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PROTECTION OF PERSONAL PRIVACY INTERESTS UNDER THE FREEDOM OF INFORMATION ACT

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13. ABSTRACT (Maximum 200 words)

The Freedom of Information Act (FOIA) was established primarily to deter secrecy in government by guaranteeing a statutory right of access to government information; however, society's interest in an open government sometimes conflicts with the individual right to privacy. These personal privacy interests are protected by two provisions of the FOIA: Exemptions 6 and 7(C) which concern "personal and medical files and similar files" and "records or information compiled for law enforcement purposes," respectively. This article addresses the right to privacy as it now exists under FOIA in light of the Supreme Court's decision in Department of Justice v. Reporters Committee for Freedom of the Press. In examining the FOIA's personal privacy protections, the article first outlines the legislative history of the FOIA to include a brief history of its passage, subsequent amendments, and statutory structure. The foundations of the individual right to privacy are discussed, followed by a detailed description of the threshold requirements for Exemptions 6 and 7(C). The article then explores the process presently employed by the courts in balancing the public's "right to know" against the individual's "right to privacy."

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PROTECTION OF PERSONAL PRIVACY INTERESTS UNDER THE FREEDOM OF INFORMATION ACT

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I. INTRODUCTION

> A popular Government without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern Ignorance; And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.[1]

This often-cited statement of James Madison demonstrates that even in the early days of our nation, the people recognized their right to know what the government was doing through access to government information.

The Freedom of Information Act (FOIA)[2] was established primarily to deter secrecy in government. Generally, the FOIA provides that an agency must disclose all records requested by any person,[3] unless the information sought is protected from disclosure by a specific statutory exemption or exclusion.[4] The FOIA establishes a presumption that records in the possession of agencies and departments of the Executive Branch of the United States government[5] are accessible to the people.[6] Thus, the Act guarantees a statutory right of access to government information.

The principle underlying the FOIA has been expressed by the Supreme Court in NLRB v. Robbins Tire & Rubber Co.[7] In NLRB, the Court stated that "[t]he basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and

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[1]Letter from James Madison to W. T. Barry (Aug. 4, 1822) in THE COMPLETE MADISON 337 (S. Padover ed. 1953).

[2]5 U.S.C. § 552, *amended by* the Freedom of Information Reform Act of 1986, §§ 1801-1804 of Pub. L. No. 99-570, 100 Stat. 3207, 3207-48 (1986) [hereinafter FOIA-1986].

[3]*Id.* at § 552(a)(3).

[4]*Id.* at § 552(d).

[5]5 U.S.C. § 552(f) provides:

> For purposes of this section, the term "agency" as defined in . . . this title includes any Executive department, military department, Government corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

[6]COMMITTEE ON GOVERNMENT OPERATIONS, A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS, H.R. REP. NO. 193, 101st Cong., 1st Sess. 2 (1989) [hereinafter CITIZEN'S GUIDE].

[7]437 U.S. 214 (1978).

to hold the governors accountable to the governed."[8] However, the goal of an informed citizenry may often be in conflict with other important societal interests.[9] For instance, society's interest in an open government may conflict with the general public's interest in (1) effective and efficient government operations, (2) responsible use of limited fiscal resources, or (3) the preservation of confidentiality of sensitive personal, commercial and governmental information.[10] Most importantly, the public's right of access to government information may conflict with the individual's right to privacy.

In providing for a statutory right of access, Congress recognized the possible conflict with the individual's right to privacy. The House committee report on the FOIA stated, "The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his government. [The FOIA] strikes a balance considering all these interests."[11] Furthermore, in discussing the balancing of these interests, Congress stated:

> [I]t is necessary to protect certain equally important rights of privacy with respect to certain information. . . . It is also necessary for the very operation of our Government to allow it to keep confidential certain material. . . .
>
> It is not an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.[12]

Society's personal privacy interests are protected by two provisions of the FOIA. Exemptions 6 and 7(C) Exemption 6 permits the government to withhold all information in "personal and medical files and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of privacy."[13] Exemption 7(C), on the other hand, applies to "records or information compiled for law

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[8]*Id.* at 242.

[9]OFFICE OF INFORMATION AND PRIVACY, U.S. DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION CASE LIST 349 (Sept. 1989) [hereinafter DOJ CASE LIST].

[10]*Id.*

[11]SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, S. DOC. NO. 82, 93d Cong., 2d Sess. 2 (1974) [hereinafter SOURCE BOOK].

[12]COMMITTEE ON THE JUDICIARY, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter RIGHT TO INFORMATION].

[13]FOIA-1986, *supra* note 2, at § 552 (b)(6).

enforcement purposes," and permits the withholding of information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[14]

This article will address the right to privacy as it now exists under the FOIA. The legislative history of the FOIA will be examined and will include a brief history of its passage, subsequent amendments, and basic statutory structure. The FOIA's two privacy exemptions will be described, followed by an exploration of the process presently employed by the courts in balancing the public's "right to know" against the individual's "right of privacy."

II. LEGISLATIVE HISTORY OF THE FOIA

During its over 20-year history, the FOIA has "led to the disclosure of much government waste and wrongdoing. It has expanded public knowledge of health, safety, and environmental risks. It has been the key to public knowledge of Federal contract discrimination, Medicare fraud, dangerous consumer products, harmful drugs, and unsafe medical devices."[15] Although the FOIA has had a profound effect in these areas, this was not always the approach taken with regards to federal information disclosure policy.[16]

Prior to the passage of the FOIA in 1966,[17] agency and department heads enjoyed broad discretion in suppressing information.[18] Public access to governmental records at that time was governed by Section 3 of the Administrative Procedure Act (APA).[19] The APA, as enacted in 1946, contained serious deficiencies

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[14]*Id.* at § 552 (b)(7)(C).

[15]*The Freedom of Information Act: Hearing before the Subcommittee on Technology and the Law of the Committee on the Judiciary United States Senate*, 100th Cong., 2d Sess. 2 (1988) [hereinafter *Hearing: FOIA*] (statement of Hon. Patrick J. Leahy, U.S. Senator from the State of Vermont).

[16]CITIZEN'S GUIDE, *supra* note 6.

[17]Pub. L. No. 89-487, 80 Stat. 250 (1966) [hereinafter FOIA-1966].

[18]Maxwell & Reinsch, *Freedom of Information Privacy Exemption*, COMM. & L. 45, 48 (1985) [hereinafter *Privacy Exemption*].

[19]Ch. 324, 60 Stat. 237 (1946) [hereinafter APA]. Section 3 provided:

> Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency--
> (a) Rules. Every agency shall separately state and currently publish in the Federal Register (.) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests, (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations, and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner

and was considered by many to encourage withholding rather than disclosure of information.[20] Although implemented to aid in free access to government information,[21] the APA had precisely the opposite effect.[22] In fact, the APA had been cited as statutory authority for the withholding of virtually any piece of information that an agency did not wish to disclose.[23] Among other things, Section 3 of the APA authorized agencies to withhold information "for good cause found;"[24] where secrecy was in "the public interest;"[25] where the information had a bearing on "any matter relating solely to the internal management of an agency;"[26] or when the person seeking disclosure was not "properly and directly concerned."[27] These broad and vague provisions gave agencies unlimited discretion in denying legitimate information to the public. In addition, the individual requesting information had the burden of establishing a right to examine government records, and there were no statutory guidelines or procedures to help a perso

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be required to resort to organization or procedure not so published.

(b) Opinions and Orders. Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Public Records. Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

[20]GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 92 (R. Bouchard & J. Franklin eds. 1980) [hereinafter GUIDEBOOK-1980].

[21] [Section 3 of the APA] has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness assurance.

COMMITTEE ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 752, 79th Cong., 1st Sess. 12 (1945).

[22]RIGHT TO INFORMATION, *supra* note 12, at 5.

[23]*Id.*

[24]APA, *supra* note 19, at § 3(c).

[25]*Id.* at § 3(1).

[26]*Id.* at § 3(2).

[27]*Id.* at § 3(c).

seeking information.[28] Finally, there were no judicial remedies in cases of wrongful withholding of information.[29]

The FOIA, which went into effect in 1967, created for the first time the statutory right of access to government information. It replaced the vague and general language of Section 3 of the APA and established "a general philosophy of full agency disclosure."[30] In his bill-signing statement, President Lyndon B. Johnson articulated the spirit which the FOIA was intended to instill in all areas of government.

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest. . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.[31]

With the passage of the FOIA, the burden of proof shifted from the individual to the government, placing the onus upon the government to justify withholding.[32] Individuals seeking information were no longer required to show a need for the material.[33] Instead, the "need to know" standard was replaced by a "right to know" doctrine.[34] The legislation also set standards for determining which records must be made available to the public and which records could be withheld from disclosure.[35] The law also provided administrative and judicial remedies for those denied access to records.[36]

Despite the substantial shift in emphasis brought about by the passage of the FOIA, some government agencies responded slowly and reluctantly to requests made under the law.[37] In the views

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[28]CITIZEN'S GUIDE, *supra* note 6.

[29]RIGHT TO INFORMATION, *supra* note 12, at 5.

[30]*Id.* at 3.

[31]Statement by President Lyndon B. Johnson, *quoted in* SOURCE BOOK, *supra* note 11, at 1.

[32]GUIDEBOOK-1980, *supra* note 20, at 90. *See* FOIA-1966, *supra* note 17, at § 3(c).

[33]CITIZEN'S GUIDE, *supra* note 6.

[34]*Id.*

[35]*Id. See e.g.*, FOIA-1966, *supra* note 17, at §§ 3(e)(1)-(9) (describes categories of information which were exempt from disclosure under FOIA as enacted in 1967).

[36]CITIZEN'S GUIDE, *supra* note 6. *See e.g.*, FOIA-1966, *supra* note 17, at § 3(c) (contains specific court remedy for any alleged wrongful withholding of agency records by agency personnel).

[37]GUIDEBOOK-1980, *supra* note 20.

of many, various weaknesses detracted from the FOIA's ideal operation.[38] In an attempt to avoid releasing information, agencies created broad definitions of the FOIA's exemptions, which when subjected to interpretation, could be manipulated to meet the agencies' particular desires. To discourage the use of the FOIA altogether, agencies resorted to tactics such as asserting that the requested material could not be found, charging very high fees, and instituting long delays.[39]

In response to the agencies' attempts at noncompliance, the courts fashioned procedural remedies designed to deter further circumventing of the law.[40] Of these remedies, the most notable were the "*Vaughn* index" -- a detailed index of requested documents and the agency's rationale for applying a particular exemption[41] -- and requiring the release of segregable portions of a file which was partially exempt.[42]

In 1974, Congress also addressed the issue of noncompliance through a series of amendments to the FOIA. The 1974 amendments were a result of the findings of the House oversight hearings conducted in 1972 by the House Foreign Operations and Government Information Subcommittee.[43] These hearings, which were conducted to examine the administration of the FOIA by Federal agencies, concluded that the "efficient operation of the Freedom of Information Act has been hindered by five years of foot dragging by the Federal bureaucracy."[44] As a result of these findings, and as a reaction to the abuses of the Watergate era, the FOIA was substantially amended in 1974.[45] The amendments considerably narrowed the overall scope of the FOIA's law enforcement and national security exemptions and broadened many of the FOIA's

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[38]GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 1-14 (J. Franklin & R. Bouchard eds. 1990) [hereinafter GUIDEBOOK-1990].

[39]1983 EDITION OF LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT 4 (A. Adler & M. Halperin eds. 1982) [hereinafter LITIGATION UNDER FOIA].

[40]*Id.*

[41]Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[42]*See* EPA v. Mink, 410 U.S. 73, 91 (1973).

[43]COMMITTEE ON GOVERNMENT OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 1419, 92d Cong., 2d Sess. (1972).

[44]*Id.* at 15.

[45]GUIDEBOOK-1990, *supra* note 38, at 1-15.

procedural provisions, such as those relating to fees, time limits, segregability and court inspection of withheld information.[46]

The 1974 amendments made it easier for FOIA requesters to make requests and to challenge agency nondisclosure decisions in court.[47] They also greatly increased the burden to be met by the government in properly withholding sensitive records or record portions, particularly pertaining to information related to law enforcement and national security matters.[48] These amendments substantially altered Exemption 7[49] (discussed *infra* section V.B.), which concerned investigatory material compiled for law enforcement purposes. As amended, Exemption 7 allowed an agency to withhold investigatory records, but only to the extent that their production would cause one of six enumerated harms.[50]

As a result of the 1974 amendments, the volume of activity under the FOIA increased enormously, especially for agencies holding law enforcement responsibilities.[51] A significant amount of information from law enforcement files and other agency files was publicly disclosed for the first time as a result of this greatly

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[46]*Id.* Among other things, agencies were required to publish comprehensive indexes for the processing of requests for information, identify records for the purpose of FOIA requests, charge fees only for the actual costs for searching and copying, meet request processing deadlines, and release segregable portions of exempt material. The amendments also made more explicit the *in camera* and *de novo* reviews by the courts, directed the courts to expedite consideration of FOIA cases, and provided for the award of attorney fees and costs by requestors who prevailed in litigation.

[47]*Hearing: FOIA, supra* note 15, at 52 (statement of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice).

[48]*Id.*

[49]5 U.S.C. § 552(b)(7), Pub. L. No. 90-23, 81 Stat. 54 (1967).

[50]5 U.S.C. § 552(b)(7), *amended by* Pub. L. No. 93-502, 88 Stat. 1561 (1974) [hereinafter FOIA-1974]. Section (b)(7) provided that the FOIA did not apply to matters that were:

> "(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel."

[51]*Hearings: FOIA, supra* note 15, at 52. *See, e.g.*, Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 617 n.3 (D.C. Cir. 1976) (annual number of FOIA requests received by the Federal Bureau of Investigation increased from 447 to 13,875 within one year after the FOIA 1974 amendments went into effect).

increased FOIA activity.[52] There were some who felt that Congress, through its reaction to the perceived need for greater disclosure, had overcorrected through the 1974 amendments and seriously impaired the ability of federal law enforcement agencies to perform their crucial mission.[53] For example, both foreign and local law enforcement agencies expressed great concern over the Department of Justice's ability to protect the sensitive information that they had provided to federal law enforcement agencies.[54] Similarly, law enforcement agencies found that many of their individual confidential sources had become reluctant or unwilling to continue to cooperate, as they began to doubt the government's ability to protect them in the face of FOIA requests.[55] Many observers felt that corrective legislative reform to the FOIA was necessary to provide greater protection for law enforcement information.[56]

A FOIA reform movement to counterbalance the 1974 amendments began in the late 1970's,[57] however, it wasn't until late 1986 that Congress passed legislation to implement these reforms. In that year, the President signed into law the Anti-Drug Abuse Act of 1986,[58] a principle component of which was the Freedom of Information Reform Act of 1986.[59] This legislation, through its major law enforcement provisions, rectified the many weaknesses that were present in the previous restructuring of the FOIA under the 1974 amendments.[60] Under the FOIA Reform Act, the FOIA was amended in two major areas. Most significantly, it provided broader exemption protection for law enforcement information under Exemption 7 (discussed *infra* section V B.),[61] and created special record exclusion protections for certain categories of

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[52]*Hearing: FOIA, supra* note 15, at 53.

[53]The Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act, iii (Dec. 1987) [hereinafter Att'y Gen. Memo-1986].

[54]*Hearing: FOIA, supra* note 15, at 53.

[55]*Id.* at 56.

[56]*Id.* at 54.

[57]*Id.*

[58]Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[59]§§ 1801-1804 of Pub. L. No. 99-570, 100 Stat. 3207-48 (1986).

[60]Att'y Gen. Memo-1986, *supra* note 53.

[61]*See* FOIA-1986, *supra* note 2, at § 552(b)(7).

especially sensitive law enforcement records (discussed *infra* section III.).[62] Secondly, it established a new statutory structure for the assessment and waiver of FOIA fees.[63]

The legislative history of the FOIA demonstrates the continuing development of this vital document. With periodic refinement and constant improvement, the FOIA will continue to accommodate society's conflicting interests between an open government and individual personal privacy.[64]

III. STATUTORY STRUCTURE OF THE FOIA

The Freedom of Information Act contains six subsections to accomplish its purpose of providing access to government information. As such, the FOIA mandates three separate and distinct disclosure requirements embodied in subsections (a)(1), (a)(2), and (a)(3). Subsection (a)(1)[65] describes five categories of information which agencies are automatically required to publish in the Federal Register. These categories include information describing an agency's organization,[66] functions,[67] procedures,[68] substantive rules,[69] and statements of general policy.[70] The purpose of subsection (a)(1) is to insure that members of the public who must deal with a federal agency have access to a published source containing the essential information needed to effectively interact with the agency.[71]

Subsection (a)(2)[72] prescribes three categories of records which agencies must make available fr public inspection and copying. The agencies are also required to prepare and make available current

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[62]*See id.* at § 552(c).

[63]*See id.* at § 552(a)(4)(A). For example, under the new fee structure, agencies are permitted to charge full document review fees to commercial requesters. At the same time, special fee limitations are applicable to specified categories of noncommercial requesters such as educational institutions engaged in scholarly or scientific research. Additionally, fee waivers are extended to requesters when the requested information is likely to contribute significantly to public understanding of government operations. *See generally id.*

[64]GUIDEBOOK-1990, *supra* note 38, at 1-16.

[65]FOIA-1986, *supra* note 2, at § 552 (a)(1).

[66]*Id.* at § 552 (a)(1)(A).

[67]*Id.* at § 552 (a)(1)(B).

[68]*Id.* at § 552 (a)(1)(C).

[69]*Id.* at § 552 (a)(1)(D).

[70]*Id.*

[71]FOIA Comment, Access Reference File #81, 100-4 (Dec. 1989) [hereinafter FOIA Comment].

[72]FOIA-1986, *supra* note 2, at § 552 (a)(2).

indexes to ease public inspection of these records. The records covered under this subsection include final opinions in adjudicated cases,[73] statements of policy and interpretations,[74] and certain administrative staff manuals and instructions to staff members.[75] The underlying purpose of subsection (a)(2) was to eliminate "secret law" which was known to agency personnel and available to them in making decisions, but which was not readily available to the public.[76]

Subsection (a)(3)[77] provides that any record which is not covered under subsections (a)(1) and (a)(2), or exempted from mandatory disclosure under subsection (b) (discussed *infra* this section), or excluded under subsection (c) (discussed *infra* this section), must be made available upon request to any person. The only requirements for the requester under this subsection are that he reasonably describe the records being sought,[78] and that he make the request in accordance with the agency's rules and procedures.[79]

Subsection (a)(4)[80] directs all federal agencies to promulgate regulations specifying fee schedules applicable to processing FOIA requests and establishing procedures and guidelines for determining fee waivers.[81] Subsection (a)(4) also gives federal district courts the power to judicially review agency decisions to withhold information under the FOIA;[82] sets forth time limits for FOIA complaints in an effort to expedite FOIA cases;[83] gives district courts the discretion to award attorney fees and costs if the complainant has substantially prevailed in his suit;[84] establishes a system for the disciplining of agency

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[73]*Id.* at § 552 (a)(2)(A).

[74]*Id.* at § 552 (a)(2)(B).

[75]*Id.* at § 552 (a)(2)(C).

[76]FOIA Comment, *supra* note 71, at 100-5.

[77]FOIA-1986, *supra* note 2, at § 552 (a)(3).

[78]*Id.* at § 552 (a)(3)(A).

[79]*Id.* at § 552 (a)(3)(B).

[80]*Id.* at § 552 (a)(4).

[81]*Id.* at § 552 (a)(4)(A).

[82]*Id.* at § 552 (a)(4)(B).

[83]*Id.* at §§ 552 (a)(4)(C) and (D).

[84]*Id.* at § 552 (a)(4)(E).

officials found to have made an arbitrary and capricious denial of an FOIA request;[85] and empowers the district courts to punish for contempt any employee who fails to obey a court order to comply with an FOIA request.[86]

Subsection (a)(6)[87] establishes a system of administrative deadlines for agency response to FOIA requests. Agencies are required to determine whether they will comply with a request within 10 working days after receiving the request and to notify the requester of their determination.[88] If any part of the request is denied, the agency must inform the requester of the reason for the denial and the right to appeal the denial to the head of the agency.[89]

The FOIA's nine exemptions are listed in subsection (b).[90] The records which are exempt from disclosure include matters that are (1) classified secret in the interests of national defense or foreign policy;[91] (2) related solely to an agency's internal personnel rules and practices;[92] (3) specifically exempted from disclosure by statute other than section 552 (b);[93] (4) privileged or confidential trade secrets and commercial or financial information obtained from a person;[94] (5) inter- or intra-agency memorandums which would not be available by law to a party other than an agency in litigation with the agency;[95] (6) personnel and medical files which would constitute a clearly unwarranted invasion of personal privacy if

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[85]*Id.* at § 552 (a)(4)(F).

[86]*Id.* at § 552 (a)(4)(G). In the case of noncompliance by a military member of the uniformed service, the military member may be punished for contempt just as any other federal employee. *Id.*

[87]*Id.* at § 552 (a)(6).

[88]*Id.* at § 552 (a)(6)(A)(i). Under "unusual circumstances", the 10 day time limit may be extended by written notice to the requester setting forth the reasons for the extension and the date on which a determination will be made. The extension may not be for more than 10 days. *Id.* at § 552 (a)(6)(B).

[89]*Id.* at § 552 (a)(6)(A)(i). A determination with respect to any appeal must be made within 20 workdays after receipt of the appeal. If denial of the request is upheld on appeal, the requester must be notified of the provisions for judicial review under subsection (a)(4) discussed *supra*. *Id.* at § 552 (a)(6)(A)(ii).

[90]*Id.* at § 552 (b).

[91]*Id.* at § 552 (b)(1).

[92]*Id.* at § 552 (b)(2).

[93]*Id.* at § 552 (b)(3).

[94]*Id.* at § 552 (b)(4).

[95]*Id.* at § 552 (b)(5).

disclosed;[96] (7) records compiled for law enforcement purposes,[97] (8) records concerning the regulation or supervision of financial institutions;[98] and (9) geological and geophysical information and data concerning wells.[99]

The nine exemptions listed above are permissive rather than mandatory, in that even though an exemption may apply, an agency is not required to withhold the records.[100] In addition, a provision in subsection (b) also makes it clear that the fact that a record contains some exempt portions does not automatically justify the withholding of the entire record.[101] In such cases, the agency is required to delete the portions of the record which are exempt and provide the requester with the remaining nonexempt portions, as long as the record is reasonably segregable.[102]

Subsection (c)[103] describes certain categories of law enforcement records which have been excluded from the coverage of the FOIA. The categories of records protected under this subsection include requests for the release of information which would disclose an ongoing criminal investigation,[104] reveal

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[96]*Id.* at § 552 (b)(6).

[97]*Id.* at § 552 (b)(7). This section exempts law enforcement records or information that:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual. *Id.*

[98]*Id.* at § 552 (b)(8).

[99]*Id.* at § 552 (b)(9).

[100]*See* Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979).

[101]FOIA-1986, *supra* note 2, at § 552 (b).

[102]*Id.*

[103]*Id.* at § 552 (c).

[104]*Id.* at § 552 (c)(1).

the identity of an informant;[105] or reveal Federal Bureau of Investigation records pertaining to foreign intelligence or counterintelligence or international terrorism.[106] If this exclusion applies, an agency may respond to the request as if the records did not exist.[107]

Subsection (d)[108] explains that the FOIA authorizes the withholding of information to the public only to the extent provided by the FOIA's exemptions under subsection (b). In addition, this subsection also states that these exemptions cannot be used as authority to withhold information from Congress.[109]

The requirement that each agency submit an annual report containing information relating to its implementation of the FOIA is contained in subsection (e).[110] Finally, subsection (f)[111] defines the "agencies" to which the FOIA applies.

IV. INDIVIDUAL RIGHT TO PRIVACY

The individual right to privacy, although not explicitly mentioned in the Bill of Rights, has been upheld as an implied Constitutional right since the earliest days of the Constitution.[112] This right was expressed by the Supreme Court in Griswold v. Connecticut.[113] Griswold involved a Connecticut statute which made the use of contraceptives a criminal offense. The statute also forbade the aiding or counseling of others in the use of contraceptives. The defendants, who were the executive and medical directors of a local Planned Parenthood League, were convicted of giving information, instruction and medical advice to married persons in the use of contraceptives. The Supreme Court held that the law, as applied to the

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[105]*Id.* at § 552 (c)(2).

[106]*Id.* at § 552 (c)(3).

[107]Att'y Gen. Memo-1988, *supra* note 53, at 18.

[108]FOIA-1986, *supra* note 2, at § 552 (d).

[109]*Id.* While individual members of Congress have the rights of access guaranteed to "any person" under subsection (a)(3), Congress as a body cannot be denied access to information on the grounds of the FOIA exemptions. DOJ CASE LIST, *supra* note 9, at 351.

[110]FOIA-1986, *supra* note 2, at § 552 (e). The information contained in the annual report includes the following: (1) the number of and reasons for determinations made by the agency not to comply with requests for information, *id.* at § (e)(1); (2) the number and result of appeals made by persons under subsection (a)(6), *id.* at § (e)(2); (3) the names of persons responsible for the denial of records, *id.* at § (e)(3); (4) the results of actions taken against the officer or employee responsible for improperly withholding information, *id.* at § (e)(4); (5) and a copy of fee schedules and the total amount of fees collected by the agency in response to FOIA requests, *id.* at § (e)(6).

[111]*Id.* at § 552 (f). *See supra* note 5 for the text of this section.

[112]*Privacy Exemption*, *supra* note 18, at 46.

[113]381 U.S. 479 (1965).

marriage relationship, was unconstitutional.[114] In expressing the opinion of the Court, Justice Douglas stated, "We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[115]

Justice Douglas also addressed the issue that although many rights are not enumerated in the Bill of Rights, they are still protected fundamental rights. To this end, Justice Douglas stated:

> The association of the people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parent's choice--whether public or private or parochial--is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of these rights.[116]

Justice Douglas suggests in his opinion that personal privacy rights are guaranteed in the "penumbras" of the Bill of Rights when he wrote, "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion."[117]

Similarly, the Supreme Court's support of a constitutionally protected right to privacy was demonstrated in Roe v. Wade.[118] In Roe, a pregnant single woman challenged, on right of privacy grounds, a Texas criminal abortion law which prohibited procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. Although the Court recognized that the right to privacy was broad enough to encompass a woman's decision whether or not to terminate her pregnancy,[119] they also ruled that this right was not absolute and the woman was not entitled to terminate her pregnancy whenever and however she wished.[120] In addressing the privacy interest, the Court stated, "[t]he Constitution does not explicitly mention any right of privacy. . . . [H]owever . . . the [United States

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[114] *Id.* at 486.

[115] *Id.*

[116] *Id.* at 382.

[117] *Id.* at 383.

[118] 410 U.S. 113 (1973).

[119] *Id.* at 153.

[120] *Id.*

Supreme] Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[121]

Stanley v. Georgia[122] is yet another case in which the individual's right to privacy was recognized and protected by the Supreme Court. Stanley involved a defendant who was convicted of knowingly possessing obscene material in violation of a Georgia statute. On appeal, the appellant argued that the Georgia statute was unconstitutional, insofar as it punished the mere private possession of obscene matter. In reversing the conviction, the Supreme Court stated, "For also fundamental is the right to be free, except in very limited circumstances, from unwanted government intrusions into one's privacy."[123]

Although the individual right to privacy is recognized as a fundamental right, this right is not absolute, and must be balanced against other societal interests.[124] One of the interests to be balanced against the right to privacy is society's right to know in the context of government information. In applying the FOIA's privacy provisions under Exemptions 6 and 7(C), the public interest in disclosure is balanced against the degree of the invasion of privacy which would result from the disclosure. Before discussing the manner in which the court applies this balancing test, an examination of the provisions of Exemptions 6 and 7(C) would be instructive.

V. PRIVACY EXEMPTIONS UNDER THE FOIA

Privacy concerns have been argued in the courts under both Exemption 6 and 7(C). Although a similar balancing test is applied when employing each of these exemptions, they are designed to protect two separate and distinct privacy interests. However, prior to conducting the balancing test, the threshold requirements of these exemptions must be satisfied.

A. EXEMPTION 6 THRESHOLD REQUIREMENTS

Exemption 6 provides that the FOIA does not apply to matters that are "personnel and medical files and similar files the disclosure of which would cause a clearly unwarranted invasion of personal privacy."[125] This exemption has remained unchanged since the FOIA's enactment in 1966.[126] Designed to protect

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[121]*Id.* at 152. *See also* Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891) (court stated, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 251.).

[122]394 U.S. 557 (1969).

[123]*Id.* at 564.

[124]Hulett, *Privacy and the Freedom of Information Act*, ADMIN. L. REV. 275, 277 (Summer 1975).

[125]FOIA-1986, *supra* note 2, at § 552 (b)(6).

[126]LITIGATION UNDER FOIA, *supra* note 39, at 89.

confidential and personal details contained in files maintained by government agencies, Exemption 6 requires a balancing of interests between individual privacy and the public's right to government information.[127] In expressing this purpose, Congress stated, "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information."[128]

Prior to balancing these interests, the request for information must first meet the threshold requirement of Exemption 6, in that the information must fall within the meaning of "personnel and medical files and similar files." In Department of the Air Force v. Rose,[129] student editors of the New York Law Review were denied access to case summaries of honor and ethics hearings maintained at the United States Air Force Academy, even though all personal references or other identifying information had been deleted from the summaries. The action was initiated to compel disclosure under the FOIA. The Court addressed the question of whether the clause "the disclosure of which would constitute a clearly unwarranted invasion or privacy" modified "personnel and medical files" or only "similar files."[130] In holding that the clause modified "personnel and medical files", as well as "similar files", the Supreme Court noted that Congress did not intend any *per se* exemptions for personnel and medical files, but intended that their contents, like the contents of "similar files", be subject to the same balancing process.[131]

Although "personnel and medical files" are easily identified, there was not always complete agreement concerning the meaning of "similar files".[132] Prior to 1982, judicial interpretations of "similar files" varied considerably, with the courts narrowly construing the term to only encompass information which included "intimate" personal details.[133] In other words, if the file was not a personnel or medical file and did not contain "intimate" personal details, the government had no right to withhold the information under Exemption 6.

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[127]RIGHT TO INFORMATION, *supra* note 12, at 9.

[128]*Id.*

[129]425 U.S. 352 (1976).

[130]*Id.* at 370.

[131]*Id.* at 372.

[132]DOJ CASE LIST, *supra* note 9, at 428-29.

[133]*Id.* *See* Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 399-400 (D.C. Cir. 1980) (holding that the identity of "trade sources" did not constitute similar files since the information was not concerned with any aspect of their personal lives)

In 1982, in Department of State v. Washington Post Co.,[134] the Supreme Court, after reviewing the legislative history of the FOIA, held that Congress intended "similar files" to be interpreted broadly, rather than narrowly.[135] The Court rejected the narrow, restrictive interpretation of "similar files" and held that any information that applied to a particular individual satisfied the threshold requirement of Exemption 6,[136] regardless of the "nature of the file in which the requested information [was] contained."[137]

In 1988, the Supreme Court's broad interpretation of "similar files" was narrowed by a divided panel of the D.C. Circuit Court of Appeals in New York Times Co. v. NASA.[138] In New York Times, a newspaper brought suit against NASA to compel the release of the voice communication tape from the space shuttle Challenger on the day of its tragic destruction. NASA refused to release the tape asserting that because the tape incorporated identifiable human voices, it was "related to" and "personal to" particular individuals and was, therefore, a "similar file" under Exemption 6.[139] In rejecting NASA's argument, the district court held that requested information must not only apply to a particular individual, as pronounced by the Supreme Court in Washington Post, but it must also be "personal" in nature, relating in some way to the individual's life.[140] The court held that the tape recorded voices of the Challenger astronauts did not constitute a "similar file", since the tape did not contain information applying to a particular individual's life.[141] As such, the appellate court upheld the lower court's decision to compel the disclosure of the tape recording.

In 1990, on rehearing, the D.C. Circuit Court of Appeals reversed its decision in New York Times.[142] In rejecting the earlier decision, the court held that the voice communication tape applied to

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[134]456 U.S. 595 (1982).

[135]*See id.* at 599-603.

[136]*Id.* at 602.

[137]*Id.* at 601.

[138]852 F.2d 602 (D.C. Cir. 1988), *reh'g granted*, 860 F.2d 1093 (D.C. Cir. 1988).

[139]*Id.* at 606.

[140]*Id.*

[141]*Id.* The court stated, "[t]o call the sound of a human voice 'personal information' distorts the plain meaning and common understanding of the phrase, as well as the meaning Congress ascribed to it. . . [T]he tape contains no information about any astronaut beyond participation in the launch." *Id. But see id.* at 609 (D. Ginsburg, J., dissenting) (stating that it is "inconceivable that the 'sound and inflection' of a person's voice during the last seconds of his or her life is not information that 'somehow relates to an individual's life'").

[142]New York Times Co., 920 F.2d 1002 (D.C. Cir. 1990).

"particular individuals", and therefore, met the threshold requirement of Exemption 6.[143] In reaching this decision, the court concluded, "while the taped words do not contain information about the personal lives of the astronauts, disclosure of the file would reveal the sound inflection of the crew's voices during the last seconds of their lives. Therefore, the tape contains personal information, the release of which is subject to the balancing of the public gain against the private harm at which it is purchased."[144] The court then remanded the case to the district court to determine the strengths of the private and public interests involved before deciding whether NASA should release the tape.[145]

It is important to note that another element is necessary to meet the threshold requirements of Exemption 6. In addition to requiring that the requested material be personal information relating to a particular individual, protection under Exemption 6 also requires that the information be identifiable to a "specific" individual.[146]

B. EXEMPTION 7 THRESHOLD REQUIREMENTS

Subsection (C) of Exemption 7 provides that the FOIA does not apply to "records or information compiled for law enforcement purposes" which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[147] Just as in the case of Exemption 6, before balancing the privacy interests under Exemption 7(C), the requested information must fall within the exemption's threshold requirements, in that the "records or information" must be "compiled for law enforcement purposes." Unlike Exemption 6, the threshold requirements for Exemption 7 have undergone substantial amendment since the FOIA's original implementation in 1966.

The FOIA, as originally enacted, exempted from disclosure all "investigatory files compiled for the law enforcement purposes except to the extent available by law to a private party."[148] This exemption was interpreted to provide broad protection for all records containing anything determined to be an "investigatory

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[143]*Id.* at 1010.

[144]*Id.* at 1005.

[145]*Id.* at 1004.

[146]DOJ CASE LIST, *supra* note 9, at 429. *See, e.g.,* Arieff v. Department of the Navy, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (list of drugs ordered for use by some members of group of over 600 individuals held not identifiable to any specific individual); Citizens for Envtl. Quality v. Department of Agric., 602 F. Supp. 534, 540-41 (D.D.C. 1984) (health test results ordered disclosed because identity of only agency employee tested could not, after deletion of his name, be ascertained from information known outside agency).

[147]FOIA-1974, *supra* note 2, at § 552 (b)(7)(C).

[148]FOIA-1966, *supra* note 17, at § 3(e)(7).

file", in essence providing a *per se* exemption to all files which were found to be "investigatory" in nature.[149] As a result, federal agencies used Exemption 7 to withhold records characterized as investigatory, although the withholding would serve no legitimate interest.[150] In those cases, the judicial inquiry was limited to an examination of how and under what circumstances the requested information was compiled, regardless of whether any further law enforcement proceedings were likely or would be harmed by disclosure.[151]

In 1974, amendments to Exemption 7 were enacted specifically to reverse the overly broad judicial interpretations applied to this exemption.[152] The 1974 amendments substituted the term "records" for "files", and prescribed that the withholding of records had to be justified by at least one of six specified harms.[153] By changing the language from "files" to "records", agencies were no longer able to withhold information merely because the material was contained in an agency file. The amendments required agencies to look beyond the status of the requested material and consider instead the nature of the particular document and the need to withhold it.[154] Under the 1974 amendments, the threshold questions were whether the requested material was "investigatory" and whether it was "compiled for law enforcement purposes."[155] Once it was determined that a request pertained to an investigatory record compiled for law enforcement purposes, the next question addressed whether release of the material would involve one of the six specified harms.[156] If one of these harms existed, then the agency could withhold the requested

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[149]LITIGATION UNDER FOIA, *supra* note 39, at 103. *See, e.g.,* Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 993 (1974) (holding that 10-year-old investigatory files on Kennedy assassination were exempt although enforcement proceedings were apparently not expected).

[150]Waldman, *Privacy Versus Open Government: Section 7(C) Exemption of the Freedom of Information Act*, ANN. SURV. AM. L. 609 (1986) [hereinafter *Privacy Versus Open Gov't*].

[151]LITIGATION UNDER FOIA, *supra* note 39, at 103.

[152]*Id.* at 104.

[153]The Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, 5 (Feb. 1975) [hereinafter Att'y Gen. Memo-1974]. *See supra* note 50 for text of the 1974 amendment to Exemption 7.

[154]Att'y Gen. Memo-1974, *supra* note 153.

[155]*Id.* at 6. "Investigatory records" were defined as records which reflected or resulted from investigative efforts, and not only included activities in which the agencies took the initiative, but also included situations where the agency received complaints or other communications indicating possible violations of law. The "law enforcement" definition included activities involving the detection, punishment and prevention of law violations. *Id.*

[156]*Id.* at 6-7.

material One basis for nondisclosure set forth in the 1974 amendments concerned records which would "constitute an unwarranted invasion of personal privacy."[157]

As previously noted, the 1974 amendments precipitated an increased volume of FOIA requests for Federal law enforcement agencies. The increased activity made these agencies vulnerable to sophisticated requesters who used the FOIA to obtain sensitive law enforcement information. In an effort to provide greater law enforcement protection and avoid the impairment of law enforcement interests, Exemption 7 was once again amended in 1986.[158]

The 1986 amendments increased significantly the authority of federal agencies to withhold sensitive law enforcement materials in their possession.[159] In so doing, these amendments broadened the threshold requirements of Exemption 7 to encompass a much more expansive range of law enforcement information. Specifically, the 1986 amendments modified the introductory language of Exemption 7 in two respects. first, by deleting the word "investigatory," and, second, by adding the words "or information." As a result of these modifications, the protections of Exemption 7 extended to all "records or information compiled for law enforcement purposes."[160]

The expansion of Exemption 7 to include "information" compiled for law enforcement purposes was the more technical of the two language modifications.[161] This modification permits Exemption 7 to apply not only to compilations of information as they are maintained in the particular records requested, but also to any part of the information itself, so long as the information was compiled for law enforcement purposes [162] This modification was designed "to ensure that sensitive law enforcement information [was] protected under Exemption 7 regardless of the particular format or record in which [it] [was] maintained."[163] Thus, Exemption 7's focus was broadened from "records" to items of "information".[164]

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[157]*See* FOIA-1974, *supra* note 50, at § 552 (b)(7)(C).

[158]Att'y Gen. Memo-1986, *supra* note 53, at 1.

[159]*Id.* at ii.

[160]FOIA-1986, *supra* note 2, at § 552(b)(7).

[161]Att'y Gen. Memo-1986, *supra* note 53, at 5.

[162]*Id.*

[163]*Id.* (quoting S. REP. NO. 221, 98th Cong., 1st Sess 23 (1983)).

[164]Att'y Gen. Memo-1986, *supra* note 53, at 5.

The 1986 amendments built upon the Supreme Court's approach to Exemption 7's threshold requirements which was enunciated in FBI v. Abramson.[165] In Abramson, a journalist filed a request for specific documents relating to the transmittal of information from the FBI to the White House in 1969 which concerned particular individuals who had criticized the Administration. The FBI denied the request. The sole question presented in the case was whether information contained in records compiled for law enforcement purposes loses its exempt status when the information is incorporated into records compiled for purposes other than law enforcement.[166] The Court focused on the "kind of information" contained in the law enforcement record and held that the information could be withheld.[167]

As presently employed, Exemption 7 protections are available to items of information which were originally compiled by an agency for law enforcement purposes, even if the information is maintained in or recompiled into a non-law enforcement record.[168] As such, the emphasis has been placed on the contents rather than the physical format of requested information.[169] Therefore, in applying the Exemption 7 threshold requirements, agencies now focus on the content and compilation purpose of each item of information involved, regardless of the overall character of the record in which the requested information is maintained.[170]

The second amendment to Exemption 7's threshold language was of much greater importance.[171] This amendment removed the requirement that records or information be "investigatory" in character in order to qualify for Exemption 7 protection. Prior to this amendment, agencies and courts confronted with Exemption 7 issues often struggled with the "investigatory" requirement, since not all law enforcement information could easily fit the label of "investigatory".[172] Although the courts generally interpreted

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[165]456 U.S. 615 (1982).

[166]*Id.* at 618.

[167]*Id.* at 626, 632.

[168]*Id.* Additionally, an item of information not initially compiled for law enforcement purposes can qualify for Exemption 7 protection if it is substantially recompiled for a valid law enforcement purpose. *Id.* at n.9. *See, e.g.,* Lesar v. Department of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980) (documents which summarized FBI surveillance activities constituted "investigatory records" even if the actual surveillance records did not).

[169]*See, e.g.,* Center for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 590 (D.D.C. 1983) (applying Abramson, the court held that duplicates of congressional records were not subject to disclosure).

[170]Att'y Gen. Memo-1986, *supra* note 53, at 6.

[171]*Id.*

[172]*Id.*

"investigatory" as requiring that the records in question resulted from specifically focused law enforcement inquires,[173] the distinction between "investigatory" and "noninvestigatory" law enforcement records was difficult to discern.[174]

The 1986 amendments were designed to eliminate the difficulty in distinguishing between "investigatory" and "noninvestigatory" records, thereby broadening the potential scope of Exemption 7 protections.[175] By extending the protections of Exemption 7 to all "records or information" that have been "compiled for law enforcement purposes," even records that could never have been regarded previously as "investigatory" in nature now qualify for Exemption 7 protection, so long as they involve a law enforcement purpose. This includes records generated for general law enforcement purposes that do not necessarily relate to specific investigations.[176]

Nothing in the 1986 amendments has altered the basic Exemption 7 threshold requirement that the records or information be "compiled for law enforcement purposes".[177] In fact, as a result of these amendments, the "law enforcement purposes" requirement now stands as the primary consideration for determining Exemption 7 applicability.[178] The law to be enforced within the meaning of "law enforcement purposes" includes both civil and criminal statutes, as well as those statutes authorizing administrative proceedings.[179]

What constitutes a proper "law enforcement purpose" within the meaning of Exemption 7 protection can depend upon the primary purpose of the agency seeking to invoke the exemption.[180] The courts have

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[173]*Id.* The courts utilized this interpretation of "investigatory" rather than apply the term to records which focused on the routine monitoring or oversight of government programs. *Compare, e.g.,* Sears Roebuck & Co. v. GSA, 509 F.2d 527, 529-30 (D.C. Cir. 1974) (records submitted for mere monitoring of employment discrimination found not to be "investigatory") *with* Center for Nat'l Policy Review on Race & Urban Issues v. Weinburger, 502 F.2d 370, 373-74 (D.C. Cir. 1974) (records of agency review of public schools suspected of discriminatory practices found to be "investigatory").

[174]Att'y Gen. Memo-1986, *supra* note 53, at 6. *Compare, e.g.,* Gregory v. FDIC, 470 F. Supp. 1329, 1334 (D.D.C. 1979) (bank examination report "typifies routine oversight" and thus is not "investigatory") *with* Copus v Rougeau, 504 F. Supp. 534, 538 (D.D.C. 1980) (compliance review forecast report "clearly" is investigatory record).

[175]Att'y Gen. Memo-1986, *supra* note 53, at 7.

[176]*Id.*

[177]*Id.*

[178]*Id.*

[179]DOJ CASE LIST, *supra* note 9, at 448.

[180]Att'y Gen. Memo-1986, *supra* note 53, at 7.

in the past generally distinguished between agencies holding both law enforcement and administrative functions and those whose principal function is in the area of traditional law enforcement.[181] Federal agencies with both law enforcement and administrative functions were required to show that their records involved the enforcement of a statute or regulation within their authority.[182] By contrast, the records of federal law enforcement agencies have been accorded varying degrees of special deference when considering whether the records meet the threshold requirements of Exemption 7,[183] and, as a result, are more likely to come within the exemption's protections.

The full effects of the 1986 amendments on the Exemption 7 threshold requirements still remain to be seen.[184] As the courts continue to apply the plain meaning of the threshold requirements in the absence of the "investigatory" requirement, each federal agency should consider the extent to which any of their records may now qualify for Exemption 7 protection.[185] In his memorandum[186] on the 1986 amendments to the FOIA, the Attorney General echoed this thought when he made the following observations:

> For the principal federal civil and criminal law enforcement agencies, the elimination of the "investigatory" limitation means that any record heretofore not considered covered by Exemption 7 due solely to its noninvestigatory character is likely to be sufficiently related to the agency's general law enforcement mission that it now can be considered for possible Exemption 7 protection. Other agencies should carefully consider the extent to which any of their records, even though not compiled for a specific investigation, are so directly related to the enforcement of civil or criminal laws that they might reasonably meet Exemption 7's revised threshold standard and thus qualify for necessary protection under it.[187]

Once the threshold requirements of Exemptions 6 and 7 have been satisfied, the disclosure of information involving privacy concerns will be determined by balancing the individual's privacy interests

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[181] *Id.*

[182] DOJ CASE LIST, *supra* note 9, at 450.

[183] *Id.* Some courts have adopted a *per se* rule that qualifies all "investigative" records of criminal law enforcement agencies for protections under Exemption 7. Other courts, while still according significant deference to these agencies, require the agency to demonstrate some nexus between the records and a proper law enforcement purpose to qualify for Exemption 7 protections. *See generally id.* at 450-51.

[184] *Id.* at 452.

[185] *Id.*

[186] Att'y Gen. Memo-1986, *supra* note 53.

[187] *Id.* at 8. Specifically, such records as law enforcement manuals, background investigation documents and program oversight reports can be prime candidates for consideration of Exemption 7 protections. *Id.* at 8-9.

against the public's right to government information. The next section will examine the balancing process employed by the courts in the protection of personal privacy interests.

VI. BALANCING PRIVACY INTERESTS

In the administration of the Freedom of Information Act, few decisions can be as complex and challenging as those involving the possible protection of personal privacy.[188] After the threshold requirements of Exemptions 6 and 7(C) have been established, the focus of inquiry shifts to whether disclosure of the material would result in an invasion of personal privacy. Exemption 6 permits withholding information to prevent a *clearly* unwarranted invasion of personal privacy,"[189] while Exemption 7(C) permits withholding if disclosure "*could reasonably* be expected to constitute an unwarranted invasion of personal privacy."[190] (emphasis added). Both of these exemptions require the balancing of the personal privacy interest against the public interest in disclosure of the material.

In 1989, the Supreme Court issued a landmark FOIA decision in Department of Justice v. Reporters Committee for Freedom of the Press,[191] which greatly changed the manner in which federal agencies would administer the balancing test for individual privacy interests under the FOIA's privacy exemptions. A full understanding of this decision is essential for the proper application of Exemptions 6 and 7(C), however, to place the Supreme Court's holding in the proper perspective the balancing process employed prior to Reporters Committee will be examined.

A. PRE-REPORTERS COMMITTEE BALANCING

Prior to the Supreme Court's decision in Reporters Committee, some courts which were confronted with privacy interests under the FOIA utilized the balancing test set forth in Getman v. National Labor Relations Board [192] In Getman, two labor law professors studying National Labor Relations Board (NLRB) voting patterns requested the names and addresses of employees eligible to vote in elections. The NLRB denied the request, citing Exemption 6.[193] In their decision, the court traced the legislative history of the

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[188]U S Department of Justice, *Privacy Protection Under the Supreme Court's Reporters Committee Decision*, FOIA UPDATE 3 (Spring 1989) [hereinafter FOIA UPDATE-1989].

[189]*Id.* at § 552 (b)(7)(C). Prior to the 1986 amendments to the FOIA (discussed *supra* section V.B.), withholding was appropriate when disclosure of law enforcement records "would" result in an unwarranted invasion of personal privacy. *See* FOIA-1974, *supra* note 50, at § 552(b)(7)(C).

[190]FOIA-1986, *supra* note 2, at § 552(b)(6).

[191]489 U.S. ___, 103 L.Ed.2d 774, 109 S.Ct. ___ (1989) [hereinafter Reporters Committee III].

[192]450 F.2d 670 (D.C. Cir. 1971).

[193]The NLBR also cited Exemptions 4 and 7, however the court found that these exemptions were inapplicable to the case. *Id.* at 673.

FOIA, defining the real thrust of Exemption 6 as a "guard against unnecessary disclosure of files . . . which would contain 'intimate details' of a 'highly personal' nature."[194] To that end, the court stated, "Exemption 6 requires a court reviewing the matter *de novo* to balance the right of privacy of affected individuals against the right of the public to be informed; and the statutory language 'clearly unwarranted' instructs the court to tilt the balance in favor of disclosure."[195]

In carrying out the balancing of interests required by Exemption 6, the Getman court employed a use-specific approach and considered two factors. 1. whether disclosure would constitute an invasion of privacy;[196] and 2. whether the invasion was "warranted" by the public interest purpose of the requested information.[197] The court found that although the release of the names and addresses of the employees invaded their privacy, the invasion was minimal, and the significant nature of the research project "warranted" the release of the information.[198]

Although the privacy interest balancing test required the courts to evaluate the importance of the public interest served by disclosure, the use-specific approach, such as the one utilized by the Getman court, proved to be troublesome. For example, the Getman court found that a decision to grant disclosure under Exemption 6 carried with it "an implicit limitation that the information, once disclosed, be used only by the requesting party and for the public interest purpose upon which the balancing was based.[199] However, if one were to employ the use-specific approach, there was no guarantee that the requested information would actually be used for the asserted purpose.[200] Additionally, even if one were to assume that the Getman court was correct in considering the requester's purpose for the information, there appeared to be no authority for the court to impose limitations on the use of the information once it was released.[201]

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[194]*Id.* at 675.

[195]*Id.* at 674.

[196]*Id.*

[197]*Id.* at 675.

[198]*Id.* at 677.

[199]*Id.* at n.24.

[200]Note, *Developments Under the Freedom of Information Act-1987*, 1988 DUKE L.J. 566, 601 [hereinafter *Developments-1987*].

[201]*See* Ditlow v. Shultz, 517 F.2d 166, 171 n.18 (D.C. Cir 1975) ("court would appear to be without authority to impose. . . limitations [on use]").

Another troublesome aspect of the use-specific approach involved the question of whether this method was consistent with the FOIA's statutory language requiring that records be released to "the public."[202] Section 552(a) of the FOIA states that "[e]ach agency shall make available to the public information" which is set forth in the FOIA's statutory provisions.[203] It seems clear that Congress envisioned a balancing process when they stated that the application of Exemption 6 would "involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information."[204] However, it was unclear whether the balancing was to be performed in the context of a use-specified release which considered the nature of the requesting parties.[205]

In addition to the use-specific approach set forth in Getman, courts also employed other methods to evaluate the public interest that would be served by disclosure. Traditionally, the measure of the public interest was determined by the public benefit gained from making the requested information available.[206] The law was clear that the disclosure had to benefit the public overall and not just the requester.[207] For example, many courts found that a request made for purely commercial purposes furthered no public interest.[208] Examples of interests that were found to be served by disclosure included the public oversight of government operations,[209] and the public interest in disclosure of the misconduct of government officials.[210]

While the courts' decisions prior to Reporters Committee varied in their treatment of factors such as the weight and significance afforded to the requester's purpose and commercial interest, all of the courts

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[202]*Developments-1987*, *supra* note 200.

[203]Of course, the availability of this information would depend upon whether one of the exemptions listed in § 552 (b)(7) was applicable.

[204]RIGHT TO INFORMATION, *supra* note 12, at 9.

[205]517 F.2d 171.

[206]GUIDEBOOK-1990, *supra* note 38, at 1-122.

[207]*Id.* at 1-123. *See also* Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981) ("[I]t is the interest of the general public, and not that of the private litigant, that must be considered.").

[208]*See, e.g.*, Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1413 (9th Cir. 1987) ("[c]ommercial interest does not warrant disclosure of otherwise private information."). *But see* Aronson v. HUD, 822 F.2d 182, 185-86 (1st Cir. 1987) (requester's commercial motivations not relevant to evaluation of the public interest in disclosure).

[209]GUIDEBOOK-1990, *supra* note 38, at 1-124.

[210]*Developments-1987*, *supra* note 200.

attempted to evaluate the public interest served by disclosure of the requested records. The Reporters Committee decision departed significantly from the analysis employed by these courts, and set forth new principles that altered the traditional balancing process for individual privacy interests under Exemptions 6 and 7(C).

B. REPORTERS COMMITTEE DECISION

1. The Case History

In Reporters Committee, a news correspondent and an association of journalists made FOIA requests to the Department of Justice and the Federal Bureau of Investigation. The requesters sought the criminal history records, or "rap sheets", of four brothers whose family company allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman.[211] The requesters received the information regarding three of the brothers who were deceased, however the Department of Justice refused to release the information concerning the brother who was still living.

The requesters filed suit in the district court to compel release of the information. They claimed that the information should have been released since "most, if not all, of the requested documents would be on public record in the jurisdictions" in which the records were created.[212] The agencies, however, argued that the information could be withheld under the provisions of Exemptions 6 and 7(C).[213] The District Court entered a summary judgement dismissing the suit, and held that the rap sheets were protected from disclosure by Exemptions 6 and 7(C).[214]

The reporter and association appealed to the United States Court of Appeals for the District of Columbia. The appeals court found that the primary factor to be considered in evaluating "public interest" in disclosure was whether the state had made the requested information a part of the public record.[215] If the states determined the information had a public interest, the court concluded that the federal judiciary was not in a position to dispute that determination.[216] The court also held that both the requesters' status

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[211]Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 785, 109 S.Ct. at ___.

[212]Reporters Comm. for Freedom of the Press v. Department of Justice, 816 f.2d 730, 732 (D.C. Cir. 1987 [hereinafter Reporters Committee I], *reh'g denied,* 831 F.2d 1124 (D.C. Cir. 1987) [hereinafter Reporters Committee II], *cert. granted,* 108 S.Ct. 1467 (1988).

[213]Reporters Committee I, 816 F.2d at 732.

[214]*Id.* at 734. The court also concluded that since another statute (28 U.S.C. § 534) prohibited the release of rap sheets to members of the public, Exemption 3, which protects information "specifically exempted from disclosure by statute," was applicable. *Id.*

[215]*Id.* at 741.

[216]*Id.*

as journalists and the specific purpose for the requested material were irrelevant to a determination of public interest.[217] Accordingly, the court found that Exemptions 6 and 7(C) were inapplicable.[218] Consequently, the Court of Appeals reversed and directed the district court to determine, on remand, whether the withheld information was publicly available.[219] If the information was publicly available, the district court was instructed to release the records.[220]

The Department of Justice filed a petition for rehearing, arguing that the appeals court had misinterpreted the term "public interest".[221] The Court of Appeals denied the petition for rehearing; however, the court modified its prior rationale. Contrary to their prior holding, the court found that many states had adopted policies or laws that prohibited the release of criminal history summaries to members of the public.[222] As such, the court determined that reliance on conflicting state disclosure policies could be confusing and unworkable.[223] Rather than rely on the state and local policies concerning the disclosure of criminal records, the court instead directed the district court to make a factual determination of the potential invasion of privacy.[224] Specifically, the case was remanded for the district court to determine whether the subject's privacy interest in his rap sheet had faded because the information had appeared on the public record.[225]

In reaffirming their previous holding, the Court of Appeals found that Congress had not given the courts any standards against which to judge the public interest necessary for balancing under Exemptions 6 and 7(C) [226] Consequently, the court concluded that Congress could not have intended for the judiciary

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[217]*Id.* at 741-42.

[218]In addition, the court held that Exemption 3 did not apply because 28 U.S.C. § 534 (*see supra* note 214) did not qualify as a statute "specifically" exempting rap sheets from disclosure. *Id.* at 736.

[219]*Id.* at 742-43.

[220]*Id.*

[221]Reporters Committee II, 831 F.2d 1124.

[222]*Id.* at 1125.

[223]*Id.*

[224]*Id.* at 1127.

[225]*Id.*

[226]*Id.* at 1126.

to measure the public interest in disclosure of the requested information.[227] Instead, the court held that the phrase "public interest" meant nothing more that the general policy of the FOIA favoring disclosure.[228]

The Court of Appeals' decision in this case severely questioned the mechanics of the balancing process under the FOIA's privacy exemptions, thereby leaving great confusion and uncertainty over what approach should be employed.[229] Recognizing the potential effect of this decision on values of personal privacy, the Supreme Court granted *certiorari* and issued a landmark decision that further altered the balancing process employed for Exemptions 6 and 7(C).

2. The Decision

The Supreme Court in Reporters Committee reversed the decision of the Court of Appeals and held that the disclosure of rap sheets constituted an unwarranted invasion of privacy under Exemption 7(C).[230] In reaching their decision, the Court reaffirmed that personal privacy protection under Exemption 7(C) required a balancing of the privacy interest against the public interest in disclosure. However, in applying their balancing test, the Court established five new guiding principles that currently govern the process by which privacy interest determinations are made under both Exemptions 6 and 7(C).[231] These new principles should guide future privacy protection decisions by clarifying how the privacy and public interests are to be measured.

a. "Practical Obscurity" Standard

In Reporters Committee, the Supreme Court first addressed whether a privacy right existed with respect to the rap sheets, especially since the information had been previously released to the public.[232] In establishing a "practical obscurity" standard,[233] the Court found that substantial privacy interests could exist in personal information, even though the information has been made available to the general public at some place and point in time.[234] The Court stated, "the fact that an event is not wholly private does

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[227]*Id.*

[228]*Id.*

[229]FOIA UPDATE-1989, *supra* note 188.

[230]Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 800, 109 S.Ct. at ___. The Supreme Court determined that Exemption 7(C) covered this case. As such, the Court had no occasion to address the application of Exemption 6. *Id.* at 788 n.12.

[231]DOJ CASE LIST, *supra* note 9, at 430.

[232]Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 789, 109 S.Ct. at ___.

[233]*Id.* at 788.

[234]FOIA UPDATE-1989, *supra* note 188.

not mean that an individual has no interest in limiting disclosure or dissemination of the information."[235] The Court further observed that if the information was in fact "'freely available', there would be no reason to invoke the FOIA to obtain access to" it.[236] Accordingly, the court found that a privacy right existed in the rap sheets.

b. Requester's Identity and Purpose Irrelevant

The Court next addressed what public interest factors, if any, might warrant an invasion of an individual's privacy right. In determining the public interest, the Court declared, "the identity of the requesting party has no bearing on the merits of his or her FOIA request."[237] As such, the Court held that neither the identity of the FOIA requester, nor the purpose of the request could be taken into consideration in determining what should be released under the FOIA.[238] Therefore, the rights of the journalists in the case were found to be no different from those that could have been "asserted by any other third party."[239]

c. Nature of Requested Document and Relationship to Public Interest

Rather than rely upon the requester's particular purpose, circumstances or proposed use of the information, the Court directed that determinations of public interest "must turn on the nature of the requested document and its relationship to" the basic purpose of the FOIA.[240] Consistent with this holding, the Court did not consider the particular purpose for which the journalists made the FOIA request. Instead, the Court looked only at the nature of the contents of the information in order to determine whether the public interest would be served by disclosure.[241] Thus, the Supreme Court effectively overruled the Getman court's use-specific approach to public interest (discussed *supra*, section VI.A.).

d. "Basic Purpose" of the FOIA

The Court continued its analysis of the public interest, declaring for the first time that the scope of public interest would be limited to the kind of public interest contemplated by Congress in enacting the

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[235]Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 794, 109 S.Ct. at ___.

[236]*Id.* at 790.

[237]*Id.* at 794. The single exception to this rule is that an agency will not be permitted to invoke an exemption where the interest to be protected is the requester's own interest. *Id.*

[238]*Id.*

[239]*Id.* at 794-95.

[240]*Id.* at 795.

[241]FOIA UPDATE-1989, *supra* note 188, at 4.

FOIA.[242] The Court emphasized that the basic purpose of the FOIA was to "shed[] light on an agency's performance of its statutory duty."[243] Applying this purpose to the privacy interest in the disclosure of the rap sheets, the Court declared:

> Conceivably [the rap sheets] would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA. . . . [A]lthough there is undoubted some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.[244] (emphasis in original).

Accordingly, the Court found that releasing the rap sheets "would not shed any light on the conduct of any Government agency or official."[245] As a result, the Court determined that there was no public interest in the disclosure of the rap sheets.

e. Categorical Balancing

The final principle announced in Reporters Committee concerned what the Court termed "categorical balancing". This principle acknowledged the fact that a certain category of information would always be protected from disclosure regardless of the individual circumstances of the case, since disclosure of this type of information would always result in an unwarranted invasion of personal privacy.[246] These categorical decisions are appropriate "when a case fits into a genus in which the balance characteristically tips in one direction."[247] Applying this new principle, the Court concluded, "as a categorical matter," that the rap sheets were properly withheld under Exemption 7(C).[248]

The decision announced by the Supreme Court in Reporters Committee has greatly affected personal privacy interest balancing under the FOIA.[249] The new principles established by the Court have

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[242]*Id.*

[243]Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 795-96, 109 S.Ct. at ___.

[244]*Id.* at 796-97.

[245]*Id.* at 796.

[246]FOIA UPDATE-1989, *supra* note 188, at 4.

[247]Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 798, 109 S.Ct. at ___.

[248]*Id.* at 800.

[249]FOIA UPDATE-1989, *supra* note 188, at 7.

altered the balancing process by which privacy-protection decisions are made.[250] The next section will detail the personal privacy balancing process as it now exists in light of the Reporters Committee decision.

C. POST-REPORTERS COMMITTEE BALANCING

Although the principles expressed in Reporters Committee were applied to balancing under Exemption 7(C), these principles are equally applicable to Exemption 6 balancing.[251] As previously stated, once the threshold requirements of Exemptions 6 and 7(C) have been established (discussed *supra* section V), the inquiry shifts to whether disclosure would result in an unwarranted invasion of personal privacy. When conducting this inquiry, the following decisionmaking process should be employed.

1. Identify Personal Privacy Interest

The first step in Exemption 6 and 7(C) balancing requires one to determine whether disclosure of the requested information would jeopardize a personal privacy interest.[252] If no personal privacy interest is threatened by disclosure, then Exemptions 6 and 7(C) do not apply.[253] No further analysis is required, and the requested information should be released.

Assessing personal privacy interests under Exemption 6 requires that the threat to privacy be real rather than speculative.[254] This requirement was originally interpreted to mean that the privacy interest had to be threatened by the actual disclosure of the information and not by any possible "secondary effects" of the release.[255] However, it is now recognized that even "secondary effects" of disclosure will be sufficient to establish a privacy interest in the information.[256] Additionally, it had been held that there was no expectation of privacy in information which had been previously released to the general public or was especially well known.[257] This issue was settled in Reporters Committee when the court formulated the

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[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] DOJ CASE LIST, *supra* note 9, at 431. *See, e.g.,* Department of the Air Force v. Rose, 425 U.S. 352, 380 n 19 (1976) (indicates that legislative history of Exemption 6 directs that threats to privacy interests be more than mere possibilities).

[255] DOJ CASE LIST, *supra* note 9, at 431.

[256] *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 878 (D.C. Cir. 1989) ("Where there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain.").

[257] DOJ CASE LIST, *supra* note 9, at 432.

"practical obscurity" standard. This standard recognizes that even though some information has been made available to the public, a privacy interest still exists, if the public information is now "hard-to-obtain".[258] As such, the "practical obscurity" standard should be applied in all cases where the requested information has previously been released to the general public.

Another factor to consider in assessing personal privacy interests under Exemption 6 concerns the status of the individual whose privacy interest is threatened. For example, the courts have held that neither corporations nor associations have protectible privacy interests under Exemption 6.[259] Likewise, death has also been found to extinguish personal privacy interests under the FOIA.[260] However, information concerning a deceased person may by withheld to protect the privacy interests of surviving family members.[261] Additionally, courts have determined that public figures, by virtue of their status alone, do not forfeit all of their rights to privacy, even though their status, in some cases, may tend to diminish their privacy right.[262] It should also be noted that foreign nationals are entitled to the same privacy rights under the FOIA as U.S. citizens.[263]

Personal privacy interests under Exemption 7(C) are determined in much the same way as described for Exemption 6, except that the requested information pertains to law enforcement records. It has been generally recognized that the mere mention of an individual's name in a law enforcement file could potentially threaten that individual's privacy interests.[264] As a result, privacy interests threatened by the disclosure of law enforcement records are more readily apparent and easily justified. For example, Exemption 7(C) recognizes the privacy interests of investigators working for law enforcement agencies, in that these investigators' "anonymity may well be important to their personal safety and the effective discharge of their public responsibilities."[265] Although the courts are concerned with the privacy interests

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[258]Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 790, 109 S.Ct. at ___.

[259]DOJ CASE LIST, *supra* note 9, at 432. However, an exception to this rule applies in the case of a closely held corporation or similar entity. *Id.*

[260]*Id.* at 433.

[261]*Id.*

[262]*Id.*

[263]*Id.*

[264]*Id.* at 460. For example, inclusion of one's name in a law enforcement file may result in embarrassment, harassment, personal discomfort, damage to reputation, or derogatory inferences. *See generally id.*

[265]*Privacy Versus Open Gov't, supra* note 150, at 610-11.

of law enforcement personnel, they have been unwilling to apply a blanket exemption for the names of all law enforcement personnel in all cases.[266]

Privacy interests have also been extended to individuals who have been the subjects of criminal investigations, much like the rap sheets at issue in Reporters Committee.[267] Furthermore, just because an individual's name has been previously disclosed in a law enforcement record does not mean that the individual loses his right to privacy in further disclosure.[268] This application necessarily involves the "practical obscurity" standard enunciated in Reporters Committee. The Courts have also found protectible privacy interests in the identities of government informants, as well as the names of witnesses, their home and business addresses, and their telephone numbers.[269]

2. Identify Public Interest

Once a personal privacy interest has been established, the balancing process under Exemptions 6 and 7(C) requires the identification of a public interest.[270] The requester has the burden of establishing that disclosure of the requested material would serve the public interest.[271] If disclosure of the information would serve no public interest, then any identified privacy interest should be protected and the information should be withheld.[272] For example, it has been held that "something, even a modest privacy interest, outweighs nothing every time."[273] However, if the a public interest is identified, then some measure of value is attached to it, so that balancing against the threatened privacy interest can be conducted.[274]

In determining whether a public interest exists, an agency should look to the public benefit, if any, which would be derived from disclosure. However, the public benefit is only considered in light of the content and context of the requested information.[275] With the Supreme Court's decision in Reporters

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[266]DOJ CASE LIST, *supra* note 9, at 462.

[267]*See generally id.* at 460-61.

[268]*Id.* at 460.

[269]*Id.* at 462-63.

[270]FOIA UPDATE, *supra* note 188, at 7.

[271]DOJ CASE LIST, *supra* note 9, at 435.

[272]FOIA UPDATE, *supra* note 188, at 7.

[273]National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

[274]DOJ CASE LIST, *supra* note 9, at 435.

[275]FOIA UPDATE, *supra* note 188, at 7.

Committee, it is clear that the requester's particular purpose, personal interests, circumstances and proposed use of the information are irrelevant to a determination of public interest.[276] As such, all FOIA requesters should be treated alike in making disclosure decisions, except when the privacy interest to be protected belongs solely to the requester himself.[277] Under these circumstances, the information should be disclosed.

3. Determine "Qualified" Public Interest

Although a public interest may be argued in a number of different ways, the public interest contemplated after Reporters Committee is limited to the FOIA's basic purpose which concerns information that directly reveals the operations or activities of the government. If the information does not relate to these governmental functions, then the "interest falls outside the ambit of public interest that the FOIA was enacted to serve."[278] Moreover, the requested information must directly reveal official government activities, and not merely permit inferences about the conduct of an agency or government official.[279]

This narrowing of the public interest under the FOIA can be expected to have a significant effect on FOIA decisionmaking, especially when disclosure under Exemption 7(C) is contemplated.[280] As a result of this new standard, the requester of law enforcement records which pertain to a particular individual will have a difficult time demonstrating how the requested information relates to an agency's operations or activities.[281] Thus, even if a public interest has been identified, to qualify for balancing against the privacy interest, the public interest must fall within the basic purpose of the FOIA. If the basic purpose is not satisfied, then the identified privacy interest should be protected by withholding the information.[282]

4. Balance Privacy Interest Against Public Interest

The fourth and final step in the decisionmaking process regarding Exemptions 6 and 7(C) requires the balancing of the qualified public interest against the personal privacy interest.[283] In conducting this balancing, an assessment and comparison of the relative magnitudes of the conflicting interests becomes

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[276] *Id.*

[277] DOJ CASE LIST, *supra* note 9, at 435.

[278] Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 797, 109 S.Ct. at ___.

[279] DOJ CASE LIST, *supra* note 9, at 436.

[280] FOIA UPDATE, *supra* note 188, at 6.

[281] DOJ CASE LIST, *supra* note 9, at 464.

[282] FOIA UPDATE, *supra* note 188, at 7.

[283] *Id.*

necessary[284] If the privacy interest outweighs the public interest, then the privacy exemption applies and the information should be withheld. However, if the public interest is greater, then the privacy exemption does not apply, and the information should be released.

Although balancing under Exemption 6 and 7(C) is conducted in a similar manner, these exemptions require separate standards for disclosure. Exemption 7(C)'s statutory language is much broader than the comparable language in Exemption 6, and, therefore, establishes a lesser burden of proof to justify withholding[285] The Supreme Court addressed this issue in Reporters Committee when they declared that "[t]he standard for evaluating a threatened invasion of privacy interests resulting from disclosure of records compiled for law-enforcement purposes [under Exemption 7(C)] is somewhat broader than the standard applicable to personnel, medical and similar files [under Exemption 6]."[286]

The broad nature of Exemption 7(C) as compared to Exemption 6 is apparent in two respects. First, the "clearly unwarranted" language of Exemption 6 has been held to tip the balance in favor of disclosure,[287] while the omission of the term "clearly" from the language of Exemption 7(C) lessens the burden of disclosure of law enforcement records.[288] Secondly, while Exemption 6 refers to disclosures that "would constitute" an unwarranted invasion of privacy, Exemption 7(C) provides protection when disclosure "could reasonably be expected to constitute" an unwarranted invasion of privacy. This provision in Exemption 7(C), which was incorporated as a result of the 1986 amendments to the FOIA, further broadened the protections afforded under this exemption.[289]

Applying the balancing standards for Exemptions 6 and 7(C), the courts have upheld the nondisclosure of information concerning marital status, legitimacy of children, medical condition, family fights and reputation[290] In essence, the courts have found an interest in protecting information concerning the

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[284]*Id.*

[285]DOJ CASE LIST, *supra* note 9, at 459.

[286]Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 785, 109 S.Ct. at ___.

[287]DOJ CASE LIST, *supra* note 9, at 438.

[288]*Id.* at 459.

[289]*Id* In adopting the "could reasonably be expected to" language, Congress established a more relaxed standard to be met by agencies wishing to invoke Exemption 7(C). As a result, a lesser degree of certainty of harm is required in determining whether law enforcement records should be disclosed. As such, the language under the 1986 amendments allows greater latitude in protecting privacy interests under Exemption 7(C). *See* Att'y Gen. Memo-1986, *supra* note 53. at 10-12.

[290]DOJ CASE LIST, *supra* note 9, at 439.

personal, intimate details of an individual's life, if the release of the information is likely to cause distress or embarrassment.[291]

Requests for mailing lists have been the source of a significant amount of litigation under the FOIA.[292] After Reporters Committee, the courts have ignored the requester's intended purpose for the lists and have held that these lists were protected from disclosure under Exemption 6.[293] However, the courts have treated requests for information concerning civilian and military federal employees differently. In these cases, employees' names, present and past position titles, grades, salaries and duty stations are generally releasable, since it has been determined that no privacy interest exists with respect to such information.[294] Conversely, certain military personnel are entitled to greater privacy protections than other military members and civilian employees. Specifically, the courts have found that servicemen stationed abroad have a greater expectation of privacy, which in turn prevents information about them from being released.[295]

5. Additional Considerations

It is important to note that although some portions of a record may by withheld, all reasonably segregable, nonexempt portions of the file must be released.[296] In a normal case, the removal of all personal identifying information concerning an individual would be sufficient to protect the individual's privacy interests. However, in other cases, even the deletion of all personal identifying information would not be adequate to provide privacy protection.[297] Under these circumstances, even the segregable portions of the record should be withheld. Segregation of the record will also be inappropriate when a request is limited to information pertaining to an identified or identifiable person.[298]

Furthermore, one should also remember that there are an assortment of cases which come under the "categorical balancing" standard. If information is appropriate for "categorical" treatment, then the material can be withheld without regard to the individual circumstances surrounding the information.[299]

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[291] *Id.*

[292] *Id.*

[293] *Id.* at 440.

[294] *Id.* at 441.

[295] *Id.*

[296] *Id.* at 443. *See* FOIA-1986, *supra* note 2, at § 552(b).

[297] DOJ CASE LIST, *supra* note 9, at 443.

[298] *Id.* at 444.

[299] Reporters Committee III, 489 U.S. at ___, 103 L.Ed.2d at 798, 109 S.Ct. at ___.

Just as the rap sheets in Reporters Committee were held to be entitled to categorical protection, other categories of information under Exemptions 6 and 7(C) are also eligible for such treatment. For example, categorical withholding under Exemption 7(C) should protect the identities of law enforcement personnel mentioned in routine investigations.[300] Additionally, although the courts have not completely settled the issue, it would appear that mailing lists containing home addresses are also eligible for categorical protection under Exemption 6.[301]

VII. CONCLUSION

This article has examined the individual right to privacy as it currently exists under the Freedom of Information Act. The legislative history of the FOIA confirms that it was enacted to provide for the disclosure of government information, thereby deterring secrecy and ensuring an informed citizenry. However, from the outset, legislators recognized that these goals would be in direct conflict with the individual right to privacy. In an effort to provide protection for individual privacy rights, as well as ensure continued access to government information, the FOIA contains two provisions which strike a balance between these competing interests: Exemptions 6 and 7(C).

Although the FOIA has undergone significant revision since its original enactment, the privacy protections have remained, and, in fact, have been strengthened as a result of statutory amendment and judicial action. The most recent amendments to the FOIA greatly enhanced the right to privacy associated with law enforcement records, and provided more authority for federal agencies to withhold information due to privacy concerns. In addition, the Supreme Court's decision in Reporters Committee evinced a desire to further expand privacy rights by narrowing the inquiry into the public interest which is necessary for balancing under Exemptions 6 and 7(C). Moreover, the Reporters Committee decision established several new guiding principles which make it more difficult for FOIA requesters to justify the disclosure of government information pertaining to a particular individual.

At present, it appears that the scope of personal privacy rights under the FOIA is at its apex. As such, one could argue that the FOIA's expanded privacy protections could potentially be abused by federal agencies attempting to hide behind the privacy exemptions in an effort to withhold information. While Congress recognized the necessity for a balance between disclosure and confidentiality, such abuses are possible and "[a] government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens fervor of its citizens, and mocks their

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[300]DOJ CASE LIST, *supra* note 9, at 462.

[301]*Id.* at 440. *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989) (court held that names and addresses of federal annuitants qualify for categorical withholding).

loyalty."[302] However, if this became the prevalent practice, Congress could pass legislation much like the 1974 amendments which were enacted to deter attempts by federal agencies to circumvent the FOIA's primary purpose of disclosure.

In any event, personal privacy protection under the Freedom of Information Act will continue to evolve with the courts maintaining the delicate balance between the individual right to privacy and the public's right of access to government information.

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[302]RIGHT TO INFORMATION, *supra* note 12, at 10.