

Freedom of Information Act Access to Personal Information Contained in Government Records: Public Property or Protected Information?

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When a man assumes a public trust, he should consider himself as public property.

— Thomas Jefferson

When we assumed the Soldier, we did not lay aside the Citizen.

— George Washington

Introduction

On a mid-winter afternoon, the Chief of Administrative Law hands you two recently received Freedom of Information Act¹ (FOIA) requests from the local newspaper. The first requests the identities and punishments imposed on all servicemembers arrested on post for driving under the influence of alcohol on New Year's Eve, and the second requests all records the command has concerning misconduct by First Lieutenant (1LT) Friendly. With regard to the first request, because the command did an excellent job emphasizing the dangers of drunk driving, only three servicemembers were snagged by the MP's New Year's Eve dragnet: Colonel (COL) Oops, the now-former Chief of Staff; Second Lieutenant (2LT) Special, the son of an assistant secretary of the Army; and Private First Class (PFC) Ordinary, a twenty-one-year-old infantryman. As a result of their transgressions, each man received a general officer memorandum of reprimand (GOMOR), and COL Oops was relieved from his position as Chief of Staff. With regard to the second request, the newspaper had recently run an exposé on military fraternization in which it asserted that fraternization between officers and junior enlisted personnel was rampant on post. Included was the allegation that 1LT Friendly had paid all expenses to fly himself and a female PFC in the command to Cancun for a romantic weekend together. As it turns out, the allegation is true, and in addition to a copy of the GOMOR 1LT Friendly received, the command also has an Army Regulation 15-6 investigation that documents the misconduct.

These two FOIA requests highlight the conflict between the public's right to government records and the privacy interests of Department of Defense (DoD) employees, whose personal information may be contained in those government records. This is a real conflict. While DoD employees do assume a public trust when they assume their duties, they certainly do not become "public property"; and while, as holders of such public trust, they are open to more inspection than those employed in the private sector, such inspection is not, and should not be, limitless. The rights that all individuals enjoy, including those involving privacy, survive the oath of office. Where, then, is the line drawn between the public's right to government records and the government employee's right to privacy? How does the DoD meet its obligations under the FOIA while protecting the privacy interests of its personnel? By providing some background and ultimately addressing these two fictional FOIA requests, this article answers these questions and demonstrates that even though DoD employees assume a certain public trust when they work for the DoD, their privacy interests are well protected. In fact, in recent years the protection of personal privacy has taken on a new emphasis throughout DoD as part of a larger force protection posture.

[The events of 9/11], and the wars the country is currently engaged in [in] Afghanistan and Iraq, have heightened the Defense Department's security awareness, and that in turn has caused us to look at ways to prevent future terrorist attacks and better ensure the safety of our personnel by proactive security precautions. Numerous security measures are now in place for just the purpose of preventing future attacks and protecting DOD personnel. The idea behind such security measures is that a layered response is most effective in dealing with threats that are as yet unknown. The policy to withhold the names of DOD

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¹ 5 U.S.C. § 552 (2006).

personnel is not the “silver bullet” that will by itself prevent an attack such as the one on the Pentagon; however, it is part of a larger security system designed to enable DOD to prevent attacks directed at any and all DOD personnel. The Department of Defense, through changes in security procedures and regulations including the policy [that most personal information about DOD personnel are redacted from releasable records] at issue here, is trying to make it as difficult as possible for adversaries to collect valuable information that will enable them to carry out attacks on DOD personnel.²

Three FOIA exemptions are key to providing this protection. They are Exemption 3,³ which protects information that other federal statutes require or permit to be withheld from release under the FOIA; Exemption 6,⁴ which protects personal information contained in personnel, medical, or similar files; and Exemption 7(C),⁵ which protects personal information in law enforcement records. To thoroughly understand these exemptions, however, it is important to consider several issues that affect their application. First, among the dozens of Exemption 3 statutes that exist, the primary Exemption 3 statute used by DoD is 10 U.S.C. § 130b. That provision protects DoD employees serving in specific critical organizations. Second, the applicability of Exemptions 6 and 7(C) depends upon certain thresholds being met since the protection afforded by those exemptions is limited to specific—albeit broad—types of records. More critical, however, is the balancing test that weighs the privacy interest involved and the public interest that may exist in disclosing the records. The outcome of this test will determine whether private information is released or not. And third, recognizing how President Barack Obama’s FOIA policy of openness⁶ might impact the application of these exemptions is important to ensure current policy is accurately implemented.

Exemption 3 and 10 U.S.C. § 130b

Exemption 3⁷ incorporates all federal nondisclosure statutes, including 10 U.S.C. § 130b. Section 130b authorizes the Secretary of Defense to withhold from release any “personally identifying information” concerning DoD personnel—members of the Armed Forces and civilian employees alike—who are assigned to overseas, sensitive, or routinely deployable units.⁸ According to DoD, “personally identifying information” includes “the person’s name, rank, duty address, and official

² Declaration by Michael B. Donley, Director, Admin. & Mgmt., Office of the Sec’y of Def., *quoted in* Long v. Office of Pers. Mgmt., 2007 U.S. Dist. LEXIS 72887, at *40–41 (N.D.N.Y. Sept. 30, 2007).

³ 5 U.S.C. § 552(b)(3).

⁴ *Id.* § 552(b)(6).

⁵ *Id.* § 552(b)(7)(C).

⁶ See Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, subject: Freedom of Information Act (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/ [hereinafter President Obama’s FOIA Memo]; see also Memorandum from Attorney General Eric Holder to the Heads of Executive Departments and Agencies, subject: The Freedom of Information Act (FOIA) (Mar. 19, 2009), *available at* <http://www.usdoj.gov/ag/foia-memo-march2009.pdf> [hereinafter Attorney General Holder’s FOIA Guidelines] (implementing President Obama’s FOIA Memo); Office of Information Policy, President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines: Creating a “New Era of Open Government” (Apr. 17, 2009), <http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm> [hereinafter OIP Guidance] (providing guidance to agencies on implementing President Obama’s FOIA Memo and Attorney General Holder’s FOIA Guidelines).

⁷ FOIA Exemption 3 provides, “This section does not apply to matters that are—

...

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”

5 U.S.C. § 552(b)(3).

⁸ 10 U.S.C. § 130b (2006) provides

(a) Exemption From Disclosure.— The Secretary of Defense and, with respect to the Coast Guard when it is not operating as a service in the Navy, the Secretary of Homeland Security may, notwithstanding section 552 of title 5, authorize to be withheld from disclosure to the public personally identifying information regarding—

- (1) any member of the armed forces assigned to an overseas unit, a sensitive unit, or a routinely deployable unit; and
- (2) any employee of the Department of Defense or of the Coast Guard whose duty station is with any such unit.

Id. § 130b(a).

title and information regarding the person's pay."⁹ The Army describes personally identifying information as including the "[n]ames and duty addresses (postal and/or e-mail) published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories."¹⁰ The statute's coverage also applies to similarly situated National Guard units¹¹ and, presumably, Reserve units. The burden, however, is on the Government to show that a particular unit fits into one of the 10 U.S.C. § 130b categories. Simply concluding that a unit does so, without supporting facts, is not sufficient.¹²

With most deployable units—both active and reserve components—meeting the criteria of 10 U.S.C. § 130b, the coverage is certainly expansive. It is not limitless, however. The DoD has curtailed the statute by declaring that it “does not preclude a DoD component's discretionary release of names and duty information of personnel in overseas, sensitive, or routinely deployable units who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons.”¹³

The language of 10 U.S.C. § 130b states that the Secretary of Defense may authorize the withholding of personally identifying information. Courts have uniformly interpreted this language to allow for the delegation of this authority if, when invoked in litigation, the protection of personal information is “supported by declaration of a military officer.”¹⁴ In other words, the Secretary of Defense need not personally authorize every instance where 10 U.S.C. § 130b is used to redact personal information. If litigated, an appropriate military officer may declare that the redactions comply with Section 130b.

Several other Exemption 3 statutes can also be used to protect personal privacy. For example, 10 U.S.C. § 424 protects names, official titles, occupational series, grades, and salaries of employees of the Defense Intelligence Agency, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency; and 21 U.S.C. § 1175 protects drug abuse program patient records. For additional information, the Office of the Secretary of Defense and Joint Staff Requester Service Center maintain excellent FOIA reference materials, including a list of Exemption 3 statutes used by DoD components.¹⁵

Exemptions 6 and 7(C): The Privacy Exemptions

Threshold Considerations

Two FOIA exemptions also specifically protect personal privacy. Exemption 6 protects “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personnel privacy.”¹⁶ Exemption 7(C) protects “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”¹⁷

⁹ Memorandum from D. O. Cooke, Director, Admin. & Mgmt., Office of the Sec'y of Def., to See Distribution, subject: Withholding of Personal Information of DoD Personnel (Feb. 17, 2001), available at <http://www.DOD.mil/pubs/foi/dfoipo/docs/130b.pdf> [hereinafter Cooke February Memo].

¹⁰ Department of the Army, The Freedom of Information Act Program; Final Rule, 32 C.F.R. § 518, § 518.13(c)(1) (2006), available at <https://www.rmda.army.mil/foia/docs/foia-32CFRPart518.pdf> [hereinafter Army Final Rule]. This rule is intended to replace U.S. Dep't of Army, Reg. 25-55, *The Department of the Army Freedom of Information Act Program* (1 Dec. 1997). While AR 25-55 has not been rescinded, the Final Rule and not AR 25-55 should control if there is a conflict between the two.

¹¹ See *Windel v. United States*, No. A02-306, 2005 WL 846206 (D. Alaska) (holding that 10 U.S.C. § 130b protects the identities of all members assigned to a routinely deployable unit of the Alaska Air National Guard).

¹² *O'Keefe v. Dep't of Def.*, 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006).

¹³ Cooke February Memo, *supra* note 9.

¹⁴ *Hiken v. Dep't of Def.*, 521 F. Supp. 2d 1047, 1062 (N.D. Cal. 2007) (citing *Windel*, 2005 WL 846206, at *2).

¹⁵ Defense Freedom of Information Policy Office, (b)(3) Statutes and Type of Information Covered, <http://www.dod.mil/pubs/foi/dfoipo/docs/b3.pdf> (last visited 27 January 2010).

¹⁶ 5 U.S.C. § 552(b)(6).

¹⁷ *Id.* § 552(b)(7)(C).

The “similar files” part of the threshold requirement of Exemption 6 caused significant confusion¹⁸ before the Supreme Court clarified the phrase in *U.S. Department of State v. Washington Post Co.*¹⁹ In its ruling, the Supreme Court found that Congress had intended “similar files” to include any information that “applies to a particular individual.”²⁰ In other words, if the record contains personal information about an identified individual, it is considered a “similar file.” In light of this broad interpretation, the only potential, but unlikely, limitation to the “similar files” language may be information about a particular individual, but one who cannot be readily identified.²¹

Similarly, the threshold of Exemption 7(C) is not as concrete as it may initially appear. “[R]ecords or information compiled for law enforcement purposes” are not limited to those compiled for criminal investigation purposes²² but also include those compiled for national security investigations,²³ background security investigations²⁴ and personnel investigations of servicemembers or other employees if they focus on “specific and potentially unlawful activity by particular employees.”²⁵ Sometimes it can be difficult to determine whether an employee record was created for law enforcement purposes or merely as part of an agency’s “general monitoring of its own employees to ensure compliance with the agency’s statutory mandate and regulations.”²⁶ Records created to conduct “general monitoring,” and similar employee files, are not considered law enforcement records and are, therefore, not protected under Exemption 7(C), although they will qualify as “similar files” for Exemption 6 purposes.

Although all records that qualify for protection under Exemption 7(C)’s threshold also qualify under Exemption 6’s threshold, the language of Exemption 7(C) affords even greater privacy protection. Exemption 7(C)’s more extensive protection recognizes that there is a stigma attached to being mentioned in a law enforcement record—not to mention being

¹⁸ See, e.g., *Bd. of Trade of Chicago v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 400 (D.C. Cir. 1980) (ruling that only “intimate” information is protectable in “similar files”).

¹⁹ 456 U.S. 595 (1982).

²⁰ *Id.* at 602; see also *Sherman v. U.S. Dep’t of the Army*, 244 F.3d 357, 361 (5th Cir. 2001) (noting, in the context of protecting social security numbers, that the “Supreme Court has interpreted exemption 6 ‘files’ broadly to include any ‘information which applies to any particular individual’”) (citing *Wash. Post Co.*, 456 U.S. at 602). As a result, any record containing personal information about any individual could be considered a “similar file,” and, therefore, would potentially be protected from disclosure by Exemption 6.

²¹ See, e.g., *Arief v. U.S. Dep’t of the Navy*, 712 F.2d 1462, 1467–68 (D.C. Cir. 1983) (finding disclosure of the entire inventory of drugs available to over 1000 individual beneficiaries of the Office of Attending Physician of the U.S. Congress would not apply to any particular individual because there was nothing to connect any specific drug to any identifiable beneficiary); *Dayton Newspapers, Inc. v. U.S. Dep’t of the Air Force*, 107 F. Supp. 2d 912, 919 (S.D. Ohio 1999) (refusing to protect details, other than names, social security numbers, home addresses, home and work telephone numbers, and places of employment of individuals receiving medical malpractice settlements even though there was a “possibility that factual information might be pieced together to supply the ‘missing link,’ and lead to personal identification” of claimants); cf. *O’Keefe v. Dep’t of Def.*, 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006) (holding that Exemption 6–protected personal information should be withheld from the requester even though, “due to his ‘familiarity and working relationship’ with these individuals, he is already able to deduce the identities of the parties”).

²² See, e.g., *Providence Journal Co. v. U.S. Dep’t of the Army*, 981 F.2d 552, 555 & n.13 (1st Cir. 1992) (noting no dispute that records compiled by the Inspector General in investigation of “alleged misconduct punishable either by internal disciplinary action or by court-martial under the Uniform Code of Military Justice” by two senior National Guard officers satisfied Exemption 7’s threshold); *Aspin v. Dep’t of Def.*, 491 F.2d 24, 26–28 (D.C. Cir. 1973) (explaining that records of the My Lai investigation “directed toward discovering and toward obtaining evidence of possible offenses under the Uniform Code of Military Justice” were compiled for law enforcement purposes).

²³ See, e.g., *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F. 3d 918, 926 (D.C. Cir. 2003) (finding 9/11 investigation into “heinous violation of federal law as well as a breach of this nation’s security” to satisfy threshold); *L.A. Times Commc’ns v. U.S. Dep’t of the Army*, 442 F. Supp. 2d 880, 898 (C.D. Cal. 2006) (holding that incident reports from private security contractors in Iraq meet the law enforcement threshold because the purpose of compiling such incident reports “falls within a cognizable law enforcement mandate in Iraq [of tracking] insurgent attacks on and other unlawful activities against Coalition forces [and contract employees] to improve intelligence information that will enhance security”).

²⁴ See, e.g., *Mittleman v. Office of Pers. Mgmt.*, 76 F.3d 1240, 1241–43 (D.C. Cir. 1996) (Office of Personnel Management investigation); *Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 809 (9th Cir. 1995) (“FBI government appointment investigations”).

²⁵ *Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984) (internal investigation of three FBI employees in connection with a possible cover-up of illegal FBI surveillance activities); see also *Kimberlin v. Dep’t of Justice*, 139 F.3d 944, 947–48 (D.C. Cir. 1998) (concluding that an investigation “conducted in response to and focused upon a specific, potentially illegal release of information by a particular, identified official” satisfies the threshold); *Strang v. Arms Control & Disarmament Agency*, 864 F.2d 859, 862 (D.C. Cir. 1989) (ruling agency investigation into employee violation of national security laws by “improperly storing, transporting, and disclosing classified documents” in the context of FOIA Exemption 7 and Privacy Act Exemption (k)(2), qualifies as “compiled for law enforcement purposes”); *O’Keefe*, 463 F. Supp. 2d at 320, 324 (finding that report detailing investigation of Inspector General complaint into alleged misconduct by commanding officers was compiled for law enforcement purposes).

²⁶ *Stern*, 737 F.2d at 89; see also *Jefferson v. U.S. Dep’t of Justice*, 284 F.3d 172, 177 (D.C. Cir. 2002) (holding that agencies must distinguish between “(1) files in connection with government oversight of the performance of duties by its employees, and (2) files in connection with investigations that focus directly on specific alleged illegal acts which could result in civil or criminal sanctions”).

the subject of a law enforcement record.²⁷ As a result, individuals mentioned in law enforcement records are afforded more privacy protection than those mentioned in non-law enforcement records. As the Supreme Court explained,

Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President. Second, whereas Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. This difference is also the product of a specific amendment. Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.²⁸

Although the Government's burden is greater under Exemption 6 than Exemption 7(C), the analysis under each requires that a privacy interest, if any, be identified, and a public interest, if any, be identified, and if both are found to exist, that the two be balanced against each other.²⁹

Is There a Privacy Interest?

In the lead case on FOIA's privacy exemptions, *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court made three key observations on the concept of privacy: (1) that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person"; (2) that there is a "privacy interest in keeping personal facts away from the public eye"; and (3) that "information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons [or] not freely available to the public.'"³⁰ Also, as the Court itself held in *Reporters Committee*, a privacy interest may exist even though the information may at one time have been known to some members of the public.³¹ Similarly, individuals' privacy rights are not lost or diminished merely because the requester is personally aware of the information³² or because he is able to "piece together" the identities of individuals whose names have been deleted from disclosed records.³³ The result is that if the

²⁷ *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) ("the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation") (quoting *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987)).

²⁸ *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989) (footnotes omitted); see also *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994) ("Exemption 7(C) is more protective of privacy than Exemption 6: The former provision applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,' while the latter bars any disclosure that 'would constitute' an invasion of privacy that is 'clearly unwarranted'").

²⁹ See, e.g., *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (observing under Exemption 6 that "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to government information by excluding those kinds of files the disclosure of which might harm the individual") (quoting *Hearings on H.R. 5012 before a Subcommittee of the House Committee on Government Operations*, 89th Cong., 1st Sess., at 29-30 (1965)), cited in *H.R. REP. NO. 1497*, at 11 (1966); *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-75 (2004) (discussing the "unwarranted" standard under Exemption 7(C)).

³⁰ *Reporters Comm.*, 489 U.S. at 763-64, 769 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1804) (1976)).

³¹ *Id.* at 767 (protecting FBI criminal history information—a "rap sheet" consisting largely of arrests and convictions—on an alleged organized crime figure, "even where the information may have been at one time public"); see also *Fed. Labor Relations Auth.*, 510 U.S. at 500 (protecting home addresses of government employees and observing that "[i]t is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but 'in an organized society, there are few facts that are not at one time or another divulged to another'" (quoting *Reporters Comm.*, 489 U.S. at 763)); *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 363-64 (5th Cir. 2001) (protecting social security numbers in award orders listing multiple individuals and observing that "the fact that otherwise private information at one time or in some way may have been placed in the public domain does not mean that a person irretrievably loses his or her privacy interest in the information"); *Mueller v. U.S. Dep't of the Air Force*, 63 F. Supp. 2d 738, 743 (E.D. Va. 1999) (ruling that publicity surrounding an Airman's suicide and a subsequent investigation into prosecutorial misconduct does not eliminate the subject of the investigation's privacy interests in "avoiding disclosure of the details of the investigation, of his misconduct, and of his punishment." (citation omitted)); *U.S. DEP'T OF DEF., REG. 5400.7-R, FREEDOM OF INFORMATION ACT PROGRAM* para. C3.2.1.6.2.1 (4 Sept. 1998), available at <http://www.dtic.mil/whs/directives/corres/pdf/540007r.pdf> [hereinafter DoD REG. 5400.7-R]; *Army Final Rule*, *supra* note 9, § 518.13 (f)(2)(I) ("A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure.").

³² See *Schiffer v. FBI*, 78 F.3d 1045, 1411 (9th Cir. 1996).

³³ *Weisberg v. U.S. Dep't of Justice*, 746 F.2d 1476, 1491 (1984); see also *L&C Marine Trans. v. United States*, 740 F.2d 919, 922 (11th Cir. 1984) (an individual's privacy interest is not lost merely because requester can ascertain it by other means).

information is protected under Exemption 6 or 7(C), an individual's privacy interest should be protected and the information redacted even if the requester can figure out what information has been deleted.

While the concept of a privacy interest is broad, it is limited by case law and certain regulatory requirements. For example, the Department of Justice (DoJ) has long taken the position that a decedent possesses no cognizable privacy interest in any information about him.³⁴ However, the DoJ and almost all judicial decisions have recognized a privacy interest in the next-of-kin in records reflecting time-of-death information.³⁵ Removing all doubt on this issue, the Supreme Court in *National Archives and Records Administration v. Favish* ruled that the close relatives of suicide victim Vincent Foster, former White House Deputy Legal Counsel, possessed their own privacy interests in his death-scene photographs.³⁶ This should be relevant when reviewing hostile death, friendly fire, or other serious accident investigations. The family should receive a copy of the photos, but other requesters should not because of the family's privacy interest.

In addition to case law, administrative determinations on privacy also bind agencies. For instance, by regulation the Office of Personnel Management has determined what personnel information about "most" federal employees should be disclosed or withheld.³⁷ (Although this regulation provides that a civilian employee's name and duty station will be

³⁴ FOIA Update, FOIA Counselor: Questions & Answers, vol. III, no. 4 (1982), available at http://www.usdoj.gov/oip/foia_updates/Vol_III_4/page7.htm; see also *Reporters Comm.*, 489 U.S. at 757 (noting that the Department of Justice "provided the requested data concerning three of the [subjects of the request] after their deaths"); DoD REG. 5400.7-R, *supra* note 31, para. C3.2.1.6.3 ("This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if disclosure is in the public interest."); cf. *Army Final Rule*, *supra* note 9, § 518.13(f)(2)(ii) ("The right to privacy of deceased persons is not entirely settled, but the majority rule is that death extinguishes their privacy rights. However, particularly sensitive, graphic, personal details about the circumstances surrounding an individual's death may be withheld when necessary to protect the privacy interests of surviving family members. Even information that is not particularly sensitive in and of itself may be withheld to protect the privacy interests of surviving family members if disclosure would rekindle grief, anguish, pain, embarrassment, or cause a disruption of their peace of minds."). *But cf.* *Schrecker v. U.S. Dep't of Justice*, 254 F.3d 162, 166 (D.C. Cir. 2001) ("The fact of death, therefore, while not requiring the release of information, is a relevant factor to be taken into account in the balancing decision whether to release information.")

³⁵ See, e.g., *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 902 (10th Cir. 1992) (crime scene photograph of decedent), *cert. granted, vacated & remanded on other grounds*, 509 U.S. 918 (1993); *Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991) (autopsy reports); *Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports); *Marzen v. Dep't of Health & Human Servs.*, 825 F.2d 1148, 1154 (7th Cir. 1987) (deceased infant's medical records); *N.Y. Times Co. v. Nat'l Aeronautics & Space Admin.*, 782 F. Supp. 628, 631-32 (D.D.C. 1991) (audiotape of voices of Challenger astronauts recorded immediately before their deaths). *But see* Office of Info. Privacy, U.S. Dep't of Justice, Compiled FOIA Decisions (Received January-June 1990) (Nov. 3, 2003), <http://www.justice.gov/archive/oip/foiapist/2003foiapist38.htm> (summarizing a case titled "Journal-Gazette Co. v. U.S. Dep't of the Army").

³⁶ *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). *But cf.* *Outlaw v. U.S. Dep't of the Army*, 815 F. Supp. 505, 506 (D.D.C. 1993) (ordering disclosure of five murder-scene photographs to murderer twenty-five years after the crime in the absence of the Army's ability to ascertain whether the victim left any surviving next-of-kin or whether any surviving next-of-kin, if extant, would be offended by the disclosure).

³⁷ 32 C.F.R. § 293.311 (2010) provides:

(a) The following information from both the OPF and employee performance file system folders, their automated equivalent records, and from other personnel record files that constitute an agency record within the meaning of the FOIA and which are under the control of the Office, about most present and former Federal employees, is available to the public:

- (1) Name;
- (2) Present and past position titles and occupational series;
- (3) Present and past grades;
- (4) Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials);
- (5) Present and past duty stations (includes room numbers, shop designations, or other identifying information regarding buildings or places of employment); and
- (6) Position descriptions, identification of job elements, and those performance standards (but not actual performance appraisals) that the release of which would not interfere with law enforcement programs or severely inhibit agency effectiveness. Performance elements and standards (or work expectations) may be withheld when they are so intertwined with performance appraisals that their disclosure would reveal an individual's performance appraisal.

(b) The Office or agency will generally not disclose information where the data sought is a list of names, present or past position titles, grades, salaries, performance standards, and/or duty stations of Federal employees which, as determined by the official responsible for custody of the information:

- (1) Is selected in such a way that would reveal more about the employee on whom information is sought than the six enumerated items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or

disclosed,³⁸ it does not override the protections of 10 U.S.C. § 130b for DoD personnel assigned to overseas, sensitive, or routinely deployable units, or other agency-specific protections.) While the DoD regulation did not specifically address the disclosability of information on individuals who did not meet 10 U.S.C. § 130b's criteria, prior to 9 November 2001, the DoD's practice had been to disclose such information, to include lists of names and correlating information.³⁹ However, on 9 November 2001, as a result of the terrorist attacks of 11 September 2001, the DoD recognized that its "personnel [were] at increased risk regardless of their duty assignment" and, accordingly, modified its policy to require the withholding of lists of names and other personally identifying information of all DoD personnel and contractors associated with a particular component, unit, organization or office.⁴⁰ The policy provides for some discretion by stating that components could disclose personal information of this sort if (1) they determined that no privacy concerns were implicated and if such information had routinely been disclosed in the past or (2) the names, other than in list format, were in documents otherwise releasable under the FOIA.⁴¹ Despite the discretion, with this increased security concern and heightened privacy interest, more personal information on DoD employees should still be redacted from released records. Finally, DoD policy also "does not preclude a DOD component's discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons."⁴²

Judicial decisions have uniformly approved of the post-9/11 DoD privacy position to withhold the personal information of DoD personnel, in some cases explicitly,⁴³ and in others implicitly.⁴⁴ The protection extended to DoD civilian employees is consistent with other judicially recognized exceptions to the Office of Personnel Management's general rule that the names and duty stations of "most" civilian employees must be disclosed.⁴⁵ It should also be noted that even the names and other

(2) Would otherwise be protected from mandatory disclosure under an exemption of the FOIA.

(c) In addition to the information described in paragraph (a) of this section, a Government official may provide other information from these records (or automated equivalents) of an employee, to others outside of the agency, under a summons, warrant, subpoena, or other legal process; as provided by the Privacy Act (5 U.S.C. 552a(b)(4) through (b)(11)), under those Privacy Act routine uses promulgated by the Office, and as required by the FOIA.

³⁸ *Id.* § 293.311(a)(1) and (5).

³⁹ See Memorandum from D. O. Cooke, Director, Admin. & Mgmt., Office of the Sec'y of Def., to DoD FOIA Offices, subject: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA) para. 2 (9 Nov. 2001), available at <http://www.DOD.mil/pubs/foi/dfoipo/docs/withhold.pdf> [hereinafter Cooke November Memo].

⁴⁰ *Id.*; see also Army Final Rule, *supra* note 9, § 518.13 (f)(2).

Army components shall ordinarily withhold lists of names (including active duty military, civilian employees, contractors, members of the National Guard and Reserves, and military dependents) and other personally identifying information, including lists of e-mail addresses of personnel currently or recently assigned within a particular component, unit, organization, or office within the Army. Home addresses, including private e-mail addresses, are normally not releasable without the consent of the individuals concerned. This includes lists of home addresses and military quarters' addressees without the occupant's name.

Id.

⁴¹ Cooke November Memo, *supra* note 9.

⁴² *Id.*

⁴³ See, e.g., *Schoenman v. FBI*, 575 F. Supp. 2d 136, 160 (D.D.C. 2008) (finding that since the 9/11 attacks, "as a matter of official policy, the DoD carefully considers and limits the release of all names and other personal information concerning military and civilian personnel, based on a conclusion that they 'are at increased risk regardless of their duties or assignment.'" and further finding that this policy reflects "the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency") (second quotation marks omitted); *Long v. Office of Pers. Mgmt.*, No. 5:05-1522, 2007 U.S. Dist. LEXIS 72887, at **21, 47-48 (N.D.N.Y. Sept. 30, 2007) (recognizing that disclosure could subject DoD civilian employees to "embarrassment and harassment in the conduct of their official duties and personal affairs") (quoting *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999)); *Ctr. for Pub. Integrity v. U.S. Office of Pers. Mgmt.*, No. 04-1274, 2006 U.S. LEXIS 87367, at **5 & n.2, 18 (D.D.C. Dec. 4, 2006) (finding privacy interest of DoD civilian employees "not insubstantial"); *Kimmel v. U.S. Dep't of Def.*, No. 04-1551, 2006 U.S. LEXIS 14904, at **11-12 (D.D.C. Mar. 31, 2006) (finding that "DoD acted out of concern that employees of DoD could become targets of terrorist assaults, and the court has no reason to question this determination"); *Judicial Watch, Inc. v. Dep't of the Army*, 402 F. Supp. 2d 241, 251 (D.D.C. 2005) (citing with agreement the DoD's position that DoD employees and their families "are particularly vulnerable to harassment and attack and therefore there is a heightened privacy interest in their identities") (citation omitted).

⁴⁴ *Hiken v. Dep't of Def.*, 521 F. Supp. 2d 1047, 1065 (N.D. Cal. 2007) (protecting identities of names of military personnel involved in, or interviewed in connection with, an AR 15-6 investigation into the firing upon a car carrying an Italian journalist in Iraq where disclosure "would risk harm or retaliation"); *L.A. Times Comm'ns LLC v. U.S. Dep't of Labor*, 483 F. Supp. 2d 975, 985 (C.D. Cal. 2007) (protecting identities of DoD civilian contractors since they "have been specifically targeted by enemies of Allied forces, and . . . they continue to be prime targets for enemies of Allied forces") (emphasis omitted).

⁴⁵ Other categories of employees qualifying for categorical protection include personnel in "sensitive occupations"—correctional and law enforcement officers, internal revenue agents, nuclear engineering personnel, and intelligence personnel—and all employees in the Drug Enforcement Administration,

identifying information of non-DoD personnel which would otherwise be disclosed may be protected when a privacy interest results from a particular risk of harm or other privacy invasion.⁴⁶

There are also a variety of other circumstances giving rise to privacy interests. The DoD regulation provides the following examples:

- (i) [Records] compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.
- (ii) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.⁴⁷

Case law has also recognized various types of personnel records that implicate privacy issues. For instance, privacy interests have been recognized in the identities of members of military personnel boards,⁴⁸ in unsuccessful candidates for federal employment,⁴⁹ in employee performance appraisals,⁵⁰ in the contents of background investigations,⁵¹ and in various other personal data such as financial information;⁵² religious affiliation;⁵³ marital status and college grades;⁵⁴ medical records and related documents concerning a claim under the Federal Employees Compensation Act;⁵⁵ social security numbers;⁵⁶ home addresses;⁵⁷ home telephone numbers;⁵⁸ and date of birth, insurance, and retirement information, as well as reasons for leaving prior employment.⁵⁹ Finally, a significant privacy interest exists in records reflecting criminal wrongdoing,⁶⁰ in

Bureau of Alcohol, Tobacco, Firearms and Explosives, the U.S. Mint, the Secret Service, and the Customs Service. *See, e.g., Long* 2007 U.S. Dist. LEXIS 72887, at **8 n.5 19; *Ctr. for Pub. Integrity v. U.S. Office of Pers. Mgmt.*, No. 04-1274, 2006 U.S. LEXIS 87367, at **16-18, 67-68 (D.D.C. Dec. 4, 2006).

⁴⁶ *See, e.g., Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006) (protecting names of FDA personnel who worked on approval of RU-486, an abortion drug, finding a “priva[cy] interest in avoiding harassment or violence”).

⁴⁷ DoD REG. 5400.7-R, *supra* note 31, para. C3.2.1.6.1.1.

⁴⁸ *Brannum v. Dominguez*, 377 F. Supp. 2d 75, 84 (D.D.C. 2005); *see also Dayton Newspapers, Inc. v. U.S. Dep’t of the Navy*, 109 F. Supp. 2d 768, 775 (S.D. Ohio 1999) (questionnaire responses by court-martial members).

⁴⁹ *See, e.g., Core v. USPS*, 730 F.2d 946, 948-49 (4th Cir. 1984) (protecting identities and qualifications of unsuccessful applicants, but ordering disclosure of same for successful applicants); *Putnam v. U.S. Dep’t of Justice*, 873 F. Supp. 705, 712-13 (D.D.C. 1995) (protecting identities of FBI personnel who were job candidates).

⁵⁰ *See, e.g., Fed. Labor Relations Auth. v. U.S. Dep’t of Commerce*, 962 F.2d 1055, 1061 (D.C. Cir. 1992) (performance appraisals); *Ripskis v. Dep’t of Housing & Urban Dev.*, 746 F.2d 1, 3-4 (D.C. Cir. 1984) (list of all agency personnel with outstanding evaluations); *see also Vunder v. Potter*, No. 05-142, 2006 WL 162985, at *2-3 (D. Utah Jan. 20, 2006) (protecting list of accomplishments submitted to supervisor as a part of performance evaluation process); *Peralta v. U.S. Attorney’s Office*, 69 F. Supp. 2d 21, 33 (D.D.C. 1999) (protecting letters of commendation); *cf. Fed. Labor Relations Auth.*, 962 F.2d at 1060 (distinguishing personnel “ratings,” which traditionally have not been disclosed, from “performance awards,” which ordinarily are disclosed).

⁵¹ *Ferri v. U.S. Dep’t of Justice*, 573 F. Supp. 852, 862-63 (W.D. Pa. 1983) (FBI background investigation of a Department of Justice attorney).

⁵² *Consumers’ Checkbook Ctr. for the Study of Servs v. U.S. Dep’t of Health & Human Servs.*, 554 F.3d 1046, 1050 (D.C. Cir. 2009) (“We have consistently held that an individual has a substantial privacy interest under FOIA in his financial information . . .”).

⁵³ *Church of Scientology v. U.S. Dep’t of the Army*, 611 F.2d 738, 747 (9th Cir. 1979) (“A reasonable person would be very likely to find that disclosure of religious affiliations and activities would constitute an invasion of his or her privacy.”).

⁵⁴ *Info. Acquisition Corp. v. Dep’t of Justice*, 444 F. Supp. 458, 463-64 (D.D.C. 1978); *see also U.S. Department of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982) (date of marriage).

⁵⁵ *Plain Dealer Publ’g Co. v. U.S. Dep’t of Labor*, 471 F. Supp. 1023, 1028-30 (D.D.C. 1979); *see also Hunt v. U.S. Marine Corps*, 935 F. Supp. 46, 54 (D.D.C. 1996) (third-party request for then-Senate candidate Oliver North’s medical records).

⁵⁶ *Sherman v. U.S. Dep’t of the Army*, 244 F.3d 357, 363-64 (5th Cir. 2001); *Norwood v. Fed. Aviation Admin.*, 993 F.2d 570, 575 (6th Cir. 1993).

⁵⁷ *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994) (members of bargaining unit); *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) (federal annuitants); *Retired Officers Ass’n v. Dep’t of the Navy*, 744 F. Supp. 1, 2-3 (D.D.C. 1990) (names and home addresses of retired military officers).

⁵⁸ *Kidd v. Dep’t of Justice*, 362 F. Supp. 2d 291, 296-97 (D.D.C. 2005); *Barvick v. Cisneros*, 941 F. Supp. 1015, 1020-21 (D. Kan. 1996).

⁵⁹ *Barvick*, 941 F. Supp. at 1020-21; *see also Wash. Post Co.*, 456 U.S. at 600 (“place of birth, date of birth”) (dicta).

⁶⁰ *See, e.g., U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (“The privacy interest in a rap-sheet is substantial.”); *Neely v. FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (names and identifying information of third-party suspects); *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999) (material that suggests person may have been subject to criminal investigation); *Mack v. Dep’t of the Navy*, 259 F. Supp. 2d 99, 106

records of nonjudicial punishment proceedings,⁶¹ and in documents reflecting allegations of other misconduct by government employees.⁶² Identifying the legitimate privacy interest is important because it is this privacy interest that must be balanced against any public interest that might exist in the information.

Is There a Qualifying Public Interest That Outweighs Any Privacy Interest?

If a cognizable privacy interest is identified, the next step to determining whether the information should be withheld or disclosed requires balancing the privacy interest against any public interest in disclosure. If there is no privacy interest to start with, however, the absence of a public interest in disclosure is irrelevant; the record must be disclosed: “Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests.”⁶³

Just as *Reporters Committee*⁶⁴ represents the lead case on the privacy side of the balance, *Reporters Committee* governs the analysis on the public interest side of the balance as well. Prior to *Reporters Committee*, courts made “public interest” determinations based largely on the interest of the requester and the requester’s proposed use of the information.⁶⁵ In deciding *Reporters Committee*, the Supreme Court ruled that the identity of the requester was irrelevant, holding that, “the identity of the requesting party has no bearing on the merits of his or her FOIA request.”⁶⁶ Therefore, the requester’s interest in the request and anticipated use of the requested information had no bearing on whether the information should be released. (This, of course, does not mean that an agency can assert an individual’s own privacy interest to “protect” him from invading his own privacy.⁶⁷) For example, in the context of a request for the home addresses of bargaining unit employees, the Supreme Court ruled in *U.S. Department of Defense v. Federal Labor Relations Authority* that “because all FOIA requesters have an equal, and equally qualified, right to information, the fact that respondents are seeking to vindicate the policies behind the Labor Statute is irrelevant to the FOIA analysis.”⁶⁸ Noble purpose or otherwise, when trying to identify a public

(D.D.C. 2003) (protecting identities of “law enforcement agents, victims, witnesses, other subjects of investigations, and non-agent third parties” mentioned in a Naval Criminal Investigative Service investigation).

⁶¹ See, e.g., *Cochran v. United States*, 770 F.2d 949, 956–57 (11th Cir. 1985) (“We assume that appellant had a privacy interest in keeping the information as to his disciplinary proceedings confidential.”); *Chang v. Dep’t of the Navy*, 314 F. Supp. 2d 35, 43 (D.D.C. 2004) (“An individual does have a privacy interest in keeping employment history, job performance evaluations and information as to disciplinary proceedings confidential.”); *Schmidt v. U.S. Air Force*, No. 06-3069, 2007 U.S. Dist. LEXIS 69584 at *31 (C.D. Ill. Sept. 20, 2007) (finding the subject “had a privacy interest in keeping the information about his discipline confidential”); *Lurie v. Dep’t of the Army*, 970 F. Supp. 19, 40 (D.D.C. 1997) (“An individual has a privacy interest in the fact that he or she was the subject or target of a government investigation.”).

⁶² See, e.g., *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 381 (1976) (names of cadets found to have violated academy honor or ethics code); *McCutchen v. U.S. Dep’t of Health & Human Servs.*, 30 F.3d 183, 187–89 (D.C. Cir. 1994) (identities of both federally and privately employed scientists investigated for possible scientific misconduct); *Beck v. U.S. Dep’t of Justice*, 997 F.2d 1489, 1493 (D.C. Cir. 1993) (refusing to confirm or deny existence of disciplinary records pertaining to named DEA agents); *Dunkelberger v. Dep’t of Justice*, 906 F.2d 779, 782 (D.C. Cir. 1990) (refusing to confirm or deny existence of letter of reprimand or suspension of FBI agent); *Mueller v. U.S. Dep’t of the Air Force*, 63 F. Supp. 2d 738, 743–45 (E.D. Va. 1999) (unsubstantiated allegations of prosecutorial misconduct).

⁶³ *Associated Press v. U.S. Dep’t of Def.*, 554 F.3d 274, 291 (quoting *Fed. Labor Relations Auth. v. U.S. Dep’t of Veterans Affairs*, 958 F.2d 503, 509 (2d Cir. 1992)) (internal quotation marks omitted); see also *Ripskis v. Dep’t of Housing & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (“if privacy interests in given information are de minimis[,] disclosure would not amount to a clearly unwarranted invasion of personal privacy”) (internal quotation marks omitted); cf. *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (“We need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time.”).

⁶⁴ 489 U.S. 749.

⁶⁵ See, e.g., *Disabled Officer’s Ass’n v. Rumsfeld*, 428 F. Supp. 454, 458 (D.D.C.1977) (ordering disclosure of names and addresses of retired disabled officers to nonprofit organization which might not survive without the data and where disclosure would benefit the officers), *aff’d*, 574 F.2d 636 (D.C. Cir. 1978) (table cite).

⁶⁶ 489 U.S. at 771; see also *id.* at 772 (stating that “Congress ‘clearly intended’ the FOIA ‘to give any member of the public as much right to disclosure as one with a special interest [in a particular document]’” (quoting *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975))).

⁶⁷ *Id.*

⁶⁸ *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 499 (1994); see also *Bibles v. Or. Natural Desert Ass’n*, 519 U.S. 355, 355 (1997) (summarily reversing disclosure order of the Ninth Circuit Court of Appeals based on “perceived public interest in ‘providing [persons on the BLM’s mailing list] with additional information.’”) (brackets in original); *Neely v. FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (“That [the requester] seeks this information to establish indirectly his own innocence does not alter the fact that there would appear to be no FOIA-cognizable public interest in such information.”); *Hopkins v. U.S. Dep’t of Housing & Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991) (explaining “whatever public interest there may be in knowing whether private parties are violating the [Davis-Bacon] law is not the sort of public interest advanced by the FOIA, and has no weight in an Exemption 6 balancing”).

interest in disclosure, it simply does not matter who the requester is or how the requester will use the information. Rather, when trying to identify a public interest in disclosure, an application of the FOIA's underlying purpose is key.

The Supreme Court in *Reporters Committee* limited the public interest in records to the FOIA's statutory "core purpose," which "focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose."⁶⁹ In contrast to the burden of proof FOIA normally imposes on an agency,⁷⁰ in *National Archives & Records Administration v. Favish*, the Supreme Court held that the privacy exemptions (Exemptions 6 and 7(C)) require "the person requesting the information to establish a sufficient reason for the disclosure."⁷¹ Explaining how this burden was to be satisfied, the Supreme Court instructed, "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted."⁷² Finally, the Supreme Court ruled that

where there is a privacy interest protected by Exemption 7(C) [or Exemption 6] and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.⁷³

The type of public interest most frequently found to be sufficient to outweigh a substantial privacy interest involves wrongdoing by a high-level government official. Perhaps the best example involved the question of the application of Exemption 6, although not in a judicial case involving a requester seeking records under the FOIA, but one in which the Army disclosed information and the subject of those records sued for a violation of his rights under the Privacy Act's nondisclosure provision.⁷⁴ In that case, the Army distributed a press release to members of the media who had inquired about a post's former commander, a major general who had received nonjudicial punishment for wrongful requisition of an aircraft to fly himself and his wife from Fort Stewart to West Point for his son's graduation. He was also disciplined for the diversion of government resources and manpower in connection with a repair of a stove on his private boat.⁷⁵ The Eleventh Circuit Court of Appeals ruled that the Army had not violated the Privacy Act because subsection (b)(2) excepts from the act's general prohibition all disclosures "required" by the FOIA.⁷⁶ After noting that the subject had a "privacy interest in keeping the information as to his disciplinary proceedings confidential," the court observed that "the balance struck under FOIA exemption six overwhelming[ly] favors the disclosure of information relating to a violation of the public trust by a government official, which certainly includes the situation of a misuse of public funds or facilities by a Major General of the United States Army."⁷⁷

A similar approach is found in judicial decisions ordering the disclosure of the names of civilian employees of government agencies involving (1) deliberate misrepresentations made by a Federal Bureau of Investigation Special Agent in Charge who "knowingly participat[ed] in a cover-up during a 1974 GAO [Government Accountability Office] audit of the FBI's domestic intelligence operations,"⁷⁸ (2) an Inspector General's report that contained substantial evidence that the general counsel "allowed former INS [Immigration and Naturalization Service] officials with financial interests in the [visa]

⁶⁹ U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989); see also *Fed. Labor Relations Auth.*, 510 U.S. at 495 ("the only relevant public interest is the extent to which disclosure would contribute significantly to public understanding of the operations or activities of the government") (quoting *Reporters Comm.*, 489 U.S. at 775 (emphasis and internal quotation marks omitted)).

⁷⁰ See 5 U.S.C. § 552(a)(4)(B) (2006) ("the burden is on the agency to sustain its action").

⁷¹ *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

⁷² *Id.*

⁷³ *Id.* at 174.

⁷⁴ 5 U.S.C. § 552a(b).

⁷⁵ *Cochran v. United States*, 770 F.2d 949 (11th Cir. 1985).

⁷⁶ 5 U.S.C. § 552a(b)(2).

⁷⁷ 770 F.2d at 956; see also *Stern v. FBI*, 737 F.2d 84, 94 (D.D.C.1984) ("The public has a great interest in being enlightened about that type of malfeasance by this senior FBI official—an action called 'intolerable' by the FBI—an interest that is not outweighed by his own interest in personal privacy.").

⁷⁸ 737 F.2d at 87.

program to exercise improper influence over the program's administration,"⁷⁹ and (3) an Inspector General's report and reprimand of a senior administrator who misused a government vehicle, failed to report an accident involving a government vehicle, and misappropriated government funds to make repairs to a privately owned automobile.⁸⁰

Judicial decisions have similarly ordered records disclosed (subject to withholding of social security numbers and other personal data) involving the misconduct of (1) a Navy commander who was relieved of his command for dereliction of duty as a result of his vessel's collision with another ship,⁸¹ (2) an Air Force major who was punished for dropping a bomb which resulted in "friendly fire" deaths of several Canadian military personnel, in order to give the public "insight into the way in which the United States government was holding its pilot accountable,"⁸² and (3) an Army major whose misrepresentation of medical research and misconduct contributed to Congress appropriating \$20,000,000 for a particular form of AIDS research being conducted at the major's research facility.⁸³

On the other hand, misconduct by lower-level personnel is almost always considered insufficient to constitute a public interest that will overcome a substantial privacy interest.⁸⁴ This is not to say that the personal information of lower-level personnel is automatically redacted and the personal information of higher-level personnel is always released but, rather, the lower the rank of the individual, the more likely the individual's privacy interest will outweigh any public interest in release of the individual's personal information. On this general proposition, the courts have concurred.⁸⁵ Examples include protecting the identities of (1) Air Force cadets who violated the Air Force Academy's ethics and honor code,⁸⁶ (2) six "low and mid-level" employees who were disciplined in connection with a fire that cost the lives of two of their fellow firefighters,⁸⁷ (3) two "mid-level FBI Special Agents censured for negligent job performance,"⁸⁸ (4) lower-ranking Navy officers disciplined in connection with their vessel's collision with another ship,⁸⁹ and (5) an Air Force major judge advocate accused of prosecutorial misconduct.⁹⁰

Although uncommon, the courts have also weighed in favor of a recognized public interest over the interests of a third party in a few cases not involving wrongdoing by senior officials. Although difficult to categorize, most of these cases involved what the courts described as "lesser," "minimal," or "tepid" privacy interests. In one example, the interest in keeping private the names of site locations that could be used to identify the owners of land on which an endangered species of pygmy owl nested were found to be outweighed by "the public interest in examining the [agency's] use of the owl data in the 1999 critical habitat designation and on a day-to-day basis in a broad array of other contexts."⁹¹ Other "lesser" privacy

⁷⁹ *Perlman v. U.S. Dep't of Justice*, 312 F.3d 100, 107 (2d Cir. 2002), *vacated & remanded*, *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 541 U.S. 970, *on remand*, 380 F.3d 110, 111–12 (2d Cir. 2004) (per curiam) (affirming previous holding).

⁸⁰ *Sullivan v. Veterans Admin.*, 617 F. Supp. 258 (D.D.C. 1985) (Privacy Act wrongful disclosure suit).

⁸¹ *Chang v. Dep't of the Navy*, 314 F. Supp. 2d 35, 42–45 (D.D.C. 2004) (Privacy Act wrongful disclosure suit involving press release summarizing imposed punishment).

⁸² *Schmidt v. U.S. Air Force*, No. 06-3069, 2007 WL 2812148, at *11 (C.D. Ill. Sept. 20, 2007) (Privacy Act wrongful disclosure suit).

⁸³ *Lurie v. Dep't of the Army*, 970 F. Supp. 19, 38–48 (D.D.C. 1997).

⁸⁴ *See, e.g., Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008) ("lower level officials . . . generally have a stronger interest in personal privacy than do senior officials") (quoting *Dobronski v. Fed. Comm'ns Comm's*, 17 F.3d 275, 280 n.4 (9th Cir. 1994)); *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1234 (10th Cir. 2007) ("The public interest in learning of a government employee's misconduct increases as one moves up an agency's hierarchical ladder."). *But cf. Schmidt v. U.S. Air Force*, No. 06-3069, 2007 WL 2812148, at *11 (categorizing a major as a "junior officer," but finding public interest so great as to outweigh his privacy interests).

⁸⁵ *Kimmel v. U.S. Dep't of Def.*, No. 04-1551, 2006 WL 1126812 (D.D.C. Mar. 31, 2006) (holding that the protection of "names of civilian personnel below the level of office-director and military personnel below the rank of Colonel" in documents was valid because disclosure of those names would not shed light on the operations and activities of DoD.); *Schoenman v. FBI*, 575 F. Supp. 2d 136, 160 (D.D.C. 2008) (upholding the withholding of names of Air Force personnel below the office director level amid post-9/11 security concerns and the fact that revealing names would not shed any light on the Air Force's performance of its statutory duties.)

⁸⁶ *Dep't of the Air Force v. Rose*, 425 U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 380 (1976); *see also U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) ("[T]he names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code.").

⁸⁷ *Forest Serv. Employees for Envtl. Ethics*, 524 F.3d at 1026.

⁸⁸ *Stern v. FBI*, 737 F.2d 84, 94 (D.D.C.1984).

⁸⁹ *Chang v. Dep't of the Navy*, 314 F. Supp. 2d 35, 44–45 (D.D.C. 2004).

⁹⁰ *Mueller v. U.S. Dep't of the Air Force*, 63 F. Supp. 2d 738, 743–44 (E.D. Va. 1999).

⁹¹ *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 36 (D.C. Cir. 2002) (ellipsis and internal quotation marks omitted).

interests were found in (1) computerized files reflecting identifiable information describing landowners' farms, tracts, boundaries, acreage, and other characteristics that would permit a reader to accurately estimate the value of the farm in order to monitor whether the Department of Agriculture is "correctly doing its job" in "making subsidy and benefit determinations,"⁹² (2) the names and addresses of purchasers of property seized by the U.S. Marshals Service in order to show how the agency is exercising its power to seize property and sell it,⁹³ and (3) "the names of depositors with unclaimed funds at three banks for which the Federal Deposit Insurance Corporation ("FDIC") is now the receiver" because the depositors, if found, will actually benefit from the disclosure.⁹⁴

The Targeted Request

A special problem arises whenever a request seeks personal information, not officially confirmed by the agency, about a named or otherwise identifiable living person where the response would require the agency to disclose the fact that it maintains responsive records and that the abstract fact that records even exist would result in an invasion of that person's privacy. In order to protect individuals' privacy interest in cases like this, agencies should refuse to confirm or deny the existence of the requested records. For instance, when Reporters Committee for Freedom of the Press sought the criminal history—"rap sheet"—of Charles Medico, the Federal Bureau of Investigation refused to confirm or deny whether it maintained such records, because, based on Exemption 7(C), such a response was necessary to protect the privacy of Mr. Medico. In *Reporters Committee*, the Supreme Court upheld the FBI's response.⁹⁵ First recognized in a case involving Exemption 1 (classified records) seeking CIA records that might reveal any covert relationship between the agency and Howard Hughes' submarine retrieval ship, the *Glomar Explorer*,⁹⁶ the refusal to confirm or deny the existence of certain records is sometimes referred to as a "Glomar" response, or "Glomarization."

To illustrate the application of the "Glomarization" principle, first imagine a request for all records of nonjudicial punishments imposed on members of the 1st Battalion during the past year. The proper response would be to process all responsive records, withholding only personally identifying information⁹⁷ (assuming there were no senior officers who received such punishment during the past year, which might implicate a public interest that would outweigh those officers' privacy interests). "Glomarizing" such a request would be improper because the processed records for a unit as large as a battalion would not invade the privacy of any one individual. On the other hand, imagine a request for any record containing the division commander's social security number. Here the proper response would be to simply deny the request based on Exemption 6. "Glomarizing" such a request would be improper because there is no privacy interest in the abstract fact that the command maintains records containing the commander's social security number or the fact that the commander does, in fact, have a social security number. Finally, imagine a request seeking medical records reflecting whether the installation's current Chief of Administrative Law has ever been diagnosed with a sexually transmitted disease (STD). The proper response is to refuse to confirm or deny whether any such records exist based on Exemption 6. If the Chief of Administrative Law did have an STD and the records are denied based on Exemption 6, the denial would confirm that the individual had an STD. Similarly, it would be "pointless" to disclose the records and merely redact the Chief of Administrative Law's name, because the request itself would have contained the identification.⁹⁸ Alternatively, if the individual has not had an STD and a "no records" response is provided, how would the next request seeking records on whether the Chief of Military Justice has had an STD be handled? It is important to give a consistent "Glomarization" response whenever a targeted request for records whose very existence implicates a privacy interest is received. In fact, DoD regulation states that, "A 'refusal to

⁹² *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1231 (D.C. Cir. 2008) (2 to 1 decision). Note that the future impact of this holding was legislatively nullified by an Exemption 3 provision of the Food, Conservation and Energy Act of 2008, 7 U.S.C. § 8791(b)(2)(A).

⁹³ *Baltimore Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729–30 (D. Md. 2001).

⁹⁴ *Lepelletier v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 46–49 (D.C. Cir. 1999) (recognizing that on remand the district court may find that the privacy interests of depositors of small amounts exceed their interest in recovering their funds, but implicitly admitting that its unprecedented public interest finding is inconsistent with *U.S. Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 497 (1994)).

⁹⁵ 489 U.S. 740, 775 (1989) ("What we have said should make clear that the public interest in the release of any rap-sheet on Medico that may exist is not the type of interest protected by the FOIA. Medico may or may not be one of the 24 million persons for whom the FBI has a rap-sheet.")

⁹⁶ 546 F.2d 1009, 1013 (D.C. Cir. 1976) (recognizing the principle, but remanding the case on other grounds).

⁹⁷ See, e.g., *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 293 (2d Cir. 2009) (finding that the DoD disclosure of 1400 responsive pages with the names of detainees and their family members redacted satisfied the public interest while properly withholding the identities of certain detainees under Exemptions 6 and 7(C)).

⁹⁸ *Mueller v. U.S. Dep't of the Air Force*, 63 F. Supp. 2d 738, 744 (E.D. Va. 1999).

confirm or deny' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a 'no records' response when a record does not exist and a 'refusal to confirm or deny' when a record does exist will itself disclose personally private information."⁹⁹

Effect of President Obama's FOIA Policy

Upon assuming office, President Barack Obama announced a new openness policy that emphasized that when it comes to FOIA, there must be a "presumption in favor of disclosure."¹⁰⁰ Attorney General Eric Holder has implemented this policy and has instructed that a federal agency "should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."¹⁰¹ The effect of this policy has been to encourage agencies to make discretionary disclosures of information whenever possible. With regard to the DoJ's litigation responsibility, the Attorney General further advised that "the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."¹⁰² With respect to any information that is protected by Exemption 3—for example, information listed under 10 U.S.C. § 130b—the DoJ's Office of Information Policy has advised that no discretionary disclosure is appropriate because such a disclosure would be prohibited by law.¹⁰³ Further, "[f]or information falling within Exemption 6 or 7(C), if the information is also protected by the Privacy Act of 1974, it is not possible to make a discretionary release, as the Privacy Act contains a prohibition on disclosure of information not 'required' to be released under the FOIA."¹⁰⁴ Even if the Privacy Act does not apply¹⁰⁵ to the information covered by Exemptions 6 or 7(C), however, the harm implicit in the finding of a privacy interest that outweighs any public interest would make discretionary disclosure inappropriate. Accordingly, the important policy interest in discretionary disclosures does not apply to the exempt information discussed in this article.

Conclusion: What Do We Do With Our Pending FOIA Requests?

For purposes of this article, we will assume that the Soldiers described in the introductory example are not stationed overseas, members of a routinely deployable unit, or otherwise covered by 10 U.S.C. § 130b. As a result, Exemption 3 does not apply to these FOIA requests. Applying, therefore, only the privacy exemptions, the FOIA requires us to disclose in response to the first request, the identities of two of the three Soldiers who received GOMORs, subject to the deletion of personal information such as social security numbers.

In the case of COL Oops, just as in the case of *Cohran v. Department of the Army*,¹⁰⁶ a senior official has engaged in serious misconduct of the sort for which his privacy interests are likely outweighed by the public interest in disclosure. In the case of PFC Ordinary, just as in the case of *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*,¹⁰⁷ a lower-ranking individual has engaged in serious misconduct of the sort for which his privacy interests outweigh the minimal

⁹⁹ DoD REG. 5400.7-R, *supra* note 31, para. C3.2.1.6.5.1.

¹⁰⁰ See President Obama's FOIA Memo, *supra* note 6.

¹⁰¹ Attorney General Holder's FOIA Guidelines, *supra* note 6.

¹⁰² *Id.*

¹⁰³ See OIP Guidance, *supra* note 6. Note that the guidance contained in the Cooke's February Memorandum permitting the "discretionary release of names and duty information of personnel in overseas, sensitive, or routinely deployable units who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons" is not inconsistent with the general prohibition of discretionary disclosures in Exemption 3 cases because 10 U.S.C. § 130b itself permits the Secretary of Defense to define the limits of protection to be claimed under the statute.

¹⁰⁴ *Id.*; see, e.g., *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 502 (1994) ("Because the privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure, we conclude that disclosure would constitute a 'clearly unwarranted invasion of personal privacy.' 5 U.S.C. § 552(b)(6) (2006). The FOIA, thus, does not require the agencies to divulge the addresses, and the Privacy Act, therefore, prohibits their release to the unions.").

¹⁰⁵ The Privacy Act applies to records maintained by an agency about a citizen or someone lawfully admitted for permanent residence that are retrieved from a system of records by the subject's name or personal identifier. See 5 U.S.C. § 552a(1), (2), (4), (5).

¹⁰⁶ 770 F.2d 949, 956–57 (11th Cir. 1985).

¹⁰⁷ 524 F.3d 1021, 1025 (9th Cir. 2008).

public interest in disclosure. In this case, all information identifying PFC Ordinary will be redacted. The most difficult case is the one involving 2LT Special. Like the others, 2LT Special has a substantial privacy interest in his disciplinary record, and if we were to look solely at his grade, we would withhold his identity just as in the case of PFC Ordinary. Unfortunately for 2LT Special, his father's senior rank gives rise to a public interest in monitoring the performance of the agency by determining whether the father's rank influenced—directly or indirectly—the fact of, or extent of, his punishment.¹⁰⁸ As a result, 2LT Special's name will be released, although other personal information, such as his social security number, will be withheld.

With respect to the second request, because 1LT Friendly is a junior official, his privacy interests outweigh the public interest in disclosing his misconduct. As a result, 1LT Friendly's personal information should not be released. Since this is a targeted request, however, the appropriate response is to refuse to confirm or deny whether such records exist, rather than just redact the identifying information from the records as in the case of PFC Ordinary. If the requester were told that documents relating to the request regarding 1LT Friendly were found but were being withheld under Exemption 7(C), the response would reveal that 1LT Friendly has, in fact, been involved in an allegation of fraternization. This is the type of information protected by Exemptions 6 and 7(C). Thus, a "Glomar" response is appropriate.

Department of Defense personnel continue to enjoy the rights of all individuals, to include that of privacy, even though they work for the Federal Government, and the fact that their personal information may be contained in an agency record does not make that information public property. In fact, since 9/11, DoD personnel have a heightened privacy interest in the personal information contained in agency records, and due consideration must be given to the protection of that personal privacy. Key to this protection are several FOIA exemptions that must be properly employed. Exemption 3 of the FOIA incorporates other federal withholding statutes and should be used to protect certain information. One of those Exemption 3 statutes is 10 U.S.C. § 130b, which protects personally identifying information of DoD personnel who are assigned to overseas, sensitive, or routinely deployable units. Exemption 6 of the FOIA protects personal information contained in personnel, medical or similar files, and Exemption 7(C) protects personal information in law enforcement records. Application of 6 and 7(C) require a careful balancing of the privacy interest of the individual and the public interest in disclosure. If properly applied, these exemptions should guarantee that DoD personnel are afforded all the protection available to them while ensuring that appropriate agency records or portions thereof are still available to the public.

¹⁰⁸ See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (observing that "the American people have as much interest in knowing that key IRS decisions are free from the taint of conflict of interest as they have in discovering that they are not" in the context of finding a public interest in a fee waiver case).