1-1-2003

Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records

Bill F. Chamberlin
University of Florida Levin College of Law, bfchamb@ufl.edu

Michael Hoefges

Martin E. Halstuk

WILLIAM & MARY
BILL OF RIGHTS JOURNAL

VOLUME 12 | DECEMBER 2003 | ISSUE 1

PRIVACY RIGHTS VERSUS FOIA DISCLOSURE POLICY: THE "USES AND EFFECTS" DOUBLE STANDARD IN ACCESS TO PERSONALLY-IDENTIFIABLE INFORMATION IN GOVERNMENT RECORDS

Michael Hoefges, Martin E. Halstuk, Bill F. Chamberlin*

The U.S. government maintains a vast amount of personally-identifiable information on millions of American citizens. Much of this information is contained in electronic databases maintained by federal agencies. Various Freedom of Information Act (FOIA) requesters, such as journalists, marketers, and union organizers seek this information for different purposes including investigative reporting and targeted solicitations. These kinds of uses are known as "derivative uses" because this government-compiled information is requested for purposes other than the official purposes for which the information was originally gathered. These and other derivative uses of personally-identifiable information often implicate privacy concerns. Conversely, restrictions on public access to federal agency records can pose negative public policy implications. This article explores the continuing conflict between protecting personal privacy rights and safeguarding public access rights to personally-identifiable information under FOIA.

* * *

* Michael Hoefges is an assistant professor in the School of Journalism and Mass Communication at the University of North Carolina at Chapel Hill and a former partner with the law firm of Gobelman, Love, Gavin, Blazs and Mathis of Jacksonville, Florida.

Martin E. Halstuk is an assistant professor in the College of Communications at the Pennsylvania State University and a Senior Fellow of the Pennsylvania Center for the First Amendment. He is a former courthouse reporter for the *San Francisco Chronicle* and former copy editor for the *Los Angeles Times*.

Bill F. Chamberlin is the Joseph L. Brechner Eminent Scholar of Journalism and Mass Communication at the University of Florida and director of the Marion Brechner Citizen Access Project.

INTRODUCTION

The U.S. Supreme Court has eschewed finding a general First Amendment right of access to government-held information under either the free speech or free press clauses of the First Amendment.[1] Writing for the Supreme Court in 1978, former Chief Justice Warren Burger said public access to government information must be determined instead by "carefully drawn legislation," and the "political forces in American society."[2]

To provide public access to government information, Congress and every state legislature have enacted varying degrees of statutory access to government information.[3] The Freedom of Information Act (FOIA),[4] passed by Congress in 1966, generally requires that records held by federal executive branch agencies must be made available to the public.[5] In crafting FOIA, Congress recognized the

---

[1] *See* Houchins v. KQED, 438 U.S. 1 (1977) (holding that press access to penal institutions was a legislative question); Pell v. Procunier, 417 U.S. 817 (1974) (holding that denying inmates access to media was not a violation of their First Amendment rights); Saxbe v. Wash. Post, 417 U.S. 843 (1973) (holding that reporters have no constitutional right to interview prisoners); Branzburg v. Hayes, 408 U.S. 665 (1972) (holding that compelling a newspaper reporter to testify before a grand jury was constitutional); Zemel v. Rusk, 381 U.S. 1 (1965) (holding the Secretary of State could enforce an executive order that prohibited issuing a passport to travel to certain nations). However, the Court has recognized a qualified First Amendment right of access to criminal court records and proceedings. *See* Press-Enter. v. Riverside Superior Court, 478 U.S. 1 (1986) (holding that public access to preliminary hearings in criminal trials was constitutional); Press-Enter. v. Riverside Superior Court, 464 U.S. 501 (1984) (holding that the accused's right to a public trial outweighed the government's interest in keeping sensitive information secret); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (holding that the press and public may attend a murder trial even though details may leak).

[2] *See Houchins*, 438 U.S. at 14–15 (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975)).

[3] President Lyndon B. Johnson signed the FOIA bill into law on July 4, 1966. *See* 5 U.S.C. § 552 (1989). State public-records laws have a longer history. State statutes providing for public access to government records were enacted as early as 1849, when the Wisconsin legislature passed a public-records law. *See* Comments, *Public Inspection of State and Municipal Executive Documents*, 45 FORDHAM L. REV. 1105, 1105 (1976). By 1950, at least twenty-seven states already had enacted limited open-records statutes. *See* HAROLD CROSS, THE PEOPLE'S RIGHT TO KNOW 337–47 (1953). Today, all fifty states have open-records laws enacted by their legislatures.

[4] *See* 5 U.S.C. § 552 (1989).

[5] *Id.*; *see also* S. REP. NO. 89-813 (1965), *reprinted in* SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 38 (Comm. Print 1974) [hereinafter FOIA SOURCE BOOK]. The FOIA source book is a primary source for the legislative history of FOIA, containing congressional reports, hearings testimony and

important need for citizens in a democracy to have access to government information in order to participate in self-rule.[6] However, legislators also understood the government's need to keep some information confidential and the individual's need for privacy.[7] Congress thus included nine exemptions to the Act,[8] two of which allow federal agencies to withhold information to protect the personal privacy of individuals identified in records and databases.[9]

The FOIA privacy exemptions seem to place the public interest in full public disclosure of government-held information in an adversarial relationship with the individual privacy interest in nondisclosure.[10] Capturing the essence of this conflict, constitutional scholar Thomas Emerson wrote that while full disclosure of government-held information is the public's "principal source" of information about

---

other materials. *See generally id.*

[6] A 1966 House report on FOIA noted the "intelligence of the electorate varies as the quantity and quality of its information varies." *See* H.R. REP. NO. 89-1497 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 5, at 33. A 1965 Senate report observed that the "very vastness of our Government and its myriad of agencies makes it difficult for the electorate" to gain access to public information. *See* S. REP. No. 89-813 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 5, at 38. "[I]t is only when one further considers the hundreds of departments, branches, and agencies which are directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure." *Id.*

[7] *See* FOIA SOURCE BOOK, *supra* note 5, at 38.

[8] *See* 5 U.S.C. § 552(b)1–9 (1989). FOIA does not apply to matters that fall under the categories of: (1) classified information and national security, (2) internal agency personnel information, (3) information specifically exempted from FOIA disclosure under another federal statute, (4) trade secrets and other confidential business information, (5) agency memoranda, (6) disclosures that invade personal privacy, (7) law enforcement investigation records, (8) reports from regulated financial institutions, and (9) geological and geophysical information. *Id.*

[9] Exemption 6 states that FOIA does not apply to matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)6. Exemption 7 permits withholding "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." 5 U.S.C. § 552(b)7. Neither the original FOIA nor its exemptions referred to electronic information such as databases. However, the 1996 amendments to FOIA, known as the Electronic Freedom of Information Act, explicitly defined records as including information compiled by the government in all of its forms, including electronic and digital materials. *See* Electronic Freedom of Information Act Amendments, Pub. L. No. 104-231, § 3, 110 Stat. 3049 (1996) [hereinafter EFOIA Amendments].

[10] *See, e.g.*, Robert Gellman, *Public Records — Access, Privacy, and Public Policy: A Discussion Paper*, 12 GOV'T INFO. Q. 391, 391 (1995) (stating there are "sharp conflicts between privacy advocates and information users over the availability of [personal information in public records].").

the operations of government, concerns for the privacy of individuals identified in government-held information requires consideration of some limits on disclosure.[11]

Concerns about the use of government-held information have increased over the years as computerized federal agency databases have accumulated tremendous amounts of personally-identifiable information such as names, addresses, and social security numbers.[12] The conflict between access and privacy interests is heightened when personally-identifiable information in government records is requested by nongovernment parties for so-called "derivative uses" — meaning uses for purposes other than the official purposes for which the information was originally compiled. For example, labor unions might want a list of names, addresses, and phone numbers for federal employees so that they can contact employees for collective bargaining purposes.[13] Alternatively, a commercial business might want income data gathered as part of the U.S. census in order to identify and target individuals for direct-mail advertising for products ranging from burglar alarm systems for inner-city residents to luxurious ocean cruises for upscale suburban dwellers.[14] Such derivative uses also arise in instances when public records are used by journalists to investigate stories,[15] by corporate intelligence firms to conduct individual background checks,[16] by lawyers to identify potential witnesses to contact and interview,[17] or by political and other organizations to seek names and

---

[11] Thomas L. Emerson, *Legal Foundations of the Right to Know*, WASH. U. L.Q. 1, 18 (1976).

[12] *See* FEDERAL TRADE COMMISSION, INDIVIDUAL REFERENCE SERVICES: A REPORT TO CONGRESS, *available at* http://www.ftc.gov/bcp/privacy/wkshp97/irsdoc2.htm (last visited Sept. 3, 2003) (concluding that public records are a "rich source of personal identifying information"). For purposes of this article, "personally-identifiable information" is defined as information that can be used to identify or locate a specific individual and includes such data as names, addresses, social security numbers, dates of birth, employment dates, and salaries. This definition is based on one used by the Federal Trade Commission. *See id.*

[13] *See* Dep't of Def. v. Fed. Labor Relations Auth. (FLRA), 510 U.S. 487 (1994).

[14] *See* Direct Marketing Association, *Understanding Privacy, at* http://www.the-dma.org/library/privacy/understanding.shtml (last visited July 20, 2001, (stating that direct marketers rely on public records and other sources of personally-identifiable information to "more accurately target offers to prospective customers"); *see also* Joseph E. Phelps & Matthew D. Bunker, *Direct Marketers' Use of Public Records: Current Legal Environment and Outlook for Future*, 15 J. INTERACTIVE MKTG. 33, 35 (2001) (discussing the importance of public records as a source of information for direct marketers) [hereinafter Phelps & Bunker].

[15] *See* Matthew D. Bunker & Sigman L. Splichal, *Relational Privacy Cases and Freedom of Information*, 18 NEWSPAPER RES. J. 109 (1997); *see generally* Brooke Barnett, *Use of Public Records Databases in Newspaper and Television Newsrooms*, 53 FED. COMM. L.J. 557 (2001).

[16] *See* ALAN F. WESTIN, PRIVACY AND FREEDOM 159–60 (1967); FEDERAL TRADE COMMISSION, *supra* note 12.

[17] *See generally FLRA*, 510 U.S. at 487; Dep't of State v. Ray, 502 U.S. 164 (1991) (concerning lawyers who attempted to gain contact information for returned Haitian

addresses to solicit new members or disseminate literature.[18] A recent study indicated that forty percent of all FOIA requests made in the first six months of 2001 came from corporations and twenty-five percent from lawyers.[19] Journalists made five percent of the FOIA requests during this time period, and public advocacy groups submitted eight percent. The remainder of the requests came from individuals and other groups.[20]

Policy debates over the disclosure of personally-identifiable information in government records and databases have focused mainly on two points: first, how requesters would use this information (what this article calls the "derivative uses" of personally-identifiable information); and, second, what the resulting consequences might be for the individuals named in the records (referred to in this paper as the "secondary effects" of disclosure).[21] Clearly, technological advances such as computerized databases and the Internet, have escalated the conflict between disclosure and privacy as technology increasingly is harnessed by corporations, lawyers, journalists, and others, to gather identifying information on private citizens from a myriad of sources, including public records covered by FOIA.[22] While technology can make access to electronically-stored information faster and cheaper, it can also make invasions of personal privacy far easier.[23]

---

refugees).

[18] *See generally* Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355 (1997).

[19] *See* Mark Tapscott & Nicole Taylor, *Few Journalists Use the Federal Freedom of Information Act: A Study by the Center for Media and Public Policy*, The Heritage Foundation, *available at* http://www.heritage.org/Press/MediaCenter/FOIA.cfm (last visited Feb. 4, 2003).

[20] *See id.*

[21] *See, e.g.*, Reno v. Condon, 528 U.S. 141 (2000) (holding that Congress had the power to regulate the states' disclosure of personal information contained in their DMV records); L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999) (holding that a private publisher could not challenge a state statute that regulated access to information police departments possessed as to arrestees' addresses).

[22] FOIA access to agency records contained in databases was mandated by Congress in 1996 when it passed the Electronic Freedom of Information Act (EFOIA). *See* EFOIA Amendments, *supra* note 9, §§ 1–12 (amending sections of 5 U.S.C. § 552). Congress enacted this law because legislators wanted to add certain electronic provisions to the original act in order to make clear that the statute's disclosure requirements applied to electronically recorded information and databases. *See* H.R. REP. NO. 104-795 (1996), *reprinted in* 1996 U.S.C.C.A.N.

[23] *See, e.g.*, FEDERAL TRADE COMMISSION, *supra* note 12 (concluding that privacy concerns over personally-identifiable information in public records have been heightened by: increasing availability of electronic data; ease of collating and aggregating electronic data from various sources; increasing computer processing speeds; decreasing costs of electronic data storage; and increasing affordability computers); *see also* FRED H. CATE & RICHARD J. VARN, COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS, THE PUBLIC RECORD: INFORMATION AND PRIVACY AND ACCESS: A NEW FRAMEWORK FOR FINDING THE BALANCE 15 (1999) ("[T]echnologies, such as the Internet, that expand opportunities for easy,

Whether courts weighing personal privacy against public access interests under FOIA should, or even can, consider the derivative uses or secondary effects of disclosure of personally-identifiable information remains unresolved by the Supreme Court and unexplored in any great depth in FOIA literature and commentary. One reason this issue remains unresolved is that many FOIA users, and freedom-of-information activists in general, have shied away from raising the issue.[24] Many believe that if the courts explicitly decide that derivative-use and secondary-effect considerations are permissible, then federal agencies could exploit the uses and effects of disclosure as an excuse to deny access to records.[25] In

---

inexpensive access to public records also increase the ability of the government and citizens to search and collect disparate pieces of data to 'profile' individuals, thereby heightening concerns about personal privacy."); Phelps & Bunker, *supra* note 14, at 34 (stating that the use of computerized public records containing personally-identifiable information by marketers implicates privacy concerns, especially when citizens are compelled to provide that information to the government under the auspices of a different purpose — such as motor vehicle or voter registration).

[24] Some FOIA activists argue that the purpose for a FOIA request should not be a factor when agencies or courts consider whether the information should be disclosed. They point to FOIA's plain language and legislative history to support their claims. *See The Implementation of the Electronic Freedom of Information Act Amendments of 1996: Is Access to Government Information Improving?: Hearing Before the Subcomm. on Gov't Mgmt., Info. and Tech. of the House Comm. on Gov't Reform and Oversight,* 105th Cong. (1998) [hereinafter *Hearings*] (testimony of Jane E. Kirtley, Executive Director, Reporters Committee for Freedom of the Press); Senator Patrick Leahy, *The Electronic FOIA Amendments of 1996: Reformatting FOIA for On-Line Access*, 50 ADMIN. L. REV. 339, 340 (1998); *see also* REPORTERS COMM. FOR FREEDOM OF THE PRESS, 105TH CONG., REPORT ON RESPONSES AND NON-RESPONSE OF THE EXECUTIVE AND JUDICIAL BRANCHES TO CONGRESS' FINDING THAT THE FOI ACT SERVES 'ANY PURPOSE' 2 (Comm. Print 1998) [hereinafter RCFP REPORT]. This report was prepared by request of Rep. Steven Horn, Chairman, Subcommittee on Government Management, Information and Technology.

[25] These concerns are not unfounded. According to a 2002 Justice Department analysis of recent agency annual reports, the personal privacy exemption, Exemption 6, was the most commonly used of all of FOIA's nine statutory exemptions to reject FOIA requests. *See* U.S. Dep't of Justice, Office of Info. & Privacy, SUMMARY ANNUAL FOIA REPORTS FOR FISCAL YEAR 2000, *available at* http://www.usdoj.gov/oip/foiapost/2002foiapost3.htm (last visited Feb. 4, 2003). The history of FOIA privacy disputes that have reached the Supreme Court over the years shows the Justice Department has been highly effective, as the legal representative for federal agencies, in arguing for the withholding of records. To date, the Court has heard seven FOIA privacy cases since 1976, and it ruled in favor of agency decisions to withhold records in all but one of those cases. *See* Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, (1997); Dep't of Def. v. FLRA, 510 U.S. 487 (1994); Dep't of State v. Ray, 502 U.S. 164 (1991); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); FBI v. Abramson, 456 U.S. 615 (1982); Dep't of State v. Wash. Post Co., 456 U.S. 595 (1982); Dep't of the Air Force v. Rose, 425 U.S. 352 (1976). These cases concerned either the personal privacy exemption — Exemption 6, 5 U.S.C. § 552(b)6 — or the privacy subsection of the law enforcement exemption — Exemption 7, 5 U.S.C. §

practical terms, a derivative-use analysis arguably is integral to *both* sides of the privacy/access equation. The value of access to certain records might not be fully revealed without considering how the information would be used once released. For instance, a journalist might utilize information from an agency record to identify a source to interview who can shed light on agency operations. Likewise, the individual privacy interest in secrecy might not be fully illuminated until the privacy impact on individuals named in records is considered along with the potential public interest uses of the information.[26] Thus, the journalist's request for an interview with an individual named in an agency database might be considered to be an invasion of that individual's privacy.

The need for a meaningful derivative-uses analysis gains further importance in light of the Supreme Court's current jurisprudence, under which the Court considers derivative uses and secondary effects of disclosure on the privacy side as a matter of course, but not on the public-interest side of the balance.[27] Additionally, the Department of Justice, which Congress charged with overseeing FOIA operations when the statute was enacted,[28] has weighed in on the question squarely in favor of protecting privacy.[29] In October 2001, Attorney General John Ashcroft issued a memorandum to the federal agencies strongly encouraging agencies to use the privacy exemptions to withhold records requested under FOIA as long as there is a sound legal basis to do so.[30]

At the time of this article, the Supreme Court had granted *certiorari* in the case of *Office of the Independent Counsel v. Favish*.[31] *Favish* involved a FOIA request for death scene and autopsy photographs relating to the fatal shooting of former White House Deputy Counsel Vincent W. Foster, Jr.[32] As will be discussed in this article, the U.S. Court of Appeals, Ninth Circuit, held that the U.S. Office of the Independent Counsel could withhold six of the requested photographs on grounds that the surviving members of Foster's family had a sufficient FOIA-related privacy

---

552(b)7(C). Most of these cases will be discussed in detail later in this article.

[26] As one FOIA commentator stated, "Derivative use analysis ascertains how requested information will be used and whether that use will cause invasions of privacy, serve public interests, or both." Eric J. Sinrod, *Blocking Access to Government Information Under the New Personal Privacy Rule*, 24 SETON HALL L. REV. 214, 214 (1993).

[27] *See Bibles*, 519 U.S. at 355; *FLRA*, 510 U.S. at 487; *Ray*, 502 U.S. at 164.

[28] *See* 5 U.S.C. § 552 (1994).

[29] *See* U.S. DEP'T OF JUSTICE, OFFICE OF INFO. & PRIVACY, NEW ATTORNEY GEN. MEMORANDUM ISSUED (2001), *available at* http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm [hereinafter NEW ATTORNEY GEN. MEMORANDUM] (last visited Feb. 4, 2003); *see also* Martin E. Halstuk, *In Review: The Threat to Freedom of Information*, COLUM. JOURNALISM REV., January/February 2002, at 8; Adam Clymer, *Government Openness at Issue As Bush Holds On to Records*, N.Y. TIMES, Jan. 3, 2003, at A1.

[30] *See* NEW ATTORNEY GEN. MEMORANDUM, *supra* note 29.

[31] 2003 WL 2011010 (U.S. 2003).

[32] *Id.*

interest to keep the photographs hidden from public view.[33] Significantly, the Ninth Circuit explicitly utilized a derivative-uses analysis when weighing the privacy interest of Foster's family. In so doing, the Ninth Circuit concluded that the mere release of the photographs would not necessarily invade the family's privacy as would potential media coverage and publication of the photographs, including publication on the Internet.[34] The *Favish* case presents a clear opportunity for the Supreme Court to clarify the issue of when, if ever, derivative uses may be properly considered by courts weighing disclosure decisions under FOIA privacy exemptions. As pointed out later in this article, the Supreme Court explicitly avoided that issue in a 1991 FOIA privacy exemption case,[35] but has since continued to tacitly approve a balancing scheme that seemingly utilizes a derivative-uses analysis when considering the privacy interest in nondisclosure but not the public interest in disclosure.[36]

The purpose of this article is to shed light on the continuing conflict between safeguarding personal privacy and allowing derivative uses of government information under FOIA. In section one, the article discusses FOIA and outlines the statute's two privacy exemptions.[37] The second section reviews a series of

---

[33] *See* Favish v. Office of the Indep. Counsel, 2003 WL 1263948 (9th Cir. 2002), *aff'g in part and rev'g in part*, 2001 WL 770410 (C.D. Cal.).

[34] *See* Favish v. Office of the Indep. Counsel, 217 F.3d 1168, 1173 (9th Cir. 2000). In addition, the Ninth Circuit clearly extended the privacy protection of FOIA beyond Foster, the individual who was the subject of the photographs, to his family. *See id.* (citing Katz v. Nat'l Archives & Records Admin., 862 F. Supp. 476, 485 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995), and N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 920 F.2d 1002, 1009–10 (D.C. Cir. 1990), *remanded to* 782 F. Supp. 628 (D.D.C. 1991).

[35] *See* Dep't of State v. Ray, 502 U.S. 164 (1991).

[36] *See infra* text accompanying notes 227–29.

[37] *See* 5 U.S.C. §§ 552(b)6, (b)7(C) (1994). In a memorandum issued October 12, 2001, Attorney General John Ashcroft wrote, in part, that the government is "committed to full compliance" with FOIA, but he added that the Justice Department and the administration are:

> equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy . . . I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that *could* be implicated by disclosure of the information. (emphasis added).

Ashcroft's memo went on to rescind the previous FOIA disclosure standard set by former Attorney General Janet Reno. The Reno FOIA policy emphasized "maximum responsible disclosure of government information" unless "disclosure *would* be harmful" (emphasis added). U.S. DEP'T OF JUSTICE, ATTORNEY GEN.'S MEMORANDUM FOR HEADS OF DEP'TS &

Supreme Court cases in which the government raised a FOIA privacy exemption to block disclosure of personally-identifiable information in federal agency records.[38] Sections three and four demonstrate how the Supreme Court has considered derivative uses and secondary effects in these cases — but only on the privacy side of the privacy-access balance, and to justify withholding of records. Section five examines the implied constitutional right of "informational privacy" that courts have applied to some personal information in government records and databases. This section also looks at how the Supreme Court considered derivative uses and secondary effects in its scant constitution-based informational privacy jurisprudence.[39] Section six explains how a variety of public interests are not served when federal agencies withhold government-held information, as a matter of course, under a theory based on impermissible derivative uses and secondary effects. Finally, section six also proposes a model and system of analysis that courts can use to clearly identify the leading kinds of derivative uses and thus fairly balance privacy rights of the individual against the public interests that disclosure would serve.

I. THE FREEDOM OF INFORMATION ACT AND PRIVACY

Enacted by Congress in 1966 and amended several times,[40] FOIA creates a judicially enforceable policy that favors a general philosophy of full disclosure of federal agency records.[41] FOIA's legislative history demonstrates congressional intent for a broad policy of full disclosure based on democratic political theory and a philosophy of open government.[42] Legislators noted that transparent government,

---

AGENCIES REGARDING THE FREEDOM OF INFO. ACT (1993), *reprinted in* FOIA UPDATE 4 (1993) [hereinafter ASHCROFT MEMORANDUM]. Ashcroft replaced Reno's foreseeable-harm standard with a test that encourages withholding based on a "sound legal basis." NEW ATTORNEY GEN. MEMEORANDUM, *supra* note 29.

[38] *See* Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355 (1997); Dep't of Def. v. FLRA, 510 U.S. 487 (1994); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Dep't of State v. Wash. Post Co., 456 U.S. 595 (1982); Dep't of the Air Force v. Rose, 425 U.S. 352 (1976).

[39] *See* Whalen v. Roe, 429 U.S. 589 (1977); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).

[40] *See* 5 U.S.C. § 552 (1994). Congress revised FOIA in 1974, 1976, 1978, 1984, 1986 and 1996.

[41] *See* S. REP. NO. 89-813 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 5, at 38; *see also Rose*, 425 U.S. at 361. *But see Reporters Comm.*, 489 U.S. at 774–75 (holding that the central purpose of FOIA is to disclose only those records that directly shed light on the operations of the government).

[42] *See* H.R. REP. No. 89-1497 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 5, at 33; S. REP. No. 89-813 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 5, at 38. The impetus behind FOIA's broad policy of full disclosure was to remedy gaping loopholes in FOIA's predecessor, the public disclosure section of the Administrative Procedure Act of

subject to public and press scrutiny and evaluation, has a long and historic tradition in the nation.[43]

FOIA applies to "record[s]" held by "agenc[ies]" within the executive branch of the federal government,[44] including the Executive Office of the President and independent regulatory agencies[45] such as the Federal Communications Commission, the Environmental Protection Agency, and the Securities and Exchange Commission.[46] FOIA makes agency records available to "any person"[47] upon request and places the burden of justifying nondisclosure on the government.[48] FOIA requests can be made for any reason,[49] without requiring either a showing of relevancy or an explanation for a request.[50]

1946, commonly referred to as the APA. *See* 5 U.S.C. § 1002 (1946). Among these loopholes was the requirement that "even 'matters of official record' were only to be made available to 'persons properly and directly concerned' with the information." *See* EPA v. Mink, 410 U.S. 73, 79 (1973). Under this provision, requesters had to explain how the requested information concerned them in order to justify disclosure. Congress crafted FOIA after legislators concluded that the APA's restrictive disclosure requirements failed to meet that statute's intended disclosure goals. Indeed, the APA was so easily exploited that it came to be regarded by agencies as a tool to withhold information. *Id.*; *see also* H. REP. NO. 89-1497, at 5–6 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 5, at 26 ("For more than 10 years, through the administration of both political parties, case after case of improper withholding based upon [the APA] has been documented."); S. REP. NO. 89-813, 89th Cong., 1st Sess., 5 (1965).

[43] During a hearing on the original FOIA legislation before it was enacted, then-U.S. Representative Donald Rumsfeld advocated its passage, quoting Thomas Jefferson's famous remark: "Were it left to me to decide whether we should have a government without newspapers or newspaper without government, I should not hesitate for a moment to prefer the latter." FOIA SOURCE BOOK, *supra* note 5, at 72.

[44] 5 U.S.C. § 552(f) (1994), *amended by* EFOIA Amendments, *supra* note 9.

[45] *Id.*

[46] *Id.*

[47] 5 U.S.C. § 552(a)(3) (1994). The term "any person" is defined as including individuals, foreign nationals, partnerships, corporations, associations or foreign or domestic governments. *See* 5 U.S.C. § 551(2) (1994). The statute specifically excludes federal agencies from the definition of a "person," but state agencies can make FOIA requests; *see also* U.S. DEP'T OF JUSTICE, FREEDOM OF INFO. ACT GUIDE & PRIVACY ACT OVERVIEW 38 (2002) [hereinafter FOIA GUIDE].

[48] *See* 5 U.S.C. § 552(a)(4)(B)(b) (1994); *see also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 235–36 (1977) (requiring the board to meet the burden of justifying nondisclosure); *Mink* 410 U.S. at 73, 79, 87.

[49] *See* FOIA GUIDE, *supra* note 47, at 39–40 (stating that "FOIA requests can be made for any reason whatsoever; because the purpose for which records are sought has no bearing upon the merits of the request, FOIA requesters do not have to explain or justify their requests. As a result, and despite repeated Supreme Court admonitions for restraint," FOIA is often used as a substitute for, or a supplement to, discovery in both civil and criminal litigation).

[50] *Id.*; *see also* Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986)

FOIA contains two privacy exemptions that represent congressional attempts to balance individual privacy interests against public access to government information. Under these provisions — Exemptions 6 and 7(C) — agencies may withhold documents on grounds of protecting the individual interest in privacy of the individuals named in agency records.[51] However, the exemptions do not define the parameters of agency discretion in privacy-based FOIA denials,[52] and thus the task to decide FOIA privacy-exemption disputes is left to the courts. This section analyzes the language and legislative histories of the privacy exemptions in search of legislative intent on whether derivative uses of information and secondary effects of disclosure should be considered as reasons to block the release of government-held information requested under FOIA.

A. Exemption 6: Personnel and Medical and Similar Files

Exemption 6 allows agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[53] The threshold question under Exemption 6 is whether the requested information fits the description "personnel and medical files and similar files."[54] If it does, the second question in the inquiry considers whether "disclosure . . . would constitute a clearly unwarranted invasion of personal privacy."[55]

In passing FOIA in 1966, Congress recognized a need to protect some personally-identifiable information contained in the records of dozens of federal agencies such as the Veterans Administration, the Selective Service, the Bureau of Prisons, and the Department of Health, Education and Welfare.[56] The House Report recommending passage of FOIA pointed out that the myriad federal agencies

---

("Congress granted the scholar and the scoundrel equal rights of access to agency records."), *cert. granted, judgment vacated on other grounds and remanded*, 486 U.S. 1029 (1988); Forsham v. Califano, 587 F.2d 1128, 1134 (D.C. Cir. 1978) (reasoning that while factors such as need, interest, or public interest may bear upon an agency's determination of order of processing, those factors have no bearing on a person's right of access under FOIA); *see also* U.S. DEP'T OF JUSTICE, OFFICE OF INFO. & PRIVACY, REPORTERS COMM. DECIDED BROADLY, 10 FOIA UPDATE 5 (1989).

[51] 5 U.S.C. §§ 552(b)6, (b)7(C) (1994).

[52] The House report recommending passage of FOIA said it was intended to establish "workable standards for the categories of records which may be exempt from public disclosure . . . with specific definitions of information which may be withheld." H.R. REP. NO. 89-1497, at 1 (1966).

[53] 5 U.S.C. § 552 (b)6 (1994).

[54] *See supra* note 47. The Supreme Court clearly took this two-prong approach in the first two Exemption 6 cases it decided. *See* Dep't of State v. Wash. Post Co., 456 U.S. 595, 598, 602–03 (1982); Dep't of the Air Force v. Rose, 425 U.S. 352, 370 (1976).

[55] *See supra* note 47.

[56] *See* H.R. REP. NO. 89-1497, at 32 (1966).

gathered vast quantities of information on intimate details about millions of citizens, and that confidentiality of these records had been maintained by agency regulation but without statutory authority.[57] Addressing the personal privacy interests protected by Exemption 6, the report said:

> A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The 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 . . . .[58]

Similarly, the corresponding Senate report clarified the "clearly unwarranted invasion of personal privacy" standard expressed in Exemption 6.[59] Congress intended for this language to maintain a balance between the "protection of an individual's private affairs from *unnecessary* public scrutiny, and the preservation of the public's right to governmental information."[60]

Congress thus recognized that FOIA disputes under Exemption 6 would likely involve a balance of conflicting interests in public access and individual privacy.[61] For example, the Senate report noted that while FOIA enacts a broad philosophy of "freedom of information," Congress also needs to protect "equally important rights of privacy" regarding certain information in government files, including medical and personnel records.[62] The report stated:

> 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 . . . either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, *yet places emphasis on*

---

[57] *Id.*

[58] *Id.* The House report further stated: "The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records." *Id.*

[59] S. REP. NO. 93-813, at 44 (1965).

[60] *Id.* (emphasis added).

[61] *Id.* at 38 (stating that balancing these interests "is not an easy task," but requires a "workable formula"); *see also* Dep't of the Air Force v. Rose, 425 U.S. 352, 373 (1976) ("Congress enunciated a . . . policy [regarding Exemption 6], to be enforced . . . by the courts.").

[62] S. REP. NO. 93-813, at 38 (1965).

the fullest responsible disclosure.[63]

This quoted passage suggests that Congress did not intend for rights of privacy to easily trump those of public access in a FOIA balance under Exemption 6.

B. Exemption 7(C): Information Compiled for Law Enforcement Purposes

In 1974, Congress amended FOIA and added Exemption 7(C), which allows agencies to withhold "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."[64] The two-pronged disclosure analysis first asks whether the requested information constitutes "records or information compiled for law enforcement purposes," and, if so, next asks whether disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[65]

Exemption 7(C) provides broader protection for individual privacy than does Exemption 6. In other words, it is easier for an agency to deny a FOIA request on privacy grounds under Exemption 7(C) than under Exemption 6. For instance, under Exemption 7(C), the agency need only show that disclosure of the requested information "*could reasonably* be expected" to constitute a privacy invasion, not that it "*would constitute*" a privacy invasion as required under Exemption 6.[66] Also, under Exemption 7(C), the agency needs only to demonstrate an "unwarranted invasion of personal privacy," not a "*clearly* unwarranted invasion of personal privacy" as required by Exemption 6. Congress seems to have intended these distinctions,[67] and the Supreme Court has recognized them in Exemption 6 and 7(C)

---

[63] *Id.* (emphasis added).

[64] 5 U.S.C. § 552(b)7(C) (1994).

[65] *Id*; *see also* FBI v. Abramson, 456 U.S. 615, 622 (1982) (calling this analysis a "two-part inquiry"). The Supreme Court has held that "information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where that recorded information is reproduced or summarized in a new document prepared for a non-law-enforcement purpose." *Id.* at 631–32.

[66] *See* Dep't of Def. v. FLRA, 510 U.S. 487, 496 n.6 (1994); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 (1989)(emphasis added).

[67] The legislative history shows that Exemption 7(C), as originally proposed by Sen. Philip Hart, also required a "*clearly*" unwarranted invasion of personal privacy. *See* 120 CONG. REC. 17,033 (1974) (emphasis added). However, the word "clearly" was dropped by the Conference Committee as a concession in negotiations with President Gerald Ford to get the Act approved. *See* H.R. CONF. REP. NO. 93-1380, at 4 (1974). By dropping "clearly," the exemption lessened the agency's burden to meet the test. Legislators also agreed to the difference in language between "would" in Exemption 6, and "could reasonably be expected" in Exemption 7(C) in order to enact the legislation. As a result, courts have concluded that

cases.[68]

In making a determination in a privacy-exception case under Exemptions 6 and 7(C), the courts use a two-prong test. Under Exemption 6, the courts first must determine if the records fall within the definition of "personnel," "medical," or "similar" files.[69] Second, the courts must balance the invasion of the individual's personal privacy against the public benefit that would result from disclosure.[70] To withhold information, the government must show that the disclosure "would constitute a clearly unwarranted invasion of personal privacy."[71] Likewise, the courts use a similar test in deciding an Exemption 7(C) privacy-interest case.[72] Under Exemption 7(C), the documents first must have been compiled for law enforcement reasons because this exemption pertains only to investigative records.[73] Second, the government must prove that the disclosure could "reasonably be expected to constitute an unwarranted invasion of privacy."[74]

The FOIA privacy exemptions are broadly worded. Congress did not define any of the key terms, including the clause "unwarranted invasion of personal privacy" in either exemption. However, the legislative histories strongly suggest that only significant privacy concerns should trump public access rights to FOIA records,[75] and the Supreme Court has concluded that the privacy exemptions must be narrowly construed.[76] In addition, the legislative histories do not indicate whether the courts should — or must — consider derivative uses of government information or secondary effects of disclosure when weighing the individual privacy interest in nondisclosure and the public interest in disclosure.[77]

Exemption 7(C) allows law enforcement officers more latitude to withhold records to protect privacy than is permitted under the stricter standard of Exemption 6. *See Reporters Comm.*, 489 U.S. at 755–56. In addition, Exemption 7(C) means the public interest in disclosure carries less weight. *Id.*

[68] *See Reporters Comm.*, 489 U.S. at 755–56 (citations to various legislative materials omitted); *Abramson*, 456 U.S. at 629 n.13 (calling the distinction between "unwarranted" and "clearly unwarranted" a "meaningful" one); Dep't of the Air Force v. Rose, 425 U.S. 352, 380 n.16 (1976) (citations omitted).

[69] 5 U.S.C. § 552(b)6 (1994).

[70] *See, e.g., Rose*, 425 U.S. at 352.

[71] *Id.*

[72] *See, e.g., Wash. Post*, 456 U.S. at 595; *Rose*, 425 U.S. at 352.

[73] 5 U.S.C. § (b)7(C).

[74] *Id.*

[75] *See* H.R. REP. NO. 89-1497 (1966); S. REP. NO. 93-813, at 44 (1965).

[76] *See Rose*, 425 U.S. at 361.

[77] *See* Jeffery D. Zimmerman, United States Dep't of State v. Ray*: The Distorted Application of the Freedom of Information Act's Privacy Exemption to Repatriated Haitian Migrants*, 9 AM. U. J. INT'L L. & POL'Y 385, 414 (1993) (stating that "[n]othing in the text or legislative history of the Freedom of Information Act supports the contention that the public interest in requested information must be in the disclosure itself and not in any possible derivative use") (citations omitted).

II. THE SUPREME COURT'S ACCESS-PRIVACY BALANCE AND THE "CENTRAL PURPOSE" DOCTRINE

In passing the FOIA privacy exemptions,[78] Congress acknowledged the legal and traditional protections afforded to privacy over the years and tried to provide a means of resolving conflicts between access and privacy interests in requests for agency records that contain personally-identifiable information. However, Congress left the exemptions largely undefined and thus subject to varying interpretations and applications by federal agencies and the courts, particularly the Supreme Court. Indeed, since FOIA was passed, the Supreme Court created a framework for balancing public access and personal privacy interests in disputes over the release of government-held information in a series of cases.[79] These cases remain controversial, and commentators have accused the Court of judicially legislating a balancing scheme that strongly favors individual privacy over public access despite evidence of congressional legislative intent to the contrary.[80]

In *Department of the Air Force v. Rose*,[81] decided in 1976, the Supreme Court addressed an Exemption 6 case for the first time and created a balance that weighs the public interest in disclosure against the individual privacy interest in keeping the information confidential.[82] However, in *Department of State v. Washington Post Co.*,[83] an Exemption 6 case decided in 1982, the Court held that even a minimal

---

[78] *See* 5 U.S.C. § 552(b)(1)–(9) (1995); *supra* note 8.

[79] *See* Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355 (1997); Dep't of Def. v. FLRA, 510 U.S. 487 (1994); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); FBI v. Abramson, 456 U.S. 615 (1982); Dep't of State v. Wash. Post Co., 456 U.S. 595 (1982); Dep't of the Air Force v. Rose, 425 U.S. 352 (1976).

[80] *See, e.g.*, Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the* Reporters Committee *"Central Purpose" Reformulation,* 54 ADMIN. L. REV. 983 (2002). In a 1998 report, the Reporters Committee for Freedom of the Press asserted that since the *Reporters Committee* decision was handed down, the balance in the test between individual privacy and the public interest in disclosure has weighed heavily in favor of privacy. *See* REPORTERS COMM. FOR FREEDOM OF THE PRESS, REPORT ON RESPONSES AND NON-RESPONSE OF THE EXECUTIVE AND JUDICIAL BRANCHES TO CONGRESS' FINDING THAT THE FOI ACT SERVES 'ANY PURPOSE' 2 (1998) (prepared by request of Rep. Steven Horn, Chairman, Subcomm. on Gov't Mgmt., Info. & Tech., of the House Comm. on Gov't Reform & Oversight). Any asserted FOIA-related public interest that does not fall within the Supreme Court's narrowly defined definition of the Court's central-purpose doctrine is not considered, the report said. *See id.* at 2–3. Since the *Reporters Committee* decision was handed down, many journalists have complained that they have been thwarted in fully reporting news on important issues because federal agencies overuse the privacy exemptions. *See id* at 3.

[81] 425 U.S. 352 (1976).

[82] *See id.* at 372–73.

[83] 456 U.S. 595 (1982).

privacy interest could trigger the balancing analysis in an Exemption 6 dispute.[84] Seven years later, in *Department of Justice v. Reporters Committee for Freedom of the Press*,[85] a 1989 case decided under Exemption 7(C), the Court further skewed the balance strongly in favor of privacy interests over access interests.[86] The Court formulated the now-familiar "central purpose" test, which created a *de facto* rule against the disclosure of any personally-identifiable information in federal agency records.[87] An understanding of these three cases is necessary to approach the derivative-use issue, which will be discussed in forthcoming sections.

A. Department of the Air Force v. Rose *(1976)*

In *Rose*, the dispute concerned a FOIA request for summaries of official proceedings against Air Force Academy cadets accused of honor and ethics code violations.[88] The records were sought by the *New York University Law Review*, which was researching an article on military disciplinary procedures.[89] The law review did not request the names of individual cadets, but instead requested summaries with "personal references or other identifying information deleted."[90]

The Air Force denied the request, and the law review filed suit in federal district court to compel disclosure.[91] Without examining the summaries, the U.S. District Court for the Southern District of New York ruled that Exemption 6 did not apply because release of the summaries were not "medical and personnel files and similar files."[92] However, the judge ruled against disclosure under another exemption, Exemption 2, which protects an agency's internal personnel memoranda from disclosure.[93] On appeal, the U.S. Court of Appeals for the Second Circuit reversed and held that Exemption 2 did not apply.[94] The appeals court ordered the Air Force to produce the redacted summaries to the trial judge for *in camera* inspection to determine whether Exemption 6 applied.[95]

---

[84] *See id.* at 602.

[85] 489 U.S. 749 (1989).

[86] *See id.* at 774, 780.

[87] *See id.*

[88] *See Rose*, 425 U.S. at 354–55.

[89] *See id.*

[90] *Id.* at 355.

[91] *See id.* at 355–56.

[92] *Id.* at 357–58; *see also* 5 U.S.C. § 552(b)6 (1995) (containing the text of Exemption 6). The trial court had granted summary judgment for the Air Force without examining the redacted summaries. *See Rose*, 425 U.S. at 356–57.

[93] *See id.* For the text of Exemption 2, see 5 U.S.C. § 552(b)2.

[94] *See* Rose v. Dep't of the Air Force, 495 F.2d 261, 266 (2d Cir. 1974).

[95] *Id.* at 268.

The Supreme Court affirmed the appeals court order, holding that the redacted summaries qualified as "similar files" under Exemption 6,[96] but the records had to be released unless disclosure would result in a "'clearly unwarranted' invasion of privacy."[97] Because the Air Force had never produced the summaries in the proceedings below, they were not part of the record on appeal. For this reason, the *Rose* Court was unable to balance the actual access and privacy interests implicated by disclosure of the requested records. Instead, the majority simply agreed with the Fifth Circuit that the trial judge needed to inspect the summaries *in camera* and balance the salient access and privacy interests.[98] Accordingly, the Court upheld the appellate court order compelling the Air Force to produce the redacted summaries to the trial judge to inspect the summaries[99] and to determine if redaction would sufficiently "safeguard privacy."[100]

Writing for the *Rose* Court, Justice William J. Brennan said that FOIA's legislative history made it clear that the statute was "broadly conceived" and Congress intended for the statute to permit access to official information and to open agency action to public scrutiny.[101] Further, he said that any exceptions to disclosure must fall under one or more of the statute's nine exemptions,[102] which should be "narrowly construed."[103] The opinion took the position that FOIA's "dominant objective" is disclosure.[104]

The *Rose* Court cautioned against broad application of the FOIA privacy exemptions.[105] For instance, Brennan said that "Exemption 6 does not protect against disclosure [of] every incidental invasion of privacy — only such disclosures

---

[96] *See Rose*, 425 U.S. at 376–77. The Court said the summaries were "similar files" under Exemption 6 because they "relate[d] to the discipline of cadet personnel" and implicated "privacy values" as those implicated by information in personnel files. *Id.*

[97] *Id.* at 380–81.

[98] *See id.* at 381 (stating that an *in camera* inspection of the redacted summaries by the trial judge was the appropriate procedure as had been ordered by the court of appeals below).

[99] *Id.*

[100] *Id.* at 380–81. The *Rose* Court said that redaction of identifying information is an appropriate means by which to protect individual privacy and still allow for public disclosure of the remaining information. *See id.* at 381–82 (stating that "redaction is a familiar technique . . . [and FOIA] exemptions . . . were intended to be practical workable concepts") (citing EPA v. Mink, 410 U.S. 73, 79 (1973)). However, the Court noted that redaction might not necessarily be a perfect means of achieving anonymity for the cadets discussed in the summaries. *See id.* at 381 (stating that "redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe").

[101] *Id.* at 361 (citing *Mink*, 410 U.S. at 80).

[102] *See supra* note 8 and accompanying text.

[103] *Rose*, 425 U.S. at 361.

[104] *See id.*

[105] *Id.* at 381–82.

that constitute 'clearly unwarranted' invasions of personal privacy."[106] In language that seemed to bode well for access advocates, Brennan said that Congress clearly directed Exemption 6 "at threats to privacy interests *more palpable than mere possibilities*."[107] He said Congress intended to craft a personal privacy exemption that "would require a balancing of the individual's right of privacy against the preservation of the basic purpose of [FOIA] 'to open agency action to the light of public scrutiny.'"[108]

B. Department of State v. Washington Post Co. *(1982)*

The Supreme Court next addressed Exemption 6 in 1982 in *Department of State v. Washington Post Co.*,[109] the first news media case involving a disclosure dispute under Exemption 6. In an apparent departure from Brennan's clear admonition six years earlier — that FOIA's exemptions, explicitly Exemption 6, should be "narrowly construed"[110] — Chief Justice William H. Rehnquist strongly suggested that even a minimal individual privacy interest is sufficient to trigger Exemption 6 and invoke the privacy/access balancing analysis.[111] In a unanimous opinion, the Court held that a file need not contain highly intimate personal information to be blocked from disclosure under Exemption 6.[112]

The privacy dispute in *Washington Post* arose in September 1979 after the newspaper wanted to confirm an unofficial report that two officials of Iran's revolutionary, anti-American government held U.S. passports.[113] The newspaper asked the State Department for passport-information records to determine if the report was true.[114] The government refused, asserting that such disclosure would constitute a "clearly unwarranted invasion" of the Iranian nationals' privacy under FOIA Exemption 6.[115] Specifically, the State Department asserted that the disclosure of its passport information would "cause a real threat of physical harm" to both men.[116] The U.S. District Court for the District of Columbia ruled for the

---

[106] *Id.* at 382.

[107] *Id.* at 380 n.19 (citing H.R. REP. NO. 89-1497, at 11 (1966); S. REP. NO. 89-813, at 9 (1966)) (emphasis added).

[108] *Id.* at 372 (citations to internal quotation not in original). Justice Brennan said that Congress intended for FOIA disputes involving Exemption 6 denials to be arbitrated by the courts, and that Congress meant for the judiciary to "constrain agencies from withholding non-exempt" information. *Id.* at 379–80 (citations omitted).

[109] 456 U.S. 595 (1982).

[110] *See Rose*, 425 U.S. at 361.

[111] *Wash. Post*, 456 U.S. at 600–01.

[112] *Id.*

[113] *See id.* at 596, 597 n.2.

[114] *Id.* at 596.

[115] *Id.* at 596 (quoting 5 U.S.C. § 552(b)6).

[116] *Id.* at 597 n.2. In an affidavit, the State Department stated:

newspaper in favor of public disclosure.[117] The U.S. Court of Appeals for the D.C. Circuit affirmed and held that the State Department did not prove that the passport information qualified as "personnel," "medical," or "similar" records under the first prong of Exemption 6.[118] The court held that the passports did not contain "highly personal" information or "intimate details" about the Iranian nationals.[119]

On appeal, the Supreme Court reversed.[120] Writing for the *Washington Post* Court, Rehnquist said Congress intended a broader construction of the "similar files" clause in Exemption 6 than was applied by the appeals court below.[121] Rehnquist wrote that a file does not need to contain intimate information to be withheld under Exemption 6, but that an individual's citizenship documentation and passport information was a sufficient privacy interest to trigger Exemption 6. Rehnquist said Exemption 6 applies to both intimate *and* nonintimate personally-identifiable information, including such things as "place of birth, date of birth, date of marriage, employment history, and comparable data [that] is not normally regarded as highly personal."[122] In *dicta*, Rehnquist said that even matters of public record could trigger the first prong of Exemption 6.[123] Rehnquist noted, however, once the exemption is triggered, the government still has to prove that a disclosure "would constitute a clearly unwarranted invasion of personal privacy" to justify nondisclosure.[124] He said that Congress intended the "clearly unwarranted" clause to limit nondisclosure under Exemption 6 despite the broad application of the "similar files" clause.[125]

Although the Court held that official citizenship information triggers the "similar files" provision of Exemption 6,[126] the Court did not decide whether

---

> Any individual in Iran who is suspected of being an American citizen or having American connections is looked upon with mistrust. An official of the Government of Iran who is reputed to be an American Citizen would . . . be in physical danger from some of the revolutionary groups that are prone to violence.

Id.

[117] *Id.* at 597.

[118] *See* Wash. Post Co., v. Dep't of State, 647 F.2d 197, 198 (D.C. Cir. 1981) (per curiam).

[119] *Id.* at 198–99 (citing its ruling in Simpson v. Vance, 648 F.2d 10 (D.C. Cir. 1980) that facts related to an individual's naturalization — which are similar to the information contained in a passport — are nonexempt).

[120] *See Wash. Post*, 456 U.S. at 598.

[121] *Id.* at 600.

[122] *Id.*

[123] *Id.* at 603 n.5 (stating that "[t]he public nature of information . . . does not militate against a conclusion that files are 'similar' to personnel and medical files").

[124] *Id.* at 602.

[125] *Id.* at 600.

[126] *Id.*

disclosure "would constitute a clearly unwarranted invasion of personal privacy."[127] The *Washington Post* Court remanded the case to the lower courts to consider the "clearly unwarranted" issue because the courts below had avoided it.[128] Thus, the Supreme Court did not explain what types of privacy interests would be covered by Exemption 6 nor how lower courts should apply the "clearly unwarranted" standard in terms of the actual privacy/access balance.[129]

Still, it is significant that the *Washington Post* Court said that even "nonintimate" personally-identifiable information could trigger the privacy balance under Exemption 6.[130] The *Washington Post* opinion directly affected FOIA policy. In its official FOIA guidelines, the Justice Department said the *Washington Post* opinion supported the conclusion that Exemption 6 is broadly triggered by "all information that 'applies to a particular individual.'"[131] On that point, the Department concluded that *Washington Post* effectively overruled a "troublesome" line of lower court rulings that had limited the Exemption 6 trigger to "'intimate' personal details" and had not allowed the exemption to be triggered by personally-identifiable information that did not meet that criterion.[132] As summed up by the U.S. Court of Appeals for the Second Circuit in a 1992 opinion, the *Washington Post* opinion established that FOIA "requires only a measurable interest in privacy to trigger" the balancing test under the privacy exemptions.[133]

C. Department of Justice v. Reporters Committee *(1989)*

In *Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court established the "central purpose" doctrine as a test in FOIA privacy exemption cases for determining whether a FOIA-related public interest in access exists.[134] In *Reporters Committee*, the Supreme Court held that an individual's FBI

---

[127] *Id.* at 602–03.

[128] *Id.*

[129] *See* Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 490 (1995) (discussing the critical issues left undecided after *Washington Post*).

[130] *See Wash. Post*, 456 U.S. at 600–01 (noting that information that is "not normally regarded as highly personal . . . would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy"). Regarding Exemption 6, Rehnquist also wrote that "under the plain language of the exemption, nonintimate information about a particular individual which happens to be contained in a personnel or medical file can be withheld if its release would constitute a clearly unwarranted invasion of personal privacy." *Id.* at 601.

[131] *See* FOIA GUIDE, *supra* note 47, at 326.

[132] *Id.* at 325–27.

[133] *See* FLRA v. Dep't of Veterans Affairs, 958 F.2d 503, 510 (2d Cir. 1992).

[134] *See* Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989).

"rap sheet" — a computerized compilation of criminal arrests, charges and convictions[135] — was categorically exempt from disclosure under Exemption 7(C).[136] Each FBI rap sheet contained information on an individual — often from public sources — including "date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject."[137] Various local, state, and federal law enforcement agencies provided the FBI with their criminal history information, which the FBI, in turn, included in a computerized database that functions as an official clearinghouse for individual criminal histories.[138] The FBI treated rap sheets as confidential, only to be released to other government agencies for official purposes.[139]

In *Reporters Committee*, the FBI had denied a FOIA request made by a CBS reporter who asked for the rap sheet of an alleged organized-crime figure suspected of corrupt business dealings with a congressman.[140] The reporter asked for the FBI's rap sheet on Charles Medico, a businessman identified by the Pennsylvania Crime Commission as an owner of a legitimate business associated with organized-crime figures.[141] The CBS reporter was investigating Medico because his company had received defense contracts allegedly in exchange for political contributions to former Representative Daniel J. Flood.[142]

In response to the request, the FBI released information on three of Medico's brothers, all deceased.[143] However, the agency refused to release the rap sheet of

---

[135] *See id.* at 749.

[136] *See id.* at 780.

[137] *Id.* at 752. The FBI typically maintained rap sheets on subjects until they reached age eighty. *See id.*

[138] *Reporters Comm.*, 489 U.S. at 752, 761. The information typically was used by various local, state and federal law enforcement agencies in the investigations and prosecutions of crimes and by courts and corrections officials in the disposition of sentencing and parole matters. *See id.* at 752.

[139] *See id.* (noting that congressional legislation passed in 1957 that allowed the FBI to cancel dissemination of rap sheets to any receiving agency that disseminated the information to an unrelated third party). The Court noted that this policy was consistent with the policies of most states that compiled criminal histories on subjects. *Id.* at 767.

[140] *Id.* at 757.

[141] *See* Al Kamen, *High Court Backs Refusal to Release 'Rap Sheet' to News Media*, WASH. POST, Mar. 23, 1989, at A4.

[142] *See id.* Flood, who eventually resigned from the House on January 31, 1980, was already under investigation for corruption at the time of the request. The Pennsylvania Democrat left office while under indictment and plead guilty on February 26, 1980, to conspiracy to violate federal campaign laws. He was convicted of conspiracy to solicit campaign contributions from persons seeking federal government contracts and was placed on probation for one year. He had earlier been tried on charges of bribery, perjury and conspiracy. That trial ended with a hung jury in February 1979. *See* Laura Kiernan, *Flood Is Placed on Year's Probation*, WASH. POST, Feb. 27, 1980, at A8.

[143] *Reporters Comm.*, 489 U.S. at 757.

the living Medico brother.[144] Following the denial, the reporter sued for access but the U.S. District Court for D.C. sided with the FBI and dismissed the suit on summary judgment.[145] In doing so, the district judge said Medico's rap sheet contained information that triggered the privacy provision of FOIA's law enforcement exemption,[146] and — before reviewing the rap sheet — concluded that disclosure would be an unwarranted invasion of his personal privacy.[147] On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed and ordered the district judge to reconsider after conducting an *in camera* inspection of Medico's rap sheet to see if its release was unreasonable and unwarranted.[148] The appeals court reasoned that the government could not likely sustain such a privacy claim based on records that comprised criminal records that were publicly available from the reporting agencies themselves.[149]

On appeal, the Supreme Court said the sole issue was whether public disclosure of computerized FBI rap sheets "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under Exemption 7(C).[150] In ruling on that issue, the *Reporters Committee* Court first said FBI rap sheets implicated a FOIA-related privacy interest under Exemption 7(C).[151] The Court therefore concluded that the request for Medico's FBI rap sheet indeed triggered the privacy protection of Exemption 7(C).[152]

Writing for the Court, Justice John Paul Stevens concluded that informational privacy had been defined in common law as an individual's right to control private information that pertains to him or her.[153] In order to draw a line between private and nonprivate information, Justice Stevens quoted a standard dictionary definition and wrote that information is "private" when it is "intended for or restricted to the

---

[144] *See id.*

[145] *See* Reporters Comm. v. Dep't of Justice, 816 F.2d 730, 732 (D.C. Cir. 1987).

[146] *See* 5 U.S.C. § 552(b)7(C) (2000) (stating that records collected for "law enforcement purposes" are exempt from disclosure if their release "could reasonably be expected to constitute an unwarranted invasion of personal privacy").

[147] *See Reporters Comm.*, 489 U.S. at 757–59.

[148] *Reporters Comm.*, 816 F.2d at 742.

[149] *Id.* at 740.

[150] *Reporters Comm.*, 489 U.S. at 751 (citing 5 U.S.C. § 552(b)7(C) (1982 & Supp. V 1987)).

[151] *See id.* at 762. The Court pointed out that the privacy interest implicated was not constitutional-based or grounded in tort concepts of privacy. *See id.* at 762, 762 n.13, 763. The Court stated: "The question of the statutory meaning of privacy under FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution." *Id.* at 762 n.13.

[152] *Id.* at 774–75 (stating that the public may have an interest in the release of the rap sheet, but that interest is not the type protected by FOIA).

[153] *Id.* at 763.

use of a particular person or group or class of persons[;] not freely available to the public."[154] Based on this definition, the Court held categorically that an individual would always have a strong FOIA-based privacy interest in his or her FBI rap sheet under Exemption 7(C).[155]

The requesters argued against such a conclusion and pointed out that most of the information in Medico's as well as most other FBI rap sheets, came from publicly available records such as arrest records in which no privacy interest should attach.[156] Calling this interpretation a "cramped notion of personal privacy,"[157] Stevens said, "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[158]

Because the *Reporters Committee* Court found a FOIA-based privacy interest at stake, it was necessary to proceed with balancing that interest against the public interest in access and disclosure.[159] On that point, the *Reporters Committee* Court ruled that the only FOIA-related interest in disclosing private information is to inform the public about government operations and activities.[160] Writing for the Court, Stevens said that 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."[161]

The *Reporters Committee* Court ruled categorically that an individual's computerized rap sheet would not directly reveal government operations or performance and, thus, would lie "outside the ambit of the public interest that FOIA

---

[154] *Id.* at 763–64 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1804 (1976)).

[155] *Id.* at 780. The Court concluded that a categorical balancing approach under Exemption 7(C) was proper for an "appropriate class of law enforcement records or information" such as FBI rap sheets. *Id.* at 777. The Court said that a categorical balancing approach, as opposed to an *ad hoc* or case-by-case approach, would lead to expedited FOIA disclosure decisions. *See id.* at 779 (citing FTC v. Grolier Inc., 462 U.S. 19, 27–28 (1983)).

[156] *See Reporters Comm.*, 489 U.S. at 762–63.

[157] *Id.* at 763.

[158] *Id.* at 764. The Court pointed out that there is a "distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole." *Id.* Each FBI rap sheet was a "compilation of otherwise hard-to-obtain information" that required federal resources to prepare, and thus, the rap sheet information was not "freely available" to the public or to public officials. *See id.*

[159] *See id.* at 776 (noting that the parties in the case agreed that a *Rose* balance was appropriate, but disagreed on how that balance should be implemented).

[160] *See id.* at 772–73.

[161] *Id.* at 774.

was enacted to serve."[162] In other words, according to the *Reporters Committee* Court, disclosing an individual's FBI rap sheet always would constitute an unwarranted invasion of privacy because it would not directly illuminate government activity.[163] When the Court applied its newly-created "central purpose" test[164] to Medico's rap sheet, the Court concluded that disclosure would not reveal anything directly about the behavior of the congressman who allegedly had improper dealings with Medico,[165] or anything about how the Department of Defense had awarded contracts to Medico's company.[166]

Using the "central purpose" doctrine, the *Reporters Committee* Court established a "bright line" rule that there was no FOIA-based public interest in disclosing a private citizen's FBI rap sheet.[167] Stevens wrote that disclosure of "law enforcement records or information about a private citizen" would always be "unwarranted" when the requested information reveals no official agency action.[168] In other words, the requested information is not a record of "what the government is up to."[169] The opinion is therefore significant for rejecting a "cramped" interpretation of individual privacy while using a narrow interpretation of FOIA-related interest in disclosure.

D. Impact of Rose, Washington Post, *and* Reporters Committee

Viewed together, the *Washington Post* and *Reporters Committee* opinions have made a profound impact on constricting the boundaries of disclosure under FOIA in privacy cases, and have gone a long way toward skewing the *Rose* balancing test in a manner that favored withholding over disclosure.[170]

In *Rose*, the Court emphasized that in FOIA privacy-exemption cases, the public interest in disclosure should be weighed against the individual privacy interests in determining whether privacy can be raised to block public access to records otherwise subject to disclosure.[171] The first Court-crafted obstacle to disclosure was

---

[162] *Id.* at 775.

[163] *Id.* at 774–75.

[164] *Id.*

[165] *Id.* at 774.

[166] Stevens wrote that information about Medico's criminal history "would neither aggravate nor mitigate his allegedly improper relationship with [a member of Congress]" and "would tell us nothing directly about the character of the *Congressman's* behavior" nor "anything about the conduct of the *Department of Defense* . . . in awarding . . . contracts to [Medico's company]." *Id.*

[167] *See id.* at 779–80.

[168] *Id.*

[169] *Id.* at 780.

[170] Arguably, this was not the intent of the *Rose* Court as indicated by the majority opinion by Justice Brennan. *See supra* notes 96–108 and accompanying text.

[171] Dep't of the Air Force v. Rose, 425 U.S. 352 (1976); *see also infra* notes 336–38 and

set forth in *Washington Post*, when the Court held that even a minimal privacy interest is sufficient to trigger FOIA privacy exemptions.[172] Later, the *Reporters Committee* Court laid out the "central purpose" doctrine, which drastically limited the FOIA-related public interest in disclosure once one of the privacy exemptions was triggered.[173] Thus, after *Reporters Committee*, what remained was a balancing framework that significantly departed from the *Rose* Court's standard, replacing it with one that broadly interprets the privacy interests in withholding records while severely constricting the concept of FOIA-related public interests in disclosure.[174] None of these cases, however, directly addressed the issues of whether courts deciding FOIA privacy exemption cases should consider derivative uses of information and secondary effects of disclosure when balancing the public interest in disclosure and the individual privacy interest in nondisclosure.

However, in these cases the Court seemed to implicitly favor an approach that weighs derivative uses and secondary effects on the privacy side of the balance and not the access side. In *Rose*, the Court said the requested Air Force disciplinary summaries implicated FOIA-related "privacy values" because the "identification of disciplined cadets . . . could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends."[175] Writing for the *Rose* majority, Brennan said the privacy issue had to be analyzed from the "vantage" of the cadets' colleagues and not just from the "viewpoint of the [general] public."[176] The *Rose* majority said the trial court should not allow release of the summaries if redaction would not sufficiently "safeguard privacy."[177] Thus, the Court, at least implicitly, condoned consideration of derivative uses and secondary effects when considering the privacy interest of the cadets.

Similarly, in the *Washington Post* opinion in 1982, the Court seemed to suggest that secondary effects of disclosure were relevant on the privacy side of the balance. Rehnquist wrote in that case that Congress intended Exemption 6 to protect people

---

accompanying text.

[172] *See supra* notes 120–25 and accompanying text.

[173] *See Reporters Comm.*, 489 U.S. at 772–73.

[174] *See id.*

[175] *Rose*, 425 U.S. at 376–77 (quoting Rose v. Dep't of the Air Force, 495 F.2d 261, 267 (2d Cir. 1974)).

[176] *Id.* at 380. The Supreme Court said the U.S. District Court for the Southern District of New York could consider the Air Force Academy tradition of keeping confidential within the Academy the identities of cadets who are subject to ethics and honors proceedings. *See id.* Still, the Court said the "risk to the privacy interests of a former cadet, particularly one who has remained in the military, posed by his identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial." *Id.* at 381.

[177] *Id.* at 381 (quoting from the court of appeals opinion in Rose v. Dep't of the Air Force, 495 F.2d 261, 268 (2d Cir. 1974)).

from "the *injury and embarrassment that can result* from the unnecessary disclosure of personal information."[178] The majority instructed the lower court on remand to consider the "effect of disclosure" on the privacy interests of the Iranian nationals whose citizenship information had been requested.[179] The Court still had not explicitly endorsed or rejected consideration of derivative uses and secondary effects on either side of the balance, but seemed to have again endorsed it on the privacy side.

In 1989, the *Reporters Committee* Court likewise suggested that secondary effects of disclosure should not be considered when weighing the public interest in access and disclosure.[180] The Court refused to compel disclosure of reputed crime figure Charles Medico's FBI rap sheet to a reporter investigating whether Medico's company had been awarded government contracts based on corrupt dealings with a congressman. Writing for the *Reporters Committee* majority, Stevens concluded that Medico's criminal history "would tell us nothing directly about the character" of the corrupt congressman's behavior, nor "anything about the conduct" of the Department of Defense in awarding one or more contracts to Medico's company.[181] The Court indicated that a FOIA-related public interest in an activity of the government — as defined by the central-purpose doctrine — must be evident on the face of the requested documents in a privacy exemption case.[182]

In this series of three decisions, the Supreme Court arguably ratified — without explicitly addressing the issues of derivative uses and secondary effects — an approach that weighs derivative uses and secondary effects on the privacy side of the FOIA balance but not on the public access side.[183]

III. DERIVATIVE USES AND SECONDARY EFFECTS OF DISCLOSURE: THE *RAY* CASE (1991)

Department of State v. Ray,[184] is a 1991 Supreme Court opinion that stands as the only FOIA privacy exemption case to date in which the Court explicitly acknowledged it was engaging in an analysis based on derivative uses and secondary effects.[185] In practice, however, the Court had applied precisely such an analysis in its three previous FOIA privacy cases — consistently on the privacy side

---

[178] Dep't of State v. Wash. Post Co., 456 U.S. 595, 599 (1982) (emphasis added).

[179] *See id.* at 602–03.

[180] *See Reporters Comm.*, 489 U.S. at 774; *see also* Sinrod, *supra* note 26, at 221–22 (noting that the *Reporters Committee* majority did not consider derivative uses on the public-interest side of the balance).

[181] *Reporters Comm.*, 489 U.S. at 774 (emphasis added).

[182] *See id.* at 774, 779–80.

[183] *See* Dep't of State v. Ray, 502 U.S. 164 (1991).

[184] *Id.*

[185] *Id.*

of the balance: In *Department of the Air Force v. Rose*,[186] the Court considered the potential effects of cadets being stigmatized if it were disclosed they cheated; in *Department of State v. Washington Post*,[187] the Court considered the speculative harm that might have befallen the two Iranian officials whose U.S. passport information was requested; and in *Department of Justice v. Reporters Committee for Freedom of the Press*,[188] the Court noted that comprehensive FBI rap sheets contained records of arrests that never led to indictments, charges that were dropped, and trials that resulted in acquittals, and thus could be prejudicial.

Ray involved a request for the identities of Haitian refugees who had fled to the United States, but were later deported to Haiti.[189] The Court's decision in *Ray* remains the only opinion to date that explicitly addresses the derivative uses issue.[190] In *Ray*, a unanimous Supreme Court held that Exemption 6 prohibited disclosure of the identities of Haitian refugees who had been intercepted at sea, denied political asylum, and returned to Haiti against their will by the U.S. government.[191] Relying on the central-purpose doctrine from *Reporters Committee*, the Court concluded that mere disclosure of the refugees' identities would not shed light on official agency action.[192] Furthermore, the *Ray* Court explicitly declined to decide the derivative uses and secondary effects issue on the public-interest side of the balance even though it considered secondary effects of disclosure on the privacy side.[193]

In *Ray*, the FOIA requester was a lawyer representing undocumented Haitian immigrants in Florida seeking political asylum in the United States. In immigration proceedings, the lawyer alleged that the Haitian government would retaliate against his clients if they were deported and returned there.[194] The State Department claimed these fears were unfounded because it had obtained a promise by the Haitian government to not prosecute or harass returnees.[195]

The State Department said it had monitored Haitian compliance for more than three years by interviewing returnees after their return to Haiti.[196] To verify this, the

---

[186] 425 U.S. 352 (1976).

[187] 456 U.S. 595 (1982).

[188] 489 U.S. 749 (1989).

[189] *See Ray*, 502 U.S. at 164.

[190] *Id.* For a detailed discussion of the *Ray* case, including its factual background and U.S. interdiction policy, see generally Zimmerman, *supra* note 77.

[191] *Ray*, 502 U.S. at 170–71, 179.

[192] *Id.* at 177–79.

[193] *Id.*

[194] *See id.* at 168.

[195] *Id.* at 167–68.

[196] *Id.* at 168–69. The State Department claimed it had interviewed more than 1,000 returnees, which it said represented almost twenty-five percent of the total number of returnees. *Id.* at 169 n.4. The State Department said that only two of the interviewed returnees reported any mistreatment, and it did not consider either report serious. *Id.* at 168.

immigrants' lawyer filed a FOIA request for official documentation on the State Department's monitoring efforts, including interview transcripts. The State Department, which had promised the interviewees confidentiality to protect them from retaliation by the Haitian government, produced a summary of its interviews and findings, with all identifying information redacted.[197] The lawyer sued in federal district court in Florida seeking release of the redacted information so that he could check the veracity of the State Department summaries with his own follow-up interviews.[198]

The U.S. District Court for the Southern District of Florida ordered production of the redacted information and ruled that the public interest in the "safe relocation of returned Haitians" outweighed any invasion of the personal privacy arising from the "mere act of disclosure of names and addresses."[199] The judge characterized the privacy interest as speculative and *de minimis*.[200] On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed, but rejected the district court's characterization of the privacy interest as *de minimis*.[201]

The Eleventh Circuit said the Haitian returnees had "significant privacy interests at stake" because the State Department had promised them anonymity and the requester admittedly intended to contact them.[202] However, the appeals court ruled in favor of access to the requested information based on what it called a "weightier public interest" in knowing whether the U.S. government was adequately monitoring the Haitian government and truthfully reporting these efforts.[203] Using a derivative-uses analysis on the public interest side, the appeals court said the redacted information would provide the means to locate returnees and conduct interviews.[204]

However, the Supreme Court, in an opinion written by Justice Stevens, reversed the Eleventh Circuit and ruled that disclosure of the redacted information "would

---

197 *See id.* at 168–69.

198 Ray v. Dep't of Justice, 725 F. Supp. 502 (S.D.Fla. 1989).

199 *Id.* at 505.

200 *Id.*

201 *See* Ray v. Dep't of Justice, 908 F.2d 1549, 1554–55 (11th Cir. 1990).

202 *See id.* at 1554.

203 *See id.* at 1555. The Eleventh Circuit wrote:

> However, the [requesters] . . . seek the information in order to learn whether the United States government is adequately monitoring Haiti's compliance with its obligation not to persecute returnees and to learn whether our government is honest to the public about Haiti's treatment of returnees. They dispute the view expressed publicly by some government officials that Haiti is adhering to its promise not to punish returnees, and they seek information that will assist them in testing the accuracy of that information. We consider these to be matters of great public interest significant enough to outweigh the privacy interests of the Haitian returnees.

204 *See id.* at 1555–56.

constitute a clearly unwarranted invasion of personal privacy" under Exemption 6.[205] The Court said the privacy interest in nondisclosure was compelling because the requester intended to contact the refugees, and disclosure of their names might lead to their embarrassment and to official retaliation against them by the Haitian government.[206] Stevens wrote: "How significant the danger of mistreatment may now be is, of course, impossible to measure, but the privacy interest in protecting these individuals from any retaliatory action that might result from a renewed interest in their aborted attempt to emigrate must be given great weight."[207] Stevens thus seemed willing to give "great weight" to the privacy interest in nondisclosure based on speculation about potential derivative uses and secondary effects of disclosure. On the other hand, when it came to considering uses and effects on the public interest side of the balance — i.e., the potential harms that may befall the Haitians if the government's claims are not confirmed — the Court sidestepped the issue by stating, "Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy. Accordingly, we need not address the question whether a 'derivative use' theory would ever justify release of information about private individuals."[208]

In weighing the public interest in disclosure, the *Ray* Court reiterated the central-purpose doctrine from *Reporters Committee* and said public scrutiny of official agency action was the only FOIA-based consideration on that count.[209] The Court agreed with the requester that determining whether the State Department had adequately monitored the Haitian government's treatment of returnees was indeed a FOIA-related public interest. However, the Court concluded that the redacted summaries were sufficiently adequate for that purpose.[210] Stevens said that releasing the names of the refugees would not provide additional information about State Department actions and, therefore, met the "clearly unwarranted" standard of Exemption 6.[211]

---

[205] *Ray*, 502 U.S. at 170–71, 173.

[206] *Id.* at 175–77, 179. The Court also relied on the government's promise not to identify the interviewees and said that disclosure would publicly identify the returnees — now living in Haiti — as having cooperated with a foreign government in monitoring efforts aimed at their own government. *Id.* at 176.

[207] *Id.* at 176–77 (emphasis added) ("[Disclosure] would publicly identify the interviewees as people who cooperated with a State Department investigation of the Haitian Government's compliance with its promise to the United States Government not to persecute the returnees.").

[208] *See id.* at 179.

[209] *See id.* at 178 (citing Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)) (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976)).

[210] *See id.* at 178.

[211] *See id.*

The *Ray* majority explicitly acknowledged FOIA requester's derivative-uses argument on the public-interest side of the balance.[212] Stevens pointed out that the requester was trying to establish a FOIA-related public interest based on the "hope" that the redacted information could be used as a link to discover information beyond the official summaries, primarily through follow-up interviews with the refugees named in the records.[213] However, he characterized this potential public benefit as "hypothetical" and insufficient to outweigh the refugees' privacy interests in nondisclosure.[214] Stevens said there was no evidence to suggest that additional interviews would yield relevant information beyond the State Department summaries.[215] Furthermore, Stevens said there was no evidence that cast doubt on the validity of the summaries themselves.[216] On the latter point, he wrote:

> We generally accord Government records and official conduct a *presumption of legitimacy*. If a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information. *What sort of evidence of official misconduct might be sufficient to identify a genuine public interest in disclosure is a matter that we need not address in this case.*[217]

The Court thus created a rebuttable presumption of legitimacy in the requested records, meaning that the records are presumed to be accurate and correct. In other words, if, according to the records, U.S. officials said Haitians were interviewed to make sure they were not harassed by the Haitian government, then there is no FOIA-related public interest in the records for the purpose of confirming the U.S. government's statements; the records are presumptively legitimate, barring evidence to the contrary. The Court did not, however, provide guidance on the amount or type of evidence a requester would need to show in order to overcome that presumption.

The government had urged the *Ray* Court to categorically ban consideration of derivative uses when weighing the public interest in disclosure.[218] The majority

---

[212] *Id.*

[213] *Id.*

[214] *Ray*, 502 U.S. at 179.

[215] *See id.* at 178–79.

[216] *See id.* at 179 ("We are also unmoved by respondents' asserted interest in ascertaining the veracity of the interview reports. There is not a scintilla of evidence either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports.").

[217] *Id.* (emphasis added).

[218] *Id.* at 178. In his concurring opinion, Justice Scalia said the derivative-use issue had been "vigorously disputed" by the parties. *See id.* at 180 (Scalia, J., concurring).

refused and found such a "rigid rule" unnecessary under the facts of the case.[219] In a concurring opinion, Justice Antonin Scalia disagreed on this point, and said the Court should have banned consideration of derivative uses when weighing *either* the public interest in disclosure or the individual privacy interest in secrecy.[220]

Justice Scalia pointed out that the *Ray* majority had in fact considered derivative uses and secondary effects on the privacy side of the balance while explicitly refusing to do the same on the public-interest side, and he criticized this approach, as have subsequent commentators.[221] Scalia said that in weighing the refugees' privacy interests, the majority had explicitly considered the *possibility* that disclosure would bring additional contacts upon the returnees, including interview attempts by lawyers and retaliatory actions by the Haitian government.[222] Scalia concluded that such speculation on the privacy side was unnecessary because the redacted information was inherently private on its face.[223] He wrote:

> [E]ach of the unredacted documents requested . . . would disclose that a particular person had agreed, under a pledge of confidentiality, to report to a foreign power concerning the conduct of his own government. This is information that a person would ordinarily not wish to be known about himself — and thus constitutes an invasion of personal privacy.[224]

On the public-interest side, Scalia agreed with the majority that disclosure of the redacted names would not further illuminate official State Department activity. He said there was "nothing" on the public-interest side in support of access[225] and,

---

[219] *Id.* at 178–79.

[220] *Id.* at 179–82 (emphasis added) (Scalia, J., concurring). Eric J. Sinrod, the lawyer for FOIA requesters in *Ray*, subsequently criticized such a categorical rule as creating an "irrebuttable presumption of nondisclosure." *See* Sinrod, *supra* note 26, at 229–31. He argued that courts should consider derivative uses and secondary effects when evaluating both the individual privacy interest in nondisclosure and the public interest in access. *See id.* at 227–31.

[221] *See id.* at 502 U.S. at 181 ("Since derivative use on the public-benefits side, and derivative use on the personal-privacy side must surely go together (there is no plausible reason to allow it for the one and bar it for the other), the [majority] should have been consistent"); *see also* Amy McDonald, Case Comment, 26 SUFFOLK U. L. REV. 201, 208, 208 n.38 (1992) (noting the *Ray* majority's use of the derivative-use analysis on the privacy side and not the public-interest side and Scalia's concurrence in this regard); Sinrod, *supra* note 26, at 226 (noting by counsel for FOIA requesters in *Ray*, the majority's inconsistent consideration of derivative uses).

[222] *See Ray*, 502 U.S. at 177–79.

[223] *Id.* at 181.

[224] *Id.* (comparing *Wash. Post*, 456 U.S. at 595).

[225] *Id.*; *see also* Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines over Public Information Law*, 45 Duke L.J. 1249, 1260–61 (1996) (stating that the *Ray* majority effectively precluded consideration of derivative uses on the public interest side by refusing

therefore, disclosure was "clearly unwarranted."[226]

The *Ray* opinion is significant for several reasons. First, it reaffirmed the Court's commitment to the central-purpose doctrine from *Reporters Committee*. Second, the *Ray* Court recognized the important role of derivative uses and secondary effects when balancing access and privacy interests. However, the opinion left undecided the issue of what kind of evidence would be sufficient to invoke a derivative-use analysis when weighing the public interest in access. At a minimum, the opinion suggests that unsupported assertions and speculation about public benefits of disclosure are insufficient. In his *Ray* concurrence, Scalia concluded that the majority had placed a great deal of weight in speculative scenarios when evaluating the refugees' privacy interests.[227] Third, the *Ray* opinion created an unprecedented "presumption of legitimacy" for requested government records in FOIA privacy-exemption cases.[228] Arguably, such a presumption places a substantial burden on FOIA requesters to proffer evidence that will demonstrate a convincing need to investigate or verify government action. But the *Ray* Court did not describe the type or amount of evidence that is sufficient to rebut the presumption of legitimacy for government records.[229] This issue remains unresolved.

IV. SUBSEQUENT PRIVACY EXEMPTION CASES

Since issuing the *Ray* opinion, the Supreme Court has decided two FOIA privacy-exemption cases: *Department of Defense v. Federal Labor Relations Authority (FLRA)*[230] in 1994, and *Bibles v. Oregon Natural Desert Association*[231]

---

to consider the purpose for which the request for the information had been made).

[226] *See* 502 U.S. at 181–82.

[227] *See id.* at 177–79.

[228] *See id.* at 179.

[229] In this regard, the *Ray* opinion has been criticized for giving federal agencies too much discretion to withhold significant information from the public. *See* Zimmerman, *supra* note 77, at 414 ("The *Ray* opinion represents a considerable amount of deference toward the United States Government's interest in nondisclosure of significant information") (citation omitted). More specifically, the opinion has been criticized for deflating the whole idea of open government by creating a "'presumption of legitimacy' concerning the veracity of government reports" that has the "potential to further distort the balancing process mandated under Exemption 6." *Id.* at 414–15 (citation omitted).

[230] 510 U.S. 487 (1994). For a discussion of this case and the history of the conflict among the federal appellate courts leading up to the decision, see William F. Kullman, *Right of Privacy: Whether the Public Interest in Collective Bargaining Outweighs Federal Employees' Privacy Interests in Their Homes and Occupations*, 66 TEMP. L. REV. 343 (1993).

[231] 519 U.S. 355 (1997). At the time of this article, the Supreme Court was scheduled to

in 1997. Both the *FLRA* and *Bibles* opinions reiterate the Court's steadfast commitment to the central-purpose doctrine in FOIA privacy-exemptions cases. These cases also reflect the Court's implicit consideration of derivative uses and secondary effects of disclosure when considering individual privacy interests in nondisclosure.

A. Department of Defense v. Federal Labor Relations Authority (FLRA) *(1994)*

In *Department of Defense v. Federal Labor Relations Authority*,[232] the Supreme Court held in 1994 that disclosure of federal employees' home addresses to labor unions that wanted to send them direct mail would constitute a "clearly unwarranted invasion of personal privacy" under Exemption 6.[233] In doing so, the *FLRA* Court, in effect, followed the approach of the *Ray* majority and considered derivative uses and secondary effects of disclosure on the privacy side, but not on the access side of the balance.

The case arose when two labor unions asked federal agencies to produce names and addresses for agency employees in bargaining units represented by the unions.[234] In response, the agencies produced names and work locations, but not home addresses. The unions already had the home addresses of its members and of nonunion employees who had volunteered information to union representatives. The focus of the dispute became the home addresses of nonunion employees who had not given their home addresses to union representatives.[235]

The unions filed a complaint with the FLRA, which governs union-employer relations, and the FLRA ordered disclosure. On appeal, the U.S. Court of Appeals for the Fifth Circuit also ordered disclosure concluding that the "public interest in collective bargaining outweigh[ed] the employees' private interest in nondisclosure

---

hear oral arguments in an Exemption 7(C) case involving a FOIA request for the death scene photographs of Vincent J. Foster, who at the time of his death in 1993, was Deputy Counsel to President Bill Clinton. *See* Office of Indep. Counsel v. Favish, 2003 WL 2011010 (U.S. May 5, 2003). In addition, the Court had agreed to review another Exemption 7(C) case involving a city's FOIA request for information in federal weapons databases. *See* Dep't of Treasury v. City of Chicago, 537 U.S. 1018 (2002). However, the Supreme Court subsequently decided not to hear the case and instead remanded it to the lower court for further consideration in light of pending congressional legislation. *See* Dep't of Justice v. City of Chicago, 123 S.Ct. 1352 (2003). At the time of this article, the case remained pending on remand.

[232] 510 U.S. 487 (1994).

[233] *Id.* at 489.

[234] *See id.* at 491. The agencies involved in the request were the Department of Defense, Department of the Navy, Navy CBC Exchange, Construction Battalion Center in Gulfport, Mississippi, and the Department of Defense, Army and Air Force Exchange, Dallas, Texas. *Id.* at n.2.

[235] *See id.* at 490, 495 n.5.

of their names and addresses."[236] The Fifth Circuit reasoned that while disclosure might lead to additional mailings to the employees, the impact on their privacy would be insignificant because they could simply place unwanted mailings in the so-called "circular file."[237] The court noted that individuals commonly have their names listed in telephone directories and commercial mailing lists.[238]

The Supreme Court reversed on appeal. Writing for the majority, Justice Clarence Thomas said the sole issue was "whether disclosure of the home addresses 'would constitute a clearly unwarranted invasion of personal privacy'" under Exemption 6 of FOIA.[239] Thomas restated the composite framework from *Rose* and *Reporters Committee* as requiring a balance between the public interest in disclosure — as defined by the central-purpose doctrine — and the privacy interest in nondisclosure, without considering the requester's identity or intended purpose.[240] Within this framework, the *FLRA* Court first considered whether there was a "FOIA-related public interest" in disclosure of the employees' addresses.[241] Writing for the Court, Thomas said disclosure would not sufficiently illuminate official agency actions,[242] and that any FOIA-related public interest in access was thus "negligible"[243] and "virtually nonexistent."[244] Thomas acknowledged that disclosure would provide a means for labor unions to communicate by direct mail with nonunion employees, but rejected this as a FOIA-related public interest under the central-purpose doctrine.[245]

---

[236] *See* Fed. Labor Relations Auth. v. Dep't of Def., 975 F.2d 1105, 1116 (5th Cir. 1992). For law review case comment treatment of the opinion of the Fifth Circuit, see generally Karl J. Sanders, Casenote, FOIA v. Federal Sector Labor Law: *Which "Public Interest" Prevails?* 62 U. CIN. L. REV. 787 (1993).

[237] *See FLRA*, 975 F.2d at 1110–11 (quoting Dep't of the Air Force v. FLRA, 838 F.2d 229, 232 (7th Cir. 1988), *cert. denied* 488 U.S. 880 (1988)).

[238] *Id.*

[239] *FLRA*, 510 U.S. at 494–95. Actually, the exemption issue in *FLRA* was more complicated than is necessary to discuss in the text. The agencies argued for nondisclosure under the provisions of the Privacy Act, 5 U.S.C. § 552a(b)(2) (1988), which prohibits federal agencies from disclosing information about an individual absent his or her written consent. However, the Court noted the Privacy Act by its terms does not apply to information that must be disclosed under FOIA. *Id.* at 493–95. The Court noted that FOIA had its own privacy exemptions that apply to FOIA information, leading to the necessity of a privacy analysis under those exemptions, not the Privacy Act. The Court chided Congress for creating this "convoluted path of statutory references." *Id.* at 494–95.

[240] *Id.* at 495–96 (citing Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771, 773, 776 (1989); Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976)) (citations omitted).

[241] *Id.* at 497–500.

[242] *FLRA*, 510 U.S. at 498–99.

[243] *Id.* at 497.

[244] *Id.* at 500.

[245] *Id.* at 498–99.

With practically no weight given to the public interest side of the balance, the Court said that even a "very slight" or "not insubstantial" privacy interest would be sufficient to warrant nondisclosure.[246] Thomas said employees who had neither opted to join a union nor provided information to union representatives had at least a "nontrivial privacy interest in nondisclosure."[247] Using derivative-uses and secondary-effects language, Thomas said employees had an interest in "avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure."[248] He said it was irrelevant that most addresses are available in public sources such as telephone directories and voter registration records.[249] Invoking the rationale from *Reporters Committee*, Thomas wrote: "The privacy interest protected by Exemption 6 'encompasses the individual's *control of information* concerning his or her person.' An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."[250] Thus, by framing FOIA-related privacy interest in this fashion — as a right of individuals to control how their personal information is *used* — the Court considered derivative uses on the privacy side of the balance when weighing this right against disclosure in FOIA privacy-exemption cases.[251]

A University of Cincinnati casenote suggested that the facts of the *FLRA* case made for an especially strong argument in favor of considering derivative uses and secondary effects on the public-interest side of the balance.[252] The author

---

[246] *Id.* at 500.

[247] *Id.* at 501.

[248] *Id.* at 501. Thomas speculated: "Perhaps some of these individuals have failed to join the union that represents them due to lack of familiarity with the union of its services. Others may be opposed to their union or to unionism in general on practical or ideological grounds." *Id.* at 500.

[249] *Id.* at 500.

[250] *Id.* (quoting *Reporters Comm.*, 489 U.S. at 763) (emphasis added).

[251] In a concurring opinion, Justice Ruth Bader Ginsburg disagreed with the majority and argued that indeed there was a direct governing interest in the disclosure of union members' contact information because the FLRA had mandated that private-sector unions have access to employee addresses and phone numbers. *See FLRA*, 510 U.S. at 506 (Ginsburg, J., concurring). Ginsburg observed that Congress recognized a significant public interest in furthering collective bargaining when it enacted the Federal Service Labor-Management Relations statute, which "unquestionably intended to strengthen the position of federal unions." *Id.* at 506 (quoting Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth., 464 U.S. 89, 107 (1983)). Noting that lower courts have held that private-sector unions are entitled to receive employee home-address lists from employers, she thus reasoned: "It is surely doubtful that, in the very statute bolstering federal-sector unions, Congress aimed to deny those unions information their private-sector counterparts routinely receive." *FLRA*, 510 U.S. at 506 (Ginsburg, J., concurring) (citing Fed. Labor Relations Auth. v. Dep't of Treasury, Fin. Mgmt. Serv., 884 F.2d 1446, 1457–61 (D.C. Cir. 1989)).

[252] *See* Sanders, *supra* note 236, at 815–16.

postulated that union contact with nonunion federal employees outside the workplace "would likely produce more candid discussions about employer-employee relations," and would facilitate an examination of government operations within the scope of the central-purpose doctrine.[253] Thus, he concluded that the derivative-uses analysis was "particularly well-suited" to evaluate the public interest in disclosure of the requested names and addresses in *FLRA*.[254] In a case decided by the Supreme Court in 1997, the Court had the opportunity to take such an approach, but flatly refused and chastised the U.S. Court of Appeals for the Ninth Circuit for doing so.

B. Bibles v. Oregon Natural Desert Ass'n *(1997)*

In 1997, the Supreme Court continued the trend of deciding derivative-uses issues in favor of privacy in FOIA privacy-exemption cases. In *Bibles v. Oregon Natural Desert Association*,[255] the Supreme Court decisively reaffirmed its *FLRA* ruling and the central-purpose doctrine from *Reporters Committee*. The Court reversed the decision by the Ninth Circuit, which had held that Exemption 6 did not preclude disclosure of a mailing list used by the Oregon office of the U.S. Bureau of Land Management (BLM).[256] The Oregon Natural Desert Association (ONDA), a nonprofit environmental group, had made a FOIA request for the mailing list in order to send its own literature to individuals who received mailings from the BLM about government plans for the future of the Oregon high desert.[257] The environmental group described the BLM's literature as antienvironmental "propaganda."[258] After the BLM refused the request on Exemption 6 grounds, ONDA brought a FOIA suit in federal district court in Oregon, and the district judge ordered disclosure.[259]

The Ninth Circuit affirmed. Invoking derivative-uses language, the Ninth Circuit concluded there was a "substantial public interest in knowing to whom the government is directing information on public issues" so that groups with other viewpoints could communicate with those individuals as well.[260] The court reasoned this would act as a check on the "self-interest" of government agencies in

---

[253] *Id.* at 814 (citations omitted).

[254] *Id.* at 815.

[255] Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 356 (1997) (per curiam).

[256] *See* Or. Natural Desert Ass'n v. Bibles, 83 F.3d 1168, 1172 (9th Cir. 1996).

[257] *Id.* at 1169.

[258] *Id.* at 1169–70, 1171.

[259] *Id.* at 1169–70. The proceedings below also included an appeal by the ONDA to the U.S. Department of the Interior. The Department had affirmed the denial by BLM as to the names and addresses of private individuals, but ordered BLM to produce the names of organizations on its mailing list. This then prompted FOIA lawsuit by the ONDA. *See id.*

[260] *Id.* at 1171.

presenting themselves only favorably.[261] On the privacy side, the Ninth Circuit also considered derivative uses and secondary effects, and found only a "minimal" privacy interest in nondisclosure.[262] In doing so, the court pointed out that individuals on the BLM mailing list already had indicated their desire to receive mailings on the issues that ONDA wanted to address.[263] As the district judge below had stated, these individuals "have already opened up their mailboxes to the receipt of information about BLM activities."[264] Based on this analysis, the appeals court concluded that the public interest in disclosure outweighed the privacy interest in nondisclosure.[265]

In his dissent, Ninth Circuit Judge Fernandez said the majority had "practically ignore[d]" the Supreme Court's holdings in *Reporters Committee* and *FLRA*.[266] Fernandez said the majority was allowing "curiosity and gain to trump privacy."[267] He said that ONDA wanted the BLM mailing list to contact individuals on the list, and concluded that this would not sufficiently illuminate agency action under the central-purpose doctrine.[268] In addition, he said the BLM list was valuable to ONDA because it contained the names and addresses of individuals who had expressed an interest in environmental land issues and thus were likely prospects

---

[261] *Id.*

[262] *Id.* at 1171–72 (citing Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 501 (1994)) (noting that the Supreme Court in *FLRA* had characterized the privacy interest involved in the receipt of unsolicited mailings as merely "nontrivial"). The Ninth Circuit distinguished the facts in *FLRA*, noting disclosure of federal employees' names and addresses in that case might have resulted in their being contacted at home, in person, or by union representatives recruiting for members, which it said was not an issue under the facts in *Bibles*. *Id.* at 1172 ("[R]ecipients of BLM news are unlikely to be targeted for the same type of aggressive, high-stakes personal contact that the [Supreme] Court was wary of in [*FLRA*].").

[263] *Id.*

[264] *Id.* at 1170 (quoting the federal district judge below).

[265] *Id.* at 1172 (stating that "[b]ecause the privacy interests at stake are minimal, and because there is a significant public interest in knowing with whom the government has chosen to communicate and in providing those persons with additional information, we conclude disclosure would not result in a clearly unwarranted invasion of privacy under Exemption 6").

[266] *Id.* at 1172 (Fernandez, J., dissenting).

[267] *Id.*

[268] *Id.* Judge Fernandez wrote:

> That the BLM is sending out mailers is a fact well known, and if any person wishes to know what is in the mailers he need only ask for them. However, it tells us nothing about government when we discover that the mailer went to John Doe in New York or Billy Rowe in Los Angeles. ONDA does not really want to check on the government; it wants to contact the people on the list.

Id.

for ONDA to target with its own mailings.[269] He said that the individuals on the BLM list had a privacy interest in avoiding disclosure of their interests.[270]

In a two-paragraph *per curiam* opinion, the Supreme Court reversed and flatly rejected the Ninth Circuit's characterization of the public interest in disclosure of the BLM mailing list. Summarizing from *FLRA* and *Reporters Committee*, the Court reiterated that illuminating government action was the *only* FOIA-related public interest to be considered in FOIA privacy-exemption cases,[271] and that the identity and purpose of the requester must be ignored in the balancing analysis.[272] The Court concluded that the Ninth Circuit had deviated from these principles by finding a FOIA-related public interest in providing alternative viewpoints to recipients of official government propaganda, and by considering the intent of the ONDA to use the BLM mailing list for that purpose.[273]

In *Bibles*, the Supreme Court did not address the privacy analysis of the Ninth Circuit. As discussed above, the Ninth Circuit had called the privacy interest in nondisclosure of the BLM mailing list "minimal."[274] In doing so, the appeals court clearly used a derivative-uses analysis and considered the ONDA's intent to send mailings to individuals on the BLM mailing list. Because the Supreme Court rejected the Ninth Circuit's public interest analysis and left that side of the balance devoid of weight, even such a minimal privacy interest ultimately was sufficient to justify nondisclosure in the eyes of the Supreme Court.[275]

---

[269] *Id.* On this point, Judge Fernandez wrote:

> [A] list does convey more information about the recipient than a mere name and address. The proof of the pudding is in the eating, and ONDA desires this pudding so that it can feed upon information about the people who have allowed their names to be put on the list . . . the list will at least tell others that these are people who are interested in what happens to land that is controlled by the policies and doings of the BLM. If all somebody wanted were a bunch of names and addresses that conveyed no information about the individuals on the list, that person could do a random selection from the telephone book.

Id.

[270] *Id.* at 1172–73.

[271] Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 355–56 (1997) (citing Dep't of Def. v. FLRA, 510 U.S. 487, 497 (1994)); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989).

[272] *Id.* at 356 (citing *FLRA*, 510 U.S. at 496; *Reporters Comm.*, 489 U.S. at 771).

[273] *Id.* at 355.

[274] *See* Or. Natural Desert Ass'n v. Bibles, 83 F.3d 1168, 1171–72 (9th Cir. 1996) (dissenting opinion) (citing *FLRA*, 510 U.S. at 501).

[275] On remand, the Ninth Circuit in turn remanded to the federal district court with instructions to dismiss ONDA's FOIA action. *See* Or. Natural Desert Ass'n v. Bibles, 125 F.3d 1282 (9th Cir. 1997).

C. *Impact of* FLRA *and* Bibles

In deciding both *FLRA* and *Bibles*, the Supreme Court continued to apply the central-purpose doctrine to severely constrict the scope of FOIA-related public interest in disclosure when balancing that interest against the individual privacy interest in nondisclosure.[276] This approach clearly allowed minimal privacy interests to tip the scales in favor of nondisclosure in both of these cases' situations. Indeed, the Supreme Court has never ruled in favor of disclosure of personally-identifiable information in a FOIA privacy-exemption case. The Court seems unlikely to do so as long as the FOIA-related privacy interest is defined as a broad individual right to control the release and use of one's personal information and the FOIA-related disclosure interest is constricted by the central-purpose doctrine.

Additionally, the *FLRA* and *Bibles* cases continued the Supreme Court's trend of broadly considering derivative uses and secondary effects on the privacy side of the balance but not on the side of disclosure in FOIA privacy-exemption cases.[277] The Court has repeated this practice even though it has never directly ruled on the propriety of considering derivative uses and secondary effects on *either* side of the FOIA balance.[278] To date, the Supreme Court has not explicitly resolved the derivative uses and secondary effects issues left undecided after *Ray*. Arguably, *Ray*, *FLRA*, and *Bibles* seem to eliminate much hope that the Court will endorse it on the public-interest side.[279] In other words, it remains unclear whether derivative uses and secondary effects may ever be properly considered on the public-interest side in FOIA privacy-exemption cases, and, if so, under what circumstances. Meanwhile, they are — while unacknowledged — being used on the privacy side of the balance.

D. *Recent Developments in FOIA Privacy Jurisprudence*

After *Bibles*, the central-purpose doctrine and the issue of derivative uses has continued to arise in FOIA privacy-exemption cases decided by the lower federal

---

[276] *Cf.* Beall, *supra* note 225, at 1258 (stating that after the Court's ruling in *FLRA*, discussions of the continued validity of the central-purpose doctrine are "virtually academic").

[277] *See id.* at 1284 (stating that the Court has yet "to reveal explicitly what has been implicit for years — that the Court is hostile to arguments favoring broad access to government information").

[278] *See id.* (stating that since *FLRA*, the "Supreme Court has not yet been forced to announce explicitly its position with respect to the derivative-use rationale").

[279] *See* BeVier, *supra* note 129, at 494. BeVier concluded that the Court's analysis in *FLRA* "rendered implausible the prospect of any future claim that derivative uses of disclosure information would prove weighty enough to compel disclosure" in FOIA privacy exemption cases and effectively "clos[ed] off the 'derivative use' avenue" on the public interest side of the balance. *Id.*

courts. These matters are likely to arise again should the Supreme Court review another FOIA privacy-exemption case in the future. Two recent cases decided by federal courts of appeal are relevant for discussion here.

In *City of Chicago v. Department of Treasury*,[280] the U.S. Court of Appeals for the Seventh Circuit held in 2002 that the Bureau of Alcohol, Tobacco, and Firearms (ATF) could not deny a FOIA request for federal gun records based on either of the two FOIA privacy exemptions.[281] Subsequently, the Supreme Court vacated the judgment of the Seventh Circuit in the case, and remanded for further consideration.[282] However, the Seventh Circuit's opinion is important because the appeals court used a derivative-use analysis that seemed to expand FOIA-related public interest in disclosure beyond the dictates of the central-purpose doctrine set out in *Reporters Committee*.

In *City of Chicago*, the city used FOIA to request information in two databases from the ATF in connection with the city's civil lawsuit against firearm manufacturers.[283] In the civil lawsuit, the city alleged that the marketing and distribution activities of these manufacturers had resulted in the widespread possession and use of illegal firearms in the city.[284] In furtherance of these claims, the city wanted computerized ATF records that contained the names and addresses of manufacturers, dealers, purchasers and possessors of registered firearms that had been reportedly used in crimes.[285] In addition, the city wanted computerized ATF records that contained the names and addresses of unlicensed individuals who reportedly had purchased more than one firearm from the same dealer within a five-

---

[280] 287 F.3d 628 (7th Cir. 2002).

[281] *See id.* at 635–37, *vacated by* Dep't of Justice v. City of Chicago, 123 S. Ct. 1352 (2003). In addition, the Seventh Circuit ruled that the records in question could not be withheld under Exemption 7 of FOIA, which protects "law enforcement records" if their release "could reasonably be expected to interfere with enforcement proceedings." *See id.* at 633–36. On this ground, the Court ruled that the ATF had not proven that the release of any of the requested information would interfere with pending law enforcement proceedings. *Id.* at 635.

[282] *See* Dep't of Justice v. City of Chicago, 123 S.Ct. 1352 (2003).

[283] *See City of Chicago*, 287 F.3d at 631–32. The ATF is a criminal and regulatory enforcement agency within the Treasury Department. *See id.* at 631. Under federal gun laws, the ATF compels firearms manufacturers, dealers and collectors to maintain records of certain firearms transactions and make these records available to the ATF, which compiles the information into computerized databases. *See id.*

[284] *See id.* The city sought injunctive relief and monetary damages. *See id.*

[285] This database, called the "Trace Database," comprises the names and addresses of the manufacturers, dealers, distributors, purchasers and possessors of firearms that any law enforcement agency has identified by serial number and reported to the ATF as having been involved in a crime. *See id.* at 632.

day period.[286] The ATF denied the FOIA request for this information on personal privacy grounds under Exemptions 6 and 7(C).[287]

The Seventh Circuit ruled that Exemption 6 did not apply to the gun registry database because the information did not fit within the description "personnel and medical files and similar files."[288] Thus, the court did not find it necessary to balance the FOIA-related public interest in disclosure with the individual privacy interest in nondisclosure under Exemption 6.[289] Under Exemption 7(C), however, which applies to "law enforcement records," the court found it necessary to balance these interests.[290] The court concluded that firearms transactions were not private transactions because gun purchasers were on notice that their names and addresses were reported to the ATF and state and local authorities.[291] The court therefore reasoned that there was no privacy interest in nondisclosure of the ATF records.

However, the court concluded, the public interest in disclosure of the ATF records was "compelling."[292] Using a derivative-uses analysis, the court found that disclosure of the records would "facilitate the analysis of national patterns of gun trafficking" and would "shed light on ATF's efficiency in performing its duties."[293] The court took the position that its public interest rationale was sufficient to meet the central-purpose test of *Reporters Committee*.[294] The Supreme Court granted *certiorari* in the case[295] but subsequently vacated the judgment and remanded the case to the Seventh Circuit for reconsideration in light of congressional legislation enacted in 2003 that bans the ATF from using its appropriated funds to comply with FOIA requests for the types of records that the City of Chicago was seeking in the case.[296] As pointed out by the Department of Justice in an official release on the

---

[286] *See id.* at 631–32. Under federal gun laws, gun dealers were required to report this information to the ATF, which compiled the information into a computerized database known as the "Multiple Sales Database." *See id.* at 632.

[287] *See id.* at 635–37.

[288] *See id.* at 635–36. The court concluded that the requested ATF records clearly were not "medical and personnel files" and were not close enough to those types of files to be characterized as "similar files." *See id.* Because this definitional threshold was not met, the court found it unnecessary to even consider whether release of the records "would result in a clearly unwarranted invasion of personal privacy" under Exemption 6. *See id.* at 635. In addition, the court pointed out that other courts had held that that there is no individual privacy interest in the purchase of a firearm. *See id.* at 636 (citing Ctr. to Prevent Handgun Violence v. Dep't of Treasury, 981 F. Supp. 20, 23 (D.D.C. 1997)).

[289] *Id.* at 635–36.

[290] *Id.* at 637.

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] *Id.* (citing Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)).

[295] *See* Dep't of Treasury v. City of Chicago, 537 U.S. 1018 (2002).

[296] *See id.* at 537 U.S. at 1018 (referring specifically to Division J, Title 6, § 644, of the

case, the congressional legislation was passed just two weeks before the Supreme Court was scheduled to hear oral arguments.[297] Whether the Supreme Court would revisit the *City of Chicago* case after the Seventh Circuit deals with the case on remand remained uncertain at the time of this article. Whether the ultimate outcome will shed any light on the issue of how and when derivative-use analyses should apply in FOIA privacy exemption cases also remained to be seen.

At the time of this article, the Supreme Court was scheduled to hear oral arguments in another FOIA privacy-exemption case, this one an Exemption 7(C) case dealing with a lawyer's FOIA request to the Office of the Independent Counsel (OIC) for photographs related to the death of former President Bill Clinton's White House Deputy Counsel, Vincent W. Foster.[298] In the case, attorney Allan J. Favish had used FOIA in January 1997 and requested copies of 150 photographs taken at the death scene and autopsy including various photographs of Foster's body.[299] The National Park Service, FBI, and subcommittees of both the House and Senate all investigated Foster's death and concluded that he had committed suicide by shooting himself with a gun.[300]

Favish, who had represented the group Accuracy in Media (AIM) in an earlier unsuccessful attempt to gain access to some of the same photographs,[301] questioned the agencies' investigations of Foster's death and their ultimate conclusions, and submitted his own FOIA request for photographs.[302] The OIC denied Favish's individual FOIA request under Exemption 7(C), which allows an agency to withhold law enforcement records on personal privacy grounds.[303] Favish filed suit

---

Consolidated Appropriations Resolution, H.R.J. Con. Res. 2, 108th Cong., 1st Sess. (2003)). The joint resolution, which was signed into law by President George W. Bush on February 20, 2003, contains a section that prohibits appropriated funds from being utilized to "take any action based upon any provision [of FOIA]" with regard to certain records including those "provided by Federal, State, local or foreign law enforcement agencies in connection with . . . the tracing of a firearm," and records of multiple gun sales required under sections 923(3) and (7) of Title 44 of the United States Code. H.J. Res. 2, 108th Cong. (2003).

[297] U.S. Dep't of Justice, Supreme Court Vacates and Remands in ATF Database Case (2003), *available at* http://www.usdoj.gov/oip/foiapost/2003foiapost11.htm (last modified Mar. 23, 2003).

[298] Office of the Indep. Counsel v. Favish, 123 S.Ct. 1928 (2003).

[299] *See* Favish v. Office of Indep. Counsel, 217 F.3d 1168, 1170, 1179–81 (9th Cir. 2000).

[300] *See id.* at 1170, 1183.

[301] *See generally* Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120 (D.C. Cir. 1999), *cert. denied,* 529 U.S. 1111 (2000). The Ninth Circuit ruled that Favish was not estopped from making his own FOIA request for the photographs solely by having been involved in the *Accuracy in Media* case. *See Favish*, 217 F.3d at 1171.

[302] *See Favish*, 217 F.3d at 1170.

[303] *Id.* at 1170. The OIC also claimed that the photographs were subject to Exemption 7(A), which allows an agency to withhold law enforcement records when "release could reasonably be expected to interfere with enforcement proceedings." *See id.* (quoting 5 U.S.C. § 552(b)7 (1994)). Ultimately, the OIC abandoned this argument during litigation. *Id.* at

in federal district court, after which the OIC released 118 of the requested photographs and Favish withdrew his request for twenty-one other photographs.[304] Without inspecting the eleven photographs still at issue, the district court ordered the release of one that already had been released to the media and ruled that the other ten could be withheld on privacy grounds.[305]

On appeal, the U.S. Ninth Circuit Court of Appeals ruled that the district court should have inspected the disputed photographs, and reversed and remanded the case with instructions.[306] Quoting from *Reporters Committee*, the Ninth Circuit reminded the district court that the purpose of FOIA is to "shed light 'on an agency's performance of its statutory duties.'"[307] On that point, the appeals court wrote that Favish's purpose was to investigate the conduct of the official investigations of Foster's death and thus concluded that his FOIA request was in "complete conformity" with the purpose of the statute.[308] The appeals court did not indicate how the photographs might aid an investigation of the official inquiries into Foster's death, so the court's rationale on this point remains murky.

On the privacy side of the balance, the Ninth Circuit ruled as a matter of law that Exemption 7(C) could be invoked to protect the personal privacy of Foster's family including his sister, mother, children, and widow.[309] The court

---

1171–72. On appeal, the Ninth Circuit Court of Appeals noted that the "bulk of the photos requested were already in the public domain," and Favish was requesting higher quality copies of those photographs. *Id.* at 1171. The appeals court questioned how "higher quality photographs released to Favish would interfere with law enforcement." Moreover, the Court noted this argument "was not and has not been explained by an agency under a statutory duty to comply promptly with a freedom of information request." *Id.* at 1171–72.

[304] *Id.* at 1170.

[305] *Id.* at 1171. The district court did not conduct an *in camera* review of the ten photographs that it ruled could be withheld under Exemption 7(C) of FOIA. *Id.* at 1174.

[306] *Id.* at 1174.

[307] *Id.* at 1171 (quoting Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772–73 (1989)).

[308] *Id.* at 1172. The appeals court pointed out that Favish was not required to come forward with evidence of official malfeasance in order to justify his FOIA request, although such evidence might weigh on the "urgency" of a request if presented. *Id.* at 1172–73. The appeals court noted that Favish had presented evidence that, if true, justified his suspicions about the official investigations of Foster's death. *Id.* at 1173. However, the court also concluded that it was not required to evaluate the veracity or sufficiency of that evidence in considering Favish's FOIA request. *Id.*

[309] *Id.* at 1173. The Ninth Circuit said that determining "whose personal privacy" is protected by Exemption 7(C) was unclear due to the "imprecision" of the statute. *Id.* The court noted that in previous cases, privacy protection of FOIA had been extended to the families of a deceased president (citing Katz v. Nat'l Archives & Records Admin., 862 F. Supp. 476, 485–86 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995)) and families of astronauts killed in the Challenger disaster (citing N. Y. Times Co. v. Nat'l Aeronautics & Space Admin., 920 F.2d 1002, 1009–10 (D.C. Cir. 1990) and 782 F. Supp. 628 (D.D.C. 1991) (on remand)). The court in the "Challenger" case stated:

acknowledged the existence of 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," and concluded generally that to "violate that memory is to invade the personality of the survivor."[310] In addition, the court suggested that media coverage and scrutiny would constitute an invasion of the zone of familial privacy that includes the memory of a deceased relative.[311]

In addition, the Ninth Circuit tacitly endorsed the consideration of derivative uses and secondary effects on the privacy side of the balance. For instance, the court wrote: "Strictly speaking, it is not 'the production' of the records that would cause the harms suggested by the declaration but their exploitation by the media including publication on the Internet."[312] The court reasoned that the language of

---

> We hold as a matter of law that the personal privacy in [Exemption 7(C)] extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasions of their privacy caused by the released of records made for law enforcement must be balanced against the public purpose to be served by disclosure.

Id.

[310] *Id.* Similarly, in *Accuracy in Media, Inc.v. Nat'l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) the U.S. Court of Appeals, D.C. Circuit, concluded that surviving members of Foster's family had a FOIA-related privacy interest in connection with a FOIA request filed by the AIM for death scene and autopsy photographs, stating that "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." *Id.*

[311] *See Favish*, 217 F.3d at 1173. The Ninth Circuit wrote: "To violate [the memory of a deceased loved one] is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead." *Id.* In *Favish*, Foster's sister had filed a declaration under oath claiming that the release of the requested photographs "would set off another round of intense media scrutiny by the media" and that the family would be the "focus of conceivably unsavory and distasteful media coverage." *Id.*

Similarly, in *Accuracy in Media*, the U.S. Court of Appeals, D.C. Circuit, concluded that surviving members of Foster's family had a FOIA-related privacy interest in connection with a FOIA request filed by AIM for death scene and autopsy photographs. *See Accuracy in Media*, 194 F.3d at 123 (stating that "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"). The district court ruled against access to photographs of Foster's body at the death scene and in autopsy, and the D.C. Circuit affirmed on appeal. *See id.* at 121, 124. The Supreme Court denied *certiorari* and refused to hear the case. *See* Accuracy in Media, Inc. v. Nat'l Park Serv., 529 U.S. 111 (2000). As mentioned in the *Favish* case, the Ninth Circuit ruled that the fact that Favish had represented AIM in the *Accuracy in Media* case involving the access to various Foster death photographs did not estop Favish from pursuing his own individual FOIA request and litigation. *See supra* note 30; *see also Favish*, 217 F.3d at 1171.

[312] *Id.*

the privacy exemption rendered it appropriate to consider the "probable consequences of the release" when considering the privacy side of the equation.[313]

Thus, the appeals court instructed the district court to review the photographs and "balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release."[314] On remand, without much explanation, the district court found that five of the photographs should be released as "probative of the public's right to know" and found that the remaining five photographs should be withheld as intrusions on the "zone of privacy of the survivors."[315] On appeal yet again, the Ninth Circuit upheld the district court, except for withholding access to one of the five photographs that the district court had ordered released.[316] The Supreme Court granted *certiorari* in 2003[317] and thus, will have yet another opportunity to address the issue of when — if ever — derivative uses and secondary effects should be considered in FOIA privacy-exemption cases when considering the public interest in access or the individual interest in privacy, or, as is the recommendation of these authors, both.

V. CONSTITUTIONAL PRIVACY: PERSONAL INFORMATION IN GOVERNMENT DATABASES

In addition to the protection afforded under the two FOIA privacy exemptions,[318] the Supreme Court has recognized an implied and limited constitutional right to informational privacy that holds implications under FOIA for derivative uses of government-held information and the secondary effects of disclosure.[319] This section explores the implied constitutional right of informational privacy in government-held data and draws conclusions that could impact FOIA privacy-exemption cases.

The threads of privacy are woven throughout American jurisprudence. Constitutional scholar Lucas A. Powe, Jr., observed that "[t]he Supreme Court, in fact almost everyone, recognizes a place for secrecy in our society."[320] Although

---

[313] *Id.*; *cf. Accuracy in Media*, 194 F.3d at 123 (noting that Exemption 7(C) protects against "unwarranted 'invasions'" of personal privacy, and that it was the release of the Foster death photos that "triggers a weighing of the public interest against the privacy harm inflicted" and "not the grief or any feeding frenzy of media coverage" that ensues).

[314] *Favish*, 217 F.3d at 1174.

[315] Favish v. Office of the Indep. Counsel, No. CV97-1479 WDK, 2001 WL 770410 (C.D. Cal. Jan. 11, 2001).

[316] Favish v. Office of the Indep. Counsel, No. 01-55487, 37 Fed.Appx. 863, 2002 WL 1263948 (9th Cir. June 6, 2002).

[317] Office of the Indep. Counsel v. Favish, 2003 WL 2011010 (2003).

[318] 5 U.S.C. §§ 552(b)(7), 7(C) (1994).

[319] *See* Whalen v. Roe, 429 U.S. 589 (1977).

[320] LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 197 (1991).

the Constitution does not provide an explicit right of individual privacy, the Supreme Court has said there is an implied right of privacy grounded primarily in the Bill of Rights,[321] and the Fourteenth Amendment's "concept of personal liberty."[322] This implied right of privacy remains largely undefined in Supreme Court jurisprudence, although the Court has said it covers at least two distinct interests.[323]

First, the Court has said that individuals have a constitutionally protected interest in making certain fundamental decisions free from government intrusion — a right of personal autonomy.[324] In a series of cases, the Court has said this interest

---

[321] *See* Griswold v. Connecticut, 381 U.S. 479 (1965). The term "privacy" is not mentioned in the Constitution. Although *Griswold* involves government limitations on personal autonomy, Justice William O. Douglas, who wrote the opinion for the Court, spoke expansively of "zones of privacy" contained within "penumbras" of the Bill of Rights, specifically the first, third, fourth, fifth and ninth amendments: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." *Id.* at 484 (citing Poe v. Ullman, 367 U.S. 497, 516–22 (dissenting opinion)). In 1977, the Court recognized that the constitutionally protected "zone of privacy" included two separate interests: "the interest in independence in making certain kinds of important decisions" and "the individual interest in avoiding disclosure in personal matters." Whalen v. Roe, 429 U.S. 589, 599–610 (1977); *see also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (defining the constitutional right of privacy as "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men").

[322] *Whalen*, 429 U.S. at 599 nn.23–24. The Court in *Whalen* noted that previous opinions had been somewhat unclear on the source of the implied right of constitutional privacy, but that in *Roe v. Wade*, decided in 1973, the Court had already determined that the implied right of constitutional privacy was grounded in the "Fourteenth Amendment's concept of personal liberty." *Id.* (citing Roe v. Wade, 410 U.S. 113, 152–53 (1973)). The *Whalen* decision is discussed more extensively. *See infra* notes 332–56 and accompanying text.

In addition, some scholars have called the Fourth Amendment's prohibition against unreasonable searches and seizures a "zone" of constitutionally protected privacy. *See, e.g.*, RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 120–21 (1992) (referring to this zone of privacy as the right of "seclusion"); *see also* Shevin v. Byron, Harless, Schaffer, Reid & Assocs. 379 So. 2d 633, 636 (Fla. 1980) (citing Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Weeks v. United States, 232 U.S. 383 (1914)). The Supreme Court has pointed out that this Fourth Amendment right is explicit, and it is not treated in this article as a component of the implicit right of constitutional privacy. *See Whalen*, 429 U.S. at 599 n.24. The Fourth Amendment protection against unreasonable government searches and seizures is not directly relevant to this article and, therefore, will not be discussed.

[323] *See Whalen*, 429 U.S. at 599–600.

[324] *Id.* at 599–600 & n.26 (citing Paul v. Davis, 424 U.S. 693, 713 (1976); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Allgeyer v. Louisiana, 165 U.S. 578 (1897)).

covers such decisions as whether to educate one's child publicly or privately,[325] to use contraception,[326] to have an abortion,[327] or to enter into an interracial marriage.[328] About a decade after these cases were first decided, the Supreme Court has said that there is also a second constitutional privacy interest — one that prevents government disclosure of an individual's personal affairs.[329] This is often called the right of informational privacy,[330] and like the right to personal autonomy, it also remains largely undefined by the Court.[331]

A. Whalen v. Roe *(1977)*

To date, the Supreme Court has decided only one case directly addressing the constitutionally-based privacy interests of individuals named in government databases. In *Whalen v. Roe*,[332] decided in 1977, the Court held that New York

---

Constitutional scholar Professor Rodney Smolla referred to this as the constitutional right of "autonomy." *See* SMOLLA, *supra* note 322, at 121. Professor Fred Cate has referred to this privacy right as that of "fundamental decision-making," and has called it the "most controversial constitutional right to privacy." *See* Fred H. Cate, *The Challenging Face of Privacy Protection in the European Union and the United States*, 33 IND. L. REV. 174, 200 (1999).

[325] *See Pierce*, 268 U.S. at 510; *see also Meyer*, 262 U.S. at 390 (holding that state statutes that limited the teaching of foreign languages in public schools was unconstitutional).

[326] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); *Griswold*, 381 U.S. at 479.

[327] *See Roe*, 410 U.S. at 113; *Bolton*, 410 U.S. at 179.

[328] *See Loving*, 388 U.S. at 1.

[329] *See* Whalen v. Roe, 429 U.S. 589, 599 (1977) (citing Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 79 (1974) (Douglas, J., dissenting); Stanley v. Georgia, 394 U.S. 557 (1969); *Griswold*, 381 U.S. at 483; Olmstead v. United States, 277 U.S. 438, 478 (1928); *Shultz*, 416 U.S. at 78 (Powell, J., concurring)).

[330] *See Whalen*, 429 U.S. at 589 (upholding New York legislation that required physicians to compile prescription records containing detailed patient information for a centralized state database on harmful legal drugs); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977) (compelling President Nixon to disclose personal communications to government archivists in light of the important public interest in preserving the materials). Rodney Smolla has called this the individual interest in maintaining "secrecy." *See* SMOLLA, *supra* note 322, at 121; *see also* FRED H. CATE, PRIVACY IN THE INFORMATION AGE (1997); Don R. Pember, *The Burgeoning Scope of Access Privacy and the Portent for a Free Press*, 64 IOWA L. REV. 1155 (1979).

[331] One state supreme court has called this the least defined zone of constitutional privacy. *See* Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633, 636 (Fla. 1980).

[332] 429 U.S. 589 (1977). In a 1975 decision, the Supreme Court had ruled that an individual did not have a constitutional right of privacy that would have prevented a state law enforcement agency from disclosing the fact that he had been arrested for shoplifting. *See* Paul v. Davis, 424 U.S. 693, 712 (1975). A year later, the Court held that an individual did not have a constitutional right of privacy that would have prevented the government from obtaining information given by that individual to a banking institution. *See* United States v.

could constitutionally maintain a computerized database of the names and addresses of patients and their prescribing doctors when legal drugs such as methadone, amphetamines, and methaqualone (so-called "scheduled drugs") were prescribed for medical purposes.[333] In finding for the state of New York, the Court said state governments have the right to collect and use personal data when there are statutory or regulatory limits on public disclosure.[334]

The *Whalen* case arose after the New York legislature passed the Controlled Substances Act (CSA) in 1972.[335] The CSA required physicians to report each prescription they issued for a scheduled drug to the state health department.[336] The state wanted to monitor these prescriptions to prevent scheduled drugs from entering the illegal market through forged prescriptions and over-prescribing by physicians.[337] The health department logged the prescription forms in a computerized database, and the data was stored in secured facilities.[338] The CSA prohibited public disclosure of patient identifications and provided criminal sanctions for state employees who willfully violated the disclosure ban.[339]

A coalition of patients and physicians challenged the CSA in federal district court on constitutional privacy grounds — they claimed that the patient-identification requirements would chill the doctor-patient relationship and cause patients to refuse prescriptions for state-monitored drugs in fear of disclosure and stigmatization.[340] The district court agreed and enjoined the state from collecting patient identifications.[341] The district court concluded that the doctor-patient relationship fell within a constitutionally-protected zone of privacy under the Fourteenth Amendment and was infringed by state-compelled reporting of patient identifications.[342]

Miller, 425 U.S. 435 (1976). However, neither of these cases specifically mentioned a constitutional zone of *informational* privacy.

[333] *Whalen*, 429 U.S. at 591, 593 & n.8, 603–04.

[334] *Id.* at 605.

[335] *See id.* at 591–92 & n.4. The CSA was patterned after similar laws in California and Illinois. *See id.* at 592 & n.5.

[336] *Id.* at 591–92. The affected drugs were for limited lawful medical uses such as the treatment of epilepsy, narcolepsy, hyperkinesia, schizo-affective disorders, and migraine headaches. *Id.* at 593 & n.8.

[337] New York argued that there was no other effective way to keep people from using stolen or forged prescriptions, pharmacists from illegally refilling expired prescriptions, patients from seeking multiple prescriptions from different physicians, and physicians from over-prescribing. *See id.* at 592.

[338] *Id.* at 593–94.

[339] *Id.*

[340] Roe v. Ingrahm, 403 F. Supp. 931, 938 (S.D.N.Y. 1976).

[341] *Id.* at 937–38.

[342] *See id.* On the privacy issue, the court said, "An individual's physical ills and disabilities, the medication he takes, [and] the frequency of his medical consultation are among the most sensitive of personal and psychological sensibilities." *Id.* at 937. The district

On appeal, however, the Supreme Court unanimously reversed and concluded that the reporting scheme was a rational legislative attempt to try and address the problem of illegal distribution and overuse of scheduled drugs.[343] In an opinion penned by Justice Stevens, the *Whalen* Court said that the reporting requirements did not represent a "sufficiently grievous threat" to the implied constitutional interests in informational privacy or independent decision making.[344] On the informational privacy issue, the Court said that concerns over the secondary effects of unauthorized patient disclosures were speculative and, therefore, insufficient as grounds to render the CSA unconstitutional.[345] The Court emphasized that the statutory provisions contained safeguards against unauthorized disclosure and found these to be adequate for protecting patient privacy.[346] The Court noted that there was no evidence that unauthorized disclosures had occurred.[347] The Court also noted that "unpleasant invasions of privacy" were a necessary part of "modern medical practice" because patient information already was being routinely disclosed to insurance companies, hospital personnel, and various public agencies.[348]

---

court applied strict constitutional scrutiny to the reporting scheme and found that although the state had a compelling interest in controlling drug abuse and illicit drug trafficking, the CSA was unnecessarily broad in scope by requiring the reporting of patient identifications. *See id.* The court suggested that the state could meet its regulatory goals of monitoring the distribution of the drugs in question with just the names of prescribing physicians and dispensing pharmacies. *See id.*

[343] *See* Whalen v. Roe, 429 U.S. 589, 598 (1977). Unlike the district court below, the *Whalen* Court applied intermediate constitutional scrutiny to the reporting scheme. *See id.* In addition, the *Whalen* Court said that even if it was not clear that the reporting requirements were effective, New York had a "vital interest in controlling the distribution of dangerous drugs" that would justify a "decision to experiment with new techniques for control." *Id.*

[344] *See id.* at 600.

[345] In his concurring opinion in *Whalen*, Justice Brennan suggested a factual scenario that would have yielded a different result. Had New York engaged in "broad dissemination" of the prescription information, he stated, constitutional privacy rights would have been clearly implicated. *Id.* at 606 (Brennan, J., concurring). Had that been the case, Brennan said, New York would have been required to demonstrate a compelling governmental interest supporting public disclosure. *Id.* at 606. Absent such an interest, he stated that the scheme would have failed strict constitutional scrutiny and presumably been declared unconstitutional. *Id.* at 606–07.

[346] *Id.* at 594, 601–02.

[347] *Id.* at 604 n.32 (distinguishing Bates v. Little Rock, 361 U.S. 516, 522–23 (1960) and NAACP v. Alabama, 357 U.S. 449, 462 (1958), both freedom of association cases, in which actual harm had been proven by disclosures of personal identities).

[348] *Id.* at 602. The Court went on to discuss the role of information sharing in the medical context, stating that "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient." *Id.* The Court said that disclosure of patients' prescription drug information to authorized state employees thus did not "automatically amount to an

The *Whalen* Court concluded that New York's reporting scheme did not deprive patients of the right to independently decide with their physicians whether to use a scheduled drug.[349] Justice Stevens wrote that the decision to prescribe and use any of the scheduled drugs was "left entirely to the physician and the patient" and was not dependent on approval of the state or any other third party.[350] He cited to evidence that the state was recording 100,000 prescriptions per month under the CSA and concluded on that evidence that the reporting requirements were not seriously impeding prescriptions for scheduled drugs.[351] Despite finding no constitutional violations in that case, the *Whalen* Court strongly cautioned that advancing information technology brought with it potentially legitimate threats to privacy.[352] On this point, Stevens wrote:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is *personal in character and potentially embarrassing or harmful if disclosed.*[353]

The *Whalen* Court did not flesh out the constitutional right of informational privacy, nor was that even necessary to the holding in the case.[354] The Court merely

---

impermissible invasion of privacy." *Id.* For further discussion of these issues in the context of medical records, see for example, Patricia I. Carter, *Health Information Privacy: Can Congress Protect Confidential Medical Information in the "Information Age?"* 25 WM. MITCHELL L. REV. 223 (1999).

[349] *Whalen*, 429 U.S. at 603. In addition, the Court pointed out that New York could have banned the scheduled drugs altogether. *Id.*

[350] *Id.*

[351] *Id.* Arguably, this point ignores the proposition that government collection of personal data, especially in computerized databases, allows enhanced government surveillance of individuals that may indeed threaten individual privacy interests. *See* ALAN F. WESTIN, PRIVACY AND FREEDOM 158–68 (1967).

[352] *Whalen*, 429 U.S. at 605 (emphasis added) (citations omitted); *see also* BeVier, *supra* note 129, at 491–92.

[353] *Whalen*, 429 U.S. at 605 (emphasis added). In his concurring opinion in *Whalen*, Justice Brennan echoed this concern, stating, "The central storage and easy accessibility of computerized data vastly increase the potential for abuse of the information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology." *Id.* at 607 (Brennan, J., concurring).

[354] Pember, *supra* note 330, at 1175. In a case decided in 2001, the Supreme Court acknowledged the implied constitutional right of informational privacy in the context of a civil suit in tort against a media defendant for allegedly broadcasting an intercepted telephone

held that New York's prescription drug-reporting scheme did not invade a constitutionally-protected zone of personal privacy, primarily, because of the strict controls that were in place to prevent unauthorized disclosure.[355] After *Whalen*, the implied right of informational privacy remained unclear, including what information would be "personal in character and potentially embarrassing or harmful if disclosed," as quoted in the passage above.[356]

---

conversation. *See* Bartnicki v. Vopper, 532 U.S. 514 (2001). A six-to-three Court majority ruled that the First Amendment protected a Pennsylvania radio station from liability and punishment for broadcasting a secretly taped cell phone conversation between two teachers' union representatives. Both federal and Pennsylvania state wiretapping laws prohibit the secret taping of phone conversations. During a contentious period of collective bargaining talks, the two teachers' union representatives were discussing whether teachers would receive a three-percent raise as offered by the school district or a six-percent raise as proposed by the teachers union. One of the union leaders was taped as saying, "If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys." *See id.* at 518–19. The Court held that the radio station had a First Amendment right to broadcast the tape because of its high public-interest value. *See id.* at 533–34. However, the Court also acknowledged that the Constitution implies a privacy interest in private facts under the Fourteenth Amendment. *Id.* at 518. In recognizing this constitutionally protected informational privacy interest, the *Bartnicki* Court implicitly called upon the holding of the *Whalen* opinion. Both the *Bartnicki* and *Whalen* opinions were written for Court majorities by Justice Stevens. *Id.* at 516. *See Whalen*, 429 U.S. at 590.

[355] *See Whalen*, 429 U.S. at 605–06; *see also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 458–59 (1977) (stating that the *Whalen* Court had rejected a constitutional privacy challenge to the collection of personal medical information in a state computer database and had emphasized statutory measures against unauthorized disclosure). The *Whalen* decision has been characterized as providing states with an affirmative and broad "right to collect and use data about individual citizens." Jennifer Bresnahan, *Personalization, Privacy, and the First Amendment: A Look at the Law and Policy Behind Electronic Databases*, 5 VA. J.L. & TECH. 8 (2000) *available at* http://www.vjolt.net/vol5/issue3/v5i3a08-Bresnahan.html (last visited Oct. 3, 2003).

[356] As commentators have pointed out, the lower federal courts have not been consistent in interpreting the implied constitutional right of privacy. *See, e.g., Cate, supra* note 330, at 202–03 (discussing Doe v. S.E. Pa. Transp. Auth., 72 F.3d 1133 (3d Cir. 1995); Doe v. Att'y Gen., 941 F.2d 780 (9th Cir. 1991); Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980); Schacter v. Whalen, 581 F.2d 35 (2d Cir. 1978); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978) as extending the implied right of privacy to "non-fundamental matters;" and discussing Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990) and J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981) as having "severely limited the scope of the *Whalen* nondisclosure privacy right"); *see also* Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 828–30 (2000) (discussing Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1988)).

B. Nixon v. Administrator of General Services *(1977)*

In 1977, the Supreme Court again recognized an implied constitutional privacy interest in the disclosure of personal information held by the government. In *Nixon v. Administrator of General Services*,[357] decided four months after *Whalen*, the Court held that the Presidential Recordings and Materials Preservation Act[358] did not infringe on any constitutional privacy interest held by former President Richard M. Nixon.[359] The Act, signed into law by President Gerald Ford, required the then out-of-office Nixon to surrender possession of an estimated forty-two million pages of documents and 880 tape recordings accumulated during his presidency.[360] The materials were then to be screened by government archivists so that private information and materials could be removed and returned to Nixon.[361] The remainder would be open to public review for historical and other purposes.[362]

Relying on *Whalen*, the *Nixon* Court rejected the former president's argument that having his personal materials screened by the government archivists violated his constitutional right of privacy under the Fourteenth Amendment.[363] The Court agreed with Nixon that he had a constitutional privacy interest in personal communications contained in the records, but said this privacy interest had to be weighed against the strong interest in public review and historical preservation of nonpersonal presidential materials.[364] The Court concluded that only a "small fraction" of the materials were private and that screening was the only method to separate the private from the nonprivate materials.[365] In addition, the Court explained that the materials were to be screened by government archivists with an "unblemished record for discretion" and concluded that Nixon's fear of further disclosure of his personal affairs was therefore unfounded.[366]

---

[357] *Nixon*, 433 U.S. at 455–65.

[358] Presidential Recordings & Materials Act of 1974, Pub. L. No. 93-526, 88 Stat. 1695 (codified at 44 U.S.C. § 2107 (1970 & Supp. V 1974)).

[359] *Nixon*, 433 U.S. at 465.

[360] *Id.* at 429–36. The materials were being stored in a depository under a previous agreement that Nixon had reached with the Administrator of General Services in which the materials were to be stored near Nixon's home in California for a prescribed time period and destroyed upon his death. *Id.* at 431–32.

[361] *Id.* at 429.

[362] *Id.* at 435.

[363] *Id.* at 457–59, 465.

[364] *Id.* at 465.

[365] *Id.* at 454.

[366] *Id.* at 462–65 (quoting *Nixon* 408 F. Supp. at 365).

C. *Impact of* Whalen *and* Nixon

The *Whalen* and *Nixon* cases suggest that related constitutional interests in information and decisional privacy exist under the Fourteenth Amendment. In particular, the *Whalen* decision is significant because the Court acknowledged that individuals have a privacy interest in their personally-identifiable information collected by the government. While the parameters of these constitutional interests remained unclear after both *Whalen* and *Nixon*,[367] several conclusions can be drawn from the opinions regarding government collection and use of personally-identifiable information.

First, in each case, the Court found that asserted fears of unauthorized public disclosure were unfounded. It was significant to the Court in both cases, however, that official controls were in place to minimize the possibility of unauthorized disclosures,[368] and, in *Whalen* in particular, that such disclosures had not in fact occurred.[369] Clearly, the *Whalen* Court was unwilling to speculate about potential but unproven threats to individual privacy.[370]

Second, *Whalen* and *Nixon* stand for the proposition that individual privacy interests can be outweighed by public interests that are served by government collection and use of personally-identifiable data. In *Whalen*, the Court concluded that the public interest in curbing illegal drug trafficking outweighed the privacy interests of individuals named in New York's prescription drug database.[371] Likewise, in *Nixon*, the public interest in preserving presidential materials for historical purposes was found more significant than Nixon's personal privacy interest in keeping government archivists from sifting through his personal communications.[372]

Third, these cases suggest that the Fourteenth Amendment's implied constitutional zone of privacy is not easily infringed by government collection of personally-identifiable information. For instance, the *Whalen* Court said it would have taken a "sufficiently grievous threat" to patient privacy to find a constitutional violation, which was not established in the case.[373]

Hence, *Whalen* and *Nixon* hold significant implications for public access to government-held information under FOIA. In both cases, the Court recognized a constitutional interest in informational privacy and clearly articulated concerns regarding personal information collected by the government. This suggests that

---

[367] *See supra* note 355.

[368] *See Whalen*, 429 U.S. at 605–06; *Nixon*, 433 U.S. at 462–63.

[369] *See Whalen*, 429 U.S. at 605–06.

[370] *See id.*

[371] *See id.* at 598, 606.

[372] *See Nixon*, 433 U.S. at 465.

[373] *Whalen*, 429 U.S. at 600.

embarrassing or harmful secondary effects of disclosure might be relevant in a constitutional-privacy analysis, although the Court did not explicitly say so. Both *Whalen* and *Nixon*, therefore, leave open the door for a constitutional-privacy argument to trump the FOIA statutory right of disclosure. Indeed, such an argument has already been successful regarding state open-records laws in at least one state.[374] In a 1998 decision by the U.S. Court of Appeals for the Sixth Circuit, the implied right of constitutional privacy recognized in *Whalen* was successfully raised to preclude disclosure of records under Ohio's open-records law.[375] At this time, in addition to the Sixth Circuit, the Second, Third, Fifth, and Ninth Circuits also have recognized the implied right of informational privacy sketched by the Court in *Whalen*.[376] To date, the authors' research shows that a constitutionally-based privacy challenge to disclosure has not arisen under FOIA. Nonetheless, *Whalen* and *Nixon* might be used as a means to defeat access separate from any legislatively created privacy protections under FOIA.

VI. SUMMARY AND DISCUSSION

FOIA's legislative history shows that Congress clearly intended to make it possible for the public to gain access to federal-agency records without the need for requesters to explain why they wanted the information.[377] Congress also saw the need to protect some personal information from public disclosure, and thus crafted exemptions to allow federal agencies to withhold some information on personal

---

[374] *See* Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998) (holding that disclosure of information from undercover police officers' personnel files to criminal defense attorneys violated their Fourteenth Amendment rights to privacy and personal security). In *Kallstrom*, Columbus police officers pointed to the Court's recognition of informational privacy in *Whalen* in order to successfully block automatic disclosure of police personnel files, which otherwise would have been disclosable under the Ohio public records statute. *See id.* One commentator has stated that the *Kallstrom* decision narrowly construed the constitutional interest in nondisclosure of public records in the case to that of preventing "life-threatening harm" and thus was a victory of access advocates on that count. *See* Schwartz, *supra* note 356, at 828–29.

[375] *Kallstrom*, 136 F.3d 1055.

[376] *See* CATE, *supra* note 330, at 202-03 (discussing Doe v. S.E. Pa. Transp. Auth., 72 F.3d 1133, 1137 (3d Cir. 1995); Doe v. Att'y Gen., 941 F.2d 780, 795–97 (9th Cir. 1991), *vacated by* 518 U.S. 1014 (1996); Barry v. City of New York, 712 F.2d 1554, 1558–59 (2d Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980); Schacter v. Whalen, 581 F.2d 35, 37 (2d Cir. 1978), *aff'g* 445 F. Supp. 1376 (1978); Plante v. Gonzalez, 575 F.2d 1119, 1127–28 (5th Cir. 1978), *cert denied*, 439 U.S. 1129 (1979)).

[377] *See supra* notes 40–52 and accompanying text; *see also* Dep't of Air Force v. Rose, 425 U.S. 352, 360–62 (1976), *aff'g* 495 F.2d 261 (1974)(discussing the general purpose of FOIA).

privacy grounds.[378] Ostensibly, Congress intended for the privacy exemptions to prevent "unwarranted invasion[s] of personal privacy" and not merely trivial or inconvenient infractions of individual privacy.[379] While congressional intent called for a balancing analysis when public access and individual privacy interests collide under FOIA, Congress also emphasized the importance of "fullest responsible disclosure" and did not intend for individual privacy interests to easily prevail over the public interest in access.[380] Congress left it up to the courts to determine how to balance access and privacy interests in FOIA privacy-exemption requests.

Indeed, when the Supreme Court decided a FOIA privacy-exemption case the first time in *Rose*,[381] Justice Brennan, writing for the majority, established such a balancing test. As discussed, the *Rose* balancing test calls for courts to weigh the public interest in disclosure against the individual interest in privacy on an *ad hoc* basis in FOIA privacy-exemption cases.[382] The Court said FOIA's legislative history makes clear that the statute was "broadly conceived," and Congress intended for the statute to permit access to official information and to open agency action to public scrutiny.[383] Brennan emphasized that any exceptions to disclosure must fall under one or more of the statute's nine exemptions,[384] and these exemptions "must be narrowly construed."[385] The opinion further noted that Congress' move to include exemptions to the Act should not obscure the legislative intent that disclosure is FOIA's "dominant objective."[386] In *Rose,* the Supreme Court said the role of the courts was to prevent federal agencies from erecting broad barriers to public access.[387] The *Rose* Court also suggested that speculative threats to privacy should not be used to outweigh the public interest in access.[388] Justice Brennan wrote that Congress intended Exemption 6 to ameliorate "threats to privacy interests more palpable than mere possibilities."[389]

---

[378] *See supra* note 8.

[379] *See* 5 U.S.C. § 552 (1994).

[380] *See* S. REP. NO. 93-813, at 3 (1965).

[381] Dep't of the Air Force v. Rose, 425 U.S. 352 (1976).

[382] *See id.* at 372.

[383] *Id.* at 361 (citing EPA v. Mink, 410 U.S. 73, 80 (1973)).

[384] *See supra* note 8.

[385] *Rose*, 425 U.S. at 361.

[386] *Id.* at 361.

[387] *Id.* at 379 ("Congress vested the courts with the responsibility ultimately to determine '*de novo*' any dispute as to whether the exemption was properly invoked in order to constrain agencies from withholding non exempt matters.").

[388] *See id.* at 380 n.19.

[389] *Id.*

A. Altering the FOIA Calculus: Emphasis on Individual Privacy Interests

Beginning with the *Washington Post* case,[390] the Court began a trend of broadly interpreting FOIA-related privacy interests and allowed even a minimal privacy concern to trigger FOIA privacy exemptions.[391] The Court tipped the scales of balance significantly further in favor of privacy in *Reporters Committee*, when the Court established the central-purpose doctrine.[392] This test restricted the ambit of disclosable records by stringently limiting the FOIA-related public interest in access to only those records that directly revealed government activity.[393] Justice Ruth Bader Ginsburg has written that the central-purpose doctrine established in *Reporters Committee* altered the "FOIA calculus."[394] In her concurring opinion in *FLRA*, she expressed discomfort with the Court's analysis and pointed out that the central-purpose doctrine represents a "restrictive definition" of the public interest in access that does not appear in the legislative history of FOIA.[395] However, she acquiesced to the central-purpose requirement imposed by the Court in *Reporters Committee*, deferring to judicial precedent on this matter of statutory interpretation, and noted that Congress was free to amend FOIA if it disagreed with the *Reporters Committee* Court.[396]

Arguably, as one commentator has noted, the Supreme Court has concocted a balancing scheme that allows federal agencies to use the FOIA privacy exemptions "as shields to repel requests . . . [for any] records containing personally identifiable information."[397] This makes it extremely difficult for lower courts to expand on the narrow confines of the central-purpose doctrine. For instance, as discussed, the

---

[390] Dep't of State v. Wash. Post Co., 456 U.S. 595 (1982), *rev'g* 647 F.2d 197 (1981).

[391] *See* Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355 (1997) (per curiam), *rev'g* 83 F.3d 1165 (1996) (holding privacy exemption triggered when public interest was simply to provide more information to people on a government mailing list); Dep't of Def. v. FLRA, 510 U.S. 487 (1994), *rev'g* 1990 WL 156669 (F.L.R.A. Sept. 29, 1990) (holding that employee addresses were exempt from FOIA because public interest would at most be to enhance communication); Dep't of State v. Ray, 502 U.S. 164 (1991), *rev'g* 725 F. Supp. 502 (1989) (holding that unredacted reports of interviews with Haitians were exempt and required redaction of names before allowing access); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), *rev'g* 816 F.2d 730 (1987) (holding that the FBI 'rap sheet' was exempt because information concerned a private individual and not an agency).

[392] *See Reporters Comm.*, 489 U.S. at 749. One commentator has pointed out that under the central-purpose doctrine, a FOIA requestor has the burden of proving that the request will reveal what the government is up to. *See* Beall, *supra* note 225, at 1261.

[393] *See Reporters Comm.*, 489 U.S. at 774.

[394] *See FLRA*, 510 U.S. at 505 (Ginsburg, J., concurring).

[395] *Id.* at 505–08.

[396] *See id.* at 509.

[397] *See* BeVier, *supra* note 129, at 485.

Ninth Circuit's attempt in *Bibles* to apply a derivative-uses analysis and expand FOIA-related public interest in disclosure was met with a unanimous reversal and sharp rebuke on appeal to the Supreme Court.[398]

The Court has further restricted disclosure by applying a uses and effects analysis in FOIA privacy cases on the privacy side of the balance while shunning the same approach on the public-interest side. The Court has declined to decide when, if ever, derivative uses and secondary effects should be considered in privacy-exemption cases.[399] But in practice, the Court has typically applied a privacy-side derivative-uses analysis, considering speculative *harmful* secondary effects of disclosure when weighing the individual interest in secrecy, while refusing to consider potentially *beneficial* secondary effects of disclosure when weighing the public interest in public access.[400] In its uses and effects analyses, the Court has thus directly or implicitly considered how specific record seekers would use the requested records despite FOIA statutory language that plainly states requests can by made by "any person"[401] and guidelines issued by the Federal Office of Information and Privacy stating the identities of specific requesters cannot be a factor in disclosure decisions.[402] The Court has, in effect, established a *de facto* rule against disclosure that cannot be found in either the plain language or the legislative history of FOIA.

Essentially, the Supreme Court has virtually ignored the notion that broad access to public records fulfills important societal functions beyond just informing the public about government operations. For example, the kinds of valuable information gleaned from federal agency records includes demographic trends available from census data held by the Department of Commerce, and crucial public health and safety information, ranging from commercial aircraft maintenance

---

[398] Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355 (1997).

[399] In *Ray*, Justices Scalia and Kennedy supported a blanket ban on the consideration of derivative uses of information on both sides of FOIA privacy exemption balance. *See* Dep't of State v. Ray, 502 U.S. 164, 180–82 (1991). In a seeming contradiction to their stance in *Ray*, Justices Scalia and Kennedy joined in the Court's opinion in *FLRA*, which considered derivative uses and secondary effects on the privacy side of the balance. *See FLRA*, 510 U.S. 487.

[400] *See Bibles*, 519 U.S. at 355; *FLRA*, 510 U.S. at 487; *Ray*, 502 U.S. at 164; Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Dep't of State v. Wash. Post Co., 456 U.S. 595 (1982); Dep't of the Air Force v. Rose, 425 U.S. 352 (1976).

[401] *See* 5 U.S.C. § 552 (1994); *see also* FOIA GUIDE, *supra* note 47, at 38.

[402] *See* FOIA GUIDE, *supra* note 47, at 39 (stating that "FOIA requests can be made for any reason whatsoever; because the purpose for which records are sought has no bearing upon the merits of the request, FOIA requesters do not have to explain or justify their requests."). The Office of Information and Privacy is the agency within the Department of Justice that is charged under the FOIA statute with overseeing FOIA operations. *See id.* at 1.

records from the FAA, to the results of clinical drug trials from the FDA. The use of government records and database information also provides significant and overlooked economical benefits to society which should be viewed as furthering the public interest in access.[403] These benefits include: providing U.S. capital markets with data; providing information that allows creditors to verify the credit-worthiness of applicants and reduce the cost of credit; aiding in the location of heirs and other financial beneficiaries; providing attorneys with information in criminal and civil litigation matters; aiding businesses in the selection and location of operations and facilities; assisting check verification services; and facilitating the efficient purchase and sale of real estate.[404] As two prominent scholars wrote recently: "In sum, the American open public record allows citizens to oversee their government, facilitates a vibrant economy, improves efficiency, reduces costs, creates jobs, and provides valuable products and services that people want."[405] Indeed, the Supreme Court has recognized that free-flowing commercial information is vital to a healthy economy and used that principle as a basis for providing First Amendment protection to advertising.[406]

The Department of Justice, whose job it is to oversee FOIA operations and to defend agencies sued for withholding records requested under FOIA,[407] has followed the lead of the Supreme Court by relying only on a privacy-side uses and effects analysis in crafting its FOIA policy. For instance, the Department of Justice has suggested that the privacy analysis should consider the ultimate impact on personal privacy even if it involves several steps in a "causal chain" from disclosure to potential privacy invasion.[408] The department contended that it would not be pragmatic to evaluate the individual interest in privacy without considering derivative uses and resulting secondary effects.[409] This position stands as official federal policy in handling FOIA requests. The Department of Justice further bolstered its privacy-side emphasis when Attorney General Ashcroft issued a

---

[403] *See* CATE & VARN, *supra* note 23, at 10–11.

[404] *Id.* at 10–13. For instance, the authors cited data indicating that consumers save as much as $100 billion due to efficiencies in lending, facilitated by data available to lenders in public records. *See id.* at 11.

[405] *Id.* at 13.

[406] *See* Va. Bd. of Pharmacy v. Va. Citizens Council, Inc., 425 U.S. 748, 765 (1976). The Court stated:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

[407] 5 U.S.C. § 552 (1994).

[408] FOIA GUIDE, *supra* note 47, at 331 (quoting Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 878 (D.C. Cir. 1989)).

[409] *See id.* at 331.

memorandum to the federal agencies urging them to use the privacy exemptions to reject FOIA requests for records.[410] Although the memo was issued only a month after the September 11th terrorist attacks, the memo was planned and written much earlier,[411] thus demonstrating that it represented a deliberate policy decision for the long term and not simply an expedient tactic in the war on terrorism.

In its FOIA privacy-exemption cases, the Supreme Court has paid little deference to the societal harm than can result from official government policy that favors secrecy over access. This harm ultimately includes the risks of a less-informed electorate and weakened democratic participation and self-governance.[412] Robert Gellman, a former chief counsel to the Subcommittee on Government Information, has concluded generally that it constitutes bad public policy when government controls information through such means as denials of access.[413] He said such practices also inhibit democracy, especially when federal agencies use FOIA to withhold information because it might be politically embarrassing or cast the agency in a bad light.[414] The so-called "presumption of legitimacy" for government records created by the Supreme Court in *Ray* seems to facilitate such improper nondisclosure motives.[415]

---

[410] *See* NEW ATTORNEY GENERAL MEMORANDUM, *supra* note 29. In a sharp reversal of policy set eight years earlier under the Clinton Administration, Attorney General Ashcroft established a new and restrictive administration policy on how executive-branch agencies should treat requests for federal records under FOIA. In an October 12, 2001 memorandum to the federal executive-branch agencies, Ashcroft rescinded the 1993 FOIA foreseeable-harm standard set by former Attorney General Janet Reno, who had emphasized "maximum responsible disclosure of government information" unless disclosure would be harmful. Ashcroft Memorandum, *supra* note 37, at 4–5. Under the Ashcroft standard, agencies are encouraged to use FOIA's two privacy exemptions (Exemptions 6 and 7(C)) and the executive-privilege exemption (Exemption 5) to withhold records containing certain types of information whenever agency discretion allows, as long as there is a "sound legal basis" to do so. *Id.*; *see also* 5 U.S.C. §§ 552(b)6, (b)7(C), (b)5 (2000).

[411] *See* Adam Clymer, *Government Openness at Issue As Bush Holds On to Records*, N.Y. TIMES, Jan. 3, 2003, at A1.

[412] *See, e.g.*, Beall, *supra* note 225 at 1252 (stating that failure to protect public access to government information "will lead to a less informed public . . . [and will] undermine[] the essential goal of public information law — to establish the people as governors over the government").

[413] *See* Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-like Controls over Government Information*, 45 SYRACUSE L. REV. 999, 1005–13 (1995) (stating "[i]n theory, the Copyright Act and FOIA work together to ensure public availability and unrestricted use of government data").

[414] *Id.* at 1011–12.

[415] *See* Sinrod, *supra* note 26, at 214–15 (stating that the presumption of legitimacy has the potential to further distort the balancing process in FOIA privacy-exemption cases).

B. Categorizing Derivative Uses and Expanding the Public Interest in Disclosure

Ideally, federal information policy should support public access to government information for the myriad lawful purposes to which it might be put to use.[416] This is precisely why federal copyright law specifically prohibits the federal government from copyrighting information.[417] Congress crafted section 105 of the Copyright Act, which prohibits the federal government from copyrighting information, to help prevent the government from exploiting government information for political reasons, and also to keep the government from holding a monopoly on government information.[418] Copyright law, coupled with FOIA, thus establishes double-barreled support for the proposition that federal information policy should favor broad public access to federal records so that the information can be used for lawful purposes.[419] Such a policy seems to support consideration of derivative uses and secondary effects on the access side of the FOIA balance in privacy-exemption cases.[420]

Clearly, federal agency records are useful to a varied host of requesters including attorneys, businesses and corporations, advocacy groups, public interest groups, scholars, and journalists. And these uses often include many purposes other than the official reasons for which the requested information was originally collected by the government. For instance, in the FOIA privacy-exemption cases discussed in this article, requesters included a university law review researching an article on military disciplinary procedures,[421] journalists investigating citizenship information on two Iranian nationals,[422] journalists investigating connections between an allegedly corrupt U.S. Representative and alleged members of an

---

[416] *See* Gellman, *supra* note 413, at 1003–04 ("Placing federal government information . . . in the public domain is a step in the direction of permitting unfettered use of the information.").

[417] *See id.*

[418] *See* 17 U.S.C. § 105 (1982); *see also* Gellman, *supra* note 413, at 1002–04 (pointing out that the Federal Copyright Act of 1976 specifically prohibits the government from invoking copyright protection as a means of exerting official control over the use of government information).

[419] Gellman, *supra* note 413, at 1004, 1007–08; *see also* HENRY H. PERRITT, LAW AND THE INFORMATION SUPERHIGHWAY, 477 (1996) (stating that FOIA is an "instrument of the diversity principle" and "undercuts efforts to establish [government] information monopolies"); Irina Dmitrieva, *Comparison of US and UK Copyright Laws Regarding Ownership of Primary Law Materials* (2003) (unpublished Ph.D. dissertation, University of Florida).

[420] One commentator already has recommended that courts in the FOIA privacy-exemption cases consider derivative uses when weighing both the public interest in access and the individual interest in nondisclosure. *See* Sinrod, *supra* note 26, at 219.

[421] *See* Dep't of the Air Force v. Rose, 425 U.S. 352 (1976).

[422] *See* Dep't of State v. Wash. Post Co., 456 U.S. 595 (1982).

organized crime family,[423] an attorney seeking information to assist Haitian immigrants seeking political asylum in the United States,[424] labor unions seeking information in order to communicate with federal employees about collective bargaining,[425] and a nonprofit environmental group seeking information to facilitate communication with individuals who were receiving allegedly biased environmental mailings from the federal government.[426]

On the basis of studying these Supreme Court FOIA privacy-exemption cases, along with a review of lower federal court opinions on the access-privacy conflict,[427] the authors of this article have categorized the most common derivative uses of public information into three areas: (1) public informational uses, (2) public-policy advocacy uses, and (3) commercial uses. Public informational uses would include use of agency records by journalists, scholars, and nonprofit public-interest groups that monitor government. Public-policy advocacy uses would include the use of public records by organizations that advocate positions and seek certain outcomes on social and public policy issues such as collective bargaining, the environment, abortion, gun control, and stem-cell research. Commercial uses would include use of public records by marketers, advertisers, lawyers and corporations, all of whom engage in activities that provide varying degrees of economic benefit to society.

When considering the public-interest value of access to personally-identifiable information in a FOIA privacy-exemption dispute, a court applying a public-interest side derivative-uses analysis might look to these categories to help gain a

---

[423] *See* Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

[424] *See* Dep't of State v. Ray, 502 U.S. 164 (1991).

[425] *See* Dep't of Def. v. FLRA, 510 U.S. 487 (1994).

[426] *See* Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355 (1997) (per curiam).

[427] *See* Cooper Cameron Corp. v. Dep't of Labor, 280 F.3d 539 (5th Cir. 2002); Sherman v. Dep't of the Army, 244 F.3d 357 (5th Cir. 2001); Lepellier v. Fed. Deposit Ins. Corp., 164 F.3d 37 (D.C. Cir. 1998); Sheet Metal Workers Int'l Ass'n Local 19 v. Dep't of Veterans Affairs, 135 F.3d 891 (3d Cir. 1998); Davin v. Dep't of Justice, 60 F.3d 1043 (3d Cir. 1995); Rosenfield v. DOJ, 57 F.3d 803 (9th Cir. 1995); Becker v. IRS, 34 F.3d 398 (7th Cir. 1994); Jones v. FBI, 41 F.3d 238 (1994); Painting Indus. of Haw. Mkt. Recovery Fund v. Dep't of Hous. & Urban Dev., 26 F.3d 1479 (9th Cir. 1994); McDonnell v. United States, 4 F.3d 1227 (3d Cir. 1993); FLRA v. Dep't of the Navy, 975 F.2d 348 (7th Cir. 1992); FLRA v. Dep't of the Navy, 966 F.2d 747 (1992); FLRA v. Dep't of Veterans Affairs, 958 F.2d 503 (1992); Landano v. Dep't of Justice, 956 F.2d 422 (3d Cir. 1992); Painting & Drywall Work Pres. Fund, Inc. v. Dep't of Hous. & Urban Dev., 936 F.2d 1300 (D.C. Cir. 1991); Hopkins v. Dep't of Hous. & Urban Dev., 929 F.2d 81 (2d Cir. 1991); KTVY-TV v. United States, 919 F.2d 1465 (10th Cir. 1990); Navigator Publ'g, L.L.C. v. Dep't of Transp., 146 F. Supp. 2d 68 (D. Me. 2001); Sheet Metal Workers' Int'l Ass'n Local 19 v. Dep't of Veterans Affairs, 940 F. Supp. 712 (E.D. Pa. 1995); Cardona v. INS, No. 93-C3912, 1995 U.S. Dist. LEXIS 1853 (N.D. Ill. Feb. 15, 1995); *see also* Beall, *supra* note 225, at 1264–83; Sinrod, *supra* note 26, at 219–23.

meaningful understanding of the true public benefits that access can provide. For instance, journalists often use personally-identifiable information as a means of locating sources to interview and, as a result, obtain pertinent information about government operations.[428] In this manner, information from public records can act as a "link" to additional information that can allow journalists to more fully investigate the official government and actions.[429] For instance, the Reporters Committee for Freedom of the Press recently pointed out in *How to Use the Federal FOI Act*[430] that FOIA can provide reporters with information that can be used to identify leads and sources for investigative stories on potential government malfeasance.

Permitting such journalistic access thus serves the public interest by facilitating the press' role as a government watchdog that examines and evaluates governmental operations.[431] In fact, the very scrutiny that this kind of use makes possible is entirely in keeping with the "central purposes" doctrine for the purpose of revealing "what . . . government is up to."[432] Similarly, such a derivative-uses analysis can be applied to FOIA requests by scholars, public-interest and public-education groups, unions, businesses, and other profit and nonprofit informational and advocacy entities.

At the heart of a balancing test that considers these proposed categories of use is the explicit recognition that a derivative-uses analysis is indeed relevant to *both* sides of the privacy-access balance: the public interest value of certain records might not be fully understood without considering how the information would be used once disclosed. Similarly, the authors of this article appreciate that the individual privacy interests at stake might not be fully revealed until the privacy impact on individuals named in records is considered in light of the public's use of the information. The authors understand that many FOIA activists and FOIA users may oppose uses and effects analyses on *either* side of the balance because of their justifiable concerns that such a practice can be exploited by agencies to defend withholding records.[433] But the stubborn fact remains that the Supreme Court is

---

[428] *See* Sinrod, *supra* note 26, at 227–30.

[429] *See id.*

[430] *See generally* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, HOW TO USE THE FEDERAL FOI ACT, (Rebecca Daugherty ed., 8th ed. 1998) *available at* http://www.rcfp.org/foiact.

[431] *See* Sinrod, *supra* note 26, at 228–31.

[432] Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989) (quoting EPA v. Mink, 410 U.S. 73, 80 (1973) (Douglas, J., dissenting)).

[433] Typically, FOIA supporters maintain that the plain language and legislative history of the statute makes clear that FOIA requests can be made for any public or private purpose, and therefore considering the purpose of any request is irrelevant. *See Hearings*, *supra* note 24; RFCP REPORT, *supra* note 24; Leahy, *supra* note 24; *see also* Halstuk & Davis, *supra* note 80.

already applying a uses-and-effects rationale on the privacy side, and it is unlikely the Court will cease doing so. Short of a congressional remedy, which seems unlikely at this point, the best practical solution is support for uses-and-effects considerations coupled with insistence that they be fairly applied to *both* sides of the access/privacy balance once a FOIA privacy exemption has been appropriately triggered. The authors caution here that they are not proposing any type of public purpose requirement for requesters to establish as a prerequisite to gaining access to FOIA records. FOIA contains no such prerequisite, and the access/privacy balance only becomes relevant *after* a FOIA privacy exemption is triggered.[434]

VII. CONCLUSION

As illustrated by the foregoing discussion and analysis, the Supreme Court has used the central-purpose doctrine and a privacy-side-only derivative-uses analysis to ensure that all personally-identifiable information in federal records remains closed even when the individual interest in privacy is admittedly weak. While the interest in individual privacy is important and should be afforded due consideration under FOIA, the public interest in access should not be relegated to a minor factor as it has been by the Supreme Court in its FOIA privacy-exemption holdings.

A broader view of the FOIA-related public interest than has been accepted by the Supreme Court, including consideration of derivative uses on the public-interest side of the balance, would go a long way toward resetting FOIA balance to more fully embrace the congressional intent of providing a broad public access to government information. This goal also would be served by narrowing FOIA-related privacy interest to more fully reflect Congressional intent that only real and substantial privacy incursions should be sufficient to close public records under FOIA. Reconfiguring the privacy-exemption trigger from simply *any* personally-identifiable information to that which is intimate in nature, would more fully comply with congressional intent to not allow FOIA privacy exemptions to be used as broad barriers against disclosure,[435] which, arguably they have become. If the

---

[434] *See generally* U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE FREEDOM OF INFORMATION REFERENCE GUIDE (2002), *available at* http://www.usdoj.gov/04foia/referenceguidemay99.htm (last revised Dec. 2002).

[435] Such an approach might be based, for instance, on Professor Rodney Smolla's proposed zones of "quintessentially intimate . . . matters" that include:

> (1) mental and emotional condition, including grief; (2) physical health; (3) love and sexual relationships, including sexual orientation; (4) decisions concerning procreation, including a decision to have an abortion; (5) family relationships; (6) victimization, including whether the individual has been a victim of violent or sexual assault; (7) intense and close-knit associational memberships and affiliations; (8) deep personal beliefs, such as religious convictions; and (9) personal financial matters.

SMOLLA, *supra* note 322, at 128.

Supreme Court continues its current FOIA jurisprudence in privacy-exemption cases, Congress should consider amending FOIA to better and more strictly define the privacy interest that is needed to trigger the privacy exemptions.

Finally, the implications of constitutional privacy as a potential bar to disclosure should not be overlooked in the discussion of the FOIA privacy exemptions. As demonstrated in this article, the Supreme Court has found that there are constitutionally-protected zones of individual privacy that would preclude government release of personally-identifiable information such as the medical information at issue in *Whalen v. Roe*.[436] In those instances, the constitutional protection for privacy would most likely trump the statutory right of access provided by FOIA unless there is a constitutionally compelling reason to allow access.

Former Chief Justice Burger's admonition to Congress that public access to government-held information should be achieved by "carefully drawn legislation"[437] has yet to be followed in the context of FOIA's current language describing the privacy exemptions. It is the recommendation of these authors that Congress better craft FOIA privacy exemptions to comply with the legislative goal of broad public access and, in the alternative, that the courts expand the narrow confines of the central-purpose doctrine as it has been applied in recent FOIA privacy-exemption cases. In the long term, the preservation of democracy, the cultivation of an educated and informed public, and the facilitation of a vigorous free-market economy seem to preclude a *de facto* rule against the disclosure of all personally-identifiable information collected by the federal government.

---

[436] *See* 429 U.S. 589 (1977).

[437] Houchins v. KQED, 438 U.S. 1, 14–15 (1978) (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975)).