. Cir. 2006) ("The Supreme Court has read Exemption 6 broadly, concluding the propriety of an agency's decision to withhold information does not 'turn upon the label of the file which contains the damaging information.'" (quoting Wash. Post, 456 U.S. at 601)).

¹⁹ 456 U.S. at 602; see, e.g., Cook, 758 F.3d at 174 (observing that "similar files" encompasses all records identifiable to particular individuals even if records do not encompass "intimate" or "highly personal" information (quoting Wash. Post, 456 U.S. at 599-602)); Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1050 (D.C. Cir. 2009) ("It is undisputed that the requested Medicare records are personnel, medical, or 'similar files.'"); Associated Press v. DOD, 554 F.3d 274, 291 (2d Cir. 2009) (finding that records applying to detainees whose family members seek protection are "similar files," explaining that "[t]he phrase 'similar files' has a broad meaning and encompasses the government's records on an individual which can be identified as applying to that individual"); Berger v. IRS, 288 F. App'x 829, 832 (3d Cir. 2008) ("[Revenue Officer's] time records are a personal recording of the time expended as an employee and therefore can be identified as applying to her."); Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1024 (9th Cir. 2008) (stating that threshold test of Exemption 6 is satisfied when government records contain information applying to particular individuals); Pierce v. U.S. Air Force, 512 F.3d 184, 191 (5th Cir. 2007) ("To qualify as a

satisfied when the information cannot be linked to a particular individual,²⁰ or when the information pertains to federal government employees, but is "essentially business" in nature, rather than personal.²¹

'similar file' under Exemption 6 . . . the information need only 'appl[y]' to the individual."); Wood v. FBI, 432 F.3d 78, 86-87 (2d Cir. 2005) (recognizing that personal information about government investigators appearing in investigative records are "similar files"); Lakin Law Firm, P.C. v. FTC, 352 F.3d 1122, 1123 (7th Cir. 2003) (finding that consumer complaints filed with the FTC "clearly fall[] within the exemption"); Families for Freedom v. U.S. Customs & Border Prot., 837 F. Supp. 2d 287, 301 (S.D.N.Y. 2011) ("[T]he plain meaning of the statute and the Second Circuit's method of applying it make clear that Exemption 6 applies only to personnel and medical files and to similar files, such as those containing investigations of alleged corruption, passport applications, asylum requests, or detainee abuse."); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 144-45 (D.D.C. 2007) (concluding that the FTC met the threshold requirement for Exemption 6 protection regarding the names, addresses, and phone numbers of consumers who filed complaints "[s]ince each piece of information withheld by defendants applies to specific individuals"); MacLean v. U.S. Dep't of the Army, No. 05-1519, 2007 WL 935604, at *14 (S.D. Cal. Mar. 6, 2007) ("The phrase, 'similar files,' is to be given a broad meaning, and it may apply even if the files at issue 'are likely to contain much information about a particular individual that is not intimate.'" (quoting Wash. Post, 456 U.S. at 598-600)); Hecht v. USAID, No. 95-263, 1996 WL 33502232, at *12 (D. Del. Dec. 18, 1996) ("We do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information").

²⁰ See, e.g., Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (holding that defendant must establish "more than a 'mere possibility' that the medical condition of a particular individual might be disclosed" in order to protect a list of drugs ordered for use by some members of large group); In Def. of Animals v. NIH, 543 F. Supp. 2d 70, 80 (D.D.C. 2008) (concluding that information related to a primate facility building does not meet the threshold of Exemption 6 because it "is not associated with any particular individual"); Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1413 (D. Haw. 1995) (same for records pertaining to large group of Native Hawaiian human remains) (reverse FOIA case).

²¹ Aguirre v. SEC, 551 F. Supp. 2d 33, 54 (D.D.C. 2008) ("Correspondence does not become personal solely because it identifies government employees."); Yonemoto v. VA, No 06-00378, 2007 WL 1310165, at *2 (D. Haw. May 2, 2007) (stating that "[i]ntra-agency emails often qualify as 'similar files' under Exemption 6," but concluding that records at issue are not "similar files" when they have "an essentially business nature" or pertain to business relationships), appeal dismissed as moot, 305 F. App'x 333 (9th Cir. 2008); see, e.g., Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding that the names and work telephone numbers of Justice Department paralegals do not meet the threshold for Exemption 6 on the basis that information is not "similar to a 'personnel' or 'medical' file"), appeal dismissed voluntarily, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006); Gordon v. FBI, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (deciding that names of agency employees are not personal information about those employees that meets Exemption 6 threshold), summary judgment granted, 388 F. Supp. 2d 1028, 1040-42 (N.D. Cal. 2005) (concluding that Exemption 6 does not apply to the names of agency's "lower-level" employees, and likewise opining that "[t]he [agency] still has not

The Court of Appeals for the District of Columbia Circuit, sitting en banc, subsequently reinforced the Supreme Court's broad interpretation of the "similar files" threshold of Exemption 6 by holding that a tape recording of the last words of the Space Shuttle *Challenger* crew, which "reveal[ed] the sound and inflection of the crew's voices during the last seconds of their lives" satisfied the standard.²²

Once it has been determined that information meets the threshold requirement of Exemption 6, the next step of the analysis is to identify whether there is a significant privacy interest in the requested information and to ascertain the extent of that interest in nondisclosure.²³

Privacy Interest

In the landmark FOIA decision of DOJ v. Reporters Comm. for Freedom of the Press, which governs all privacy-protection decision making under the FOIA, the Supreme Court stressed that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."²⁴ As the Court of Appeals for the District of Columbia Circuit has recognized, this concept of privacy "includes the prosaic (e.g., place of birth and date of marriage) as well as the intimate and potentially embarrassing."²⁵ The Supreme Court has declared

demonstrated that an employee's name alone makes a document a personnel, medical or 'similar file'").

²² N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc) (determining that "lexical" and "non-lexical" information are subject to identical treatment under the FOIA); see Forest Guardians v. FEMA, 410 F.3d 1214, 1218 (10th Cir. 2005) (finding that electronic Geographic Information System files containing "specific geographic location" of structures are "similar files"); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 85 n.11 (D.D.C. 2003) (finding that requested videotapes "contain identifiable audio and video images of individual residents," and concluding that they are "similar files").

²³ See FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step by Step Decisionmaking").

²⁴ 489 U.S. 749, 763 (1989) (holding "rap sheets" are entitled to protection under Exemption 7(C) and setting forth five guiding principles that govern the process by which determinations are made under both Exemptions 6 and 7(C)).

²⁵ Painting & Drywall Work Pres. Fund, Inc. v. HUD, 936 F.2d 1300, 1302 (D.C. Cir. 1991); see Kulkarni v. Dep't of State, 692 F. App'x 896, 896 (9th Cir. 2017) (affirming District Court's finding that documents concerning the passport application of plaintiff's son were properly withheld), cert. denied sub nom., 138 S. Ct. 1015 (2018); Associated Press v. DOD, 554 F.3d 274, 286-87 (2d Cir. 2009) (holding that identities of Guantanamo Bay detainees associated with abuse allegations were entitled to protection, and noting that "[a]lthough the detainees here are indeed like prisoners, their Fourth Amendment reasonable expectation of privacy is not the measure by which we assess their personal privacy interest

that the privacy interest inherent in Exemption 6 "belongs to the individual, not the agency holding the information."²⁶ As such, Exemption 6 cannot be invoked to withhold from a requester information pertaining only to him or herself.²⁷ Furthermore, both the "author" and the "subject" of a file may possess cognizable privacy interests under Exemption 6.²⁸ Notably, courts afford foreign nationals the same privacy rights under the FOIA as they afford U.S. citizens.²⁹

protected by FOIA"). But cf. Hyatt v. U.S. Patent & Trademark Office, No. 18-234, 2018 WL 4682020, at *8 (D.D.C. Sept. 28, 2018) (finding that while "gossip amongst colleagues is natural and even normal, such exchanges between public servants are not *per se* shielded from disclosure merely because their employing agency considers them to be insignificant").

²⁶ See Reporters Comm., 489 U.S. at 763-65 (emphasizing that privacy interest belongs to individual, not agency holding information pertaining to individual); Joseph W. Diemert, Jr. and Assocs. Co., L.P.A. v. FAA, 218 F. App'x 479, 482 (6th Cir. 2007) ("[S]ome courts have concluded that where personal privacy interests are implicated, only the individual who owns such interest may validly waive it."); Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 363-64 (5th Cir. 2001) (protecting social security numbers of soldiers even though Army publicly disclosed them in some circumstances, because individuals rather than government hold privacy interest in that information); Amuso v. DOJ, 600 F. Supp. 2d 78, 93 (D.D.C. 2009) ("The privacy interest at stake belongs to the individual, not the agency."); Cozen O'Connor v. Dep't of Treasury, 570 F. Supp. 2d 749, 781 (E.D. Pa. 2008) ("The focus of the exemption is the individual's interest, not the government's").

²⁷ See Reporters Comm., 489 U.S. at 771 (citing DOJ v. Julian, 486 U.S. 1, 13-14 (1988)); Dean v. FDIC, 389 F. Supp. 2d 780, 794 (E.D. Ky. 2005) (stating that "to the extent that the defendants have redacted the 'name, address, and other identifying information' of the plaintiff himself in these documents . . . reliance on Exemption 6 or 7(C) would be improper"); H.R. Rep. No. 93-1380, at 13 (1974) ("disclosure of information about a person to that person does not constitute an invasion of his privacy"); see also FOIA Update, Vol. X, No. 2, at 5 ("Privacy Protection Under the Supreme Court's Reporters Committee Decision") (advising that, as a matter of sound administrative practice, "[a]n agency will not invoke an exemption to protect a requester from himself").

²⁸ N.Y. Times Co. v. NASA, 920 F.2d 1002, 1007-08 (D.C. Cir. 1990) (en banc).

²⁹ See U.S. Dep't of State v. Ray, 502 U.S. 164, 175-79 (1991) (applying traditional analysis of privacy interests under FOIA to Haitian nationals); Graff v. FBI, 822 F. Supp. 2d 23, 34 (D.D.C. 2011) (holding "foreign nationals are entitled to the privacy protections embodied in FOIA") (Exemption 7(C)); Judicial Watch, Inc. v. DHS, 514 F. Supp. 2d 7, 10 n.4 (D.D.C. 2007) (stating that "courts in our Circuit have held that foreign nationals are entitled to the same privacy rights under FOIA as United States citizens"); Ctr. for Nat'l Sec. Studies v. DOJ, 215 F. Supp. 2d 94, 105-06 (D.D.C. 2002) (recognizing, without discussion, the privacy rights of post-9/11 detainees who were unlawfully in the United States, although ultimately concluding that public interest in disclosure outweighed those interests) (Exemption 7(C)), rev'd on other grounds, 331 F.3d 918 (D.C. Cir. 2003); Schiller v. INS, 205 F. Supp. 2d 648, 662 (W.D. Tex. 2002) (finding that "[a]liens [and] their families . . . have a strong privacy interest in nondisclosure of their names, addresses, and other information which could lead to revelation of their identities") (Exemption 7(C)); Judicial

The D.C. Circuit has also emphasized that under the FOIA's privacy-protection exemptions, "[t]he threat to privacy . . . need not be patent or obvious to be relevant."³⁰ At the same time, courts have found that the threat to privacy must be real rather than speculative.³¹ In National Ass'n of Retired Federal Employees v. Horner [hereinafter NARFE], the D.C. Circuit explained that "mere speculation" of an invasion of privacy is

Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at *8 (D.D.C. Mar. 30, 2001) (protecting asylum application filed on behalf of Cuban émigré).

³⁰ Pub. Citizen Health Research Group v. U.S. Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978) (per curiam) (ruling that district court improperly refused to look beyond face of document at issue (i.e., to proffered in camera explanation of harm), which led it to fail to recognize underlying sensitivity); see also Cameranesi v. DOD, 856 F.3d 626, 642 (9th Cir. 2017) ("We have never held that an agency must document that harassment or mistreatment have happened in the past or will certainly happen in the future; rather, the agency must merely establish that disclosure would result in a 'potential for harassment'" (quoting Forest Serv. Emps. for Env'tl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1026 (9th Cir. 2008))).

³¹ See Dep't of the Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976) ("The legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities."); ACLU v. DOD, 543 F.3d 59, 85-86 (2d Cir. 2008) ("Even accepting [defendants'] argument that it may be 'possible' to identify the detainees in spite of the district court's redactions, or that there remains a 'chance' that the detainees could identify themselves . . . such speculation does not establish a privacy interest that surpasses a de minimis level for the purposes of a FOIA inquiry.") (Exemptions 6 and 7(C)), cert. granted, vacated & remanded on other grounds, 130 S. Ct. 777 (2009); Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987) (stating that "[w]ithholding information to prevent speculative harm" is contrary to the FOIA's pro-disclosure policy); Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (finding that Exemption 6 did not apply when there was only a "'mere possibility'" that the medical condition of a particular individual would be disclosed by releasing a list of pharmaceuticals supplied to a congressional doctor (quoting Rose, 425 U.S. at 380 n.19)); Sai v. TSA, 315 F. Supp. 3d 218, 262-63 (D.D.C. 2018) (finding that agency "offered little more than conclusory assertions" regarding privacy interests of various TSA and DHS employees "without regard to the position held by the relevant employee, the role played by that employee, the substance of the underlying agency action, or the nature of the agency record at issue") (Exemptions 6 and 7(C)); Pinson v. DOJ, 313 F. Supp. 3d 88, 112 (D.D.C. 2018) (finding that "conclusory" and "generalized" allegations of privacy harms are insufficient for protection of records under Exemption 6); Seife v. Dep't of State, 298 F. Supp. 3d 592, 625 (S.D.N.Y. 2018) (finding that State Department failed to show "real" threat of harassment from identification of senior officials who anonymously provided press briefings on their areas of expertise); Aqualliance v. U.S. Army Corps. of Eng'rs, 243 F. Supp. 3d 193, 198 (D.D.C. 2017) (finding no substantial privacy interest in mailing list of homeowners who lived in proximity to California water project because agency failed to provide "anything beyond speculation regarding the results of disclosing the distribution list.").

not sufficient.³² The NARFE court went on to state that "[f]or the Exemption 6 balance to be implicated, there must, of course, be a causal relationship between the disclosure and the threatened invasion of privacy."³³

The D.C. Circuit has ruled that agencies must initially determine "whether disclosure of the files 'would compromise a substantial, as opposed to de minimis, privacy interest,' because 'if no significant privacy interest is implicated . . . FOIA demands disclosure.'"³⁴ The D.C. Circuit has explained that, in the FOIA context, when assessing

³² 879 F.2d 873, 878 (D.C. Cir. 1989) (citing Arieff, 712 F.2d at 1468); see also ACLU v. DOD, 543 F.3d at 86 (stating that "because the district court has redacted the Army photos to remove all identifying features, there is no cognizable privacy interest at issue in the release of the Army photos") (Exemptions 6 and 7(C)); Hall v. DOJ, 552 F. Supp. 2d 23, 30 (D.D.C. 2008) (finding that DOJ failed to demonstrate that there is a real threat to employees' privacy, concluding that "DOJ merely asserts, in vague and conclusory fashion, that the redacted information relates to a small group of employees and that release of the redacted information will lead to identification and harassment"); United Am. Fin., Inc. v. Potter, 531 F. Supp. 2d 29, 47 (D.D.C. 2008) ("A 'bare conclusory assessment' that public disclosure of an employee's name would constitute an invasion of personal privacy is insufficient to support the existence of a privacy interest."); Finkel v. Dep't of Labor, No. 05-5525, 2007 WL 1963163, at *9 (D.N.J. June 29, 2007) (concluding that defendant failed to meet its burden of showing that release of inspectors' "coded ID numbers" would constitute a clearly unwarranted invasion of privacy because defendant "has 'established no more than a mere possibility that the medical condition of a particular individual might be disclosed - which the Supreme Court has told us is not enough'" (quoting Arieff, 712 F.2d at 1467)); Fortson v. Harvey, 407 F. Supp. 2d 13, 17 (D.D.C. 2005) (deciding that potential harm to witnesses of unfavorable personnel evaluations and workplace harassment was "pure speculation"); Dayton Newspapers, Inc. v. Dep't of the Air Force, 107 F. Supp. 2d 912, 919 (S.D. Ohio 1999) (declining to protect medical malpractice settlement figures based upon "mere possibility that factual information might be pieced together to supply 'missing link' and lead to personal identification" of claimants).

³³ 879 F.2d at 878.

³⁴ Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (quoting NARFE, 879 F.2d at 874); see, e.g., Cook v. NARA, 758 F.3d 168, 175-76 (2d Cir. 2014) (noting that Exemption 6's privacy analysis first requires agencies to "determine whether disclosure of the files would compromise a substantial, as opposed to de minimis, privacy interest . . .", finding that former President, Vice President and their designated representatives maintain "compelling" privacy interest in conducting research regarding their years of public service "free from unwanted public scrutiny" of the subjects of inquiry); Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1050 (D.C. Cir. 2009) ("[W]e must determine whether 'disclosure would compromise a substantial, as opposed to a de minimis, privacy interest.'" (quoting NARFE, 879 F.2d at 874)); Associated Press, 554 F.3d at 285 ("Thus, 'once a more than de minimis privacy interest is implicated the competing interests at stake must be balanced in order to decide whether disclosure is permitted under FOIA.'" (quoting FLRA v. VA, 958 F.2d 503, 510 (2d Cir. 1992))); cf. Climate Investigations Ctr. v. DOE, 331 F. Supp. 3d 1, 26 (D.D.C. 2018) ("An agency must provide affidavits containing 'reasonable specificity of detail rather than merely conclusory statements' to establish a substantial

the weight of a protectible privacy interest, "[a] substantial privacy interest is anything greater than a de minimis privacy interest."³⁵ As discussed above, when a substantial privacy interest is found, the inquiry under the privacy exemptions is not finished, it is only advanced to "address the question whether the public interest in disclosure outweighs the individual privacy concerns."³⁶ Thus, as the D.C. Circuit has held, "a privacy interest may be substantial – more than de minimis – and yet be insufficient to overcome the public interest in disclosure."³⁷ Substantial privacy interests cognizable under the FOIA are generally found to exist in such personally identifying information as a person's name, physical address, email address, image, computer user ID, phone number, date of birth, criminal history, medical history, and social security number.³⁸

invasion of privacy") (quoting Judicial Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 215 (D.C. Cir. 2013)).

³⁵ Multi Ag, 515 F.3d at 1229-30; see, e.g., Barnard v. DHS, 598 F. Supp. 2d 1, 11 (D.D.C. 2009); Schoenman v. FBI, 576 F. Supp. 2d 3, 9 (D.D.C. 2008); Unidad Latina En Accion v. DHS, 253 F.R.D. 44, 48 (D. Conn. 2008); Schoenman v. FBI, 573 F. Supp. 2d 119, 148 (D.D.C. 2008); Schoenman v. FBI, 575 F. Supp. 2d 136, 160 (D.D.C. 2008); cf. Aqualliance v. U.S. Bureau of Reclamation, 139 F. Supp. 3d 203, 212-13 (D.D.C. 2015) (finding "greater than de minimis" but "not substantial" privacy interest in names and addresses of water well owners and water transfer program participants), aff'd on other grounds, 856 F.3d 101 (D.C. Cir. 2017).

³⁶ Multi Ag, 515 F.3d at 1230 (quoting Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 35 (D.C. Cir. 2002)); see, e.g., Consumers' Checkbook, 554 F.3d at 1050 ("If a substantial privacy interest is at stake, then we must balance the privacy interest in nondisclosure against the public interest."); Associated Press v. DOJ, 549 F.3d 62, 66 (2d Cir. 2008) ("Notwithstanding a document's private nature, FOIA may nevertheless require disclosure if the requester can show that revelation of the contents of the requested document would serve the public interest."); Scales v. EOUSA, 594 F. Supp. 2d 87, 90 (D.D.C. 2009) ("Given the significant individual privacy interest, disclosure of 7(C) material is warranted only when the individual's interest in privacy is outweighed by the public's interest in disclosure.") (Exemption 7(C)).

³⁷ Multi Ag, 515 F.3d at 1230-33 (finding that the significant public interest in disclosure of the databases outweighs the "greater than de minimis" privacy interest of individual farmers).

³⁸ See Dep't of State v. Wash. Post Co., 456 U.S. 595, 600 (1982) (finding that "[i]nformation such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet . . . such information . . . would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy"); Henson v. HHS, 892 F.3d 868, 878 (7th Cir. 2018) (finding that Exemption 6 protected "medical information about the manufacturer's patients and the contact information for employees of the manufacturer and the agency"), reh'g denied, July 31, 2018; Tereshchuk v. BOP, No. 14-5278, 2015 WL 4072055, at *1 (D.C. Cir. June 29, 2015) (holding that BOP properly withheld inmate names and register numbers in certain indexes); Yagman v. BOP, 605 F. App'x 666, 666-67 (9th Cir. 2015) (affirming district court's finding that withholding was proper as release of "the full name, prison number, and

Similarly, individuals who provide law enforcement agencies with reports of illegal conduct have well-recognized privacy interests, particularly when such persons reasonably fear reprisals for their assistance.³⁹ Some courts have found that even absent

mailing address of every person in BOP custody" would constitute an invasion of inmates' privacy) (Exemptions 6 and 7(C)); Associated Press, 549 F.3d at 65 ("Personal information, including a citizen's name, address, and criminal history, has been found to implicate a privacy interest cognizable under the FOIA exemptions.") (Exemptions 6 and 7(C)); Maryland v. VA, 130 F. Supp. 3d 342, 353 (D.D.C. 2015) (finding substantial privacy interest in identifying portions of email addresses of individuals whose applications for inclusion in veteran small business database were rejected); Performance Coal Co. v. U.S. Dep't of Labor, 847 F. Supp. 2d 6, 17-18 (D.D.C. 2012) (concluding that defendants properly withheld "miners' names, cell phone numbers, and home phone numbers; inspectors' names and email addresses; inspectors' initials; MSHA employees' government issued cell phone numbers, home addresses, and home telephone numbers; third party home addresses, dates of birth, last four digits of social security numbers; and miners' job titles and ethnicities" contained in law enforcement records) (Exemption 7(C)); Strunk v. U.S. Dep't of State, 845 F. Supp. 2d 38, 45-46 (D.D.C. 2012) (concluding that defendant properly withheld "unique characters constituting a terminal user ID which is generally assigned to a single person or system user" and which could identify the agency employee who accessed the record); Advocates for Highway & Auto Safety v. Fed. Highway Admin., 818 F. Supp. 2d 122, 128-29 (D.D.C. 2011) (noting that "the drivers have a privacy interest in their videotaped images from the study" to the extent that they reveal "personal details, captured up close and over a prolonged period of time, [which] are not generally available in the ordinary course of daily life"); Skinner v. DOJ, 806 F. Supp. 2d 105 (D.D.C. 2011) (holding that agencies properly withheld names and identifying information related to law enforcement personnel and the face of a third party) (Exemption 7(C)); Mingo v. DOJ, 793 F. Supp. 2d 447, 456 (D.D.C. 2011) (finding privacy interest in videotapes of inmates and in medical records of inmates and staff) (Exemption 7(C)); Showing Animals Respect & Kindness v. U.S. Dep't of the Interior, 730 F. Supp. 2d 180, 197 (D.D.C. 2010) (finding that, with respect to photographs, "[t]he fact that it may be obvious to Plaintiff whose faces or names are redacted . . . does not mean that the subjects of those redactions have no privacy interest in avoiding disclosure"); Nat'l Sec. News Serv. v. U.S. Dep't of Navy, 584 F. Supp. 2d 94, 96 (D.D.C. 2008) ("Records . . . indicating that individuals sought medical treatment at a hospital are particularly sensitive."); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 304, 306 (D.D.C. 2007) (stating that "[f]ederal courts have previously recognized a privacy interest in a person's name and address" and concluding that "[g]enerally, there is a stronger case to be made for the applicability of Exemption 6 to phone numbers and addresses"). But see Int'l Counsel Bureau v. DOD, 723 F. Supp. 2d 54, 66 (D.D.C. 2010) (rejecting DOD's assertion that disclosure of photographs of detainees "would risk both [their] safety upon release, through reprisals, and would undermine their likely willingness to cooperate with the intelligence collection activities").

³⁹ See Wadhwa v. VA, 707 F. App'x 61, 63-64 (3d Cir. 2017) (noting agency properly withheld names and other identifying information of complainants and witnesses involved in adjudication of discrimination complaints); McCutchen v. HHS, 30 F.3d 183, 189 (D.C. Cir. 1994) ("The complainants [alleging scientific misconduct] have a strong privacy interest in remaining anonymous because, as 'whistle-blowers,' they might face retaliation if their identities were revealed.") (Exemption 7(C)); Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564-65

any evidence of fear of reprisals, witnesses who provide information to investigative bodies – administrative and civil, as well as criminal – should be accorded privacy

(D.C. Cir. 1982) (MacKinnon, J., concurring) (recognizing that writers of letters to authorities describing "'bizarre' and possibly illegal activities . . . could reasonably have feared reprisals against themselves or their family members") (Exemptions 6 and 7(C)); Rimmer v. Holder, No. 10-1106, 2011 WL 4431828, at *8 (M.D. Tenn. Sept. 22, 2011) (finding "heightened privacy protections . . . are owed to . . . individuals who willingly provide potentially incriminating information to law enforcement") (Exemption 7(C)), aff'd, 700 F.3d 246 (6th Cir. 2012); Moffat v. DOJ, No. 09-12067, 2011 WL 3475440, at *17 (D. Mass. Aug. 5, 2011) (finding that, with respect to information pertaining to individuals interviewed by the FBI in the course of criminal investigations, "disclosure could subject these individuals to harassment, intimidation, threats, or even economic and physical harm, which could deter this kind of assistance to the FBI in the future") (Exemption 7(C)); Amuso v. DOJ, 600 F. Supp. 2d 78, 93 (D.D.C. 2009) ("Disclosure of the interviewee's identity could result in harassment, intimidation, or threats of reprisal or physical harm to the interviewee."); Clemmons v. U.S. Army Crime Records Ctr., No. 05-02353, 2007 WL 1020827, at *6 (D.D.C. Mar. 30, 2007) (stating that "there is a significant interest in maintaining the secrecy of the identity of witnesses and third party interviewees so that law enforcement can continue to gather information through these interviews while assuring that the interviewees will not be subject to harassment or reprisal") (Exemptions 6 and 7(C)); Balderrama v. DHS, No. 04-1617, 2006 WL 889778, at *9 (D.D.C. Mar. 30, 2006) ("[T]he individuals whose identities have been protected – witnesses, undercover officers, informants – maintain a substantial privacy interest in not being identified with law enforcement proceedings.") (Exemptions 6 and 7(C)); Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., No. 05-6015, 2005 WL 3488453, at *3 (D. Or. Dec. 21, 2005) (protecting identities of low-level and mid-level Forest Service employees who cooperated with accident investigation, because "these employees could face harassment"), aff'd, 524 F.3d 1021 (9th Cir. 2008); McQueen v. United States, 264 F. Supp. 2d 502, 519-20 (S.D. Tex. 2003) (protecting names and identifying information of grand jury witnesses and other sources when suspect had made previous threats against witnesses) (Exemption 7(C)), aff'd, 100 F. App'x 964 (5th Cir. 2004) (per curiam); Ortiz v. HHS, 874 F. Supp. 570, 573-75 (S.D.N.Y. 1995) (noting that probable close relationship between plaintiff and author of letter about her to HHS was likely to lead to retaliation), aff'd on Exemption 7(D) grounds, 70 F.3d 729 (2d Cir. 1995); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1564-65 (M.D. Fla. 1994) (finding that the "opportunity for harassment or embarrassment is very strong" in a case involving the investigation of "allegations of harassment and retaliation for cooperation in a prior investigation") (Exemptions 6 and 7(C)).

protection⁴⁰ although at times courts have ruled otherwise.⁴¹ (For a more detailed discussion of the privacy protection accorded such law enforcement sources, see the chapter on Exemption 7(C).)

Practical Obscurity and Survivor Privacy

The FOIA's broad conception of privacy also encompasses the doctrines of "practical obscurity" and "survivor privacy." As to "practical obscurity," while as a general rule individuals have no privacy interest in information that has been previously disclosed, in DOJ v. Reporters Comm. for Freedom of the Press, the Supreme Court found a "strong privacy interest" in the nondisclosure of records of a private citizen's criminal history, "even where the information may have been at one time public, if the information

⁴⁰ See, e.g., Perlman v. DOJ, 312 F.3d 100, 106 (2d Cir. 2002) (finding that witnesses and third parties possess "strong privacy interests, because being identified as part of a law enforcement investigation could subject them to 'embarrassment and harassment,' especially if 'the material in question demonstrates or suggests they had at one time been subject to criminal investigation'" (quoting Halpern v. FBI, 181 F.3d 279, 297 (2d Cir. 1999))) (Exemptions 6 and 7(C)), vacated & remanded, 541 U.S. 970, on remand, 380 F.3d 110 (2d Cir. 2004) (per curiam); Citizens for Responsibility & Ethics in Wash. v. DOJ, 846 F. Supp. 2d 63, 73 (D.D.C. 2012) (noting that "in particular, informants and witnesses, have a significant interest in [the files'] contents not being disclosed") (Exemption 7(C)); Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, 467 F. Supp. 2d 40, 53 (D.D.C. 2006) ("The fact that an individual supplied information to assist [the National Indian Gaming Commission] in its investigations is exempt from disclosure under FOIA, regardless of the nature of the information supplied.") (Exemptions 6 and 7(C)); Brown v. EPA, 384 F. Supp. 2d 271, 278-80 (D.D.C. 2005) (protecting government employee-witnesses and informants because "[t]here are important principles at stake in the general rule that employees may come forward to law enforcement officials with allegations of government wrongdoing and not fear that their identities will be exposed through FOIA") (Exemption 7(C)); Wolk v. United States, No. 04-832, 2005 WL 465382, at *5 n.7 (E.D. Pa. Feb. 28, 2005) (recognizing that "interviewees who participate in FBI background investigations have a substantial privacy interest") (Exemptions 6 and 7(C)).

⁴¹ See Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 553-54 (5th Cir. 2002) (ordering disclosure of information that could link witnesses to their OSHA investigation statements, because agency presented no evidence of "possibility of employer retaliation") (Exemption 7(C)); Fortson v. Harvey, 407 F. Supp. 2d 13, 17 (D.D.C. 2005) (deciding that witness statements compiled during an investigation of an equal employment opportunity complaint filed by the plaintiff must be released due to the following: the government previously released the names of persons who gave statements during the investigation; the agency offered only "pure speculation" of potential for harm to be caused by disclosure of the statements; and "witness statements made during a discrimination investigation are not the type of information that exemption 6 is designed to protect"); Fine v. DOE, 823 F. Supp. 888, 896 (D.N.M. 1993) (ordering disclosure based partly upon the fact that the plaintiff was no longer employed by the agency and was "not in a position on-the-job to harass or intimidate employees of DOE/OIG and/or its contractors").

has over time become 'practically obscure.'⁴² As the Supreme Court held, individuals can have a cognizable privacy interest in identifying information "that might be found after a diligent search of courthouse files, county archives, [. . .] local police stations," and other publicly available sources of information, but otherwise is not readily available to the public.⁴³ The Reporters Comm. decision and its progeny have thus recognized that individuals have a privacy interest in information that at one time may have been disclosed or made publicly available, but is now difficult to obtain.⁴⁴ That is, such individuals may have a privacy interest in maintaining the information's "practical obscurity."⁴⁵ The Court of Appeals for the District of Columbia Circuit has noted,

⁴² 489 U.S. 749, 762, 764, 767, 780 (1989) (establishing a "practical obscurity" standard, observing that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to" them); see also DOD v. FLRA, 510 U.S. 487, 500 (1994) (finding privacy interest in federal employees' home addresses even though they "often are publicly available through sources such as telephone directories and voter registration lists"); FOIA Update, Vol. X, No. 2, at 4 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision").

⁴³ DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989).

⁴⁴ See id. at 780.

⁴⁵ Id.; see, e.g., Associated Press v. DOJ, 549 F.3d 62, 65 (2d Cir. 2008) (applying "practical obscurity" concept and noting that "[t]his [privacy] protection extends even to information previously made public") (Exemptions 6 and 7(C)); Isley v. EOUSA, 203 F.3d 52, 52 (D.C. Cir. Oct. 1999) (unpublished disposition) (finding no evidence that previously disclosed documents "continue to be 'freely available' in any 'permanent public record'") (Exemption 7(C)); Fiduccia v. DOJ, 185 F.3d 1035, 1046-47 (9th Cir. 1999) (finding privacy interest based on "practical obscurity" justified and protecting information about two individuals whose homes were searched ten years previously despite publicity at that time and fact that some information might be public in various courthouses) (Exemption 7(C)); Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1083 (6th Cir. 1998) (holding that there may be privacy interest in personal information even if "available on publicly recorded filings"); Lawyers' Comm. for Civil Rights of S.F. Bay Area v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *21 (N.D. Cal. Sept. 30, 2008) (noting, consistent with "practical obscurity" principles, that "the Ninth Circuit has held that simply because certain documents that would normally be subject to Exemptions 7(C) and Exemption 6 have already been publicized does not mean they must be disclosed by the agency"); Jarvis v. ATE, No. 07-00111, 2008 WL 2620741, at *12 (N.D. Fla. June 30, 2008) (stating that "[a] document previously disclosed may have 'practical obscurity' and might not again become public without a diligent search[;]" consequently, "the individual privacy exemption in the FOIA is not necessarily vitiated by prior disclosures"); Canaday v. ICE, 545 F. Supp. 2d 113, 117 (D.D.C. 2008) (relying on "practical obscurity" and recognizing "a privacy interest in the identifying information of the Federal employees even though the information may have been public at one time"); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257-59 (D.D.C. 2005) (holding, under Exemption 6, that law enforcement records that were previously given to symposium members fall within "practical obscurity" rule), appeal dismissed voluntarily, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006).

however, that computerized databases may minimize the extent to which "practical obscurity" applies to conviction data.⁴⁶

"Survivor privacy" is also encompassed within the Act's privacy exemptions.⁴⁷ In NARA v. Favish, the Supreme Court unanimously found that the surviving family members of a former Deputy White House Counsel had a protectable privacy interest in his death-scene photographs, based in part on the family's fears of "intense scrutiny by the media."⁴⁸ Pointing out that the surviving relatives invoked their own "right and interest to personal privacy,"⁴⁹ the Court held "that FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images."⁵⁰ Relying upon case law and cultural traditions, the Court concentrated on "the right of family members to direct and control disposition of the body of the deceased" and noted the right of family members "to limit attempts to exploit pictures of the deceased family member's remains for public purposes."⁵¹ Analyzing what recipients of the death scene photos may do with them, the Court found that the surviving family members had a protectable privacy interest in seeking to limit the attempts by the requester, as well as the public and media, to exploit the deceased's photos.⁵²

The Court held that "survivor privacy" was a valid privacy interest protected by Exemption 7(C) based on three factors. First, the Court had previously ruled in Reporters Comm. that FOIA's personal privacy protection was not "some limited or 'cramped

⁴⁶ See ACLU v. DOJ, 655 F.3d 1, 12 (D.C. Cir. 2011) ("[D]isclosure under FOIA [will not] make that information any more accessible than it already is through publicly available computerized databases.") (Exemption 7(C)); see also CNA Holdings, Inc. v. DOJ, No. 07-CV-2084, 2008 WL 2002050, at *6 (N.D. Tex. May 9, 2008) (finding court documents to be in the public domain, noting defendant failed to meet its "burden to show that the documents that were clearly public and should be in the court's files, according to PACER and the common record retention practice of federal courts, are for some reason not actually still publicly available").

⁴⁷ See NARA v. Favish, 541 U.S. 157, 165-70 (2004) ("[T]he concept of personal privacy . . . is not some limited or 'cramped notion' of that idea.") (Exemption 7(C)); see also OIP Guidance: [Supreme Court Rules for "Survivor Privacy" in Favish](#) (posted 2004, updated 8/10/2015) (highlighting breadth of privacy protection principles in Supreme Court's decision).

⁴⁸ 541 U.S. at 167; see also OIP Guidance: [Supreme Court Decides to Hear "Survivor Privacy" Case](#) (posted 5/13/2003, updated 10/10/2003) (chronicling case's history).

⁴⁹ 541 U.S. at 166.

⁵⁰ Id. at 170.

⁵¹ Id. at 168.

⁵² Id. at 167.

notion' of that idea,"⁵³ and so was broad enough to protect surviving family members' "own privacy rights against public intrusions."⁵⁴ Second, the Court reviewed the long tradition at common law of "acknowledging a family's control over the body and death images of the deceased."⁵⁵ Third, the Court reasoned that Congress used that background in creating Exemption 7(C), including the fact that the government-wide FOIA policy memoranda of two Attorneys General had specifically extended privacy protection to families.⁵⁶ Thus, the Favish decision endorsed the holdings of several lower courts in recognizing that surviving family members have substantial privacy interests in sensitive, often graphic, personal details about the circumstances surrounding an individual's death.⁵⁷

Derivative Privacy Invasion

⁵³ Id. at 165.

⁵⁴ Id. at 167.

⁵⁵ Id. at 168. But cf. Showler v. Harper's Magazine Found., No. 05-178, slip op. at 6 (E.D. Okla. Dec. 22, 2005) (finding that a photograph of a deceased individual was distinguishable from the death-scene photographs in Favish because, inter alia, the photograph "was taken at a public, newsworthy event" and "was the same scene the funeral attendees observed").

⁵⁶ 541 U.S. at 169 (citing [Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act](#) 36 (June 1967) and [Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act](#) 9-10 (Feb. 1975)).

⁵⁷ See, e.g., Sikes v. U.S. Dep't of Navy, 896 F.3d 1227, 1238 (11th Cir. 2018) (noting weighty privacy interest family members have in suicide note, and holding that "[s]uch significant privacy interests 'should yield only where exceptional [public] interests militate in favor of disclosure'" (quoting Judicial Watch, Inc. v. NARA, 876 F.3d 346, 350 (D.C. Cir. 2017)) (Exemptions 6 and 7(C)); Hale v. DOJ, 973 F.2d 894, 902 (10th Cir. 1992) (finding "personal privacy interests of the victim's family" outweigh non-existent public interest (Exemption 7(C)), overruled in part on other grounds, 2 F.3d 1055 (10th Cir. 1993); Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (affirming nondisclosure of autopsy reports of individuals killed by cyanide-contaminated products); Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 186 (D.C. Cir. 1987) (noting that some autopsy reports might "shock the sensibilities of surviving kin"); Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (holding deceased infant's medical records exempt because their release "would almost certainly cause . . . parents more anguish"); Katz v. NARA, 862 F. Supp. 476, 483-86 (D.D.C. 1994) (holding that Kennedy family's privacy interests would be invaded by disclosure of "graphic and explicit" JFK autopsy photographs), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995); cf. Outlaw v. U.S. Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. 1993) (ordering disclosure in absence of evidence of existence of any survivor whose privacy would be invaded by release of murder-scene photographs of man murdered twenty-five years earlier).

Courts have found that an invasion of privacy need not occur immediately upon disclosure in order to be considered "clearly unwarranted."⁵⁸ As the Court of Appeals for the District of Columbia Circuit has held, "[w]here there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain."⁵⁹ One court has observed that to distinguish

⁵⁸ See National Ass'n of Retired Federal Employees v. Horner [hereinafter NARFE], 879 F.2d 873, 878 (D.C. Cir. 1989) ("In virtually every case in which a privacy concern is implicated, someone must take steps after the initial disclosure in order to bring about the untoward effect."); Hudson v. Dep't of the Army, No. 86-1114, 1987 WL 46755, at *3 (D.D.C. Jan. 29, 1987) ("While [possible threats and harassment] may be characterized as a sort of 'secondary effect,' to give credence to the distinction [between the original invasion of privacy and its possible effects] is to honor form over substance."), aff'd, 926 F.2d 1215 (D.C. Cir. 1991) (unpublished table decision).

⁵⁹ NARFE, 879 F.2d at 878; see, e.g., NARA v. Favish, 541 U.S. 157, 167-70 (2004) (specifically taking into account "the consequences" of FOIA disclosure, including "public exploitation" of the records by either the requester or others); Forest Serv. Emps. for Env'tl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1026 (9th Cir. 2008) (finding that "the public association of the employees with [the Cramer Fire] would subject them to the risk of embarrassment in their official capacities and in their personal lives"); Bernegger v. EOUSA, 334 F. Supp. 3d 74, 89 (D.D.C. 2018) (finding names, addresses, and telephone numbers of AUSAs, legal assistants, law enforcement officers, and other personally identifiable information related to witness or nonparty individuals properly withholdable as "there is reason to believe" that plaintiff will harass or retaliate against those individuals) (Exemptions 6 and 7(C)); Moore v. Bush, 601 F. Supp. 2d 6, 14 (D.D.C. 2009) (concluding that release of name and phone number of an FBI support employee and the name of a Special Agent "could subject the Agent and employee to harassment") (Exemptions 6 and 7(C)); Hall v. DOJ, 552 F. Supp. 2d 23, 30 (D.D.C. 2008) ("Pursuant to Exemption 6, individuals have a privacy interest in avoiding disclosure of identifying information if disclosure would subject them to harassment."); Reilly v. DOE, No. 07-995, 2007 WL 4548300, at *6 (N.D. Ill. Dec. 18, 2007) ("If the names of the [Merit Review Committee] members were disclosed to the public, they would be subject to harassment from disgruntled applicants whose proposals were denied."); George v. IRS, No. 05-955, 2007 WL 1450309, at *11 (N.D. Cal. May 14, 2007) ("IRS employees have a strong right to privacy in order to fulfill their obligations without fear that taxpayers will attempt to harass or contact employees directly instead of using the administrative and judicial processes for appeal."); O'Keefe v. DOD, 463 F. Supp. 2d 317, 324 (E.D.N.Y. 2006) ("Government employees, and specifically law enforcement personnel, have a significant privacy interest in their identities, as the release of their identities may subject them to embarrassment and harassment.") (Exemption 7(C)); Judicial Watch, Inc. v. Dep't of the Army, 402 F. Supp. 2d 241, 251 (D.D.C. 2005) (granting defendant's motion for summary judgment as to information withheld pursuant to Exemption 6; finding that it is "likely" that the documents would be published on the internet and that media reporters would seek out employees; and stating "[t]his contact is the very type of privacy invasion that Exemption 6 is designed to prevent"); cf. N.Y. Times, Co. v. U.S. Dep't of the Treasury, No. 09-10437, 2010 WL 4159601, at *5 (S.D.N.Y. Oct. 13, 2010) (noting that privacy interest is weak due to "lack of

between the initial disclosure and unwanted intrusions that result from disclosure would be "to honor form over substance."⁶⁰

For instance, the Court of Appeals for the Tenth Circuit, in Forest Guardians v. FEMA, decided that the release of "electronic mapping files" would invade the privacy interest of homeowners, even though the invasion would occur only after "manipulat[ion] [of the square and lot numbers] to derive the addresses of policyholders and potential policyholders."⁶¹ The Tenth Circuit found that the files contained the specific locations of insured structures that "could easily lead to the discovery of an individual's name and home address," as well as "unwanted and unsolicited mail, if not more."⁶²

In another case considering derivative privacy invasions, Prudential Locations LLC v. HUD, the Court of Appeals for the Ninth Circuit considered the consequences of disclosure of the names of individuals who sent emails to an agency alleging that a business had violated a federal statute.⁶³ In holding that the names should be withheld, the court found that the authors of the emails "could easily be adversely affected if their identities became known."⁶⁴ The court noted that the authors were vulnerable "to retaliation such as loss of employment or loss of business" and "the possibility of a civil lawsuit," concluding that there was a "significant risk of harassment, retaliation, stigma, or embarrassment of the authors if their identities [were] revealed."⁶⁵

Courts in other jurisdictions have also recognized the concept of derivative privacy invasions under Exemption 6.⁶⁶

evidence that any of the corporate licensees – whose identities were released to the Times – have faced any negative consequences following that disclosure").

⁶⁰ Hudson, 1987 WL 46755, at *3 (protecting personally identifying information because disclosure under FOIA could ultimately lead to physical harm), aff'd, 926 F.2d 1215 (D.C. Cir. 1991) (unpublished table decision); see also, e.g., Hemenway v. Hughes, 601 F. Supp. 1002, 1006-07 (D.D.C. 1985) (same).

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

⁶² Id. (finding that additional information, such as individual's decision to buy flood insurance, could be revealed through disclosure of requested files and thus also invade privacy).

⁶³ 739 F.3d 424 (9th Cir. 2013).

⁶⁴ Id. at 432.

⁶⁵ Id.

⁶⁶ See, e.g., Havemann v. Colvin, 537 F. App'x 142, 147-48 (4th Cir. 2013) (unpublished disposition) (affirming withholding of data regarding social security beneficiaries, noting that while agency cannot withhold information based on a speculative possibility of

There have been occasions, though, where this concept of derivative privacy has been questioned.⁶⁷ Moreover, even when courts recognize a derivative privacy invasion that results after the release of the requested information, they do not always find that invasion to be clearly unwarranted. In Multi Ag Media LLC v. USDA, the D.C. Circuit concluded that the disclosure of two databases containing information on crops and field acreage, and farm data on a digitized aerial photograph, would compromise a greater than de minimis privacy interest of individual farmers.⁶⁸ Although "not persuaded that the privacy interest that may exist is particularly strong," the court found that "[t]elling the public how many crops are on how much land or letting the public look at photographs of farmland with accompanying data will in some cases allow for an inference to be drawn about the financial situation of an individual farmer."⁶⁹ Despite this invasion of privacy, the court concluded that the information should be disclosed in light of a strong public interest in USDA's administration of certain subsidy and benefit programs.⁷⁰

identification of specific beneficiaries, it could withhold data that does not inherently constitute a "unique identifier" where there is "a likelihood that releasing the information would connect private records to specific individuals."); Inclusive Communities Project, Inc. v. HUD, No. 14-3333, 2016 WL 4800440, at *8-10 (N.D. Tex. 2016) (noting that Court of Appeals for Fifth Circuit has not ruled on issue of derivative privacy interests, but following other circuits that have done so, and finding that Exemption 6 does not apply to certain data regarding HUD housing vouchers for low-income families because agency failed to show a "substantial probability" that such data could lead to identification of individual voucher recipients).

⁶⁷ See U.S. Dep't of State v. Ray, 502 U.S. 164, 179-82 (1991) (Scalia, J., concurring in part) (suggesting that "derivative" privacy harm should not be relied upon in evaluating privacy interests); Associated Press v. DOD, 410 F. Supp. 2d 147, 151 (S.D.N.Y. 2006) (suggesting that "derivative" harms might not be cognizable under Exemption 6, based on Justice Scalia's concurring opinion in Ray); Forest Guardians v. U.S. Dep't of the Interior, No. 02-1003, 2004 WL 3426434, at *16-17 (D.N.M. Feb. 28, 2004) (deciding that agency did not meet its burden of establishing that names of financial institutions and amounts of individual loans in lienholder agreements could be used to trace individual permittees); Dayton Newspapers, Inc. v. VA, 257 F. Supp. 2d 988, 1001-05 (S.D. Ohio 2003) (rejecting argument based upon agency's concern that names of judges and attorneys could be used to search through databases to identify claimants and thereby invade privacy of claimants).

⁶⁸ 515 F.3d 1224, 1230 (D.C. Cir. 2008).

⁶⁹ Id.; see, e.g., Seized Prop. Recovery, Corp. v. U.S. Customs & Border Prot., 502 F. Supp. 2d 50, 58 (D.D.C. 2007) ("[I]ndividuals have a privacy interest in the nondisclosure of their names and addresses when linked to financial information, especially when this information could be used for solicitation purposes.") (Exemption 6 and 7(C)).

⁷⁰ Multi Ag, 515 F.3d at 1233.

Similarly, in ACLU v. DOJ, the D.C. Circuit considered the release of court docket information, finding that "it would take little work for an interested person to use the . . . information . . . to look up the underlying case files in the public records of the courts, and therein find the information of interest."⁷¹ The court found that the requester's plan to use this information to contact individuals was relevant to the consideration of the privacy interest.⁷² Nevertheless, the court held that, unlike the rap sheets that were at issue in Reporters Comm., "even if the docket information is used to find the underlying proceedings, for any particular individual it mostly likely would reveal only a single prosecution, rather than a comprehensive scorecard of the person's entire criminal history" and thus privacy intrusions would be "marginal."⁷³

Expectations of Privacy

In some instances, the disclosure of information might involve no invasion of privacy because, fundamentally, the information is of such a nature that little or no expectation of privacy exists.⁷⁴ For example, the District Court for the District of Columbia has held that the names of individuals submitting comments to proposed

⁷¹ ACLU v. DOJ, 655 F.3d 1, 6-7 (D.C. Cir. 2011) (Exemption 7(C)).

⁷² Id. at 11 ("There is no doubt that the courts have held that the risk of unwanted contact following a FOIA disclosure is a privacy interest that must be weighed in the privacy interest/public interest balance.").

⁷³ Id. at 8, 12; see also N.Y. Times, Co., 2010 WL 4159601, at *4 (holding that "[t]he mere fact that someone might seek to interview a [third party] does not mean . . . that the individual would be subject to opprobrium or harassment" so as to cause a clearly unwarranted invasion of personal privacy); Showing Animals Respect & Kindness v. United States Department of Interior, 730 F. Supp. 2d 180, 193 (D.D.C. 2010) (holding that privacy interests in video recordings made by subject of investigation are "quite attenuated," because "[u]nlike surveillance tapes that capture a person's image without their consent, the videos at issue here were created . . . expressly for distribution to the public . . . for later use on television or a music video").

⁷⁴ See, e.g., Ditlow v. Shultz, 517 F.2d 166, 172 (D.C. Cir. 1975) (finding that, with regard to travelers' names in customs forms, both "the absence of a governmental assurance of confidentiality" and "agency assertion of authority to make discretionary disclosure" would "undercut the privacy expectations protected by exemption 6"); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 306 (D.D.C. 2007) ("Disclosing the mere identity of individuals who voluntarily submitted comments regarding the Lincoln video does not raise the kind of privacy concerns protected by Exemption 6."); Fuller v. CIA, No. 04-253, 2007 WL 666586, at *4 (D.D.C. Feb. 28, 2007) (finding that information reflecting only professional and business judgments and relationships "cannot fairly be characterized as personal information that exemption (b)(6) was meant to protect"); Alliance for the Wild Rockies v. Dep't of the Interior, 53 F. Supp. 2d 32, 37 (D.D.C. 1999) (finding that commenters to proposed rulemaking could have no expectation of privacy when agency made clear that their identities would not be concealed).

agency rules should be released when the rulemaking notice "specified that '[t]he complete file for this proposed rule is available for inspection'" and comments were made voluntarily.⁷⁵

By contrast, the majority of courts to have considered the issue have held that individuals who write to the government expressing personal opinions generally have some expectation of confidentiality, and their identities, but not necessarily the substance of their letters, ordinarily have been withheld.⁷⁶ For instance, the Court of Appeals for the Fourth Circuit protected under Exemption 7(C) the names and addresses of people who wrote to the IRS expressing concerns about an organization's tax-exempt status.⁷⁷ The Court of Appeals for the Ninth Circuit found a "cognizable privacy interest" in the names of individuals who wrote to HUD alleging that a business had violated a federal statute.⁷⁸ The United States District Court for the Northern District of California found that the names of persons who complained to the TSA and FBI about the TSA "watch list" were properly protected, as long as those individuals had not otherwise made their complaints public.⁷⁹ The Court of Appeals for the Second Circuit found a "compelling"

⁷⁵ Alliance for the Wild Rockies, 53 F. Supp. 2d at 36-37.

⁷⁶ See, e.g., Lakin Law Firm, P.C. v. FTC, 352 F.3d 1122, 1125 (7th Cir. 2003) (finding that the "core purposes" of the FOIA would not be served by the release of the names and addresses of persons who complained to the FTC about "cramming"); Strout v. U.S. Parole Comm'n, 40 F.3d 136, 139 (6th Cir. 1994) (articulating public policy against disclosure of names and addresses of people who write Parole Commission opposing convict's parole); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 145 n.4 (D.D.C. 2007) ("Consumers making complaints with the FTC have an expectation that it will protect their personal information."); Kidd v. DOJ, 362 F. Supp. 2d 291, 297 (D.D.C. 2005) (protecting names and addresses of constituents in letters written to their congressman); Holy Spirit Ass'n v. U.S. Dep't of State, 526 F. Supp. 1022, 1032-34 (S.D.N.Y. 1981) (finding that "strong public interest in encouraging citizens to communicate their concerns regarding their communities" is fostered by protecting identities of writers); see also Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564 (D.C. Cir. 1982) (MacKinnon, J., concurring) (concurring with the nondisclosure of correspondence because communications from citizens to their government "will frequently contain information of an intensely personal sort") (Exemptions 6 and 7(C)).

⁷⁷ See Judicial Watch, Inc. v. United States, 84 F. App'x 335, 337 (4th Cir. 2004); accord Judicial Watch, Inc. v. Rossotti, 285 F. Supp. 2d 17, 28 (D.D.C. 2003) (finding names and addresses of people who wrote to the IRS to comment on organization's tax-exempt status, both pro and con, withholdable under Exemption 7(C)).

⁷⁸ See Prudential Locations LLC v. HUD, 739 F.3d 424, 432 (9th Cir. 2013) (holding that "in light of the repeated pronouncements of HUD's confidentiality policy," authors of emails to HUD alleging violations of federal statute "had reasonable expectations that HUD would protect their confidentiality even without a specific request that it do so").

⁷⁹ Gordon v. FBI, 388 F. Supp. 2d 1028, 1041-42, 1045 (N.D. Cal. 2005) (Exemptions 6 and 7(C)).

privacy interest for a former U.S. President and his Vice President in the types of records they sought for research purposes under the Presidential Records Act concerning their years in public office.⁸⁰ Nevertheless, in some circumstances courts have refused to accord privacy protection to such government correspondence.⁸¹

Similarly, the District Court for the District of Columbia has held that Exemption 6 does not justify a "blanket withholding" of the names and organizational affiliations of FOIA requesters, but noted that the agency may be able to justify the redactions in individual cases.⁸²

⁸⁰ Cook v. NARA, 758 F.3d 168, 176-77 (2d Cir. 2014) (rejecting plaintiff's argument that former President, Vice President, and their representatives have only diminished privacy interest in subjects of their requests for archived White House records, noting strong legal tradition of confidentiality in all fifty states for research requests made to libraries).

⁸¹ See Prechtel v. FCC, 330 F. Supp. 3d 320, 329-34 (D.D.C. 2018) (ordering disclosure of .csv files used to submit public comments by large numbers of submitters, including email addresses of bulk submitters and individual commenters, given substantiated allegations of widespread fraudulent comment submissions concerning proposed regulation to repeal "net neutrality" rules); Edelman v. SEC, 239 F. Supp. 3d 45, 55-56 (D.D.C. 2017) (finding valid public interest in names of Empire State Building investors who filed complaints to oppose SEC's approval of real estate investment trust for that building, because such information would provide insight into which complainants views were given greater weight by SEC, and whether those complaints were based on proper or improper factors); People for the Am. Way Found., 503 F. Supp. 2d at 306 ("Disclosing the mere identity of individuals who voluntarily submitted comments regarding the Lincoln video does not raise the kind of privacy concerns protected by Exemption 6 Moreover, the public interest in knowing who may be exerting influence on [agency] officials sufficient to convince them to change the video outweighs any privacy interest in one's name."); Lardner v. DOJ, No. 03-0180, 2005 WL 758267, at *17, *19 (D.D.C. Mar. 31, 2005) (requiring release of identities of unsuccessful pardon applicants, as well as individuals mentioned in pardon documents, because they wrote letters in support of pardon applications or were listed as character references on pardon applications); Landmark Legal Found. v. IRS, 87 F. Supp. 2d 21, 27-28 (D.D.C. 2000) (granting Exemption 3 protection under 26 U.S.C. § 6103, but declining to grant Exemption 6 protection to citizens who wrote to IRS to express opinions or provide information; noting that "IRS has suggested no reason why existing laws are insufficient to deter any criminal or tortious conduct targeted at persons who would be identified"), aff'd on Exemption 3 grounds, 267 F.3d 1132 (D.C. Cir. 2001); Cardona v. INS, No. 93-3912, 1995 WL 68747, at *3 (N.D. Ill. Feb. 16, 1995) (finding only "de minimis invasion of privacy" in release of name and address of individual who wrote letter to INS complaining about private agency that offered assistance to immigrants).

⁸² See Kwoka v. IRS, No. 17-1157, 2018 WL 4681000, at *3 n.3 (D.D.C. Sept. 28, 2018) (noting "due to the vague topic descriptions in the publicly accessible log, adding the topic does not add much at all to the privacy interests at stake – and where the topic is more specific, the IRS can make case-by-case redactions if necessary"); see also Silets v. DOJ, 945 F.2d 227, 230 (7th Cir. 1991) (en banc) (protecting name of high school student who requested information about wiretaps on Jimmy Hoffa) (Exemption 7(C)). But see Agee v.

Federal Employees

Civilian federal employees who are not involved in law enforcement or sensitive occupations generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees⁸³ or regarding the parts of their successful employment applications that show their qualifications for their positions.⁸⁴ Courts have

CIA, 1 Gov't Disclosure Serv. (P-H) ¶ 80,213 at 80,532 (D.D.C. Jul. 23, 1980) (holding that "FOIA requesters . . . have no general expectation that their names will be kept private.")

⁸³ See OPM Regulation, 5 C.F.R. § 293.311 (2018) (specifying that certain information contained in federal employee personnel files is generally available to public); see also FLRA v. U.S. Dep't of Commerce, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992) (noting that performance awards "have traditionally been subject to disclosure"); Core v. USPS, 730 F.2d 946, 948 (4th Cir. 1984) (finding no substantial invasion of privacy in information identifying successful federal job applicants); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (noting that Justice Department paralegals' names and work numbers "are already publicly available from [OPM]"), appeal dismissed voluntarily, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (stating that "disclosure [of names of State Department's officers and staff members involved in highly publicized case] merely establishes State [Department] employees' professional relationships or associates these employees with agency business"); Nat'l W. Life Ins. v. United States, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (discerning no expectation of privacy in names and duty stations of Postal Service employees); FOIA Update, Vol. III, No. 4, at 3 ("Privacy Protection Considerations") (discussing extent to which privacy of federal employees can be protected); cf. Tomscha v. GSA, No. 03-6755, 2004 WL 1234043, at *4-5 (S.D.N.Y. June 3, 2004) (deciding without discussion that amount of performance award was properly redacted when agency showed that there could be "mathematical linkage" between award and performance evaluation), aff'd, 158 F. App'x 329, 329 (2d Cir. 2005) (agreeing with the district court's finding that "the release of the justifications for [low-ranking GSA employee's] awards would constitute more than a de minimis invasion of privacy").

⁸⁴ See Knittel v. IRS, No. 07-01213, 2009 WL 2163619, at *6 (W.D. Tenn. July 20, 2009) (holding that agency is incorrect in its assertion that it is only required to disclose information about employees specifically listed in OPM's regulation, as categories mentioned there are "not meant to be exhaustive"); Cowdery, Ecker & Murphy, LLC v. Dep't of Interior, 511 F. Supp. 2d 215, 219 (D. Conn. 2007) ("Because exemption 6 seeks to protect government employees from unwarranted invasions of privacy, it makes sense that FOIA should protect an employee's personal information, but not information related to job function."); Barvick v. Cisneros, 941 F. Supp. 1015, 1020 n.4 (D. Kan. 1996) (noting that the agency had "released information pertaining to the successful candidates' educational and professional qualifications, including letters of commendation and awards, as well as their prior work history, including federal positions, grades, salaries, and duty stations"); Associated Gen. Contractors v. EPA, 488 F. Supp. 861, 863 (D. Nev. 1980) (education, former employment, academic achievements, and employee qualifications).

reached different conclusions as to whether work contact information for federal employees should be protected.⁸⁵ However, those employees have a protectible privacy interest in purely personal details that do not shed light on agency functions.⁸⁶ Indeed,

⁸⁵ Compare Bernegger v. EOUSA, 334 F. Supp. 3d 74, 89 (D.D.C. 2018) (finding names, addresses, and telephone numbers of AUSAs, legal assistants, law enforcement officers, and other personally identifiable information related to witness or nonparty individuals properly withholdable as "there is reason to believe" that plaintiff will harass or retaliate against those individuals) (Exemptions 6 and 7(C)), and Shurtleff v. EPA, 991 F. Supp. 2d 1, 18-19 (D.D.C. 2013) (protecting work email addresses of EPA Administrator and Executive Office of the President personnel due to significant privacy interest of such individuals in avoiding harassment and unsolicited email), with Sai v. TSA, 315 F. Supp. 3d 218, 262 (D.D.C. 2018) (finding defendant has not met its burden of showing substantial privacy interest in contact information withheld pursuant to Exemption 6 because defendant "has offered little more than conclusory assertions applicable to each redaction, without regard to the position held by the relevant employee, the role played by that employee, the substance of the underlying agency action, or the nature of the agency record at issue"), and Kleinert v. BLM, 132 F. Supp. 3d 79 (D.D.C. 2015) (finding that defendant did not meet its burden to support use of Exemption 6 to withhold email addresses because "[t]he disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed; whether it is a significant or a *de minimis* threat depends upon the characteristic(s) revealed . . . and the consequences likely to ensue" (quoting Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 877 (D.C. Cir. 1989)). See also Pinson v. DOJ, 313 F. Supp. 3d 88, 112 (D.D.C. 2018) (observing that courts have come to differing conclusions regarding protection of work telephone numbers and email addresses of federal employees, and holding that such information is withholdable).

⁸⁶ See, e.g., DOD v. FLRA, 510 U.S. 487, 500 (1994) (protecting federal employees' home addresses); Hunton & Williams LLP v. EPA, 346 F. Supp. 3d 61, 85-86 (D.D.C. 2018) (finding that agency properly withheld number of hours two employees intended to take for vacation and information concerning health of EPA employee); Sai v. TSA, 315 F. Supp. 3d 218, 262 (D.D.C. 2018) (protecting "personal information" regarding two TSA employees for which there was no public interest in disclosure) (Exemptions 6 and 7(C)); Pub. Emps. for Envtl. Resp. v. U.S. Sec. Int'l Boundary & Water Comm'n, 839 F. Supp. 2d 304, 323-24 (D.D.C. 2012) (protecting private contact information of emergency personnel whose names appear in emergency action plans), aff'd in part and vacated in part on other grounds, 740 F.3d 195 (D.C. Cir. 2014); Morales v. Pension Benefit Guar. Corp., No. 10-1167, 2012 U.S. Dist. LEXIS 9101, at *12 (D. Md. Jan. 26, 2012) (protecting handwritten Flex Time sign-in sheets on which employees sign in and out of work); Wilson v. U.S. Air Force, No. 08-324, 2009 WL 4782120, at *4 (E.D. Ky. Dec. 9, 2009) (finding that signatures, personal phone numbers, personal email addresses, and government email addresses were properly redacted); Kidd v. DOJ, 362 F. Supp. 2d 291, 296-97 (D.D.C. 2005) (home telephone number); Barvick, 941 F. Supp. at 1020-21 (personal information such as home addresses and telephone numbers, social security numbers, dates of birth, insurance and retirement information, reasons for leaving prior employment, and performance appraisals). But see Wash. Post Co. v. HHS, 690 F.2d 252, 258-65 (D.C. Cir. 1982) (holding personal financial information required for appointment as HHS scientific consultant not exempt when balanced against need for oversight of awarding of government grants).

courts generally have recognized the sensitivity of information contained in personnel-related files and have accorded protection to the personal details of a federal employee's service.⁸⁷

Generally, federal employees have a privacy interest in their job performance evaluations.⁸⁸ Even "favorable information," such as details of an employee's outstanding performance evaluation, can be protected on the basis that it "may well embarrass an individual or incite jealousy" among co-workers.⁸⁹ Moreover, release of such information

⁸⁷ See, e.g., Ripskis v. HUD, 746 F.2d 1, 3-4 (D.C. Cir. 1984) (protecting names and identifying data contained on evaluation forms of HUD employees who received outstanding performance ratings); Ferrigno v. DHS, No. 09-5878, 2011 WL 1345168, at *8 (S.D.N.Y. Mar. 29, 2011) (determining that "the Supervisor, the Investigator, and the interviewees whose statements are recorded in the memoranda at issue all have a more than de minimus privacy interest in these memoranda, as being identified as part of Plaintiff's [employment-related harassment] complaint could subject them to embarrassment and harassment"); Wilson v. DOT, 730 F. Supp. 2d 140, 156 (D.D.C. 2010) (concluding that "[b]ecause [Equal Employment Opportunity] charges often concern matters of a sensitive nature, an EEO complainant has a significant privacy interest"), aff'd, No. 10-5295, 2010 WL 5479580 (D.C. Cir. Dec. 30, 2010); Warren v. SSA, No. 98-0116E, 2000 WL 1209383, at *4 (W.D.N.Y. Aug. 22, 2000) (award nomination forms for specific employees), aff'd, 10 F. App'x 20 (2d Cir. 2001); Putnam v. DOJ, 873 F. Supp. 705, 712-13 (D.D.C. 1995) (names of FBI employees mentioned in "circumstances outside of their official duties," such as attending training classes and as job applicants); Ferri v. DOJ, 573 F. Supp. 852, 862-63 (W.D. Pa. 1983) (FBI background investigation of Assistant United States Attorney); Dubin v. Dep't of Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981) (studies of supervisors' performance and recommendations for performance awards), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision); see also FLRA v. U.S. Dep't of Commerce, 962 F.2d at 1060 (distinguishing personnel "ratings," which traditionally have not been disclosed, from "performance awards," which ordinarily are disclosed).

⁸⁸ See, e.g., Smith v. Dep't of Labor, 798 F. Supp. 2d 274, 283-85 (D.D.C. 2011) (affirming agency's redaction of personal and job-performance information); see also Bonilla v. DOJ, 798 F. Supp. 2d 1325, 1332 (S.D. Fla. 2011) (recognizing a privacy interest in reference letters revealing "colleagues' personal opinions of [an AUSA] as a person and as a prosecutor"); Long v. OPM, No. 05-1522, 2010 WL 681321, at *18 (N.D.N.Y. Feb. 23, 2010) (concluding that "employees' interest in keeping performance based awards, or the lack thereof, private outweighs any public interest in disclosure of this information"), aff'd in part on other grounds, 692 F.3d 185 (2d Cir. 2012); People for the Ethical Treatment of Animals v. USDA, No. 06-930, 2007 WL 1720136, at *4 (D.D.C. June 11, 2007) ("[A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures." (quoting Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984))) (Exemption 7(C)).

⁸⁹ Ripskis, 746 F.2d at 3; see Hardison v. Sec'y of VA, 159 F. App'x 93, 93 (11th Cir. 2005) (performance appraisals); FLRA v. U.S. Dep't of Commerce, 962 F.2d at 1059-61 (performance appraisals); Lewis v. EPA, No. 06-2660, 2006 WL 3227787, at *6 (E.D. Pa. Nov. 3, 2006) (employee or candidate rankings and evaluations); Vunder v. Potter, No. 05-

"reveals by omission the identities of employees who did not receive high ratings, creating an invasion of their privacy."⁹⁰ Employees may also retain a privacy interest in employment related misconduct⁹¹ and mistakes,⁹² although the higher the level of the employee, the greater the public interest will be in disclosure.⁹³ (See further discussion of this point under FOIA Public Interest, below.)

Further, the identities of employees who provide information to investigators are generally protected.⁹⁴ In addition, the identities of persons who apply but are not selected

142, 2006 WL 162985, at *2-3 (D. Utah Jan. 20, 2006) (narrative of accomplishments submitted to superiors for consideration in performance evaluation); Tomscha, 2004 WL 1234043, at *4 ("Both favorable and unfavorable assessments trigger a privacy interest."), aff'd, 158 F. App'x 329, 331 (2d Cir. 2005) ("[W]e agree with the district court's finding that the release of the justifications for [plaintiff's] awards would constitute more than a de minimis invasion of privacy, as they necessarily include personal, albeit positive, information regarding his job performance."). But see also Hardy v. DOD, No. 99-523, 2001 WL 34354945, at *9 (D. Ariz. Aug. 27, 2001) (finding privacy concern with jealousy on parts of co-workers diminished by fact that subject employee had since retired).

⁹⁰ FLRA v. U.S. Dep't of Commerce, 962 F.2d at 1059.

⁹¹ See, e.g., Sensor Sys. Support, Inc. v. FAA, 851 F. Supp. 2d 321, 333 (D.N.H. 2012) (noting that "[a]lthough a government employee investigated for performance-related misconduct 'generally possesses a diminished privacy interest' in comparison to private individuals, 'an internal criminal investigation would not invariably trigger FOIA disclosure of the identity of a targeted government employee'") (Exemptions 6 and 7(C)); Steese, Evans & Frankel, P.C. v. SEC, No. 10-01071, 2010 U.S. Dist. LEXIS 129401, at *22, 25 (D. Colo. Dec. 7, 2010) (finding "overwhelming" privacy interests in employees' identities where the "public was informed that employees were found to have spent hours at work viewing sexually explicit sites;" holding that disclosure could be the source of "severe personal and professional harm including embarrassment and disgrace").

⁹² See, e.g., Am. Small Bus. League v. Dep't of the Interior, No. 11-01880, 2011 U.S. Dist. LEXIS 114752, at *12 (N.D. Cal. Oct. 5, 2011) (determining that "invasion of [employees'] privacy is not warranted" because employees were "mere contracting officers [who] made data entry mistakes").

⁹³ See, e.g., CASA de Maryland, Inc. v. DHS, 409 F. App'x 697 (4th Cir. 2011) (per curiam) (affirming district court's decision ordering disclosure of names in internal investigation report authored by DHS's Office of Professional Responsibility in light of evidence produced by plaintiff indicating that agency impropriety might have occurred); Stern, 737 F.2d at 94 (finding employees' level of seniority to be relevant to public interest in disclosure) (Exemption 7(C)).

⁹⁴ See, e.g., Corbett v. TSA, 568 F. App'x 690, 702-05 (11th Cir. 2014) (unpublished disposition) (protecting names and faces of TSA employees and Sheriff's Office employee who provided information or otherwise assisted with investigation of uncooperative airport traveler); McCann v. HHS, 828 F. Supp. 2d 317, 322-23 (D.D.C. Dec. 15, 2011) (finding that assertion of Exemption 6 to protect identities of "individuals who provided

for federal government employment may be protected.⁹⁵ The Court of Appeals for the Second Circuit has held that the privacy interests of a former President and Vice President in the subjects of their research requests under the Presidential Records Act are not diminished merely because of their former public service.⁹⁶ Even suggestions submitted to an Employee Suggestion Program have been withheld to protect employees with whom the suggestions are identifiable from the embarrassment that might occur from disclosure.⁹⁷

Federal employees involved in law enforcement, as well as military personnel and employees in sensitive occupations, do possess, by virtue of the nature of their work, substantial privacy interests in their identities and work addresses.⁹⁸ In light of this

information to an investigator who was conducting an investigation into Plaintiff's HIPAA complaint" was appropriate, and disclosure "could reasonably be expected to cause potential harassment or misuse of the [witness'] information"); Am. Small Bus. League, 2011 U.S. Dist. LEXIS 114752, at *10 (holding that agency properly withheld contracting officer and employee names and contact information in Office of the Inspector General workpapers).

⁹⁵ See, e.g., Core, 730 F.2d at 948-49 (protecting identities and qualifications of unsuccessful applicants for federal employment); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 177 (D.D.C. 2004) (holding that résumé of individual interested in project that never "got out of the embryonic stages" was properly withheld); Warren, 2000 WL 1209383, at *4 (protecting identities of unsuccessful job applicants); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 38 (D.D.C. 2000) (protecting résumés of individuals whose applications for insurance were withdrawn or denied); Judicial Watch, Inc. v. Comm'n on U.S.-Pac. Trade & Inv. Policy, No. 97-0099, 1999 WL 33944413, at *11-12 (D.D.C. Sept. 30, 1999) (protecting identities of individuals considered for but not appointed to Commission); Barvick, 941 F. Supp. at 1021-22 (protecting all information about unsuccessful federal job applicants because any information about members of "select group" that applies for such jobs could identify them); Voinche v. FBI, 940 F. Supp. 323, 329-30 (D.D.C. 1996) (protecting identities of possible candidates for Supreme Court vacancies), aff'd per curiam, No. 96-5304, 1997 WL 411685 (D.C. Cir. June 19, 1997).

⁹⁶ Cook v. NARA, 758 F.3d 168, 176-77 (2d Cir. 2014) (rejecting plaintiff's argument that former high-ranking federal officials are "quasi-government actors" deserving of "diminished" privacy protection in subjects of their research requests, noting that all fifty states provide confidentiality for research requests to libraries, and finding that former federal officials have significant privacy interest in "developing their ideas [regarding their years of public service] privately, free from unwanted public scrutiny.").

⁹⁷ See Matthews v. USPS, No. 92-1208, slip op. at 5 (W.D. Mo. Apr. 15, 1994).

⁹⁸ See Baker v. FBI, 863 F.3d 682, 684 (7th Cir. 2017) (protecting names of FBI agents involved in criminal investigation) (Exemptions 6 and 7(C)); Solers, Inc. v. IRS, 827 F.3d 323, 332-33 (4th Cir. 2016) (holding that IRS employees and other government employees have substantial privacy interests in withholding their names in connection with particular

privacy interest, the Department of Defense now regularly withholds personally identifying information about all military and civilian employees with respect to whom

investigations due to potential for harassment or embarrassment) (Exemptions 6 and 7(C)); Long v. OPM, 692 F.3d 185, 194 (2d Cir. 2012) (holding that OPM properly withheld both names and duty-station information for over 800,000 federal employees in five sensitive agencies and twenty-four sensitive occupations, including, inter alia, correctional officer, U.S. Marshal, nuclear materials courier, internal revenue agent, game law enforcement, immigration inspection, customs and border interdiction, and border protection); Lahr v. NTSB, 569 F.3d 964, 977 (9th Cir. 2009) (reversing district court and holding that FBI agents have cognizable privacy interest in withholding their names because release of FBI agents' identity would most likely subject agents "to unwanted contact by the media and others, including [plaintiff], who are skeptical of the government's conclusion" in investigation of crash of TWA Flight 800); Wood v. FBI, 432 F.3d 78, 87-89 (2d Cir. 2005) (protecting investigative personnel of FBI's Office of Professional Responsibility); Judicial Watch, Inc. v. United States, 84 F. App'x 335, 338-39 (4th Cir. 2004) (protecting names of lower-level clerical workers at IRS); New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (protecting identities of nonsupervisory Inspector General investigators who participated in grand jury investigation of requester) (Exemption 7(C)); Waterman v. IRS, 288 F. Supp. 3d 206, 211 (D.D.C. 2018) (holding that work telephone numbers and email addresses of IRS employees could be withheld because such information sheds little light on agency activities and release could cause harassment or threats of employees); Pinson v. DOJ, 313 F. Supp. 3d 88, 113 (D.D.C. 2018) (finding significant privacy interest in names of individuals who conducted audit for Bureau of Prisons because release of such names could threaten objectivity of auditors); Millbrand v. U.S. Dep't of Labor, No. 17-13237, 2018 WL 3770053, at *3 (E.D. Mich. Aug. 9, 2018) (finding that identities of OSHA employees who inspect workplaces and investigate health and safety complaints should be protected because they conduct sensitive law enforcement activities); Lewis v. DOJ, 867 F. Supp. 2d 1, 21 (D.D.C. 2011) (observing that although "[a] government employee's privacy interest may be diminished by virtue of his government service, . . . he retains an interest nonetheless") (Exemption 7(C)); Banks v. DOJ, 813 F. Supp. 2d 132, 142 (D.D.C. 2011) (determining that agency properly redacted law enforcement personnel's names and telephone numbers "from a list of newspapers"); Moore v. Bush, 601 F. Supp. 2d 6, 14 (D.D.C. 2009) (protecting the name and phone number of an FBI support employee and the name of a Special Agent because release "could subject the Agent and employee to harassment") (Exemptions 6 and 7(C)); Cal-Trim Inc. v. IRS, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting names of lower-level IRS employees in internal IRS correspondence so as not to expose them to unreasonable annoyance or harassment) (Exemptions 6 and 7(C)); Van Mechelen v. U.S. Dep't of the Interior, No. 05-5393, 2005 WL 3007121, at *4-5 (W.D. Wash. Nov. 9, 2005) (protecting identifying information of lower-level Office of Inspector General and Bureau of Indian Affairs employees in report of investigation) (Exemptions 6 and 7(C)), aff'd, 230 F. App'x 705 (9th Cir. 2007); Judicial Watch, Inc. v. FDA, 407 F. Supp. 2d 70, 76-77 (D.D.C. 2005) (finding that HHS employees named in records concerning abortion drug testing of mifepristone (also referred to as Mifeprex or RU-486) were properly protected pursuant to Exemption 6 in order to ensure employees' safety), aff'd in pertinent part, 449 F.3d 141, 152-54 (D.C. Cir. 2006); Davy v. CIA, 357 F. Supp. 2d 76, 87-88 (D.D.C. 2004) (protecting CIA employee names).

disclosure would "raise security or privacy concerns."⁹⁹ For law enforcement personnel in particular, these privacy interests are generally protected under Exemption 7(C) when their personally identifying information is located in a law enforcement record.¹⁰⁰ (For a

⁹⁹ Department of Defense Director for Administration and Management Memorandum for DOD FOIA Offices 1-2 (Nov. 9, 2001) (noting that, by contrast, certain personnel's names can be released due to "the nature of their positions and duties," including public affairs officers and flag officers); see also Long, 692 F.3d at 192 (finding that federal employees in sensitive agencies and occupations "have a cognizable privacy interest in keeping their names from being disclosed wholesale"); Seife v. Dep't of State, 298 F. Supp. 3d 592, 628 (S.D.N.Y. 2018) Seife v. Dep't of State, 298 F. Supp. 3d at 592, 628 (S.D.N.Y. 2018) (finding privacy interest in DOD names to be stronger than public interest in disclosure for DOD personnel holding military rank of Colonel or below, or holding General Schedule rank of GS-15 or below); Am. Mgmt. Servs., LLC v. Dep't of the Army, 842 F. Supp. 2d 859, 864 n.4 (E.D. Va. 2012) (holding that DOD employees have a "substantial privacy interest" in their names and contact information), aff'd, 703 F.3d 724 (4th Cir. 2013); Schoenman v. FBI, 573 F. Supp. 2d 119, 160 (D.D.C. 2008) (stating that "since the attacks, as a matter of official policy, the DoD carefully considers and limits the release of all names and other personal information concerning military and civilian personnel, based on a conclusion that they are at increased risk regardless of their duties or assignment to such a unit"); Los Angeles Times Commc'ns LLC v. U.S. Dep't of Labor, 483 F. Supp. 2d 975, 985-86 (C.D. Cal. 2007) (concluding that defendant properly withheld information revealing the identity of all civilian contractors supporting Allied military operations in Iraq and Afghanistan because "the privacy life or death interest of the individual whose records are requested" outweighs "the public interest in disclosure"); Hiken v. DOD, 521 F. Supp. 2d 1047, 1065 (N.D. Cal. 2007) (finding that redactions of names of military personnel proper because "defendants present a strong argument that the privacy interests at stake are significant where the disclosure of these names would risk harm or retaliation"); Clemmons, 2007 WL 1020827, at *6 ("The identities of [U.S. Army Criminal Investigation Division] special agents, military police, other government personnel and [third party] witnesses were all properly withheld under Exemptions (b)(6) and (b)(7)(C)."); O'Keefe v. DOD, 463 F. Supp. 2d 317, 327 (E.D.N.Y. 2006) (upholding DOD's withholding of personal information of investigators as well as subjects of investigation found in United States Central Command Report); Ctr. for Pub. Integrity v. OPM, No. 04-1274, 2006 WL 3498089, at *6 (D.D.C. Dec. 12, 2006) (finding that OPM properly withheld the names and duty stations of DOD and certain non-DOD federal personnel in sensitive occupations under Exemption 6); Deichman v. United States, No. 05-680, 2006 WL 3000448, at *7 (E.D. Va. Oct. 20, 2006) (upholding United States Joint Forces Command's withholding of employee names and discussions of personnel matters relating to other employees under Exemption 6); MacLean v. DOD, No. 04-2425, slip op. at 18 (S.D. Cal. June 2, 2005) (protecting "names, initials, and other personal information" about Defense Hotline Investigators and other DOD personnel) (Exemptions 6 and 7(C)).

¹⁰⁰ See Baker, 863 F.3d at 684-85 (stating district court correctly observed that "disclosing the names of the Chicago officers could expose them to harassment without conferring an offsetting public benefit and would thus be an unwarranted invasion of their personal privacy") (Exemptions 6 and 7(C)); Pinson v. Lappin, 806 F. Supp. 2d 230, 234 (D.D.C. 2011) (noting that the Bureau of Prisons properly redacted telephone numbers and email addresses of staff at certain offices "both because this information was not requested . . . and

more detailed discussion of the privacy protection accorded law enforcement personnel, see the chapter on Exemption 7(C)).

Information in the Public Domain

Individuals generally do not possess substantial privacy interests in information that is particularly well known or is widely available within the public domain.¹⁰¹ Likewise, an individual generally does not have substantial privacy interests with respect to information that he or she has made public.¹⁰² The Court of Appeals for the District of

because this information is exempt from disclosure"); Keys v. DHS, 570 F. Supp. 2d 59, 68 (D.D.C. 2008) (stating that "[o]ne who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives" (quoting Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978))) (Exemption 7(C)).

¹⁰¹ See, e.g., Trentadue v. Integrity Comm., 501 F.3d 1215, 1234 (10th Cir. 2007) (concluding that the Inspector General's substantive response to the Integrity Committee's questions should be released because "those portions answer Trentadue's allegations with respect to specific individuals" and Trentadue's complaint filed with the Integrity Committee is a public document included in the record of the appeal; therefore, the "[Inspector General's] response to these accusations, by necessity, mentions the names of these individuals" and "[d]isclosure of these names, when the allegations made against the individuals are already part of the public record, would not invade the accused's privacy at all"); Gawker Media LLC v. FBI, 145 F. Supp. 3d 1100, 1108-11 (M.D. Fla. 2015) (ordering disclosure of names of individuals involved in highly-publicized investigation where such names were disclosed in open court and were subject of widespread media attention) (Exemptions 6 and 7(C)); Abou-Hussein v. Mabus, No. 09-1988, 2010 U.S. Dist. LEXIS 114830, at *4 (D.S.C. Oct. 28, 2010) (holding that "certain personnel and medical files," are protected "to the extent that they were not already publically available in the course of the public bidding process"), aff'd on other grounds, 414 F. App'x 518 (4th Cir. 2011); Blanton v. DOJ, No. 93-2398, 1994 U.S. Dist. LEXIS 21444, at *11-12 (W.D. Tenn. July 14, 1994) ("The fact of [requester's former counsel's] representation is a matter of public record Whether an individual possesses a valid license to practice law is also a matter of public record and cannot be protected by any privacy interest.").

¹⁰² See Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 896 (D.C. Cir. 1995) (finding no privacy interest in documents concerning presidential candidate's offer to aid federal government in drug interdiction, a subject about which the candidate had made several public statements); see also Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (noting that government lawyer investigated by DOJ's Office of Professional Responsibility diminished his privacy interest by acknowledging existence of investigation but that he still retains privacy interest in nondisclosure of any details of investigation) (Exemption 7(C)); Lindsey v. FBI, 271 F. Supp. 3d 1, 8 (D.D.C. 2017) (finding that regardless of whether government publicly acknowledged existence of records, subject of request can diminish his expectation of privacy by his own public acknowledgment) (Exemptions 6 and 7(C)); Gawker Media, 145 F. Supp. 3d at 1108-10 (ordering release of names of individuals who

Columbia Circuit has held that under the public domain doctrine, information that would otherwise be subject to a valid FOIA exemption must be disclosed if that information is preserved in a permanent public record or is otherwise easily accessible by the public.¹⁰³ In order for the public domain doctrine to apply, a requester must be able to point "to specific information in the public domain that appears to duplicate that being withheld."¹⁰⁴

Although public knowledge diminishes an individual's privacy interests in that information, courts have found that the mere fact that some of the information may be known to some members of the public does not negate the individual's privacy interest in preventing further dissemination to the public at large.¹⁰⁵ For example, the Supreme

publicly disclosed their roles in high-profile investigation); cf. Associated Press v. DOD, 410 F. Supp. 2d 147, 150 (S.D.N.Y. 2006) (holding Guantanamo Bay military detainees had no privacy interests in their identifying information because they provided the information at formal legal proceedings before tribunal and there was no evidence that detainees "were informed that the proceedings would remain confidential in any respect").

¹⁰³ See Niagara Mohawk Power Corp. v. DOE, 169 F.3d 16, 19 (D.C. Cir. 1999); see also Avondale Indus. v. NLRB, 90 F.3d 955, 961 (5th Cir. 1996) (finding that names and addresses of voters in union election were already disclosed in voluminous public record and that there was no showing that public record was compiled in such a way as to effectively obscure that information); Hall v. DOJ, 552 F. Supp. 2d 23, 30-31 (D.D.C. 2008) (stating that "[t]he court agrees that, to the extent that the non-redacted portions specifically identify the names of individuals in specific redacted portions of the documents, DOJ cannot redact these names" because "[t]he FOIA exemptions do not apply once the information is in the public domain"); Hidalgo v. FBI, 541 F. Supp. 2d 250, 255 (D.D.C. 2008) (finding government informant's personal privacy at stake, "but his interest is far more limited than that of the typical confidential informant" because "status as a government informant is open and notorious") (Exemptions 6 and 7(C)); O'Neill v. DOJ, No. 05-306, 2007 WL 983143, at *9 (E.D. Wis. Mar. 26, 2007) ("Under the public domain doctrine, materials not normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.").

¹⁰⁴ Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983); see, e.g., Edwards v. DOJ, No. 04-5044, 2004 WL 2905342, at *1 (D.C. Cir. Dec. 15, 2004) (per curiam) (summarily affirming district court's decision to bar release of any responsive documents pursuant to Exemption 7(C); finding that appellant's argument that release of the documents was required, because government officially acknowledged the information contained therein, fails because appellant "has failed to point to 'specific information in the public domain that appears to duplicate that being withheld'" (quoting Davis, 968 F.2d at 1279)); Sai v. TSA, 315 F. Supp. 3d 218, 262 (D.D.C. 2018) (noting that release of similar information to prior FOIA requesters does not trigger official acknowledgment doctrine; rather, "the specific information sought by the plaintiff must already be in the public domain" (quoting Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007))) (Exemptions 6 and 7(C)).

¹⁰⁵ See Am. Farm Bureau Fed'n v. EPA, 836 F.3d 963, 972 (8th Cir. 2016) (finding "[t]hat information about a particular owner might be obtained through publicly-available sources

Court in NARA v. Favish held that the fact that one photograph of the death scene had been leaked to the media did not detract from the weighty privacy interests of the surviving relatives to be secure from intrusions by a "sensation-seeking culture" and in

likewise does not preclude a substantial privacy interest" because "[t]here is an important distinction 'between the mere *ability* to access information and the likelihood of actual public *focus* on that information'" (quoting Am. Civil Liberties Union v. DOJ, 750 F.3d 927, 933 (D.C. Cir. 2014)) (reverse FOIA suit); Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1025 n.3 (9th Cir. 2008) ("As a preliminary matter, we reject [plaintiff's] contention that the unauthorized leak of the unredacted Cramer Fire Report or OSHA's decision to identify certain employees in its own report diminishes the Forest Service's ability to apply Exemption 6 to redact the identities from the Report."); Horowitz v. Peace Corps, 428 F.3d 271, 280 (D.C. Cir. 2005) ("Even though the student did reveal his allegation to two Peace Corps workers . . . he still has an interest in avoiding further dissemination of his identity."); Citizens for Responsibility & Ethics in Wash. v. DOJ, 846 F. Supp. 2d 63, 72 (D.D.C. 2012) (determining that Congressman who was investigated "retains a cognizable privacy interest in the requested records," because although he publicly acknowledged existence of investigation, "the details of that investigation have not been publicly disclosed") (Exemption 7(C)); Sensor Sys. Support, Inc. v. FAA, 851 F. Supp. 2d 321, 335 (D.N.H. 2012) (noting that "[a]n individual's interest in controlling the dissemination of information regarding personal matters [such as one's home address] does not dissolve simply because that information may be available to the public in some form") (Exemptions 6 and 7(C)); Barnard v. DHS, 598 F. Supp. 2d 1, 12 (D.D.C. 2009) ("Plaintiff's argument is foreclosed by a long line of cases recognizing that individuals maintain an interest in their privacy even where some information is known about them publicly."); Lawyers' Comm. for Civil Rights of S.F. Bay Area v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *21 (N.D. Cal. Sept. 30, 2008) (stating that "a person may still have a privacy interest in information that has already been publicized" and explaining that "[n]or is one's privacy interest in potentially embarrassing information lost by the possibility that someone could reconstruct that data from public files"); Schoenman v. FBI, 573 F. Supp. 2d 119, 149 (D.D.C. 2008) ("[E]ven if Plaintiff is correct that he can guess the individual's identity, 'the fact that Plaintiff may deduce the identities of individuals through other means . . . does not diminish their privacy interests.'" (quoting Shores v. FBI, 185 F. Supp. 2d 77, 83 (D.D.C. 2002))); Thomas v. DOJ, 531 F. Supp. 2d 102, 109 (D.D.C. 2008) ("Third parties' privacy interests are not lost because a requester knows or can determine from a redacted record their identities Nor do third parties lose their privacy interests because their names already have been disclosed.") (Exemption 7(C)); Summers v. DOJ, 517 F. Supp. 2d 231, 240 (D.D.C. 2007) ("The possibility that plaintiff has determined the identity of the agent, however, does not undermine that agent's privacy interests."); Lee v. DOJ, No. 05-1665, 2007 WL 744731, at *2 (D.D.C. Mar. 6, 2007) ("[A]lthough the documents may contain information that has already been made public at one time, given that the information would disclose incidents of prior criminal conduct by third parties, those individuals certainly have privacy interests in keeping the information from renewed public scrutiny.") (Exemptions 6 and 7(C)); Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 743 (E.D. Va. 1999) (stating that existence of publicity surrounding events does not eliminate privacy interest) (Exemptions 6 and 7(C)); cf. Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) (treating requester's personal knowledge as irrelevant in assessing privacy interests).

limiting further disclosure of the death scene images "for their own piece of mind and tranquility."¹⁰⁶

Furthermore, the Court of Appeals for the Eighth Circuit has held that individuals who sign a petition, knowing that those who sign afterward will observe their signatures, do not waive their privacy interests.¹⁰⁷ While such persons "would have no reason to be concerned that a limited number of like-minded individuals may have seen their names," they may well be concerned "that the petition not become available to the general public, including those opposing [the petitioners' position]."¹⁰⁸

Similarly, individuals who testify at criminal trials do not forfeit their rights to privacy except on those very matters that become part of the public record,¹⁰⁹ nor do individuals who plead guilty to criminal charges lose all rights to privacy with regard to the proceedings against them.¹¹⁰

¹⁰⁶ NARA v. Favish, 541 U.S. 157, 166-71 (2004); see also Baltimore Sun v. U.S. Customs Serv., No. 97-1991, slip op. at 5 (D. Md. Nov. 21, 1997) (finding that subject of photograph introduced into court record "retained at least some privacy interest in preventing the further dissemination of the photographic image" when "[t]he photocopy in the Court record was of such poor quality as to severely limit its dissemination") (Exemption 7(C)).

¹⁰⁷ See Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1188 (8th Cir. 2000) (reverse FOIA suit).

¹⁰⁸ Id.

¹⁰⁹ See, e.g., Isley v. EOUSA, 203 F.3d 52, 52 (D.C. Cir. Oct. 1999) (unpublished disposition); Kiraly v. FBI, 728 F.2d 273, 279 (6th Cir. 1984); Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981); see also Sellers v. DOJ, 684 F. Supp. 2d 149, 160 (D.D.C. 2010) ("A witness does not waive his or her interest in personal privacy by testifying at a public trial."); Scales v. EOUSA, 594 F. Supp. 2d 87, 91 (D.D.C. 2009) ("The mere fact that Hubbard testified at trial, or that she acknowledged at trial that there were forgery charges pending against her at that time, does not constitute a waiver of her privacy rights to all other related information, as requested by the plaintiff."); Jarvis v. ATF, No. 07-00111, 2008 WL 2620741, at *13 (N.D. Fla. June 30, 2008) ("That the individual testified in a public trial, however, is not necessarily a waiver.") (Exemption 7(C)); Valdez v. DOJ, 474 F. Supp. 2d 128, 133 (D.D.C. 2007) ("The fact that a third party testified publicly at trial does not diminish or waive his privacy interest.") (Exemption 7(C)); Meserve v. DOJ, No. 04-1844, 2006 WL 2366427, at *7 (D.D.C. Aug. 14, 2006) ("[A] witness who testifies at trial does not waive her personal privacy."); cf. Irons v. FBI, 880 F.2d 1446, 1454 (1st Cir. 1989) (en banc) (holding that disclosure of any source information beyond that actually testified to by confidential source is not required) (Exemption 7(D)).

¹¹⁰ See Detroit Free Press Inc. v. DOJ, 829 F.3d 478, 482 (6th Cir. 2016) (individuals have non-trivial privacy interest in preventing disclosure of their booking photos under Exemption 7(C)) (Exemption 7(C)), cert. denied sub nom. Detroit Free Press, Inc. v. DOJ, 137 S. Ct. 2158 (2017); World Publ'g Co. v. DOJ, 672 F.3d 825, 829 (10th Cir. 2012) (holding that "[e]xcept in limited circumstances, such as the attempt to capture a fugitive, a USMS

Passage of Time

As a general rule, courts have found that the passage of time serves to increase an individual's privacy interests, even in personal information that was once publically available.¹¹¹ However, in some situations, courts have found privacy interests diminished over time.

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booking photograph simply is not available to the public") (Exemption 7(C)); Karantsalis v. DOJ, 635 F.3d 497, 503 (11th Cir. 2011) (per curiam) (finding "booking photographs are generally not available for public dissemination . . . which suggests the information implicates a personal privacy interest") (Exemption 7(C)); Times Picayune Publ'g Corp. v. DOJ, 37 F. Supp. 2d 472, 477-82 (E.D. La. 1999) (protecting the mug shot of a prominent individual despite wide publicity prior to his guilty plea, and observing that a "mug is more than just another photograph of a person") (Exemption 7(C)); McNamera v. DOJ, 974 F. Supp. 946, 959 (W.D. Tex. 1997) (holding that convict's privacy rights are diminished only with respect to information made public during criminal proceedings against him) (Exemption 7(C)); cf. ACLU v. DOJ, 655 F.3d 1, 17 (D.C. Cir. 2011) (noting "distinction between indictments resulting in convictions or guilty pleas, and those resulting in acquittals or dismissals, or cases that remain sealed," as privacy concerns are potentially greater for cases that resulted in acquittal or dismissal and those that are sealed). But see Rosenfeld v. DOJ, No. 07-3240, 2012 WL 710186, at *5 (N.D. Cal. Mar. 5, 2012) (finding that "the fact that the documents concerns [forty year] old traffic violations as opposed to more serious criminal prosecutions decreases the likely stigma that would follow such a disclosure" and "[a]s the likely stigma of disclosure falls, so too does the privacy interest at issue").

¹¹¹ See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989) ("[T]he extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private."); Bloomgarden v. DOJ, 874 F.3d 757, 761 (D.C. Cir. 2017) (finding "quite substantial" privacy interest in termination letter which was over twenty years old and presented allegations against former AUSA); ACLU v. DOJ, 655 F.3d 1, 9 (D.C. Cir. 2011) (distinguishing information that is "less than (and probably quite a bit less than) ten years old," from the Reporters Committee "rap sheets that recorded a lifetime of everything from major crimes to youthful indiscretions") (Exemption 7(C)); Roth v. DOJ, 642 F.3d 1161, 1174 (D.C. Cir. 2011) (finding that "if . . . the passage of approximately a half century did not 'materially diminish' individuals' privacy interests in not being associated with McCarthy-era investigations, then certainly individuals continue to have a significant interest in not being associated with an investigation into a brutal quadruple homicide committed less than thirty years ago" (quoting Shrecker v. DOJ, 349 F.3d 657, 666 (D.C. Cir. 2003))) (Exemption 7(C)).

The Supreme Court has held that corporations do not possess personal privacy interests under the FOIA.¹¹² A closely held corporation or similar business entity is treated differently, however, as the Court of Appeals for the District of Columbia Circuit has held that "Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and 'the records would necessarily reveal at least a portion of the owner's personal finances.'"¹¹³

Moreover, when a record reflects personal details regarding an individual, albeit within the context of a business record, the individual's privacy interest is not

¹¹² See FCC v. AT&T, Inc., 562 U.S. 397, 403 (2011) (finding that in common usage the term "[p]ersonal" ordinarily refers to individuals" and that the word is not used to "refer[] to corporations or other artificial entities") (Exemption 7(C)); see also Sims v. CIA, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 686 n.44 (D.C. Cir. 1976) ("The sixth exemption has not been extended to protect the privacy interests of businesses or corporations."); Hodes v. HUD, 532 F. Supp. 2d 108, 119 (D.D.C. 2008) ("As a threshold matter, both Parties fail . . . to acknowledge that only individuals (not commercial entities) may possess protectible privacy interests under Exemption 6."); Maydak v. DOJ, 362 F. Supp. 2d 316, 324-25 (D.D.C. 2005) (stating that Exemption 6 applies "only to individuals" (quoting Sims, 642 F.2d at 572 n.47)); cf. Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 952 n.10 (S.D. Iowa 2002) (dictum) (noting that "[i]t is not clear to this Court that a trust, any more than a corporation, has a privacy interest worthy of protection under the FOIA").

¹¹³ Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1228-29 (D.C. Cir. 2008) (quoting Nat'l Parks, 547 F.2d at 685); see, e.g., Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1051 (D.C. Cir. 2009) ("We have . . . recognized substantial privacy interests in business-related financial information for individually owned or closely held businesses."); Providence Journal Co. v. FBI, 460 F. Supp. 778, 785 (D.R.I. 1978) ("While corporations have no privacy, personal financial information is protected, including information about small businesses when the individual and corporation are identical.") rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979); see also Beard v. Espy, 76 F.3d 384 (9th Cir. 1995) (unpublished table decision); Nat'l Parks, 547 F.2d at 685-86; FOIA Update, Vol. III, No. 4, at 5 ("FOIA Counselor: Questions & Answers") (advising that corporations do not have privacy, but that personal financial information is protectible when individual and corporation are identical); cf. Doe v. Veneman, 230 F. Supp. 2d 739, 748-51 (W.D. Tex. 2002) (holding that Department of Agriculture erroneously labeled individuals taking part in USDA program as businesses based on either number of livestock owned or fact that they had name for their ranch, and finding that personally identifying information about those individuals exempt from disclosure), aff'd in pertinent part on other grounds, 380 F.3d 807, 818 n.39 (5th Cir. 2004). But cf. Long v. DOJ, 450 F. Supp. 2d 42, 72 (D.D.C. 2006) ("At most, [the Department of Justice] ha[s] shown that disclosure of one record would reveal that an individual is associated with a business that in turn is a party to a legal proceeding. That fact, standing alone, does not implicate the FOIA's personal privacy concerns . . ."), amended on other grounds on reconsideration, 479 F. Supp. 2d 23 (D.D.C. 2007).

diminished and courts have permitted agency withholding of such information.¹¹⁴ For example, the District Court for the District of Columbia has found that names and organizations associated with personal visits with the Chairman of the Board of Governors of the Federal Reserve System were properly redacted from visitor logs.¹¹⁵ On the other hand, the Court of Appeals for the Ninth Circuit has found that the release of telecommunication industry lobbyists' names did not constitute a clearly unwarranted invasion of personal privacy, as "government acknowledgment of a lobbyist's lobbying activities does not reveal 'sensitive personal information' about the individual rising to a 'clearly unwarranted invasion of personal privacy.'"¹¹⁶ Similarly, courts have found that such an individual's expectation of privacy is diminished with

¹¹⁴ See Am. Small Bus. League v. DOD, 674 F. App'x 675, 677 (9th Cir. 2017) (finding DOD properly withheld business contact information and signatures of employees whose privacy interests were small, but not trivial, as this information could be used for harassment or forgery); Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187-89 (8th Cir. 2000) (protecting identities of pork producers who signed petition calling for abolishment of mandatory contributions to fund for marketing and advertising pork, because release would reveal position on referendum and "would vitiate petitioners' privacy interest in secret ballot") (reverse FOIA suit); Skybridge Spectrum Found. v. FCC, 842 F. Supp. 2d 65, 83-84 (D.D.C. 2012) (holding that the FCC properly invoked Exemption 6 to withhold "the names and personal identifying information of officers, employees, and representatives of [plaintiff's competitors]" because "the private interest in non-disclosure outweighs the public interest in disclosure"); Hill v. USDA, 77 F. Supp. 2d 6, 8 (D.D.C. 1999) (finding privacy interest in records of business transactions between borrowers and partly owned family corporation relating to loans made by Farmers Home Administration to individual borrowers), summary affirmance granted, No. 99-5365, 2000 WL 520724, at *1 (D.C. Cir. Mar. 7, 2000).

¹¹⁵ Judicial Watch, Inc. v. Bd. of Governors of Fed. Reserve Sys., 773 F. Supp. 2d 57, 62 (D.D.C. 2011) (concluding that "visitors have at least some privacy interest in protecting their names from disclosure, as it is quite conceivable that parties other than [plaintiff] might be interested in obtaining the names of individuals personally affiliated with high-ranking members of the Board").

¹¹⁶ Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 639 F.3d 876, 888 (9th Cir. 2010) (quoting Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

regard to matters in which he or she is acting in a business capacity,¹¹⁷ although privacy has still been afforded at times.¹¹⁸

Life Status

An individual who is deceased has greatly diminished personal privacy interests in the context of the FOIA.¹¹⁹ While courts have not established a bright-line rule regarding

¹¹⁷ See, e.g., Brown v. Perez, 835 F.3d 1223, 1235-37 (10th Cir. 2016) (finding summary judgment at district court level not appropriate because "[i]t is not intuitive . . . that the . . . physicians [at issue] possess a cognizable privacy interest in their business addresses – after all, it is in their economic interests to make their office locations generally available to the public . . . [and] the agency has not provided any testimony from physicians – or any other evidence – to support its assertion that treating physicians have a privacy interest in their business addresses") noting the agency did not identify adverse consequences that could result from disclosure of referee physicians' identities and business addresses), amended other grounds on reh'g (Nov. 8, 2016); Edelman v. SEC, 239 F. Supp. 3d 45, 56-57 (D.D.C. 2017) (finding that names of individuals who make comments/complaints to government implicate "less weighty" privacy interests where such comments concern commercial activities); W. Watersheds Project & Wildearth Guardians v. Bureau of Land Mgmt, et al., No. 09-482, 2010 WL 3735710, at *1, *12 (D. Idaho Sept. 13, 2010) (finding that two categories of permittees [i.e., "entities listed under a personal name along with the words 'Ranch' or 'Farm'"] have only a "minimal" privacy interest in the disclosure of their names and/or addresses and that release "would not constitute a clearly unwarranted invasion of personal privacy"); Hersh & Hersh v. HHS, No. 06-4234, 2008 WL 901539, at *8 (N.D. Cal. Mar. 31, 2008) (finding that business addresses, phone numbers, and job titles of non-federal corporate employees do not implicate the same type of heightened concerns as "private citizens' identities, home addresses, home telephone numbers, social security numbers, medical information, etc."); Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1089 (D. Or. 1998) (concluding that cattle owners who violated federal grazing laws have "diminished expectation of privacy" in their names when such information relates to commercial interests) (Exemption 7(C)); Wash. Post Co. v. USDA, 943 F. Supp. 31, 34-36 (D.D.C. 1996) (finding that farmers who received subsidies under cotton price-support program have only minimal privacy interests in home addresses from which they also operate businesses), appeal dismissed voluntarily, No. 96-5373 (D.C. Cir. May 19, 1997).

¹¹⁸ See Citizens for Responsibility & Ethics in Wash. v. DOJ, 822 F. Supp. 2d 12, 20-21 (D.D.C. 2011) (concluding that "there is at least a minimal privacy interest" in identities of journalist and filmmakers seeking to interview former lobbyist while he was in BOP custody, even though they were acting "in their professional capacities").

¹¹⁹ See Davis v. DOJ, 460 F.3d 92, 97-98 (D.C. Cir. 2007) ("We have recognized 'that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased.'" (quoting Schrecker v. DOJ, 349 F.3d 657, 661 (D.C. Cir. 2003) ("The fact of death, therefore, while not requiring the release of identifying information, is a relevant factor to be taken into account in the balancing decision whether to release information."))) (Exemption 7(C)); Vest v. Dep't of the Air Force, 793 F. Supp. 2d 103, 122 (D.D.C. 2011) ("An individual's death diminishes, but does not eliminate, his privacy

the extent to which an agency must go in determining whether an individual has died, the Court of Appeals for the District of Columbia Circuit has held that an agency must take certain "basic steps," which can vary depending on the specific circumstances of a particular case, to investigate whether disclosure would violate a significant privacy interest.¹²⁰ The D.C. Circuit has found that an agency must take these basic steps to determine life status before invoking a privacy interest under Exemptions 6 or 7(C).¹²¹ The D.C. Circuit has upheld the use of the FBI's "100-year rule," in making its privacy protection determinations whereby the FBI assumes that an individual is alive unless his or her birth date is more than 100 years ago.¹²²

interest . . .") (Exemption 7(C)); Grandison v. DOJ, 600 F. Supp. 2d 103, 114 (D.D.C. 2009) ("However, 'the death of the subject of personal information does diminish to some extent the privacy interest in that information, though it by no means extinguishes that interest; one's own and one's relations' interests in privacy ordinarily extend beyond one's death.'" (quoting Schrecker v. DOJ, 254 F.3d 162, 166 (D.C. Cir. 2001))).

¹²⁰ See, e.g., Johnson v. EOUSA, 310 F.3d 771, 775-76 (D.C. Cir. 2002) (finding that agency's efforts to determine if individuals were alive or dead met "basic steps" necessary to determine information that could affect privacy interests, and concluding that "[w]e will not attempt to establish a brightline set of steps for agency to take" in determining whether an individual is dead).

¹²¹ See Schrecker, 254 F.3d at 167 ("Without confirmation that the Government took certain basic steps to ascertain whether an individual was dead or alive, we are unable to say whether the Government reasonably balanced the interests in personal privacy against the public interest in release of the information at issue."); Schoenman v. FBI, 576 F. Supp. 2d 3, 9-10, 13-14 (D.D.C. 2008) (declaring that an agency must make reasonable effort to determine an individual's life status prior to invoking privacy interest under Exemptions 6 and 7(C), and finding that "agencies must take pains to ascertain life status in the first instance, i.e., in initially balancing the privacy and public interests at issue"). But cf. Vest, 793 F. Supp. 2d at 122 (finding that "[w]hile on first blush it appears that the DOJ/FBI should have taken the life status of [the subject] into account, '[t]he effect of an individual's death on [their] privacy interests need not be factored into an Exemption 7(C) balancing test . . . where no public interest would be served by the disclosure of that individual's name or other identifying information'" (Exemption 7(C))).

¹²² Schrecker, 349 F.3d at 662-65 (holding that the FBI's administrative process of using its "100-year rule," searching the Social Security Death Index if an individual's birthdate is in records, and using its institutional knowledge, is reasonable and sufficient in determining whether individuals mentioned in requested records are deceased); see also Schoenman, 576 F. Supp. 2d at 10 ("The D.C. Circuit has concluded that the 100-year rule is, as a general matter, a reasonable prophylactic presumption."); Summers, 517 F. Supp. 2d at 242 (concluding that defendants adequately "determined the life status of named agents by using the agency's '100-year rule,' the Who Was Who publication, the institutional knowledge of employees, and prior FOIA requests" given that "there are over 1100 responsive documents, and there are likely many third-party named individuals whose privacy is at issue"); cf. Davis, 460 F.3d at 101-05 (acknowledging FBI's use of "100-year rule"; finding that use of the rule was destined to fail when applied to audiotapes, as opposed to documents, and stating that "[t]he reasonableness of [the '100-year rule']

Public Figures

Although courts have found that an individual's status as a public figure might in some circumstances factor into the privacy balance,¹²³ a public figure does not, by virtue of his or her status, forfeit all rights of privacy.¹²⁴ Indeed, in NARA v. Favish, the

depends upon the probability that the responsive records will contain the individual's birth date [I]t seems highly unlikely that the participants in an audiotaped conversation would have announced their ages or dates of birth") (Exemption 7(C)).

¹²³ See, e.g., Rosenfeld v. DOJ, No. 07-3240, 2012 WL 710186, at *4 (N.D. Cal. Mar. 5, 2012) (finding that privacy interest "is low because . . . the subject is a public figure").

¹²⁴ See Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1025 (9th Cir. 2008) (noting that "while the privacy interests of public officials are 'somewhat reduced' when compared to those of private citizens, 'individuals do not waive all privacy interests . . . simply by taking an oath of public office'" (quoting Lissner v. U.S. Customs Serv., 241 F.3d 1220, 1223 (9th Cir. 2001))); Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (stating that "although government officials, as we have stated before, may have a 'somewhat diminished' privacy interest, they 'do not surrender all rights to personal privacy when they accept a public appointment'" (quoting Quinon v. FBI, 86 F.3d 1222, 1230 (D.C. Cir. 1996))) (Exemption 7(C)); Fund for Constitutional Gov't v. NARA, 656 F.2d 856, 865 (D.C. Cir. 1981); Citizens for Responsibility & Ethics in Wash. v. DOJ, 840 F. Supp. 2d 226, 233 (D.D.C. 2012) (observing that "'individuals have a strong interest in not being associated unwarrantedly with alleged criminal activity'" (quoting Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984)) and this "may be especially true for politicians who rely on the electorate to return them to public office"); Citizens for Responsibility & Ethics in Wash. v. DOJ, 846 F. Supp. 2d 63, 71 (D.D.C. 2012) (observing that "despite the fact that [a congressman's] privacy interest is 'somewhat diminished' by the office he holds, he nevertheless 'd[id] not surrender all rights to personal privacy when [he] accept[ed] a public appointment'" (Exemption 7(C)); Taitz v. Astrue, 806 F. Supp. 2d 214, 219 (D.D.C. 2011) (noting that "an individual's status as a public official does not, as plaintiff contends, 'make exemption 6 irrelevant to him and his vital records'", summary affirmance granted, No. 11-5304, 2012 WL 1930959 (D.C. Cir. May 25, 2012); Nat'l Sec. News Serv. v. U.S. Dep't of the Navy, 584 F. Supp. 2d 94, 96 (D.D.C. 2008) (finding that "[d]isclosure of the requested patient admission records only would reveal who was admitted to the Naval Medical Center; it would reveal nothing about the Navy's own conduct" and "[t]his is so irrespective of whether one of the persons then admitted to the hospital is now a public figure"); Canaday v. ICE, 545 F. Supp. 2d 113, 118 (D.D.C. 2008) (stating that public figures "do not forfeit all vestiges of privacy"); Phillips v. ICE, 385 F. Supp. 2d 296, 305 (S.D.N.Y. 2005) (disregarding requester's unsupported claim that former foreign government officials have no "legitimate privacy interest[s]"); Wolk v. United States, No. 04-832, 2005 WL 465382, at *5 (E.D. Pa. Feb. 28, 2005) ("[O]fficials do not surrender all of their rights to personal privacy when they accept a public appointment.") (Exemptions 6 and 7(C)); cf. McNamara v. DOJ, 974 F. Supp. 946, 959 (W.D. Tex. 1997) (stating that "[s]imply because an individual was once a public official does not mean that he retains that status throughout his life," and holding that three years after a disgraced sheriff resigned he was "a private, not a public figure") (Exemption 7(C)). But cf. Judicial Watch, Inc. v. DOJ, No. 00-745, 2001 U.S. Dist. LEXIS 25731, at *13 (D.D.C.

deceased former Deputy White House Counsel's status as both a public figure and a high-level government official did not, in the Supreme Court's opinion, "detract" from the "weighty privacy interests involved."¹²⁵ Likewise, a candidate for a political office, either federal or nonfederal, does not forfeit all rights to privacy.¹²⁶

Privacy Assurances and Waivers

Privacy assurances given to those providing information to the government generally serve to increase their privacy interests.¹²⁷ However, such assurances alone are not dispositive.¹²⁸ Alternatively, courts have found that disclosure warnings advising the public that information may be released pursuant to the FOIA do not operate to waive privacy rights.¹²⁹ As one court has observed, such a statement is not a

Feb. 12, 2001) (suggesting that pardoned prisoners lost any privacy interests since they "arguably bec[a]me public figures through their well-publicized pleas for clemency and [given] the speeches some have made since their release") (Exemption 7(C)).

¹²⁵ 541 U.S. 157, 171 (2004).

¹²⁶ See Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 894 & n.9 (D.C. Cir. 1995) ("Although candidacy for federal office may diminish an individual's right to privacy . . . it does not eliminate it . . ."); Hunt v. U.S. Marine Corps, 935 F. Supp. 46, 54 (D.D.C. 1996) (finding that senatorial candidate has unquestionable privacy interest in his military service personnel records and medical records); Nation Magazine v. Dep't of State, No. 92-2303, 1995 WL 17660254, at *10 (D.D.C. Aug. 18, 1995) (upholding refusal to confirm or deny existence of investigative records pertaining to presidential candidate); cf. Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 954 (S.D. Iowa 2002) (ruling that nominee for position of Undersecretary of Agriculture for Rural Development does not forfeit all privacy rights).

¹²⁷ See, e.g., Kensington Research & Recovery v. Dep't of Treasury, No. 10-3538, 2011 WL 2647969, at *9 (N.D. Ill. June 30, 2011) (finding that the agency's regulation governing individuals purchasing securities, in which it "pledged confidentiality and protection under Exemption 6," both "raises the bondholders' expectation of privacy, and enhances the privacy interests of nondisclosure").

¹²⁸ See, e.g., Prudential Locations LLC v. HUD, 739 F.3d 424, 431-32 (9th Cir. 2013) (noting that "an assurance [of confidentiality] is neither a necessary, nor a necessarily sufficient, condition for the existence of a cognizable personal privacy interest under Exemption 6," but it is "a relevant factor"); Advocates for Highway & Auto Safety v. Fed. Highway Admin., 818 F. Supp. 2d 122, 129 (D.D.C. 2011) (finding that while "[a]ssurances of confidentiality are to be accorded some weight in assessing privacy interest under FOIA Exemption 6 . . . such promises do not necessarily prohibit disclosure").

¹²⁹ See Lakin Law Firm, P.C. v. FTC, 352 F.3d 1122, 1124-25 (7th Cir. 2003) (explaining that warning on Federal Trade Commission website that "information provided may be subject to release under the FOIA" cannot be construed as a waiver by consumers) (emphasis added); Hill v. USDA, 77 F. Supp. 2d 6, 8 (D.D.C. 1999) (noting that disclosure warning in

waiver of the right to confidentiality, it is merely a warning by the agency and corresponding acknowledgment by the signers "that the information they were providing could be subject to release."¹³⁰ Further, one person's waiver has been found not to apply to other individuals.¹³¹

Interest in Disclosure

In certain circumstances, an individual may have an interest in having his or her personal information disclosed rather than withheld. In Lepelletier v. FDIC, the Court of Appeals for the District of Columbia Circuit remanded the case back to the district court to determine whether some of the names of individual depositors with unclaimed funds at banks for which the FDIC was then the receiver should be released to a professional money finder.¹³² Introducing a new element into the balancing test for this particular type of information, the D.C. Circuit held that the standard test "is inapposite here, i.e., where the individuals whom the government seeks to protect have a clear interest in the release of the requested information."¹³³ As guidance to the lower court charged with addressing this novel set of circumstances, the D.C. Circuit ordered, first, that "release of names associated with unclaimed deposits should not be matched with the amount owed to that individual" and, second, that "on remand, the District Court must determine the dollar amount below which an individual's privacy interest should be deemed to outweigh his or her interest in discovering his or her money, such that the names of depositors with lesser amounts may be redacted."¹³⁴

Faced with reverse FOIA challenges,¹³⁵ several courts have had to consider whether to order agencies not to release records pertaining to individuals that agencies had

loan documents was "a warning, not a waiver," and that "[t]he statement does not say that the government will not attempt to protect privacy rights by asserting them, and indeed the government is expected to do so"), summary affirmance granted, No. 99-5365, 2000 WL 520724, at *1 (D.C. Cir. Mar. 7, 2000).

¹³⁰ Hill, 77 F. Supp. 2d at 8 (holding borrowers of Farmers Home Administration loans did not waive their privacy interests by signing loan-application documents that contained a mere warning information supplied could be released).

¹³¹ Milton v. DOJ, 783 F. Supp. 2d 55, 58 (D.D.C. 2011) (finding that release of recording of telephone conversation can be invasion of personal privacy; rejecting plaintiff's assertion that waiver he signed "allowing [Bureau of Prisons] to monitor his phone calls . . . impliedly extends to any party who accepted his calls").

¹³² 164 F.3d 37, 48-49 (D.C. Cir. 1999).

¹³³ Id. at 48.

¹³⁴ Id.

¹³⁵ See 5 U.S.C. §§ 701-706 (2012 & Supp. V 2017) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to

determined should be disclosed.¹³⁶ Courts have generally not found any requirement that an agency notify record subjects of the agency's intent to disclose personal information about them or that it "track down an individual about whom another has requested information merely to obtain the former's permission to comply with the request."¹³⁷

judicial review thereof."); see also Chrysler Corp. v. Brown, 441 U.S. 281, 318 (1979) (deciding that judicial review based on administrative record according to "arbitrary, capricious, or not in accordance with law" standard applies to reverse FOIA cases).

¹³⁶ See, e.g., Am. Farm Bureau Fed'n v. EPA, 836 F.3d 963, 973-74 (8th Cir. 2016) (holding agency improperly decided that Exemption 6 did not protect personal information about owners, and noting information revealed little about agency's own conduct) (reverse FOIA suit); Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1184-89 (8th Cir. 2000) (finding agency decision to release petition with names unredacted was not in accordance with law) (reverse FOIA suit); Nat'l Org. for Women v. SSA, 736 F.2d 727, 728 (D.C. Cir. 1984) (per curiam) (affirming district court's decision to enjoin release of affirmative action plans submitted to SSA) (Exemptions 4 and 6); Schmidt v. U.S. Air Force, No. 06-3069, 2007 WL 2812148, at *11 (C.D. Ill. Sept. 20, 2007) (finding that plaintiff has a valid privacy interest regarding information about his discipline; however, disclosure of records regarding disciplinary actions against plaintiff is proper because "[i]t is undisputed that the friendly-fire incident garnered significant public and media attention" and "[t]he release of Schmidt's reprimand gave the public, in the United States and around the world, insight into the way in which the United States government was holding its pilot accountable") (Reverse FOIA/Privacy Act wrongful disclosure suit); Doe v. Veneman, 230 F. Supp. 2d 739, 749-51 (W.D. Tex. 2002) (holding agency decision to release identifying information pertaining to farmers and ranchers was incorrect) (reverse FOIA suit), aff'd in pertinent part on other grounds, 380 F.3d 807, 818 n.39 (5th Cir. 2004); Am. Fed'n of Labor & Congress of Indus. Orgs. v. FEC, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001) (finding agency's decision not to invoke Exemption 7(C) to withhold identities of individuals in its investigative files to be "arbitrary, capricious and contrary to law") (reverse FOIA suit), aff'd on other grounds, 333 F.3d 168 (D.C. Cir. 2003); Sonderegger v. U.S. Dep't of the Interior, 424 F. Supp. 847, 853-56 (D. Idaho 1976) (ordering temporary injunction of release of claimant names and amount claimed for victims of Teton Dam disaster, while allowing release of amount paid and category of payment with all personal identifying information deleted) (Exemptions 4 and 6); cf. Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1412-13 (D. Haw. 1995) (concluding that Exemption 6 was not intended to protect information pertaining to human remains, nor to protect information pertaining to large groups in which individuals are not identifiable) (reverse FOIA suit).

¹³⁷ Blakey v. DOJ, 549 F. Supp. 362, 365 (D.D.C. 1982) (Exemption 7(C)), aff'd, 720 F.2d 215 (D.C. Cir. 1983); cf. Hemenway v. Hughes, 601 F. Supp. 1002, 1007 (D.D.C. 1985) (placing burden on requester, not agency, to contact foreign correspondents for requested citizenship information after receiving list of correspondents with office telephone numbers and addresses, and noting that correspondents are "free to decline to respond"). But see Associated Press v. DOD, 395 F. Supp. 2d 15, 16-17 & n.1 (S.D.N.Y. 2005) (requiring agency to ask Guantanamo Bay detainees whether they wished their identifying information to be released to plaintiff, based on fact that "detainees are in custody and therefore readily available"); cf. War Babes v. Wilson, 770 F. Supp. 1, 4-5 (D.D.C. 1990) (allowing agency sixty days to meet burden of establishing privacy interest by obtaining affidavits from World War

FOIA Public Interest

Once it is determined that a substantial privacy interest may be infringed by disclosure, the third step of the analysis must be undertaken. This step requires the identification and assessment of the FOIA public interest in disclosure.¹³⁸ In order to constitute a FOIA public interest in disclosure, information must serve the "basic purpose of the Freedom of Information Act[,] 'to open agency action to the light of public scrutiny.'"¹³⁹ Information that informs the public about "an agency's performance of its statutory duties falls squarely within that statutory purpose."¹⁴⁰ Furthermore, as the Supreme Court held in NARA v. Favish, "the public interest sought to be advanced [must be] a significant one, an interest more specific than having the information for its own sake."¹⁴¹

While requesters are typically not required to provide the reasons for requesting information, when disclosure could result in an invasion of personal privacy, the

II service members who objected to release of their addresses to British citizens seeking to locate their fathers).

¹³⁸ See FOIA Update, [Vol. X, No. 2](#), at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking").

¹³⁹ Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); see also Showing Animals Respect & Kindness v. Dep't of the Interior, 730 F. Supp. 2d 180, 196 (D.D.C. 2010) ("[T]he public interest in disclosure under FOIA is not limited to the agency processing the request for records; the public has a right to know what their 'government' is up to, not just what a particular agency is up to.").

¹⁴⁰ DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989); see also O'Kane v. U.S. Customs Serv., 169 F.3d 1308, 1310 (11th Cir. 1999) (per curiam) (affirming that Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, do not overrule Reporters Comm. definition of "public interest"); cf. NARA v. Favish, 541 U.S. 157, 172 (2004) (reiterating the Reporters Comm. "public interest" standard, and characterizing it as "a structural necessity in a real democracy" that "should not be dismissed" – despite arguments by amici that Reporters Comm. had been "overruled" by Electronic FOIA amendments since 1996).

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

Supreme Court has ruled that a requester bears the burden of establishing that disclosure would serve a FOIA public interest.¹⁴² A requester's personal interest in disclosure is irrelevant to the public interest analysis.¹⁴³ As the Supreme Court held in

¹⁴² See Favish, 541 U.S. at 172 ("Where the privacy concerns . . . are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure.") (Exemption 7(C)); Wadhwa v. VA, 446 F. App'x 516, 519 (3d Cir. 2011) (per curiam) (unpublished disposition) (finding withholding appropriate where requester failed to articulate proper FOIA public interest in disclosure); Associated Press v. DOD, 549 F.3d 62, 66 (2d Cir. 2008) ("The requesting party bears the burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA."); Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 391 nn.8 & 13 (D.C. Cir. 1987); see also Hunton & Williams LLP v. EPA, 346 F. Supp. 3d 61, 85 (D.D.C. 2018) (finding withholding of certain information, including EPA employee's work email address and mobile phone number, proper as no public interest was identified); Graff v. FBI, 822 F. Supp. 2d 23, 33 (D.D.C. 2011) ("[B]ecause the public interest justification in each case depends on how the requester plans to use the records or information, the agency must obtain that justification from the requester in order to balance it against the third party's privacy interest."); Rogers v. Davis, No. 08-177, 2009 WL 213034, at *2 (E.D. Mo. Jan. 28, 2009) ("The burden of establishing that the disclosure would serve the public interest . . . is on the requester."); Salas v. IG, 577 F. Supp. 2d 105, 112 (D.D.C. 2008) ("It is the requester's obligation to articulate a public interest sufficient to outweigh an individual's privacy interest, and the public interest must be significant.").

¹⁴³ See Reporters Comm., 489 U.S. at 771-72 & n.20; see also Joseph W. Diemert, Jr. and Assocs. Co., L.P.A. v. FAA, 218 F. App'x 479, 482 (6th Cir. 2007) (concluding that "the release of the requested information is clearly an unwarranted invasion of personal privacy" because "[t]he disclosure of such information would only serve the private interests of Diemert"); Schiffer v. FBI, 78 F.3d 1405, 1410-11 (9th Cir. 1996) (noting that individual interest in obtaining information about oneself does not constitute public interest); Ubungen v. ICE, 600 F. Supp. 2d 9, 12 (D.D.C. 2009) (concluding that plaintiff's request for information about the whereabouts or fate of her sister is "purely personal" and there is no public interest under the FOIA); Salas, 577 F. Supp. 2d at 111 (finding that plaintiff's argument that release of redacted information will expose an agency's action pertaining to an incident involving plaintiff is insufficient because "[t]his one incident, though of obvious importance to plaintiff, is not one of such magnitude that it outweighs the agency employees' substantial privacy interest"); Summers v. DOJ, 517 F. Supp. 2d 231, 240 (D.D.C. 2007) (finding plaintiff's argument "that knowing the names of the FBI agents in question would enable him to contact them and seek more information about" a former agent insufficient since "the operative inquiry in determining whether disclosure of a document implicating privacy issues is warranted is the nature of the requested document itself, not the purpose for which the document is being requested"); Berger v. IRS, 487 F. Supp. 2d 482, 505 (D.N.J. 2007) (stating that disclosure of IRS employee's time sheets "would primarily serve Plaintiffs' particular private interests as individual taxpayers. Disclosure would not be 'instrumental in shedding light on the operations of government.'" (quoting Lewis v. EPA, No. 06-2660, 2006 WL 3227787, at *6 (E.D. Pa. Nov. 3, 2006))); Los Angeles Times Commc'ns LLC v. Dep't of Labor, 483 F. Supp. 2d 975, 981 (C.D. Cal. 2007) ("Courts weigh the public interest by considering the interest of the general public, not the private motives, interests, or needs of a litigant."). But see Finkel v. Dep't of Labor, No. 05-

DOJ v. Reporters Comm. for Freedom of the Press, the requester's identity can have "no bearing on the merits of his or her FOIA request."¹⁴⁴ In so declaring, the Court ruled that agencies should treat all requesters alike in making FOIA disclosure decisions, and should not consider a requester's "particular purpose" in making the request.¹⁴⁵ Rather, the proper approach for determining whether there is a FOIA public interest in

5525, 2007 WL 1963163, at *9 (D.N.J. June 29, 2007) (noting that "plaintiff raises a legitimate public interest in the information sought because his proposed research concerns OSHA's response to beryllium sensitization amongst its own inspectors and the general workforce").

¹⁴⁴ 489 U.S. at 771; see also Favish, 541 U.S. at 170-72 (reiterating that "[a]s a general rule, withholding information under FOIA cannot be predicated on the identity of the requester," but adding that this does not mean that a requester seeking to establish an overriding "public interest" in disclosure of requested information "need not offer a reason for requesting the information"); DOD v. FLRA, 510 U.S. 487, 496-501 (1994); Associated Press, 554 F.3d 274, 285 (2d Cir. 2009) ("The public interest 'cannot turn on the purposes for which the request for information is made,' and 'the identity of the requesting party has no bearing on the merits of his or her FOIA request.'" (quoting Reporters Comm., 489 U.S. at 771)); Carpenter, 470 F.3d at 440 ("Neither the specific purpose for which the information is requested nor the identity of the requesting party has any bearing on the evaluation."); O'Neill v. DOJ, No. 05-0306, 2007 WL 983143, at *8 (E.D. Wis. Mar. 26, 2007) ("The requester's identity, purpose in making the request, and proposed use of the requested information have no bearing on this balancing test.").

¹⁴⁵ 489 U.S. at 771-72 & n.20; see also Favish, 541 U.S. at 172 (reiterating the Reporters Comm. principle that "citizens should not be required to explain why they seek the information" at issue, but further elucidating that in a case where the requester's purported public interest revolves around an allegation of government wrongdoing, "the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable"); DOD v. FLRA, 510 U.S. at 496 (holding that "except in certain cases involving claims of privilege, 'the identity of the requesting party has no bearing on the merits of his or her FOIA request'" (quoting Reporters Comm., 489 U.S. at 773)); Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1051 (D.C. Cir. 2009) ("The requesting party's intended use for the information is irrelevant to our analysis."); Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1231 n.2 (D.C. Cir. 2008) ("Although Multi Ag may not want the information to check up on the government itself, the use for which the requester seeks the information is not relevant for purposes of determining the public interest under FOIA Exemption 6."); Milton v. DOJ, 783 F. Supp. 2d 55, 59 (D.D.C. 2011) (finding that "[i]n the absence of any evidence of government impropriety," plaintiff's claim that certain telephone recordings are needed to support a claim of innocence "reflects a personal rather than a public interest"); Moore v. United States, 602 F. Supp. 2d 189, 194 (D.D.C. 2009) ("The plaintiff's personal interest is, no doubt, of paramount importance to him, but it is irrelevant to the FOIA, which by law is sensitive only to a public interest."); Rogers, 2009 WL 213034, at *2 ("[T]he purposes for which the FOIA request is made is irrelevant to whether an invasion of privacy is warranted.").

disclosure is to evaluate "the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act.'"¹⁴⁶

Information serves a FOIA public interest if it sheds light on agency action.¹⁴⁷ Several courts have observed that the minimal amount of information of interest to the

¹⁴⁶ Reporters Comm., 489 U.S. at 772 (quoting Rose, 425 U.S. at 372); see, e.g., Carpenter, 470 F.3d at 440 (observing that nature of requested document and its relationship to opening agency action to light of public scrutiny determines whether invasion of privacy is warranted); McGehee v. DOJ, 800 F. Supp. 2d 220, 234 (D.D.C. 2011) ("Although the Jonestown Massacre may have elicited a great deal of public attention, the relevant question is not whether the public would like to know the names of FBI agents and victims involved, but whether knowing those names would shed light on the FBI's performance of its statutory duties.") (Exemption 7(C)); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 304 (D.D.C. 2007) ("Accordingly, to assess the public interest, the Court must examine 'the nature of the requested document and its relationship to the basic purpose of [FOIA] to open agency action to the light of public scrutiny.'" (quoting Judicial Watch of Florida, Inc. v. DOJ, 102 F. Supp. 2d 6, 17 (D.D.C. 2000))); ACLU of N. Cal. v. DOJ, No. 04-4447, 2005 WL 588354, at *13 (N.D. Cal. Mar. 11, 2005) (ruling that "it was not sufficient for the plaintiffs to show [public] interest in only the general subject area of the request"); see also Schrecker v. DOJ, 349 F.3d 657, 661 (D.C. Cir. 2003) (stating that an inquiry regarding the public interest "should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld") (Exemption 7(C)). But see Int'l Counsel Bureau v. DOD, 723 F. Supp. 2d 54, 66 (D.D.C. 2010) (finding substantial public interest in disclosure of photographs of Guantanamo Bay detainees, as "[t]he press has taken a substantial interest in the Guantanamo Bay detainees, and has reported extensively on them and their condition").

¹⁴⁷ See Reporters Comm., 489 U.S. at 773; Rose, 425 U.S. at 372; see also Bartko v. DOJ, 898 F.3d 51, 76 (D.C. Cir. 2018) ("[T]he public interest in the material [appellant] seeks is substantial given the Fourth Circuit's disclosure of a troubling pattern of prosecutorial missteps and the U.S. Attorney's Office's recognition that errors had been made and changes would be implemented") (Exemption 7(C)), reh'g denied (July 31, 2018); Henson v. HHS, 892 F.3d 868, 878 (7th Cir. 2018) (upholding protection of "medical information about the manufacturer's patients and the contact information for employees of the manufacturer and the agency," stating that "the [FOIA] requires transparency from the government—not the manufacturer's patients and employees"), reh'g denied (July 31, 2018); Citizens for Responsibility & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1092-96 (D.C. Cir. 2014) (holding categorical rule inappropriate as "[o]n the other side of the scale sits a weighty public interest in shining a light on the FBI's investigation of major political corruption and the DOJ's ultimate decision not to prosecute a prominent member of the Congress for any involvement he may have had") ((Exemption 7(C)); Nat'l Day Laborer Org. Network v. ICE, 811 F. Supp. 2d 713, 748 (S.D.N.Y. 2011) ("[T]he public interest in disclosure outweighs the privacy interest as regards the names of agency heads or high-level subordinates . . . [as] [t]here is a substantial public interest in knowing whether the documents at issue reflect high-level agency policy, helping to inform the public as to 'what their government is up to.'" (quoting Reporters Comm., 489 U.S. at 773) (Exemptions 6 & 7(C)); Families for Freedom v. U.S. Customs & Border Prot., 797 F. Supp. 2d 375, 399 (S.D.N.Y. 2011) (finding

public revealed by a single incident or investigation does not shed enough light on an agency's conduct to overcome the subject's privacy interest in his records.¹⁴⁸ At other times, though, courts have found that the public interest in a particular, singular investigation is sufficient.¹⁴⁹

A request made for the purpose of challenging a criminal conviction has generally been found not to further a FOIA public interest.¹⁵⁰ Likewise, a request made in order

disclosure of agency employee names would inform the public of "what their government is up to" by revealing "whether the expectations and requirements articulated in the memoranda reflect high-level agency policy") (Exemptions 6 and 7(C)); Gordon v. FBI, 388 F. Supp. 2d 1028, 1041 (N.D. Cal. 2005) (finding public interest served by disclosure of individual agency employee names because their names show "who are making important government policy") (Exemptions 6 and 7(C)).

¹⁴⁸ See, e.g., Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (observing that "courts have refused to recognize, for purposes of FOIA, a public interest in nothing more than the fairness of a criminal defendant's own trial") (Exemption 7(C)); Hunt v. FBI, 972 F.2d 286, 289 (9th Cir. 1992) (observing that disclosure of single internal investigation file "will not shed any light on whether all such FBI investigations are comprehensive or whether sexual misconduct by agents is common"); Salas, 577 F. Supp. 2d at 112 (finding that OIG properly redacted personally identifying information about Border Patrol employees mentioned in investigative records about a complaint by plaintiff concluding that "[t]his one incident, though of obvious importance to plaintiff, is not one of such magnitude that it outweighs the agency employees' substantial privacy interest"); Berger, 487 F. Supp. 2d at 505 (finding that disclosure of one IRS employee's time sheets would not serve the public interest); Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 745 (E.D. Va. 1999) ("[T]he interest of the public in the personnel file of one Air Force prosecutor is attenuated because information concerning a single isolated investigation reveals relatively little about the conduct of the Air Force as an agency.") (Exemptions 6 and 7(C)); cf. Tomscha v. GSA, 158 F. App'x 329, 331 (2d Cir. 2005) (finding that disclosure of the justification for awards given to "a single low-ranking employee of the GSA . . . would not 'contribute significantly to the public understanding of the operations or activities of the government'" (quoting DOD v. FLRA, 510 U.S. at 495)).

¹⁴⁹ See, e.g., Citizens for Responsibility & Ethics in Wash. v. DOJ, 846 F. Supp. 2d 63, 67 (D.D.C. 2012) ("Against the backdrop of broader public concerns about the agency's handling of allegations of corruption leveled against high-ranking public officials . . . the public has a clear interest in documents concerning" DOJ's investigation of Congressman accused of providing earmarks and contracts to donors.) (Exemption 7(C)); Citizens for Responsibility & Ethics in Wash. v. DOJ, 840 F. Supp. 2d 226, 234 (D.D.C. 2012) (recognizing significant public interest in information relating to DOJ's investigation of congressman accused of bribery because "the American public has a right to know about the manner in which its representatives are conducting themselves and whether the government agency responsible for investigating and, if warranted, prosecuting those representatives for alleged illegal conduct is doing its job") (Exemptions 6 & 7(C)).

¹⁵⁰ See, e.g., Watters v. DOJ, 576 F. App'x 718, 724 (10th Cir. 2014) (finding that agency properly withheld identifying information of law enforcement personnel and private third

to obtain or supplement discovery in a private lawsuit has generally been found not to serve a FOIA public interest.¹⁵¹ In fact, one court has observed that if the requester truly had a great need for the records for purposes of litigation, he or she should seek them in that forum, where it would be possible to provide them under an appropriate protective

parties because plaintiff sought records to secure his release from prison rather than to further public understanding of government activities) (Exemptions 6 & 7(C)); Rimmer v. Holder, No. 10-1106, 2011 WL 4431828, at *7 (M.D. Tenn. Sept. 22, 2011) (characterizing requester's asserted interest in collaterally attacking his state conviction as an "illegitimate" public interest) (Exemption 7(C)), aff'd, 700 F.3d 246 (6th Cir. 2012); Lewis v. DOJ, 733 F. Supp. 2d 97, 111 (D.D.C. 2010) (finding plaintiff's personal interest in learning "the identities of the DEA Special Agents" related to his criminal conviction "does not qualify as a public interest favoring disclosure") (Exemptions 6 and 7(C)), denying motion for relief from judgment, 867 F. Supp. 2d 1 (D.D.C. 2011); Lasko v. DOJ, 684 F. Supp. 2d 120, 129 (D.D.C. 2010) ("Plaintiff's personal interest in the requested records for the purpose of attacking his conviction or sentence is not relevant to this analysis.") (Exemption 7(C)), aff'd, No. 10-5068, 2010 WL 3521595 (D.C. Cir. Sept. 3, 2010); Amuso v. DOJ, 600 F. Supp. 2d 78, 93 (D.D.C. 2009) ("Any interest in the information for purposes of proving his innocence or proving that government witnesses perjured testimony at his criminal trial does not overcome the individual's privacy interest."); Lopez v. EOUSA, 598 F. Supp. 2d 83, 88 (D.D.C. 2009) (rejecting plaintiff's argument that "the personal privacy exemptions must yield in the face of the plaintiff's belief that a Brady violation infected his criminal trial"); Scales v. EOUSA, 594 F. Supp. 2d 87, 91 (D.D.C. 2009) (stating "that a bald assertion of a Brady violation is insufficient to overcome the individual's privacy interests in the records at issue"); Thomas v. DOJ, No. 04-112, 2006 WL 722141, at *3 (E.D. Tex. Mar. 15, 2006) ("[T]he interest of a private litigant is not a significant public interest."), aff'd, 260 F. App'x 677 (5th Cir. 2007).

¹⁵¹ See Carpenter, 470 F.3d at 441 ("There is no public interest in supplementing an individual's request for discovery.") (criminal trial) (Exemption 7(C)); Horowitz v. Peace Corps, 428 F.3d 271, 278 (D.C. Cir. 2005) (finding that plaintiff's "need to obtain the information for a pending civil suit is irrelevant, as the public interest to be weighed has nothing to do with [his] personal situation"); Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981) (holding that the court "cannot allow the plaintiff's personal interest to enter into the weighing or balancing process" where he is "hoping to obtain evidence sufficient to mount a collateral attack on his kidnapping conviction"); Ebersole v. United States, No. 06-2219, 2007 WL 2908725, at *6 (D. Md. Sept. 24, 2007) ("Thus, FOIA requests are not meant to displace discovery rules.") (Exemption 7(C)); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1197 (N.D. Cal. 2006) ("Here, plaintiff expressly acknowledges that she wants the discrimination complaint files to use as possible evidence in her employment discrimination case . . . [which is] not a significant public interest warranting disclosure of private information."); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (seeking records for job-related causes of action insufficient). But see United Am. Fin., Inc. v. Potter, 667 F. Supp. 2d. 49, 60 (D.D.C. 2009) (ordering release of names of USPS employees and agents where individuals identified could provide information in a related civil suit) (Exemption 7(C)).

order.¹⁵² The Court of Appeals for the District of Columbia Circuit has found that there is a public interest, however, "in knowing whether the FBI is withholding information that could corroborate a death-row inmate's claim of innocence."¹⁵³ Specifically, the D.C. Circuit ruled that there is a "substantial" public interest "where the FOIA requester has [shown] that a reasonable person could believe that the FBI might be withholding information that could corroborate a death-row inmates' claim of innocence."¹⁵⁴

Assigning a Weight to the FOIA Public Interest

If an asserted public interest is found to qualify under this standard, it then must be accorded some measure of value so that it can be weighed against the threat to privacy.¹⁵⁵ In evaluating the weightiness of a FOIA public interest in disclosure, the Court of Appeals for the District of Columbia Circuit has found that "[w]hile [this] certainly not a *per se* defense to a FOIA request," it is appropriate, when assessing the public interest side of the balancing equation, to consider "the extent to which there are alternative sources of information available that could serve the public interest in disclosure."¹⁵⁶ Significantly, although a FOIA public interest typically weighs in favor of

¹⁵² Gilbey v. Dep't of the Interior, No. 89-0801, 1990 WL 174889, at *2 (D.D.C. Oct. 22, 1990); see also Bongiorno v. Reno, No. 95-72143, 1996 WL 426451, at *4 (E.D. Mich. Mar. 19, 1996) (observing that the proper place for a noncustodial parent to seek information about his child is the "state court that has jurisdiction over the parties, not a FOIA request or the federal court system"); cf. Favish, 541 U.S. at 174 ("There is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination.").

¹⁵³ Roth v. DOJ, 642 F.3d 1161, 1180 (D.C. Cir. 2011) (finding FOIA public interest militating in favor of fuller disclosure where death-row inmate has surmounted fairly substantial hurdle of showing that a reasonable person could believe that the agency might be withholding information that could corroborate his claim that four other men actually committed the quadruple homicide for which he was convicted) (Exemption 7(C)).

¹⁵⁴ Id. at 1176, 1184.

¹⁵⁵ See, e.g., Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); Fund for Constitutional Gov't v. NARA, 656 F.2d 856, 862 (D.C. Cir. 1981).

¹⁵⁶ DOD v. FLRA, 964 F.2d 26, 29-30 (D.C. Cir. 1992); see NARA v. Favish, 541 U.S. 157, 175 (2004) (recognizing that the government had thoroughly investigated the suicide at issue and that "[i]t would be quite extraordinary to say we must ignore the fact that five different inquiries into the . . . matter reached the same conclusion"); Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1028 (9th Cir. 2008) ("As a result of the substantial information already in the public domain, we must conclude that the release of the identities of the employees who participated in the Forest Service's response to the Cramer Fire would not appreciably further the public's important interest in monitoring the agency's performance during that tragic event."); Forest Guardians v. FEMA, 410 F.3d 1214, 1219 & n.3 (10th Cir. 2005) (finding no public interest in a request to FEMA for "electronic

disclosure, several courts including the D.C. Circuit have implicitly recognized that there can be a public interest in the nondisclosure of personal privacy information – particularly, the public interest in avoiding the impairment of ongoing and future law enforcement investigations.¹⁵⁷

Nexus Between the Requested Information and the Public Interest

map files" showing the locations of federally insured structures, because the electronic files were "merely cumulative of the information" that FEMA already had released in "hard copies" of the maps and because the requester already had a "plethora of information" with which "to evaluate FEMA's activities"); Office of the Capital Collateral Counsel v. DOJ, 331 F.3d 799, 804 (11th Cir. 2003) (finding that there is substantial public information available about AUSA's misconduct and that therefore any "public interest in knowing how DOJ responded to [AUSA's] misconduct can be satisfied by this other public information"); Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of the Air Force, 26 F.3d 1479, 1485 (9th Cir. 1994) (union may "pass out fliers" or "post signs or advertisements soliciting information from workers about possible violations of the Davis-Bacon Act"); FLRA v. U.S. Dep't of Commerce, 962 F.2d 1055, 1060 n.2 (D.C. Cir. 1992) (union may "distribute questionnaires or conduct confidential face-to-face interviews" to obtain rating information about employees); Painting & Drywall Work Pres. Fund, Inc. v. HUD, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (contact at workplace is alternative to disclosing home addresses of employees); Multnomah Cnty. Med. Soc'y v. Scott, 825 F.2d 1410, 1416 (9th Cir. 1987) (medical society can have members send literature to their patients as alternative to disclosure of identities of all Medicare beneficiaries); cf. Cowdery, Ecker & Murphy, LLC v. Dep't of the Interior, 511 F. Supp. 2d 215, 219 (D. Conn. 2007) (stating that "it is not clear from the Department's arguments that other means could adequately provide such information and such an assessment," and so concluding that "this factor weighs in favor of disclosure").

¹⁵⁷ See, e.g., Perlman v. DOJ, 312 F.3d 100, 106 (2d Cir. 2002) ("The strong public interest in encouraging witnesses to participate in future government investigations offsets the weak public interest in learning witness and third party identities.") (Exemptions 6 and 7(C)), cert. granted, vacated & remanded, 541 U.S. 970 (2004), reinstated after remand, 380 F.3d 110 (2d Cir. 2004) (per curiam); Strout v. U.S. Parole Comm'n, 40 F.3d 136, 139 (6th Cir. 1994) ("[T]here would appear to be a public policy interest against such disclosure, as the fear of disclosure to a convicted criminal could have a chilling effect on persons, particularly victims, who would otherwise provide the Commission with information relevant to a parole decision."); Fund for Constitutional Gov't, 656 F.2d at 865-66 (recognizing that "public interest properly factors into both sides of the balance," and finding that agency properly withheld the identities of government officials investigated but not charged with any crime in "Watergate" investigation) (Exemption 7(C)); Amuso v. DOJ, 600 F. Supp. 2d 78, 97 (D.D.C. 2009) (stating that "[i]ndividuals involved in law enforcement investigations" and suspects have a "substantial interest" in the nondisclosure of their identities and connection to a particular investigation"). But see Advocates for Highway & Auto Safety v. Fed. Highway Admin., 818 F. Supp. 2d 122, 131 (D.D.C. 2011) ("The belief that disclosure might impair the government's ability to acquire similar information in the future carries no weight under FOIA Exemption 6, which focuses on individual privacy interests.").

The Supreme Court has held that there must be a "nexus between the requested information and the asserted public interest that would be advanced by disclosure."¹⁵⁸ That is to say, release of the actual personal information at issue must further the public's understanding of the activity that is the basis for the asserted FOIA public interest in disclosure.¹⁵⁹ Courts have found that it is not enough that the information

¹⁵⁸ NARA v. Favish, 541 U.S. 157, 172-73 (2004); see also Associated Press v. DOD, 554 F.3d 274, 293 (2d Cir. 2009) ("We conclude that the public interest in evaluating whether DOD properly followed-up on the detainees' claims of mistaken identity have been adequately served by the disclosure of the redacted information and that disclosing names and addresses of the family members would constitute a clearly unwarranted invasion of the family members' privacy interest because such disclosure would not shed any light on DOD's action in connection with the detainees' claims at issue here."); Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1083 (6th Cir. 1998) (finding that information about individual taxpayers does not serve any possible public interest in "how the IRS exercises its power over the collection of taxes"); Grandison v. DOJ, 600 F. Supp. 2d 109, 117 (D.D.C. 2009) ("Release of the names of law enforcement personnel, witnesses, experts, targets of investigation, court reporters and other court personnel, sheds no light on the working of the government."); Anderson v. DOJ, 518 F. Supp. 2d 1, 14 (D.D.C. 2007) (protecting retired DEA Special Agent's home address because release of the address "in no way would further FOIA's basic purpose"); Sutton v. IRS, No. 05-7177, 2007 WL 30547, at *6 (N.D. Ill. Jan. 4, 2007) (protecting personal information of third party taxpayers and IRS personnel because "none of their personal information will give Plaintiff a greater understanding of how the agency is performing its duties"); Forest Guardians v. U.S. Dep't of the Interior, No. 02-1003, 2004 WL 3426434, at *17 (D.N.M. Feb. 28, 2004) (finding public interest served by release of financial value of loans and names of financial institutions that issued loans, but "protecting any arguably private personal financial or other information concerning individual [Bureau of Land Management] grazing permittees"); Hecht v. U.S. Agency for Int'l Dev., No. 95-263, 1996 WL 33502232, at *12 (D. Del. Dec. 18, 1996) (determining that the public interest is served by release of redacted contractor's employee data sheets without the names, addresses, and other identifying information of employees); Stabasefski v. United States, 919 F. Supp. 1570, 1575 (M.D. Ga. 1996) (finding that public interest is served by release of redacted vouchers showing amounts of Hurricane Andrew subsistence payment to FAA employees; disclosure of names of employees would shed no additional light on agency activities).

¹⁵⁹ See Favish, 541 U.S. at 172 (declaring that requesters "must show the information is likely to advance [a specific, significant public] interest"). Compare Cameranesi v. DOD, 856 F.3d 626, 644-45 (9th Cir. 2017) (noting that "the relationship between WHINSEC's obligation to provide human rights training to WHINSEC students and the subsequent conduct of foreign law enforcement or military personnel, perhaps years after their training at WHINSEC, is tenuous at best[]" and that "[b]ecause any incremental value stemming from the disclosure of the identities of WHINSEC students and instructors is small, the public interest in this case does not outweigh the serious risks that would result from disclosure"), and Havemann v. Colvin, 629 F. App'x 537, 540 (4th Cir. 2015) (finding privacy interest outweighed FOIA public interest as "it is undisputed that [plaintiff] would be unable to make any eligibility determinations for benefits based solely on [requested personal] data [concerning social security beneficiaries], because such . . . determinations require examination of many

would permit speculative inferences about the conduct of an agency or a government official,¹⁶⁰ or that it might aid the requester in lobbying efforts that would result in passage of laws and thus benefit the public in that respect.¹⁶¹ As stated by the Court of Appeals for the Second Circuit in Hopkins v. HUD, "[t]he simple invocation of a legitimate public interest . . . cannot itself justify the release of personal information."¹⁶² The Second Circuit held that instead, "a court must first ascertain whether that interest would be served by disclosure."¹⁶³ For example, in NARA v. Favish the Supreme Court

different and complicated variables including work issues, prior filings, and auxiliary benefits"), with Avondale Indus. v. NLRB, 90 F.3d 955, 961-62 (5th Cir. 1996) (declaring that disclosure of marked unredacted voting lists in union representation election would give plaintiff information it needs to determine whether NLRB conducted election tainted with fraud and corruption), Mattachine Soc'y of Wash., D.C. v. DOJ, 267 F. Supp. 3d 218, 228 (D.D.C. 2017) (determining that third party names were properly withheld, but finding significant public interest in extent to which government "surveilled, harassed, and/or terminated" "lesbian, gay, bisexual, and transgender federal employees" under E.O. No. 10,450, and ordering agency to replace third party names in responsive records with "alphanumeric markers, which are to be uniquely identifiable and consistent throughout all documents produced" in order to protect privacy while vindicating public interest) (Exemptions 6 and 7(C)); and Int'l Diatomite Producers Ass'n v. SSA, No. 92-1634, 1993 WL 137286, at *5 (N.D. Cal. Apr. 28, 1993) (finding that release of vital status information concerning diatomite industry workers serves "public interest in evaluating whether public agencies . . . carry out their statutory duties to protect the public from the potential health hazards from crystalline silica exposure").

¹⁶⁰ See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 766 n.18 (1989); see also Cozen O'Connor v. Dep't of the Treasury, 570 F. Supp. 2d 749, 781 (E.D. Pa. 2008) (stating that "[d]uring information gathering and compilation, government agencies may coincidentally receive personal and private information that has no bearing on their decision-making or operations[,] and "[i]n those instances, the relationship of the information to the individual is not pertinent to the government's workings").

¹⁶¹ See Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989) [hereinafter NARFE].

¹⁶² 929 F.2d 81, 88 (2d Cir. 1991) (citing Halloran v. VA, 874 F.2d 315, 323 (5th Cir. 1989) (observing that "merely stating that the interest exists in the abstract is not enough; rather, the court should have analyzed how that interest would be served by compelling disclosure").

¹⁶³ Id.; see also Favish, 541 U.S. at 172-73 (highlighting "the nexus required between the requested documents and the purported public interest served by disclosure"); Cook v. NARA, 758 F.3d 168, 178 (2d Cir. 2014) (protecting specific subjects of Presidential Records Act (PRA) requests by former President and Vice President because records would shed little light on activities of NARA, which has no role in policing types of records requested by former officials under PRA); World Publ'g Co. v. DOJ, 672 F.3d 825, 831 (10th Cir. 2012) ("Based upon the purpose of the FOIA, there is little to suggest that disclosure of booking photos would inform citizens of a government agency's adequate performance of its function" or "would significantly assist the public in detecting or deterring any underlying

recognized that surviving family members had a privacy interest in their close relative's death scene images, and also found there could be a FOIA public interest "in uncovering deficiencies or misfeasance in the Government's investigation" of an apparent suicide that occurred under mysterious circumstances.¹⁶⁴ However, the Supreme Court found that the asserted FOIA public interest would not be served by release of the death scene images because the requester failed to "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."¹⁶⁵ Without such a showing, the requester could not establish the requisite nexus, that disclosure of the images at issue would shed light on whether the government's investigation was deficient.¹⁶⁶

Similarly, the Supreme Court in DOJ v. Reporters Comm. for Freedom of the Press held that the subject of a criminal history or "rap sheet" possessed a substantial privacy interest in its contents, and that disclosure of this information would not contribute to the public's understanding of the operations or activities of the government.¹⁶⁷ Specifically, the requesters in Reporters Comm. argued that information contained in a defense contractor's rap sheet, if it existed, needed to be disclosed to the public because (1) the contractor "allegedly had improper dealings with a corrupt Congressman," and (2) the contractor was "an officer of a corporation with defense contracts."¹⁶⁸ The Supreme

government misconduct.") (Exemption 7(C)); Karantsalis v. DOJ, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam) (finding disclosure of booking photographs might satisfy "voyeuristic curiosities," but "would not serve the public interest" as "the facial expression of a prisoner in a booking photograph is [not] a sufficient proxy to evaluate whether a prisoner is receiving preferential treatment") (Exemption 7(C)); Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1056 (D.C. Cir. 2009) (concluding, after carefully scrutinizing various public interests asserted by plaintiff, that "the requested data does not serve any FOIA-related public interest in disclosure"); Vento v. IRS, No. 08-159, 2010 WL 1375279, at *8 (D.V.I. Mar. 31, 2010) ("While Plaintiffs argue they seek this information merely to know what the government is 'up to,' such an argument is plainly disingenuous given the ongoing enforcement proceedings against Plaintiffs.") (Exemption 7(C)); Berger v. IRS, 487 F. Supp. 2d 482, 505 (D.N.J. 2007) (finding that disclosure of an IRS agent's time sheets would do little to serve plaintiff's asserted public interest that the records would shed light on the operations of the IRS in conducting investigations of taxpayers); Associated Press v. DOD, 462 F. Supp. 2d 573, 577-78 (S.D.N.Y. 2006) (finding a strong public interest in information pertaining to the height and weight of Guantanamo Bay detainees, as it would allow the public to assess "not only DOD's conduct with respect to the hunger strikes at Guantanamo, but more generally DOD's care and (literally) feeding of the detainees").

¹⁶⁴ 541 U.S. at 173.

¹⁶⁵ Id. at 174.

¹⁶⁶ Id.

¹⁶⁷ 489 U.S. at 774.

¹⁶⁸ Id.

Court rejected this two-fold public interest claim, commenting that "the rap sheet would [conceivably] provide details to include in a news story, but, in itself . . . [was] not the kind of public interest for which Congress enacted the FOIA."¹⁶⁹ It premised this conclusion on the fact that the defense contractor's rap sheet would reveal nothing directly about the behavior of the Congressman with whom the contractor allegedly had an improper relationship, nor would it reveal anything about the conduct of the DOD in awarding contracts to the contractor's company.¹⁷⁰

Furthermore, in U.S. Dep't of State v. Ray,¹⁷¹ the Supreme Court recognized that although there was a legitimate public interest in whether the State Department was adequately monitoring the Haitian Government's promise not to prosecute Haitians who were returned to their country after failed attempts to enter the United States, the Court determined that this public interest had been "adequately served" by release of redacted summaries of the agency's interviews with the returnees.¹⁷² The court held that

¹⁶⁹ Id.

¹⁷⁰ Id.; see, e.g., Long v. OPM, 692 F.3d 185, 194 (2d Cir. 2012) (noting that "an employee's name may be useful for investigating the behavior of individual employees; but courts have been skeptical of recognizing a public interest in this 'derivative' use of information, which is indirect and speculative"); Associated Press, 554 F.3d at 288 ("This Court has similarly said that 'disclosure of information affecting privacy interests is permissible only if the information reveals something directly about the character of a government agency or official.'" (quoting Hopkins, 929 F.2d at 88)); NARFE, 879 F.2d at 879 (finding that names and home addresses of federal annuitants reveal nothing directly about workings of government); 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 . . .") (Exemption 7(C)); Kimberlin v. Dep't of the Treasury, 774 F.2d 204, 208 (7th Cir. 1985) ("The record fails to reflect any benefit which would accrue to the public from disclosure and [the requester's] self-serving assertions of government wrongdoing and coverup do not rise to the level of justifying disclosure.") (Exemption 7(C)); Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984) (finding that certain specified public interests "would not be satiated in any way" by disclosure) (Exemption 7(C)); Barnard v. DHS, 598 F. Supp. 2d 1, 9 (D.D.C. 2009) ("Where, as here, the nexus between the information sought and the asserted public interest is lacking, the asserted public interests will not outweigh legitimate privacy interests."); Seized Prop. Recovery, Corp. v. U.S. Customs & Border Prot., 502 F. Supp. 2d 50, 59 (D.D.C. 2007) (stating that there must be a nexus between the information sought under FOIA and the public's ability to learn about the agency's operations) (Exemptions 6 and 7(C)). But see Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 895 (D.C. Cir. 1995) (finding that agency's response to presidential candidate H. Ross Perot's offer to assist in drug interdiction would serve public interest in knowing about agency's plans to privatize government functions).

¹⁷¹ 502 U.S. 164 (1991).

¹⁷² Id. at 174.

"[t]he addition of the redacted identifying information would not shed any additional light on the Government's conduct of its obligation."¹⁷³ Although the plaintiff claimed that disclosure of the identities of the unsuccessful emigrants would allow him to re-interview them and elicit further information concerning their treatment, the Court found "nothing in the record to suggest that a second set of interviews with the already-interviewed returnees would produce any relevant information . . . Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy."¹⁷⁴

¹⁷³ *Id.* at 178; see also *Prudential Locations LLC v. HUD*, 739 F.3d 424, 433 (9th Cir. 2013) ("Revealing the identity of a private individual [who wrote an email alleging illegal conduct by a business] does not further the public interest unless it casts light on the conduct of the government."); *Associated Press*, 554 F.3d at 293 (concluding that "the public interest in evaluating whether DOD properly followed-up on the detainees' claims of mistaken identity have been adequately served by the disclosure of the redacted information and that disclosing names and addresses of the family members would constitute a clearly unwarranted invasion of the family members' privacy interest because such disclosure would not shed any light on DOD's action in connection with the detainees' claims at issue here"); *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 822 F. Supp. 2d 12, 22 (D.D.C. 2011) (holding any public interest "in knowing the extent to which the BOP and Criminal Division 'sought to prevent [convicted lobbyist] from speaking with members of the media'" had "been satisfied by the documents and portions of the documents already released") (quoting plaintiff's motion at 15); *Seized Prop. Recovery, Corp.* 502 F. Supp. 2d at 60 (noting that "any documents containing information about Custom's performance or behavior would advance [the public interest of informing the citizenry of how Customs operates] regardless of whether they contained the names and addresses of individuals whose property was subject to forfeiture") (Exemptions 6 and 7(C)). *But see Rosenfeld v. DOJ*, 57 F.3d 803, 811-12 (9th Cir. 1995) (concluding that disclosure of names of investigative subjects would serve public interest in knowing whether FBI "overzealously" investigated political protest group by allowing comparison of investigative subjects to group's leadership roster) (Exemption 7(C)).

¹⁷⁴ *Ray*, 502 U.S. at 178-79; see also *Prison Legal News v. EOUSA*, 628 F.3d 1243, 1250 (10th Cir. 2011) (holding public interest in disclosure of video and audio files depicting death scene outweighed by survivors' privacy interests, because "[w]hile the BOP's protection of prisoners and the government's discretionary use of taxpayer money may be matters of public interest, there is nothing to suggest the records would add anything new to the public understanding") (Exemption 7(C)); *Forest Serv. Emps. For Envtl Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027-28 (9th Cir. 2008)(finding that plaintiff, who admitted that "the identities of the employees alone will shed no new light on the Forest Service's performance of its duties beyond that which is already publicly known[,] did not persuade the court that "direct contact with the employees would produce any information that has not already been revealed to the public through the four investigations that have already occurred and the three reports that have been publicly released"); *Navigator Publ'g v. DOT*, 146 F. Supp. 2d 68, 71 (D. Me. 2001) (concluding that release of addresses of merchant mariners licensed by United States would serve only "hypothetical 'derivative use'" that is far outweighed by "demonstrably significant invasion of privacy").

Courts have found no FOIA public interest for records concerning state or foreign governments¹⁷⁵ or individuals.¹⁷⁶ As the Supreme Court has declared, such information

¹⁷⁵ See Landano v. DOJ, 956 F.2d 422, 430 (3d Cir. 1992) (stating that there is "no FOIA-recognized public interest in discovering wrongdoing by a state agency") (Exemption 7(C)), rev'd & remanded on other grounds, 508 U.S. 165 (1993); Phillips v. ICE, 385 F. Supp. 2d 296, 305 (S.D.N.Y. 2005) (observing that, although privacy interests of government officials may be lessened by countervailing public interest, that idea "would appear to be inapplicable to former foreign government officials"); McMillian v. BOP, No. 03-1210, 2004 WL 4953170, at *7 n.11 (D.D.C. July 23, 2004) (ruling that the plaintiff's argument that an audiotape would show the misconduct of the District of Columbia Board of Parole was irrelevant because "the FOIA is designed to support the public interest in how agencies of the federal government conduct business"); Garcia v. DOJ, 181 F. Supp. 2d 356, 374 (S.D.N.Y. 2002) (recognizing that the "discovery of wrongdoing at a state as opposed to a federal agency . . . is not a goal of FOIA") (Exemption 7(C)); see also FOIA Update, Vol. XII, No. 2, at 6 ("FOIA Counselor: Questions & Answers") (advising that "government" should mean federal government); cf. Lissner v. U.S. Customs Serv., 241 F.3d 1220, 1223 & n.2 (9th Cir. 2001) (finding a public interest in the agency's treatment of city police officers arrested for smuggling steroids, but declining to "address the issue of whether opening up state and local governments to scrutiny also raises a cognizable public interest under the FOIA") (Exemption 7(C)).

¹⁷⁶ Reporters Comm., 489 U.S. at 773; see Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 355-56 (1997) (finding that there is no FOIA public interest in "knowing with whom the government has chosen to communicate"); DOD v. FLRA, 510 U.S. 487, 497 (1994) ("Disclosure of the addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further 'the citizens' right to be informed about what their government is up to." (quoting Reporters Comm., 489 U.S. at 773)); see also, e.g., Zaldivar v. VA, 695 F. App'x 319, 320 (9th Cir. 2017) (upholding district court's Exemption 6 analysis where district court previously held plaintiff did not identify any public interest in disclosure of third party's contact information and social security number); Consumers' Checkbook, 554 F.3d at 1051 ("[I]nformation about private citizens . . . that reveals little or nothing about an agency's own conduct' does not serve a relevant public interest under FOIA." (quoting Reporters Comm., 489 U.S. at 773)); Kishore v. DOJ, 575 F. Supp. 2d 243, 257 (D.D.C. 2008) ("Information about individuals that does not directly reveal the operations or activities of the government – which is the focus of FOIA – 'falls outside the ambit of the public interest that the FOIA was enacted to serve' and may be protected under Exemption 7(C)." (quoting Reporters Comm., 489 U.S. at 775)); Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. DOJ, 503 F. Supp. 2d 373, 382 (D.D.C. 2007) ("When the material in the government's control is a compilation of information about private citizens, rather than a record of government actions, there is little legitimate public interest that would outweigh the invasion of privacy because the information reveals little or nothing about an agency's own conduct."); Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 951 (S.D. Iowa 2002) (declaring that while a presidential nominee's "fitness for public office may be of great popular concern to the public," such concern "does not translate into a real public interest that is cognizable . . . [under] the FOIA"); Andrews v. DOJ, 769 F. Supp. 314, 316-17 (E.D. Mo. 1991) (finding that although release of an individual's address, telephone number, and place of employment might serve a general public interest in the

"falls outside the ambit of the public interest that the FOIA was enacted to serve," as it does not directly reveal the operations or activities of the federal government.¹⁷⁷

Derivative Use of the Information

The Supreme Court expressly declined in United States Department of State v. Ray to decide whether a public interest that stems not from the documents themselves but rather from a "derivative use" to which the documents could be put could ever be weighed in the balancing process against a privacy interest.¹⁷⁸ Subsequently, however, the Court of Appeals for the District of Columbia Circuit and several other courts have addressed the "derivative use" issue and ordered the release of personal information despite the fact that the public benefit to be derived from release depended upon the requesters' use of the information to further investigate how the government performs its duties.¹⁷⁹ In ACLU v. DOJ, the D.C. Circuit found that release of certain court docket information could be used to show the "kinds of crimes the government uses cell phone tracking data to investigate" and "how often prosecutions against people who have been tracked are successful."¹⁸⁰ The court found that derivative information from suppression hearings in these cases could show "the efficacy of the technique," the "standards the government uses to justify warrantless tracking," and "the duration of tracking and the quality of tracking data," thus informing "the public discussion concerning the intrusiveness of this

satisfaction of monetary judgments, "it does not implicate a public interest cognizable under the FOIA"); FOIA Update, Vol. XVIII, No. 1, at 1; ("Supreme Court Rules in Mailing List Case"); FOIA Update, Vol. X, No. 2, at 4, 6 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision").

¹⁷⁷ Reporters Comm., 489 U.S. at 775.

¹⁷⁸ 502 U.S. 164, 178-79 (1991); see Associated Press v. DOD, 554 F.3d 274, 290 (2d Cir. 2009) (explaining that the "derivative use" theory "posits that the public interest can be read more broadly to include the ability to use redacted information to obtain additional as yet undiscovered information outside the government files").

¹⁷⁹ See, e.g., ACLU v. DOJ, 655 F.3d 1, 13 (D.C. Cir. 2011); Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 639 F.3d 876, 887-88 (9th Cir. 2010); Rosenfeld v. DOJ, 57 F.3d 803, 811-12 (9th Cir. 1995); W. Watersheds Project & Wildearth Guardians v. Bureau of Land Mgmt., No. 09-482, 2010 WL 3735710, at *12 (D. Idaho Sept. 13, 2010); Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1269-73 (S.D. Fla. 2006), *aff'd sub nom. News-Press v. DHS*, 489 F.3d 1173 (11th Cir. 2007); Lardner v. DOJ, No. 03-0180, 2005 WL 758267, at *17 (D.D.C. Mar. 31, 2005); Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 729-30 (D. Md. 2001) (Exemption 7(C)); Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1093 (D. Or. 1998) (Exemption 7(C)); Cardona v. INS, No. 93-3912, 1995 WL 68747, at *3 (N.D. Ill. Feb. 16, 1995); Ray v. DOJ, 852 F. Supp. 1558, 1564-65 (S.D. Fla. 1994).

¹⁸⁰ 655 F.3d at 13-14 (considering derivative use of docket information, such as case name, case number and court) (Exemption 7(C)).

investigative tool."¹⁸¹ The court reasoned that this was a relevant consideration, and if a court "consider[s] derivative use for evaluating privacy concerns, [then it] must do the same for the public interest."¹⁸² Other courts have found a "derivative use" public interest in the following contexts:

- (1) a list of individuals who sold land to the Fish and Wildlife Service, which could be used to contact the individuals to determine how the agency acquires property throughout the United States;¹⁸³
- (2) a list of Haitian nationals returned to Haiti, which could be used for follow-up interviews with the Haitians to learn "whether the INS is fulfilling its duties not to turn away Haitians who may have valid claims for political asylum;"¹⁸⁴
- (3) a list of citizens who reported wolf sightings, which could be used to monitor the Fish and Wildlife Service's enforcement of the Endangered Species Act;¹⁸⁵
- (4) the names of agents involved in the management and supervision of the FBI's 1972 investigation of John Lennon, which could be used to help determine whether the investigation was politically motivated;¹⁸⁶
- (5) the name and address of an individual who wrote a letter complaining about an immigration assistance company, which could be used to determine whether the INS acted upon the complaint;¹⁸⁷

¹⁸¹ Id.

¹⁸² Id. at 16 ("[D]erivative use on the public-benefits side, and derivative use on the personal-privacy side must surely go together." (citing Ray, 502 U.S. at 181 (Scalia, J., concurring in part))).

¹⁸³ Thott v. U.S. Dep't of the Interior, No. 93-0177-B, slip op. at 5-6 (D. Me. Apr. 14, 1994).

¹⁸⁴ Ray, 852 F. Supp. at 1564-65 (distinguishing Supreme Court's decision in Ray, 502 U.S. 164, on the basis that "in the instant case . . . the public interest is not adequately served by release of the redacted logs [and] this Court cannot say that interviewing the returnees would not produce any information concerning our government's conduct during the interdiction process").

¹⁸⁵ Urbigkit v. U.S. Dep't of the Interior, No. 93-0232-J, slip op. at 13 (D. Wyo. May 31, 1994).

¹⁸⁶ Weiner v. FBI, No. 83-1720, slip op. at 5-7 (C.D. Cal. Dec. 6, 1995) (Exemptions 6 and 7(C)).

¹⁸⁷ Cardona v. INS, No. 93-3912, 1995 WL 68747, at *3 (N.D. Ill. Feb. 16, 1995).

- (6) the addresses of claimants awarded disaster assistance by FEMA based upon claims of damages from various hurricanes in Florida in 2004, which could be used to uncover further information pertaining to allegations of fraud and wasteful spending in the distribution of disaster assistance by FEMA;¹⁸⁸
- (7) the names of unsuccessful pardon applicants, which would assist the public in analyzing the "circumstances in which the executive chooses to grant or deny a pardon and the factors that bear on that decision;"¹⁸⁹
- (8) the "names and addresses [of purchasers of seized property, which] would enable the public to assess law enforcement agencies' exercise of the substantial power to seize property, as well as USMS's performance of its duties regarding disposal of forfeited property;"¹⁹⁰
- (9) the "names and addresses of individuals as well as the addresses of the closely held entities and family owned businesses" which would "allow the public to better understand the scope of the [Department of the Interior, Bureau of Land Management's] grazing program;"¹⁹¹
- (10) the identities of individuals investigated by the FBI, which "would make it possible to compare the FBI's investigation [subjects] to a roster of the [Free Speech Movement]'s leadership" to determine "to what extent the FBI investigated individuals for participating in political protests, not federal criminal activity" (Exemption 7(C));¹⁹²
- (11) the identities of "well-connected corporate lobbyists," which would enable the public to "determine how the Executive Branch used advice from particular individuals and corporations in reaching its own policy decisions."¹⁹³

¹⁸⁸ Sun-Sentinel Co., 431 F. Supp. 2d at 1269-73.

¹⁸⁹ Lardner, 2005 WL 758267, at *17.

¹⁹⁰ Baltimore Sun, 131 F. Supp. 2d at 729-30.

¹⁹¹ W. Watersheds Project & Wildearth Guardians, 2010 WL 3735710, at *4; see also Or. Natural Desert Ass'n, 24 F. Supp. 2d at 1093 (finding that public interest in knowing how agency is enforcing land-management laws is served by release of names of cattle owners who violated federal grazing laws) (Exemption 7(C)).

¹⁹² Rosenfeld, 57 F.3d at 812.

¹⁹³ Elec. Frontier Found., 639 F.3d at 887-88; cf. Prudential Locations LLC v. HUD, 739 F.3d 424, 433 (9th Cir. 2013) (distinguishing the lobbyists in Elec. Frontier Found. from email authors who "did not seek to influence legislation or to change any substantive

The Court of Appeals for the Second Circuit expressed skepticism as to whether a "derivative use" can support a public interest under the FOIA. In Associated Press v. DOD, the Second Circuit stated that "[a]lthough this Court has not addressed the issue of whether a 'derivative use' theory is cognizable under FOIA as a valid way by which to assert that a public interest is furthered, we have indicated that it may not be."¹⁹⁴ The Court of Appeals for the Ninth Circuit has at times expressed similar concerns.¹⁹⁵

Public Servant Accountability

Public oversight of government operations is the essence of public interest under the FOIA, one of the purposes of which is to "check against corruption and to hold the governors accountable to the governed."¹⁹⁶ Accordingly, disclosure of information that

policy," but rather "alleged violations of an existing federal statute in communications to the federal agency charged with enforcing that statute").

¹⁹⁴ 554 F.3d 274, 290 (2d Cir. 2009); see Kuzma v. DOJ, 692 F. App'x 30, 35 (2d Cir. 2017) ("[t]o the extent [plaintiff] means that learning the identities will provide further avenues for research, we have observed that 'courts have been skeptical of recognizing a public interest in this derivative use of information'" (quoting Long v. OPM, 692 F.3d 185, 194 (2d Cir. 2012))) (Exemptions 6 and 7(C)); Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991) ("[W]e find that disclosure of information affecting privacy interests is permissible only if the information reveals something directly about the character of a government agency or official."); Seife v. Dep't of State, 298 F. Supp. 3d 592, 626 (S.D.N.Y. 2018) (rejecting plaintiff's argument that public interest would be satisfied by release of names of certain agency officials because plaintiff would need to contact those officials to obtain further information to satisfy that interest, and Second Circuit has rejected derivative public interests as grounds for FOIA disclosure).

¹⁹⁵ Lahr v. NTSB, 569 F.3d 964, 979 (9th Cir. 2009) ("The only way that the identities of the eyewitnesses and FBI agents mentioned in the documents already released would have public value is if these individuals were contacted directly by the plaintiff or by the media [S]uch use is insufficient to override the witnesses' and agents' privacy interests, as the disclosure would bring about additional useful information only if direct contacts, furthering the privacy intrusion, are made." (Exemption 7(C))); Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1027-28 (9th Cir. 2008) (finding that "[w]e have previously expressed skepticism at the notion that such derivative use of information can justify disclosure under Exemption 6," and concluding that the plaintiff's theory that "the only way the release of the identities of the Forest Service employees can benefit the public is if the public uses such information to contact the employees directly" is an unjustified reason to release their identities). But see Elec. Frontier Found., 639 F.3d at 887-88 (recognizing derivative use).

¹⁹⁶ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); see also ACLU v. DOD, 543 F.3d 59, 66 (2d Cir. 2008) (Exemptions 6 and 7(C)), cert. granted, vacated & remanded on other grounds, 130 S. Ct. 777 (2009); Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1232 (D.C. Cir. 2008); News-Press v. DHS, 489 F.3d 1173, 1190 (11th Cir. 2007); Arieff v. U.S.

informs the public of violations of the public trust has been found to serve a strong public interest and is accorded great weight in the balancing process.¹⁹⁷ The Court of Appeals for the District of Columbia Circuit's decision in Stern v. FBI¹⁹⁸ provides guidance for evaluating whether the public's interest in public servant accountability, a distinct category of FOIA public interest, supports disclosure of the identities of federal employees. Although the Stern decision was decided prior to the Supreme Court's decision in DOJ v. Reporters Comm. for Freedom of the Press,¹⁹⁹ the D.C. Circuit subsequently reaffirmed the legitimacy of a FOIA public interest rooted in public servant accountability in Dunkelberger v. DOJ,²⁰⁰ in which it held that even post-Reporters Committee, the D.C. Circuit's Stern decision provides guidance for the balancing of the privacy interests of federal employees found to have committed wrongdoing against the public interest in shedding light on agency activities.²⁰¹

Dep't of the Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983); Wash. Post Co. v. HHS, 690 F.2d 252, 264 (D.C. Cir. 1982).

¹⁹⁷ See Bartko v. DOJ, 898 F.3d 51 (D.C. Cir. 2018) (finding categorical denial of access to disciplinary records inappropriate following public referral of supervisory AUSA to OPR, and, "[o]n the other side of the scale, the public interest in knowing what OPR did weighs heavily[;] FOIA, at its core, operates on the assumption that 'it is for the public to know and then to judge[;]' . . . [t]he public has an interest in knowing 'that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner' . . . [t]hat is how FOIA helps 'to hold the governors accountable to the governed'" (quoting Stern v. FBI, 737 F.2d 84, 92-4 (D.C. Cir. 1984)) (Exemption 7(C)); Cochran v. United States, 770 F.2d 949, 956 (11th Cir. 1985) ("[T]he balance struck under FOIA exemption six overwhelming favors the disclosure of information relating to a violation of the public trust by a government official . . ."); Engberg v. DOJ, No. 10-01775, 2011 WL 4502079, at *7 (M.D. Fla. Aug. 12, 2011) ("When a government official's actions constitute a violation of the public trust, courts favor disclosure."), report and recommendation adopted, No. 10-1775, 2011 WL 4501388 (M.D. Fla. Sept. 27, 2011).

¹⁹⁸ 737 F.2d 84 (D.C. Cir. 1984).

¹⁹⁹ 489 U.S. 749 (1989).

²⁰⁰ 906 F.2d 779, 782 (D.C. Cir. 1990) (upholding FBI's refusal to confirm or deny existence of letters of reprimand or suspension for alleged misconduct by undercover agent) (Exemption 7(C)).

²⁰¹ Id. at 781; see also Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (protecting information about investigation of staff-level attorney for allegations of unauthorized disclosure of information to media) (Exemption 7(C)); Beck v. DOJ, 997 F.2d 1489, 1494 (D.C. Cir. 1993) (upholding agency's refusal to either confirm or deny existence of records concerning alleged wrongdoing of named DEA agents) (Exemptions 6 and 7(C)); Hunt v. FBI, 972 F.2d 286, 288-90 (9th Cir. 1992) (protecting contents of investigative file of nonsupervisory FBI agent accused of unsubstantiated misconduct) (Exemption 7(C)).

In Stern, the court was faced with the question of whether the FBI improperly withheld the identities of three FBI employees identified in letters of censure, which were issued to the employees as the result of an investigation into whether they had engaged in a cover-up of illegal FBI surveillance activities.²⁰² The court found the employees' level of seniority within the FBI and their respective levels of culpability to be particularly relevant in evaluating the extent of the public interest in disclosure.²⁰³ After recognizing that all three employees had privacy interests in information relating to their employment evaluations, and a strong interest in "not being associated unwarrantedly with alleged criminal activity," the court found that the agency properly withheld the identities of two lower-level employees who "were found to have contributed only inadvertently to the wrongdoing under investigation."²⁰⁴

However, with regard to the senior level employee, the court reached the opposite conclusion and held:

[I]t would not be an "unwarranted invasion of personal privacy" to reveal his name, despite the potential association with notorious and serious allegations of criminal wrongdoing. He was a high-level employee who was found to have participated deliberately and knowingly in the withholding of damaging information in an important inquiry – an act that he should have known would lead to a misrepresentation by the FBI. The public has a great interest in being enlightened about that type of malfeasance by this senior FBI official – an action called "intolerable" by the FBI – an interest that is not outweighed by his own interest in personal privacy.²⁰⁵

Applying this analysis, courts have followed a general rule that demonstrated wrongdoing of a serious and intentional nature by high-level government officials is of sufficient public interest to outweigh almost any privacy interest of that official.²⁰⁶ By

²⁰² 737 F.2d at 86.

²⁰³ Id. at 94.

²⁰⁴ Id. at 92, 93.

²⁰⁵ Id. at 94.

²⁰⁶ See, e.g., Am. Immigration Lawyers Ass'n v. EOIR, 830 F.3d 667, 675 (D.C. Cir. 2016) (noting that "disclosing the name of an immigration judge subject to numerous and/or serious substantiated complaints might shed considerable light on matters of public interest, whereas disclosing the name of an immigration judge subject to a single, unsubstantiated complaint might not"); Perlman v. DOJ, 312 F.3d 100, 107 (2d Cir. 2002) (noting subject of request involved INS General Counsel investigated for allegedly granting improper access and preferential treatment to former INS officials with financial interests in various visa investment firms, and finding that government employee's high rank and responsibility for serious allegations tilted the balance strongly in favor of disclosure)

contrast, both serious and less serious misconduct by lower-level agency employees generally have not been considered of sufficient public interest to outweigh the privacy interest of the employee.²⁰⁷ As such, courts customarily have extended protection to the

(Exemptions 6 and 7(C)), cert. granted, vacated & remanded, 541 U.S. 970 (2004), reinstated after remand, 380 F.3d 110 (2d Cir. 2004) (per curiam); Ferri v. Bell, 645 F.2d 1213, 1218 (3d Cir. 1981) (finding attempt to expose alleged deal between prosecutor and witness to be in public interest) (Exemption 7(C)), vacated & reinstated in part on reh'g, 671 F.2d 769 (3d Cir. 1982); Columbia Packing Co. v. USDA, 563 F.2d 495, 499 (1st Cir. 1977) (information about federal employees found guilty of accepting bribes); Cowdery, Ecker & Murphy, LLC v. Dep't of the Interior, 511 F. Supp. 2d 215, 221 (D. Conn. 2007) (performance evaluation information pertaining to high ranking federal employee charged with wrongdoing); Chang v. Dep't of the Navy, 314 F. Supp. 2d 35, 42-45 (D.D.C. 2004) (information about Naval Commander's nonjudicial punishment for involvement in accident at sea) (Privacy Act "wrongful disclosure" suit); Wood v. FBI, 312 F. Supp. 2d 328, 345-51 (D. Conn. 2004) (identifying information linking FBI Supervisory Special Agent's name with specific findings and disciplinary action taken against him), aff'd in part & rev'd in part on other grounds, 432 F.3d 78 (2d Cir. 2005).

²⁰⁷ See, e.g., Dep't of the Air Force v. Rose, 425 U.S. 352, 381 (1976) (protecting names of cadets found to have violated Academy honor code); Janangelo v. Treasury Inspector Gen. for Tax Admin., 726 F. App'x 660, 661 (9th Cir. 2018) (placing "'emphasis on the employee's position in her employer's hierarchical structure'" and "giving greater weight to the privacy interests of 'lower level officials' like [the plaintiff's] former boss" (quoting Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv. 524 F.3d 1021, 1025 (9th Cir. 2008))), cert. denied, No. 18-439, 2018 WL 4853506, at *1 (U.S. Nov. 13, 2018); Forest Serv. Emps. for Envtl. Ethics, 524 F.3d at 1025 ("[W]e have placed emphasis on the employee's position in her employer's hierarchical structure as 'lower level officials . . . generally have a stronger interest in personal privacy than do senior officials.'" (quoting Dobronski v. FCC, 17 F.3d 275, 280 n.4 (9th Cir. 1994))); Trentadue v. Integrity Comm., 501 F.3d 1215, 1234 (10th Cir. 2007) (noting "[t]he public interest in learning of a government employee's misconduct increases as one moves up an agency's hierarchical ladder," and concluding that the agency properly withheld identifying information about employees because "[e]ach of these individuals was a low-level employee who committed serious acts of misconduct" and even though "[t]he public interest in learning how law enforcement agencies dealt with these individuals is very high," the "[d]isclos[ure of] the names of the employees . . . would shed little light on the operation of government"); Beck, 997 F.2d at 1493 ("The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct.") (Exemptions 6 and 7(C)); Chamberlain v. Kurtz, 589 F.2d 827, 842 (5th Cir. 1979) (protecting names of disciplined IRS agents); Sensor Sys. Support, Inc. v. FAA, 851 F. Supp. 2d 321, 334 (D.N.H. 2012) (finding that disclosure of the identity of "a low-level FAA employee" investigated for possible misconduct would "shed little light on the operation of the agency"); Gerstein v. CIA, No. 06-4643, 2011 WL 89337, at *3 (N.D. Cal. Jan. 11, 2011) (holding identity of AUSA properly withheld "[g]iven the level of the employee in question, [and] the lack of intentional misconduct") (Exemption 7(C)); Steese, Evans & Frankel, P.C. v. SEC, No. 10-01071, 2010 U.S. Dist. LEXIS 129401, at *31-32 (D. Colo. Dec. 7, 2010) (holding employee names properly withheld where "the misconduct was not directly related to how the employees performed their official responsibilities, but rather, whether and when they

identities of mid- and low-level federal employees accused of misconduct.²⁰⁸ Furthermore, the D.C. Circuit has held that there is not likely to be strong public interest in disclosure of the names of censured employees when the case has not "occurred against the backdrop of a well-publicized scandal" that has resulted in "widespread knowledge" that certain employees were disciplined.²⁰⁹

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performed them" and the employees' conduct did not reflect on the "'attitude' of the SEC toward fulfillment of its duties and responsibilities"); Coleman v. Lappin, 680 F. Supp. 2d 192, 200 (D.D.C. 2010) ("There exists a public interest in disclosure of information about [an] investigation [of a BOP staff member accused of serious misconduct], but that interest is minimal."); MacLean v. U.S. Dep't of the Army, No. 05-1519, 2007 WL 935604, at *13 (S.D. Cal. Mar. 6, 2007) ("Moreover, 'lower level officials . . . generally have a stronger interest in personal privacy than do senior officials,' . . . the public's interest in misconduct by a lower level official is weaker than its interest in misconduct by a senior official." (quoting Dobronski v. FCC, 17 F.3d 275, 280 n.4 (9th Cir. 1994))) (Exemptions 6 and 7(C)); Kimmel v. DOD, No. 04-1551, 2006 WL 1126812, at *3 (D.D.C. Mar. 31, 2006) (protecting names of civilian personnel below level of office director and of military personnel below rank of colonel (or captain in Navy); finding that disclosure of names would not shed any light on subject matter of FOIA request seeking release of documents related to posthumous advancement of Rear Admiral to rank of admiral on retired list of Navy); Chang, 314 F. Supp. 2d at 44-45 (protecting names and results of punishment of lower-level officers involved in collision of Navy vessel with another ship).

²⁰⁸ See, e.g., McCutchen v. HHS, 30 F.3d 183, 187-89 (D.C. Cir. 1994) (protecting identities of both federally and privately employed scientists investigated for possible scientific misconduct) (Exemption 7(C)); Chamberlain, 589 F.2d at 841-42 (protecting names of disciplined IRS agents); MacLean, 2007 WL 935604, at *10-12 (protecting identity of military attorneys who issued illegal subpoenas in court-martial proceedings); Cawthon v. DOJ, No. 05-0567, 2006 WL 581250, at *2-4 (D.D.C. Mar. 9, 2006) (protecting information about two Bureau of Prisons doctors, including records pertaining to malpractice and disciplinary matters); Forest Serv. Emps. for Env'tl. Ethics v. U.S. Forest Serv., No. 05-6015, 2005 WL 3488453, at *4 (D. Or. Dec. 21, 2005) (protecting names of public employees in connection with stigmatizing event), aff'd, 524 F.3d 1021 (9th Cir. 2008); but see Schmidt v. U.S. Air Force, No. 06-3069, 2007 WL 2812148, at *11 (C.D. Ill. Sept. 20, 2007) (finding that although Air Force officer had a privacy interest in keeping information about his discipline confidential, competing public interest in deadly friendly-fire incident with international effects outweighed that privacy interest and shed light on how the United States government was holding its pilot accountable); Gannett River States Publ'g Corp. v. Bureau of the Nat'l Guard, No. 91-0455, 1992 WL 175235, at *5-6 (S.D. Miss. Mar. 2, 1992) (holding that given previous disclosure of investigative report of helocasting accident, disclosure of actual discipline received would result in "insignificant burden" on soldiers' privacy interests).

²⁰⁹ Beck, 997 F.2d at 1493-94.

The Court of Appeals for the District of Columbia Circuit has opined that disclosure of information may be "necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity."²¹⁰ At the same time, however, the Supreme Court has held that mere allegations of wrongdoing do not constitute a FOIA public interest and cannot outweigh an individual's privacy interest in avoiding unwarranted association with such allegations.²¹¹ In NARA v. Favish, the Supreme

²¹⁰ SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1991) (protecting individuals' identities in absence of such a showing); see also Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904-05 (D.C. Cir. 1996) ("[T]he public interest is insubstantial unless the requester puts forward compelling evidence that the agency denying the FOIA request is engaged in illegal activity and shows that the information sought is necessary in order to confirm or refute that evidence") (Exemption 7(C)), amended (Feb. 20, 1996); cf. Dobronski v. FCC, 17 F.3d 275, 278-80 (9th Cir. 1994) (ordering release of employee's sick leave slips despite fact that requester's allegations of abuse of leave time were wholly based upon unsubstantiated tips).

²¹¹ NARA v. Favish, 541 U.S. 157, 175 (2004); see, e.g., Bloomgarden v. DOJ, 874 F.3d 757, 761 (D.C. Cir. 2017) (finding substantial privacy interest in termination letter concerning Assistant United States Attorney and noting "[t]he aspect of the letter that concerns [the court] the most is that it contains mere allegations; it was never tested, nor was it ever formally adopted by the deputy-attorney general's office"); Kuzma v. DOJ, 692 F. App'x 30, 35 (2d Cir. 2017) (protecting identities of individuals involved in murder investigation and noting plaintiff does not provide evidence that information would reveal fault in handling of investigation) (Exemptions 6 and 7(C)); Watters v. DOJ, 576 F. App'x 718, 724 (10th Cir. 2014) (finding fault with plaintiff's asserted public interest of obtaining exculpatory information to prove his innocence because he provided no evidence of government wrongdoing) (Exemptions 6 & 7(C)); Sussman v. USMS, 494 F.3d 1106, 1115 (D.C. Cir. 2007) (finding that USMS properly protected the privacy of various individuals stressing that "[w]hile we find [plaintiff] did in fact allege misconduct, his bare and undeveloped allegations would not warrant a belief by a reasonable person that impropriety might have occurred") (Exemption 7(C)); McCutchen v. HHS, 30 F.3d 183, 187-89 (D.C. Cir. 1994) (protecting identities of scientists found not to have engaged in alleged scientific misconduct) (Exemption 7(C)); Hunt v. FBI, 972 F.2d 286, 288-90 (9th Cir. 1992) (protecting investigation of named FBI agent cleared of charges of misconduct) (Exemption 7(C)); Dunkelberger v. DOJ, 906 F.2d 779, 782 (D.C. Cir. 1990) (same) (Exemption 7(C)); Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987) (protecting identities of attorneys subject to disciplinary proceedings, which were later dismissed); Bonilla v. DOJ, 798 F. Supp. 2d 1325, 1332 (S.D. Fla. 2011) (holding that speculative allegations of impropriety, found meritless in requester's criminal action, fail to satisfy Favish standard); Aguirre v. SEC, 551 F. Supp. 2d 33, 56 (D.D.C. 2008) ("A 'bare suspicion' of agency misconduct is insufficient; the FOIA requester 'must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred'" (quoting Favish, 541 U.S. at 174)); McQueen v. United States, 264 F. Supp. 2d 502, 533-34 (S.D. Tex. 2003) (deciding that public interest would not be served by "disclosure of information regarding unsubstantiated allegations" made against three government employees) (Exemptions 6 and 7(C)), aff'd, 100 F. App'x 964 (5th Cir. 2004) (per curiam).

Court observed that if "bare allegations" could be sufficient to satisfy the public interest requirement, then the exemption would be "transformed . . . into nothing more than a rule of pleading."²¹² The court went on to recognize that "allegations of misconduct are 'easy to allege and hard to disprove'"²¹³ and that courts therefore must require a "meaningful evidentiary showing" by the FOIA requester.²¹⁴ Specifically:

[T]he requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.²¹⁵

²¹² 541 U.S. at 174; see also U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991) ("If a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information.").

²¹³ Favish, 541 U.S. at 175 (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998)); see also Ray, 502 U.S. at 178-79 (holding that there is presumption of legitimacy given to government conduct, and noting that privacy interests would be worthless if only bare allegations could overcome these interests).

²¹⁴ Favish, 541 U.S. at 175; see, e.g., Martin v. DOJ, 488 F.3d 446, 458 (D.C. Cir. 2007) (concluding that "[u]nsubstantiated assertions of government wrongdoing . . . do not establish a meaningful evidentiary showing" (quoting Boyd v. DOJ, 475 F.3d 381, 388 (D.C. Cir. 2007))); Cole v. DOJ, No. 04-5329, 2005 U.S. App. LEXIS 7358, at *2-3 (D.C. Cir. Apr. 27, 2005) (holding that requester's asserted public interest "that disclosure of the records is necessary to show prosecutorial misconduct is insufficient to overcome Exemption 7(C), because appellant has failed to put forward a 'meaningful evidentiary showing' that would 'warrant a belief by a reasonable person that the alleged Government impropriety might have occurred'" (quoting Favish, 541 U.S. at 174)); Cole v. FBI, No. 13-01205, 2015 WL 4622917, at *3 (D.D.C. July 31, 2015) (observing that where government misconduct is alleged, plaintiffs must make a "meaningful evidentiary showing" that is "based on the known facts") (Exemptions 6 and 7(C)); Jarvis v. ATF, No. 07-00111, 2008 WL 2620741, at *13 (N.D. Fla. June 30, 2008) ("When the significant asserted public interest is to uncover Government misfeasance, there must be a 'meaningful evidentiary showing.'").

²¹⁵ Favish, 541 U.S. at 174; cf., Citizens for Responsibility & Ethics in Wash. v. DOJ, 846 F. Supp. 2d 63, 74 (D.D.C. 2012) (holding that as "agency misconduct" was not the asserted basis for disclosure, "[plaintiff] need not produce the compelling evidence of illegal activity that would be required if it had done so") (Exemption 7(C)); Vento v. IRS, 714 F. Supp. 2d 137, 150 (D.D.C. 2010) (concluding that "the improper withholding of requested documents is not the type of government 'impropriety' to which the interest of privacy yields") (Exemption 7(C)); Judicial Watch v. DHS, 598 F. Supp. 2d 93, 97 (D.D.C. 2009) ("The extra burden established by Favish only applies when the requester asserts government negligence or improper conduct.").

Courts applying this heightened standard to allegations of government misconduct have generally found that plaintiffs have not provided the requisite evidence required by Favish,²¹⁶ while in some cases the standard has been found to be satisfied.²¹⁷

²¹⁶ See Janangelo v. Treasury Inspector Gen. for Tax Admin., 726 F. App'x 660, 661-62 (9th Cir. 2018) (finding that plaintiff produced no evidence "that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred," but instead provided "mere allegations and conjecture" (quoting Favish, 541 U.S. at 174)), cert. denied, No. 18-439, 2018 WL 4853506 (U.S. Nov. 13, 2018); Cameranesi v. DOD, 856 F.3d 626, 644 (9th Cir. 2017) ("Although we agree there is a public interest in identifying government impropriety in performing its statutory duties, allegations of two errors among the thousands of students that trained at WHINSEC from 2001 through 2004 does not amount to a 'meaningful evidentiary showing' that would lead to 'a belief by a reasonable person that the alleged Government impropriety might have occurred'" (quoting Favish, 541 U.S. at 174-75)); Watters, 576 F. App'x at 724 (observing that plaintiff provided only unsubstantiated allegations of government wrongdoing to support his assertions that disclosure of third party information would prove his innocence); Hulstein v. DEA, 671 F.3d 690, 696 (8th Cir. 2012) (finding plaintiff's "casting general aspersions on the fact that the DEA was investigating him" is not a FOIA public interest in disclosure) (Exemption 7(C)); Blackwell v. FBI, 646 F.3d 37, 41 (D.C. Cir. 2011) (finding that plaintiff "has failed to meet the demanding Favish standard," where "[t]he only support [he] offers for his allegation of government misconduct is his own affidavit, which recounts a litany of alleged suspicious circumstances but lacks any substantiation") (Exemption 7(C)); Associated Press v. DOD, 554 F.3d 274, 289-92 (2d Cir. 2009) (concluding that redactions of the detainees' identifying information was proper because plaintiff failed to produce sufficient evidence of impropriety by DOD) (Exemption 7(C)); Lane v. Dep't of the Interior, 523 F.3d 1128, 1138 (9th Cir. 2008) (finding that because interest in disclosure involved government employee's alleged misconduct, requester was required to "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" (quoting Favish, 541 U.S. at 174)); Martin, 488 F.3d at 458 (stating that "[i]f the public interest is government wrongdoing, then the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" (quoting Boyd v. DOJ, 475 F.3d 381, 387 (D.C. Cir. 2007))); Carpenter v. DOJ, 470 F.3d 434, 442 (1st Cir. 2006) (declaring that valid public interest in disclosure of information relating to allegations of impropriety on part of government officials must be supported by more than mere suspicion improper actions occurred) (Exemption 7(C)); Wood v. FBI, 432 F.3d 78, 89 (2d Cir. 2005) (finding that plaintiff's "unsupported allegations" do not overcome "presumption of legitimacy . . . [of] government actions"); Horowitz v. Peace Corps, 428 F.3d 271, 278 & n.1 (D.C. Cir. 2005) (finding that the plaintiff offered "no further details to support these extremely speculative allegations" and did not "overcome the presumption that the Peace Corps' [] official conduct was proper"); Oguaju v. United States, 378 F.3d 1115, 1117 (D.C. Cir. 2004) (ruling that plaintiff "failed to make the requisite showing" required by Favish), reh'g denied & amended, 386 F.3d 273 (D.C. Cir. 2004) (per curiam); Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (rejecting public interest argument absent evidence suggesting wrongdoing by FBI); Halloran v. VA, 874 F.2d 315, 323 (5th Cir. 1989) (finding that while there is general public interest in the government's interaction with federal contractors, "merely stating that the interest exists in the abstract is not enough[;]" requesters must show how that interest would be served by compelling disclosure); Bernegger v. EOUSA, 334 F. Supp. 3d 74, 90

Public Interest in Agency Compliance with Federal Statutes

The Supreme Court has held that requesters seeking to vindicate the policies of another federal statute have not demonstrated a FOIA public interest in disclosure.²¹⁸ Specifically, in DOD v. FLRA, two unions requested the names and home addresses of certain DOD employees who worked in bargaining units represented by the unions.²¹⁹ DOD responded by providing the employee names and work stations, but did not provide the home addresses on the grounds such disclosure would violate the employees privacy.²²⁰ The asserted public interest in disclosure, that the home addresses would facilitate communication between the unions and the bargaining unit employees, which would further the public interest in collective bargaining under the Federal Service Labor-Management Relations statute, was characterized by the Supreme Court as being "negligible, at best."²²¹ Noting that only information that contributes significantly to public understanding of government operations or activities constitutes a FOIA public interest, the Court held that "the fact that respondents are seeking to vindicate the policies behind the Labor Statute is irrelevant to the FOIA analysis."²²²

(D.D.C. 2018) (concluding "baseless accusations are insufficient to overcome the privacy interests at stake") (Exemptions 6 and 7(C)); Cole, 2015 WL 4622917, at *3-4 (finding insufficient evidence that FBI special agent interfered with potential witness, noting that habeas court had also found insufficient evidence of such misconduct); Long v. OPM, No. 05-1522, 2007 WL 2903924, at *18 (N.D.N.Y. Sept. 30, 2007) ("Although plaintiffs have submitted declarations from reporters who . . . have uncovered government wrongdoing, plaintiffs submit no actual evidence of wrongdoing, thus this factor weighs against disclosure"), aff'd in pertinent part, 692 F.3d 185 (2d Cir. 2012).

²¹⁷ CASA de Maryland, Inc. v. DHS, 409 F. App'x 697, 700-01 (4th Cir. 2011) (finding Favish requirement satisfied where requester did provide evidence indicating agency impropriety) (Exemptions 6 and 7(C)); Lardner v. DOJ, 398 F. App'x 609, 611 (D.C. Cir. 2010) (per curiam) (finding privacy interests outweighed by the public interest in disclosing the names of unsuccessful clemency applicants "in view of the Inspector General's Report on whether impermissible considerations played a role in pardon determinations").

²¹⁸ DOD v. FLRA, 510 U.S. 487 (1994).

²¹⁹ Id.

²²⁰ Id.

²²¹ Id. at 497; see also Wade v. IRS, 771 F. Supp. 2d 20, 25 (D.D.C. 2011) ("[J]ust as '[d]isclosure of the addresses might [have allowed] the unions to communicate more effectively with employees,' in Federal Labor Relations Authority, the disclosure of the home phone numbers of Enrolled Agents here might, as Plaintiffs argue, help the public at large access greater contact information for Enrolled Agents who complete public tax returns, 'but it would not appreciably further the citizens right to be informed about what their government is up to.'" (quoting DOD v. FLRA, 512 U.S. at 497)).

²²² 510 U.S. at 499.

Similarly, the Courts of Appeals for the District of Columbia, Second, Third, and Tenth Circuits have found that the public interest in compliance with the Davis-Bacon Act²²³ is not a public interest whose significance outweighs competing privacy interests of third parties.²²⁴ For example, in Painting & Drywall Work Pres. Fund, Inc. v. HUD, a nonprofit cooperative of painting and drywall contractors and labor unions requested certified payroll records relating to three HUD-assisted construction projects in an effort to determine whether these projects were in compliance with laws effecting public work projects.²²⁵ Finding that those identified in the certified payroll records had personal privacy interests in their information, the court turned to the public interest in disclosure and found "information that might reveal the failure of contractors to comply with relevant laws does not in itself cast light on what HUD is up to," and was not a "public interest in . . . disclosure that is relevant to this analysis."²²⁶ As to the requester's argument that disclosure could be used to monitor how well the government was enforcing labor statutes, the court acknowledged the possibility that the disclosure of names could serve such a public interest in certain cases, but found that in this case, the requester had alternative means of accessing this information by engaging in "face-to-face conversation[s]" with workers at worksites.²²⁷

Although the Second Circuit found a legitimate public interest in monitoring HUD's enforcement of prevailing wage laws generally, it found that disclosure of the names and addresses of workers employed on HUD-assisted public housing projects would shed no light on the agency's performance of that duty in particular.²²⁸ Faced with the same public interest question, the Court of Appeals for the Ninth Circuit took a different approach but reached the same result.²²⁹ The Ninth Circuit found a public interest in monitoring the agency's "diligence in enforcing Davis-Bacon," but found the weight to be given that interest weakened when the public benefit was derived neither

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

²²⁴ See Sheet Metal Workers Int'l Ass'n, Local No. 19 v. VA, 135 F.3d 891, 903-05 (3d Cir. 1998); Sheet Metal Workers Int'l Ass'n, Local No. 9 v. U.S. Air Force, 63 F.3d 994, 997-98 (10th Cir. 1995); Painting & Drywall Work Pres. Fund, Inc. v. HUD, 936 F.2d 1300, 1303 (D.C. Cir. 1991); Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991).

²²⁵ 936 F.2d at 1301.

²²⁶ Id. at 1303.

²²⁷ Id.

²²⁸ Hopkins, 929 F.2d at 88.

²²⁹ Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of the Air Force, 26 F.3d 1479, 1486 (9th Cir. 1994).

directly from the release of the information itself nor from mere tabulation of data or further research, but rather, from personal contact with the individuals whose privacy was at issue.²³⁰

Courts of Appeals have reached similar conclusions outside the context of federal labor laws. For example, the Ninth Circuit in Minnis v. USDA recognized a valid public interest in the fairness of an agency lottery system that awarded permits to raft down the Rogue River, but found, upon careful analysis, that the release of the names and addresses of the applicants would in no way further that interest.²³¹ Similarly, in Heights Cmty. Congress v. VA, the Court of Appeals for the Sixth Circuit found that the release of names and home addresses would result only in the "involuntary personal involvement" of innocent purchasers rather than appreciably furthering a concededly valid public interest in determining whether anyone had engaged in "racial steering."²³²

As such, the majority of courts to have considered the question of whether disclosure of personal information serves a FOIA public interest in agency compliance with federal statutes have generally found that where disclosure of personal information reveals nothing "directly" about the character of a government agency or official" but rather, bears only an "attenuated . . . relationship to governmental activity," such an attenuated public interest in disclosure does not outweigh individuals' privacy interests in their personal information.²³³

²³⁰ Id. at 1485; see also Sheet Metal Workers Int'l Ass'n, Local No. 9, 63 F.3d at 997-98.

²³¹ 737 F.2d 784, 787 (9th Cir. 1984).

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

²³³ Hopkins, 929 F.2d at 88; see Sheet Metal Workers Int'l Ass'n, Local No. 19, 135 F.3d at 903-05 (concluding that names, addresses and social security numbers included in payroll records did not need to be disclosed to union in order to ensure enforcement of prevailing wage laws); Sheet Metal Workers Int'l Ass'n, Local No. 9, 63 F.3d at 997-98 (same); Painting & Drywall Work Pres. Fund, Inc., 936 F.2d at 1303 ("As information that might reveal the failure of contractors to comply with relevant laws does not in itself cast light on what HUD is up to, we can find no obvious public interest in its disclosure that is relevant to this analysis."); People for the Ethical Treatment of Animals v. NIH, No. 10-1818, 2012 WL 1185730, 9 (D.D.C. Apr. 10, 2012) (assuming arguendo that the Animal Welfare Act and Health Research Extension Acts establish a public interest in knowing "whether those who conduct research on animals are treating them humanely," and finding that disclosure of identities of three named researchers would not serve that interest because information would not reveal anything about the government's own conduct) (quoting plaintiff's memorandum) (Exemption 7(C)), aff'd in part, No. 12-5183, 2012 WL 5896791 (D.C. Cir. Nov. 2, 2012), aff'd in part, vacated in part, 745 F.3d 535 (D.C. Cir. 2014); Long v. DOJ, 778 F. Supp. 2d 222, 236 (N.D.N.Y. 2011) (rejecting plaintiffs' claims that "disclosure of the

In conclusion, the identification and assessment of a FOIA public interest is the second part of the analysis used for determining whether personal information falls within the FOIA's privacy exemptions. If an agency determines that no legitimate FOIA public interest exists, and there is a more than de minimis privacy interest in nondisclosure, courts have found that the information should be protected as "something, even a modest privacy interest outweighs nothing every time."²³⁴ Alternatively, if a FOIA public interest is found to exist, the next step of the analysis requires the public interest in disclosure to be balanced against the privacy interest in nondisclosure.²³⁵

Balancing a Privacy Interest in Nondisclosure Against a Public Interest in Release

If an agency identifies both a substantial (i.e., more than de minimis) privacy interest in nondisclosure of the requested information and a FOIA public interest in its disclosure (i.e., the information opens agency action to the light of public scrutiny) the two competing interests must be weighed against one another in order to determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy.²³⁶ In other words, courts have held that identifying a substantial privacy interest and the existence of a FOIA public interest "does not conclude the inquiry; it only moves it along to the point where [the agency] can 'address the question whether the public interest in disclosure outweighs the individual privacy concerns.'"²³⁷ If the privacy

vaccine type and date of administration will shed light on the DOJ's handling of petitions brought under the Vaccine Act").

²³⁴ Schoenman v. FBI, 573 F. Supp. 2d 119, 149 (D.D.C. 2008) (concluding that information was properly withheld in absence of public interest (quoting Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989))); Seized Prop. Recovery, Corp. v. U.S. Customs & Border Prot., 502 F. Supp. 2d 50, 56 (D.D.C. 2007) ("If no public interest is found, then withholding the information is proper, even if the privacy interest is only modest."); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 144-45 (D.D.C. 2007) (Exemptions 6 and 7(C).); see also FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking").

²³⁵ See NARA v. Favish, 541 U.S. 157, 171 (2004) ("The term 'unwarranted' requires us to balance the family's privacy interest against the public interest in disclosure.") (Exemption 7(C)).

²³⁶ See DOD v. FLRA, 510 U.S. 487, 495 (1994); DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) (discussing balancing in Exemption 7(C) context, which generally employs same balancing test applicable in Exemption 6 cases); Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); see also FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking").

²³⁷ Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1229-30 (D.C. Cir. 2008) (quoting Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 35 (D.C. Cir. 2002)); see Reporters Comm.,

interests against disclosure are greater than the public interests in disclosure, the information may be properly withheld; alternatively, if the balance is in favor of disclosure the information should be released.²³⁸

As the Supreme Court has held: "Exemption 6 does not protect against disclosure [of] every incidental invasion of privacy, only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy."²³⁹ In balancing these interests, the Court of Appeals for the District of Columbia Circuit has held that "the 'clearly unwarranted' language of Exemption 6 weights the scales in favor of disclosure"²⁴⁰ and "creates a 'heavy burden'" for an agency invoking Exemption 6.²⁴¹

Although "the presumption in favor of disclosure is as strong [under Exemption 6] as can be found anywhere in the Act,"²⁴² courts have readily protected personal, intimate details of an individual's life. For example, as the D.C. Circuit has noted, courts have

489 U.S. at 749 (a "court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect"); see also DOD v. FLRA, 510 U.S. at 495 (same); U.S. Dep't of State v. Ray, 502 U.S. 164, 175 (1991) (same); Rose, 425 U.S. at 372 (same).

²³⁸ See, e.g., Ray, 502 U.S. at 177 (noting that "unless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail"); News-Press v. DHS, 489 F.3d 1173, 1205 (11th Cir. 2007) ("In order to affirm withholding the addresses, we would have to find that the privacy interests against disclosure are greater than the public interest in disclosure."); see also Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978) (finding that "[s]ince this is a balancing test, any invasion of privacy can prevail, so long as the public interest balanced against it is sufficiently weaker").

²³⁹ Rose, 425 U.S. at 382; see, e.g., Ctr. for Biological Diversity v. Office of the U.S. Trade Representative, 450 F. App'x 605, 609 (9th Cir. 2011) (observing that "[i]n assessing the applicability of Exemption 6 on remand, the district court should 'consider, first, whether the information is contained in a personnel, medical, or similar file, and, second, whether release of the information would constitute a clearly unwarranted invasion of the person's privacy'" and, next, the district court should balance the privacy interests of the individuals identified in the records against the public interest in disclosure (quoting Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 639 F.3d 876, 886 (9th Cir. 2010)) (unpublished disposition); Associated Press v. DOD, 554 F.3d 274, 291 (2d Cir. 2009) (same).

²⁴⁰ Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); see, e.g., Morley v. CIA, 508 F.3d 1108, 1127 (D.C. Cir. 2007) ("Exemption 6's requirement that disclosure be clearly unwarranted instructs us to tilt the balance (of disclosure interests against privacy interests) in favor of disclosure." (quoting Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982))).

²⁴¹ Morley, 508 F.3d at 1127 (quoting Wash. Post Co., 690 F.2d at 261).

²⁴² Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

traditionally upheld the nondisclosure of information concerning "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation" and similarly personal information.²⁴³ Furthermore, courts have consistently upheld protection for:

- (1) birth dates;²⁴⁴
- (2) religious affiliations;²⁴⁵
- (3) citizenship data;²⁴⁶
- (4) social security numbers;²⁴⁷
- (5) criminal history records;²⁴⁸

²⁴³ Rural Hous. Alliance v. USDA, 498 F.2d 73, 77 (D.C. Cir. 1974), supplemented, 511 F.2d 1347 (D.C. Cir. 1974); see Hardison v. Sec'y of VA, 159 F. App'x 93, 94 (11th Cir. 2005) (dates of marriage and spouses' names); Kortlander v. Bureau of Land Mgmt., 816 F. Supp. 2d 1001, 1013 (D. Mont. 2011) ("[A]ddresses, social security numbers, dates of birth, criminal histories, past addresses, private signatures, phone numbers, drivers license numbers, motor vehicle identification numbers, fax numbers, private email addresses, credit card number, and eBay and Paypal identifiers.") (Exemptions 6 and 7(C)).

²⁴⁴ See, e.g., Hardison, 159 F. App'x at 93; In Def. of Animals v. NIH, 543 F. Supp. 2d 70, 80 (D.D.C. 2008) ("Exemption 6 allows an agency to withhold documents if they contain personal identifying information, such as 'place of birth, date of birth, date of marriage, employment history, and comparable data'" (quoting U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 600 (1982))).

²⁴⁵ See, e.g., Hall v. CIA, 881 F. Supp. 2d 38, 71 (D.D.C. 2012).

²⁴⁶ See U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982) (passport information); Hemenway v. Hughes, 601 F. Supp. 1002, 1006 (D.D.C. 1985) ("Nationals from some countries face persistent discrimination . . . [and] are potential targets for terrorist attacks."); cf. Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at *8 (D.D.C. Mar. 30, 2001) (asylum application).

²⁴⁷ See, e.g., Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 365-66 (5th Cir. 2001); Norwood v. FAA, 993 F.2d 570, 575 (6th Cir. 1993); Prison Legal News v. Lappin, 780 F. Supp. 2d 29, 40 (D.D.C. 2011) (finding that "the privacy interest in one's social security number is self-evident"); Schoenman v. FBI, 575 F. Supp. 2d 136, 164 (D.D.C. 2008) (concluding that "the Army has properly invoked FOIA Exemption 6 to withhold the names, birthdates, and social security numbers of government personnel and third parties"); Peay v. DOJ, No. 04-1859, 2006 WL 1805616, at *2 (D.D.C. June 29, 2006) ("The IRS properly applied exemption 6 to the social security numbers of IRS personnel.").

²⁴⁸ See, e.g., Reporters Comm., 489 U.S. at 780; Associated Press v. DOJ, 549 F.3d 62, 66 (2d Cir. 2008) (per curiam) (holding commutation petition exempt from disclosure

- (6) incarceration of United States citizens in foreign prisons;²⁴⁹
- (7) identities of crime victims;²⁵⁰
- (8) financial information;²⁵¹
- (9) personal landline and cellular telephone numbers;²⁵²

under Exemptions 6 and 7(C)); Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1124-26 (D.C. Cir. 2004) (protecting pardon applications, which include information about crimes committed); Lee v. DOJ, No. 05-1665, 2007 WL 744731, at *2 (D.D.C. Mar. 6, 2007) (withholding list of individuals convicted of serious criminal activity from whom the government attempted to collect restitution).

²⁴⁹ See Harbolt v. Dep't of State, 616 F.2d 772, 774 (5th Cir. 1980).

²⁵⁰ See, e.g., Horowitz v. Peace Corps, 428 F.3d 271, 279-80 (D.C. Cir. 2005) (recognizing that "strong privacy interests are implicated . . . when the individual has reported a sexual assault"); Pickens v. DOJ, No. 11-1168, 2012 WL 761995, at *6 (D.S.C. Mar. 7, 2012) (The court "does not see how disclosure of the limited information that has been withheld – identifying information of third parties and the victim of Plaintiff's crimes – would serve the FOIA's underlying purpose, as that information fails to shed light on the operations of the FBI") (Exemptions 6 and 7(C)).

²⁵¹ See, e.g., Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1056 (D.C. Cir. 2009) (concluding that HHS properly withheld information that could reveal total payments received by physicians from Medicare for covered services); Beard v. Espy, 76 F.3d 384 (9th Cir. 1995) (unpublished table decision); Kensington Research & Recovery v. Dep't of the Treasury, No. 10-3538, 2011 WL 2647969, at *9 (N.D. Ill. June 30, 2011) (determining that "[t]he disclosure of specific information on the registration records, such as the name, address, or bond serial number would publicize the financial affairs of the individual bondholders" and "would also expose the bondholders to unsolicited attempts by [plaintiff] and other companies to collect the unredeemed bonds"); Green v. United States, 8 F. Supp. 2d 983, 998 (W.D. Mich. 1998), appeal dismissed, No. 98-1568 (6th Cir. Aug. 11, 1998); Stabasefski v. United States, 919 F. Supp. 1570, 1575 (M.D. Ga. 1996). But see Reno Newspapers, Inc. v. U.S. Parole Comm'n, No. 09-683, 2011 WL 1233477, at *7 (D. Nev. Mar. 29, 2011) (holding that agency must release "all segregable" information from a parole applicant's bank statements and other documents submitted to parole officer).

²⁵² See, e.g., Performance Coal Co. v. U.S. Dep't of Labor, 847 F. Supp. 2d 6, 17-18 (D.D.C. 2012) (holding agency properly withheld names, cell phone numbers, and home phone numbers) (Exemption 7(C)); Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. U.S. Dep't of Labor, 828 F. Supp. 2d 183 (D.D.C. 2011) (noting that "[d]isclosure of these [phone] numbers could subject the individuals to 'annoyance, embarrassment, and harassment in the conduct of their official and private lives'" (quoting Marshall v. FBI, No. 10-871, 2011 WL 3497801, at *6 (D.D.C. Aug. 10, 2011))); Lowy v. IRS, No. 10-767, 2011 U.S. Dist. LEXIS 34168, at *51 (N.D. Cal. Mar. 30, 2011) (concluding that agency provided "sufficient justification for the withholding and/or redaction of personal information" such

- (10) email addresses;²⁵³ and
- (11) medical information linked to individuals.²⁵⁴

By contrast, on some occasions, courts have found that the FOIA public interest outweighs even a strong personal privacy interest in the requested records.²⁵⁵

as mobile telephone numbers, bank account numbers of third parties, and similar types of information); Wade v. IRS, 771 F. Supp. 2d 20, 26 (D.D.C. 2011) (determining that the IRS properly withheld the home telephone numbers of third parties who are permitted to practice before the IRS).

²⁵³ See Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 639 F.3d 876, 888 (9th Cir. 2010) (finding that lobbyists' email addresses should be protected from disclosure unless they are the only way to identify the agent in question); Maryland v. VA, 130 F. Supp. 3d 342, 353 (D.D.C. 2015) (finding substantial privacy interest in identifying portions of email addresses of individuals whose applications for inclusion in veteran small business database were rejected); Wilson v. U.S. Air Force, No. 08-324, 2009 WL 4782120, at *4 (E.D. Ky. Dec. 9, 2009) (finding that signatures, personal phone numbers, personal email addresses, and government email addresses were properly redacted). But see Prechtel v. FCC, 330 F. Supp. 3d 320, 329-33 (D.D.C. 2018) (finding that agency improperly withheld email addresses of "bulk submitters" of comments on proposed repeal of "net neutrality" regulations due to demonstrated, widespread fraud in comment submission process, such that there was high public interest in specific email addresses used by submitters of public comments).

²⁵⁴ See, e.g., Henson v. HHS, 892 F.3d 868, 878 (7th Cir. 2018) (medical information about manufacturer's patients) reh'g denied (July 31, 2018); Wadhwa v. VA, 446 F. App'x 516, 519 (3d Cir. 2011) (per curiam) (unpublished disposition) (third party medical files); McDonnell v. United States, 4 F.3d 1227, 1254 (3d Cir. 1993) ("living individual has a strong privacy interest in withholding his medical records"); Long v. DOJ, 778 F. Supp. 2d 222, 236 (N.D.N.Y. 2011) ("list of vaccine type and date of administration"); Nat'l Sec. News Serv. v. U.S. Dep't of the Navy, 584 F. Supp. 2d 94, 97 (D.D.C. 2008) (upholding nondisclosure of hospital patient admission records); Pub. Emps. for Envtl. Responsibility v. U.S. Dep't of the Interior, No. 06-182, 2006 WL 3422484, at *4 n.4 (D.D.C. Nov. 28, 2006) (withholding information detailing employee's physical ailments and medical advice regarding those ailments).

²⁵⁵ See Roth v. DOJ, 642 F.3d 1161, 1166 (D.C. Cir. 2011) (concluding that "(1) the public has an interest in knowing whether the federal government is withholding information that could corroborate a death-row inmate's claim of innocence, and (2) that interest outweighs the three men's privacy interest in having the FBI not disclose whether it possesses any information linking them to the murders") (Exemption 7(C)); Lardner v. DOJ, 398 F. App'x 609, 610 (D.C. Cir. 2010) (per curiam) (holding that public interest in names of unsuccessful clemency applicants outweighed applicants privacy interests); Rosenfeld v. DOJ, No. 07-3240, 2012 WL 710186, at *8 (N.D. Cal. Mar. 5, 2012) (concluding that any privacy interest in a traffic violation is "outweighed by the public interest in understanding

Names and Home Addresses

There are numerous decisions concerning requests for lists of names and home addresses of individuals. Because agencies may neither distinguish between requesters nor limit the use to which disclosed information is put,²⁵⁶ courts have found that an analysis of the consequences of disclosure of names and addresses cannot turn on the identity or purpose of the requester.²⁵⁷ The Supreme Court has held that when considering whether compilations of names and home addresses fall under Exemption 6, the only relevant FOIA public interest is the extent to which disclosure sheds light on an agency's operations,²⁵⁸ and that specific lists may reveal sensitive information beyond the mere names and addresses of the individuals found on the list.²⁵⁹ The Court

whether the FBI used public resources to compile information, without any apparent law enforcement purpose, to assist Ronald Reagan's political aspirations").

²⁵⁶ See NARA v. Favish, 541 U.S. 157, 174 (2004) ("It must be remembered that once there is disclosure, the information belongs to the general public. There is no mechanism under FOIA for a protective order allowing only the requester to see . . . the information . . . or for proscribing its general dissemination."); Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1025 (9th Cir. 2008) ("FOIA provides every member of the public with equal access to public documents and, as such, information released in response to one FOIA request must be released to the public at large."); Bernegger v. EOUSA, 334 F. Supp. 3d 74, 90 (D.D.C. 2018) ("[A]gencies releasing records pursuant to FOIA requests must be mindful that '[d]ocuments released in a FOIA action must be made available to the public as a whole'" (quoting Stonehill v. IRS, 558 F.3d 534, 539 (D.C. Cir. 2009))) (Exemptions 6 and 7(C)).

²⁵⁷ See Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 356 (1997) (finding irrelevant requester's claimed purpose for seeking mailing list in order to disseminate information); Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989) [hereinafter NARFE] (finding irrelevant requester's claimed purpose to use list of federal retirees to aid in its lobbying efforts on behalf of those retirees).

²⁵⁸ See Bibles, 519 U.S. at 355-56 (remanding for further consideration of withholding of mailing list of recipients of Bureau of Land Management publication); DOD v. FLRA, 510 U.S. 487, 494, 502 (1994) (protecting names and home addresses of federal employees in union bargaining units); U.S. Dep't of State v. Ray, 502 U.S. 164, 173-79 (1991) (withholding from interview summaries the names and addresses of Haitian refugees interviewed by State Department about treatment upon return to Haiti).

²⁵⁹ See Ray, 502 U.S. at 176 (observing that disclosure of a list of Haitian refugees interviewed by the State Department about their treatment upon return to Haiti "would publicly identify the interviewees as people who cooperated with a State Department investigation"); Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187-88 (8th Cir. 2000) (protecting list of pork producers who signed petition that declared their position on referendum that was sought by petition) (reverse FOIA suit); NARFE, 879 F.2d at 876

of Appeals for the District of Columbia Circuit addressed the question of whether disclosure of mailing lists constituted a clearly unwarranted invasion of personal privacy in Nat'l Ass'n of Retired Fed. Emps. v. Horner, and, while stopping short of creating a nondisclosure category for all mailing lists, the D.C. Circuit held that mailing lists consisting of names and home addresses of federal annuitants are categorically withholdable under Exemption 6.²⁶⁰

In these types of cases, courts have frequently found the asserted public interest too attenuated to overcome the clear privacy interest an individual has in his name and home address.²⁶¹ Nevertheless, a number of courts have ordered the disclosure of such information in certain contexts. Some of these courts have found little or no privacy interest in the names and addresses at issue.²⁶² Other courts have ordered the release of

(characterizing the list at issue as revealing that each individual on it "is retired or disabled (or the survivor of such a person) and receives a monthly annuity check from the federal Government"); Minnis v. USDA, 737 F.2d 784, 787 (9th Cir. 1984) ("Disclosure would reveal not only the applicants' names and addresses, but also their personal interests in water sports and the out-of-doors."). See generally McDonald v. City of Chicago, 130 S.Ct. 3020, 3105 (2010) (finding "we have long accorded special deference to the privacy of the home") (non-FOIA case); Wilson v. Layne, 526 U.S. 603, 604 (1999) (noting the Fourth Amendment "embodies centuries-old principles of respect for the privacy of the home") (non-FOIA case).

²⁶⁰ NARFE, 879 F.2d at 879; see also Retired Officers Ass'n v. Dep't of the Navy, 744 F. Supp. 1, 2-3 (D.D.C. May 14, 1990) (holding names and home addresses of retired military officers exempt); cf. Reed v. NLRB, 927 F.2d 1249, 1251-52 (D.C. Cir. 1991) (categorically protecting "Excelsior" list (names and addresses of employees eligible to vote in union representation elections)).

²⁶¹ See Bibles, 519 U.S. at 355-56; DOD v. FLRA, 510 U.S. at 494-502; Ray, 502 U.S. at 173-79.

²⁶² See Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 36 (D.C. Cir. 2002) (finding privacy interest "relatively weak," and determining that public interest in learning about agency's use of owl data is served by release of lot numbers of parcels of land where owls have been spotted, even while acknowledging that the identities of landowners could be determined by use of this information); Avondale Indus. v. NLRB, 90 F.3d 955, 961 (5th Cir. 1996) (finding that names and addresses of voters in union election already were disclosed in voluminous public record); Aqualliance v. U.S. Army Corps. of Eng'rs, 243 F. Supp. 3d 193, 198 (D.D.C. 2017) (ordering disclosure of list of names and home addresses of individuals living near proposed California water project because agency failed to articulate why such individuals would be subject to unwanted harassment or solicitation merely due to proximity to water project); Aqualliance v. US. Bureau of Reclamation, 139 F. Supp. 3d 203, 212-13 (D.D.C. 2015) (finding "greater than de minimis" but "not substantial" privacy interest in names and addresses of water well owners and water transfer program participants), aff'd on other grounds, 856 F.3d 101 (D.C. Cir. 2017); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 306 (D.D.C. 2007) (ordering release of names of those who voluntarily submitted comments regarding informational video shown at Lincoln Memorial because "the public interest in knowing who may be exerting influence

such personal information on the rationale that the names and addresses themselves would reveal (or lead to other information that would reveal) how an agency conducted some aspect of its business.²⁶³

For example, the Court of Appeals for the Eleventh Circuit concluded in News-Press v. DHS that disclosure of the addresses of buildings that received disaster assistance from FEMA should be released, but that the names of aid recipients were properly withheld.²⁶⁴ The court recognized that the public had a legitimate interest in knowing whether FEMA appropriately handled billions of dollars in disaster relief claims, especially in light of evidence submitted by the requesters of wasteful or fraudulent spending of disaster assistance funds.²⁶⁵ The court went on to find that the addresses of those structures allegedly damaged would shed light directly on the allegations of impropriety, as those addresses that received disaster relief which were located outside the path of the natural disasters "plainly would raise red flags" regarding FEMA's effectiveness in properly distributing disaster assistance.²⁶⁶

Against this "powerful public interest,"²⁶⁷ the court weighed the privacy interests of aid recipients in the nondisclosure of their home addresses. The court identified a number of privacy interests threatened by disclosure of the home addresses, including the fact that disclosure of the addresses would allow the public to "link certain information

on National Park Service officials sufficient to convince them to change the video outweighs any privacy interest in one's name"); Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 729 (D. Md. 2001) (declaring that purchasers of property previously seized by the government "voluntarily choose to participate in . . . a wholly legal commercial transaction" and "have little to fear in the way of 'harassment, annoyance, or embarrassment'"); Alliance for the Wild Rockies v. Dep't of the Interior, 53 F. Supp. 2d 32, 36-37 (D.D.C. 1999) (concluding that commenters to proposed rulemaking could have little expectation of privacy when rulemaking notice stated that complete file would be publicly available).

²⁶³ See Columbia Riverkeeper v. FERC, 650 F. Supp. 2d 1121, 1131 (D. Or. 2009) (ordering agency to produce a list of land owner names and addresses where agency has previously posted a similar list on its website and plaintiffs have demonstrated a public interest in release of the list in order to verify the defendant was complying with public notice mandate); Baltimore Sun, 131 F. Supp. 2d at 729-30 (names and addresses of purchasers of property seized by government found to allow public to assess agencies' exercise of their power to seize property and their duty to dispose of such property); Ray v. DOJ, 852 F. Supp. 1558, 1564-65 (S.D. Fla. 1994) (names and addresses of interdicted Haitians might reveal "information concerning our government's conduct during the interdiction process").

²⁶⁴ 489 F.3d 1173, 1205-06 (11th Cir. 2007).

²⁶⁵ Id. at 1192.

²⁶⁶ Id. at 1192-96.

²⁶⁷ Id. at 1196.

already disclosed by FEMA to particular individuals."²⁶⁸ However, the court found that these privacy interests were not substantial enough to warrant protection under Exemption 6.²⁶⁹ In summary, the court stated that "[q]uite simply, the disclosure of the addresses serves a powerful public interest, and the privacy interests extant cannot be said even to rival this public interest, let alone exceed it, so that disclosure would constitute a 'clearly unwarranted' invasion of personal privacy."²⁷⁰ The court remarked that in this case it did "not find the balancing calculus to be particularly hard."²⁷¹

By contrast, the court held that disclosure of the names of the aid recipients would constitute a "clearly unwarranted invasion of personal privacy."²⁷² Whereas the addresses would shed light directly on whether FEMA improperly disbursed funds, the names of those aid recipients "would provide no further insight into the operations of FEMA."²⁷³ As such, the court found that the public's interest in the aid recipient names was "outweighed by the increased privacy risks" posed by disclosure of those names.²⁷⁴

Redacting Identifying Information

Deletion of the identities of individuals mentioned in a document, with release of the remaining material, can provide protection for personal privacy while at the same time opening agency action to the light of public scrutiny.²⁷⁵ For example, in Department

²⁶⁸ Id. at 1199.

²⁶⁹ Id. at 1200.

²⁷⁰ Id. at 1205.

²⁷¹ Id.

²⁷² Id.

²⁷³ Id. at 1205 (quoting Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1271 (S.D. Fla. 2006)).

²⁷⁴ Id.

²⁷⁵ See Torres Consulting & Law Grp., LLC v. NASA, 666 F. App'x 643, 645 (9th Cir. 2016) (reversing district court's Exemption 6 finding regarding protection of tax and net earnings information and remanding for segregability analysis as "any privacy interest in payroll data after names, addresses, and social security numbers are redacted is trivial"); Kowack v. U.S. Forest Serv., 766 F.3d 1130, 1134 (9th Cir. 2014) (requiring agency to provide additional detail about whether substance of particular witness statements could be released without revealing identities of individuals who made those statements); Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 390 (D.C. Cir. 1987) (affirming district court's finding that redactions were proper where agency had "already given as much [unredacted information] as possible without unduly risking disclosure of the identities of the investigation targets"); Steese, Evans & Frankel, P.C. v. SEC, No. 10-01071, 2010 U.S. Dist. LEXIS 129401, at *34 (D. Colo. Dec. 7, 2010) (noting that "[t]he redacted reports and other information that the

of the Air Force v. Rose, the Supreme Court ordered the release of case summaries of disciplinary proceedings, provided that personal identifying information was deleted.²⁷⁶ Similarly, courts have ordered the disclosure of a variety of medical and health-related data after deletion of any item identifiable to a specific individual.²⁷⁷ Similarly, documents voluntarily submitted to the government by private citizens have been held releasable, as long as redactions are made of personally identifying information.²⁷⁸

SEC has disclosed to date are sufficient to inform the public about the extent and the nature of the employees' misconduct as well as the SEC's response to the same"); see also FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking"); cf. Mattachine Soc'y of Wash., D.C. v. DOJ, 267 F. Supp. 3d 218, 228 (D.D.C. 2017) (balancing significant privacy interest of third parties with significant public interest in extent to which government "surveilled, harassed, and/or terminated" "lesbian, gay, bisexual, and transgender federal employees" under E.O. 10,450 by ordering agency to replace third-party names in responsive records with "alphanumeric markers, which are to be uniquely identifiable and consistent throughout all documents produced") (Exemptions 6 and 7(C)).

²⁷⁶ 425 U.S. 352, 380-81 (1976); see Ripskis v. HUD, 746 F.2d 1, 4 (D.C. Cir. 1984) (noting that agency voluntarily released outstanding performance rating forms with identifying information deleted); Ferrigno v. DHS, No. 095878, 2011 WL 1345168, at *9 (S.D.N.Y. Mar. 29, 2011) (holding identity of supervisor in employment-related harassment complaint could be withheld because "the Supervisor's somewhat low rank, the relatively minor charge against him, and the weakness of the evidence all weigh against disclosure"); Aldridge v. U.S. Comm'r of Internal Revenue, No. 00-131, 2001 WL 196965, at *3 (N.D. Tex. Feb. 23, 2001) (determining that privacy interests of employees recommended for discipline could be protected by redacting their names); Hecht v. U.S. Agency for Int'l Dev., No. 95-263, 1996 WL 33502232, at *12 (D. Del. Dec. 18, 1996) (finding that privacy interests of government contractor's employees could be protected by withholding their names and addresses from biographical data sheets); Church of Scientology of Tex. v. IRS, 816 F. Supp. 1138, 1160 (W.D. Tex. 1993) (ordering agency to protect employees' privacy interests in their handwriting by typing handwritten records at requester's expense).

²⁷⁷ See Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1468-69 (D.C. Cir. 1983) (ordering disclosure of computerized lists of numbers and types of drugs routinely ordered by the congressional pharmacy); see also Dayton Newspapers, Inc. v. Dep't of the Air Force, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998) (ordering release of military-wide medical tort-claims database with "claimants' names, social security numbers, home addresses, home/work telephone numbers and places of employment" redacted), reconsidered in part on other grounds, 107 F. Supp. 2d 912 (S.D. Ohio 1999); Frets v. DOT, No. 88-0404, 1989 WL 222608, at *5 (W.D. Mo. Dec. 14, 1989) (ordering disclosure of drug reports of air traffic controllers with identities deleted).

²⁷⁸ See Billington v. DOJ, 258 F. App'x 348, 349 (D.C. Cir. 2007); see also Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 148 (D.D.C. 2007) (finding agency properly released text of consumer complaints while redacting personal information pertaining to individual complainants).

Nevertheless, in some situations courts have found that the deletion of personal identifying information may not be adequate to provide necessary privacy protection.²⁷⁹ The Supreme Court recognized this in Rose, and specifically held that if the District Court determined on remand that the deletions of personal references were not sufficient to safeguard privacy, then the summaries of disciplinary hearings should not be released.²⁸⁰ Following this line of reasoning, the Court of Appeals for the District of Columbia Circuit upheld the nondisclosure of public information contained in disciplinary files when the redaction of personal information would not be adequate to protect the privacy of the subjects because the requester could easily obtain and compare unredacted copies of the documents from public sources.²⁸¹

Furthermore, when requested information is "personal and unique" to the subjects of a record, courts have found that deletion of personal identifying information may not be adequate to provide the necessary privacy protection.²⁸² Indeed, as one court has put it, a determination of what constitutes identifying information requires

²⁷⁹ See, e.g., Alirez v. NLRB, 676 F.2d 423, 428 (10th Cir. 1982) (finding that deletion of names and other identifying data pertaining to small group of co-workers was simply inadequate to protect them from embarrassment or reprisals because requester could still possibly identify individuals) (Exemption 7(C)).

²⁸⁰ 425 U.S. at 381; see also, e.g., ACLU v. DOD, 389 F. Supp. 2d 547, 572 (S.D.N.Y. 2005) (declaring that for certain photographic and video images, "where the context compelled the conclusion that individual recognition could not be prevented without redaction so extensive as to render the images meaningless, [the court orders] those images not to be produced").

²⁸¹ Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987); see also, e.g., Marzen v. HHS, 825 F.2d 1148, 1152 (7th Cir. 1987) (concluding that redaction of "identifying characteristics" would not protect the privacy of a deceased infant's family because others could ascertain the identity and "would learn the intimate details connected with the family's ordeal"); Campaign for Family Farms v. Veneman, No. 99-1165, 2001 WL 1631459, at *3 (D. Minn. July 19, 2001) (finding that disclosure of zip codes and dates of signatures could identify signers of petition); Ligorner v. Reno, 2 F. Supp. 2d 400, 405 (S.D.N.Y. 1998) (finding that redaction of a complaint letter to the Office of Professional Responsibility would be inadequate to protect the identities of the individual accused of misconduct and of the accuser, because "public could deduce the identities of the individuals whose names appear in the document from its context").

²⁸² See Whitehouse v. U.S. Dep't of Labor, 997 F. Supp. 172, 175 (D. Mass. 1998) (discerning "no practical way" to sanitize "personal and unique" medical evaluation reports to prevent identification by knowledgeable reader); see, e.g., Ortiz v. HHS, 874 F. Supp. 570, 573-75 (S.D.N.Y. 1995) (finding that factors such as type style, grammar, syntax, language usage, writing style, and mention of facts "that would reasonably be known only by a few persons" could lead to identification of the author if an anonymous letter were released) (Exemptions 7(C) and 7(D)), aff'd on Exemption 7(D) grounds, 70 F.3d 729 (2d Cir. 1995).

both an objective analysis and an analysis "from the vantage point of those familiar with the mentioned individuals."²⁸³

"Glomar" Responses

In some circumstances a FOIA request can be narrowly targeted so that by its very terms it is limited to privacy-sensitive information pertaining to an identified or identifiable individual. In such circumstances, courts have recognized that redaction would not be adequate to protect the personal privacy interests at risk,²⁸⁴ and an agency may have to invoke the Glomar response, i.e., neither confirm nor deny the existence of any responsive records.²⁸⁵ Courts have endorsed Glomar responses to requests seeking records that might reveal whether an individual government employee was investigated for misconduct or disciplined, for example, because even to acknowledge the existence of such records would typically cause an unwarranted invasion of personal privacy.²⁸⁶ The

²⁸³ Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1565 (M.D. Fla. 1994). But see ACLU v. DOD, 389 F. Supp. 2d at 572 ("If, because someone sees the redacted pictures and remembers from earlier versions leaked to, or otherwise obtained by, the media that his image, or someone else's, may have been redacted from the picture, the intrusion into personal privacy is marginal and speculative, arising from the event itself and not the redacted image.").

²⁸⁴ See, e.g., Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992) (holding that "public availability" of an accused FBI agent's name does not defeat privacy protection and "would make redactions of [the agent's name in] the file a pointless exercise"); Claudio v. SSA, No. H-98-1911, 2000 WL 33379041, at *8 (S.D. Tex. May 24, 2000) (observing that redaction of documents concerning named subject "would prove meaningless"); Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 744 (E.D. Va. 1999) (noting that when requested documents relate to a specific individual, "deleting [her] name from the disclosed documents, when it is known that she was the subject of the investigation, would be pointless").

²⁸⁵ See, e.g., Cole v. FBI, No. 13-01205, 2015 WL 4622917, at *2 (D.D.C. July 31, 2015) (noting that Glomar response is appropriate where confirming or denying existence of records would itself cause cognizable harm under FOIA) (Exemptions 6 and 7(C)); Rahim v. FBI, 947 F. Supp. 2d 631, 648 (E.D. La. 2013) ("Defendants' Glomar response invoking exemptions 6 and 7(C) as to [an alleged informant] was proper."); Claudio, 2000 WL 33379041, at *8-9 (affirming agency's refusal to confirm or deny existence of any record reflecting any investigation of administrative law judge). See generally FOIA Update, Vol. VII, No. 1, at 3-4 ("OIP Guidance: Privacy 'Glomarization'").

²⁸⁶ See Wadhwa v. VA, 707 F. App'x 61, 64-65 (3d Cir. 2017) (upholding agency's refusal to confirm or deny existence of disciplinary records concerning removal of two VA doctors given plaintiff's failure to identify any FOIA public interest in disclosure of records); Beck v. DOJ, 997 F.2d 1489 (D.C. Cir. 1993) (affirming Glomar response to request for records concerning misconduct by two DEA agents) (Exemptions 6 & 7(C)); Lewis v. DOJ, 733 F. Supp. 2d 97, 112 (D.D.C. 2010) ("If an individual is the target of a FOIA request [for investigative records], the agency to which the FOIA request is submitted may provide a

Glomar response was also upheld in a case where the public disclosure of certain information by other agencies "diminished" the privacy of the third party subject, but where the requester failed to make a sufficient showing of public interest to outweigh even that diminished privacy interest.²⁸⁷ Courts have found Glomar responses to not be appropriate, however, when there is a substantial FOIA public interest in the requested information that outweighs the privacy interest,²⁸⁸ or when the existence of the requested information has been officially acknowledged.²⁸⁹ (For a detailed explanation of the Glomar response used in protecting privacy interests in law enforcement records, see the discussion in the chapter on Exemption 7(C).)

'Glomar' response, that is, the agency may refuse to confirm or deny the existence of records or information responsive to the FOIA request on the ground that even acknowledging the existence of responsive records constitutes an unwarranted invasion of the targeted individual's personal privacy.") (Exemptions 6 & 7(C)), denying motion for relief from judgment, 867 F. Supp. 2d 1 (D.D.C. 2011); Smith v. FBI, 663 F. Supp. 2d 1, 5 (D.D.C. 2009) ("Because . . . confirmation of records concerning '[a]ny adverse action or disciplinary reports on [named] Agent . . . ' would necessarily reveal the precise information Exemption 6 shields, the Glomar response was proper.") (Exemptions 6 & 7(C)).

²⁸⁷ See Taplin v. DOJ, 967 F. Supp. 2d 348, 355 (D.D.C. 2013) (finding that although "it is the law of this circuit that another agency's disclosure cannot altogether preclude [an agency] from asserting a Glomar response, the rule does not speak to the much narrower issue of whether such a disclosure can diminish a third party's privacy interest" and holding that third party's "privacy interest exists in a diminished capacity" where disclosures were made about him by judge and in sheriff's report, but finding that plaintiff had failed to establish public interest in disclosure sufficient to override even that diminished privacy interest) (Exemption 7(C)).

²⁸⁸ See Roth v. DOJ, 642 F.3d 1161, 1176 (D.C. Cir. 2011) (holding that the public's "general interest in knowing whether the FBI [wa]s withholding information" that could corroborate death-row inmate's claim of innocence overcame the FBI's Glomar response for three named individuals) (Exemption 7(C)); Parker v. EOUSA, 852 F. Supp. 2d 1, 10-13 (D.D.C. 2012) (finding that although an AUSA "has a valid privacy interest at stake in DOJ's disclosure of disciplinary documents about her," there is a countervailing "public interest in knowing how DOJ handles the investigation of unlicensed attorneys").

²⁸⁹ See, e.g., Janangelo v. Treasury Inspector Gen. for Tax Admin., 726 F. App'x 660, 661 (9th Cir. 2018) (holding that agency "did not waive its ability to make a so-called Glomar response" because the report sought "has not been 'officially acknowledged'"), cert. denied, No. 18-439, 2018 WL 4853506, at *1 (U.S. Nov. 13, 2018); see also ACLU v. CIA, 710 F.3d 422, 427 (D.C. Cir. 2013) (agency may not issue Glomar response if it has already publically acknowledged existence of records sought).