Exemption 7(C)

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] Exemption 7(C) is the law enforcement counterpart to the privacy protection afforded under Exemption 6.[2] (See the discussions of the primary privacy-protection principles that apply to both exemptions under Exemption 6, above.)

In DOJ v. Reporters Committee for Freedom of the Press, the Supreme Court discussed the strong privacy interests protected under Exemption 7(C) and found that a third party's request for law enforcement records pertaining to a private citizen categorically invades that citizen's privacy, and that where a request seeks no official information about a government agency, the privacy invasion is unwarranted.[3] Indeed, the Court of Appeals for the District of Columbia Circuit held in SafeCard Services v. SEC[4] that based upon the traditional recognition of the strong privacy interests inherent in law enforcement records, and the logical ramifications of Reporters Committee, the categorical withholding of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C).[5]

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

[2] See Seized Prop. Recovery, Corp. v. U.S. Customs & Border Prot., 502 F. Supp. 2d 50, 56 (D.D.C. 2007).

[3] 489 U.S. 749, 780 (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 en banc denied, Nos. 05-5207 & 06-5048 (D.C. Cir. Aug. 3, 2007); FOIA Update, Vol. X, No. 2, at 3-7 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision" & "FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking") (discussing mechanics of privacy-protection decisionmaking process employed under Exemptions 6 and 7(C)).

[4] 926 F.2d 1197 (D.C. Cir. 1991).

[5] 926 F.2d at 1206; see, e.g., Thomas v. DOJ, 260 F. App'x 677, 679 (5th Cir. 2007) (recognizing that "[t]he Supreme Court has held as a categorical matter that a third party's

The Supreme Court has noted that the language of Exemption 7(C) "is in marked contrast to the language in Exemption 6, pertaining to 'personnel and medical files,'" with Exemption 7(C) more broadly protecting personal privacy by omitting the word "clearly" and substituting the "would constitute" standard for "could reasonably be expected to" standard.[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]

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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 houses of two named individuals); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 896 (D.C. Cir. 1995) (restating that 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"); 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); McNamera v. DOJ, 974 F. Supp. 946, 957-60 (W.D. Tex. 1997) (allowing categorical withholding of information concerning criminal investigation of private citizens). But see Kimberlin v. DOJ, 139 F.3d 944, 948 (D.C. Cir. 1998) (eschewing categorical rule of nondisclosure for OPR files, and suggesting use of case-by-case balancing test involving consideration of "rank of public official involved and the seriousness of misconduct alleged"); Davin v. DOJ, 60 F.3d 1043, 1060 (3d Cir. 1995) (ruling that "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); Balt. 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).

[6] See NARA v. Favish, 541 U.S. 157, 165-66 (2004) (distinguishing between Exemption 6's and Exemption 7(C)'s language and noting that "Exemption 7(C)'s comparative breadth is no mere accident in drafting"); see also Keys v. DOJ, 830 F.2d 337, 346 (D.C. Cir. 1987) (finding that "government need not 'prove to a certainty that release will lead to an unwarranted invasion of personal privacy,'" (quoting Reporters Comm., 816 F.2d 730, 738 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989))).

[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 Roth v. DOJ, 642 F.3d 1161, 1175 (D.C. Cir. 2011) (noting that "being associated with a quadruple homicide would likely cause [third parties] precisely the type of embarrassment and reputational harm that Exemption 7(C) is designed to guard against"), reh'g en banc denied, No. 09-5428 (D.C. Cir. Nov. 14, 2011); Neely v. FBI, 208 F.3d 461, 464-66 (4th Cir. 2000) (finding that FBI Special Agents and third-party suspects

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 nature and extent of the privacy interest implicated in the requested records.[8]

In the case of records related to investigations by criminal law enforcement agencies, courts have 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.'"[9] Thus, Exemption 7(C) has been regularly

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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"); Bast v. DOJ, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (ruling that government officials do not surrender all rights to personal privacy by virtue of public appointment).

[8] 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."); 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 to information compiled for law enforcement purposes, agency must still prove that it is reasonably expected that disclosure would result in unwarranted invasion of privacy); see also Bartko v. DOJ, 898 F.3d 51, 66 (D.C. Cir. 2018) (explaining application of Exemption 7(C) to attorney misconduct allegations, finding that agency has obligation to identify privacy interest at stake based on various factors, including "frequency, nature, and severity" of misconduct allegations); 100Reporters LLC v. DOJ, 248 F. Supp. 3d 115, 164 (D.D.C. 2017) (pointing out the failure to differentiate the differing privacy interests of various groups of individuals named in corporation compliance monitoring records); FOIA Update, Vol. X, No. 2, at 7 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking") (advising that there first must be viable privacy interest of identifiable, living person in requested information for any further consideration of privacy-exemption protection to be appropriate).

[9] Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting Branch v. FBI, 658 F. Supp. 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))); Kortlander v. Bureau of Land Mgmt., 816 F. Supp. 2d 1001, 1014 (D. Mont. 2011) (noting that "[c]ourts addressing Exemption 7(C) have found that the stigma of being associated with a law enforcement investigation, the potential for harassment and potential to prejudice law enforcement personnel in carrying out law enforcement functions, generally outweighs the public interest"); 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, 37 F. Supp. 2d at 477 (recognizing that "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"); 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 (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)).

applied to withhold references to persons who are merely mentioned in law enforcement files,[10] as well as to persons of "investigatory interest" to a criminal law enforcement agency.[11]

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[10] See Peltier v. FBI, 563 F.3d 754, 766 (8th Cir. 2009) (per curiam) (affirming district court's determination that third parties mentioned within released records were properly withheld); 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, 229 F.3d 1153, 1154 (6th Cir. 2000) (protecting names of, and identifying information about, private individuals) (unpublished table decision); 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); Gabel v. IRS, 134 F.3d 377 (9th Cir. 1998) (protecting third-party names in Department of Motor Vehicles computer printout included in plaintiff's IRS file) (unpublished table decision); 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); 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 interest in maintaining privacy of their personal information); 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 Balt. Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 729 (D. Md. 2001) (rejecting protection of names and addresses of purchasers of forfeited property), appeal dismissed voluntarily, No. 01-1537 (4th Cir. June 25, 2001).

[11] See, e.g., 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 for Soc. Responsibility, 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 "insofar as disclosure of their names might reveal that they were suspects in criminal investigations"); 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 &

In DOJ v. Reporters Committee for Freedom of the Press, the Supreme Court 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."[12] It subsequently recognized, in NARA v. Favish,[13] that law enforcement files often contain information on individuals by "mere happenstance," and it strongly reinforced the protection available under Exemption 7(C).[14] Courts have found that privacy interests extend to foreign nationals, in addition to private citizens.[15] The Court of Appeals for the District of Columbia Circuit has held that even a convicted defendant retains some privacy interest in the facts of his conviction, but that "those interests are weaker than for individuals who have been acquitted or whose cases have been dismissed."[16] The D.C. Circuit has stressed that "defendants whose prosecutions ended in acquittal or dismissal have a much stronger privacy interest in controlling information concerning those prosecutions than defendants who were ultimately convicted."[17]

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"); 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).

[12] 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").

[13] 541 U.S. 157 (2004).

[14] 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 OIP Guidance: Supreme Court Rules for "Survivor Privacy" in Favish (posted 4/9/04).

[15] See, e.g., Graff v. FBI, 822 F. Supp. 2d 23, 34 (D.D.C. 2011); see also Tuffly v. DHS, 870 F.3d 1086, 1093 (9th Cir. 2017) (holding that non-citizens formerly detained by ICE pending final determination in their removal proceedings have particularly strong privacy interest in their identities).

[16] ACLU v. DOJ, 655 F.3d 1, 7 (D.C. Cir. 2011) [hereinafter *ACLU I*]; see also Citizens for Responsibility & Ethics in Wash. v. DOJ, 854 F.3d 675, 683 (D.C. Cir. 2017) (holding that privacy interests of individuals not convicted or not publicly linked with investigation differ greatly from those convicted or pled guilty); Venkataram v. OIP, 590 F. App'x 138, 140 (3rd Cir. 2014) (per curiam) (determining that co-conspirator, whose charges were dismissed, "has a 'fundamental interest' in limiting the disclosure of [his criminal] information."); cf Shapiro v. CIA, 247 F. Supp. 3d 53, 66-67 (D.D.C. 2017) (finding that "[i]t might be that a convicted individual's privacy interest would still win out, but [defendant] needs to take the public nature of his or her conviction into account when conducting the balancing").

[17] ACLU v. DOJ, 750 F.3d 927, 933 (D.C. Cir. 2014) [hereinafter *ACLU II*].

Courts have found that booking photos or "mug shots" may be properly withheld under Exemption 7(C). [18] The Court of Appeals for the Sixth Circuit in Detroit Free Press explained that "[b]ooking photos – snapped 'in the vulnerable and embarrassing moments immediately after [an individual is] accused, taken into custody, and deprived of most liberties' – fit squarely within [the] realm of embarrassing and humiliating information."[19] The court explained that "[m]ore than just 'vivid symbol[s] of criminal *accusation*,' booking photos convey *guilt* to the viewer," and found that a "disclosed booking photo casts a long, damaging shadow over the depicted individual."[20]

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.[21]

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[18] See Detroit Free Press Inc. v. DOJ, 829 F.3d 478, 485 (6th Cir. 2016) (holding that individuals have privacy interest in preventing disclosure of their booking photos under Exemption 7(C)); World Pub'g Co. v. DOJ, 672 F.3d 825, 827-32 (10th Cir. 2012) (finding that agency properly withheld mug shots after balancing sensitive nature of such photographs with requester's failure to show how release would inform public about operations of government); Karantsalis v. DOJ, 635 F.3d 497, 504 (11th Cir. 2011) (same).

[19] 829 F.3d at 482 (quoting Karantsalis, 635 F.3d at 503).

[20] Id.

[21] Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978); see, e.g., Hulstein v. DEA, 671 F.3d 690, 695-96 (8th Cir. 2012) (protecting names and signatures of DEA agents); Moore v. Obama, No. 09-5072, 2009 WL 2762827, at *1 (D.C. Cir. Aug. 24, 2009) (per curiam) (protecting names and a phone number of FBI employees); 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); Fiduccia v. DOJ, 185 F.3d 1035, 1043-45 (9th Cir. 1999) (withholding DEA and INS agents' names); Halpern v. FBI, 181 F.3d 279, 296 (2d Cir. 1999) (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); Davis v. DOJ, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (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 v. Bell, 661 F.2d 623, 630 (7th Cir. 1981) ("It is not necessary that harassment rise to the level of endangering physical safety before the protections of 7(C) can

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.[22] Indeed, courts have held that identities of both clerical personnel and investigators are properly withheld as a routine matter under Exemption 7(C), even when they take part in a highly publicized investigation.[23]

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be invoked."); O'Keefe v. DOD, 463 F. Supp. 2d 317, 324 (E.D.N.Y. 2006) (protecting identities of DOD investigators); cf. Fowlkes v. ATF, 139 F. Supp. 3d 287, 293 (D.D.C. 2015) (determining name of judge presiding over grand jury must be disclosed as Exemption 7(C) does not afford such broad protection).

[22] See, e.g., Burke v.EOUSA, 2018 U.S. Dist. LEXIS 44854, at *5-*6 (D.D.C. Mar. 20, 2018) (finding names of FBI support personnel withholdable because defendant adequately explained privacy interests at stake); Council on Am.-Islamic Relations v. FBI, 749 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010) (upholding agency's redaction of support personnel); Skinner v. DOJ, 744 F. Supp. 2d 185, 210-11 (D.D.C. 2010) (concluding that names and identification of law enforcement support staff were properly withheld); 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"); see also Schotz v. DOJ, No. 14-1212, 2016 WL 1588491, at *5 (D.D.C. 2016) (determining direct office and cellular phone number of BOP attorney was properly redacted).

[23] See Hodge v. FBI, 703 F.3d 575, 580 (D.C. Cir. 2013) (upholding protection of names of investigators); Lahr v. NTSB, 569 F.3d 964, 977-79 (9th Cir. 2009) (holding names of FBI agents involved in investigation of crash of TWA Flight 800 were protected from disclosure and noting "courts have recognized that agents retain an interest in keeping private their involvement in investigation of especially controversial events"); Anderson v. BOP, 2018 WL 6573282, at *3 (D.D.C. Dec. 13, 2018) (noting that "'[t]he D.C. Circuit has consistently held that exemption 7(C) protects the privacy interests of all persons mentioned in law enforcement records, including investigators'" (quoting Lewis v. Dep't of Justice, 609 F. Supp. 2d 80, 84 (D.D.C. 2009)); Lamb v. Millennium Challenge Corp., 334 F. Supp. 3d 204, 216-17 (D.D.C. Sept. 24, 2018) (finding that "government investigators and employees 'have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives'" (quoting Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980)); 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), adopted, (S.D. Fla. June 26, 1998), aff'd per curiam, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision); 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), aff'd per curiam, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990); cf. Armstrong v. Executive Office of the President, 97 F.3d 575, 581-82 (D.C. Cir. 1996) (finding

Courts routinely have found protectible privacy interests in the identities of individuals who provide information to law enforcement agencies.[24] Consequently, the names of witnesses and other identifying information have been held properly protectible under Exemption 7(C).[25] Courts have generally found that trial testimony does not

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that agency had not adequately defended categorical rule for withholding identities of low-level FBI Special Agents) (Exemption 6).

[24] See, e.g., Stalcup v. CIA, 768 F.3d 65, 73 (1st Cir. 2014) (finding significant privacy interest in identity of eyewitness who provided information to FBI finding privacy interest is "'at its apex' when he or she is involved in a law enforcement investigation"); 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); Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (protecting names of persons who provided information to FBI); Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904-05 (D.C. Cir. 1996) (protecting names of informants, including name of company that reported crime to police, because disclosure might permit identification of corporate officer who reported crime); Jones v. FBI, 41 F.3d 238, 246 (6th Cir. 1994) (protecting informants' identities); McCutchen v. HHS, 30 F.3d 183, 189 (D.C. Cir. 1994) (protecting names of individuals alleging scientific misconduct); McDonnell v. United States, 4 F.3d 1227, 1256 (3d Cir. 1993) (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"); Nadler v. DOJ, 955 F.2d 1479, 1489 (11th Cir. 1992) (finding privacy interest in disclosure of source's identity because disclosure "might subject [source] to unnecessary questioning or harassment by those who look unfavorably upon law enforcement officials or by private litigants in civil suits incidentally related to the investigation")); KTVY-TV, a Div. of Knight-Ridder Broad., Inc. 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"). But see Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 554 (5th Cir. 2002) (rebuffing idea of retaliation against employees who gave statements to OSHA investigator, and ordering disclosure of source-identifying content of statements despite fact that identifiable employee-witnesses' names already had been released in separate civil proceeding).

[25] See Lahr, 569 F.3d at 975-77 (reversing district court and holding that eyewitnesses in investigation of crash of TWA Flight 800 have cognizable privacy interest in nondisclosure of their names to avoid unwanted contact by plaintiff and other entities); Coulter v. Reno, 153 F.3d 605 (9th Cir. 1998) (protecting names of witnesses and of requester's accusers) (unpublished table decision); Spirko v. USPS, 147 F.3d 992, 998 (D.C. Cir. 1998) (protecting notes and phone messages concerning witnesses); L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 922 (11th Cir. 1984) (noting that "employee-witnesses . . . have a substantial privacy interest"); Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) ("[The

eliminate Exemption 7(C) protection.[26] Similarly, courts have found privacy protection for individuals identified as potential witnesses.[27]

Moreover, courts have repeatedly recognized that the passage of time will not ordinarily diminish the privacy protection afforded by Exemption 7(C).[28] This has been

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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"); 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 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).

[26] See Hawkins v. DEA, 347 F. App'x 223, 225 (7th Cir. 2009) (finding that testifying at requester's trial "did not wholly extinguish [witnesses'] privacy interests"); 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); 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"). 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).

[27] See Stalcup, 768 F.3d at 73 (emphasizing that the "mere possibility of being called as a witness" does not mean privacy is "abdicated"); Sorin v. DOJ, 758 F. App'x 28, 29 (2nd Cir. 2018) (per curiam) (mentioning the substantial privacy interest in the professional, educational and financial information of potential witnesses obtained in a criminal investigation) (summary order); North v. DOJ, 774 F. Supp. 2d 217, 224 (D.D.C. 2011) (finding that agency properly withheld names of potential witnesses in grand jury proceeding); Rosenglick v. IRS, No. 97-747, 1998 U.S. Dist. LEXIS 3920, at *9 (M.D. Fla. Mar. 10, 1998) ("the chance of revealing the names of potential witnesses . . . counsels against forced disclosure").

[28] See, e.g., Halpern v. FBI, 181 F.3d 279, 297 (2d Cir. 1999) ("Confidentiality interests cannot be waived through . . . the passage of time."); McDonnell, 4 F.3d at 1256 (deciding

found even in instances in which the information was obtained through past law enforcement investigations that are now viewed critically by the public.[29]

Relatedly, in DOJ v. Reporters Committee for Freedom of the Press, the Supreme Court found that substantial privacy interests can exist in personal information even though the information has been made available to the general public at some place and point in time.[30] Applying a "practical obscurity" standard,[31] the Supreme Court observed that if such items of information actually "were 'freely available,' there would be no reason

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that passage of forty-nine years does not negate individual's privacy interest); Maynard v. CIA, 986 F.2d 547, 566 n.21 (1st Cir. 1993) (finding effect of passage of time upon individual's privacy interests to be "simply irrelevant"); Fitzgibbon v. CIA, 911 F.2d 755, 768 (D.C. Cir. 1990) (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"); Diamond v. FBI, 707 F.2d 75, 77 (2d Cir. 1983) (noting that "the danger of disclosure may apply to old documents"); Stone, 727 F. Supp. at 664 (explaining that FBI Special Agents who participated in investigation over twenty years earlier, even one as well known as RFK assassination, "have earned the right to be 'left alone' unless an important public interest outweighs that right"); 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). 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).

[29] 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 political climate at the time dictated").

[30] 489 U.S. 749, 770-71 (1989) (finding "substantial" privacy interest in rap sheets even though they contain information previously disclosed to public); see also 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").

[31] See 489 U.S. at 757-71 (recognizing certain events may "have been wholly forgotten," and noting that information in requested compilation, even though publicly available in various places, was "hard-to-obtain" and "web of federal statutory and regulatory provisions limited its disclosure").

to invoke the FOIA to obtain access to [them]."[32] In fact, the "practical obscurity" concept embraced by the Supreme Court 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.[33] There have been times, however, when courts have found that the information at issue was not "practically obscure."[34]

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[32] Id. at 764; see also Eil v. DEA, 878 F.3d 392, 400 (1st Cir. 2017) (emphasizing that privacy interests of convicted physician's living former patients did not diminish due to prior introduction of records as trial exhibits); Prison Legal News v. EOUSA, 628 F.3d 1243, 1249-50 (10th Cir. 2011) (finding "strong privacy interest" in video and photographs where "images are no longer available to the public; they were displayed only twice (once at each [defendant's] trial)); only those physically present in the court room were able to view the images; and the images were never reproduced for public consumption beyond those trials"); Fiduccia v. DOJ, 185 F.3d 1035, 1047 (9th Cir. 1999) (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))); McGehee v. DOJ, 800 F. Supp. 2d 220, 234 n.6 (D.D.C. 2011) (noting "it is clear that in our Circuit a privacy interest may be implicated by 'practically obscure' information"); Harrison v. EOUSA, 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); 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, 10 F. Supp. 2d 3, 30 (D.D.C. 1998) (finding third party's privacy interest not extinguished because public may be aware he was target of investigation).

[33] 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); Judicial Watch v. DHS, 736 F. Supp. 2d 202, 211 (D.D.C. 2010) (finding "that the passage of time has not diluted the privacy interest at stake and, if anything, has actually increased [the] privacy interest as the events surrounding the . . . prosecution have faded from memory"); 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 privacy protection, notwithstanding passage of ten years since third party's death).

[34] See ACLU v. DOJ, 655 F.3d 1, 9-10 (D.C. Cir. 2011) (finding that "unlike the rap sheet information in Reporters Committee," docket information compiled into single list by agency from cases pertaining to various individuals was "not practically obscure" on grounds that docket information contained only small amount of information regarding

Courts have held that an individual's Exemption 7(C) privacy interest likewise is not extinguished merely because a requester might, on their own, be able to "piece together" the identities of third parties whose names have been protected.[35] Similarly, courts have found that publicity regarding a matter does not eliminate privacy interests

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individual's criminal history rather than compilation, there was no "web of statutory or regulatory policies obscuring that information," and no "logistical difficulty in gathering" the information); Gawker Media, LLC v. FBI, 145 F. Supp. 3d 1100, 1108-112 (M.D. Fla. 2015) (requiring release of names mentioned in investigation of tape recording, made publicly available at one point in time); 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 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 *61 n.30 (D.D.C. Mar. 31, 2005) (rejecting agency argument that release of names of unsuccessful pardon applicants was analogous to rap sheets in Reporters Committee and finding "[i]t would stretch Reporters Comm. well past recognition to apply it to a case where information is sought that does not compile sensitive information, but might only remind one of public sensitive information") (Exemption 6).

[35] Weisberg v. DOJ, 745 F.2d 1476, 1491 (D.C. Cir. 1984), aff'd in part remanded on other grounds, 848 F.2d 1265 (D.C. Cir. 1988); 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, 149 F.3d 1190, 1193 (10th Cir. 1998) (holding fact that requester obtained some information through other channels does not change privacy protection under FOIA) (unpublished table decision); L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 922 (11th Cir. 1984) ("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"); 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).

in preventing further disclosures[36] or preventing disclosures of related information.[37] Courts have further held that an inadvertent failure to redact information regarding a third party does not eliminate the individual's privacy interest.[38]

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[36] See, e.g., Fitzgibbon, 911 F.2d at 768 (concluding fact that CIA or FBI may have released information about individual elsewhere does not diminish individual's "substantial privacy interests"); Bast v. DOJ, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (finding that "previous publicity amounting to journalistic speculation cannot vitiate the FOIA privacy exemption"); Berger v. IRS, 487 F. Supp. 2d 482, 502 (D.N.J. 2007) (finding that agency's prior release of list of names of third parties contacted during investigation does not allow for further disclosure of identifying information), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008); 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); Thomas v. Office of U.S. Attorney for E. Dist. of N.Y., 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). But 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).

[37] See 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 remaining pictures); Judicial Watch, Inc. v. NARA, 876 F.3d 346, 349 (D.C. Cir. 2017) (determining "distinct" privacy interest in contents of subject's investigation files although existence of Independent Counsel investigation of subject was public knowledge); Karantsalis, 635 F.3d at 503 (per curiam) (finding that agency's publishing of driver's license photograph did not eliminate individual's privacy interest in his mug shot); Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (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); 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 in substance of FBI's internal investigation); Parker v. DOJ, 214 F. Supp. 3d 79, 88 (D.D.C. 2016) (determining former AUSA and other named individuals retained a substantial privacy interest in undisclosed records related to OPR investigation even if certain other information had been publicly disclosed). 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); 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), aff'd, No. 98-5465, 1999 WL 1215779 *1 (D.C. Cir. Nov. 5, 1999).

[38] See, e.g., Canning v. DOJ, 567 F. Supp. 2d 85, 95 (D.D.C. 2008) (finding that agency's inadvertent failure to redact does not strip third party of privacy interests); 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

Courts have found that death diminishes, but might not eliminate, an individual's privacy interest.[39] The D.C. Circuit approved the FBI's methods for determining whether individuals are presumed living or dead in Schrecker v. DOJ.[40] 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.[41] When these methods failed to reveal that an individual was deceased the D.C. Circuit upheld the FBI's use of Exemption 7(C).[42]

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individuals" involved), aff'd in pertinent part, 233 F.3d 581, 583 (D.C. Cir. 2000) (stating there was "nothing to add to the district court's sound reasoning" with respect to the withholdings under Exemption 7(C)).

[39] Schrecker v. DOJ, 254 F.3d 162, 166 (D.C. Cir. 2001) ("one's own and one's relations' interests in privacy ordinarily extend beyond one's death"), aff'd, 349 F.3d 657 (D.C. Cir. 2003); Vest v. Dep't of the Air Force, 793 F. Supp. 2d 103, 122 (D.D.C. 2011) ("An individual's death diminishes, but does not eliminate, his privacy interest in the nondisclosure of any information about him contained in law enforcement records"); Clemente v. FBI, 741 F. Supp. 2d 64, 85 (D.D.C. 2010) ("[e]ven after death, a person retains some privacy interest in her identifying information").

[40] 349 F.3d 657, 663 (D.C. Cir. 2003) (pointing to FBI's use of online database *Who Was Who*; 100-year rule; previous FOIA requests; "'internal sources;'" and Social Security Death Index searches where individual's social security number appeared in responsive records); 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), cert. denied, 551 U.S. 1144 (2007); Johnson v. EOUSA, 310 F.3d 771, 775 (D.C. Cir. 2002) (approving agency's inquiries concerning subject of request, and refusing to establish "brightline set of steps for an agency" to determine whether he or she is living or dead).

[41] Schrecker, 349 F.3d at 663-66; see also Frankenberry v. FBI, 567 F. App'x 120, 122–23 (3d Cir. 2014) (finding that FBI made reasonable efforts to determine life status of individuals upon whose behalf it claimed privacy interest); Shapiro v. CIA, 247 F. Supp. 3d 53, 66 (relying on Schrecker to determine FBI met its obligation to determine "life status"); 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); Peltier v. FBI, No. 03-905, 2005 WL 735964, at *14 (W.D.N.Y. Mar. 31, 2005) (same).

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

In Davis v. DOJ[43] 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.[44] 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.[45] The court concluded that in determining whether an agency has made a reasonable effort to ascertain whether an individual is deceased, 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."[46] The court remanded the case in Davis "to permit the agency an opportunity to evaluate the alternatives and either to conduct a further search [to determine whether individuals were deceased] or to explain satisfactorily why it should not be required to do so."[47]

The District Court for the District of Columbia addressed this issue in Schoenman v. FBI.[48] 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.[49] 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.[50] 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

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[43] 460 F.3d 92.

[44] Id. at 95.

[45] Id. at 104.

[46] See id. at 105.

[47] Id.; see Davis v. DOJ, 2007 WL 4275512, at *4 (D.D.C. Dec. 13, 2007) (following remand finding agency's use of speaker's birth dates in searches of Google, obituaries, general circulation newspaper, law database, crime story compilation site, and five sites related to genealogy which included automatic Social Security Death Index searches adequate).

[48] 575 F. Supp. 2d 166, 177 (D.D.C. 2008) (advising 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) (same).

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

[50] Id.

president of the Association of Retired Naval Investigative Service Agents to see if he or one of his members knew the individual.[51] 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 department, and a search of the AUTO-TRACK database, which is a general public records database.[52] 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.[53]

Finally, the issue of whether a corporation may have "personal privacy" interests under Exemption 7(C) was addressed by the Supreme Court in FCC v. AT&T, Inc..[54] In that case, the Court of Appeals for the Third Circuit had found that a corporation may have personal privacy interests because the Administrative Procedure Act defined the word "person" to include corporations, and noted that "[i]t would be very odd indeed for an adjectival form of a defined term not to refer back to that defined term."[55] In reversing the Third Circuit, the Supreme Court explained that "[a]djectives typically reflect the meaning of corresponding nouns, but not always."[56] Citing various examples,[57] the Court noted that such adjectives sometimes "acquire distinct meanings of their own."[58] The Court found that Exemption 7(C) presented such an instance, and that because the word "personal" was not defined by Congress, it should be given its ordinary meaning, which "refers to individuals" but not to corporations.[59] Ultimately, the Supreme Court unanimously held that "the protection in FOIA against disclosure of law enforcement

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[51] Id. at 178.

[52] Id.

[53] 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).

[54] 131 S. Ct. 1177 (2011); see also OIP Guidance: Supreme Court Rejects Argument that Corporations Have 'Personal Privacy' Interests (posted 2011, updated 8/6/2014).

[55] AT&T Inc. v. FCC, 582 F.3d 490, 497 (3d Cir. 2009), rev'd, 131 S. Ct. 1177 (2011).

[56] FCC v. AT&T Inc., 131 S. Ct. at 1181.

[57] See id. (comparing "crab" with "crabbed," "corn" with "corny," and "crank" with "cranky").

[58] Id.

[59] Id. at 1181-82.

information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations."[60]

On the other hand, where disclosure concerning the financial makeup of a closely held corporation or small business would reveal the owner's personal finances, courts have found that the owner may have a personal privacy interest in such information.[61] This expectation of privacy can be diminished, however, with regard to matters in which that individual is acting in a business capacity.[62]

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.[63] In NARA v. Favish,

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[60] Id. at 1185; see also Sims v. CIA, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals.").

[61] See, e.g., Consumers' Checkbook, Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1051 (D.C. Cir. 2009) (stating that 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).

[62] See, e.g., Doe v. FEC, 920 F.3d 866 (D.C. Cir. 2019) (holding trust had no personal privacy under Exemption 7(C) and trustees had minimal privacy interests); 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); cf. Judicial Watch, Inc. v. FDA, 449 F.3d 141 (D.C. Cir. 2006) (upholding the redaction of business's 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).

[63] 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

the Supreme Court explained that in order to balance the interests "and give practical meaning to the exemption, the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable."[64] Instead, the Supreme Court held that unless a requester shows "that the public interest sought to be advanced is a significant one" and that "the information is likely to advance that interest," an invasion of privacy is necessarily unwarranted in the Exemption 7(C) context.[65] Where a request seeks

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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); Thomas v. Office of U.S. Attorney for the E. Dist. of N.Y., 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); OIP Guidance: 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 ("FOIA Counselor: Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking").

[64] Favish, 541 U.S. at 172; see also Graff v. FBI, 822 F. Supp. 2d 23, 33-34 (D.D.C. 2011) (recognizing "special burden" on requester in Exemption 7(C) context and noting "it would be inefficient and impractical, and ultimately, unfair to the requesters, to depend upon the government to guess what the requesters had in mind and to catalogue the possible public reasons for disclosure"); Lewis v. DOJ, 867 F. Supp. 2d 1, 19 (D.D.C. 2011) (holding that "[i]t is the requester's obligation to articulate a public interest sufficient to outweigh an individual's privacy interest, and the public interest must be significant" (citing Favish, 541 U.S. at 172)).

[65] 541 U.S. at 172; see also Tuffly v. DHS, 870 F.3d 1086, 1098 (9th Cir. 2017) (finding that names of ICE detainees would not add significantly to already available information and names would not be likely to advance that interest because public already has access to substantive portions of ICE material); Prison Legal News v. EOUSA, 628 F.3d 1243, 1251 (10th Cir. 2011) (noting that because alleged public interests already satisfied by materials viewed and reported on by media related to trial, any "incremental addition" to public knowledge was outweighed by privacy interest); Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv., No. 16-720, 2019 WL 3842309, at *6-*7 (D.D.C. Aug. 15, 2019) (finding that disclosure of names of hunters would not advance significant public interest because plaintiff's argument based on misconduct by hunters was speculative and names of hunters would not themselves advance any public interest in agency's monitoring of licenses); Behar v. DHS, Nos. 17-8153, 18-7516, 2019 WL 3841916, ay *9 (S.D.N.Y. Aug. 15, 2019) (finding identities of visitors to presidential candidate under Secret Service protection "would not advance public understanding of how the USSS spends taxpayer funds, vets visitors, conducts background checks or any other USSS function" and would "reveal only who met with [the candidate] at a given time"); Clemente v. FBI, 741 F. Supp. 2d 64, 85 (D.D.C. 2010) (finding that "[w]hile the Court agrees that the public has a significant interest in learning about any misuse of criminal informants by the FBI, [plaintiff] has failed to explain how that interest would be advanced by the release of the names and identifying information of all individuals mentioned in [the] file"); OIP Guidance: 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

information that categorically implicates a privacy interest, and the requester has failed to assert a cognizable public interest, courts have upheld agencies' use of Exemption 7(C) to categorically protect possibly responsive records, without the need to conduct a search.[66]

Once a requester identifies a public interest in the requested information, however, an agency may be required to search for and review records in order to effect the balancing required under Exemption 7(C).[67]

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interest asserted); cf. Mattachine Society of Wash., D.C. v. DOJ, 267 F. Supp. 3d 218, 228 (D.D.C. 2017) (finding public interest in release of records naming government employees targeted by Executive Order, but names would be replaced with unique alphanumeric markers that would serve as index); 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).

[66] See Reep v. DOJ, No. 18-5132, 2018 WL 6721099 (D.C. Cir. Dec. 18, 2018) (finding "appellant's conclusory assertions of government misconduct do not constitute the 'compelling evidence that the agency is engaged in illegal activity' required to overcome the categorical exemption from disclosure of personal identifying information of law enforcement personnel" (quoting Citizens for Responsibility and Ethics in Washington v. DOJ, 854 F.3d 675, 681-82 (D.C. Cir. 2017))); Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011) (holding that agency "was correct in declining to search" for records pertaining to certain third parties because it "would have added only information that [the court has] concluded is protected by Exemption 7(C)"); Boyd v. Crim. Div. of the DOJ, 475 F.3d 381, 388-89 (D.C. Cir. 2007) (finding that Exemption 7(C) protected information pertaining to third party even where "Glomar" response was improper and that it was unnecessary to find out whether government actually had the requested information); Allen v. BOP, No. 16-0708, 2019 WL 498804, at *6 (D.D.C. Feb. 8, 2019) (utilizing categorical rule permitting agency to withhold information identifying private citizens mentioned in law enforcement records unless disclosure is necessary to advance public interest); Graff v. FBI, 822 F. Supp. 2d at 33-34 (noting that "[w]hen a request . . . specifically calls for law enforcement records related to a third party, all of the responsive records will fall within the scope of the categorical exemption unless it can be shown that the invasion of privacy is 'warranted'" and approving of agency's policy of categorically denying such requests in absence of death certificate, privacy waiver, or showing of public interest that would be advanced); see also Oguaju v. United States, 288 F.3d 448, 451 (D.C. Cir. 2002) (holding that third party's "privacy interest, however slight, necessarily outweighs the nil public interest in release" and so it was irrelevant whether agency erred in using "Glomar" response for request for law enforcement information pertaining to third party, as refusal to confirm or deny existence of responsive records "deprives [plaintiff] of nothing to which he is entitled"), vacated & remanded, 541 U.S. 970, on remand, 378 F.3d 1115 (D.C. Cir. 2004) (reaffirming prior decision). But cf., Venkataram v. Office of Info. Policy, No. 09-6520, 2011 WL 2038735, at *3 (D.N.J. May 25, 2011) (rejecting agency's assertion that records were categorically exempt after determining that underlying records may not entirely consist of "private information").

[67] See, e.g., Citizens for Responsibility & Ethics in Wash. v. DOJ, 854 F.3d 675, 683 (D.C. Cir. 2017) (rejecting agency's categorical denial of investigatory records related to

Under Reporters Committee, the public interest recognized under the FOIA is specifically limited to the FOIA's "core 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, with the exception discussed below regarding death row inmates, courts have rarely recognized any public interest, as defined by Reporters Committee, in disclosure of information sought to assist someone in challenging their

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investigation of member of Congress and fourteen specified individuals, since connecting this information to names "could add much, or not at all, to the public's understanding of how the Government carried out its investigation"); Citizens for Responsibility & Ethics in Wash. v. DOJ, 840 F. Supp. 2d 226, 234 (D.D.C. 2012) (rejecting agency's categorical denial of request for investigatory records pertaining to member of Congress where agency had been specifically directed by Congress to investigate particular project and stating "the American public has a right to know about the manner in which its representatives are conducting themselves and whether the government agency responsible for investigating and, if warranted, prosecuting those representatives for alleged illegal conduct is doing its job"); see also Bonilla v. DOJ, No. 10-22168, 2011 WL 122023, at *3 (S.D. Fla. Jan. 13, 2011) (rejecting categorical withholding and finding that "[d]efendant has not met its burden of showing the type of record requested by Plaintiff would not reveal any 'official information' about a government agency").

[68] DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989); see also McGehee v. DOJ, 800 F. Supp. 2d 220, 234 (D.D.C. 2011) (noting that "the relevant question" in public interest analysis "is not whether the public would like to know the names . . . but whether knowing those names would shed light on the [agency's] performance of its statutory duties"); 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 "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").

conviction.[70] Indeed, a FOIA requester's private need for information in connection with litigation has been found to play no part in determining whether disclosure is warranted.[71]

Significantly, in 2011 the Court of Appeals for the District of Columbia Circuit found that there was a "substantial" public interest "in knowing whether [an agency] is withholding information that could corroborate a death-row inmate's claim of innocence."[72] In Roth v. DOJ, the court held that the requested information would advance that interest where the requester "show[ed] that a reasonable person could believe that the following might be true: (1) that the [subjects of the request] were the real killers, and (2) that the [agency was] withholding information that could corroborate

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[70] See, e.g., Watters v. DOJ, 576 F. App'x. 718, 724 (10th Cir. 2014) (determining that plaintiff "offers nothing to suggest that disclosure would contribute to public's understanding of Defendants' activities; instead, he asserts his own personal interest in securing his release"); Hawkins v. DEA, 347 F. App'x 223, 225 (7th Cir. 2009) (finding that "a prisoner's interest in attacking his own conviction is not a public interest"); Peltier v. FBI, 563 F.3d 754, 764 (8th Cir. 2009) (per curiam) (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"); 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), vacated & remanded on other grounds, 509 U.S. 918 (1993); 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), vacated & remanded on other grounds, 508 U.S. 165; 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").

[71] See Massey v. FBI, 3 F.3d 620, 625 (2nd Cir. 1993) ("[The] mere possibility that information may aid an individual in the pursuit of litigation does not give rise to a public interest."); Del Rio v. Miami Field Office of the FBI, No. 08-21103, 2009 WL 2762698, at *5 (S.D. Fla. Aug. 27, 2009) (holding that "[a] FOIA litigant's private interest in obtaining materials for personal reasons plays no part in the required balancing of interests"); 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); Garcia v. DOJ, 181 F. Supp. 2d 356, 372 (S.D.N.Y. 2002) (holding that request seeking information in furtherance of private litigation falls outside "the ambit of FOIA's goal of public disclosure of agency action"). But see United Am. Fin., Inc. v. Potter, 667 F. Supp. 2d 49, 60 (D.D.C. 2009) (holding that "the potential use of [the responsive records] in a potential civil suit does constitute a recognized public interest under Exemption 7(C)"); 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] Roth, 642 F.3d at 1175-76 (D.C. Cir. 2011).

that theory."[73] The D.C. Circuit, after finding that the requester had made such a showing in the case, ordered the government to reveal the existence of any records connecting three individuals with a specific criminal investigation.[74]

In NARA v. Favish, the Supreme Court addressed the showing necessary to demonstrate a public interest in disclosure where government wrongdoing is alleged.[75] Noting that "[a]llegations of misconduct are 'easy to allege and hard to disprove,'"[76] it ruled that a FOIA requester relying on such a public interest must do more than assert a "bare suspicion" and instead "must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred" before there will "exist a counterweight on the FOIA scale to balance against the cognizable privacy interests in the requested records."[77] (See also the further discussions of Favish's privacy-protection principles under Exemption 6, above.)

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[73] Id. at 1180-81.

[74] Id. at 1181-82.

[75] 541 U.S. 157 (2004).

[76] Id. at 175 (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998)).

[77] Id. at 174-75; see, e.g., Blackwell, 646 F.3d 37, 41 (D.C. Cir. 2011) (holding plaintiff had "not come close to meeting the demanding Favish standard"); CASA de Md., Inc. v. DHS, 409 F. App'x 697, 698-701 (4th Cir. 2011) (per curiam) (finding Favish misconduct standard satisfied); 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 public interest that must then be weighed); Associated Press v. DOD, 554 F.3d 274, 289 (2d Cir. 2009) (finding plaintiff's argument "squarely foreclosed by Favish" as no evidence of abuse was produced); 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"), vacated & remanded on other grounds, 558 U.S. 1042 (2009); 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 "'meaningful evidentiary showing'" as required by Favish (quoting Favish, 475 U.S. at 175)); see also Oguaju v. United States, 288 F.3d 448, 451 (D.C. Cir. 2002) (holding that "bald accusations" of prosecutorial misconduct are insufficient to establish public interest), vacated & remanded, 541 U.S. 970, on remand, 378 F.3d 1115 (D.C. Cir. 2004) (reaffirming prior decision); 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"); 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;

In the seminal case of Stern v. FBI,[78] the D.C. Circuit established guidelines to differentiate between employees in this context, holding "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.[79] Courts have found that disclosure must serve a public interest that is greater than the strong privacy interests of these employees and for lower level employees in particular, privacy protection is still often afforded.[80]

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no public interest absent any evidence of wrongdoing or widespread publicity of investigation); 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").

[78] 737 F.2d 84 (D.C. Cir. 1984).

[79] 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); see also, 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), vacated, 541 U.S. 970 (2004), aff'd on remand, 380 F.3d 110 (2d. Cir. 2004); 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).

[80] 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 operations or activities 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 "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).

Courts have held that no public interest exists in federal records that pertain to alleged misconduct by state officials.[81] Moreover, any special expertise claimed by the requester is irrelevant in assessing any public interest in disclosure.[82]

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.[83] The key consideration is whether disclosure of the particular record portions at issue would serve an identified public interest and whether the magnitude of such interest warrants the overriding of a personal privacy interest in the Exemption 7(C)

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[81] See Landano v. DOJ, 956 F.2d 422, 430 (3d Cir. 1991) (discerning "no FOIA-recognized public interest in discovering wrongdoing by a state agency"), vacated & remanded on other grounds, 508 U.S. 165; Garcia v. DOJ, 181 F. Supp. 2d 356, 374 (S.D.N.Y. 2002) ("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 v. Office of U.S. Attorney for E. Dist. of N.Y., 928 F. Supp. 245, 251 (E.D.N.Y. 1996) (recognizing that FOIA cannot serve as basis for requests about conduct of state agency). But see Lissner 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).

[82] See Hawkins v. DEA, 347 F. App'x 223, 224 (7th Cir. 2009) (noting that "the identity of the requesting party and the motivation for a FOIA request are irrelevant"); Ford v. West, 149 F.3d 1190, *3 (10th Cir. 1998) (unpublished table decision) (holding that plaintiff's prior EEO successes against agency do not establish public interest in disclosure of third-party names in this investigation); Massey v. FBI, 3 F.3d 620, 625 (2nd Cir. 1993) (finding that identity of requesting party and use that party plans to make of 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"), aff'd per curiam, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990). 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).

[83] 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, 355 F. Supp. 2d 98, 102 (D.D.C. 2004) (stating that "[t]he fact that [the requester] has provided evidence that there is some media interest in data mining as an umbrella issue does not satisfy the requirement that [it] demonstrate interest in the specific subject of [its] FOIA request").

balancing process.[84] At times courts have found a cognizable public interest in disclosure of the requested information.[85]

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[84] See, e.g., Peltier v. FBI, 563 F.3d at 765-66 (upholding Exemption 7(C) redactions because 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, a Div. of Knight-Ridder Broad., Inc. v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) (rejecting assertion that "the public interest at stake is the right of the public to know" about controversial event, because on careful analysis 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. v. U.S. Customs & Border Prot., 502 F. Supp. 2d 50, 59 (D.D.C. 2007) (finding no "appropriate nexus" between disclosure of names and addresses of individuals whose property is seized and public interest in how Customs performs its duties); see also Halloran v. Veterans Admin., 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").

[85] See, e.g., ACLU v. DOJ, 655 F.3d 1, 14 (D.C. Cir. 2011) (finding valid public interest where requesters sought to show nature, effectiveness, and intrusiveness of government's policy regarding warrantless cell phone tracking, and specifically noting that "plaintiffs are not (or at least not only) seeking to show that the government's tracking policy is legally improper"); Wessler v. DOJ, 381 F. Supp 3d 253, 261 (S.D.N.Y. 2019) (finding release of records concerning conditions of confinement for federal pretrial detainees held in state, local, and private prison facilities with which USMS contracts to house those detainees would advance the public understanding of USMS's monitoring of care provided to detainees in these facilities which "is a core responsibility of USMS, as set forth on USMS's own website); Citizens for Responsibility & Ethics in Wash. v. DOJ, 840 F. Supp. 2d 226, 230 (D.D.C. 2012) (finding public interest in request for investigatory records pertaining to member of Congress and noting that as requester "made it very clear . . . it is not arguing that [agency] engaged in misconduct . . . it is not correct that Plaintiff must provide compelling evidence of any such conduct"); Families for Freedom v. U.S. Customs & Border Prot., 797 F. Supp. 2d 375, 398-99 (S.D.N.Y. 2011) (finding that even if Exemption 7 threshold met, names of authors and recipients of two memoranda must be released because of the "substantial public interest in knowing whether the expectations and requirements articulated in the memoranda reflect high-level agency policy"); 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 White House would shed light on why visitors came to White House); 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); Butler v. DOJ, No. 86-2255, 1994 WL 55621, at *5 (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).

Balancing Process

If a court finds that there is no 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."[86]

If a court finds that a public interest qualifies for consideration under Reporters Committee,[87] the court then analyzes whether the public interest in disclosure is sufficiently compelling to, on balance, outweigh legitimate privacy interests.[88] When the

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[86] 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 Cole v. FBI, No. 13-01205, 2015 WL 4622917, at *3 (D.D.C. July 31, 2015) ("The Court concludes, however, that it need not reach the step of balancing private and public interests because [plaintiff] has not provided sufficient evidence of any public interest to be balanced."); 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); (Exemptions 6 and 7(C)); Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993) (finding that court "need not . . . dwell upon the balance" where no public interest is implicated); 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).

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

[88] See Lahr v. NTSB, 569 F.3d 964, 979 (9th Cir. 2009) (finding that where "only way that [third parties] mentioned . . . would have public value is if [they] were contacted directly by the plaintiff or by the media is insufficient to override the witnesses' and agents' privacy interests, as the disclosure would bring about additional useful information only if direct contacts, furthering the privacy intrusion, are made") [hereinafter NSTB]; 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 "private, personal information" contained in petition); Senate of the Commonwealth 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"); 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); Ctr. to Prevent Handgun Violence v. U.S. Dep't of Treasury, 981 F. Supp. 20, 23-24 (D.D.C. 1997) (finding "minuscule privacy interest" in identifying sellers in

public interest is found to outweigh the privacy interest at stake, courts have found that release of third party information is justified.[89]

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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); Fitzgibbon v. U.S. Secret Serv., 747 F. 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 minutiae of little or no value in terms of the public interest."), aff'd per curiam, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990). But see Lindsey v. FBI, 271 F. Supp. 3d 1, 9 (D.D.C. 2017) ("Even a modicum of public interest may suffice to warrant disclosure, if public acknowledgments by [the third party] have vitiated the claimed privacy interests in this matter.").

[89] See, e.g., Bartko v. DOJ, 898 F.3d 51, 69 (D.C. Cir. 2018) (finding public interest in disclosing OPR records of prosecutorial misconduct, since matter was of public record, attorney was a supervisory official, and there was public interest in knowing how investigation was conducted); Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 554 (5th Cir. 2002) (viewing "general public interest in monitoring" a specific OSHA investigation as sufficient to overcome employee-witnesses' privacy interests against employer retaliation); Rosenfeld v. DOJ, 57 F.3d 803, 811-12 (9th Cir. 1995) (ordering agency to release names of subjects of investigation after finding public interest in "knowing whether and to what extent the FBI investigated individuals for participating in political protests, not federal criminal activity" outweighed privacy interests); 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 senior officials outweighed privacy interests); Am. Civil Liberties Union of Ariz. v. DHS, No. 15-00247, 2018 WL 1428153, at *6 (D. Ariz. 2018) (finding public interest in disclosing names of federal employees accused of misconduct, as request was targeted at specific accused employees which could shed light on patterns of behavior and determine whether appropriate investigation was conducted by agencies); Eberg v. DOD, 193 F. Supp. 3d 95, 117 -18 (D. Conn. 2016) (finding public interest "significant" in release of records naming third party in sexual assault, equal employment opportunity, and sexual harassment complaints as "gender-based obstacles to success in the military, and issues of gender discrimination have long been a matter of strong public concern"); Families for Freedom v. U.S. Customs & Border Prot., 797 F. Supp. 2d 375, 399 (S.D.N.Y. 2011) (finding "substantial public interest in knowing whether the expectations and requirements articulated in the memoranda reflect high-level agency policy" greater than privacy interests of authors and recipients of memoranda); 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) (finding public interest in misconduct satisfying Favish standard warranted ordering disclosure of names of FBI and DEA Special Agents, and of state, local, and foreign law enforcement officers); Bennett v. DEA, 55 F. Supp. 2d 36, 41 (D.D.C. 1999) (ordering release of informant's rap sheet after

In Reporters Committee, the Supreme Court emphasized the appropriateness of "categorical balancing" under Exemption 7(C) as a means of achieving "workable rules" for processing FOIA requests.[90] In so doing, it recognized that entire categories of cases can properly receive uniform disposition "without regard to individual circumstances; [when] the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided."[91] 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.[92]

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."[93] Recognizing the fundamentally inherent privacy interest of individuals mentioned in any way in law enforcement files,[94] 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."[95] 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."[96] It observed that such information would serve a "significant" public interest only if "there is

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finding "very compelling" evidence of "extensive government misconduct" in handling "career" informant); Or. Nat. 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)).

[90] 489 U.S. 749, 776-80 (1989).

[91] Id. at 780. But see Cooper Cameron Corp., 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).

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

[93] Id. at 1205.

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

[95] Id.

[96] Id.

compelling evidence that the agency . . . is engaged in illegal activity."[97] Consequently, the D.C. Circuit held that "unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is [categorically] exempt from disclosure."[98]

The D.C. Circuit subsequently cautioned, however, "a categorical approach is appropriate only if 'a case fits into a genus in which the balance *characteristically* tips in one direction.'"[99]

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[97] Id. at 1206; see also Kuzma v. DOJ, 692 F. App'x 30, 34 (2nd Cir. 2017) (per curiam) (determining that requester's assertion that disclosing names of individuals involved in investigation will reveal government mishandling of one case is not enough); 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), vacated & remanded, 541 U.S. 970, on remand, 378 F.3d 1115 (D.C. Cir. 2004) (reaffirming prior decision); Quiñon v. FBI, 86 F.3d 1222, 1227, 1231 (D.C. Cir. 1996) (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); 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 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 Servs., 926 F.2d at 1205-06)).

[98] SafeCard Servs., 926 F.2d at 1206; see also Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (adopting SafeCard approach); But see Balt. 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, No. 01-1537 (4th Cir. June 25, 2001).

[99] Citizens for Responsibility & Ethics in Washington v. DOJ, 746 F.3d 1082, 1095 (D.C. Cir. 2014) (quoting Reporters Comm., 489 U.S. at 776 (emphasis added by D.C. Circuit)) (finding that case-by-case balancing approach that considers rank of public official involved and seriousness of misconduct alleged appropriate in place of categorical approach); see, e.g., Roth v. DOJ, 642 F.3d 1161, 1183-84 (D.C. Cir. 2011) (finding balancing approach, not categorical approach, appropriate because "where the FOIA requester has surmounted the fairly substantial hurdle of showing that a reasonable person could believe that the FBI might be withholding information that could corroborate a death-row inmate's claim of innocence, the balance militates in favor of fuller disclosure"); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 893 (D.C. Cir. 1995) (finding that "[b]ecause the range of circumstances included in . . . categorical rule do not 'characteristically support' an inference that all material in law enforcement files which names a particular individual is exempt from disclosure to third parties, a more particularized approach is required"); Judicial Watch, Inc. v. DHS, 598 F. Supp. 2d 93, 96 (D.D.C. 2009) (finding that records concerning agency's handling of immigration matters not appropriate for categorical

The D.C. Circuit balanced the privacy and public interests in a case where the record at issue consisted of aggregated docket information pertaining to 255 criminal cases in which warrantless cellular phone tracking was utilized by the government.[100] After finding that convicted defendants maintained a small but cognizable privacy interest in this information, the court found a "significant public interest in disclosure" that would result from the derivative use of the information, and noted the widespread media, congressional, and judicial interest in the issue.[101] As a result "of the strength of the public interest . . . and the relative weakness of the privacy interests at stake," the court concluded that the balance tilted in favor of disclosure.[102]

As with Exemption 6, when applying Exemption 7(C), courts have required agencies to address whether they could redact the documents to protect individual privacy interests, while releasing the remaining information.[103] (See the further discussion of privacy redaction under Exemption 6, Balancing Process, above.)

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handling because balance between private and public interests in records requested "is a much closer call" and defendant must conduct "an assessment of each responsive document to determine whether it is exempt").

[100] ACLU v. DOJ, 655 F.3d 1, 1-4 (D.C. Cir. 2011).

[101] Id. at 12-15.

[102] Id. at 16.

[103] See, e.g., Ocasio v. DOJ, No. 17-5005, 17-5085, 2017 U.S. App. LEXIS 16147, at *2 (D.C. Cir. Aug. 23, 2017) (per curiam) (finding government's declaration and Vaughn index provided sufficient justification for withholding documents in their entirety by demonstrating no further information could be segregated for release); 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 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); Aldridge v. U.S. Comm'r of Internal Revenue, No. 00-131, 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); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 571 (S.D.N.Y. 1989) (finding 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 occupation and country of excluded individuals).

The "Glomar" Response

The Court of Appeals for the District of Columbia Circuit has explained that "[a] 'Glomar' response to a FOIA request, [i.e., when an agency does not acknowledge whether records responsive to the request exist] is permitted in that rare situation when either confirming or denying the very existence of records responsive to a request would 'cause harm cognizable under a FOIA exception.'"[104] For purposes of Exemption 7(C), the D.C. Circuit found that "[t]he question . . . is whether disclosing even 'the existence or nonexistence of the requested records' is itself information protected by Exemption 7(C)."[105] The D.C. Circuit has held that acknowledging the existence of records that would reveal that named individuals were investigated "'go[es] to the heart of the privacy interest that Exemption 7(C) was designed to protect.'"[106] Indeed, "'[t]here can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of [a law enforcement] investigation.'"[107]

Courts have found a Glomar response appropriate when responding to targeted requests for documents regarding alleged government informants,[108] trial witnesses,[109]

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[104] Bartko v. DOJ, 898 F.3d 51, 63-64 (D.C. Cir. 2018) (quoting Roth v. Department of Justice, 642 F.3d 1161, 1178 (D.C. Cir. 2011)) (concluding that Glomar response was inappropriate because records did not satisfy law enforcement threshold of Exemption 7 and agency had not demonstrated that "there would be a single answer to every balancing of interests" involved).

[105] Id.; see, e.g., 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").

[106] People for the Ethical Treatment of Animals v. NIH, 745 F.3d 535, 540 (D.C. Cir 2014) (quoting PETA v. NIH, 853 F.Supp.2d 146, 154–59 (D.D.C.2012)).

[107] Id. (citing Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 864 (D.C.Cir.1981) (quoting Baez v. Dep't of Justice, 647 F.2d 1328, 1338 (D.C.Cir.1980))

[108] 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 existence of records pertaining to alleged DEA informants); 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).

[109] See, e.g., Oguaju v. United States, 288 F.3d 448, 451 (D.C. Cir. 2002) (approving Glomar response to request for any information on individual who testified at requester's trial when requester provided no public interest rationale), vacated & remanded, 541 U.S. 970, on remand, 378 F.3d 1115 (D.C. Cir. 2004) (reaffirming prior decision); 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

subjects of investigations,[110] or individuals who may merely be mentioned in a law enforcement record.[111]

In order for a Glomar response to be effective, it must be employed universally in situations where mere acknowledgment of records would reveal exempt information, even where no responsive records actually exist, because, as one court has noted "[i]f a *Glomar* response is provided only when . . . records are found, the response would in fact be useless because it 'would unsurprisingly be interpreted as an admission that . . . responsive records exist.'"[112]

Courts have limited agencies' use of Glomar in a variety of circumstances. A request that does not sufficiently "target" the subject of the request is not appropriate for

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associate witnesses with criminal investigation); 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).

[110] 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); Beck v. DOJ, 997 F.2d 1489, 1493-94 (D.C. Cir. 1993) (request for records concerning alleged wrongdoing by two named DEA agents); 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"); Strassman v. DOJ, 792 F.2d 1267, 1268 (4th Cir. 1986) (finding Glomar response appropriate regarding request for records allegedly indicating whether governor of West Virginia threatened to invoke Fifth Amendment because "divulgence of [responsive records], if [they] existed, could lead the public to infer a link between [the governor] and criminal wrongdoing"); 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).

[111] 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, Wash. Bureau v. U.S. Customs Serv., 71 F.3d 885, 894 (D.C. Cir. 1995) (concluding Glomar response appropriate after finding 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).

[112] Moore v. FBI, 883 F. Supp. 2d 155, 164 (D.D.C. 2012) (quoting agency declaration and noting agency provided "reasonable explanation" for invoking Glomar regardless of whether responsive records existed) (Exemptions 1 and 3).

a Glomar response.[113] An agency may not be able to utilize the Glomar response where the subject of a request has already been publicly associated with the agency.[114] Courts have held that a Glomar response is inappropriate once it is determined that an informant's status has been officially confirmed.[115] The Court of Appeals for the District of Columbia Circuit rejected an agency's use of Glomar even where the underlying subjects had never been associated by the agency with a specific investigation, when it found an overriding public interest in knowing whether the individuals who were the subject of the request were the actual perpetrators of a crime for which the requester was convicted and on death row.[116]

For a request that seeks non-law enforcement records as well as law enforcement records, or which seeks acknowledged law enforcement files as well as unacknowledged files, courts have upheld agencies' use of a "bifurcated" or two-pronged approach in its

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[113] People for the Ethical Treatment of Animals v. NIH, 745 F.3d 535, 544–45 (D.C. Cir. 2014) (holding the Glomar response inappropriate when "the request, broadly construed, encompasses documents relating to *any* ensuing investigation," and not investigation targeted to specific individual).

[114] See, e.g., Citizens for Responsibility & Ethics in Washington v. DOJ, 746 F.3d 1082, 1091-92 (D.C. Cir. 2014) (holding that subject's public statements that he had been, but was no longer, under investigation, made Glomar response inappropriate); see also Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (noting prosecutor's public acknowledgment that he was subject of disciplinary proceedings "undoubtedly does diminish his interest in privacy: the public already knows who he is, what he was accused of, and that he received a relatively mild sanction" and so Glomar response inappropriate). Cf. Lindsey v. FBI, 271 F. Supp. 3d 1, 7-8 (D.D.C. 2017) (requiring defendant to provide more information to justify Glomar response after third party acknowledged information because "the fact that the *government* has not acknowledged a potentially personal piece of information, does not mean that the *third-party's* acknowledgment of that information has no bearing on the private-public interest balancing test underlying the FOIA exemptions at issue") (citing CREW, 746 F.3d 1082, 1092 (D.C. Cir. 2014)).

[115] See Pickard v. DOJ, 653 F.3d 782, 787 (9th Cir. 2011) (finding that agency could not refuse to confirm or deny records pertaining to third party where "the government . . . intentionally elicited testimony from [the third party] and several DEA agents as to [the third party's] activities as a confidential informant in open court in the course of official and documented public proceedings"); Boyd v. Crim. Div. of the DOJ, 475 F.3d 381, 389 (D.C. Cir. 2007) ("Where an informant's status has been officially confirmed, a Glomar response is unavailable, and the agency must acknowledge the existence of any responsive records it holds"); North v. DOJ, 810 F. Supp. 2d 205, 208-09 (D.D.C. 2011) (rejecting Glomar response where requester produced trial transcripts in which government referred to third party as informant, and that third party testified regarding his cooperation agreement with government).

[116] Roth v. DOJ, 642 F.3d 1161, 1181-82 (D.C. Cir. 2011), reh'g en banc denied, No. 09-5428 (D.C. Cir. Nov. 14, 2011).

response, i.e., using Glomar for part and addressing and processing separately other records that are located.[117]

[117] See, e.g., Jefferson v. DOJ, 284 F.3d 172, 178-79 (D.C. Cir. 2002) (refusing to allow Glomar response to request for OPR records concerning AUSA because agency did not bifurcate for separate treatment its non-law enforcement records); Nation Magazine, Wash. Bureau, 71 F.3d at 894-96 (deciding that Glomar response is appropriate only as to existence of records associating former presidential candidate with criminal activity), on remand, 937 F. Supp. 39, 45 (D.D.C. 1996) (finding that Glomar response as to whether candidate was subject, witness, or informant in law enforcement investigation appropriate after agency searched law enforcement files for records concerning candidate's acknowledged efforts to assist agency); Burke v. DOJ, 96-1739, 1999 WL 1032814, at *5 (D.D.C. Sept. 30, 1999) (finding no need to bifurcate request that "specifically and exclusively" sought investigative records on third parties). See generally FOIA Update, Vol. XVII, No. 2, at 3-4 ("OIP Guidance: The Bifurcation Requirement for Privacy 'Glomarization'") (providing guidance on how agencies should handle requests for law enforcement records on third-parties).