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Balancing a Citizen's Right to Know with the Privacy of an Innocent Family: The Expansion of the Scope of Exemption 7(C) of The Freedom of Information Act under *National Archives & Records Administration v. Favish*.

By Lauren Bemis*

I. INTRODUCTION

Suicide or murder? Government conspiracy or one man's decision to take his own life? These questions surrounded the United States Government's investigation of the death of Vincent Foster, Jr., White House deputy counsel. But one man's interest in the circumstances surrounding Foster's death took him to the United States Supreme Court. A unanimous court denied his request for autopsy photographs of Foster, a request that he made under the Freedom of Information Act. The Court ultimately held that the privacy interests of Foster's family greatly outweighed any public interest Favish was attempting to advance by obtaining the photographs.

Law enforcement records, such as photographs from a crime scene, are available for public scrutiny under the Freedom of Information Act (FOIA), unless the government can prove that disclosure of the photographs would reasonably be expected to constitute an unwarranted invasion of privacy.¹ More specifically, Exemption 7(C) of FOIA was drafted to protect against precisely this interest: to effectively ensure that there be no disclosure of law

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1. Freedom of Information Act, 5 U.S.C. § 552 (1996), *amended by* Pub. L. No. 104-231 (1996).

enforcement records that would constitute an unwarranted privacy invasion.²

Exemption 7(C) has taken a bumpy ride in the courts. Some circuits have placed no requirements on the requestor to explain why the documents were asked for, while others have required the requestor to show that access to this information will advance the public interest. Some courts have required knowledge of the requestor's identity, while others have not. After the Supreme Court's ruling in *National Archives & Records Administration v. Favish*, a new bright-line test was established, placing a greater burden on the requestor to show how the disclosure of the information will advance the public interest.³

When the FOIA was first drafted, the congressional intent behind the statute was to provide a vehicle for private citizens to gather information in order to more closely scrutinize the government. FOIA's purpose was to be a full-disclosure statute, and the burden was placed on the agency to show that certain pieces of information should not be released. Despite being a full-disclosure statute, some materials were never intended for public dissemination. Therefore, Congress enacted nine exemptions to give agencies the power to withhold sensitive materials. Exemption 7(C) was specifically created so agencies could withhold law enforcement documents. However, when a court was faced with the decision of whether families were afforded the same protections as the subject of those documents who had deceased there was no rule or statutory guidance. However, *National Archives* changed the way Exemption 7(C) is interpreted, and has turned Exemption 7(C) into a withholding statute.

II. BACKGROUND OF THE FREEDOM OF INFORMATION ACT

The Purpose of the Freedom of Information Act is to "*pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.*"⁴ The Freedom of Information Act (FOIA) was enacted by the government to provide full disclosure of government

2. *Id.*

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

4. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)).

activities to private citizens.⁵ In 1966, Congress passed FOIA to allow access to information concerning the government's inner-workings.⁶ In other words, the FOIA was intended to be a "full disclosure statute."⁷

FOIA, now part of the Administrative Procedure Act (APA), was drafted to revise Section Three of the APA; Section Three was regarded as a withholding statute rather than a disclosure statute.⁸ The language in the statute was littered with vague phrases, such as an exempted disclosure of "any function of the United States requiring secrecy in the public interest."⁹ Additionally, "matters of official record" were accessible only to those "persons properly and directly concerned" with the information.¹⁰ FOIA's statutory construction eliminates the "persons properly and directly concerned" test and replaces it with the language of "to the public" and "for public inspection."¹¹ Nine exemptions in subsection (b) of FOIA set out specific situations where the government may elect to not disclose certain pieces of information.¹² These nine exemptions provide agencies with a more concrete and efficient manner to decide whether materials should be made available or not. If the party requesting the information is denied access, that person may appeal to the judicial system and have his case reviewed *de novo*.¹³

Congress' intent behind FOIA was to allow private citizens the opportunity to request and access information necessary to ensure that the government was legitimately carrying out its functions.¹⁴

5. Laurie A. Doherty, *The D.C. Circuit Review: The Freedom of Information Act*, 56 GEO. WASH. L. REV. 880 (1988).

6. *Id.*

7. *Id.*

8. *EPA v. Mink*, 410 U.S. 73, 79 (1973).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 80. "Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." *Id.*

13. *Id.* "[FOIA] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Id.*

14. See Doherty, *supra* note 5, at 880.

Before FOIA's enactment, the government had no system by which a citizen could request information; rather, all information was protected and inaccessible.¹⁵ Thus, when drafting this legislation, Congress was aware of the need to protect certain types of materials; as such, it balanced open access to government activity and protection of confidential material.¹⁶

At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in government files, such as medical and personnel records. It is also necessary for the very operation of our government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.¹⁷

A central principle of FOIA was to release only that information that served a public purpose.¹⁸ The typical situation involves a private requestor that asks for documents from the agency holding them.¹⁹ The agency then has the choice to turn over the documents or to invoke one of the nine exemptions.²⁰ The burden rests on the government to show that the retention of the documents is in fact protected by one of the nine exemptions.²¹ If the documents are withheld, the party may file suit in court to have the documents

15. *Id.*

16. *Id.* This paper focuses on exemption 7(C) and will briefly discuss exemption 6, but will not discuss the other exemptions.

17. *See EPA*, 410 U.S. at 80 n.6 (quoting S. Rep. No. 813 at 3 (1965)).

18. James T. O'Reilly, *Expanding the Purpose of Federal Records Access: New Private Entitlement or New Threat to Privacy?*, 50 ADMIN. L. REV. 371, 372 (1998).

19. *Id.*

20. *Id.*

21. James O. Pearson, Jr., *What Constitutes "Unwarranted Invasion of Personal Privacy" for Purposes of Law Enforcement Investigatory Records Exemption of Freedom of Information Act (5 U.S.C.A. §552(b)(7)(C))*, 52 A.L.R. FED. 181, §2(a) (2004).

turned over.²² In that situation, the court would employ a *de novo* standard of review.²³

A. Exemptions under FOIA: 7(C)

The exemptions under FOIA provide a shield of privacy for two distinct groups: the governmental agencies and the people who are the subject of the documents. Under FOIA, the agencies are not required to release certain pieces of information if they fall within one of the nine exemptions.²⁴ Specifically, Exemption 7(C) of FOIA provides for the protection of law enforcement records from unwarranted invasions of privacy: "This section does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy."²⁵

However, the courts have not set out a bright-line rule defining what is protected under 7(C) and what is not. Typically, any report compiled by a law enforcement agency is examined under this exemption. Case law has examined reports compiled by the Internal Revenue Service, Federal Bureau of Investigation, Watergate Special Prosecuting Force, the National Park Service, and the Office of Independent Council.²⁶ To determine which records are exempt from disclosure under FOIA, the Court has employed a balancing test; the public interest in disclosure is balanced against the private interest in withholding the information.²⁷ Exemption 7(C) not only provides protection to the source of the information, but also to third parties of

22. *Id.*

23. *Id.*

24. *See* § 522(b)(7)(C).

25. *Id.*

26. *See* Pearson, 52 A.L.R. 181 at *2a; *see also* *Nat'l Archives*, 541 U.S. at 161.

27. Pearson, *supra* note 21. When using this balancing test, the courts have generally found that disclosure of material in investigative reports constitutes an unwarranted invasion of privacy when that report was compiled by the Federal Bureau of Investigation, the Internal Revenue Service, or the Watergate Special Prosecuting Force. *Id.*

that source if disclosure of information constitutes an unwarranted privacy invasion as to that third party.²⁸ In addition, Exemption 7(C) affords protection to the person whose information was in the files, along with others who could be hurt from the release of those files, such as family members.²⁹ Under Exemption 7(c), the agency will only release files that compromise a privacy interest if the requestor can show that there is a greater overriding interest in the public release of the documents. It is insufficient that the requestor has a personal or pecuniary interest in the disclosure.³⁰

When a court faces a FOIA Exemption 7(C) case, it utilizes the balancing test set forth above: weighing the public interest in disclosure versus the privacy interest of the subject of the documents. The balancing process involves various criteria and, in making a determination, the court considers the information at issue. If there are other means available to request or obtain the information, for instance, then it is possible that the information does not hold an overriding privacy interest because of its availability elsewhere.³¹ The court may also consider the extent to which the disclosure includes the public's interest in the oversight of government functions.³²

B. The Personal Privacy Exemptions under FOIA

Exemption 7(C) and Exemption 6 under FOIA are both considered personal privacy exemptions under FOIA.³³ Like 7(C), Exemption 6 provides a privacy right, but deals specifically with the disclosure of personnel, medical, and other similar files.³⁴

28. *Id.* (citing *Lame v. United States Dep't of Justice*, 654 F.2d 917 (3rd Cir. 1981)).

29. *Id.*

30. *Id.* "[P]rivate, personal, or pecuniary interests of a requester is not enough." *King v. United States Dep't of Justice*, 586 F. Supp. 286 (D.D.C. 1983).

31. Pearson, *supra* note 21.

32. *Id.*

33. Doherty, *supra* note 5, at 893.

34. *Id.* See also 5 U.S.C. § 552(b)(6) (1996). Documents which may be withheld from disclosure include "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.*

Interestingly, the language of Exemption 6 provides that the disclosure must constitute a "*clearly* unwarranted invasion of personal privacy."³⁵ Exemption 7(C) refers only to disclosures that "*could reasonably* be expected to constitute an unwarranted invasion of personal privacy."³⁶ Despite the differing language in the two statutes the same balancing test is applied under both exemptions: weighing the public interest against the privacy rights of the individual.³⁷ Nevertheless, the Supreme Court has noted that Exemption 6 is afforded stricter standards of scrutiny because of the use of the word "*clearly*."³⁸

C. Department of the Air Force v. Rose

The 1976 case *Department of the Air Force v. Rose* set forth the standards to determine whether the invasion of privacy is unwarranted under Exemptions 6 and 7(C).³⁹ In *Rose*, the respondents were student editors and former editors of New York University Law Review conducting research for an article on disciplinary systems in the military.⁴⁰ They requested information from the Air Force Academy Honor Board on case summaries of honor and ethics hearings with personal references or other personal information that could be deleted so as to protect the identity of the cadets.⁴¹ However, the Air Force Academy Honor Board denied the requests.⁴²

35. *Id.* (emphasis added).

36. See 5 U.S.C. § 552(b)(7)(C) (emphasis added); see also Doherty, *supra* note 5, at 893.

37. Doherty, *supra* note 5, at 893 n.107.

38. *Id.*

39. *Id.* at 893.

40. *Dep't of Air Force*, 425 U.S. at 354-55.

41. *Id.* at 355. The documents requested summarized cadet breaches of the Honor Code at the academy. *Id.* at 358. The code states "[w]e will not lie, steal, or cheat, nor tolerate among us anyone who does." *Id.* at 358-59. An Honor Committee is charged with carrying out disciplinary actions if anyone violates this code. *Id.* at 359. Suspected violations are reported to the committee chairman; the chairman then appoints a three-cadet investigatory team with help from a legal advisor. *Id.* If this team determines that a hearing is warranted, the alleged violator appears before an honor board of eight cadets. *Id.* The accused may present witnesses to testify on his behalf. *Id.* The board may only return a guilty verdict if

Respondents then brought an action under the FOIA to have the Air Force Academy Honor Board release the requested information.⁴³ The district court granted the Agency's motion for summary judgment.⁴⁴ The respondents appealed the decision to the Second Circuit, which reversed the district court.⁴⁵ The Agency tried to argue that the documents fell within Exemption 6 of the FOIA - that the files were medical, personnel, or similar, and their disclosure would constitute a clearly unwarranted invasion of privacy.⁴⁶ Although the Second Circuit agreed that it is possible for the case summaries to fall within Exemption 6, it refused to simply compel the Agency to turn over all the documents or deny the respondents any of the case summaries under Exemption 6.⁴⁷ Instead, the court

the vote is unanimous. *Id.* The guilty verdict can be with or without discretion; "with discretion" means that the cadet still has good standing, while without discretion means the cadet may have to resign from the academy, request a hearing before a board of officers, or request a trial by court-martial. *Id.* From these hearings, the Committee prepares a one-page case summary with the relevant facts. *Id.* It was normal practice for the academy to post copies of these summaries on forty squadron bulletin boards throughout the academy and to distribute the same to academy officials and faculty. *Id.* at 355.

42. *Id.* However, the Air Force Honor's Board did release official copies of the Honor Code, the Honor Reference Manual, and other materials explaining the relevant ethic and honor code. *Id.* at 352 n.2. The board denied release of the case summaries because "[s]ome cases may be recognized by the reader by the circumstances alone without the identity of the cadet given' and '[t]here is no way of determining just how these facts will be or could be used.'" *Id.*

43. *Id.* at 356. The respondents brought the action under 5 U.S.C. § 552, as amended in 1974. *Id.*

44. *Id.* The district court did not require the Air Force to first produce the case summaries for inspection. *Id.* at 357. The judge held that even with the deletions of personal references, the documents fell under Exemption 2 of the statute - "matters . . . related solely to the internal personnel rules and practices of an agency." *Id.*; 5 U.S.C. § 552(b)(2).

45. *Dep't of Air Force*, 425 U.S. at 357. The Second Circuit disagreed with the district court and held that the case summaries do not fall within Exemption 2. *Id.*

46. *Id.*, see 5 U.S.C. § 552(b)(6). The district court found this exemption to be inapplicable, however, because . . . that disclosure of the summaries without names or other identifying information would not subject any former cadet to public identification and stigma, and the possibility of identification by another former cadet could not, in the context of the Academy's practice of distribution and official posting of the summaries, constitute an invasion of personal privacy *Dep't of Air Force*, 425 U.S. at 357.

47. *Dep't of Air Force*, 425 U.S. at 357.

found that the Agency had not met its burden at the district court level of showing that all of the case summaries were protected, since the Agency never produced the documents for inspection.⁴⁸ The Agency was now required to produce the case summaries for an in camera inspection.⁴⁹ The Agency appealed and the Supreme Court granted certiorari.⁵⁰

The Supreme Court focused on the legislative history of the FOIA to make its determination about the release of these case summaries. The Court found itself asking, under Exemption 6, "whether the clause 'the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,' modifies 'personnel and medical files' or only 'similar files.'"⁵¹ The Agency argued that all personnel files should be excluded under Exemption 6, but similar files should only be excluded when their disclosure constitutes a clearly unwarranted invasion of personal privacy.⁵² However, the Agency only made this argument to the Supreme Court and not in the district court or court of appeals.⁵³ The Supreme Court therefore found that there is no exception under Exemption 6 for personnel files only, nor any indication in the legislative history that personnel files should always be exempt.⁵⁴

The Court relied on the Congressional and Senate Reports to determine the meaning of Exemption 6. The House Report stated, "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual."⁵⁵ The Senate Report

48. *Id.*

49. *Id.* at 358. "We think it highly likely that the combined skills of the court and Agency, applied to the summaries, will yield edited documents sufficient for the purpose sought and sufficient as well to safeguard affected persons in their legitimate claims of privacy." *Id.* (quoting *Rose v. Dep't of Air Force*, 495 F.2d 261, 268 (2d Cir. 1974)).

50. *Dep't of Air Force*, 425 U.S. at 358.

51. *Id.* at 370.

52. *Id.* at 371.

53. *Id.*

54. *Id.*

55. *Id.* at 372 (quoting H.R. REP. NO. 89-1497, at 11 (1966)).

similarly stated, "[t]he 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."⁵⁶ After comparing both statements, the Supreme Court held that there was clearly no congressional intent to separate personnel and similar files; rather Congress was enumerating a single policy to be enforced judicially by balancing private and public interests.⁵⁷

The Supreme Court also noted that Exemption 7(C), the other personal privacy exemption under the FOIA, underwent changes during the amendment process in 1974.⁵⁸ The same "clearly unwarranted" language used in Exemption 6 was inserted into Exemption 7(C).⁵⁹ At the request of the President, however, Exemption 7(C) was amended again and "clearly" was dropped from the language of Exemption 7(C).⁶⁰ However, despite the differing language in the two exemptions, the protections of the Exemption 6 still apply to Exemption 7(C).⁶¹ Thus, the same test - "balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny'" - should be applied to both Exemptions 6 and 7(C).⁶² The agency must, "before releasing any information that might involve an invasion of personal privacy . . . weigh the public

56. *Id.* (quoting S. REP. NO. 89-813, at 9 (1965)).

57. *Id.* at 373. The Senate Report states as to this balancing test:

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

Id. at 373 n.9 (quoting S. REP. NO. 89-813, at 3).

58. *Id.* at 380 n.16.

59. *Id.*

60. *Id.*; see also Doherty, *supra* note 5, at 893 n.107.

61. See Doherty, *supra* note 5, at 893 n.107 (quoting 120 CONG. REC. 17,033 (1974) (statement by Sen. Hart)).

62. *Dep't of Air Force*, 425 U.S. at 372-74; see also Doherty, *supra* note 5, at 893.

interest in disclosure of the information against the privacy interest in protecting such information from disclosure."⁶³

The courts were then faced with another issue under Exemption 7(C): that of how to balance the public and private interests when faced with disclosing publicly available information to a third party.⁶⁴

D. U.S. Department of Justice v. Reporters Committee

In *Reporters Committee*, a CBS news correspondent and the Reporters Committee for Freedom of Press, requested information about the criminal records of four family members of the Medico family.⁶⁵ Specifically, the respondents were interested in obtaining the rap sheets of the four members.⁶⁶ The FBI initially denied the requests, however, upon the death of three of the Medico's, the FBI handed over the rap sheets but failed to turn over Charles Medico's (Medico) rap sheets.⁶⁷ Reporters Committee brought an action under the FOIA claiming that the information in the Medico rap sheet contained "matters of public record."⁶⁸

At the D.C. Circuit Court of Appeals, the Department of Justice argued that the rap sheets fell under Exemption 7(C) of the FOIA, and therefore were not subject to disclosure because they contained sensitive information.⁶⁹ The majority, using legislative history as its guide, first made a determination on whether the FOIA exemptions were targeted at all information or information not yet within the

63. Doherty, *supra* note 5, at 893-94.

64. *See id.*

65. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 785 (1989). The Medico family ran a legitimate business called Medico Industries, as reported by the Pennsylvania Crime Commissions, but that business was dominated by organized crime figures. *Id.* It was also reported that this company obtained defense contracts through improper negotiations with a corrupt congressman. *Id.*

66. *Id.* Rap sheets are criminal identification records created by the FBI, that contain information like date of birth, physical characteristics, dates of arrests, charges, and convictions. *Id.* at 751.

67. *Id.* at 757.

68. *Id.*

69. Reporters Comm. for Freedom of Press v. U.S. Dep't of Justice, 816 F.2d 730, 737 (D.C. Cir. 1987).

public domain.⁷⁰ The court initially determined that based on a 1965 Senate Report examining the language of Exemption 6, "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."⁷¹ Thus, it appears that Congress did not intend to require documents that were already made public to be inaccessible under Exemption 7(C).⁷² The court rejected the Agency's argument that although information within the rap sheets had been made public, the rap sheet is still afforded protection under Exemption 7(C).⁷³ The court relied on two Supreme Court cases for support: *Department of State v. Washington Post Co.* and *Cox Broadcasting Corp. v. Cohn*.⁷⁴ Quoting from *Department of State*. Quoting the decision in *Dep't of State*, the court explained that:

[W]here information is "a matter of public record," for example, "past criminal convictions," the public nature of [the] information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a 'clearly unwarranted invasion of personal privacy [under Exemption 6]'⁷⁵

The court, quoting *Cox Broadcasting*, further explained that "[t]he prevailing law of invasion of privacy generally recognizes that the interests in privacy *fade* when the information involved already

70. *Id.* at 738.

71. *Id.* at 739-40 (quoting REP. NO. 89-813, at 9 (1965)) (emphasis omitted). Making the same connection as the Supreme Court in *Rose*, the D.C. Circuit Court recognized that it was Congress' intent to use the Exemption 6 analysis in Exemption 7(C). *Id.* at 739 n.11.

72. *Id.* at 738.

73. *Id.* at 739.

74. *Id.*; *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595 (1982); *Cox Broad. Corp. v. Cohen*, 420 U.S. 469 (1975).

75. *Reporters Comm.*, 816 F.2d at 739 (quoting *Wash. Post Co.*, 456 U.S. at 602-03 n.5).

appears on the public record."⁷⁶ Therefore the Circuit Court made the determination that once a matter is of public record, privacy interests are lessened but not completely eliminated.⁷⁷ This now requires, however, the threshold inquiry under Exemption 7(C) as to whether the information is a matter of public record.⁷⁸

The court defined a public record as "mean[ing] that a local, state or federal political body has made an affirmative determination that criminal records must be freely available to the general public and has provided a mechanism to ensure the implementation of that policy."⁷⁹ If a law enforcement body only provides the information to certain agencies and not the public at large, then the information would not be considered a matter of public record.⁸⁰ Accordingly, the majority opinion held in *Cox* that once it is established that the matter is of public record, then there is a presumption of public interest in that record.⁸¹ Thus, once the presumption of public interest is established, there need be no further inquiry as to the degree of public interest since the privacy interest is so substantially diminished.⁸² Thus the district court erred in first establishing whether the rap sheets were made publicly available.⁸³

Judge Kenneth W. Starr wrote a concurring opinion in which he disagreed with the majority's decision to set aside the balancing test in favor of a single factor test that would only look at the public interest in disclosure.⁸⁴ Under the majority's holding, he argued, the court will no longer review FOIA cases *de novo* as instructed by Congress.⁸⁵ Rather, the court deferred to the legislative

76. *Id.* at 740 (quoting *Cox Broadcasting Corp.*, 420 U.S. at 494-95) (emphasis in original).

77. *Reporters Comm.*, 816 F.2d at 740.

78. *Id.*

79. *Id.* at 740.

80. *Id.*

81. *Id.* at 740-41; see also Doherty, *supra* note 5, at 898.

82. Doherty, *supra* note 5, at 898.

83. *Id.* at 896.

84. *Reporters Comm.*, 816 F.2d at 743 (Starr, J., concurring).

85. *Id.* at 744.

determination of what is and what is not public record.⁸⁶ Judge Starr also cautioned that by rejecting the balancing test and placing the single factor test in its place, in future cases the court will be forced to overlook other factors that should be considered when assessing the general public interest, such as the nature of the crime and when the crime or arrest occurred.⁸⁷ Judge Starr also criticized the majority for abandoning the notion that the request's reasoning should be considered.⁸⁸ He argued the majority used the statement in *FBI v. Abrahamson*, "Congress did not differentiate between the purposes for which information was requested," to mean that the purpose of the request should never be considered.⁸⁹ But under *Abrahamson*, the Supreme Court stated that the purpose of the request was only irrelevant *after* the private and public interest had been balanced.⁹⁰ Judge Starr further argued that the majority read the line out of context and that the statement that Congress does not differentiate between purposes was meant to apply to a later phase of the Exemption 7(C) balancing test.⁹¹ Rather, the purpose of the request should always be one of the factors used in the balancing test.

Ultimately, the Supreme Court granted certiorari to *Reporters Committee* and reversed the Circuit Court's decision. The Court first determined that although parts of the rap sheets may have been public at one point, that does not mean that the individual who is the source of the rap sheet has lost their privacy interest.⁹² Rather, the Court steered in the opposite direction of the Court of Appeals:

86. *Id.* "[T]he majority decides to go AWOL, as it were, by failing entirely to heed Congress' directive. Instead of *de novo* balancing, the court's 'analysis' is reduced to deferential rubber-stamping." *Id.*

87. *Id.* at 745.

88. *Id.* In the context of this case, the fact that the records are sought by representatives of the media for the avowed purpose of exposing the possible misuse of government funds -- rather than by some idiosyncratic individual seeking to satisfy a mere curiosity about criminal records -- should be a factor in the public-interest determination. *Id.*

89. *Id.*

90. *Reporters Comm.*, 816 F.2d at 746 (Starr, J., concurring) (emphasis added).

91. *Id.*

92. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 767 (1989). "State policies . . . provide evidence that the law enforcement profession generally assumes . . . that individual subjects have a significant privacy

The privacy interest in a rap sheet is substantial. The substantial character of that interest is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80, when the FBI's rap sheets are discarded.⁹³

Returning to its decision in *Rose*, the Court reiterated that although documents may have been public at one time, the subject of those documents still maintains a privacy interest in nondisclosure.⁹⁴ In order to maintain the privacy interest of the individual, the Court stressed that the FOIA has a segregability element.⁹⁵ Once identifying material is deleted from the documents, the documents may be made available to the court for an *in camera* inspection to determine whether that disclosure would constitute an invasion of privacy.⁹⁶

The Court next discussed when a privacy invasion is unwarranted.⁹⁷ The Court rejected Judge Starr's argument that the purpose of the request should be considered. Instead, returning to the fundamental principles behind the FOIA, the Court underscored Congress's intent "'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'"⁹⁸ The test of whether the invasion is unwarranted "turn[s] on the nature of the requested document and its relationship

in their criminal histories. It is reasonable to presume that Congress legislated with an understanding of this professional point of view." *Id.*

93. *Id.* at 771.

94. *Id.* at 767-68. The Court notes that though *Rose* dealt with Exemption 6 "personnel and medical files," the same analysis is applicable to Exemption 7(C). *Id.* The documents referred to by the Court were the case summaries of the cadets that were made public to other students and faculty of the Air Force Academy. *Id.*

95. *Id.* at 768.

96. *Id.* "[T]he FOIA permits release of a segregable portion of a record with other portions deleted, and that *in camera* inspection was proper to determine whether parts of the record could be released while keeping other parts secret." *Id.* at 768.

97. *Id.* at 771.

98. *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 123, 149 (1975)).

to" the purpose of the FOIA.⁹⁹ Therefore, if the document is one which may be disclosed, the requestor must have a public purpose by using the information to check government action. This, however, is where the Reporters Committee lost their case. Because it sought a private individual's rap sheet, wanting the document to expose a mobster, and not the inner-workings of the government, they failed the unwarranted invasion of the privacy test.¹⁰⁰

The Court then developed a bright line test for Exemption 7(C) to aide the lower courts in balancing the public interest in disclosure against the interest the Exemption was designed to protect. Departing from past decisions, the Court adopted a categorical approach by rejecting the notion that every FOIA exemption case should be examined on a case-by-case basis.¹⁰¹ A court's decision may now be "appropriate" once a case fits into a "genus" where the balance generally tips in one direction; the court may ignore other circumstances surrounding that case.¹⁰² Thus for an "appropriate class of law enforcement records or information a categorical balance may be undertaken"¹⁰³

E. The Central Purpose Doctrine

The impact of the Supreme Court's opinion in *Reporters Committee* left the lower courts with guiding principles to follow. These guidelines are known as the "central purpose" doctrine, though the Supreme Court never formally named the guidelines.¹⁰⁴ The analysis of the public interest in *Reporters Committee* yielded to this standard.¹⁰⁵ While the plaintiffs - the reporters and media - argued that there was a substantial interest in the past criminal history of

99. *Id.* at 772.

100. *Id.* at 775. "There is, unquestionably, *some* public interest in providing interested citizens with answers to their questions about Medico. But that interest falls outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* at 774 (emphasis added).

101. *Id.* at 776.

102. *Id.*

103. *Id.* at 777.

104. Christopher P. Beall, *The Exaltation of Privacy Doctrines over Public Information Law*, 45 DUKE L.J. 1249, 1255 (1996).

105. *Id.* at 1257.

Medico, the Court agreed that in fact there was some public interest in the disclosure of this material.¹⁰⁶ But the Court held that FOIA was not the appropriate vehicle in which to obtain the rap sheet.¹⁰⁷ Rather the "central purpose" behind the FOIA is to ensure that the government is open for public scrutiny; not for parties to gather personal information about a third party.¹⁰⁸

The central purpose doctrine in essence is a means to an end, rather than just an end.¹⁰⁹ The FOIA simply provides the tools by which a citizen can gain access to information about the government. The Court has said before that the "touchstone" of the FOIA is "good government," not "freedom of information."¹¹⁰

The Supreme Court has reaffirmed the central purpose doctrine with two cases: *U.S. Department of State v. Ray* and *U.S. Department of Defense v. Federal Labor Relations Authority*.¹¹¹

1. *U.S. Department of State v. Ray*

The *Ray* case dealt with Exemption 6, and extended the central purpose doctrine to this Exemption.¹¹² In this case, a Florida lawyer requested under FOIA interviews with Haitian refugees taken at sea.¹¹³ The Court held that the same balancing test used for Exemption 7(C) is necessary for Exemption 6. "[Exemption 6] requires the Court to balance 'the individual's right to privacy' against the basic policy of opening 'agency action to the light of public scrutiny.'"¹¹⁴ Using this test, the Court said that a great public interest existed in seeing if the State Department had been monitoring the Haitian government to ensure that it was in compliance with its

106. *Id.*

107. *Id.* The purpose for which the media sought the rap sheets was "outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* (quoting *Reporters Comm.*, 489 U.S. at 774).

108. Beall, *supra* note 104, at 1255.

109. *Id.* at 1258.

110. *Id.*

111. *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991); *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994).

112. *Ray*, 502 U.S. at 166; *see also* Beall, *supra* note 104, at 1258-59.

113. *Ray*, 502 U.S. at 168.

114. *Id.* at 175 (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

promise to not prosecute returnees.¹¹⁵ However, the Court only allowed the release of redacted interview summaries because that was in accordance with the central purpose of the FOIA.¹¹⁶ Similar to *Rose*, the Court required that all identifying information be removed or deleted.¹¹⁷ The Court rejected Ray's argument that deleting the identifying information would hinder his investigation into whether or not the Haitian government was keeping its word.¹¹⁸

2. *U.S. Department of Defense v. Federal Labor Relations Authority*

When the Supreme Court heard *U.S. Department of Defense v. Federal Labor Relations Authority*, it explicitly stated for the first time that the public interest test could now only be satisfied under the central purpose of the FOIA.¹¹⁹ This case involved FOIA requests for home addresses of civilian, non-union workers at military bases.¹²⁰ The requestors were unions and bargaining units that wanted the information to facilitate collective bargaining for these civilians.¹²¹ Though the unions argued for the derivative use theory, the Court did not accept that theory.¹²² Rather, the Court held that the names and addresses did not serve the public interest under derivative use by showing what the government had been up to.¹²³ Therefore the unions failed the central purpose doctrine and were denied access to the information.¹²⁴

115. *Id.* at 177-78.

116. *Id.*

117. *Id.* 178-79.

118. *Id.*; see also Beall, *supra* note 104, at 1259.

119. *U.S. Dep't of Def. v. Fed. Lab. Relations Auth.*, 510 U.S. 487, 495-96 (1994).

120. *Id.* at 489-90.

121. *Id.* at 497-98.

122. *Id.* The Derivate Use Theory purports that "the information is valuable not just for its own sake but also because it may be used to discover, or 'derive' additional information." Beall, *supra* note 104, at n.38. The Court rejected this theory in *Ray* because releasing the information with the names in it served only a "hypothetical" public interest. *Id.* See also *supra* notes 106-12.

123. *U.S. Dep't of Def.*, 510 U.S. at 497.

124. *Id.* at 503. See also Beall, *supra* note 104, at 1260-61.

This holding created an unforeseen burden on a requestor of information. Though the initial burden lies with the government agency to show why information falls within an exemption, now the requestor also has the burden of showing that the information he seeks will reveal the activities of the government, thereby satisfying the central purpose doctrine.¹²⁵

3. *Manna v. Department of Justice*

One of the more exceptional cases under Exemption 7(C) is *Manna v. Department of Justice*. Manna was a "consigliere" to the Genovese organized crime family in New Jersey.¹²⁶ During this case, Manna was incarcerated for murder, RICO violations, and other mafia-related crimes.¹²⁷ He requested under the FOIA all government documents referring to him, to be able to use them to help clear his name.¹²⁸ The district court denied the request, and the Third Circuit affirmed.¹²⁹ Manna argued that releasing the documents to him would aide the criminal justice system by bringing to light the government's misconduct in Manna's prosecution.¹³⁰ The court rejected this argument - the public interest would never be served, only that of Manna.¹³¹ Secondly, there was no public interest in releasing to Manna, a mobster, interviews and other documents with identifying information of those who aided in his prosecution.¹³² The Third Circuit majority panel also stated that the allegations Manna raised of government misconduct were hypothetical and unfounded.¹³³ Before Manna could receive any documents, he would first have to show that the government had been acting in the

125. Beall, *supra* note 104, at 1261. See also *U.S. Dep't of Def.*, 510 U.S. at 506 (Ginsburg J., concurring).

126. *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1161 (3d Cir. 1995).

127. *Id.*

128. *Id.*

129. Beall, *supra* note 104, at 1268-69.

130. *Manna*, 51 F.3d at 1161.

131. *Id.* at 1166 (citing *Manna v. U.S. Dep't of Justice*, 815 F. Supp. 798, 808-10 (D.N.J. 1993)).

132. *Id.* at 1165.

133. *Id.* at 1166.

wrong.¹³⁴ But naturally, the next question for the court is, “[h]ow can Manna show that the government is up to no good when he is denied access to the documents to prove it?” This question, however, was not answered by the court.

Despite this mystery requirement placed upon the plaintiff by the court, the panel majority made another interesting decision in this case. The court took into consideration the identity of the requestor - something that had been forbidden by former case law.¹³⁵ Because Manna's connection with the Mafia was alive and well, the disclosure of the requested documents placed the lives of government informants in jeopardy.¹³⁶ "Although a court does not usually take a requester's identity into consideration, Manna's position in the hierarchy of a particularly influential and violent La Cosa Nostra Family is highly material to the protection of individual privacy . . ."¹³⁷

This rationale now suggests that, when balancing the public interest, secondary effects of the disclosure should be taken into account. The scope of the privacy interest under Exemption 7(C) seems to have been expanded to third parties. This expanded scope favors the use of a derivative use standard - showing that, in this case, the nondisclosure of documents would be better for those witnesses who testified against Manna.¹³⁸ This is especially important in Exemption 7(C) cases, where the government wants to protect its witnesses from retaliation.¹³⁹ Without this consideration, criminals would be able to access their criminal records and gather the identities of government informants. In these cases, the government's interest in protecting their informants would override any criminal's desire to get his or her hands on their own law enforcement documents.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Manna*, 51 F.3d at 1166.

138. *Id.*

139. *Id.*

F. The FOIA: Protecting the Privacy Rights of Third Parties

Protection from an unwarranted invasion of privacy not only extends to the person who is the subject of the information under the FOIA, but also extends to third parties who could be greatly affected by the disclosure of that information.¹⁴⁰ *Katz v. National Archives* supports this statement. In *Katz*, the plaintiff wanted to obtain autopsy photographs of President John F. Kennedy for research.¹⁴¹ Though the main issue for the court was whether the autopsy records were "agency records," the court, in dicta, also examined the case under the FOIA.¹⁴²

The court analyzed the photographs under Exemption 6 because these were "similar files" to medical files.¹⁴³ Though the person holding the primary privacy interest was dead, the court stated that the Kennedy family maintained a privacy interest in the disclosure of the photographs.¹⁴⁴ The court employed the balancing test of public interest versus privacy interest to determine whether the photographs could be released under the FOIA.¹⁴⁵ Plaintiff argued that the release of the photographs would not invade any privacy rights because the photographs would only show bone, osseous, and structure - nothing graphic.¹⁴⁶ The plaintiff also argued, using experts, that the release of these photographs would serve the public interest by performing reconstruction analysis of the x-rays which had never been performed before.¹⁴⁷ However, National Archives argued that not only does plaintiff already have access to certain x-rays made available by the

140. *Katz v. Nat'l Archives*, 862 F. Supp. 476 (D.C.C. 1994).

141. *Id.* at 478. Plaintiff Katz wanted these photographs to do a "photoanalysis" of them to assist in his research on the assassination of President Kennedy. *Id.* at 483 n.12.

142. *Id.* at 482-87. The court ultimately decided that the autopsy photographs were not agency records, because the photographs were given to the Archives through a deed of gift and that deed governed the access to the records. *Id.* at 482-83. The court dismissed plaintiff's claim because it did not have jurisdiction under the FOIA to hear the case. *Id.* at 486.

143. *Id.* at 483.

144. *Id.*

145. *Id.*

146. *Id.* The Archives conceded this point as well. *Id.*

147. *Id.*

Chief of the Archival Program Branch, plaintiff is also requesting x-rays which show the gun shot wound to the head.¹⁴⁸ The release of these x-rays would then cause agonizing grief to members to the Kennedy family if the x-rays were released.¹⁴⁹ The court ultimately decided that the Kennedy family's privacy interest in the photographs outweighed the public interest.¹⁵⁰ "[T]here can be no mistaking that the Kennedy family has been traumatized by the prior publication of the unauthorized records and that further release of the autopsy materials will cause additional anguish."¹⁵¹

The next major case to consider this issue was *Accuracy in Media Inc. v. National Park Service*.¹⁵² This was an action by the plaintiffs to compel production of documents made by defendants during the investigation of Vincent Foster, Jr.'s suicide.¹⁵³ Plaintiff's FOIA requests were ultimately denied.¹⁵⁴ After plaintiff filed suit in court to compel production, defendant released 91 pages of material to plaintiff.¹⁵⁵ A month later, the Office of Independent Counsel released its report on the death of Foster concluding that Foster did in fact commit suicide.¹⁵⁶ More than a year later, the National Park Service (NPS) released another 377 pages of information to plaintiff; 193 pages were released in their entirety while the other 184 were

148. *Id.* at 483-84.

149. *Id.*

150. *Id.* at 485-86.

151. *Id.* at 485.

152. *Accuracy in Media, Inc. v. Nat'l Park Serv.*, No. 97-2109, 1998 U.S. Dist. LEXIS 18373 (D.C. Nov. 13, 1998).

153. *Id.* at *3-4. Plaintiff requested documents relating to: (1) the investigation by the defendant into Foster's death; (2) the decision by the defendant to rule the death a suicide; (3) communications between the National Park Service (NPS) and other law enforcement authorities; (4) communications between NPS and the FBI, White House, and Secret Service about the discovery of Foster's body, and; (5) interviews of NPS officers by the FBI and United States Senate and House of Representatives. *Id.* See *infra* notes 175-210 for the facts of this case.

154. *Id.* at * 4.

155. *Id.* at *4.

156. *Id.* at *5.

released in redacted form.¹⁵⁷ Then another fifteen pages were released by the OIC to plaintiff.¹⁵⁸

Only eleven pages of information regarding the investigation of Foster's death had been withheld from the plaintiff.¹⁵⁹ The NPS identified the redacted or missing information as "witness interview notes," "[d]escription of evidence regarding events that took place following the death of Mr. Foster," and "[i]nvestigatory activities regarding events that took place after the death of Mr. Foster."¹⁶⁰ In addition, the NPS also withheld autopsy photographs of Foster after conducting an Exemption 7(C) balancing test.¹⁶¹

Regarding the autopsy photographs, the district court maintained that the family of Vincent Foster does hold a privacy interest in those photographs.¹⁶²

Although the public has a well-established interest in monitoring the government's administration of justice, after weighing the Foster family's significant privacy interest against the potential ability of the photos to reveal the nature of the fatal wound to Mr. Foster, the court found that the balance weighed in favor of the Foster family.¹⁶³

Plaintiff argued that in the suicide investigation there were several inconsistencies in the paperwork, and by releasing the photographs the public would benefit by monitoring the government's administration of justice.¹⁶⁴ The court, however, refused to release the photographs on that claim and insisted that, by balancing the

157. *Id.* The NPS felt compelled to release these materials since the report by the OIC released the names of some of the officers involved in the investigation. *Id.* These names had previously been withheld under Exemption 7(C). *Id.*

158. *Id.* The autopsy photographs reveal the roof of Foster's mouth, his tongue, and the exit wound. *Id.* Plaintiff claimed that the release of these documents was imperative to determine whether the angle of the exit wound would show if Foster had committed suicide.

159. *Id.* Plaintiff originally requested 481 documents. *Id.*

160. *Id.* at *5-6. Defendant withheld names, badge information, and other contact information of law enforcement personnel. *Id.* at *6.

161. *Id.*

162. *Id.* at *13-14.

163. *Id.* at *14.

164. *Id.* at *20. Apparently plaintiff was able to show that one report completed by Dr. Haut, the medical doctor who examined Foster's body, said the death was "mouth-head," but then on page two of the report, the wound was said to be "mouth to neck". *Id.* at *21 n.4.

privacy interests of the family against the public interest in monitoring the government, the family maintained a higher interest.¹⁶⁵

After this decision, Accuracy in Media (AIM) appealed the decision. The D.C. Circuit, however, affirmed the decision of the lower court.¹⁶⁶ Regarding the autopsy photographs, AIM contended that once Foster died, so did any valid privacy interest in the photographs.¹⁶⁷ The court rejected this argument, relying on its prior decisions.¹⁶⁸ "[D]eath clearly matters, as the deceased by definition cannot personally suffer the privacy-related injuries that may plague the living . . . [but the] court must *also* account for the fact that certain reputation interests and family-related privacy expectations survive death."¹⁶⁹ Though AIM argued that this proposition was merely dicta of the D.C. Circuit, the court explicitly stated that the fact that family privacy interests survived death was an unequivocal holding of the circuit.¹⁷⁰ "AIM cannot deny the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence."¹⁷¹

In order for AIM to overcome Exemption 7(C)'s threshold requirement of showing that the invasion is not "unwarranted," the court said they must meet the "compelling evidence" test: that the agency denying the request is involved in illegal activity and access to the documents in question is necessary to confirm or deny that evidence.¹⁷² The court found that AIM failed to meet this threshold because the inconsistencies within the reports were not enough to

165. *Id.* at *22.

166. *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999).

167. *Id.* at 122.

168. *Id.* at 123, citing *Campbell v. United States Dep't of Justice*, 164 F.3d 33-24 (D.C. Cir. 1998).

169. *Id.* (quoting *Campbell*, 164 F.3d at 33-34 (emphasis in original)).

170. *Id.*

171. *Id.* "One has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos." *Id.*

172. *Id.* at 124 (citing *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (3rd Cir. 1990)).

prove any wrong-doing on the government's part.¹⁷³ "When multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification."¹⁷⁴ The court refused to hold that a few inconsistencies were enough to disclose the autopsy photographs because there was no indication that the government was acting in an illegal capacity.

After this ruling, Allan Favish of AIM filed suit in his individual capacity to have the autopsy photographs released.

III. FACTS

On July 20, 1993, Vincent Foster, Jr., White House Deputy Counsel, was found dead.¹⁷⁵ A private citizen notified two off-duty police officers that there was a body in Fort Marcy Park in Northern Virginia.¹⁷⁶ The officers called 911 and police and rescue personnel arrived on the scene and found Foster's body.¹⁷⁷ He was lying on the ground with a .38 caliber pistol in his right hand and a gunshot wound to the head.¹⁷⁸

The United States Park Police began the initial investigation into the cause of death.¹⁷⁹ The Federal Bureau of Investigation, the Senate, the House of Representatives, and Independent Counsels Robert Fiske and Kenneth Starr also conducted separate

173. *Id.* at 124. AIM relied on three separate statements concerning the exit wound. One was made by Independent Counsel Kenneth Starr which said that the exit wound was three inches from the top of the head. The Dr. Haut report was also internally inconsistent. Finally, there was an FBI report made three days after the incident which reported no exit wound. *Id.* The court, however, cannot account for the last one but insists it was made for "preliminary results" and was stamped only three days after Foster's body was found. *Id.*

174. *Id.*

175. *Id.* at 120.

176. *Id.*

177. *Id.*

178. *Id.*

179. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 161 (2003).

investigations.¹⁸⁰ However, they all reached the same conclusion: Foster had committed suicide.¹⁸¹

Despite five different investigations, a private citizen, Allan Favish, remained unconvinced that Foster had taken his own life.¹⁸² Favish applied under the FOIA to obtain photographs of Foster's body after the Park Service found him on July 20, 1993.¹⁸³ But the Park Service refused to disclose the photographs.¹⁸⁴ Favish was the associate counsel for Accuracy in Media (AIM) and thus filed suit on behalf of AIM against the Park Service in district court to release the photographs.¹⁸⁵ The district court granted summary judgment against AIM. AIM appealed to the Court of Appeals for the District of Columbia the district court was affirmed unanimously.¹⁸⁶

Favish, still not satisfied, filed his own request for the photographs from Foster's death under the FOIA.¹⁸⁷ He requested eleven photographs: one showing Foster's eyeglasses and the remainder showing different parts of Foster's body.¹⁸⁸ Once again, he was denied the photographs by the Office of Independent Counsel (OIC).¹⁸⁹ He then took his case to United States District Court for the Central District of California to compel production.¹⁹⁰ The court first held that the collateral estoppel doctrine, as to the decision by the Court of Appeals for the District of Columbia Circuit, did not preclude Favish from bringing his claim in a personal capacity.¹⁹¹ The district court released the photograph of Foster's eyeglasses and eighteen other color photographs.¹⁹² The court did not release ten other photos under Exemption 7(C) because the privacy interest of

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* Favish filed suit in the District Court for the District of Columbia to compel production. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1171 (9th Cir. 2000).

Foster's family outweighed public interest.¹⁹³ The court relied on a *Vaughn* Index provided by the OIC¹⁹⁴ and said that the privacy interests of the Foster family would be infringed by releasing the photographs to the public.¹⁹⁵ The district court informed Favish that he failed to sufficiently explain how the release of the photographs would advance any public interest into the investigation of Foster's death.¹⁹⁶

Favish appealed this decision to the Ninth Circuit. The court agreed with the district court that, as a matter of law, personal privacy interests of the deceased under Exemption 7(C) extend to familial relationships.¹⁹⁷ The court noted that the FOIA does not specifically state whose privacy interests are protected.¹⁹⁸ However, since the statute says "personal" privacy, on the statute's face it would seem that only the person who is the subject of the information may be protected under Exemption 7(C).¹⁹⁹ But the court was unsatisfied with this interpretation. Relying on two D.C. Circuit cases, the court found that textual reading of the statute too constricting.²⁰⁰ "What

193. *Id.*

194. *Nat'l Archives & Records Admin.*, 541 U.S. at 162; see *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). A *Vaughn* index identifies each document withheld, the statutory exemption claimed, and a detailed explanation of how disclosure of the documents would damage the claimed protected interest. See *Favish*, 217 F.3d at 1175. A *Vaughn* index may include affidavits or other detailed evidence. *Id.*

195. *Nat'l Archives & Records Admin.*, 541 U.S. at 162.

196. *Id.*

197. *Favish*, 217 F.3d at 1173. The court said:

We hold as a matter of law that the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure.

Id.

198. *Id.*

199. *Id.*

200. *Id.* at 1173 (citing *Katz*, 862 F. Supp. at 485); *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1009-10 (D.C. Cir. 1990). *Katz* was discussed *supra* notes 132-41. *N.Y. Times Co.* involved the release of a tape of the last conversation of the astronauts onboard the Challenger before it exploded. *N.Y. Times Co.*, 920 F.2d at

the cases point to is a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor."²⁰¹ The court ultimately decided to reverse and remand the case to the district court over Judge Pregerson's dissent.²⁰² First, the Ninth Circuit Court reminded the district court that the FOIA statute does not require that the requestor be able to show government misfeasance in order to gain access to materials.²⁰³ Second, according to the Ninth Circuit, the district court erred by only balancing the family interests against the public interest by using the *Vaughn* Index.²⁰⁴ The decision rested on the fact that the OIC described in affidavits the unreleased photographs as "graphic, explicit, and extremely upsetting," yet no court had ever seen them to determine if they were of such nature.²⁰⁵ Though the court noted that, while it is up to the lower court's discretion to rely solely on agency affidavits, in this case they were insufficiently detailed.²⁰⁶ Thus, the district court was to review the photos *in camera* and then balance the Foster family's privacy interest against public interest in disclosure under Exemption 7(C).²⁰⁷

On remand, the district court ordered the release of five photographs:

The photograph identified as "3-VF's [Vincent Foster's] body looking down from the top of berm" must be released, as the photograph is not so explicit as to overcome the public interest.

1004. The court held the release of the tape was an unwarranted invasion of privacy with respect to the family members of the astronauts. *Id.*

201. *Favish*, 217 F.3d at 1173.

202. *Id.* at 1174.

203. *Id.* at 1172-73 (citing *Hunt v. FBI*, 972 F.2d 286, 289 (9th Cir. 1992)).

204. *Id.* at 1174.

205. *Id.* The court points out that the one photo of the gun in Foster's hand was not graphic or explicit, as it had been published in Time Magazine and was broadcasted on television. Therefore, based on this photo, it is appropriate to have the remaining nine examined. *Id.*

206. *Id.*

207. *Id.*

The photograph entitled "5--VF's body-focusing on Rt. Side of shoulder arm" is again of such a nature as to be discoverable in that it is not focused in such a manner as to unnecessarily impact the privacy interests of the family.

The photograph entitled "1--Right Hand showing gun & thumb in guard" is discoverable as it may be probative of the public's right to know.

The photograph entitled "4--VF's body focusing on right side and arm" is discoverable.

The photograph entitled "5--VF's body-focus on top of head thru heavy foliage" is discoverable.²⁰⁸

On appeal, after the release of the five photographs, the Ninth Circuit affirmed in part but required the redaction of photograph 3 with no explanation.²⁰⁹

The OIC appealed and the Supreme Court granted certiorari.²¹⁰

IV. ANALYSIS AND CRITIQUE

Justice Kennedy delivered the opinion of the unanimous Court, reversing and remanding the decision of the Ninth Circuit. In this issue of first impression for the Court, the only documents at issue were the four photographs that were ordered released by the Ninth Circuit to Favish.²¹¹

The Court first decided that the documents clearly fell within Exemption 7(C) of the FOIA - "records or information compiled for law enforcement purposes."²¹² The next issue addressed by the Court was whether the disclosure of the photographs would reasonably be

208. *Nat'l Archives & Records Admin.*, 541 U.S. at 163-64.

209. *Id.* at 164.

210. *Id.* The records and photographs at this point in the case had been transferred to the National Archives and thus their name has been substituted for petitioner. However, because all the relevant actions took place before the transfer on March 23, 2004, the Court referred to the petitioner as OIC within its opinion. *Id.*

211. *Id.*

212. *Id.*

expected to constitute an unwarranted invasion of personal privacy.²¹³

The Court quickly dismissed Favish's argument that the right to personal privacy is only "the right to control information about oneself."²¹⁴ Rather, the Court notes that Congress took great care in amending the statute to expand the scope of Exemption 7(C) to "*reasonably be expected* to constitute an unwarranted invasion of personal privacy" instead of using the language found in Exemption 6 that "would constitute a clearly unwarranted invasion of personal privacy."²¹⁵ The Court reasons that Exemption 7(C) was enacted to place protections on personal, intimate data collected via law enforcement practices; therefore, this information is more deserving of protection from access by the ordinary citizen.²¹⁶

The Court then faces the interpretation of "personal" in the phrase "personal privacy."²¹⁷ In his arguments, Favish contended that personal privacy is only afforded to the decedent and excludes the family.²¹⁸ Once again, the Court rejects his view. Though the statutory language of § 552 does not indicate whose privacy interests are protected, the Court was nevertheless reluctant to afford the privacy only to the decedent.²¹⁹ In making this decision, the Court looks to the traditions of culture and case law. "We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes."²²⁰ Because he is deceased, Foster no longer has a privacy right to protect; however, the Court is more concerned with protecting the rights of his survivors. "Family members have a personal stake in honoring and

213. *Id.*

214. *Id.* (citing Brief for Respondent Favish, 4).

215. *Id.* at 166 (emphasis added) (quoting 5 U.S.C. § 552(b)).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 167. ("[W]e think it proper to conclude from Congress' use of the term 'personal privacy' that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions.").

220. *Id.*

mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."²²¹ In further support of the privacy right held by the decedent's survivors, the Court relies on past case decisions in tort law to show that the survivors maintain a viable right to privacy.²²²

It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person . . . to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.²²³

Based on past cases and cultural traditions, the Court held that the statute's protection does extend to family members.²²⁴

One of the reasons why the Court did not adopt this position was fear of what would occur if it adopted the position that Favish argued.²²⁵ Because anyone may make an FOIA request and cannot be denied based on identity, autopsy photos such as the ones at issue would be made available for anyone to view.²²⁶ As a matter of social policy, the Court refused to allow child molesters, rapists, and other violent criminals access to files of their victims.²²⁷ The government

221. *Id.* at 168.

222. *Id.* See *Schuyler v. Curtis*, 42 N.E. 22, 25 (N.Y. 1895); *McCambridge v. Little Rock*, 766 S.W.2d 909, 915 (Ark. 1989); *Bazemore v. Savannah Hospital*, 155 S.E. 194 (Ga. 1930).

223. *Nat'l Archives & Records Admin.*, 541 U.S. at 169 (quoting *Schuyler*, 42 N.E. at 25).

224. *Id.* at 170.

225. *Id.* at 171. Favish's argument rested on the notion that only the decedent held a privacy interest in these cases.

226. *Id.* at 172.

227. *Id.* at 170.

showed in its case that violent criminals made constant FOIA requests for information of their victims.²²⁸

After establishing that Exemption 7(C) did apply to family members, the Court wrestles with the notion of whether the reason for requesting material should be at issue when an FOIA request is made.

In the instant case, the Court dismisses the old rule that the reason for the request is not at issue when a FOIA request is made.²²⁹ Rather, if the request touches upon the privacy interests in Exemption 7(C), the requestor must also show why they are requesting the information.²³⁰ The Court was highly concerned with retaining FOIA's purpose; however, it also delicately balanced this purpose with the rights of private citizens to be free from exploitation.²³¹

In seeking this balance, the Court sets forth a two-prong test to determine whether the information should be disclosed under Exemption 7(C).²³² First, the citizen must show that the public interest sought to be advanced is a significant one; this interest must be more specific than having the information for its own sake.²³³ Second, the citizen must show the information is likely to advance that interest.²³⁴ If either prong fails, then the invasion of privacy is unwarranted.²³⁵ According to the Court, without this requirement Exemption 7(C) has little or no force because the requestor need only satisfy a pleading requirement.²³⁶

228. *Id.* "We find it inconceivable that Congress could have intended a definition of 'personal privacy' so narrow that it would allow convicted felons to obtain these materials without limitations at the expense of surviving family members' personal privacy." *Id.*

229. *Id.* at 172.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 173. The Court's concern with placing a higher burden on the requestor to make a showing that the government is involved with any misfeasance is due to the fact that once the information is released under FOIA, it is public and anyone can access it. *Id.* "There is no mechanism under FOIA for a protective order allowing only the requestor to see whether the information bears out his theory, or for proscribing its general dissemination." *Id.* at 174.

The Court's opinion did not define the nexus or balance between the public interest and personal privacy.²³⁷ However, the Court recognized that, without any standards of what public interest should be advanced, other courts will be left with no guidelines when balancing the competing interests.²³⁸ The Court states that, under Exemption 7(C), in cases where photographic images are taken at a death scene where the individual died under "mysterious circumstances," the requestor must make a showing that the investigative agency acted negligently or otherwise improperly in performance of their duties.²³⁹ This is not, however, an easy burden to prove. The Court held that there is a presumption of legitimacy accorded to government action; thus, clear evidence is required to displace this presumption.²⁴⁰ The scales tip in favor of the requestor only after the requestor has made a showing that would warrant a reasonable person to believe that the government is acting improperly. However, as the Court noted, "[a]llegations of government misconduct are 'easy to allege and hard to disprove.'"²⁴¹

After being faced with an FOIA Exemption 7(C) case, the Court has cemented the rule that personal privacy extends to the family members of the deceased. This holding mirrors that of the D.C. Circuit court's earlier rulings.²⁴² However, in overturning the Ninth Circuit ruling, the Supreme Court has now placed a greater burden on the requestor. By setting out a two-prong test for the lower courts to follow, the Court has finally created a concrete rule to determine whether an invasion of privacy is warranted. In a law enforcement investigation case where the subject of FOIA request is photographic images, the requestor must make the showing that the government conducted the investigation with impropriety.

However, this new rule does not completely conform with the statute. FOIA does not explicitly state that the requestor must make this showing; rather, it is the government agency that has the burden

237. *Id.* at 175.

238. *Id.*

239. *Id.*

240. *Id.* at 174. "[T]he requestor must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.*

241. *Id.* at 175. (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)).

242. See e.g., *Katz* *supra* note 200 and *N.Y. Times* *supra* note 200.

to show why the information is protected by one of FOIA's nine exemptions.²⁴³ This ruling is similar to that of *Manna*,²⁴⁴ where the Third Circuit placed the burden on the Mafioso to show that the government had acted improperly during the investigation of his criminal case. However, the same question remains: How can an individual show that the government is acting improperly when they cannot have access to the documents to prove impropriety? The courts have created a catch-22 for requestors. However, it is clear from these rulings that the courts are highly concerned with the right to personal privacy, not only for individuals who are the subject of the documents, but also for those individuals with familial ties to the subject.

The balance is not a simple task: both the freedom to information and the right to privacy are central tenants of democracy. To hold one higher than another is a difficult decision. In today's world, where information can be disseminated in the blink of an eye over the Internet for the entire world to see, the right to privacy becomes even more important to protect. Families who lose loved ones in tragic events or suicides, even if the loved one is known by the public, should not have to go through the torment and anguish of having their husband, son, or parent's autopsy photographs placed in the hands of a private citizen only interested in gory details. In this case, Favish probably maintained a legitimate concern that Foster died from something other than suicide and that the government may have tried to cover up foul play. However, under the Court's decision in this case, a legitimate reason to obtain the information will not overcome the initial showing by the requestor warranting a reasonable person to believe that the government was involved in illegal activities.

V. IMPACT

The Court's ruling in *National Archives* was a major achievement for government agencies. In this conservative ruling, the Court has given government actions a presumption of legitimacy that can only be rebutted with clear evidence. This new presumption has placed

243. § 552(b)(7)(C).

244. See *supra* note 134.

another hurdle for the requestor to jump when requesting documents made during law enforcement proceedings. Post-*National Archives*, the requestor is required to make a showing with clear evidence that the government acted in misfeasance when trying to assert that the public interest being sought is that the government acted negligently.

This, however, seems to depart from the initial intent behind FOIA. FOIA's purpose was to be a full disclosure statute; its aim was to allow private citizens to gain access to government materials to ensure that the government was acting properly. However, with the new burden imposed by *National Archives* on the requestor to show that the government has been acting poorly, a part of the pro-disclosure spirit of FOIA has been lost. Congress did not intend for the citizen to already know if the government was acting improperly; rather, the documents requested and released would contain the evidence of the government's conduct.

However, this new requirement will make it much easier for the courts to determine Exemption 7(C) cases. Without the initial showing with clear evidence that the government has acted in misfeasance, the requested documents will not have to be released. As stated before, this requirement will be hard to overcome. Without knowledge of the contents within the requested documents, it will be difficult for the requestor to make that showing with clear evidence that a reasonable person would believe that the government acted negligently. The Court seems concerned with keeping not only the privacy of individuals protected, but also with protecting confidential information. Law enforcement records contain extremely sensitive materials that should not be open to public scrutiny. Although one's privacy interests can never be fully protected because many law enforcement documents become public record once placed in the judicial system, the Court's decision seems to heighten the protection these documents. In *Favish*, the government had clearly scrutinized Foster's death extensively with five separate investigations.²⁴⁵ It appears from the Court's ruling that, once the government has completed their job properly and released the materials from the investigation that would not cause harm to the investigation or people surrounding the investigation, the agency has finished its job.

245. *Nat'l Archives & Records Admin.*, 541 U.S. at 161.

Additionally, the Court's requirement that the requestor must show why he is asking for the information is yet another departure from the intent behind FOIA; however, this too gives even greater force to the nine exemptions. Once a request under FOIA is made and it touches upon one of the nine exemptions, then the requestor must show why the information is being requested. This requirement may place more strain on the courts. When certain documents are categorized under one of those nine exemptions, there is the presumption that the documents should not be released. However, the court will now have to make subjective decisions over what are valid and invalid decisions for wanting the information.

The biggest concern for the *Favish* Court was protecting the privacy of the families whose relative was the subject of FOIA request. Post-*Favish*, innocent third-party individuals are now recognized as having the same privacy rights as those who are actually the subject of the law enforcement records. Unfortunately, as the Court recognizes, there are many potential requestors, such as convicted felons, rapists, and child molesters that may request law enforcement files on their victims. Many other people may want to exploit images such as autopsy photographs for monetary gain. For reasons such as these, it is of the utmost importance to protect family members from being abused by private citizens seeking personal gain.

VI. CONCLUSION

When FOIA was contemplated and enacted, it is doubtful that Congress accounted for the fact that dissemination of information has reached such great heights; indeed, it is unlikely that it was even foreseeable. Today, with television, the Internet, satellite radio, and cell phones, information is distributed at such a rapid pace that maintaining one's privacy as to their personal and family life is much more difficult. Exemption 7(C) has gone through many changes, but has finally been interpreted by the Supreme Court. The Court's interpretation is more conservative than that of the original intent behind FOIA. Though FOIA was enacted to facilitate disclosure of governmental activities, the Supreme Court ruling in *National Archives* will, to a certain extent, hinder disclosure of law enforcement records. When trying to obtain records under FOIA that may constitute an invasion of privacy, the requestor must not only

show an attempt to advance a public interest, but must also show with clear evidence that the government did not act legitimately. The power of the government agencies over the requestor is great; as the Court stated, allegations of government misconduct are easy to allege but hard to disprove. It will be in rare cases that someone will be able to obtain law enforcement records when trying to prove government misconduct.

While the Supreme Court has been able protect individuals from unwarranted invasions of privacy, they may have extinguished some of the original intent behind FOIA. FOIA was enacted as a disclosure statute, not as a non-disclosure statute. The extra requirements imposed upon the requestor by the Supreme Court are somewhat contrary to the purposes of FOIA, yet the importance of law enforcement is apparently greater than the private citizen's need for the information. Innocent victims, family members, and witnesses will all be afforded greater protection under Exemption 7(C) now.

What was once a simple balancing test of weighing the interests of the public in knowing the actions of their government against the personal privacy of individuals has now become an obstacle course for requestors. However, despite the conservative ruling of the Court, perhaps it is a message to those who want to interfere in the personal lives of individuals: a person's right to privacy will trump public knowledge of government actions.

For the citizens who are still skeptical about the manner in which Foster died, the Government's investigation surrounding his death will have to suffice. Most likely the Government reached the right conclusion and the dissemination of the autopsy photographs would shed no further light on the matter. Rather, they may have only caused more pain and suffering to the family. Nevertheless, after the decision in *National Archives*, it seems clear to this Court that the rights of the survivors will trump those of private citizens who seek protected, personal and intimate information under the Freedom of Information Act.

