Exemption 7(C)

Exemption 7(C) provides protection for personal information in law enforcement records. This exemption is the law enforcement counterpart to Exemption 6. (See the discussions of the primary privacy-protection principles that apply to both exemptions under Exemption 6, above.) Exemption 7(C) provides protection for law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[1]

Despite the similarities in language between Exemptions 6 and 7(C) the relative sweep of the two exemptions can be significantly different. Whereas Exemption 6 routinely requires an identification and balancing of the relevant privacy and public interests, Exemption 7(C) can be more "categorized" in its application. Indeed, the Court of Appeals for the District of Columbia Circuit held in SafeCard Services v. SEC[2] that based upon the traditional recognition of the strong privacy interests inherent in law enforcement records, and the logical ramifications of United States Department of Justice v. Reporters Committee for Freedom of the Press,[3] the "categorical withholding" of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C).[4]

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

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

[3] 489 U.S. 749 (1989); see also Martin v. DOJ, 488 F.3d 446, 456 (D.C. Cir. 2007) ("The Supreme Court has observed that the statutory privacy right protected by Exemption 7(C) is not so limited as others." (citing Reporters Comm., 489 U.S. at 762)), reh'g denied, Nos. 05-5207 & 06-5048 (D.C. Cir. Aug. 3, 2007) (en banc); FOIA Update, Vol. X, No. 2, at 3-7 (discussing mechanics of privacy-protection decisionmaking process employed under Exemptions 6 and 7(C)).

[4] 926 F.2d at 1206; see, e.g., Thomas v. DOJ, 260 F. App'x 677, 679 (5th Cir. 2007) (continued...)

Certain other distinctions between Exemption 6 and Exemption 7(C) are apparent: in contrast with Exemption 6, Exemption 7(C)'s language establishes a lesser burden of proof to justify withholding in two distinct respects.[5] First, it is well established that the omission of the word "clearly" from the language of Exemption 7(C) eases the burden of the agency and stems from the recognition that law enforcement records are inherently more invasive of

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[4](...continued)
(recognizing that "[t]he Supreme Court has held as a categorical matter that a third party's request for law-enforcement records about a private citizen can reasonably be expected to invade that citizen's privacy"); Blanton v. DOJ, 64 F. App'x 787, 789 (D.C. Cir. 2003) (protecting identities of third parties contained in FBI files categorically, including those assumed to be deceased); Fiduccia v. DOJ, 185 F.3d 1035, 1047-48 (9th Cir. 1999) (protecting categorically records concerning FBI searches of house of two named individuals); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 896 (D.C. Cir. 1995) (restating that those portions of records in investigatory files which would reveal subjects, witnesses, and informants in law enforcement investigations are categorically exempt (citing SafeCard)); Schoenman v. FBI, 575 F. Supp. 2d 136, 159 (D.D.C. 2008) (quoting SafeCard for proposition that names and addresses of private individuals can be categorically protected under Exemption 7(C), but noting that "the same categorical conclusion does not necessarily apply under Exemption 6"); Long v. DOJ, 450 F. Supp. 2d 42, 68 (D.D.C. 2006) (finding categorical principle established in Reporters Committee to be "particularly applicable" where information at issue is maintained by government in computerized compilations), amended by 457 F. Supp. 2d 30 (D.D.C. 2006), amended further on reconsideration, 479 F. Supp. 2d 23 (D.D.C. 2007) (modifying amended order on other grounds) (appeal pending); Carp v. IRS, No. 00-5992, 2002 WL 373448, at *4-5 (D.N.J. Jan. 28, 2002) (holding that all information that identifies third parties is categorically exempt); Pusa v. FBI, No. CV-00-12384, slip op. at 8 (C.D. Cal. May 4, 2001) (finding certain information pertaining to third parties to be categorically exempt), aff'd, 31 F. App'x 567 (9th Cir. 2002); Coolman v. IRS, No. 98-6149, 1999 WL 675319, at *5 (W.D. Mo. July 12, 1999) (finding categorical withholding of third-party information in law enforcement records to be proper), summary affirmance granted, 1999 WL 1419039 (8th Cir. 1999); McNamera v. DOJ, 974 F. Supp. 946, 957-60 (W.D. Tex. 1997) (allowing categorical withholding of information concerning criminal investigation of private citizens); Straughter v. HHS, No. 94-0567, slip op. at 5 (S.D. W. Va. Mar. 31, 1995) (magistrate's recommendation) (affording per se protection under Exemption 7(C) for witnesses and third parties when requester has identified no public interest), adopted, (S.D. W. Va. Apr. 17, 1995). But see Kimberlin v. DOJ, 139 F.3d 944, 948 (D.C. Cir. 1998) (eschewing the categorical rule of nondisclosure for OPR files, and suggesting the use of a case-by-case balancing test involving consideration of the "rank of public official involved and the seriousness of misconduct alleged"); Davin v. DOJ, 60 F.3d 1043, 1060 (3d Cir. 1995) (ruling that the "government must conduct a document by document fact-specific balancing"); Konigsberg v. FBI, No. 02-2428, slip op. at 5-7 (D.D.C. May 27, 2003) (refusing to apply categorical rule to records on informant who allegedly was protected from prosecution by FBI, based upon exceptional circumstances presented); Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 730 n.5 (D. Md. 2001) (declining to accord categorical protection to third parties who purchased federally forfeited property), appeal dismissed voluntarily, No. 01-1537 (4th Cir. June 25, 2001).

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

privacy than "personnel and medical files and similar files."[6] Indeed, the "'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity'" has been repeatedly recognized.[7]

Second, the Freedom of Information Reform Act of 1986 further broadened the protection afforded by Exemption 7(C) by lowering the risk-of-harm standard from "would" to

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[6] See Cong. News Syndicate v. DOJ, 438 F. Supp. 538, 541 (D.D.C. 1977) (stating that "an individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo"); see also, e.g., Iglesias v. CIA, 525 F. Supp. 547, 562 (D.D.C. 1981).

[7] Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984)); see also Neely v. FBI, 208 F.3d 461, 464-66 (4th Cir. 2000) (finding that FBI Special Agents and third-party suspects have "substantial interest[s] in nondisclosure of their identities and their connection[s] to particular investigations"); Quiñon v. FBI, 86 F.3d 1222, 1230 (D.C. Cir. 1996) (ruling that "'[p]ersons involved in FBI investigations -- even if they are not the subject of the investigation -- "have a substantial interest in seeing that their participation remains secret"'" (quoting Fitzgibbon, 911 F.2d at 767 (quoting, in turn, King v. DOJ, 830 F.2d 210, 233 (D.C. Cir. 1987)))); Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (stating that persons named in FBI files have "strong interest in 'not being associated unwarrantedly with alleged criminal activity'" (quoting Fitzgibbon, 911 F.2d at 767)); Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904 (D.C. Cir. 1996) (finding that release of names of individuals, including nonsuspects, who attended public meeting that attracted attention of law enforcement officials would impinge upon their privacy); Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992) (finding that association of FBI "agent's name with allegations of sexual and professional misconduct could cause the agent great personal and professional embarrassment"); Dunkelberger v. DOJ, 906 F.2d 779, 781 (D.C. Cir. 1990) (refusing to confirm or deny existence of letter of reprimand or suspension of named FBI Special Agent); Bast v. DOJ, 665 F.2d 1251, 1254-55 (D.C. Cir. 1981) (ruling that government officials do not surrender all rights to personal privacy by virtue of public appointment); Leveto v. IRS, No. 98-285E, 2001 U.S. Dist. LEXIS 5791, at *17-18 (W.D. Pa. Apr. 10, 2001) (recognizing privacy interests of suspects, witnesses, interviewees, and investigators); Morales Cozier v. FBI, No. 1:99 CV 0312, slip op. at 16-17 (N.D. Ga. Sept. 25, 2000) (protecting identities of FBI support personnel and individuals who provided information to FBI; citing 'well-recognized and substantial privacy interest' in nondisclosure (quoting Neely, 208 F.3d at 464)); Franklin v. DOJ, No. 97-1225, slip op. at 10 (S.D. Fla. June 15, 1998) (magistrate's recommendation) (stating law enforcement officers, suspects, witnesses, innocent third parties, and individuals named in investigative files have substantial privacy interests in nondisclosure (citing Wichlacz v. U.S. Dep't of Interior, 938 F. Supp. 325, 330 (E.D. Va. 1996))), adopted, (S.D. Fla. June 26, 1998), aff'd per curiam, 189 F.3d 485 (11th Cir. 1999); Buros v. HHS, No. 93-571, slip op. at 10 (W.D. Wis. Oct. 26, 1994) (refusing to confirm or deny existence of criminal investigatory records concerning county official, even though subject's alleged mishandling of funds already known to public; "confirming . . . federal criminal investigation brushes the subject with an independent and indelible taint of wrongdoing"). But see Davin v. DOJ, No. 92-1122, slip op. at 9 (W.D. Pa. Apr. 9, 1998) (concluding that individuals' privacy interests became diluted during more than twenty years that had passed since investigation was conducted), aff'd, 176 F.3d 471 (3d Cir. 1999) (unpublished table decision).

"could reasonably be expected to."[8] This amendment to the Act eased the standard for evaluating a threatened privacy invasion through disclosure of law enforcement records.[9] One court, in interpreting the amended language, observed that it affords the agency "greater latitude in protecting privacy interests" in the law enforcement context.[10] Such information "is now evaluated by the agency under a more elastic standard; exemption 7(C) is now more comprehensive."[11]

Privacy Considerations

Under the balancing test that traditionally has been applied to both Exemption 6 and Exemption 7(C), the agency must first identify and evaluate the privacy interest(s), if any, implicated in the requested records.[12] But in the case of records related to investigations by criminal law enforcement agencies, the case law has long recognized, either expressly or implicitly, that "'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.'"[13]

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[8] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 9-12 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

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

[10] Wash. Post Co. v. DOJ, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at *32 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted, (D.D.C. Dec. 15, 1987), rev'd on other grounds & remanded, 863 F.2d 96 (D.C. Cir. 1988).

[11] Id.; see also Keys v. DOJ, 830 F.2d 337, 346 (D.C. Cir. 1987) (finding that the "government need not 'prove to a certainty that release will lead to an unwarranted invasion of personal privacy,'" at least not after the 1986 FOIA amendments (quoting Reporters Comm., 816 F.2d 730, 738 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989))); Nishnic v. DOJ, 671 F. Supp. 776, 788 (D.D.C. 1987) (holding phrase "could reasonably be expected to" to be more easily satisfied standard than phrase "likely to materialize").

[12] See, e.g., Associated Press v. DOD, 554 F.3d 274, 284 (2d Cir. 2009) ("The first question to ask in determining whether Exemption 7(C) applies is whether there is any privacy interest in the information sought."); Albuquerque Publ'g Co. v. DOJ, 726 F. Supp. 851, 855 (D.D.C. 1989) ("Our preliminary inquiry is whether a personal privacy interest is involved."); see also Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. DOJ, 503 F. Supp. 2d 373, 383 (D.D.C. 2007) (cautioning that even though more protection is afforded information compiled for law enforcement purposes, the agency must still prove that it is reasonably expected that disclosure would result in an unwarranted invasion of privacy); FOIA Update, Vol. X, No. 2, at 7 (advising that there first must be a viable privacy interest of an identifiable, living person in the requested information for any further consideration of privacy-exemption protection to be appropriate).

[13] Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting Branch v. FBI, 658 F. Supp. (continued...)

[13](...continued)
204, 209 (D.D.C. 1987)); accord Massey v. FBI, 3 F.3d 620, 624 (2d Cir. 1993) (same); Miller v. Bell, 661 F.2d 623, 631-32 (7th Cir. 1981) ("real potential for harassment"); see also Associated Press, 554 F.3d at 286-88 (finding that disclosure of Guantanamo detainees' identities, "both those who have suffered abuse and those who are alleged to have perpetrated abuse" "could subject them to embarrassment and humiliation" and whether detainees would want to voluntarily disclose information publicly is "inapposite to the privacy interests at stake"); Lesar v. DOJ, 636 F.2d 472, 488 (D.C. Cir. 1980) ("'It is difficult if not impossible, to anticipate all respects in which disclosure might damage reputation or lead to personal embarrassment and discomfort.'" (quoting Lesar v. DOJ, 455 F. Supp. 921, 925 (D.D.C. 1978))); Ruston v. DOJ, No. 06-0224, 2007 WL 809698, at *5 (D.D.C. Mar. 15, 2007) (agreeing that release of names and references of third parties could subject those individuals "to unanticipated and unwanted injury to their reputations, and to derogatory publicity or interferences arising from their connection to law enforcement"); Palacio v. DOJ, No. 00-1564, 2002 U.S. Dist. LEXIS 2198, at *9 (D.D.C. Feb. 11, 2002) (finding that release of individual's name in connection with criminal investigation may carry stigma and subject him to unnecessary public attention or harassment), summary affirmance granted, No. 02-5247, 2003 WL 242751 (D.C. Cir. Jan. 31, 2003); Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002) (deciding that release of names of federal inmates, some of whom had not been charged with or convicted of crimes, would "stigmatize these individuals and cause what could be irreparable damage to their reputations"); Perlman v. DOJ, No. 00 Civ. 5842, 2001 WL 910406, at *6 (S.D.N.Y. Aug. 13, 2001) (finding that release of names of individuals who provided information during investigation would subject them to "embarrassment, harassment or threats of reprisal"), aff'd in pertinent part, 312 F.3d 100, 106 (2d Cir. 2002) (recognizing that witnesses and third parties have "strong privacy interests" in not being identified as having been part of law enforcement investigation), vacated & remanded, 541 U.S. 970, on remand, 380 F.3d 110, 111-12 (2d Cir. 2004) (per curiam) (affirming previous holding); Times Picayune Publ'g Corp. v. DOJ, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) (recognizing that a "mug shot's stigmatizing effect can last well beyond the actual criminal proceeding"); Abraham & Rose, P.L.C. v. United States, 36 F. Supp. 2d 955, 957 (E.D. Mich. 1998) (noting that filing of tax lien against individual could cause "comment, speculation and stigma"); Anderson v. USPS, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (disclosing identities of interviewees and witnesses may result in embarrassment and harassment), aff'd, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision); Cujas v. IRS, No. 1:97-00741, 1998 U.S. Dist. LEXIS 6466, at *9 (M.D.N.C. Apr. 15, 1998) (finding that "third parties named in these law enforcement records have a very strong privacy interest in avoiding the stigma and embarrassment resulting from their identification as a person that is or was under investigation"), summary affirmance granted, No. 98-1641, 1998 WL 539686 (4th Cir. Aug. 25, 1998); Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at *20 (M.D. Fla. Oct. 1, 1997) (protecting third-party names to avoid harassment, embarrassment, and unwanted public attention); McNamera v. DOJ, 974 F. Supp. 946, 958 (W.D. Tex. 1997) (rejecting argument that individual already investigated by one agency cannot be stigmatized by acknowledgment of investigation by another agency); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (finding disclosure of identities of individuals excludable from U.S. "would result in derogatory inferences about and possible embarrassment to those individuals"); cf. Cerveny v. CIA, 445 F. Supp. 772, 776 (D. Colo. 1978) (finding mere mention of individual's name as subject of CIA file could be damaging to his or her reputation) (Exemption 6). But see Blanton v. DOJ, No. 93-2398, 1994 U.S. Dist. LEXIS 21444, at *8-12 (continued...)

Thus, Exemption 7(C) has been regularly applied to withhold references to persons who are not targets of investigations and who were merely mentioned in law enforcement files,[14]

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[13](...continued)
(W.D. Tenn. July 14, 1993) (holding that there is no privacy interest in mere mention of defense attorney's name in criminal file or in validity of law license when attorney represented requester at criminal trial) (Exemptions 6 and 7(C)).

[14] See Fabiano v. McIntyre, 146 F. App'x 549, 550 (3d Cir. 2005) (per curiam) (affirming district court decision protecting names of victims in child pornography photographs); Rugiero v. DOJ, 257 F.3d 534, 552 (6th Cir. 2001) (protecting identifying information about third parties); Shafizadeh v. ATF, No. 99-5727, 2000 WL 1175586, at *2 (6th Cir. Aug. 10, 2000) (protecting names of, and identifying information about, private individuals); Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (withholding names of third parties mentioned or interviewed in course of investigation); Halpern v. FBI, 181 F.3d 279, 297 (2d Cir. 1999) (same); Johnston v. DOJ, No. 97-2173, 1998 U.S. App. LEXIS 18557, at *2 (8th Cir. Aug. 10, 1998) (same); Gabel v. IRS, 134 F.3d 377, 377 (9th Cir. 1998) (protecting third-party names in Department of Motor Vehicles computer printout included in plaintiff's IRS file); Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904 (D.C. Cir. 1996) (finding that release of names of any individuals who attended public meeting that attracted attention of law enforcement officials would impinge upon their privacy); SafeCard Servs. v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1991) (protecting names of third parties); Banks v. DOJ, 538 F. Supp. 2d 228, 239-41 (D.D.C. 2008) (protecting names of third parties, including prisoners, mentioned in records and withholding in full "NCIC printouts" pertaining to third parties); Berger v. IRS, 487 F. Supp. 2d 482, 501 (D.N.J. 2007) (stating that "even if a document 'concerns' only Plaintiffs, any third party information nonetheless contained in that document would be properly withheld"), aff'd, 288 F. App'x 829 (3d Cir. 2008); Sutton v. IRS, No. 05-7177, 2007 WL 30547, at *6 (N.D. Ill. Jan. 4, 2007) (finding that third-party taxpayers and IRS personnel have an interest in maintaining the privacy of their personal information); Bogan v. FBI, No. 04-C-532-C, 2005 WL 1367214, at *7 (W.D. Wis. June 7, 2005) (protecting names of third parties merely mentioned in investigative file); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588-89 (N.D. W. Va. 2005) (protecting private information about homeowners who were interviewed and whose homes were tested as part of EPA investigation); Chourre v. IRS, 203 F. Supp. 2d 1196, 1201 (W.D. Wash. 2002) (holding that redaction of third-party taxpayer information was proper); Diaz v. BOP, No. 01-40070, slip op. at 6 (D. Mass. Dec. 20, 2001) (magistrate's recommendation) (withholding audiotape of monitored telephone conversation between plaintiff (a prison inmate) and his former trial attorney), adopted, (D. Mass. Feb. 7, 2002), aff'd, 55 F. App'x 5 (1st Cir. 2003); Amro v. U.S. Customs Serv., 128 F. Supp. 2d 776, 787 (E.D. Pa. 2001) (withholding names of "non-suspects arising during investigations"); W. Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 12 (D.D.C. 2000) (protecting address of complainant and "unrelated, incidental medical information about a third party"), aff'd, 22 F. App'x 14 (D.C. Cir. 2001); Murphy v. IRS, 79 F. Supp. 2d 1180, 1185 (D. Haw. 1999) (protecting identities of third parties); Feshbach v. SEC, 5 F. Supp. 2d 774, 785 (N.D. Cal. 1997) (withholding identities of third parties against whom SEC did not take action); Ajluni v. FBI, 947 F. Supp. 599, 604-05 (N.D.N.Y. 1996) (protecting identities of third parties merely mentioned in FBI files); Fritz v. IRS, 862 F. Supp. 234, 236 (W.D. Wis. 1994) (protecting name and address of person who purchased requester's seized car). But see Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 729 (D. Md. 2001) (rejecting protection of names and addresses of purchasers of (continued...)

as well as to persons of "investigatory interest" to a criminal law enforcement agency.[15] Indeed, the Supreme Court in DOJ v. Reporters Committee for Freedom of the Press placed strong emphasis on the propriety of broadly protecting the interests of private citizens whose names or identities are in a record that the government "happens to be storing."[16] More recently, in NARA v. Favish,[17] the Supreme Court likewise recognized that law enforcement files often contain information on individuals by "mere happenstance," and it strongly

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[14](...continued)
forfeited property), appeal dismissed voluntarily, No. 01-1537 (4th Cir. June 25, 2001).

[15] See, e.g., Neely, 208 F.3d at 464 (withholding names and identifying information of third-party suspects); Halpern, 181 F.3d at 297 (finding strong privacy interest in material that suggests person has at one time been subject to criminal investigation); O'Kane v. U.S. Customs Serv., 169 F.3d 1308, 1309 (11th Cir. 1999) (protecting home addresses of individuals whose possessions were seized by government); Spirko v. USPS, 147 F.3d 992, 998-99 (D.C. Cir. 1998) (protecting suspects' palm- and fingerprints, their interviews and discussions with law enforcement officers, and photographs of former suspects and their criminal histories); Computer Prof'ls, 72 F.3d at 904 (holding potential suspects would have their privacy impinged if names disclosed); McDonnell v. United States, 4 F.3d 1227, 1255 (3d Cir. 1993) (finding suspects have "obvious privacy interest in not having their identities revealed"); Massey, 3 F.3d at 624 (finding third parties' privacy interests in nondisclosure "potentially greater" than those of law enforcement officers); Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993) (reiterating "potential for harassment, reprisal or embarrassment" if names of individuals investigated by FBI disclosed); Davis v. DOJ, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (deciding that "embarrassment and reputational harm" would result from disclosure of taped conversations of individuals with boss of New Orleans organized crime family); Silets v. DOJ, 945 F.2d 227, 230 (7th Cir. 1991) (en banc) (protecting associates of Jimmy Hoffa who were subjects of electronic surveillance); Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 861-66 (D.C. Cir. 1981) (withholding identities of persons investigated but not charged, unless "exceptional interests militate in favor of disclosure"); Seized Prop. Recovery, Corp. v. U.S. Customs and Border Prot., 502 F. Supp. 2d 50, 58-60 (D.D.C. 2007) (upholding redaction of names and addresses of individuals whose property was seized as release would "cause comment, speculation and opprobrium"), appeal dismissed voluntarily, No. 07-5287, 2007 WL 2910069 (D.C. Cir. Oct. 5, 2007); Del- Turco v. FAA, No. 04-281, slip op. at 6-7 (D. Ariz. July 11, 2005) (protecting information concerning airline employees who were investigated for safety violations but against whom charges never were brought); Garcia v. DOJ, 181 F. Supp. 2d 356, 371 (S.D.N.Y. 2002) (protecting names, identities, addresses, and information pertaining to third parties who were of investigatory interest); Willis v. FBI, No. 99-CV-73481, slip op. at 18 (E.D. Mich. July 11, 2000) (magistrate's recommendation) (protecting identifying information concerning subject of FBI investigation), adopted, (E.D. Mich. Sept. 26, 2000).

[16] 489 U.S. 749, 780 (1989); see also id. at 774-75 (declaring that "it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen").

[17] 541 U.S. 157 (2004).

reinforced the protection available under Exemption 7(C).[18]

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

> One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.[19]

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

[19] Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978); see, e.g., Favish, 541 U.S. at 171 (finding privacy interests to be undiminished by deceased's status as high-level public official); Fabiano, 146 F. App'x at 549 (affirming withholding of names and telephone numbers of FBI Special Agent, FBI support employees, and non-FBI federal employee); Rugiero, 257 F.3d at 552 (upholding nondisclosure of identifying information about DEA agents and personnel); Robert v. Nat'l Archives, 1 F. App'x 85, 86 (2d Cir. 2001) (protecting government employee's name); Neely, 208 F.3d at 464 (withholding FBI Special Agents' names); Fiduccia v. DOJ, 185 F.3d 1035, 1043-45 (9th Cir. 1999) (withholding DEA and INS agents' names); Halpern, 181 F.3d at 296 (protecting identities of nonfederal law enforcement officers); Manna v. DOJ, 51 F.3d 1158, 1166 (3d Cir. 1995) (finding law enforcement officers have substantial privacy interest in nondisclosure of names, particularly when requester held high position in La Cosa Nostra); Jones v. FBI, 41 F.3d 238, 246 (6th Cir. 1994) (protecting names of FBI Special Agents and federal, state, and local law enforcement personnel); Becker v. IRS, 34 F.3d 398, 405 n.23 (7th Cir. 1994) (protecting initials, names, and phone numbers of IRS employees); Church of Scientology Int'l v. IRS, 995 F.2d 916, 920-21 (9th Cir. 1993) (deciding privacy interest exists in handwriting of IRS agents in official documents); Maynard, 986 F.2d at 566 (protecting names and initials of low-level FBI Special Agents and support personnel); Hale v. DOJ, 973 F.2d 894, 902 (10th Cir. 1992) (finding FBI employees have substantial privacy interest in concealing their identities), vacated & remanded on other grounds, 509 U.S. 918 (1993); Davis, 968 F.2d at 1281 (holding that "undercover agents" have protectible privacy interests); New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (finding that inspector general investigator has "interest in retaining the capability to perform his tasks effectively by avoiding untoward annoyance or harassment"); Miller, 661 F.2d at 630 ("It is not necessary that harassment rise to the level of endangering physical safety before the protections of 7(C) can be invoked."); Lesar, 636 F.2d at 487-88 (finding that FBI agents "have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment"); O'Keefe v. DOD, 463 F. Supp. 2d 317, 324 (E.D.N.Y. 2006) (protecting identities of DOD investigators); Mettetal v. DOJ, No. 2:04-CV-410, 2006 U.S. Dist. LEXIS 64157, at *10-12 (E.D. Tenn. Sept. 7, 2006) (protecting names of local law enforcement and non-FBI government personnel involved in plaintiff's criminal prosecution) (Exemptions 6 and 7(C)); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *5-6 (D. Minn. Oct. 24, 2005)

(continued...)

The Court of Appeals for the District of Columbia Circuit has established an approach to the issue of disclosing law enforcement names in those situations where allegations of wrongdoing are made. In the seminal case of Stern v. FBI,[20] the D.C. Circuit held "that the level of responsibility held by a federal employee" and the type of wrongdoing committed by that employee "are appropriate considerations" in this privacy analysis.[21] Under this framework, absent a demonstration of significant misconduct on the part of law enforcement personnel or other government officials, the overwhelming majority of courts have declared their identities exempt from disclosure pursuant to Exemption 7(C).[22] Even in instances where

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[19](...continued)
(protecting names of SEC staff involved in investigation); Summers v. DOJ, No. 98-1837, slip op. at 15 (D.D.C. Mar. 10, 2003) (approving FBI's decision to distinguish between low-level (or first-line) supervisors and high-level supervisors who may be more knowledgeable about investigation); Aldridge v. U.S. Comm'r of Internal Revenue, No. 7:00-CV-131, 2001 WL 196965, at *2 (N.D. Tex. Feb. 23, 2001) (withholding IRS employees' social security numbers, home addresses, phone numbers, birthdates, and direct dial telephone number of acting chief of IRS's Examinations Division).

[20] 737 F.2d 84 (D.C. Cir. 1984).

[21] Id. at 92-94 (protecting identities of lower-level employees, who were found only to be negligent, but ordering disclosure of identity of higher-level official who knowingly participated in cover-up).

[22] See, e.g., Manna, 51 F.3d at 1166 (finding unfounded complaints of government misconduct insufficient to outweigh law enforcement officers' substantial privacy interests); Hale, 973 F.2d at 901 (holding unsubstantiated allegations of government wrongdoing do not justify disclosing law enforcement personnel names); Davis, 968 F.2d at 1281 (protecting "undercover agents"); In re Wade, 969 F.2d 241, 246 (7th Cir. 1992) (protecting FBI Special Agent); Patterson v. FBI, 893 F.2d 595, 601 (3d Cir. 1990) (protecting FBI personnel); Johnson v. DOJ, 739 F.2d 1514, 1519 (10th Cir. 1984) (deciding that FBI Special Agents' identities are properly protectible absent evidence of impropriety in undisclosed material); Stanley v. U.S. Dep't of the Treasury, No. 06-072, 2007 WL 2025212, at *6 (N.D. Ind. July 9, 2007) (protecting records of investigation into low-level IRS employee's alleged misconduct as plaintiff did not assert any agency impropriety); MacLean v. DOD, No. 04-2425, slip op. at 16-17 (S.D. Cal. June 6, 2005) (protecting prosecutor's professional responsibility file because disclosure would associate him with alleged wrongful activity of which he was ultimately cleared), aff'd, 240 F. App'x 751 (9th Cir. 2007); Wolk v. United States, No. 04-832, 2005 WL 465382, at *5-7 (E.D. Pa. Feb. 28, 2005) (protecting personal background information about federal judicial nominee absent proven allegations of wrongdoing); Dorsett v. U.S. Dep't of the Treasury, 307 F. Supp. 2d 28, 38-39 (D.D.C. 2004) (withholding names of Secret Service Agents and personnel, FBI Special Agents, and other employees in face of allegations of misconduct); Lopez v. DOJ, No. 99-1722, slip op. at 10-12 (D.D.C. Jan. 21, 2003) (protecting names of government employees absent evidence of misconduct), summary affirmance granted in pertinent part, No. 03-5192, 2004 WL 626726 (D.C. Cir. Mar. 29, 2004); Robert v. DOJ, No. 99-CV-3649, slip op. at 16 (E.D.N.Y. Mar. 22, 2001) (withholding employees' names and personal information because disclosure could cause embarrassment in light of "plaintiff's far[-]reaching allegations of departmental wrongdoing"); Ray v. DOJ, 778 F. Supp. 1212, 1215 (S.D. Fla. 1991) (affirming (continued...)

there was a showing of misconduct by law enforcement personnel, courts have found that disclosure must serve a public interest that is greater than the strong privacy interests of these employees and with lower level employees in particular, privacy protection is still often afforded.[23] Conversely, when a court does find that a plaintiff has demonstrated significant misconduct by a government official, particularly when that official is a higher-level employee, courts have found that disclosure would serve a public interest and have ordered release of the names.[24] Courts have also ordered disclosure in other contexts when they find that there

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[22](...continued)
government may neither confirm nor deny existence of records concerning results of INS investigation of alleged misconduct of employee); see also Favish, 541 U.S. at 173-75 (holding that requester who asserts a "government misconduct public interest" must produce evidence that would be deemed believable by a "reasonable person" for there to exist a "counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records"); Aldridge, 2001 WL 196965, at *3 (ordering disclosure of recommendation concerning potential disciplinary action against IRS employees, but with individuals' names redacted).

[23] See Trentadue v. Integrity Comm., 501 F.3d 1215, 1234-36 (10th Cir. 2007) (finding that protection of "low-level" employees "who committed serious acts of misconduct" was proper, as disclosure of their names "would shed little light on the operation of the government"), reh'g denied, No. 04-4200, 2007 WL 4800708 (Nov. 20, 2007); People for the Ethical Treatment of Animals v. USDA, No. 06-930, 2007 WL 1720136, at *6 (D.D.C. June 11, 2007) (protecting identities of "low-level [agency] inspectors who engaged in misconduct in performing slaughterhouse inspections," since inspectors were not "high-level employees" and it was not a "well-publicized scandal"); Jefferson v. DOJ, No. 01-1418, slip op. at 11 (D.D.C. Nov. 14, 2003) (protecting details of IG investigation of government attorney-advisor with no decisionmaking authority as employee whose rank was not so high that public interest in disclosure could outweigh personal privacy interest in learning of any investigated alleged misconduct).

[24] See, e.g., Perlman v. DOJ, 312 F.3d 100, 107-09 (2d Cir. 2002) (ordering release of extensive details concerning IG investigation of former INS general counsel who was implicated in wrongdoing, and enunciating five-factor test to balance government employee's privacy interest against public interest in disclosure, including employee's rank, degree of wrongdoing and strength of evidence, availability of information, whether information sheds light on government activity, and whether information is related to job function or is personal in nature); Stern, 737 F.2d at 94 (ordering release of name of FBI Special Agent-in-Charge who directly participated in intentional wrongdoing, while protecting names of two mid-level agents whose negligence incidentally furthered cover-up); Homick v. DOJ, No. 98-00557, slip op. at 19-27 (N.D. Cal. Sept. 16, 2004) (ordering disclosure of identities of FBI Special Agents, government support personnel, and foreign, state, and local law enforcement officers as plaintiff produced specific evidence warranting a belief by a reasonable person that alleged government impropriety during three prosecutions might have occurred), reconsideration denied, (N.D. Cal. Oct. 27, 2004), appeal dismissed voluntarily, No. 04-17568 (9th Cir. July 5, 2005); Chang v. Dep't of the Navy, 314 F. Supp. 2d 35, 42-45 (D.D.C. 2004) (approving disclosure of details of nonjudicial punishment and letter of reprimand of commander of ship punished for dereliction of duty) (Privacy Act "wrongful disclosure" decision interpreting Exemption 6); Wood v. FBI, 312 F. Supp. 2d 328, 350-51 (D. Conn. 2004) (applying Perlman (continued...)

is a significant public interest in the records at issue that outweighs the privacy interest of the government official.[25]

Moreover, agencies' redaction of the identities of law enforcement personnel who perform clerical or administrative duties with respect to requested records, are routinely upheld as courts recognize that the access these employees have to information regarding official law enforcement investigations creates a unique privacy interest.[26] As the District Court for the District of Columbia has articulated, "the only imaginable contribution that this information could make would be to enable the public to seek out individuals who had been tangentially involved in investigations and to question them for unauthorized access to information as to what the investigation entailed and what other FBI personnel were involved."[27] The same district court has reaffirmed that identities of both FBI clerical

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[24](...continued)
standard in disallowing Exemption 6 protection and ordering release of information identifying FBI Special Agent with supervisory authority who was investigated for wrongdoing, but withholding names of investigators under Exemption 7(C)).

[25] See, e.g., Finkel v. U.S. Dep't of Labor, No. 05-5525, 2007 WL 1963163, at *11 (D.N.J. June 29, 2007) (finding that public interest in information on beryllium sensitization and OSHA's response thereto outweighed limited privacy interest in inspection officers' identification numbers); Darby v. U.S. Dep't of the Air Force, No. CV-S-00-0661, slip op. at 11-12 (D. Nev. Mar. 1, 2002) (ordering release of names of DOD IG investigators and other government employees involved in investigation, as there "is a 'strong' public interest in ensuring the integrity of federal agency investigations"), aff'd sub nom. Darby v. DOD, 74 F. App'x 813 (9th Cir. 2003); Hardy v. FBI, No. 95-883, slip op. at 21 (D. Ariz. July 29, 1997) (releasing identities of supervisory ATF agents and other agents publicly associated with Waco incident, finding that public's interest in Waco raid "is greater than in the normal case where release of agent names affords no insight into an agency's conduct or operations"); Butler v. DOJ, No. 86-2255, 1994 WL 55621, at *13 (D.D.C. Feb. 3, 1994) (releasing identities of supervisory FBI personnel upon finding of "significant" public interest in protecting requester's due process rights).

[26] See, e.g., Concepcion v. FBI, 606 F. Supp. 2d 14, 16 (D.D.C. 2009) (protecting names of and identifying information about FBI support personnel and DEA laboratory personnel as privacy protection "under similar circumstances routinely is upheld"); Amuso v. DOJ, 600 F. Supp. 2d 78, 97 (D.D.C. 2009) (finding agency's decision to withhold names of agency personnel, including support personnel, "amply supported" by case law); Fischer v. DOJ, 596 F. Supp. 2d 34, 47 (D.D.C. 2009) (upholding Exemption 7(C) to protect agency employees, including "support personnel," as "[t]he D.C. Circuit has consistently held that Exemption 7(C) protects the privacy interests of all persons mentioned in law enforcement records"); Singh v. FBI, 574 F. Supp. 2d 32, 49 (D.D.C. 2008) (stating that "[r]edaction of the names of federal law enforcement officers and support personnel . . . routinely is upheld"); Adamowicz v. IRS, 552 F. Supp. 2d 355, 370 (S.D.N.Y. 2008) (characterizing privacy interest of IRS personnel as "well-recognized"); Elliot v. FBI, No. 06-1244, slip op. at 10 (D.D.C. May 1, 2007) (finding FBI's decision to withhold names of law enforcement agency's support personnel is "amply" supported in case law), summary affirmance granted, No. 07-5164 (D.C. Cir. Feb. 14, 2008).

[27] Southam News v. INS, No. 85-2721, slip op. at 3 (D.D.C. Aug. 30, 1989); see also Judicial (continued...)

personnel and low-level FBI Special Agents are properly withheld as a routine matter under Exemption 7(C), even when they take part in a highly publicized investigation.[28]

The Supreme Court addressed the showing necessary to demonstrate a public interest in disclosure in NARA v. Favish.[29] There it ruled that a FOIA requester's assertion of a public interest based on "government wrongdoing" cannot rest on allegations, but instead must meet

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[27](...continued)
Watch v. United States, 84 F. App'x 335, 339 (4th Cir. 2004) (protecting names and home addresses of lower-level IRS employees absent compelling evidence of agency corruption, in order to avoid potential harassment) (Exemption 6); Halpern, 181 F.3d at 296 (concluding that disclosure of names of law enforcement personnel could subject them to "harassment in the conduct of their official duties"); Manna, 51 F.3d at 1166 (holding law enforcement officers involved in La Cosa Nostra investigation have substantial privacy interest in nondisclosure of their names); Singh, 574 F. Supp. 2d at 49 (concluding names of law enforcement personnel were properly withheld in light of government's declarations itemizing potential harms in disclosure, such as impairing future investigations or triggering hostility from former subjects); Cal-Trim, Inc. v. IRS, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting personal privacy of lower-level IRS employees); Morales Cozier v. FBI, No. 99-CV-0312, slip op. at 17 (N.D. Ga. Sept. 25, 2000) (withholding identities of FBI Special Agents who investigated requester after her professional contact with Cuban citizen; citing potential for "harassment, surveillance, or [undue] investigation of these [Special A]gents by foreign governments"); Hambarian v. IRS, No. 99-9000, 2000 U.S. Dist. LEXIS 6317, at *10 (C.D. Cal. Feb. 15, 2000) (protecting names and identification numbers of IRS employees "who participated in the investigation of" the requester).

[28] See Stone v. FBI, 727 F. Supp. 662, 663 n.1 (D.D.C. 1990) (protecting identities of FBI Special Agents and clerical employees who participated in investigation of assassination of Robert F. Kennedy); see also Hoffman v. Brown, No. 97-1145, 1998 WL 279575 (4th Cir. May 19, 1998) (per curiam) (withholding portions of transcript of unauthorized audiotaped conversations of VA Medical Center employees made during IG investigation); Wichlacz v. U.S. Dep't of Labor, 938 F. Supp. 325, 334 (E.D. Va. 1996) (protecting names of Park Police officers who investigated suicide of former Deputy White House Counsel, as well as psychiatrists who were listed on paper found in his wallet, because disclosure would cause "onslaught of media attention" and could cause camera crews to "besiege" their workplaces and homes), aff'd per curiam, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision); Exner v. DOJ, 902 F. Supp. 240, 243-45 (D.D.C. 1995) (protecting identities of deceased former FBI Special Agent and his two sons, one of whom FBI may have observed "in criminally suspect behavior" at requester's apartment, which requester claimed had been searched for political reasons involving her alleged relationship with President Kennedy), appeal dismissed, No. 95-5411, 1997 WL 68352 (D.C. Cir. Jan. 15, 1997); cf. Armstrong v. Executive Office of the President, 97 F.3d 575, 581-82 (D.C. Cir. 1996) (finding that agency had not adequately defended categorical rule for withholding identities of low-level FBI Special Agents) (Exemption 6).

[29] 541 U.S. 157.

a specific evidentiary standard.[30] (See also the further discussions of Favish's privacy-protection principles under Exemption 6, above.)

In Reporters Committee, the Supreme Court also found that substantial privacy interests can exist in personal information such as is contained in "rap sheets," even though the information has been made available to the general public at some place and point in time. Applying a "practical obscurity" standard,[31] the Court observed that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to [them]."[32] (See Exemption 7(D), Waiver of Confidentiality, below, for a

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[30] Id. at 174 ("[T]he requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."); see, e.g., Associated Press, 554 F.3d at 289 (finding plaintiff's argument "squarely foreclosed by Favish" as no evidence of abuse was produced); Boyd v. Crim. Div. of the DOJ, 475 F.3d 381, 388 (D.C. Cir. 2007) (agreeing that agency correctly applied Exemption 7(C) as plaintiff failed to make a "'meaningful evidentiary showing'" as required by Favish (quoting Favish, 475 U.S. at 175)), cert. denied sub nom. Boyd v. U.S. Marshals Servs., 128 S. Ct. 511 (2007), reh'g denied, 128 S. Ct. 975 (2008); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing higher standard, as well as continued need for showing of Reporters Committee-type public interest even when requester successfully alleges government wrongdoing).

[31] 489 U.S. at 762-63, 780.

[32] Id. at 764; see Edwards v. DOJ, No. 04-5044, 2004 WL 2905342, at *1 (D.C. Cir. 2004) (per curiam) (summarily affirming district court decision withholding information where plaintiff failed to point to specific information in public domain that duplicated withheld information); Fiduccia, 185 F.3d at 1047 (protecting FBI records reflecting information that is also available in "various courthouses"); Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1083 (6th Cir. 1998) (stating that clear privacy interest exists with respect to names, addresses, and other identifying information, even if already available in publicly recorded filings (citing DOD v. FLRA, 510 U.S. 487, 500 (1994) (Exemption 6))); Canning v. DOJ, 567 F. Supp. 2d 104, 112-13 (D.D.C. 2008) (finding newspaper articles submitted by plaintiff only demonstrate that general information on topic was available and not that specific information withheld was in public domain); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257-59 (D.D.C. 2005) (finding privacy interest in information concerning private individuals even though documents were previously distributed in unredacted form to symposium participants), appeal dismissed voluntarily, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006); Harrison v. Executive Office for U.S. Attorneys, 377 F. Supp. 2d 141, 147-48 (D.D.C. 2005) (protecting names and addresses of criminal defendants, case captions and numbers, attorney names and addresses, and case initiation, disposition, and sentencing dates even though information could be found by searches of public records); Times Picayune, 37 F. Supp. 2d at 478-79 (holding that public dissemination of "mug shot" after trial would trigger renewed publicity and renewed invasion of privacy of subject); Billington v. DOJ, 11 F. Supp. 2d 45, 61 (D.D.C. 1998) (finding that "agency is not compelled to release information just because it may have been disclosed previously"), aff'd in pertinent part, 233 F.3d 581 (D.C. Cir. 2000); Greenberg v. U.S. Dep't of Treasury, No. 87-898, 1998 U.S. Dist. LEXIS 9803, at *55 (D.D.C. July 1, 1998) (finding third party's privacy interest not extinguished because public may be aware

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

All but one court of appeals to have addressed the issue have found protectible privacy interests -- in conjunction with or in lieu of protection under Exemption 7(D) -- in the identities of individuals who provide information to law enforcement agencies.[33] Consequently, the

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[32](...continued)
he was target of investigation); Baltimore Sun Co. v. U.S. Customs Serv., No. 97-1991, slip op. at 4 (D. Md. Nov. 12, 1997) (holding that inclusion of poor copy of defendant's photograph in publicly available court record did not eliminate privacy interest in photo altogether); Lewis v. USPS, No. 96-3467, slip op. at 2 (D. Md. Apr. 30, 1997) (holding that fact that complainant's name is already known, whether disclosed by investigating agency or otherwise, is irrelevant; declaring that "limited oral disclosure" does not constitute waiver of exemption). But see CNA Holdings, Inc. v. DOJ, No. 07-2084, 2008 WL 2002050, at *6 (N.D. Tex. 2008) (finding demonstration that documents at issue were filed in a courthouse sufficient to show their location in public domain and ordering production); Lardner v. DOJ, No. 03-0180, 2005 U.S. Dist. LEXIS 5465, at *55-61 (D.D.C. Mar. 31, 2005) (ignoring element of "practical obscurity" in ordering release of names of unsuccessful pardon applicants and names of private individuals who supported clemency applications) (Exemption 6).

[33] See, e.g., Hoffman, 1998 WL 279575 (protecting "private citizen identifiers" in VA investigative report); Beard v. Espy, No. 94-16748, 1995 U.S. App. LEXIS 38269, at *2 (9th Cir. Dec. 11, 1995) (protecting complaint letter); Manna, 51 F.3d at 1166 (holding that interviewees and witnesses involved in criminal investigation have substantial privacy interest in nondisclosure of their names, particularly when requester held high position in La Cosa Nostra); McDonnell, 4 F.3d at 1256 (protecting identities of witnesses and third parties involved in criminal investigation of maritime disaster); Massey, 3 F.3d at 624 (declaring that disclosure of names of cooperating witnesses and third parties, including cooperating law enforcement officials, could subject them to "embarrassment and harassment"); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (withholding interviewees' names as "necessary to avoid harassment and embarrassment"); Cleary v. FBI, 811 F.2d 421, 424 (8th Cir. 1987) (deciding disclosure would subject "sources to unnecessary questioning concerning the investigation [and] to subpoenas issued by private litigants in civil suits incidentally related to the investigation"); Cuccaro v. Sec'y of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (holding that "privacy interest of . . . witnesses who participated in OSHA's investigation outweighs public interest in disclosure"); L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923 (11th Cir. 1984) (reasoning that disclosure of identities of employee-witnesses in OSHA investigation could cause "problems at their jobs and with their livelihoods"); Kiraly v. FBI, 728 F.2d 273, 279 (6th Cir. 1984) (finding that, in absence of public benefit in disclosure, informant's personal privacy interests do not lapse at death); New England Apple, 725 F.2d at 144-45 ("Disclosure could have a significant, adverse effect on this individual's private or professional life."); Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564-65 (D.C. Cir. 1982) (concurring opinion) (citing "risk of harassment" and fear of reprisals); Alirez v. NLRB, 676 F.2d 423, 427 (10th Cir. 1982) (holding that disclosure would result in "embarrassment or reprisals"); Lesar, 636 F.2d at 488 (""Those cooperating with law enforcement should not now pay the price of full disclosure of personal details."' (quoting Lesar, 455 F. Supp. at 925)); cf. Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 486 (2d Cir. 1999) (finding that HUD failed to prove that disclosure of documents would identify individuals). But see Cooper Cameron Corp. v. U.S. Dep't of Labor, (continued...)

names of witnesses and their home and business addresses have been held properly protectible under Exemption 7(C).[34] Additionally, Exemption 7(C) protection has been

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[33](...continued)
280 F.3d 539, 554 (5th Cir. 2002) (rebuffing idea of retaliation against employees who gave statements to OSHA investigator, and ordering disclosure of source-identifying content of statements despite fact that identifiable employee-witnesses' names already had been released in separate civil proceeding).

[34] See Lahr v. NTSB, No. 06-56717, 2009 WL 1740752, at *7-8 (9th Cir. June 22, 2009) (reversing district court and holding that eyewitnesses in investigation of crash of TWA F'light 800 have cognizable privacy interest in nondisclosure of their names to avoid unwanted contact by plaintiff and other entities); Coulter v. Reno, No. 98-35170, 1998 WL 658835, at *1 (9th Cir. Sept. 17, 1998) (protecting names of witnesses and of requester's accusers); Spirko, 147 F.3d at 998 (protecting notes and phone messages concerning witnesses); Computer Prof'ls, 72 F.3d at 904 (protecting names of witnesses); Manna, 51 F.3d at 1166 (deciding witnesses in La Cosa Nostra case have "substantial" privacy interest in nondisclosure of their names); L&C Marine, 740 F.2d at 922 (noting that "employee-witnesses . . . have a substantial privacy interest"); Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) ("[The requester] has mentioned no legitimate need for the witnesses' phone numbers and we can well imagine the invasions of privacy that would result should he obtain them."); Jarvis v. ATF, No. 07-00111, 2008 WL 2620741, at *12 (N.D. Fla. June 30, 2008) (protecting "names and specifics of those who gave evidence in the investigation" due to risk of "impassioned acts of retaliation directed by Plaintiff through the agency of others, even though he is now in prison"); Sinsheimer v. DHS, 437 F. Supp. 2d 50, 54-56 (D.D.C. 2006) (protecting names of witnesses and of plaintiff's co-workers because of public interest in encouraging cooperation and participation of agency employees in investigations of civil rights violations); Dean v. FDIC, 389 F. Supp. 2d 780, 794-96 (E.D. Ky. 2005) (withholding identifying information of third parties and witnesses in IG investigation); Brown v. EPA, 384 F. Supp. 2d 271, 278 (D.D.C. 2005) (recognizing that federal employees who were witnesses in an internal investigation have a "broad right to be protected from mischief -- within the workplace and without -- that could follow from the public disclosure of their identit[ies] as witnesses in a criminal investigation"); Johnson v. Comm'r of Internal Revenue, 239 F. Supp. 2d 1125, 1137 (W.D. Wash. 2002) (protecting identifying information of third parties and witnesses contacted during IRS investigation); Wayne's Mech. & Maint. Contractor, Inc. v. U.S. Dep't of Labor, No. 1:00-CV-45, slip op. at 9 (N.D. Ga. May 7, 2001) ("In the context of OSHA investigations, employee-witnesses have a substantial privacy interest regarding statements given about a work-related accident in light of the potential for embarrassment and retaliation that disclosure of their identity could cause."); Heggestad v. DOJ, 182 F. Supp. 2d 1, 13 (D.D.C. 2000) (withholding identities of certain grand jury witnesses); Foster v. DOJ, 933 F. Supp. 687, 692 (E.D. Mich. 1996) (protecting prospective witnesses); Crooker v. Tax Div. of the U.S. Dep't of Justice, No. 94-30129, 1995 WL 783236, at *18 (D. Mass. Nov. 17, 1995) (magistrate's recommendation) (holding names of witnesses and individuals who cooperated with government protected to prevent "undue embarrassment and harassment"), adopted, (D. Mass. Dec. 15, 1995), aff'd per curiam, 94 F.3d 640 (1st Cir. 1996) (unpublished table decision); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1566 (M.D. Fla. 1994) (ruling that witnesses, investigators, and other subjects of investigation have "substantial privacy interests"); Farese v. DOJ, 683 F. Supp. 273, 275 (D.D.C. 1987) (protecting names and number of family members of (continued...)

afforded to the identities of informants,[35] even when it was shown that "the information

[34](...continued)
participants in Witness Security Program, as well as funds authorized to each, because disclosure "would pose a possible danger to the persons named" or "might subject those persons to harassment"). But see Cooper Cameron, 280 F.3d at 545, 554 (holding names of three employee-witnesses exempt, yet ordering release of source-identifying content of their statements); Lipman v. United States, No. 3:97-667, slip op. at 3 (M.D. Pa. June 3, 1998) (releasing names of witnesses who testified at trial based upon assumption defendant had already received information under Jencks v. United States, 353 U.S. 657 (1957)), appeal dismissed voluntarily, No. 98-7489 (3d Cir. Feb. 23, 1999).

[35] See Fiduccia, 185 F.3d at 1044 (withholding names of informants); Quiñon v. FBI, 86 F.3d 1222, 1227, 1231 (D.C. Cir. 1996) (protecting informants' identities in absence of agency misconduct); Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (protecting names of persons who provided information to FBI); Computer Prof'ls, 72 F.3d at 904-05 (protecting names of informants, including name of company that reported crime to police, because disclosure might permit identification of corporate officer who reported crime); Manna, 51 F.3d at 1162 (safeguarding names of informants in La Cosa Nostra case); Jones, 41 F.3d at 246 (protecting informants' identities); McCutchen v. HHS, 30 F.3d 183, 189 (D.C. Cir. 1994) (protecting names of individuals alleging scientific misconduct); Koch v. USPS, No. 93-1487, 1993 U.S. App. LEXIS 26130, at *2 (8th Cir. Oct. 8, 1993) ("The informant's interest in maintaining confidentiality is considerable [because] the informant risked embarrassment, harassment, and emotional and physical retaliation."); Nadler v. DOJ, 955 F.2d 1479, 1490 (11th Cir. 1992) ("Disclosure of the identities of the FBI's sources will disclose a great deal about those sources but in this case will disclose virtually nothing about the conduct of the government."); Coleman v. DOJ, No. 02-79-A, slip op. at 11 (E.D. Va. Oct. 7, 2002) (protecting names and identifying information of people who aided in investigation of Ruby Ridge incident); LaRouche v. DOJ, No. 90-2753, 2001 U.S. Dist. LEXIS 25416, at *21 (D.D.C. July 5, 2001) (finding that informant's handwritten drawings could reveal identity); Gonzalez v. FBI, No. CV F 99-5789, slip op. at 18 (E.D. Cal. Aug. 11, 2000) (finding that privacy interest is not invalidated merely because person is confirmed informant); Unger v. IRS, No. 99-698, 2000 U.S. Dist. LEXIS 5260, at *12 (N.D. Ohio Mar. 28, 2000) (protecting "identities of private citizens who provided information to law enforcement officials"); Petterson v. IRS, No. 98-6020, slip op. at 8 (W.D. Mo. Apr. 22, 1999) (protecting informant's personal data); Pfannenstiel v. FBI, No. 98-0386, slip op. at 7 (D.N.M. Feb. 18, 1999) (withholding identities of confidential informants); Schlabach v. IRS, No. 98-0075, 1998 U.S. Dist. LEXIS 19579, at *2 (E.D. Wash. Nov. 10, 1998) (withholding personal information obtained from private citizens during investigation); Local 32B-32J, Serv. Employees Int'l Union v. GSA, No. 97-8509, 1998 WL 726000, at *9 (S.D.N.Y. Oct. 15, 1998) (finding that disclosure of names of individuals who provided information during investigation may subject them to threats of reprisal); Billington, 11 F. Supp. 2d at 63 (finding that witnesses' privacy interests outweigh public interest, even when witnesses appeared in court or participated in media interview); Thompson v. DOJ, No. 96-1118, slip op. at 24 (D. Kan. July 14, 1998) (protecting names and identifying information about individuals who provided or could provide information concerning investigation); Rosenberg v. Freeh, No. 97-0476, slip op. at 10 (D.D.C. May 13, 1998) (protecting names of individuals who cooperated and actively participated in investigation, as well as of "individuals who provided assistance to the operation because of their occupation or use of their property"); see also Wrenn v. Vanderbilt
(continued...)

provided to law enforcement authorities was knowingly false."[36]

Under the Reporters Committee "practical obscurity" standard courts have generally found that trial testimony does not diminish Exemption 7(C) protection.[37] Similarly, the privacy of someone who is identified only as a potential witness has been recognized under

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[35](...continued)
Univ. Hosp., No. 3:91-1005, slip op. at 14-15 (M.D. Tenn. June 10, 1993) (protecting identity of person who alleged discrimination), aff'd, 16 F.3d 1224 (6th Cir. 1994) (unpublished table decision).

[36] Gabrielli v. DOJ, 594 F. Supp. 309, 313 (N.D.N.Y. 1984); see also Pagan v. Treasury Inspector Gen. for Tax Admin., 231 F. App'x 99, 100 (2d Cir. 2007) ("Assuming arguendo that the requested documents (if, indeed, they exist) made false allegations, [appellant's] argument is unavailing. Even false statements are protected by the privacy exemption.").

[37] See Jones, 41 F.3d at 247 (holding fact that law enforcement employee chose to testify or was required to testify or otherwise come forward in other settings does not amount to waiver of personal privacy); Burge v. Eastburn, 934 F.2d 577, 579 (5th Cir. 1991) (affirming refusal, under Exemption 7(C), to confirm or deny existence of information in FBI files regarding individuals who testified at plaintiff's murder trial); Melville v. DOJ, No. 05-0645, 2006 WL 2927575, at *9 (D.D.C. Oct. 9, 2006) (emphasizing that privacy interest of law enforcement personnel or other third parties mentioned in responsive records is not diminished by fact they may have testified at trial); McDade v. Executive Office for U.S. Attorneys, No. 03-1946, slip op. at 11 (D.D.C. Sept. 29, 2004) ("A witness who testifies at a trial does not waive personal privacy."), summary affirmance granted, No. 04-5378, 2005 U.S. App. LEXIS 15259 (D.C. Cir. July 25, 2005); Boyd v. U.S. Marshals Serv., No. 99-2712, slip op. at 5 (D.D.C. Mar. 30, 2001) (finding that plaintiff's assertion that informant and others who testified at his criminal trial waived their right to privacy by testifying is "simply wrong"); Galpine v. FBI, No. 99-1032, slip op. at 12 (E.D.N.Y. Apr. 28, 2000) (reiterating that Exemption 7(C) protects "identities of individuals who testified at [requester's] criminal trial"); Rivera v. FBI, No. 98-0649, slip op. at 5 (D.D.C. Aug. 31, 1999) ("Individuals who testify at trial do not waive their privacy interest[s] beyond the scope of the trial record."); Robinson v. DEA, No. 97-1578, slip op. at 9 (D.D.C. Apr. 2, 1998) (stating that "[t]he disclosure during a trial of otherwise exempt information does not make the information public for all purposes"); Baltimore Sun, No. 97-1991, slip op. at 5 (D. Md. Nov. 21, 1997) (reasoning that request for original photograph of defendant because court's copy was unreproducible is evidence that "substance of photograph had not been fully disclosed to the public," so defendant retained privacy interest in preventing further dissemination); Dayton Newspapers v. Dep't of the Navy, No. C-3-95-328, slip op. at 42 (S.D. Ohio Sept. 12, 1996) (finding that victims who testified at trial retain privacy interests in their identities); cf. Bey v. FBI, No. 01-0299, slip op. at 4 (D.D.C. Aug. 2, 2002) (releasing most of list of telephone numbers (captured on court-ordered "pen register") that were dialed from telephone in plaintiff's house, because numbers were made public in open-court testimony at plaintiff's criminal trial). But see Linn v. DOJ, No. 92-1406, 1997 U.S. Dist. LEXIS 9321, at *17 (D.D.C. May 29, 1997) (finding no justification for withholding identities of witnesses who testified against requester at trial) (Exemptions 7(C) and 7(F)), appeal dismissed voluntarily, No. 97-5122 (D.C. Cir. July 14, 1997).

this exemption.[38]

Moreover, courts have repeatedly recognized that the passage of time will not ordinarily diminish the applicability of Exemption 7(C).[39] This has been found even in instances in which the information was obtained through past law enforcement investigations that are now viewed critically by the public.[40] In fact, the "practical obscurity" concept

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[38] See Rosenglick v. IRS, No. 97-747-18A, 1998 U.S. Dist. LEXIS 3920, at *9 (M.D. Fla. Mar. 10, 1998); Watson v. DOJ, 799 F. Supp. 193, 196 (D.D.C. 1992).

[39] See, e.g., Halpern, 181 F.3d at 297 ("Confidentiality interests cannot be waived through . . . the passage of time."); McDonnell, 4 F.3d at 1256 (deciding that passage of forty-nine years does not negate individual's privacy interest); Maynard, 986 F.2d at 566 n.21 (finding effect of passage of time upon individual's privacy interests to be "simply irrelevant"); Fitzgibbon, 911 F.2d at 768 (concluding that passage of more than thirty years irrelevant when records reveal nothing about government activities); Keys v. DOJ, 830 F.2d 337, 348 (D.C. Cir. 1987) (holding that passage of forty years did not "dilute the privacy interest as to tip the balance the other way"); King v. DOJ, 830 F.2d 210, 234 (D.C. Cir. 1987) (rejecting argument that passage of time diminished privacy interests at stake in records more than thirty-five years old); Diamond v. FBI, 707 F.2d 75, 77 (2d Cir. 1983) (noting that "the danger of disclosure may apply to old documents"); Ray v. FBI, 441 F. Supp. 2d 27, 35 (D.D.C. 2006) (rejecting argument that passage of time and retirement of FBI Special Agents diminish their privacy interests); Franklin v. DOJ, No. 97-1225, slip op. at 12 (S.D. Fla. June 15, 1998) (magistrate's recommendation) (rejecting argument that passage of time vitiates individual's privacy interest in nondisclosure), adopted, (S.D. Fla. June 26, 1998); Stone, 727 F. Supp. at 664 (explaining that FBI Special Agents who participated in an investigation over twenty years earlier, even one as well known as the RFK assassination, "have earned the right to be 'left alone' unless an important public interest outweighs that right"); see also Exner, 902 F. Supp. at 244 n.7 (holding that fact that incidents in question "occurred more than thirty years ago may, but does not necessarily, diminish the privacy interest"); Branch, 658 F. Supp. at 209 (holding that the "privacy interests of the persons mentioned in the investigatory files do not necessarily diminish with the passage of time"); cf. Schrecker v. DOJ, 349 F.3d 657, 664-65 (D.C. Cir. 2003) (approving FBI's use of "100-year rule," which presumes that individual is dead if birthdate appeared in documents responsive to request and was more than 100 years old, to determine if subject of requested record is still alive and has privacy interest); Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1183 (D.C. Cir. 1996) (ruling that "mere passage of time is not a per se bar to reliance on [E]xemption 1"). But see Davin v. DOJ, 60 F.3d 1043, 1058 (3d Cir. 1995) (finding that for some individuals, privacy interest may become diluted by passage of over sixty years, though under certain circumstances potential for embarrassment and harassment may endure); Outlaw v. U.S. Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. Mar. 25, 1993) (ordering release of twenty-five-year-old photographs of murder victim with no known surviving next of kin).

[40] See, e.g., Dunaway v. Webster, 519 F. Supp. 1059, 1079 (N.D. Cal. 1981) ("[The target of a McCarthy era investigation] may . . . deserve greater protection, because the connection to such an investigation might prove particularly embarrassing or damaging."); see also Campbell v. DOJ, 193 F. Supp. 2d 29, 40-41 (D.C. Cir. 2001) (finding that "the persons who were involved in [investigation of 1960s writer and civil rights activist] deserve protection of their reputations as well as recognition that they were simply doing a job that the cultural and

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expressly recognizes that the passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge but has long since faded from memory.[41]

An individual's Exemption 7(C) privacy interest likewise is not extinguished merely because a requester might on his own be able to "piece together" the identities of third parties whose names have been deleted.[42] Nor do persons mentioned in law enforcement records

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[40](...continued)
political climate at the time dictated").

[41] See Reporters Comm., 489 U.S. at 767 ("[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even when the information may at one time have been public."); Rose v. Dep't of the Air Force, 495 F.2d 261, 267 (2d Cir. 1974) (noting that "a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information") (Exemption 6), aff'd, 425 U.S. 352 (1976); see also Assassination Archives & Research Ctr. v. CIA, 903 F. Supp. 131, 133 (D.D.C. 1995) (finding that passage of thirty or forty years "may actually increase privacy interests, and that even a modest privacy interest will suffice" to protect identities). See generally Favish, 541 U.S. at 173-74 (according full privacy protection without any hesitation, notwithstanding passage of ten years since third party's death).

[42] Weisberg v. DOJ, 745 F.2d 1476, 1491 (D.C. Cir. 1984); see also Carpenter v. DOJ, 470 F.3d 434, 440 (1st Cir. 2006) (finding that privacy interest of subject is not terminated even if his identity as an informant could arguably be determined from another source); Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) (holding fact that requester obtained some information through other channels does not change privacy protection under FOIA and no waiver of third parties' privacy interests due to "inadequate redactions"); L&C Marine, 740 F.2d at 922 ("An individual does not lose his privacy interest under 7(C) because his identity . . . may be discovered through other means."); Lawyer's Comm. for Civil Rights v. U.S. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *21 (N.D. Cal. Sept. 30, 2008) (finding one's privacy interest in potentially embarrassing information is not 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) ("Plaintiff's claim that he personally 'knows' that the individual at issue would not object to the release of his name is legally irrelevant."); Canning v. DOJ, 567 F. Supp. 2d 85, 95 (D.D.C. 2008) (stating that agency's inadvertent failure to redact does not strip third party of privacy interests); Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *12 (D. Minn. Aug. 23, 2007) (noting that "it is inconsequential that [plaintiff] or the public could deduce the identities of staff members and third parties whose name and personal information have been redacted"); Judicial Watch, Inc. v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at *20 (D.D.C. Apr. 20, 2001) ("The fact that the requester might be able to figure out the individuals' identities through other means or that their identities have been disclosed elsewhere does not diminish their privacy interests . . . ."); Voinche v. FBI, No. 99-1931, slip op. at 13 n.4 (D.D.C. Nov. 17, 2000) ("The fact that Mr. Voinche [might have] learned of the identity of these individuals by reading a publication does not impair the privacy rights enjoyed by these three people."); Billington v. DOJ, 69 F. Supp. 2d 128, 137 (D.D.C. 1999) (deciding that disclosure of unredacted records due to administrative error did not "diminish the magnitude of the privacy interests of the individuals" involved), aff'd in pertinent part, 233 F.3d 581, 583 (D.C. Cir. 2000)
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lose all their rights to privacy merely because their names have been disclosed.[43]

[42](...continued)
(stating there was "nothing to add to the district court's sound reasoning" with respect to the withholdings under Exemption 7(C)); Cujas, 1998 U.S. Dist. LEXIS 6466, at *9 (reiterating fact that information available elsewhere does not diminish third-party privacy interests in such law enforcement records); Smith v. ATF, 977 F. Supp. 446, 500 (D.D.C. 1997) (finding fact that plaintiff "can guess" names withheld does not waive privacy interest); Master v. FBI, 926 F. Supp. 193, 198-99 (D.D.C. 1996) (protecting subjects of investigative interest even though plaintiffs allegedly know their names), summary affirmance granted, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision); cf. EDUCAP, Inc. v. IRS, No. 07-2106, 2009 WL 416428, at *4 (D.D.C. Feb. 18, 2009) ("There is nothing in the FOIA that precludes the government from relying on an otherwise applicable FOIA exemption when a non-FOIA statute requires disclosure."). But see Cooper Cameron, 280 F.3d at 553 (refusing to protect the content of three employee-witness statements after release of the witnesses' names, even though disclosure would result in linking each employee to his or her statement).

[43] See, e.g., Fiduccia, 185 F.3d at 1047 (concluding that privacy interests are not lost by reason of earlier publicity); Halpern, 181 F.3d at 297 ("Confidentiality interests cannot be waived through prior public disclosure . . . ."); Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (finding that even after subject's public acknowledgment of charges and sanction against him, he retained privacy interest in nondisclosure of "'details of investigation, of his misconduct, and of his punishment,'" and in "preventing speculative press reports of his misconduct from receiving authoritative confirmation from official source" (citing Bast v. DOJ, 665 F.2d 1251, 1255 (D.C. Cir. 1981))); Schiffer, 78 F.3d at 1410-11 (deciding fact that much of information in requested documents was made public during related civil suit does not reduce privacy interest); Jones, 41 F.3d at 247 (holding fact that law enforcement employee chose to testify or was required to testify or otherwise come forward in other settings does not amount to personal privacy waiver); Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992) (holding that "public availability" of accused FBI Special Agent's name does not defeat privacy protection and "would make redaction of [the agent's name in] the file a pointless exercise"); Fitzgibbon, 911 F.2d at 768 (concluding fact that CIA or FBI may have released information about individual elsewhere does not diminish the individual's "substantial privacy interests"); Bast, 665 F.2d at 1255 (finding that "previous publicity amounting to journalistic speculation cannot vitiate the FOIA privacy exemption"); Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 U.S. Dist. LEXIS 6367, at *21 (D.D.C. Jan. 30, 2007) (deciding fact that identities of third parties were disclosed in a related criminal trial does not diminish privacy interest); Swope v. DOJ, 439 F. Supp. 2d 1, 6 (D.D.C. 2006) (stating that individual's awareness that telephone conversation is being monitored does not negate privacy rights in further disclosure of personal information); Odle v. DOJ, No. 05-2711, 2006 WL 1344813, at *10 (N.D. Cal. May 17, 2006) (finding that public's knowledge of subject's involvement in trial does not eliminate any privacy interest in further disclosure); Shores v. FBI, 185 F. Supp. 2d 77, 83 (D.D.C. 2002) (deciding that privacy interests are not diminished by the fact that plaintiff "may deduce the identities of individuals through other means or that their identities have already been disclosed" (citing Fitzgibbon, 911 F.2d at 768, and Weisberg, 745 F.2d at 1491)); LaRouche, 2001 U.S. Dist. LEXIS 25416, at *30 (holding that "release of similar information in another case does not warrant disclosure of otherwise properly exempted material"); Ponder v. Reno, No. 98-3097, slip op. at 6 (D.D.C. Jan. 22, 2001) (deciding that the fact that the government "failed
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Similarly, "[t]he fact that one document does disclose some names . . . does not mean that the privacy rights of these or others are waived; it has been held that [requesters] do not have the right to learn more about the activities and statements of persons merely because they are mentioned once in a public document about the investigation."[44]

The Court of Appeals for the Sixth Circuit has found, however, that these privacy interests are distinguishable from the privacy interest in a mug shot material to an ongoing criminal proceeding.[45] Specifically, the Sixth Circuit determined that no privacy interests are implicated in the disclosure of a mug shot during "an ongoing criminal proceeding, in which the names of the defendants have already been divulged and in which the defendants themselves have already appeared in open court."[46] Thus, the Sixth Circuit found these

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[43](...continued)
to fully redact all agents' names does not constitute a waiver of Exemption 7(C)"); McGhghy v. DEA, No. C 97-0185, slip op. at 11 (N.D. Iowa May 29, 1998) (holding that "mere fact that individuals named in withheld documents may have previously waived their confidentiality interests, either voluntarily or involuntarily, does not mandate disclosure of withheld documents"), aff'd per curiam, No. 98-2989, 1999 U.S. App. LEXIS 16709 (8th Cir. July 13, 1999); Thomas v. Office of U.S. Attorney, 928 F. Supp. 245, 250 & n.8 (E.D.N.Y. 1996) (holding that despite public disclosure of some information about attorney's connection with crime family, he still retains privacy interests in preventing further disclosure), appeal dismissed, No. 93-CV-3128 (2d Cir. Oct. 29, 1996); Crooker, 1995 WL 783236, at *18 (holding that despite fact that requester may have learned identities of third parties through criminal discovery, Exemption 7(C) protection remains). But see ACLU v. FBI, 429 F. Supp. 2d 179, 193 (D.D.C. 2006) ("To the extent that a person may have retained a privacy interest in publicly made comments, that interest is certainly dissipated by the FBI's failure to redact his name from the entirety of the document."); Steinberg v. DOJ, 179 F.R.D. 366, 371 (D.D.C. 1998) (holding content of sources' interviews must be disclosed once agency disclosed their identities); cf. Grove v. CIA, 752 F. Supp. 28, 32 (D.D.C. 1990) (ordering FBI to further explain Exemption 7(C) withholdings in light of highly publicized nature of investigation and fact that CIA and Secret Service released other records pertaining to same individuals).

[44] Kirk v. DOJ, 704 F. Supp. 288, 292 (D.D.C. 1989); see also Favish, 541 U.S. at 171 (holding that "the fact that other pictures had been made public [does not] detract[] from the weighty privacy interests" in the remaining pictures); Lane v. Dep't of the Interior, 523 F.3d 1128, 1137 (9th Cir. 2008) (concluding that "notions of privacy in the FOIA exemption context encompass information already revealed to the public"); Kimberlin, 139 F.3d at 949 (reasoning that merely because subject of investigation acknowledged existence of investigation -- thus precluding Glomar response -- does not constitute waiver of subject's interest in keeping contents of OPR report confidential); Berger, 487 F. Supp. 2d at 502 (finding that agency's prior release of a list of names of third parties contacted during investigation does not allow for further disclosure of identifying information). But see Lissner v. U.S. Customs Serv., 241 F.3d 1220, 1224 (9th Cir. 2001) (finding disclosure of physical description of state law enforcement officers does not implicate privacy interests because officers' identities have already been released).

[45] See Detroit Free Press, Inc. v. DOJ, 73 F.3d 93 (6th Cir. 1996).

[46] See id. at 97 (ordering release of mug shot given "detailed circumstances" of case at hand
(continued...)

circumstances distinguishable from those in Reporters Committee, and so determined that the Supreme Court's ruling was not dispositive of the issue on appeal.[47]

Courts have at times reviewed the procedures agencies use to determine whether a person is still living or has died. For instance, the D.C. Circuit approved the FBI's methods for making this determination in Schrecker v. DOJ.[48] As described in Schrecker, the FBI used several steps to determine whether an individual mentioned in a record was alive or dead, including looking up the individual's name in Who Was Who, employing its "100-year rule" (which presumes that an individual is dead if his or her birthdate appears in the responsive documents and he or she would be over 100 years old), and using previous FOIA requests (institutional knowledge), a search of the Social Security Death Index (when the Social Security number appears in the responsive documents), and other "internal" sources.[49] When these methods failed to reveal that an individual was deceased the D.C. Circuit upheld the FBI's use of Exemption 7(C).[50]

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[46](...continued)
but not deciding "whether the release of a mug shot by a government agency would constitute an invasion of privacy in situations involving dismissed charges, acquittals, or completed criminal proceedings"); see also Beacon Journal Publ'g Co. v. Gonzalez, No. 05-1396, slip op. at 2 (N.D. Ohio Nov. 16, 2005) (ordering disclosure of "mug shots" under Sixth Circuit's decision in Detroit Free Press); Detroit Free Press, Inc. v. DOJ , No. 05-71601, slip op. at 1 (E.D. Mich. Oct. 7, 2005) (same). But see Times Picayune, 37 F. Supp. 2d at 478-79 (holding that public dissemination of "mug shot" after trial would trigger renewed publicity and renewed invasion of privacy of subject).

[47] Detroit Free Press, 73 F.3d at 97 (stating that Reporters Committee involved "rap sheets [that] were not germane to any active prosecution" and are "accorded a greater degree of privacy" as they "are not single pieces of information but, rather, compilations of many facts that may not otherwise be readily available from a single source").

[48] 349 F.3d at 663 (approving FBI's usual method of determining whether individual is living or dead); see also Johnson v. Executive Office for U.S. Attorneys, 310 F.3d 771, 775 (D.C. Cir. 2002) (approving of the agency's inquiries concerning the subject of a request, and refusing to establish a "brightline set of steps for an agency" to determine whether he or she is living or dead). But see also Davis v. DOJ, 460 F.3d 92, 103 (D.C. Cir. 2006) (clarifying that court's holding in Schrecker did not purport to affirm any set of search methodologies as per se sufficient).

[49] Schrecker, 349 F.3d at 663-66; see also Peltier v. FBI, No. 02-4328, slip op. at 21 (D. Minn. Oct. 24, 2006) (magistrate's recommendation) (finding that FBI properly determined whether individuals were living or deceased by following steps set out in Schrecker), adopted, (D. Minn. Feb. 9, 2007), aff'd, 563 F.3d 754 (8th Cir. 2009); Piper v. DOJ, 428 F. Supp. 2d 1, 3-4 (D.D.C. 2006) (same), aff'd, 222 F. App'x 1 (D.C. Cir. 2007), cert. denied, 128 S. Ct. 166 (2007); Peltier v. FBI, No. 03-905, 2005 WL 735964, at *14 (W.D.N.Y. Mar. 31, 2005) (same).

[50] Schrecker, 349 F.3d at 665.

In Davis v. Department of Justice[51] the D.C. Circuit revisited the issue of agency methods for determining whether a person is still living. In Davis, the D.C. Circuit was presented with an unusual fact pattern in which the request was for audiotapes, not documents.[52] It accordingly determined that the steps outlined in Schrecker were insufficient when analyzing the tapes, as there is "virtually no chance that a speaker will announce" any personal identifiers during an oral conversation.[53] The court concluded that "[i]n determining whether an agency's search is reasonable," courts must consider several factors, specifically "the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives."[54] The court remanded the case in Davis "to permit the agency an opportunity to evaluate the alternatives and either to conduct a further search or to explain satisfactorily why it should not be required to do so."[55]

The District Court for the District of Columbia's recent holding in Schoenman v. FBI[56] provides a detailed example of the steps agencies can take to comply with the D.C. Circuit's precedent.[57] In Schoenman, the Navy explained that to the extent the information is discernable from the file, it normally uses either the birth date and applies the "100-year rule," as described above, or uses a Social Security number to consult the list of deceased persons published by the Social Security Administration.[58] The records at issue in Schoenman did not contain birth dates or Social Security numbers, so the Navy conducted further research on the Internet using the third parties' names as they appeared in the records.[59] The Navy also articulated the steps taken to determine whether a former employee, whose name appeared in the record, was deceased. Specifically, the Navy contacted the center that stores personnel information for former employees; the Office of Personnel Management, which is responsible for federal civil retired pay; and the president of the Association of Retired Naval Investigative Service Agents to see if he or one of his members knew the individual.[60] The Navy also conducted numerous searches, including several news searches via LEXIS-NEXIS for obituaries, searches in two human resources databases used by the Navy personnel

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[51] 460 F.3d 92.

[52] Id. at 95.

[53] Id. at 104.

[54] See id. at 105.

[55] Id.

[56] 575 F. Supp. 2d 166 (D.D.C. 2008).

[57] Id. at 177 (warning agency that "it is required to make efforts to ascertain an individual's life status before invoking a privacy interest in connection with FOIA Exemption 7(C)"); see also Schoenman v. FBI, 576 F. Supp. 2d 3, 10 (D.D.C. 2008) (reminding another agency of the same).

[58] Schoenman, 575 F. Supp. 2d at 177.

[59] Id.

[60] Id. at 178.

department, and a search of the AUTO-TRACK database, which is a general public records database.[61] While the Navy was unable to ascertain whether certain individuals were alive or dead, the court found that the agency had taken reasonable steps in compliance with D.C. Circuit precedent to determine whether these individuals were deceased, and so appropriately protected their identities.[62]

Lastly, it is important to note that the privacy interest protected under Exemption 7(C) is only applicable to "individual" privacy interests, as also described in Exemption 6, above.[63] Consequently, corporations or business associations do not generally possess a protectible privacy interest under Exemption 7(C).[64] The exceptions to this limitation are closely held corporations or small businesses where disclosure concerning the financial makeup of the businesses would reveal the owners' personal finances.[65] This expectation of privacy can be diminished, however, with regard to matters in which that individual is acting in a business

[61] Id.

[62] Id.; see also Schoenman, 576 F. Supp. 2d at 11 (approving efforts to determine whether FBI legal attache was alive or dead, and even though no determination was reached, upholding redaction of name).

[63] See, e.g., Reporters Comm., 489 U.S. at 764 n.16 (citing various authorities supporting the proposition that privacy rights belong to individuals); Sims v. CIA, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); see also FLRA v. VA, 958 F.2d 503, 509 (2d Cir. 1992) (holding that the same degree of privacy interest is required to trigger balancing under Exemptions 6 and 7(C)).

[64] See, e.g., Aguirre v. SEC, 551 F. Supp. 2d 33, 57 (D.D.C. 2008) (finding third party e-mails containing business discussions are not protected as "there is a clear distinction between one's business dealings, which obviously have an affect on one's personal finances, and financial information that is inherently personal in nature"); Cohen v. EPA, 575 F. Supp. 425, 429 (D.D.C. 1983) (stating that Exemption 7(C) "does not apply to information regarding professional or business activities"); cf. Judicial Watch, Inc. v. FDA, 449 F.3d 141 (D.C. Cir. 2006) (upholding the redaction of business names and addresses, as well as names of business employees as necessary to protect the privacy interests of individuals to be safe from physical violence) (Exemption 6).

[65] See, e.g., Consumers' Checkbook, Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1051 (D.C. Cir. 2009) (stating that the D.C. Circuit has "recognized substantial privacy interests in business-related financial information for individually-owned or closely-held businesses") (Exemption 6); Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1230 (D.C. Cir. 2008) (finding privacy interest in data concerning farms because disclosure would reveal private personal financial information of owners) (Exemption 6); see also Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1189 (8th Cir. 2000) ("An overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity fails to serve the exemption's purpose of protecting the privacy of individuals.") (Exemption 6).

capacity.[66]

Public Interest

Under the traditional Exemption 7(C) analysis, once a privacy interest has been identified and its magnitude has been assessed, it is balanced against the magnitude of any recognized public interest that would be served by disclosure.[67] Under Reporters Committee, the standard of public interest to consider is one specifically limited to the FOIA's "core

[66] See, e.g., Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1089 (D. Or. 1998) (concluding that cattle owners who violated federal grazing laws have "diminished expectation of privacy" in their names when that information related to their commercial interests) (Exemptions 6 and 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 interest in home addresses from which they also operate businesses), appeal dismissed voluntarily, No. 96-5373 (D.C. Cir. May 19, 1997) (Exemption 6).

[67] See Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (explaining that once agency shows that privacy interest exists, court must balance it against public's interest in disclosure); Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904 (D.C. Cir. 1996) (finding that after privacy interest found, court must identify public interest to be served by disclosure); Massey v. FBI, 3 F.3d 620, 624-25 (2d Cir. 1993) (holding that once agency establishes that privacy interest exists, that interest must be balanced against value of information in furthering FOIA's disclosure objectives); Church of Scientology Int'l v. IRS, 995 F.2d 916, 921 (9th Cir. 1993) (remanding case because district court failed to determine whether public interest in disclosure outweighed privacy concerns); Grine v. Coombs, No. 95-342, 1997 U.S. Dist. LEXIS 19578, at *19 (W.D. Pa. Oct. 10, 1997) (requiring balancing of privacy interest and extent to which it is invaded against public benefit that would result from disclosure); Thomas v. Office of U.S. Attorney, 928 F. Supp. 245, 250 (E.D.N.Y. 1996) (observing that since personal privacy interest in information is implicated, court must inquire whether any countervailing factors exist that would warrant invasion of that interest); Globe Newspaper Co. v. FBI, No. 91-13257, 1992 WL 396327, at *4 (D. Mass. Dec. 29, 1992) (finding public interest in disclosing amount of money government paid to officially confirmed informant guilty of criminal wrongdoing outweighs informant's de minimis privacy interest); Church of Scientology v. IRS, 816 F. Supp. 1138, 1160 (W.D. Tex. 1993) (concluding that while employees have privacy interest in their handwriting, that interest does not outweigh public interest in disclosure of information contained in documents not otherwise exempt); see also NARA v. Favish, 541 U.S. 157, 174-75 (2004) (holding that "only when the FOIA requester has produced evidence to satisfy [a belief by a reasonable person] will there exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records"); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 571 (S.D.N.Y. 1989) (balancing plaintiff's interest in disclosure of names of individuals listed in INS Lookout Book on basis of ideological exclusion provision against excluded individuals' privacy interests); *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing balancing of privacy interests and public interest); FOIA Update, Vol. X, No. 2, at 7.

purpose" of "shed[ding] light on an agency's performance of its statutory duties."[68] Accordingly, information that does not reveal the operations and activities of the government does not satisfy the public interest requirement.[69] As a result, courts have consistently refused to recognize any public interest, as defined by Reporters Committee, in disclosure of information sought to assist someone in challenging their conviction.[70] Indeed, a FOIA

[68] DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989); see also Dayton Newspapers, Inc. v. U.S. Dep't of the Navy, 109 F. Supp. 2d 768, 775 (S.D. Ohio 1999) (concluding that questionnaire responses by court-martial members were properly withheld because the "information contained therein sheds no light on the workings of the government").

[69] See Reporters Comm., 489 U.S. at 773 (finding that purpose of FOIA "is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct").

[70] See, e.g., Peltier v. FBI, 563 F.3d 754, 764 (8th Cir. 2009) (holding that "a prisoner may not override legitimate privacy interests recognized in Exemption 7(C) simply by pointing to the public's interest in fair criminal trials or the even-handed administration of justice"); Thomas v. DOJ, 260 F. App'x 677, 679 (5th Cir. 2007) (finding no public interest as plaintiff was "seek[ing] to learn about prosecutorial misconduct, not the [agency's] misconduct"); Oguaju v. United States, 288 F.3d 448, 450 (D.C. Cir. 2002) (finding that plaintiff's "personal stake in using the requested records to attack his convictions does not count in the calculation of the public interest"), vacated & remanded, 541 U.S. 970, on remand, 378 F.3d 1115 (D.C. Cir. 2004) (reaffirming prior decision); Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (ruling that requester's wish to establish his own innocence does not create FOIA-recognized public interest); Hale v. DOJ, 973 F.2d 894, 901 (10th Cir. 1992) (finding no FOIA-recognized public interest in death-row inmate's allegation of unfair trial); Landano v. DOJ, 956 F.2d 422, 430 (3d Cir. 1991) (finding no public interest in disclosure of identities of individuals involved in murder investigation because such release would not shed light on how FBI fulfills its responsibilities), cert. denied on Exemption 7(C) grounds, 506 U.S. 868 (1992), rev'd & remanded on other grounds, 508 U.S. 165 (1993); Burge v. Eastburn, 934 F.2d 577, 580 (5th Cir. 1991) (concluding that "requester's need, however significant, does not warrant disclosure"); Clifton v. U.S. Postal Inspection Serv., 591 F. Supp. 2d 10, 12 (D.D.C. 2008) (stating that "the plaintiff's Brady argument is both misplaced and ineffective"); Taylor v. DOJ, 257 F. Supp. 2d 101, 110 (D.D.C. 2003) (finding no public interest in disclosure of third-party information that requester asserted might assist him in challenging his conviction), reconsideration denied, 268 F. Supp. 2d 34 (D.D.C. 2003), appeal dismissed sub nom. Taylor v. FBI, No. 03-5111, 2003 WL 22005968 (D.C. Cir. Aug. 19, 2003); Galpine v. FBI, No. 99-1032, slip op. at 13 (E.D.N.Y. Apr. 28, 2000) (restating that requests for exculpatory evidence are "'outside the proper role of FOIA'" (quoting Colon v. EOUSA, No. 98-0180, 1998 WL 695631, at *5 (D.D.C. Sept. 29, 1998))); Fedrick v. DOJ, 984 F. Supp. 659, 664 (W.D.N.Y. 1997) (magistrate's recommendation) (finding that requester's personal interest in seeking information for use in collateral challenge to his conviction does not raise "FOIA-recognized interest"), adopted, No. 95-558 (W.D.N.Y. Oct. 28, 1997), aff'd sub nom. Fedrick v. Huff, 165 F.3d 13 (2d Cir. 1998) (unpublished table decision); Smith v. ATF, 977 F. Supp. 446, 499 (D.D.C. 1997) (holding that requester's personal interest in obtaining exculpatory statements does not give him greater rights under FOIA); Thomas, 928 F. Supp. at 251 (holding that prisoner's personal interest in information to challenge his

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requester's private need for information in connection with litigation plays no part in determining whether disclosure is warranted.[71]

Courts have also held that no public interest exists in federal records that pertain to alleged misconduct by state officials;[72] such an attenuated interest "falls outside the ambit of

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[70](...continued)
conviction "does not raise a FOIA-recognized interest that should be weighed against the subject's privacy interests"); Durham v. USPS, No. 91-2234, 1992 WL 700246, at *2 (D.D.C. Nov. 25, 1992) (holding "Glomar" response appropriate even though plaintiff argued that information would prove his innocence), summary affirmance granted, No. 92-5511 (D.C. Cir. July 27, 1993); Johnson, 758 F. Supp. at 5 ("Resort to Brady v. Maryland as grounds for waiving confidentiality [under Exemptions 7(C) and 7(D)] is . . . outside the proper role of the FOIA. Exceptions cannot be made because of the subject matter or [death-row status] of the requester."). But see Lipman v. United States, No. 3:97-667, slip op. at 4 (M.D. Pa. June 3, 1998) (making exceptional finding of public interest in plaintiff's quest to discover whether government withheld Brady material).

[71] See Massey, 3 F.3d at 625 ("[The] mere possibility that information may aid an individual in the pursuit of litigation does not give rise to a public interest."); Joslin v. U.S. Dep't of Labor, No. 88-1999, slip op. at 8 (10th Cir. Oct. 20, 1989) (finding no public interest in release of documents sought for use in private tort litigation); Rogers v. Davis, No. 08-177, 2009 WL 213034, at *2-4 (E.D. Mo. Jan. 28, 2009) (finding no public interest in documents sought for use in employment discrimination action against agency); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1197 (N.D. Cal. 2006) (finding no public interest in disclosure of documents sought for use in plaintiff's employment discrimination case); Meserve v. DOJ, No. 04-1844, 2006 U.S. Dist. LEXIS 56732, at *23-24 (D.D.C. Aug. 14, 2006) (holding that request seeking information in order to pursue motion for new trial and motion to vacate or set aside sentence does not involve qualifying public interest); Garcia v. DOJ, 181 F. Supp. 2d 356, 372 (S.D.N.Y. 2002) (holding that a request seeking information in furtherance of private litigation falls outside "the ambit of FOIA's goal of public disclosure of agency action"); Exner v. DOJ, 902 F. Supp. 240, 244 & n.8 (D.D.C. 1995) (explaining requester's interest in pursuing legal remedies against person who entered her apartment does not pertain to workings of government); Bruscino v. BOP, No. 94-1955, 1995 WL 444406, at *9 (D.D.C. May 15, 1995) (concluding no public interest in release of information concerning other inmates sought for use in private litigation); Andrews v. DOJ, 769 F. Supp. 314, 317 (E.D. Mo. 1991) (deciding no public interest in satisfaction of private judgments). But see Butler v. DOJ, No. 86-2255, 1994 WL 55621, at *5-6 (D.D.C. Feb. 3, 1994) (ordering identities of supervisory FBI personnel disclosed because of "significant" public interest in protecting requester's due process rights in his attempt to vacate sentence).

[72] See Landano, 956 F.2d at 430 (discerning "no FOIA-recognized public interest in discovering wrongdoing by a state agency"); Garcia, 181 F. Supp. 2d at 374 ("The discovery of wrongdoing at a state as opposed to a federal agency . . . is not the goal of FOIA."); LaRouche v. DOJ, No. 90-2753, 2001 U.S. Dist. LEXIS 25416, at *20 (D.D.C. July 5, 2001) ("The possible disclosures of state government misconduct is not information that falls within a public interest FOIA [was] intended to protect."); Thomas, 928 F. Supp. at 251 (recognizing that FOIA cannot serve as basis for requests about conduct of state agency). But see Lissner
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the public interest the FOIA was enacted to serve."[73] Moreover, any special expertise claimed by the requester is irrelevant in assessing any public interest in disclosure.[74] In NARA v. Favish, the Supreme Court held that Exemption 7(C) "requires the person requesting the information to establish a sufficient reason for the disclosure" of the requested records.[75]

Courts have found a distinction between the public interest that can exist in an overall subject that relates to a FOIA request and the public interest that might or might not be served by disclosure of the particular records that are responsive to a given FOIA request.[76] The key consideration is whether disclosure of the particular record portions at issue would serve an identified public interest and therefore warrant the overriding of a personal privacy

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[72](...continued)
v. U.S. Customs Serv., 241 F.3d 1220, 1223 (9th Cir. 2001) (finding that public interest exists in Custom Service's handling of smuggling incident despite fact that information pertained to actions of state law enforcement officers).

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

[74] See Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) (holding that plaintiff's prior EEO successes against agency do not establish public interest in disclosure of third-party names in this investigation); Massey, 3 F.3d at 625 (finding that the identity of the requesting party and the use that that party plans to make of the requested information have "no bearing on the assessment of the public interest served by disclosure"); Stone v. FBI, 727 F. Supp. 662, 668 n.4 (D.D.C. 1990) (stating that court looks to public interest served by release of information, "not to the highly specialized interests of those individuals who understandably have a greater personal stake in gaining access to that information"). But cf. Manna v. DOJ, 51 F.3d 1158, 1166 (3d Cir. 1995) (deciding that although court does not usually consider requester's identity, fact that requester held high position in La Cosa Nostra is certainly material to protection of individual privacy).

[75] See Favish, 541 U.S. at 172 (stating that requester must demonstrate both "that the public interest sought to be advanced [by disclosure] is a significant one" and that disclosure of the "information [requested] is likely to advance that interest"); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing public interest standard adopted in Favish, as well as required "nexus" between requested information and public interest asserted); cf. CEI Wash. Bureau, Inc. v. DOJ, 469 F.3d 126, 129 (D.C. Cir. 2006) (remanding for possible "evidentiary hearing[]" needed to resolve "factual disputes" regarding "extent of" both privacy interests and public interests involved).

[76] See ACLU of N. Cal. v. DOJ, No. 04-4447, 2005 WL 588354, at *13 (N.D. Cal. Mar. 11, 2005) (ruling that "it was not sufficient for the plaintiffs to show [public] interest in only the general subject area of the request"); Elec. Privacy Info. Ctr. v. DOD, 365 F. Supp. 2d 98, 102 (D.D.C. 2004) (stating that "[t]he fact that [the requester] has provided evidence that there is some media interest in data mining as an umbrella issue does not satisfy the requirement that [it] demonstrate interest in the specific subject of [its] FOIA request").

interest in the Exemption 7(C) balancing process.[77]

Furthermore, unsubstantiated allegations of official misconduct are insufficient to establish a public interest in disclosure: the Supreme Court in NARA v. Favish made it clear that "bare suspicion" of misconduct is inadequate and that a requester must produce evidence that would be credible in the eyes of a reasonable person.[78] When a requester

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[77] See, e.g., Peltier v. FBI, 563 F.3d 754, 765-66 (8th Cir. 2009) (upholding Exemption 7(C) redactions because the court was "not convinced that there is a substantial nexus" between request and requester's asserted public interest, and finding that any public benefit from disclosure is "too uncertain and remote"); KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) (rejecting an assertion that "the public interest at stake is the right of the public to know" about a controversial event, because on careful analysis the particular record segments at issue "do not provide information about" that subject); Lopez v. EOUSA, 598 F. Supp. 2d 83, 89 (D.D.C. 2009) (holding that agency's Vaughn Index demonstrates that disclosure of specific information withheld is not likely to advance any significant public interest, "even if the plaintiff could establish that the public has a significant interest in the material he is seeking"); Seized Prop. Recovery Corp., 502 F. Supp. 2d at 59 (finding no "appropriate nexus" between disclosure of names and addresses of individuals whose property is seized and the public interest in how Customs performs its duties); see also 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"). But see Judicial Watch, Inc. v. U.S. Secret Serv., 579 F. Supp. 2d 151, 154 (D.D.C. 2008) (finding that disclosure of names of those requesting access to the White House would shed light on why visitors came to the White House).

[78] 541 U.S. at 172; see, e.g., Boyd v. Crim. Div. of the DOJ, 475 F.3d 381, 388 (D.C. Cir. 2007) (stating that an alleged single instance of a Brady violation would not suffice to show a pattern of government wrongdoing), cert. denied sub nom., Boyd v. U.S. Marshals Servs., 128 S. Ct. 511 (2007), reh'g denied, 128 S. Ct. 975 (2008); Oguaju, 288 F.3d at 451 (holding that "bald accusations" of prosecutorial misconduct are insufficient to establish public interest); Spirko v. USPS, 147 F.3d 992, 999 (D.C. Cir. 1998) (finding no public interest in names and information pertaining to suspects and law enforcement officers absent any evidence of alleged misconduct by agency); Enzinna v. DOJ, No. 97-5078, 1997 WL 404327, at *1 (D.C. Cir. June 30, 1997) (finding that without evidence that AUSA made misrepresentation at trial, public interest in disclosure is insubstantial); Quiñon v. FBI, 86 F.3d 1222, 1227, 1231 (D.C. Cir. 1996) (holding that in absence of evidence FBI engaged in wrongdoing, public interest is "insubstantial"); Schiffer, 78 F.3d at 1410 (finding "little to no" public interest in disclosure when requester made unsubstantiated claim that FBI's decision to investigate him had been affected by "undue influence"); McCutchen v. HHS, 30 F.3d 183, 189 (D.C. Cir. 1994) (finding "negligible" public interest in disclosure of identities of agency scientists who did not engage in scientific misconduct); Beck v. DOJ, 997 F.2d 1489, 1492-94 (D.C. Cir. 1993) (holding that agency properly "Glomarized" request for records concerning alleged wrongdoing by two named employees; no public interest absent any evidence of wrongdoing or widespread publicity of investigation); KTVY-TV, 919 F.2d at 1470 (allegations of "possible neglect"); Ruston v. DOJ, No. 06-0224, 2007 WL 809698, at *5 (D.D.C. Mar. 15, 2007) (stating that "vague allegations of fraud, conspiracy and waste of taxpayer dollars" are insufficient); Butler v. DEA, No. 05-1798, 2005 U.S. Dist. LEXIS 40942, at *13-14 (D.D.C. Feb. 16, 2006) (finding that (continued...)

asserts government misconduct as the public interest in disclosure, that requester must make a "meaningful evidentiary showing" in order to provide a public interest "counterweight" to the privacy interest.[79]

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[78](...continued)
plaintiff's bald assertions of misconduct were not sufficient to establish public interest), aff'd, No. 06-5084, 2006 U.S. App. LEXIS 20472 (D.C. Cir. Aug. 7, 2006); Brown v. EPA, 384 F. Supp. 2d 271, 279-81 (D.D.C. 2005) (applying Favish and holding that the plaintiff failed to produce "evidence that would warrant a belief by a reasonable person that the alleged [g]overnment impropriety might have occurred"); Peltier v. FBI, No. 03-905, 2005 WL 735964, at *15 (W.D.N.Y. Mar. 31, 2005) (applying Favish and finding "no evidence of any illegality on the part of the FBI," despite opinions from two courts of appeals recognizing government misconduct during the investigation and prosecution of plaintiff's underlying criminal case), aff'd, 218 F. App'x 30 (2d Cir. 2007); Shores v. FBI, 185 F. Supp. 2d 77, 83 (D.D.C. 2002) (finding no public interest in unsubstantiated assertion that certain FBI Special Agents committed unlawful acts); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 25 (D.D.C. 1998) (rejecting plaintiffs' "post-hoc rationalization of public interest" in FBI investigation because they had not even suggested FBI wrongdoing during investigation); Ligorner v. Reno, 2 F. Supp. 2d 400, 405 (S.D.N.Y. 1998) (when considering privacy interests of person accused of misconduct, public interest is "de minimis"); Exner, 902 F. Supp. at 244-45 & n.9 (finding allegation of FBI cover-up of "extremely sensitive political operation" provides "minimal at best" public interest); Triestman v. DOJ, 878 F. Supp. 667, 673 (S.D.N.Y. 1995) (finding no substantial public interest in disclosure when request seeks information concerning possible investigations of wrongdoing by named DEA agents); Buros v. HHS, No. 93-571, slip op. at 10 (W.D. Wis. Oct. 26, 1994) (holding even though subject's potential mishandling of funds already known to public, "confirming . . . federal criminal investigation brushes the subject with an independent and indelible taint of wrongdoing"); Williams v. McCausland, No. 90-7563, 1994 WL 18510, at *12 (S.D.N.Y. Jan. 18, 1994) (protecting identities of government employees accused of improper conduct) (Exemptions 6 and 7(C)).

[79] Favish, 541 U.S. at 173-75 ("Only when the FOIA requester has produced evidence sufficient to satisfy this standard will there exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records."); see, e.g., ACLU v. DOD, 543 F.3d 59, 88 (2d Cir. 2008) (noting, as government misconduct was conceded, that public interest in disclosure of photographs depicting prisoner abuse by government forces in Iraq and Afghanistan was "strong"), application to extend time to file petition for cert. granted, No. 08A1068 (J. Ginsburg, May 29, 2009); Aguirre v. SEC, 551 F. Supp. 2d 33, 56-57 (D.D.C. 2008) (finding evidentiary standard "easily met" as allegations are documented in Senate Report uncovering potential improprieties by SEC staff); see also Peltier v. FBI, 563 F.3d 754, 765 (8th Cir. 2009) (emphasizing that requester's production of evidence that government improprieties might have occurred only establishes a public interest that must then be weighed). But see Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 567-69 (1st Cir. 1992) (finding public interest in disclosure of unsubstantiated allegations against two senior officials); McLaughlin v. Sessions, No. 92-0454, 1993 U.S. Dist. LEXIS 13817, at *18 (D.D.C. Sept. 22, 1993) (reasoning that because request seeks information to determine whether FBI investigation was improperly terminated, requester's interest in scope and course of investigation constitutes recognized public interest which must be balanced against privacy interests of named individuals).

Balancing Process

If a requester fails to identify a public interest in disclosure and there is a privacy interest in the requested material, the Court of Appeals for the District of Columbia Circuit has held "[w]e need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time."[80]

If a requester does identify a public interest that qualifies for consideration under Reporters Committee,[81] the requester must also demonstrate that the public interest in disclosure is sufficiently compelling to, on balance, outweigh legitimate privacy interests.[82]

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[80] Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989) (Exemption 6) [hereinafter NARFE]; see also Beck v. DOJ, 997 F.2d 1489, 1494 (D.C. Cir. 1993) (observing that because request implicates no public interest at all, court "'need not linger over the balance; something . . . outweighs nothing every time'" (quoting NARFE, 879 F.2d at 879) (Exemptions 6 and 7(C)); Fitzgibbon v. CIA, 911 F.2d 755, 768 (D.C. Cir. 1990) (same); Shoemaker v. DOJ, No. 03-1258, slip op. at 7 (C.D. Ill. May 19, 2004) (concluding that documents were properly withheld where the plaintiff could not identify a public interest, "let alone any substantial public interest to outweigh the privacy concerns claimed by [the government]"), aff'd, 121 F. App'x 127 (7th Cir. 2004); King v. DOJ, 586 F. Supp. 286, 294 (D.D.C. 1983) ("Where the requester fails to assert a public interest purpose for disclosure, even a less than substantial invasion of another's privacy is unwarranted."), aff'd, 830 F.2d 210 (D.C. Cir. 1987).

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

[82] See Associated Press v. DOD, 554 F.3d 274, 284-91 (2d Cir. 2009) (reversing district court ruling and finding that Guantanamo detainees have substantial privacy interest that is not outweighed by any minimal public interest that might be served by disclosure); Associated Press v. DOJ, 549 F.3d 62, 66 (2d Cir. 2008) (finding plaintiff failed to demonstrate how disclosure of John Walker Lindh's commutation petition "would in any way shed light on the DOJ's conduct" in order to warrant disclosing the "private, personal information" contained in that petition); Senate of P.R. v. DOJ, 823 F.2d 574, 588 (D.C. Cir. 1987) (holding that general interest of legislature in "getting to the bottom" of a controversial investigation is not sufficient to overcome "substantial privacy interests"); Adamowicz v. IRS, 552 F. Supp. 2d 355, 369-70 (S.D.N.Y. 2008) (finding plaintiffs' asserted public interests "too speculative to overcome the well-recognized, weighty privacy interests of IRS personnel and third-parties"); Morales Cozier v. FBI, No. 99-CV-0312, slip op. at 18 (N.D. Ga. Sept. 25, 2000) (concluding that public interest in knowing what government is up to in relation to investigation of individuals having contact with Cubans is not furthered by disclosing government employees' names and identifying information); Schrecker v. DOJ, 74 F. Supp. 2d 26, 34 (D.D.C. 1999) (finding requester's "own personal curiosity" about names of third parties and agents insufficient to outweigh privacy interests), rev'd on other grounds, 254 F.3d 162, 166 (D.C. Cir. 2001); Times Picayune Publ'g Corp. v. DOJ, 37 F. Supp. 2d 472, 482 (E.D. La. 1999) (describing public interest in public figure's "mug shot" as "purely speculative" and therefore readily outweighed by privacy interest); Ajluni v. FBI, 947 F. Supp. 599, 605 (N.D.N.Y. 1996) ("In the absence of any strong countervailing public interest in disclosure, the privacy interests of the individuals who are the subjects of the redacted material must prevail."); Fitzgibbon v. U.S. Secret Serv., 747 F.

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When this burden is met, courts have found that the balance tilts in favor of disclosure and that release of third party information is justified.[83] In the wake of Reporters Committee, the

[82](...continued)
Supp. 51, 59 (D.D.C. 1990) (holding public interest in alleged plot in United States by agents of now deposed dictatorship insufficient to overcome "strong privacy interests"); Stone v. FBI, 727 F. Supp. 662, 667-68 n.4 (D.D.C. 1990) ("[N]ew information considered significant by zealous students of the RFK assassination investigation would be nothing more than minutia of little or no value in terms of the public interest."); see also Ctr. to Prevent Handgun Violence, 981 F. Supp. 20, 23-24 (D.D.C. 1997) (finding "minuscule privacy interest" in identifying sellers in multiple-sales gun reports in comparison to public interest in scrutinizing ATF's performance of its duty to enforce gun control laws and to curtail illegal interstate gun trafficking).

[83] See, e.g., ACLU v. DOD, 543 F.3d 59, 86-87 (2d Cir. 2008) (finding no "cognizable privacy interest" in redacted photographs depicting prisoner abuse and stating there is a "significant public interest in the disclosure"), application to extend time to file petition for cert. granted, No. 08A1068 (J. Ginsburg, May 29, 2009); Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 554 (5th Cir. 2002) (viewing a "general public interest in monitoring" a specific OSHA investigation as sufficient to overcome employee-witnesses' privacy interests against employer retaliation); Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 98 (6th Cir. 1996) (discussing how public disclosure of mug shots could potentially serve public interest of subjecting the government to public oversight); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 895-96 (D.C. Cir. 1995) (noting that when individual had publicly offered to help agency, disclosure of records concerning that fact might be in public interest by reflecting "agency activity" in how it responded to offer of assistance); Rosenfeld v. DOJ, 57 F.3d 803, 811-12 (9th Cir. 1995) (making finding of public interest in disclosure of names of subjects of investigatory interest because disclosure would serve public interest by shedding light on FBI actions and showing whether and to what extent FBI "abused its law enforcement mandate by overzealously investigating a political protest movement"); Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 567-69 (1st Cir. 1992) (making finding of public interest in disclosure of unsubstantiated allegations); Dunkelberger v. DOJ, 906 F.2d 779, 782 (D.C. Cir. 1990) (finding some cognizable public interest in "FBI Special Agent's alleged participation in a scheme to entrap a public official and in the manner in which the agent was disciplined"); Hidalgo v. FBI, 541 F. Supp. 2d 250, 255-56 (D.D.C. 2008) (ordering disclosure of records reflecting any misconduct in agency's relationship with third party informant as case was "atypical" and "plaintiff has made enough of a showing to raise questions about possible agency misconduct"); Lardner v. DOJ, No. 03-0180, 2005 U.S. Dist. LEXIS 5465, at *62-64 (D.D.C. Mar. 31, 2005) (finding that release of identities of unsuccessful pardon applicants would shed light on government's exercise of pardon power in "important ways"); Homick v. DOJ, No. 98-00557, slip op. at 19-20, 22-23 (N.D. Cal. Sept. 16, 2004) (making finding of public interest in disclosure of names of FBI and DEA Special Agents, and of state, local, and foreign law enforcement officers, on basis that disclosure would show whether government officials acted negligently or perhaps otherwise improperly in performance of their duties); Bennett v. DEA, 55 F. Supp. 2d 36, 41 (D.D.C. 1999) (ordering release of informant's rap sheet after finding "very compelling" evidence of "extensive government misconduct" in handling "career" informant); Chasse v. DOJ, No. 98-207, slip op. at 11 (D. Vt. Jan. 12, 1999) (magistrate's recommendation) (deciding that Exemption 7(C) does not apply to information regarding job-related activities of high-level
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public interest standard ordinarily has been found not to be satisfied when FOIA requesters seek law enforcement information pertaining to living persons.[84]

Indeed, in Reporters Committee, the Supreme Court emphasized the appropriateness of "categorical balancing" under Exemption 7(C) as a means of achieving "workable rules" for

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[83](...continued)
INS officials alleged to have deceived members of congressional task force) (Privacy Act wrongful disclosure case), adopted, (D. Vt. Feb. 9, 1999), aff'd, No. 99-6059 (2d Cir. Apr. 6, 2000); Or. Natural Desert Ass'n v. U.S. Dep't of the Interior, 24 F. Supp. 2d 1088, 1093-94 (D. Or. 1998) (finding that public interest in knowing how government enforces and punishes violations of land-management laws outweighs privacy interests of cattle trespassers who admitted violations) (Exemptions 6 and 7(C)).

[84] See, e.g., Spirko v. USPS, 147 F.3d 992, 999 (D.C. Cir. 1998) (recognizing strong privacy interests of suspects and law enforcement officers when requested documents neither confirm nor refute plaintiff's allegations of government misconduct); Abraham & Rose, 138 F.3d at 1083 (stating that public may have interest in learning how IRS exercises its power over collection of taxes but that this does not mean that identity or other personal information concerning taxpayers will shed light on agency's performance) (Exemption 6); Quiñon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (finding insufficient public interest in disclosing individuals mentioned in FBI files when no evidence of wrongdoing; even if individuals had engaged in wrongdoing, such misconduct would have to shed light on agency's action); Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (recognizing "little to no" public interest in disclosure of persons in FBI file, including some who provided information to FBI, when no evidence of FBI wrongdoing); Schwarz v. INTERPOL, No. 94-4111, 1995 U.S. App. LEXIS 3987, at *7 (10th Cir. Feb. 28, 1995) (ruling that disclosure of any possible information about whereabouts of requester's "alleged husband" is not in public interest); Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993) (holding that disclosure of information concerning low-level FBI employees and third parties not in public interest); KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) (stating that disclosing identities of witnesses and third parties would not further plaintiff's unsupported theory that post office shootings could have been prevented by postal authorities); Fitzgibbon, 911 F.2d at 768 (stating that "there is no reasonably conceivable way in which the release of one individual's name . . . would allow citizens to know 'what their government is up to'" (quoting Reporters Comm., 489 U.S. at 773)); Pemco Aeroplex, Inc. v. U.S. Dep't of Labor, No. 01-AR-1421, slip op. at 5 (N.D. Ala. Dec. 11, 2001) (finding no public interest in disclosing identities of employees who completed race-discrimination questionnaire); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 29 (D.D.C. 1998) (holding that privacy interests of individuals mentioned in FBI surveillance tapes and transcripts obtained in arms-for-hostages investigation clearly outweigh any public interest in disclosure); Stone, 727 F. Supp. at 666-67 (stating that disclosing identities of low-level FBI Special Agents who participated in RFK assassination investigation is not in public interest); see also Fischer v. DOJ, 596 F. Supp. 2d 34, 47 (D.D.C. 2009) (stating that question of whether third party was deceased was irrelevant as plaintiff had not identified any public interest in disclosure); cf. Nation Magazine,71 F.3d at 895 (finding that "in some, perhaps many" instances when third party seeks information on named individual in law enforcement files, public interest will be "negligible"; but when individual had publicly offered to help agency, disclosure of records concerning that fact might be in public interest by reflecting "agency activity" in how it responded to offer of assistance).

processing FOIA requests.[85] In so doing, it recognized that entire categories of cases can properly receive uniform disposition "without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided."[86] This approach, in conjunction with other elements of Reporters Committee and traditional Exemption 7(C) principles, subsequently led the D.C. Circuit in SafeCard Services v. SEC to largely eliminate the need for case-by-case balancing in favor of "categorical" withholding of individuals' identities in law enforcement records.[87]

In SafeCard, the plaintiff sought information pertaining to an SEC investigation of manipulation of SafeCard stock, including "names and addresses of third parties mentioned in witness interviews, of customers listed in stock transaction records obtained from investment companies, and of persons in correspondence with the SEC."[88] Recognizing the fundamentally inherent privacy interest of individuals mentioned in any way in law enforcement files,[89] the D.C. Circuit found that the plaintiff's asserted public interest -- providing the public "with insight into the SEC's conduct with respect to SafeCard" -- was "not just less substantial [but] insubstantial."[90] Based upon the Supreme Court's endorsement of categorical rules in Reporters Committee, it then further determined that the identities of individuals who appear in law enforcement files would virtually never be "very probative of an agency's behavior or performance."[91] It observed that such information would serve a "significant" public interest only if "there is compelling evidence that the agency . . . is engaged in illegal activity."[92] Consequently, the D.C. Circuit held that "unless access to the names and

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[85] 489 U.S. at 776-80.

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

[87] SafeCard Servs. v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1991).

[88] Id. at 1205.

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

[90] Id.

[91] Id.

[92] Id. at 1206; see also Oguaju v. United States, 288 F.3d 448, 451 (D.C. Cir. 2002) (finding that "exposing a single, garden-variety act of misconduct would not serve the FOIA's purpose of showing 'what the Government is up to'" (quoting Reporters Comm., 489 U.S. at 780)); Quiñon, 86 F.3d at 1231 (finding insufficient public interest in revealing individuals mentioned in FBI files absent evidence of wrongdoing; even if individuals had engaged in wrongdoing, such misconduct would have to shed light on agency's action); McCutchen v. HHS, 30 F.3d 183, 188 (D.C. Cir. 1994) ("Mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by Exemption 7(C)."); Davis v. DOJ, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (holding that "when . . . governmental misconduct is alleged as the justification for disclosure, the public interest is 'insubstantial' unless the requester puts forward 'compelling evidence

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addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is [categorically] exempt from disclosure."[93]

The District Court for the District of Columbia, however, recently cautioned that if a responsive record does contain information regarding an agency's performance, the balance between private and public interests is a closer call and an agency must examine each responsive document to determine whether it is exempt.[94] In any event, agencies should be sure to redact their law enforcement records so that only identifying information is withheld under Exemption 7(C).[95] (See the further discussion of privacy redaction under Exemption 6,

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[92](...continued)
that the agency denying the FOIA request is engaged in illegal activity' and shows that the information sought 'is necessary in order to confirm or refute that evidence'" (quoting SafeCard, 926 F.2d at 1205-06)); Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at *9 (D.D.C. July 29, 1999) (magistrate's recommendation) (finding "significant public interest" in documents relating to FBI's terrorism investigations but concluding that withholding of third-party names is proper absent compelling evidence of illegal activity by FBI); McGhghy v. DEA, No. C 97-0185, slip op. at 10 (N.D. Iowa May 29, 1998) (holding that there is "no compelling public interest rationale" for disclosing the names of law enforcement officers, private individuals, investigative details, or suspects' names from DEA files).

[93] SafeCard, 926 F.2d at 1206; see also Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (adopting SafeCard approach); Lewis v. DOJ, 609 F. Supp. 2d 80, 85 (D.D.C. 2009) (stating that plaintiff did not demonstrate a public interest in otherwise exempt third-party information, so whether defendant searched for records is "'immaterial'" as "'that refusal deprived plaintiff of nothing to which he is entitled'" (quoting Edwards v. DOJ, 04-5044, 2004 WL 2905342, at *1 (D.C. Cir. Dec. 14, 2004))). But see Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 730 n.5 (D. Md. 2001) (determining that "plaintiff need not provide compelling evidence of government wrongdoing in light of the inapplicability of the categorical rule of SafeCard" to this case; deciding that "[a] more general public interest in what a government agency is up to is sufficient here"), appeal dismissed voluntarily, No. 01-1537 (4th Cir. June 25, 2001).

[94] See Judicial Watch, Inc. v. DHS, 598 F. Supp. 2d 93, 96 (D.D.C. 2009) (stating that "an agency must, for each record, conduct a particularized assessment of the public and private interests at stake," where "requested records could shed light on agency action-information").

[95] See, e.g., Church of Scientology Int'l v. DOJ, 30 F.3d 224, 230-31 (1st Cir. 1994) (deciding that Vaughn Index must explain why documents entirely withheld under Exemption 7(C) could not have been released with identifying information redacted); Lawyer's Comm. for Civil Rights v. U.S. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *21 (N.D. Cal. Sept. 30, 2008) (requiring parties to meet and confer regarding scope of Exemption 6 and 7(C) redactions to ensure only private information is withheld and alleviate need for Vaughn Index); Sussman v. DOJ, No. 03-3618, 2008 WL 2946006, at *9 (E.D.N.Y. July 29, 2008) (ordering in camera review to determine if third party criminal activity is inextricably intertwined with properly exempt personal identifiers); Maydak v. DOJ, 362 F. Supp. 2d 316, 325 (D.D.C. 2005) (ordering release of prisoner housing unit information, but withholding inmate names and register numbers because agency did not proffer evidence that released information could be
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Balancing Process, above.)

The "Glomar" Response

Protecting the privacy interests of individuals who are named in investigatory records and are the targets of FOIA requests requires special procedures. Most agencies with criminal law enforcement responsibilities follow the approach of the FBI, which is generally to respond to FOIA requests for records concerning other individuals by refusing to confirm or deny whether such records exist. Such a response is necessary because, as previously discussed, members of the public may draw adverse inferences from the mere fact that an individual is mentioned in the files of a criminal law enforcement agency.[96]

Therefore, the abstract fact that records exist (or not) can be protected in this context. Except when the third-party subject is deceased or provides a written waiver of his privacy rights, law enforcement agencies ordinarily refuse to either confirm or deny the existence of responsive records, i.e., issue a "Glomar" response, in order to protect the personal privacy

[95](...continued)
used to identify inmates); Canning v. DOJ, No. 01-2215, slip op. at 19 (D.D.C. Mar. 9, 2004) (finding application of Exemption 7(C) to entire documents rather than to personally identifying information within documents to be overly broad); Prows v. DOJ, No. 90-2561, 1996 WL 228463, at *3 (D.D.C. Apr. 25, 1996) (concluding that rather than withholding documents in full, agency simply can delete identifying information about third-party individuals to eliminate stigma of being associated with law enforcement investigation); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 571 (S.D.N.Y. 1989) (finding a middle ground in balancing of interest in disclosure of names in INS Lookout Book on basis of "ideological exclusion" provision against individuals' privacy interest by ordering release of only the occupation and country of excluded individuals); see also Aldridge v. U.S. Comm'r of Internal Revenue, No. 7:00-CV-131, 2001 WL 196965, at *2-3 (N.D. Tex. Feb. 23, 2001) (deciding that privacy of IRS employees could be adequately protected by redacting their names from recommendation concerning potential disciplinary action against them); Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) (reminding agencies of the requirement under FOIA to take reasonable steps to segregate and release nonexempt information), available at http://www. usdoj.gov/ag/foia-memo-march2009.pdf.

[96] See Ray v. DOJ, 778 F. Supp. 1212, 1215 (S.D. Fla. 1991); FOIA Update, Vol. X, No. 3, at 5; FOIA Update, Vol. VII, No. 1, at 3-4 ("OIP Guidance: Privacy 'Glomarization'"); FOIA Update, Vol. III, No. 4, at 2 ("Privacy Protection Practices Examined"); see also Antonelli v. FBI, 721 F.2d 615, 617 (7th Cir. 1983) (concluding that "even acknowledging that certain records are kept would jeopardize the privacy interests that the FOIA exemptions are intended to protect"); Burke v. DOJ, No. 96-1739, 1999 WL 1032814, at *5 (D.D.C. Sept. 30, 1999) (permitting agency to "simply 'Glomarize'" as to portion of request that seeks investigatory records); McNamera v. DOJ, 974 F. Supp. 946, 957-60 (W.D. Tex. 1997) (allowing FBI and INTERPOL to refuse to confirm or deny whether they have criminal investigatory files on private individuals who have "great privacy interest" in not being associated with stigma of criminal investigation).

interests of those who are in fact the subject of, or mentioned in, investigatory files.[97] Indeed, courts have endorsed this "Glomar" response by an agency in a variety of law enforcement situations. For instance, this response has generally been found appropriate when responding to requests for documents regarding alleged government informants,[98] trial witnesses,[99] subjects of investigations,[100] or individuals who may merely be mentioned in a

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

[98] See, e.g., Butler v. DEA, No. 05-1798, 2005 U.S. Dist. LEXIS 40942 (D.D.C. Feb. 16, 2006) (finding that agency properly refused to confirm or deny the existence of records pertaining to alleged DEA informants); Flores v. DOJ, No. 03-2105, slip op. at 4-5 (D.D.C. Feb. 7, 2005) (finding that agency properly gave "Glomar" response to third-party request for information on private individuals and alleged informants), summary affirmance granted, No. 05-5074, 2005 U.S. App. LEXIS 24159 (D.C. Cir. Nov. 8, 2005); Tanks v. Huff, No. 95-568, 1996 U.S. Dist. LEXIS 7266, at *12-13 (D.D.C. May 28, 1996) (permitting FBI to refuse to confirm or deny existence of any law enforcement records, unrelated to requester's case, concerning informants who testified against requester), appeal dismissed voluntarily, No. 96-5180 (D.C. Cir. Aug. 13, 1996). But see Johnson v. DOJ, No. 06-1248, 2007 WL 3408458, at *4 (E.D. Wis. Nov. 14, 2007) (finding "Glomar" response not appropriate in response to request for statement provided by known government witness); Hidalgo v. FBI, No. 04-0562, slip op. at 4-5 (D.D.C. Sept. 29, 2005) (finding "Glomar" response to be inappropriate when informant is not stigmatized by public confirmation of his FBI file and plaintiff has provided evidence to support allegations of government misconduct).

[99] See, e.g., Oguaju v. United States, 288 F.3d 448, 451 (D.C. Cir. 2002) (approving "Glomar" response for a third-party request for any information on an individual who testified at the requester's trial when the requester provided no public interest rationale); Enzinna v. DOJ, No. 97-5078, 1997 WL 404327, at *2 (D.C. Cir. June 30, 1997) (finding government's "Glomar" response appropriate because acknowledging existence of responsive documents would associate witnesses with criminal investigation); Fischer v. DOJ, 596 F. Supp. 2d 34, 48 (D.D.C. 2009) (finding "Glomar" response appropriate for request for information on third parties, including cooperating witnesses); Robinson v. Attorney Gen. of the U.S., 534 F. Supp. 2d 72, 83 (D.D.C. 2008) (holding "Glomar" response appropriate to request for information on

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law enforcement record.[101]

In employing privacy "Glomarization," however, agencies must be careful to use it only to the extent that is warranted by the terms of the particular FOIA request at hand.[102] For a

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[99](...continued)
individuals who testified at public trial and finding plaintiff's argument that testimony was false unavailing); Juste v. DOJ, No. 03-723 (D.D.C. Jan. 30, 2004) (finding that agency properly refused to confirm or deny existence of records on third parties who testified at plaintiff's trial); see also Meserve v. DOJ, No. 04-1844, 2006 U.S. Dist. LEXIS 56732, at *19-22 (D.D.C. Aug. 14, 2006) (concluding that while agency confirmed existence of records relating to third party's participation at public trial, it also properly provided "Glomar" response for any additional documents concerning third party).

[100] See, e.g., DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989) (upholding FBI's refusal to confirm or deny that it maintained "rap sheets" on named individual); Schwarz v. INTERPOL, No. 94-4111, 1995 U.S. App. LEXIS 3987, at *7 (10th Cir. Feb. 28, 1995) (holding "Glomar" response proper for third-party request for file of requester's "alleged husband" when no public interest shown); Massey v. FBI, 3 F.3d 620, 624 (2d Cir. 1993) (declaring that "individuals have substantial privacy interests in information that either confirms or suggests that they have been subject to criminal investigations or proceedings"); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) (finding that "Glomar" response is proper in connection with request for third party's law enforcement records); Claudio v. SSA, No. H-98-1911, slip op. at 16 (S.D. Tex. May 24, 2000) (holding "Glomar" response proper when request sought any investigatory records about administrative law judge); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 24 (D.D.C. 1998) (holding "Glomar" response appropriate when existence of records would link named individuals with taking of American hostages in Iran and disclosure would not shed light on agency's performance); Early v. OPR, No. 95-0254, slip op. at 3 (D.D.C. Apr. 30, 1996) (concluding that "Glomar" response concerning possible complaints against or investigations of judge and three named federal employees was proper absent any public interest in disclosure), summary affirmance granted, No. 96-5136, 1997 WL 195523 (D.C. Cir. Mar. 31, 1997); Latshaw v. FBI, No. 93-571, slip op. at 1 (W.D. Pa. Feb. 21, 1994) (deciding that FBI may refuse to confirm or deny existence of any law enforcement records on third party), aff'd, 40 F.3d 1240 (3d Cir. 1994) (unpublished table decision).

[101] See, e.g., Jefferson v. DOJ, 168 F. App'x 448 (D.C. Cir. 2005) (affirming district court judgment that agency, after processing responsive documents, could refuse to confirm or deny existence of any additional mention of third party in its investigative database); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 894 (D.C. Cir. 1995) (stating that privacy interest in keeping secret the fact that individual was subject to law enforcement investigation extends to third parties who might be mentioned in investigatory files).

[102] See, e.g., Nation Magazine, 71 F.3d at 894-96 (holding categorical "Glomar" response concerning law enforcement files on individual inappropriate when individual had publicly offered to help agency; records discussing reported offers of assistance to the agency by former presidential candidate H. Ross Perot "may implicate a less substantial privacy interest than any records associating Perot with criminal activity," so conventional processing is (continued...)

request that involves more than just a law enforcement file, the agency should take a "bifurcated" approach to it, distinguishing between the sensitive law enforcement part of the request and any part that is not so sensitive as to require "Glomarization."[103] The "Glomar" response also has been found appropriate when one government agency has officially acknowledged the existence of an investigation but the agency that received the third-party request has never officially acknowledged undertaking its own investigation into that matter.[104]

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[102](...continued)
required for such records); see also FOIA Update, Vol. XVII, No. 2, at 3-4 ("OIP Guidance: The Bifurcation Requirement for Privacy 'Glomarization'").

[103] See, e.g., Jefferson, 284 F.3d at 178-79 (refusing to allow categorical Exemption 7(C) "Glomar" response to request for OPR records concerning AUSA because agency did not bifurcate for separate treatment of its non-law enforcement records); Nation Magazine, 71 F.3d at 894-96 (deciding that "Glomar" response is appropriate only as to existence of records associating former presidential candidate H. Ross Perot with criminal activity), on remand, 937 F. Supp. 39, 45 (D.D.C. 1996) (finding that "Glomar" response as to whether Perot was subject, witness, or informant in law enforcement investigation appropriate after agency searched law enforcement files for records concerning Perot's efforts to assist agency), further proceedings, No. 94-00808, slip op. at 9-11 (D.D.C. Feb. 14, 1997) (ordering agency to file in camera declaration with court explaining whether it ever assigned informant code to named individual and results of any search performed using that code; agency not required to state on record whether individual was ever assigned code number), further proceedings, No. 94-00808, slip op. at 9-10 (D.D.C. May 21, 1997) (accepting agency's in camera declaration that search of its records using code number assigned to named individual uncovered no responsive documents); Meserve, 2006 U.S. Dist. LEXIS 56732, at *19-22 (concluding that while agency confirmed existence of certain records relating to third party's participation at public trial, it properly provided "Glomar" response for any additional documents concerning third party); Manchester v. FBI, No. 96-0137, 2005 WL 3275802, at *6 (D.D.C. Aug. 9, 2005) (finding that agency properly bifurcated request between information related to acknowledged investigation and third-party information outside scope of investigation); Burke, 1999 WL 1032814, at *5 (finding no need to bifurcate request that "specifically and exclusively" sought investigative records on third parties); Tanks, 1996 U.S. Dist. LEXIS 7266, at *4 (upholding privacy "Glomarization" after agency bifurcated between aspects of request); Nation Magazine v. Dep't of State, No. 92-2303, slip op. at 23-24 (D.D.C. Aug. 18, 1995) (requiring FBI to search for any "noninvestigative" files on Perot); Grove v. DOJ, 802 F. Supp. 506, 510-11 (D.D.C. 1992) (finding agency properly conducted search for administrative records sought but "Glomarized" part of request concerning investigatory records); accord Reporters Comm., 489 U.S. at 757 (involving "Glomarization" bifurcation along "public interest" lines); cf. Jefferson, 284 F.3d at 179 (requiring OPR to determine nature of records contained in file pertaining to AUSA before giving categorical "Glomar" response). See generally FOIA Update, Vol. XVII, No. 2, at 3-4 (providing guidance on how agencies should handle requests for law enforcement records on third-parties).

[104] See McNamera, 974 F. Supp. at 958 (finding that "Glomar" response is proper so long as agency employing it has not publicly identified individual as subject of investigation); cf. Frugone v. CIA, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (finding that CIA properly "Glomarized" (continued...)

Glomar responses are now widely accepted in the case law.[105] At the litigation stage, the agency must demonstrate to the court, either through a Vaughn affidavit or an in camera submission, that its refusal to confirm or deny the existence of responsive records is appropriate.[106]

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[104](...continued)
existence of records concerning plaintiff's alleged employment relationship with CIA despite allegation that another government agency seemingly confirmed plaintiff's status as former CIA employee) (Exemptions 1 and 3). See generally FOIA Update, Vol. X, No. 3, at 5 (stating that under Reporters Committee, Exemption 7(C) "Glomarization" can be undertaken without review of any responsive records, in response to third-party requests for routine law enforcement records pertaining to living private citizens who have not given consent to disclosure); see also FOIA Update, Vol. XII, No. 2, at 6 (warning agencies not to notify requesters of identities of other agencies to which record referrals are made, in any exceptional case in which doing so would reveal sensitive abstract fact about existence of records).

[105] See, e.g., Reporters Comm., 489 U.S. at 757 (request for any "rap sheet" on individual defense contractor); Oguaju, 288 F.3d at 451 (request for information on individual who testified at requester's trial); Schwarz, 1995 U.S. App. LEXIS 3987, at *7 (request for file on "alleged husband"); Beck, 997 F.2d at 1493-94 (request for records concerning alleged wrongdoing by two named DEA agents); Dunkelberger, 906 F.2d at 780, 782 (request for information that could verify alleged misconduct by undercover FBI Special Agent); Freeman v. DOJ, No. 86-1073, slip op. at 2 (4th Cir. Dec. 29, 1986) (request for alleged FBI informant file of Teamsters president); Strassman v. DOJ, 792 F.2d 1267, 1268 (4th Cir. 1986) (request for records allegedly indicating whether governor of West Virginia threatened to invoke Fifth Amendment); Antonelli, 721 F.2d at 616-19 (request seeking files on eight third parties); Robinson, 534 F. Supp. 2d at 82 (request for records on alleged confidential informants); Voinche v. FBI, No. 99-1931, slip op. at 12-13 (D.D.C. Nov. 17, 2000) (request for information on three individuals allegedly involved in Oklahoma City bombing); Greenberg, 10 F. Supp. 2d at 10 (request for information relating to involvement of named individuals in "October Surprise" allegations); Early, No. 95-0254, slip op. at 3 (D.D.C. Apr. 30, 1996) (request for complaints against or investigations of judge and three named federal employees); Triestman v. DOJ, 878 F. Supp. 667, 669 (S.D.N.Y. 1995) (request by prisoner seeking records of investigations of misconduct by named DEA agents); Ray, 778 F. Supp. at 1215 (request for any records reflecting results of INS investigation of alleged employee misconduct); Knight Publ'g Co. v. DOJ, No. 84-510, slip op. at 1-2 (W.D.N.C. Mar. 28, 1985) (request by newspaper seeking any DEA investigatory file on governor, lieutenant governor, or attorney general of North Carolina); Ray v. DOJ, 558 F. Supp. 226, 228-29 (D.D.C. 1982) (request by convicted killer of Dr. Martin Luther King, Jr., seeking any file on requester's former attorney or Congressman Louis Stokes), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (unpublished table decision); Blakey v. DOJ, 549 F. Supp. 362, 365-66 (D.D.C. 1982) (request by professor seeking any records relating to minor figure in investigation of assassination of President Kennedy who was indexed under topics other than Kennedy assassination), aff'd in part & vacated in part, 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision).

[106] See Valdez v. DOJ, No. 05-5184, 2006 U.S. App. LEXIS 1042, at *1-2 (D.C. Cir. Jan. 12, 2006) (per curiam) (denying government's motion for summary affirmance because agency (continued...)

[106](...continued)
failed to adequately demonstrate need for "Glomar" response); Ely v. FBI, 781 F.2d 1487, 1492 n.4 (11th Cir. 1986) (finding that "the government must first offer evidence, either publicly or in camera to show that there is a legitimate claim"); Fischer, 596 F. Supp. 2d at 48 (finding that FBI's declaration sufficiently identified its concerns with confirming or denying existence of records to support "Glomar" response); McNamera, 974 F. Supp. at 957-58 (finding agencies' affidavits sufficient to support "Glomar" response); Nation Magazine, No. 94-00808, slip op. at 9-11 (D.D.C. Feb. 14, 1997) (ordering agency to file in camera declaration with court explaining whether it ever assigned informant code to named individual and results of any search performed using that code); Grove v. CIA, 752 F. Supp. 28, 30 (D.D.C. 1990) (requiring agency to conduct search to properly justify use of "Glomar" response in litigation).