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NOTE

MUG SHOTS AND THE FOIA: WEIGHING THE PUBLIC'S INTEREST IN DISCLOSURE AGAINST THE INDIVIDUAL'S RIGHT TO PRIVACY

Jane E. Bobet†

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INTRODUCTION

Suppose you are accused of a federal crime and arrested by the United States Marshals. Once the Marshals have you in custody, they will take your “mug shot.”¹ You will be photographed facing forward

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¹ See *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) (internal quotation marks omitted).

and in profile, in front of a background with lines that mark height.² Under your face, you will hold a sign bearing a unique criminal identification number assigned to you by the United States Marshals Service (USMS).³ In addition to this information, the photograph obviously will show your general appearance and facial expression at the moment at which it is taken.

Undoubtedly, you would not want this image to be publicized. A mug shot “captures the subject in [a] vulnerable and embarrassing moment[]”⁴ and serves as a powerful visual indicator of criminality.⁵ If your mug shot were released, the public would quickly infer from the image that law enforcement detained you because you had committed a crime.⁶ You would likely suffer grave personal and professional consequences if your mug shot became available for all to see.⁷

If your mug shot were released to the public, you would find it nearly impossible to contain this damage completely. Because of the sensational and memorable nature of mug shots, the negative public opinion created by a publicized mug shot would likely persist even if you were cleared of all charges and the image was removed from all sources of publication.⁸ Worse, you might not actually be able to get the image removed at all.⁹ One local jurisdiction opted to stop post-

² *Id.* The side-by-side front and profile pictures are now easily recognizable, “standard” mug shots. See SANDRA S. PHILLIPS ET AL., POLICE PICTURES: THE PHOTOGRAPH AS EVIDENCE 20 (1997).

³ See *Times Picayune Publ'g Corp.*, 37 F. Supp. 2d at 477.

⁴ *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497, 503 (11th Cir. 2011).

⁵ See JONATHAN FINN, CAPTURING THE CRIMINAL IMAGE: FROM MUG SHOT TO SURVEILLANCE SOCIETY 1 (2009). In fact, mug shots historically have been the subject of study by scientists seeking to prove that one's physical appearance provides clues of innate criminal tendencies. See *id.* at 11–30; PHILLIPS ET AL., *supra* note 2, at 14–23.

⁶ See *Times Picayune Publ'g Corp.*, 37 F. Supp. 2d at 477 (“Mug shots in general are notorious for their visual association of the person with criminal activity.”).

⁷ See FREDERICK S. LANE, AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT 256 (2009) (detailing the potential effect of information online on individuals’ “professional well-being” given that many companies include Internet searches of applicants’ names in their routine hiring procedures); Adam Tanner, *Shakedown or Public Service? Mug Shot Websites Spread*, REUTERS (Sept. 20, 2012, 11:13 AM), <http://www.reuters.com/article/2012/09/20/net-us-usa-internet-mugshots-idUSBRE88J0R020120920> (interviewing a woman whose mug shot for a DUI arrest made its way onto several web sites and showed up in the results list for Internet searches for her name, causing complications in her search for a new job and in a new romantic relationship).

⁸ A great many websites exist for the sole purpose of collecting and preserving mug shots that have been released publicly. These websites offer little, if any, context for the arrest and are often not updated to indicate whether the subject was ultimately convicted or acquitted of the charged crime. See, e.g., BUSTED! MUGSHOTS, <http://www.bustedmugshots.com/> (last visited Feb. 3, 2014) (providing mug shots and criminal record information to subscribers); THE SMOKING GUN, <http://www.thesmokinggun.com/mugshots> (last visited Feb. 3, 2014) (publicizing mug shots of “celebrities and civilians,” which are divided into various categories).

⁹ For example, an Ohio woman won a civil judgment against a man who had falsely accused her of theft, only to find that she would have to pay anywhere between \$100 to \$500

ing mug shots on its public website because tabloids and other websites were publishing those mug shots and then charging the arrestees hundreds of dollars to have their mug shots removed—even if they were ultimately found innocent of the crime for which they had been arrested.¹⁰ Worse still, even with the full cooperation of the website on which it was originally posted, an image posted online may be subsequently copied to other locations, making it impossible to delete that image from all locations.¹¹ Your mug shot might be forever preserved online, allowing anyone with Internet access to search for it. Clearly, the consequences of having a mug shot publicized can be damaging and far-reaching for the innocent and the guilty alike.

Perhaps in light of these considerations, the Department of Justice (DOJ) states in its official guidelines that the USMS should not release mug shots to the public unless the release would serve a “law enforcement function.”¹² Generally, therefore, when the USMS receives a Freedom of Information Act (FOIA) request for the release of mug shots in its possession, it refuses that request.¹³

Until recently, the USMS made a key exception to its general rule of nondisclosure: if a FOIA request for a mug shot came from within the Sixth Circuit, the USMS would release that image.¹⁴ And once the mug shot was released to one individual or organization within the Sixth Circuit, it could then be disseminated into other circuits and

for mug shot websites to remove her photograph from their public archives. The woman eventually sued the websites on publicity-rights grounds because they were profiting from the use of her image. See Christopher Connelly, *Mug Shot Websites Charge When You're Charged, for Now*, NAT'L PUB. RADIO (Dec. 23, 2012, 12:41 PM), <http://www.npr.org/blogs/thetwo-way/2012/12/23/167916738/mug-shot-websites-charge-when-youre-charged-for-now>; see also David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?page-wanted=all&_r=0 (noting that mug shot removal is now a “mini-industry” that is “nearly as opaque as the one it is intended to counter,” namely, mug shot publication websites).

¹⁰ See Pat Reavy, *Sheriff Pulls Mug Shots Offline to Stop “Extortion” Websites*, DESERET NEWS, (Jan. 10, 2013, 1:42 PM), <http://www.deseretnews.com/article/865570390/Sheriff-pulls-mug-shots-offline-to-stop-extortion-websites.html?pg=all> (quoting Salt Lake County Sheriff Jim Winder as saying that “once those mug shots are on the Internet, they never really disappear” because they could “very easily . . . show up on another [website],” even when the subjects opt to pay for the removal).

¹¹ See LANE, *supra* note 7, at 234 (“As many, many people have discovered, it is far too easy for information to be copied from one location on the Web to another or to be spread around the globe in a seemingly endless string of forwarded e-mails.”).

¹² 28 C.F.R. § 50.2(b)(7) (2013).

¹³ See Memorandum from Gerald M. Auerbach, Gen. Counsel, U.S. Dep’t of Justice, to All U.S. Marshals 2–3 (Dec. 12, 2012) [hereinafter Auerbach Memo], available at http://www.usmarshals.gov/foia/policy/booking_photos.pdf.

¹⁴ See *id.* at 2 (explaining the exception for Sixth Circuit FOIA requests to accommodate that circuit’s holding in *Detroit Free Press, Inc. v. Dep’t of Justice*, 73 F.3d 93, 99 (6th Cir. 1996)).

beyond.¹⁵ The USMS made this exception to its usual policy because of a split in opinion among the federal Courts of Appeals.¹⁶ Three circuit courts have weighed in on the question of whether the USMS must release mug shots in response to a FOIA request, and they have reached two different answers to the question.¹⁷ The courts disagree about whether an arrestee has a privacy interest in his or her mug shot that is sufficient to outweigh any public interest that would be served by releasing the mug shot. The Sixth Circuit has long held that arrestees enjoy no such privacy interest.¹⁸ But both the Tenth and Eleventh Circuits held more recently that arrestees enjoy a significant privacy interest and that the USMS may categorically refuse to release mug shots to FOIA requesters.¹⁹

In December of 2012, this exception was all but eliminated. A memorandum from the DOJ's Office of the General Counsel advised all Marshals that "effective immediately, the USMS will not disclose booking photographs under the FOIA, regardless of where the FOIA request originated."²⁰ This means that the USMS will no longer follow the Sixth Circuit precedent requiring the release of mug shots upon FOIA request. This policy shift added a layer of complexity to

¹⁵ Some debate exists as to whether the USMS *itself* would release a mug shot to subsequent requesters once it already has released a particular image to a requester from the Sixth Circuit. Compare Josh Gerstein, *Court Ruling Keeps Federal Mugshots Secret*, POLITICO (Feb. 22, 2012, 1:04 PM), <http://www.politico.com/blogs/under-the-radar/2012/02/court-ruling-keeps-federal-mugshots-secret-115210.html> (yes, the USMS would then release the image to anyone who requested it), with Christine Beckett, *U.S. Marshals Service Explains Mug Shot Release*, REPS. COMM. FOR FREEDOM PRESS (Feb. 24, 2011), <http://www.rcfp.org/browse-media-law-resources/news/us-marshals-service-explains-mug-shot-release> (no, the USMS would continue to refuse to release the image outside of the Sixth Circuit). In any case, once a mug shot is publicly released in one jurisdiction, that successful requester certainly may disseminate it to all other jurisdictions—the USMS need not release the image to additional requesters in order for it to garner nationwide attention. For example, national news organizations were able to obtain Bernie Madoff's FBI mug shot simply by submitting their FOIA requests from one of the states encompassed within the Sixth Circuit's jurisdiction. See Erik Sherman, *Indicted Executive's Mug Shots Are Exempt from FOIA*, INSIDECOUNSEL (June 1, 2011), <http://www.insidecounsel.com/2011/06/01/indicted-executives-mug-shots-are-exempt-from-foia>.

¹⁶ See Beckett, *supra* note 15 (quoting David Gonzales, U.S. Marshal for the District of Arizona, who said that the USMS releases mug shots to Sixth Circuit requesters because of "a little wrinkle" in that circuit's case law (internal quotation marks omitted)).

¹⁷ See *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 830 (10th Cir. 2012); *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497, 502 (11th Cir. 2011); *Detroit Free Press*, 73 F.3d at 93.

¹⁸ *Detroit Free Press*, 73 F.3d at 97–98 (holding that where an individual is the subject of an ongoing criminal investigation and has already appeared in court, disclosure of his or her mug shot "could not reasonably be expected to constitute an unwarranted invasion of [his or her] personal privacy").

¹⁹ See *World Publ'g Co.*, 672 F.3d at 827–28; *Karantalis*, 635 F.3d at 503.

²⁰ Auerbach Memo, *supra* note 13, at 2–3. This rule is subject to exception, but those exceptional situations are likely to be few and far between. See *infra* notes 81–88 and accompanying text for further discussion of this memorandum and its probable consequences.

the issue: not only is there now a split among the circuits, but there is also a conflict between the Sixth Circuit and a federal administrative agency. This conflict is likely to lead to increased litigation, imposing a high burden on the federal judiciary and potential FOIA-requester plaintiffs.

In this Note, I first provide some background information about this issue. I begin by reviewing the history and purpose of the FOIA. I then outline various interpretations of the FOIA and its privacy exemptions, from the Supreme Court's decisions on this general issue, to the USMS's mercurial policy on FOIA mug shot requests, to the three circuit courts' opinions specifically addressing the release of mug shots under the FOIA.

Next, I evaluate the three circuit courts' treatments of this issue and outline a preferable approach for courts facing this issue in the future. I argue against the Sixth Circuit's holding in *Detroit Free Press* that federal law enforcement agencies must release mug shots to FOIA requesters. I assert that the Tenth and Eleventh Circuits were correct in concluding that federal agencies are not required to disclose mug shots in response to FOIA requests. Balancing the public and individual interests at stake, I conclude, as these courts did, that the public interest is ultimately outweighed by the individual's legitimate privacy interest in his or her mug shot. But I argue that the analysis required to reach this conclusion should include a more careful consideration of the interests at stake and the relevant precedent.

Finally, I explain why the current state of the law in this area is undesirable and untenable, and I advocate for a prompt resolution to the conflict among the circuits and branches of government. I further argue that my proposed solution is especially desirable because, by acknowledging the importance of the interests at stake and weighing them accordingly in their interest-balancing analyses, courts would actually emphasize the value of the individual's privacy right and publicly reaffirm judicial commitment to its protection.

I

THE FOIA'S HISTORY AND PURPOSE

Eminent American statesmen and scholars have long touted the importance of allowing citizens access to information about the actions of their government. As early as 1822, James Madison persuasively argued that an informed public is an essential element of a functioning democracy, stating that “[k]nowledge will forever govern ignorance: And a people who mean to be their own Governors, must

arm themselves with the power which knowledge gives.”²¹ As President Lyndon Johnson signed the original FOIA into law in 1966, he argued that “democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.”²² Professor Joseph Stiglitz, a Nobel Prize winner and former Chief Economist of the World Bank, also recognized the right of the citizenry in a democratic nation to know what its government is doing, asserting that there should be “a strong presumption in favor of transparency and openness in government.”²³ He believed this concern was especially relevant in light of government agencies’ inclination to keep information secret.²⁴ The FOIA²⁵ takes an important step toward implementing these lofty

²¹ Letter from James Madison to W.T. Barty (Aug. 4, 1822), *quoted in* DAVID M. O’BRIEN, *THE PUBLIC’S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* 29 (1981).

²² Statement by the President upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, 2 WEEKLY COMP. PRES. DOC. 895, 895 (July 11, 1966), *quoted in* Fred H. Cate et al., *The Right to Privacy and the Public’s Right to Know: The “Central Purpose” of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 46 (1994).

²³ Joseph E. Stiglitz, Senior Vice President and Chief Economist, The World Bank, Oxford Amnesty Lecture: On Liberty, the Right to Know, and Public Discourse; The Role of Transparency in Public Life 1 (Jan. 27, 1999), *available at* <http://siteresources.worldbank.org/NEWS/Resources/oxford-amnesty.pdf>.

²⁴ *See id.* at 9–13, 25–26 (discussing government officials’ potential evasions of their FOIA obligations).

²⁵ 5 U.S.C. § 552 (2012). In relevant part, the statute reads:

(a) Each agency shall make available to the public information as follows:

...

(3)(A) . . . [E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

...

(4)(B) On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall . . . determine whether such records . . . shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. . . .

(b) This section does not apply to matters that are—

...

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy

ideals.²⁶

In 1966, Congress enacted the FOIA as an amendment to the Administrative Procedure Act.²⁷ The FOIA was the first American law to guarantee all citizens the right to access information from their government.²⁸ Its coverage is broad: it allows private individuals and members of the press alike to access information from the government,²⁹ and its information-release requirements apply to all federal agencies.³⁰

When Congress first enacted the FOIA, the Senate issued a statement explaining the purpose of the new law.³¹ While they referenced the difficult task of balancing the opposing interests of public access and government confidentiality, the statute's framers indicated that the FOIA was meant to "establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."³² Congress expressed this same sentiment again when it amended the FOIA in 1974 to further constrain federal agencies' ability to deny public access to government information.³³ The

²⁶ At least one prominent legal scholar has theorized that Congress was actually *required* by the Constitution to pass the FOIA or a similar statute in order to secure the First Amendment's right to free speech. See Mike Dorf, *Does the First Amendment Require the Freedom of Information Act?*, DORF ON LAW (Dec. 2, 2009, 1:24 AM), <http://www.dorfonlaw.org/2009/12/does-first-amendment-require-freedom-of.html>. Professor Dorf argues that:

A, if not the, core concern of the First Amendment, is political speech to facilitate self-government. In order for the People to know when and how to criticize their government with an eye towards bringing about political change, they must know what their government is doing. If the government can keep secret large swaths of its operations, the People will not be able to learn such matters.

Id. This constitutional gloss on the FOIA is not within the scope of this Note. Nonetheless, the suggestion that FOIA-exemption analyses have serious constitutional implications underscores how important it is for courts to conduct a careful, thorough analysis of the interests at stake before allowing the federal government to withhold information from a FOIA requester.

²⁷ 5 U.S.C. §§ 551–559 (2012).

²⁸ See HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT* 44 (1999).

²⁹ See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("[T]he identity of the requesting party has no bearing on the merits of his or her FOIA request.").

³⁰ See 5 U.S.C. § 552(a)(3)(A).

³¹ S. REP. NO. 89-813, at 2–6 (1965).

³² *Id.* at 3. Though he was initially skeptical of the proposed law because he wanted to preserve the executive's ability to keep information confidential in the interest of national security, President Johnson eventually did sign the FOIA into law. See O'BRIEN, *supra* note 21, at 7. He later stated that "freedom of information is so vital that *only* the national security, not the desire of public officials or private citizens, should determine when it must be restricted." *Id.* (emphasis added) (internal quotation marks omitted).

³³ See O'BRIEN, *supra* note 21, at 7–8 (noting that the amendments were a direct response to the Supreme Court's holding in *EPA v. Mink*, 410 U.S. 73 (1973), that courts did not have the authority to review the information that a federal agency had decided to withhold from FOIA requesters under one of the statutory exemptions).

FOIA was meant to be a comprehensive cure for the ill of unnecessary governmental secrecy; therefore, it established a default position that information should be disclosed to, rather than concealed from, the public.³⁴ Individuals or institutions that request information under the FOIA need not explain their motivation for seeking the information.³⁵ And if a federal agency refuses a FOIA request, it bears the burden of justifying that decision if it is later challenged in court.³⁶

However, the FOIA's framers included nine exceptions to this general rule of disclosure.³⁷ Two of these, Exemptions 6 and 7(C), relate to the individual's right to privacy.³⁸ Essentially, these exemptions establish that where the disclosure of information by a government agency would cause an "unwarranted invasion of personal privacy," the agency need not release that information.³⁹ Importantly, the FOIA exemptions do not impose an affirmative duty upon agencies to withhold exempted information. Rather, "agencies are *free* to withhold information falling within one of [the] . . . exemptions, but there is no *requirement* that they do so."⁴⁰

Though the FOIA's privacy-interest exemptions are similar, they differ in two important ways. First, Exemption 6 applies to "personnel and medical files," while Exemption 7(C) applies to "records or information compiled for law enforcement purposes."⁴¹ Second, the exemptions differ in their protectiveness of the individual's privacy interest: Exemption 6 is triggered only where disclosure of the information in question "*would* constitute a *clearly* unwarranted" privacy invasion,⁴² whereas Exemption 7(C) is triggered when disclosure merely "*could reasonably* be expected" to result in such an invasion.⁴³ Exemption 7(C)'s coverage is broader than that of Exemption 6, meaning that the FOIA provides more privacy protection for law enforcement records than for personnel and medical records.⁴⁴

³⁴ See *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); FOERSTEL, *supra* note 28, at 40.

³⁵ See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("[W]hether an invasion of privacy is warranted cannot turn on the purposes for which the [FOIA] request for information is made." (emphasis omitted)).

³⁶ See 5 U.S.C. § 552(a)(4)(B) (2012); *Reporters Comm.*, 489 U.S. at 755.

³⁷ See 5 U.S.C. § 552(b)(1)–(9).

³⁸ See *id.* § 552(b)(6), (7)(C); *supra* note 25. This Note considers the right to privacy only as it is created and defined by these FOIA provisions—not any privacy right that may emanate from provisions of the Constitution.

³⁹ 5 U.S.C. § 552(b)(6).

⁴⁰ Cate et al., *supra* note 22, at 49 (emphasis added).

⁴¹ 5 U.S.C. § 552(b)(6), (7)(C).

⁴² *Id.* § 552(b)(6) (emphasis added).

⁴³ *Id.* § 552(b)(7)(C) (emphasis added).

⁴⁴ See *U.S. Dep't of State v. Ray*, 502 U.S. 164, 172 (1991); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989); U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 562–64 (2009), available at http://www.justice.gov/oip/foia_guide09/exemption7c.pdf.

II

THE FOIA'S PRIVACY EXEMPTIONS

A. The Supreme Court's Interpretation of the FOIA's Privacy Exemptions

The Supreme Court has heard several challenges to federal agencies' withholding of information to FOIA requesters under the statutory exemptions.⁴⁵ Because the FOIA exemptions do not impose an affirmative duty to withhold information,⁴⁶ the Court in each of these cases was asked to sanction the agency's withholding of information—it was asked not to require but to allow that action on the agency's part.⁴⁷

Most of the Supreme Court's FOIA privacy cases have hinged on an interpretation of Exemption 6 of the FOIA.⁴⁸ But any level of privacy-right protection that Exemption 6 provides also applies to cases where Exemption 7(C) is invoked because Exemption 7(C) is more protective of the individual privacy interest than Exemption 6.⁴⁹ In other words, Exemption 7(C) provides all of the privacy protection that Exemption 6 provides, and more. For this reason, a thorough review of the Court's relevant cases should include decisions turning both on Exemption 6 and on Exemption 7(C).

The Supreme Court's first case involving privacy rights under the FOIA was *Department of the Air Force v. Rose*.⁵⁰ In *Rose*, student editors of a law review had made a FOIA request that the Air Force release summaries of its ethics hearings in which the hearing subjects' names would have been redacted.⁵¹ Addressing the privacy implications of this request, the Court noted that Exemption 6 required “a balancing of the individual's right of privacy against the preservation of the basic purpose of the [FOIA] to open agency action to the light of public

⁴⁵ See, e.g., *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487 (1994); *Ray*, 502 U.S. at 164; *Reporters Comm.*, 489 U.S. at 749; *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976).

⁴⁶ See *supra* notes 37–40 and accompanying text.

⁴⁷ See *FLRA*, 510 U.S. at 489–90; *Ray*, 502 U.S. at 166–67; *Reporters Comm.*, 489 U.S. at 751–52; *Rose*, 425 U.S. at 354–59.

⁴⁸ The Court has decided at least one case with possible FOIA privacy-right implications on the basis of the First and Fourteenth Amendments. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). In ruling that the Constitution does not bestow upon the media the right to access federal prison facilities, the *Houchins* Court did not reach the issue of whether such access would be required under the FOIA because the news agency apparently did not raise that issue. But the Court implied that its analysis might change if the request had arisen from a FOIA claim rather than a constitutional one. See *id.* at 14 (plurality opinion) (“The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975))) (internal quotation marks omitted).

⁴⁹ See *supra* notes 41–44 and accompanying text.

⁵⁰ 425 U.S. 352 (1976).

⁵¹ *Id.* at 355.

scrutiny.”⁵² The Court held that release of the redacted summaries would not *necessarily* constitute a “clearly unwarranted” invasion of privacy such as would place it within the reach of Exemption 6.⁵³

The next major FOIA privacy case decided by the Supreme Court provides, arguably, the most important precedent for the cases involving requests for the release of mug shots. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the Court considered whether “rap sheets” that were compiled and held by the DOJ must be released upon FOIA request or if they were protected by Exemption 7(C).⁵⁴ The Court recognized a significant privacy interest in the information collected in these rap sheets and held that this information was not subject to FOIA release—in other words, that rap sheets are protected by Exemption 7(C) and that the DOJ is under no obligation to release them to FOIA requesters.⁵⁵

In the course of its analysis, the *Reporters Committee* Court clarified several important points with respect to the FOIA’s privacy exemptions. First, the Court adopted the same interest-balancing test in the Exemption 7(C) context that it had first used in *Rose*, a case involving Exemption 6.⁵⁶ Second, in stating that Exemption 7(C) does not require an ad hoc balancing for each new case, the Court allowed lower courts to engage in categorical balancing for certain types of information that might be requested on many separate occasions.⁵⁷

The Court’s third point in this case is the most important in the FOIA privacy jurisprudence for the purposes of this Note. Expanding on the reasoning from *Rose* that had implicated the FOIA’s “basic purpose,” the Court outlined a three-part analysis for cases involving Exemption 7(C). First, the hearing court must determine whether the privacy interest implicated in the case at hand is of the kind that Congress intended Exemption 7(C) to protect.⁵⁸ Consistent with the language of the FOIA, the court should decide *de novo* whether the requested information must be released, and the government agency that seeks to withhold that information should bear the burden of

⁵² *Id.* at 372 (internal quotation marks omitted).

⁵³ *Id.* at 381 (holding that the district court should inspect the summaries *in camera* and then balance the public and privacy interests in their release).

⁵⁴ 489 U.S. 749, 751 (1989) (internal quotation marks omitted).

⁵⁵ *See id.* at 780.

⁵⁶ *Id.* at 762 (“[T]he cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” (quoting *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977)) (internal quotation marks omitted)).

⁵⁷ *See id.* at 778–79 (treating rap sheets in general as a single category of law enforcement record for the purpose of interest balancing and discussing the public and private interests common to all rap sheets).

⁵⁸ *Id.* at 762.

showing that Exemption 7(C) does apply to the given situation.⁵⁹ Second, if the agency carries its burden, the court must decide whether the privacy-interest invasion that would result from the release of information is warranted.⁶⁰ The *Reporters Committee* Court held that the only public interest that warrants such an invasion is one that relates to the FOIA's central purpose—namely, for citizens to be informed about the actions of their government.⁶¹ In other words, the only legitimate public interest for the purpose of Exemption 7(C) is an interest in “[o]fficial information that sheds light on an agency’s performance of its statutory duties.”⁶² Exemption 7(C) protects information about a private individual that does not relate to the agency’s conduct.⁶³ In the third and final step, the court should balance the privacy interest that the Exemption was meant to protect against the public interest in disclosure.⁶⁴

This three-part analysis, which came to be known as the “central purpose” test, is now an essential part of FOIA jurisprudence.⁶⁵ It applies to this day in all cases where the government is attempting to withhold information under the FOIA’s privacy exemptions.⁶⁶

After *Reporters Committee*, the Court decided two more cases that further clarified how courts should analyze the interests at stake as they engaged in categorical balancing under the FOIA’s privacy exemptions. First, in *United States Department of State v. Ray*, the Court ruled that Exemption 6 covered the names of Haitian deportees in State Department documents and that the release of this information

⁵⁹ See 5 U.S.C. § 552 (2012).

⁶⁰ See *Reporters Comm.*, 489 U.S. at 771.

⁶¹ See *id.* at 771–73.

⁶² *Id.* at 773.

⁶³ See *id.*; see also Cate et al., *supra* note 22, at 45 (summarizing and clarifying the *Reporters Committee* holding as to the FOIA’s central purpose and arguing that “although exemptions under the FOIA are permissive, not mandatory, agencies should be prohibited from disclosing information about a private individual other than the requester, unless that information sheds light on ‘what the Government is up to’”).

⁶⁴ *Reporters Comm.*, 489 U.S. at 776.

⁶⁵ See Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines over Public Information Law*, 45 DUKE L.J. 1249, 1255 (1996) (internal quotation marks omitted); see also Cate et al., *supra* note 22, at 53 (“The Court repeatedly returned to this basic point—that the FOIA is designed to provide access to information about government, not information maintained by the government about individuals.”).

⁶⁶ See, e.g., *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). This case involved Vincent Foster, Jr., former President Bill Clinton’s deputy counsel, who fatally shot himself. See *id.* at 160–61. Foster’s family members argued that color photographs of the death scene should not be subject to FOIA release because they fell under the ambit of Exemption 7(C). The Supreme Court found that the family did have a privacy interest under Exemption 7(C). See *id.* at 170. It also held that the FOIA requester had not met his burden to show that the request implicated a legitimate public interest—here, the interest in determining whether the government improperly performed its investigative duties. See *id.* at 175. For this reason, the Court concluded that the balance tilted in favor of the privacy interest and allowed the agency to withhold the requested information. See *id.*

would be a clearly unwarranted invasion of the deportees' privacy.⁶⁷ In evaluating the privacy interest, the Court considered, among other factors, the personal nature of the information sought, the fact that the information was tied to specific individuals rather than being anonymous, and the likelihood that those individuals would experience retaliation and social embarrassment if the information were released.⁶⁸ Then, in *United States Department of Defense v. FLRA*, the Court held that Exemption 6 also protected the names and home addresses of nonunion workers.⁶⁹ Employing the central purpose test from *Reporters Committee*, the *FLRA* majority characterized the public interest as "negligible" because it did not further the FOIA's purpose of allowing citizens to access information about the government's actions.⁷⁰

B. The USMS's Interpretation of the FOIA in the Mug Shot Context

The USMS is a domestic law enforcement agency within the DOJ, tasked to "protect, defend[,] and enforce the American justice system."⁷¹ The USMS captures fugitives and noncompliant sex offenders.⁷² Additionally, it takes custody of every individual charged with a federal offense, no matter which federal law enforcement agency made the initial arrest.⁷³ The USMS keeps these individuals in custody until they are either acquitted of the charged crime or convicted and transferred to a federal prison.⁷⁴ USMS officials take a mug shot of each individual they arrest, and the USMS then catalogues and retains these images.⁷⁵

As a federal agency, the USMS is subject to the FOIA's information-disclosure requirements.⁷⁶ However, the USMS ordinarily does

⁶⁷ 502 U.S. 164, 166, 175 (1991).

⁶⁸ *See id.* at 175–76.

⁶⁹ 510 U.S. 487, 489 (1994).

⁷⁰ *Id.* at 497–98.

⁷¹ U.S. MARSHALS SERV., STRATEGIC PLAN: 2012–2016, at 3 (2012), *available at* http://www.usmarshals.gov/foia/strategic_plan-2016.pdf.

⁷² *See id.* at 3.

⁷³ *Defendants in Custody and Prisoner Management*, U.S. MARSHALS SERV., <http://www.usmarshals.gov/prisoner/> (last visited Feb. 3, 2013).

⁷⁴ *Id.*

⁷⁵ *See Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999).

⁷⁶ *See Auerbach Memo*, *supra* note 13, at 2. The cases forming the circuit split that this Note addresses all center around requests for mug shots produced and stored by the USMS, but other federal law enforcement agencies, like the Federal Bureau of Investigation, also are subject to FOIA requests. This analysis therefore applies to their operations as well. However, for ease of reference in this Note, I will assume that the USMS is the government agency that retains the image in question.

not release mug shots to the public, even upon FOIA request.⁷⁷ Therefore, for the most part, the public never sees these photos.⁷⁸ But there are two exceptions to this general rule—situations where the USMS does release mug shots. The first is where the release of the mug shot would serve “a law enforcement function.”⁷⁹ The primary law enforcement function served by the release of a mug shot is to apprehend a fugitive.⁸⁰

The second exception is controversial. For years, the USMS had a special policy for FOIA requests initiated within the Sixth Circuit: when a FOIA mug shot request came from that jurisdiction, the USMS would release the mug shot, no matter where the arrest occurred.⁸¹ The USMS adopted this policy in response to the Sixth Circuit’s holding in *Detroit Free Press v. Department of Justice*, which held that the USMS must release mug shots to FOIA requesters.⁸² But the USMS recently changed this policy. A memorandum from the DOJ Office of General Counsel preserved the exception for disclosures that would serve a legitimate law enforcement purpose, but it directed the USMS not to release mug shots otherwise, “*regardless of where the FOIA request originated, unless [the USMS] determines either that the requester has made the requisite showing that the public interest in the requested booking photograph outweighs the privacy interest at stake or that other factors specific to the particular FOIA request warrant their release.*”⁸³ The memorandum superseded all previous USMS policies on the release of mug shots.⁸⁴

This new policy represents an important shift not only in the USMS’s treatment of FOIA mug shot requests but also in its deference

⁷⁷ *Id.*; see 28 C.F.R. § 50.2(b)(7) (2013).

⁷⁸ Not so for mug shots resulting from arrests by state or local law enforcement. Most states tend to allow for the release of mug shots to the public, though this can be inconsistent across jurisdictions. See THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, POLICE RECORDS: A REPORTER’S STATE-BY-STATE ACCESS GUIDE TO LAW ENFORCEMENT RECORDS 4–23 (2008), available at <http://www.rcfp.org/rcfp/orders/docs/POLICE.pdf> (collecting information about policies and practices regarding public access to mug shots from all fifty states).

⁷⁹ 28 C.F.R. § 50.2(b)(7).

⁸⁰ See *id.* § 50.2(b)(8) (clarifying that the USMS policy of not disseminating mug shots “is not intended to restrict the release of information concerning a defendant who is a fugitive from justice”).

⁸¹ See Auerbach Memo, *supra* note 13, at 2–3; see also Brief of Appellees at 34, *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497 (11th Cir. 2011) (No. 10-10229) (citing, in a brief by DOJ attorneys, instances where the USMS released mug shots in response to FOIA requests emanating from within the Sixth Circuit and acknowledging that “the Marshals Service cannot ignore the mandate of the Sixth Circuit with regard to requests for the release of mug shots within that jurisdiction”).

⁸² 73 F.3d 93, 99 (6th Cir. 1996); see *infra* notes 89–92 and accompanying text (summarizing the reasoning and holding of *Detroit Free Press*).

⁸³ Auerbach Memo, *supra* note 13, at 2–3 (emphasis added).

⁸⁴ *Id.* at 1.

to the Sixth Circuit's precedent on this matter.⁸⁵ By refusing to follow the Sixth Circuit's interpretation of the FOIA within that jurisdiction, the USMS enters the murky territory of agency nonacquiescence.⁸⁶ Conflicts of this kind between the federal judiciary and an administrative agency necessarily raise questions of separation of powers among the branches of the federal government and who has the final say when the Supreme Court has not yet ruled on a question of statutory interpretation.

This particular interbranch conflict is likely to lead to increased litigation. Because the new USMS policy directly contravenes the Sixth Circuit's holding in *Detroit Free Press*, every time the USMS refuses a FOIA mug shot request from the Sixth Circuit, the requester will have grounds to challenge this decision in federal district court.⁸⁷ And because the long-standing *Detroit Free Press* rule is binding on all of the district courts within the Sixth Circuit, these plaintiffs will almost certainly succeed on their claims at the district-court level. With this policy shift, therefore, the USMS has virtually guaranteed that the district courts of the Sixth Circuit will hear many cases where the USMS has denied FOIA mug shot requests in contravention of the

⁸⁵ Interestingly, this was not the first such change in USMS policy. In 2004, the USMS issued a memorandum stating that it would no longer release mug shots to FOIA requesters within the Sixth Circuit. See Brief in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Motion for Summary Judgment by Plaintiff Detroit Free Press at 8, *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, No. 2:05CV71601 (E.D. Mich. July 28, 2005) [hereinafter Brief in Support of Summary Judgment]. The Detroit Free Press sued the DOJ, alleging that the agency had denied its FOIA mug shot request—made from within the Sixth Circuit—in contravention of the *Detroit Free Press* holding. See Complaint at 2–3, *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, No. 2:05CV71601 (E.D. Mich. Apr. 25, 2005). But the district court never decided the issue on the merits: the USMS changed its policy back to include the exception for FOIA requests originating from the Sixth Circuit, then moved for summary judgment because it had released the mug shots to the plaintiff, rendering the plaintiff's claim moot. See Brief in Support of Summary Judgment, *supra*, at 1, 5–7. In so doing, the DOJ acknowledged that “[w]hile USMS continues to disagree with the decision in [*Detroit Free Press*] . . . [it] is bound by the limited holding of the Court of Appeals.” *Id.* at 5.

⁸⁶ See, e.g., *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (“A decision by this court, not overruled by the United States Supreme Court, is . . . binding on all inferior courts and litigants in the . . . Circuit, and also on administrative agencies . . .” (emphasis omitted) (quoting *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979)); *Ithaca Coll. v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (“While deference is to be given to an agency’s interpretation of the statute it administers, it is the courts that have the final word on matters of statutory interpretation.” (citations omitted)).

⁸⁷ Indeed, this effect can already be seen within the Sixth Circuit. In July 2013, the Detroit Free Press filed suit against the DOJ in the Eastern District of Michigan. Complaint, *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, No. 2:13CV12939 (E.D. Mich. July 5, 2013). The complaint alleges that the Detroit Free Press made a FOIA request that the DOJ release the mug shots of three defendants charged with public corruption, which request the DOJ refused to grant. See *id.* at 2–5.

Detroit Free Press holding—cases that the district courts are bound by stare decisis to decide in favor of the FOIA-requester plaintiffs.⁸⁸

C. Mug Shots, FOIA Exemption 7(C), and the Circuit Split

The USMS's general policy not to release mug shots has given rise to several cases in federal district courts, three of which have reached the circuit courts on appeal. Though the Supreme Court has not yet ruled on the public or privacy interest in mug shots under the FOIA's privacy exemptions, its precedent regarding Exemptions 6 and 7(C) informed the circuit courts' decisions in these cases. In *Detroit Free Press*, the Sixth Circuit held that mug shots were not subject to the protection of Exemption 7(C) because the information conveyed by mug shots was not private by nature.⁸⁹ It distinguished *Reporters Committee* on the basis of the type of information sought and the extent to which that information was already available to the public, holding that "the very nature of rap sheets demands that they be accorded a greater degree of privacy and protection from public scrutiny" than mug shots.⁹⁰ The court went on to hold that there was a legitimate public interest in mug shots.⁹¹ The release of mug shots could serve the FOIA's purpose by, for example, revealing law enforcement's mistakes or misconduct in making arrests.⁹²

The *Detroit Free Press* holding has not been widely accepted.⁹³ In fact, it was explicitly rejected by the Eleventh Circuit in *Karantalis v. United States Department of Justice*⁹⁴ and again by the Tenth Circuit in *World Publishing Co. v. United States Department of Justice*.⁹⁵ These courts saw the issue completely differently from the Sixth Circuit: they recognized a robust privacy interest in mug shots,⁹⁶ holding that this far outweighed any possible public interest in the disclosure of those images.⁹⁷

⁸⁸ See *supra* note 86 and accompanying text.

⁸⁹ *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 96–97 (6th Cir. 1996) (distinguishing the information requested in *Ray* and *FLRA* on this basis).

⁹⁰ *Id.* at 97.

⁹¹ See *id.* at 98 ("Public disclosure of mug shots in limited circumstances can . . . serve to subject the government to public oversight.").

⁹² *Id.*

⁹³ Only three other courts have addressed the issue head-on: two circuit courts, see *infra* notes 94–95 and accompanying text, and one federal district court, see *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F. Supp. 2d 472 (E.D. La. 1999). All have come to the opposite conclusion as the Sixth Circuit.

⁹⁴ 635 F.3d 497, 499 (11th Cir. 2011).

⁹⁵ 672 F.3d 825, 828–32 (10th Cir. 2012).

⁹⁶ See *id.* at 829–30 (citing with approval the *Karantalis* and *Times Picayune* courts' framing of the privacy interest at stake); *Karantalis*, 635 F.3d at 503 (stating that a mug shot "raises a unique privacy interest because it captures an embarrassing moment that is not normally exposed to the public eye").

⁹⁷ See *World Publ'g*, 672 F.3d at 831–32; *Karantalis*, 635 F.3d at 504.

In evaluating the privacy interest at stake with the release of mug shots, the Tenth and Eleventh Circuits considered several factors. Three reasons led both courts to weigh the individual privacy interest heavily. First, mug shots link their subjects to criminal activity regardless of the ultimate outcome of the case.⁹⁸ Second, these images capture an extremely embarrassing moment for the subject.⁹⁹ Finally, USMS mug shots are not generally available to the public.¹⁰⁰ In addition, the *World Publishing* court considered the fact that mug shots can have a long-lasting, stigmatizing effect for the subject.¹⁰¹

On the other side of the balancing test, the *Karantsalis* and *World Publishing* courts quickly dismissed the FOIA requesters' arguments, concluding that the public interest not only was outweighed by the privacy interest but was essentially nonexistent.¹⁰² Because they decided that the interest-balancing test under Exemption 7(C) clearly favored the individual's privacy interest, these courts held that the USMS was under no obligation to release the mug shots to FOIA requesters.¹⁰³ Thus, the Tenth and Eleventh Circuits' holdings align with the USMS's position that mug shots should not normally be released to the public.

III

THE PUBLIC'S INTEREST IN DISCLOSURE VERSUS THE INDIVIDUAL'S PRIVACY INTEREST

A. The Circuit Courts' Analyses in Mug Shot Request Cases

1. Detroit Free Press

In *Detroit Free Press*, the Sixth Circuit made several questionable analytical moves that led it to conclude that mug shots are subject to release upon FOIA request. Though the court rightly emphasized the history and spirit of the FOIA, its characterization of the privacy interest at stake was seriously problematic. This characterization skewed the court's interest-balancing analysis, allowing it to conclude that the USMS must disclose mug shots upon FOIA request.

⁹⁸ See *World Publ'g*, 672 F.3d at 827–28; *Karantsalis*, 635 F.3d at 503.

⁹⁹ See *World Publ'g*, 672 F.3d at 828; *Karantsalis*, 635 F.3d at 503.

¹⁰⁰ See *World Publ'g*, 672 F.3d at 828; *Karantsalis*, 635 F.3d at 503.

¹⁰¹ See 672 F.3d at 828.

¹⁰² See *id.* at 831 (“[T]here is little to suggest that releasing [mug shots] would significantly assist the public in detecting or deterring any underlying government misconduct.”); *Karantsalis*, 635 F.3d at 504 (“[T]he public obtains no discernable interest from viewing the [mug shots], except perhaps the negligible value of satisfying voyeuristic curiosities.”).

¹⁰³ See *World Publ'g*, 672 F.3d at 831–32; *Karantsalis*, 635 F.3d at 504.

Though the *Detroit Free Press* court properly identified the central purpose test from *Reporters Committee*,¹⁰⁴ it erred in how it applied that test to the situation at hand. The court first argued that mug shots are not the kind of private interest that should be covered by the FOIA privacy exemptions.¹⁰⁵ The court went to great lengths to distinguish the rap sheets at issue in *Reporters Committee* from mug shots to explain why Exemption 7(C) should apply to the former but not the latter. The court reasoned that because rap sheets are “compilations of many facts that may not otherwise be readily available from a single source,” they demand more protection from potential public exposure than do mug shots.¹⁰⁶ But the court did not explain why this difference should be determinative.

Moreover, the availability of information from other sources has not been determinative in the post-*Reporters Committee* privacy-exemption cases.¹⁰⁷ In *Ray*, the first of two key cases that clarified and applied the central purpose test, the Supreme Court did not use this as a factor in its decision making at all.¹⁰⁸ And in *FLRA*, the Court acknowledged that the information in question—the home addresses of nonunion employees—was commonly available through public sources like telephone directories and voter-registration records.¹⁰⁹ However, it reasoned that the individual’s privacy interest in a piece of information was not negated merely because that information might be “available to the public in some form.”¹¹⁰ The nonunion workers still had a meaningful privacy interest in not having that information released to FOIA requesters.¹¹¹ In sum, the Court did not determine an individual’s privacy interest in a piece of information based on how available that information might be to the public. Therefore, the Supreme Court’s privacy-exemption precedent does not support the Sixth Circuit’s position in *Detroit Free Press* that rap sheets are different from mug shots because they are not readily available.

After establishing to its satisfaction that the case at bar did not fall under the FOIA’s intended protections for individual privacy, the *Detroit Free Press* court then addressed the second part of the central pur-

¹⁰⁴ See *Detroit Free Press, Inc. v. Dep’t of Justice*, 73 F.3d 93, 98 (6th Cir. 1996) (discussing FOIA’s primary purpose).

¹⁰⁵ See *id.* at 97.

¹⁰⁶ *Id.*

¹⁰⁷ Indeed, the *Reporters Committee* Court itself observed that availability of information from other sources is not determinative. See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770 (1989) (“[T]he fact that an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.” (citations omitted) (internal quotation marks omitted)).

¹⁰⁸ See *supra* text accompanying notes 67–68.

¹⁰⁹ *U.S. Dep’t of Def. v. FLRA*, 510 U.S. 487, 500 (1994).

¹¹⁰ *Id.*

¹¹¹ See *id.* at 500–02.

pose test. It attempted to explain exactly how the release of a mug shot might serve the FOIA's central purpose of letting the citizenry know about their government's activities. The court offered two reasons: first, that a mug shot might "reveal the government's glaring error in detaining the wrong person," and second, that it might "reveal the circumstances surrounding an arrest and initial incarceration of an individual in a way that written information cannot."¹¹² But this argument, too, is unpersuasive. While these reasons may hold true for individual mug shots, the link between mug shots as a category and government action is simply too tenuous to justify so broad a rule.¹¹³ A mug shot is far more likely to provide information about the individual photographed than about the agency that keeps the record; therefore, this analysis under the central purpose test is misguided.

In addressing the third part of the central purpose test—the interest-balancing analysis—the *Detroit Free Press* court implicitly drew a distinction between mug shots of arrestees whose names "have already been made public and . . . have already made court appearances" and those who have not.¹¹⁴ But this line drawing simply proves that the court missed the essential privacy concern that attaches to the release of mug shots: these images are extremely embarrassing and risk causing lasting, unjustified harm to the individual.¹¹⁵ The mere statement of the fact that a person was arrested and charged with a crime is potentially embarrassing, but it does not implicate privacy in the same way that the release of a mug shot would. The potential harm is simply not as great.¹¹⁶ Furthermore, the likelihood for broad-ranging publication is not the same—mug shots are sensational images, which are easy to spread and hard to erase from the public memory.¹¹⁷ This

¹¹² *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 98 (6th Cir. 1996).

¹¹³ The Supreme Court noted in *Reporters Committee*:

[I]n the typical case in which one private citizen is seeking information about another[,] the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

¹¹⁴ *Detroit Free Press*, 73 F.3d at 95.

¹¹⁵ See *supra* notes 4–7 and accompanying text.

¹¹⁶ See *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497, 503 (11th Cir. 2011) (noting that a mug shot "is a unique and powerful type of photograph . . . [that] is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt").

¹¹⁷ For example, many highly publicized mug shots become the subject of extensive public comment. Recall, for example, the mug shot of Jared Loughner, who shot and killed six people and wounded Congresswoman Gabrielle Giffords in 2011. News media characterized his post-arrest photo as "spellbinding" and speculated about what possible insights it might convey about the arrestee and his state of mind. See Dan Barry, *Looking Behind the Mug-Shot Grin*, N.Y. TIMES (Jan. 15, 2011), <http://www.nytimes.com/2011/01/>

serves to compound the negative consequences for individual privacy that result from the release of a mug shot.¹¹⁸ As a result, the court undervalued the privacy interest at stake in the *Detroit Free Press* case, erroneously concluding that the government did not meet its burden of showing that the privacy exemption covers the requested information.¹¹⁹ This faulty reasoning led the court to conclude that the USMS must release the requested mug shot because “disclosure of the requested information could not reasonably be expected to constitute an unwarranted invasion of personal privacy.”¹²⁰

2. Karantsalis and World Publishing

The Tenth and Eleventh Circuits correctly concluded that mug shots should not be subject to mandatory release under the FOIA. But their analyses of the public interest at stake in this situation, and in FOIA privacy cases in general, were somewhat cramped. First, they did not acknowledge that applying the central purpose test from *Reporters Committee* to cases involving FOIA requests for the release of a mug shot is, in fact, an extension of that test.¹²¹ In *Reporters Committee*, the court employed some language indicating that the fact that rap sheets consist of “compiled” information was important to the central purpose analysis.¹²² The cases involving mug shots might be distinguished on this basis because mug shots are not compilations of pieces of information like rap sheets.¹²³ To adequately respond to

16/us/16loughner.html?pagewanted=all&r=0. Or look to Lindsay Lohan’s collection of mug shots, each of which inspires a new wave of public interest in the actress and her legal troubles. See, e.g., Richard Winton, *Lindsay Lohan Mug Shot: Latest Police Photo Joins Growing List*, L.A. TIMES L.A. NOW BLOG (Mar. 20, 2013, 7:12 AM), <http://latimesblogs.latimes.com/lanow/2013/03/lindsay-lohan-mug-shot-latest-joins-growing-list.html> (noting that Lohan’s most recent mug shot “garner[ed] lots of attention” and that “Lindsay Lohan mug shot” was a popular Internet search shortly after the image was released (internal quotations omitted)).

¹¹⁸ Perhaps more accurately, the Sixth Circuit does acknowledge this imposition but fails to take it at all seriously, stating that “the personal privacy of an individual is not necessarily invaded simply because that person suffers ridicule or embarrassment from the disclosure of information in the possession of government agencies.” *Detroit Free Press*, 73 F.3d at 97.

¹¹⁹ See *id.* at 96.

¹²⁰ *Id.* at 98.

¹²¹ See *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 827 (10th Cir. 2012); *Karantsalis*, 635 F.3d at 502.

¹²² See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989) (noting that “the privacy interest . . . [is] at its apex” when the requested “information is in the Government’s control as a compilation”).

¹²³ FOIA-requester plaintiffs are quick to make this argument—indeed, this distinction often forms the core of their arguments for compelling the USMS to release mug shots. See, e.g., Appellant’s Reply Brief at 3–4, *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825 (10th Cir. 2012) (No. 11-5063) (explaining that rap sheets involve compiling of data that might be erroneous and incomplete, whereas mug shots do not involve government databases and the accumulation of information).

this argument, a court should treat the first part of the central purpose test thoroughly, carefully articulating the reasons why Exemption 7(C) applies to the individual privacy interest in mug shots in the same way it applied to rap sheets in *Reporters Committee*.¹²⁴ In so doing, the court should be mindful of the fact that the government agency that withholds the information, not the individual or entity requesting it, properly bears the burden of establishing that this first requirement of the central purpose test is met.

Moreover, with respect to the second prong of the central purpose test, the Tenth and Eleventh Circuits apparently concluded that there is *no* public interest at stake in mug shot cases. This overstates the point. Surely the FOIA's history and purpose, the presumption that information should normally be disclosed under the FOIA, and the fact that the agency carries the initial burden to show that a privacy exemption applies to the situation, together indicate that there is *some* public interest in the information.¹²⁵ After all, the information is produced and held by the government, and there is a chance, however slim, that it might further the FOIA's central purpose of allowing citizens to be informed about their government's actions. Minimal though it may be, a public interest does exist—it is simply *outweighed* by the robust individual privacy interest in nondisclosure.

Ultimately, the Tenth and Eleventh Circuits' opinions are somewhat lacking in their analyses of the first step of the central purpose test and the burden the government bears therein. However, this is not a fatal flaw: both of these circuits ultimately come to the correct conclusion that mug shots do fall under the protection of Exemption 7(C) and that the USMS therefore cannot be compelled to release those images to FOIA requesters.¹²⁶

B. Reweighing the Public and Private Interests to Apply the Central Purpose Test More Effectively

Before attempting each step of the central purpose test and balancing the individual privacy interest against the public interest in disclosure, it is necessary to identify exactly what is at stake when courts and parties talk about the individual's "privacy interest" in his or her mug shot.

¹²⁴ See *Reporters Comm.*, 489 U.S. at 762 n.12.

¹²⁵ The argument that the public interest is not entirely negligible does not necessitate a reconsideration of the *Reporters Committee* holding about categorical balancing. See *supra* note 57 and accompanying text. It merely cautions that, for each new context in which a court applies the central purpose test, the court should adequately consider each side of the interest-balancing test before establishing a categorical rule for the type of information in question.

¹²⁶ See *World Publ'g Co.*, 672 F.3d at 830–32; *Karantalis*, 635 F.3d at 504.

Defining the individual interest in privacy, even in the broadest of terms, can be a very difficult task.¹²⁷ Perhaps the most common definition of privacy is one of simple *physical* privacy—the right to be left alone in one’s own space.¹²⁸ A more nuanced view of the right to privacy also encompasses the right to keep intimate communications (in the form of letters, e-mails, telephone conversations, journal entries, or even one’s inner conversations with oneself) confidential.¹²⁹

Undoubtedly, both of these definitions are correct. But the conception of the right to privacy that I find most appropriate and useful in this context is somewhat more expansive.¹³⁰ It focuses on control of information about oneself: under this definition, “[p]rivacy is the condition of not having undocumented personal knowledge about one possessed by others.”¹³¹ A person is stripped of privacy when his or her personal information is entered into the public record because the information becomes “public property.”¹³² The Supreme Court has adopted this control-centric definition of privacy in its seminal cases involving the FOIA’s privacy exemptions.¹³³

This definition of the privacy right is appropriately applied to photographs and is especially apposite for cases involving mug shots.¹³⁴ Mug shots capture the individual at a vulnerable, embarrassing moment.¹³⁵ More than that, they provide a lasting visual link be-

¹²⁷ See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151, 1153, 1157–58 (2004) (noting that privacy is “an unusually slippery concept” that nonetheless looms large in American law, politics, and society).

¹²⁸ See LANE, *supra* note 7, at 1.

¹²⁹ See *id.* at 1–2.

¹³⁰ See generally W.A. Parent, *Privacy, Morality, and the Law*, 12 *PHIL. & PUB. AFF.* 269 (1983), reprinted in *PRIVACY* 105 (Eric Barendt, ed., Int’l Library of Essays in Law & Legal Theory, 2d Ser., 2001). Parent emphasizes that while “privacy” as a concept certainly implicates questions of autonomy and freedom of choice, which many scholars take up in the course of their privacy-right analyses, these are distinct from the right to privacy as defined here. See *id.* at 272–74. So, while this definition of privacy is broader than the two previously mentioned, it is not unbounded.

¹³¹ *Id.* at 269. Although public sources like newspapers may reveal extremely personal information, Parent limits his conception of the right to privacy with the word “undocumented,” meaning not present in any public record. See *id.* at 270–71.

¹³² *Id.* at 271.

¹³³ See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) (“[B]oth the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person.”); see also *supra* note 58 and accompanying text (discussing the *Reporters Committee* Court’s consideration of the FOIA privacy exemptions’ intended scope—i.e., what version of “privacy” they were meant to protect).

¹³⁴ See LANE, *supra* note 7, at 55–56 (detailing the historical rise of the opportunistic use of unauthorized photographs of individuals and the corresponding reactions of individuals).

¹³⁵ See *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 503 (11th Cir. 2011).

tween the subject and criminality—a link that is very hard to break, even if the individual is eventually cleared of all wrongdoing.¹³⁶

Traditionally, photographs were thought to be objective, purely representational images of individuals.¹³⁷ But mug shots are different. More than simple records of an objective reality, they are connected to the subject's identity in a complex way.¹³⁸ Mug shots are "image[s] . . . taken to indicate criminality."¹³⁹ In the past, many philosophers and scientists used mug shots to support their theories that certain groups had inherently deviant natures, which were manifested in their physical appearances.¹⁴⁰ Inherent in the very existence of mug shots is a judgment by the police that the individual is guilty of some crime—a judgment that is made before any court or jury has a chance to weigh in on the issue. This underscores the powerful, lasting impression that mug shots can leave on the public, even if the person pictured is ultimately cleared of all wrongdoing. This impression of criminality can lead to social and professional stigmatization.¹⁴¹ In short, the effects of having one's mug shot released publicly could potentially be devastating. This is precisely the type of information that the right to privacy, defined in terms of others' inability to obtain undocumented personal knowledge about oneself, should protect.

A number of different factors caution courts and scholars to pay careful attention to the public interest at stake where the government has invoked this exemption to withhold information. These include the important, lofty goals underlying the FOIA; its default position of disclosure; and the fact that, for the first step of the central purpose test, the government bears the burden of showing that the claimed privacy interest does fall within Exemption 7(C). All three of the circuit courts that have addressed the issue of FOIA requests for mug shots correctly adopted the *Reporters Committee* central purpose test for evaluating the public interest,¹⁴² but none of them has adequately jus-

¹³⁶ See *supra* notes 5–11 and accompanying text (discussing the presumption of criminality that a mug shot carries, the potential negative consequences of a mug shot's publication for the individual, and the difficulty that an individual might encounter in removing his or her mug shot from the public record).

¹³⁷ See FINN, *supra* note 5, at xi.

¹³⁸ See PHILLIPS ET AL., *supra* note 2, at 29.

¹³⁹ FINN, *supra* note 5, at 1.

¹⁴⁰ See FINN, *supra* note 5, at 11–23; PHILLIPS ET AL., *supra* note 2, at 22–23.

¹⁴¹ See *supra* note 7. For a more academic discussion of this issue, see generally Charles N. Davis, *Expanding Privacy Rationales Under the Federal Freedom of Information Act: Stigmatization as Talisman*, 23 SOC. SCI. COMPUTER REV. 453 (2005) (explaining that the result of releasing certain personal information, which the FOIA's privacy exemptions would likely protect, is to stigmatize the individual).

¹⁴² See, e.g., *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 830 (10th Cir. 2012); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 502 (11th Cir. 2011); *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 96–98 (6th Cir. 1996).

tified its extension to the mug shot release situation or adequately considered the public interest in applying the test. A more precise, careful application of the central purpose test would solve this problem.

Fortunately, courts facing this issue are not wholly without guidance: the *Reporters Committee* reasoning is extremely useful here. At first glance, the facts in mug shot release cases might not map perfectly onto the *Reporters Committee* privacy-exemption precedent because a mug shot captures a single moment in the criminal process and does not compile different pieces of information in the way that a rap sheet does.¹⁴³ But the *Reporters Committee* precedent is nonetheless applicable to mug shot request cases for two important reasons.

First, the privacy interests at stake with respect to rap sheets and mug shots are similar in kind. Both types of information are records that law enforcement creates and holds that are often unreported publicly and that could cause extreme embarrassment, stigmatization, and negative consequences for the subject if they are released.¹⁴⁴ And the individual lacks direct control over each of these types of information: he or she is forced to rely on the agency that holds the information to assert his or her privacy interest in the information.

Second, broad language in *Reporters Committee* about the individual right to privacy suggests that the central purpose test should be the standard by which the public interest is evaluated in *all* FOIA privacy-exemption cases. The *Reporters Committee* Court stated that “a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy.”¹⁴⁵

The application of the central purpose test in the mug shot context does extend that test’s coverage to a new category of information, so courts that are asked to apply the test should be thorough in their analyses of the *Reporters Committee* precedent. They should not gloss too quickly over the first part of that three-part test: the government

¹⁴³ See *supra* text accompanying notes 106–11, 122–23 (discussing whether the fact that a requested document consists of a collection of different pieces of information is relevant to its protectability under the FOIA’s privacy exemptions).

¹⁴⁴ See *World Publ’g*, 672 F.3d at 829–30 (acknowledging “subtle differences” between mug shots and rap sheets but nevertheless “draw[ing] a comparison between the sensitive nature of the subject matter in a rap sheet, and the vivid and personal portrayal of a person’s likeness in a booking photograph”). But see *Detroit Free Press*, 73 F.3d at 97 (distinguishing mug shots from rap sheets).

¹⁴⁵ *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989). Read carefully, this “reasonable expectation” language seems to invite courts to apply the central purpose test in other FOIA privacy-exemption contexts and incorporate it into their balancing of the public and private interests. But “reasonable expectation” is not certainty—the central purpose test is not a *per se* rule establishing an unshakeable privacy interest in all personal information held by government agencies.

must prove to the court that the claimed privacy interest is, in fact, one which the FOIA exemption was intended to cover and one to which it should apply in the instant case. If the court is satisfied that the government has carried its burden, only then should it analyze the legitimacy of the public interest and balance it against the privacy interest.

The analyses of courts facing this issue in the future should follow these basic lines: although the public interest is real and recognizable given the value of an informed public and the FOIA's stated goal of disclosure, the individual's privacy interest in his or her mug shot is simply too great to be disregarded. When a law enforcement agency releases a mug shot for the public to view, the pictured arrestee, who often has not yet been tried or convicted of the crime for which he or she was arrested, loses control over previously undocumented personal information. As a result of the mug shot's publication, the arrestee likely will suffer great embarrassment, stigmatization, and negative consequences in his or her professional and personal life.¹⁴⁶ For this reason, the individual privacy interest outweighs the public interest, and federal law enforcement agencies should be free to withhold mug shots from FOIA requesters as they see fit.

Every step of the central purpose analysis is important because together, they ensure that both the public and private interests receive their due consideration in each new FOIA-exemption case. In particular, courts must not skip over the public interest analysis in the face of statutory exemptions that threaten to "swallow the [FOIA's disclosure] presumption whole."¹⁴⁷

CONCLUSION

Currently, the Sixth Circuit's ruling in *Detroit Free Press* is in conflict with the Tenth and Eleventh Circuits' precedent and the USMS's general policy not to release the mug shots it takes.¹⁴⁸ This is an undesirable and inequitable situation. Every circuit split creates inconsistencies in the application of federal law, which puts pressure on the legal system generally.¹⁴⁹ But this particular split has more disturbing consequences for individual arrestees and for the relationship of the branches of the federal government.

¹⁴⁶ See *supra* notes 4–7 and accompanying text.

¹⁴⁷ Beall, *supra* note 65, at 1251 n.6.

¹⁴⁸ See *supra* text accompanying notes 12–19.

¹⁴⁹ See, e.g., Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 541–44 (2010) (describing the important role of uniformity in the federal justice system); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1171–74 (2012) (arguing that circuit-court disuniformity undermines judicial authority and impedes development of constitutional norms).

If the USMS honors FOIA requests for mug shots originating in the Sixth Circuit, that information may easily become public in all other jurisdictions—including those where the courts have ruled that the USMS need not release the mug shots. In this way, individuals or organizations may easily work around the Tenth and Eleventh Circuits' prohibition of the release of mug shots by originating their FOIA requests from within the geographical bounds of the Sixth Circuit. The firm rule of nondisclosure that the Tenth and Eleventh Circuits established is thus rendered essentially toothless.

But if the USMS refuses to follow the Sixth Circuit's precedent, as it recently did, another set of problems arises. This refusal raises separation-of-powers questions about whose statutory interpretation—that of the administrative agency or the Court of Appeals—should trump in the absence of Supreme Court or congressional input. A related concern is the issue of agency nonacquiescence, which has long been a topic of debate in the federal appellate courts. Finally, there is the practical concern about what negative effect the increased litigation stemming from the USMS's new policy will have on district courts in the Sixth Circuit.

This intercircuit, interbranch split on how to interpret the FOIA should therefore be resolved as soon as possible. A legislative solution might be the best option.¹⁵⁰ But Congress does not seem inclined to address the issue anytime soon. This leaves three possible judicial remedies. First, the Sixth Circuit might sit en banc to overrule its decision in *Detroit Free Press* that the USMS must release mug shots upon FOIA request. The court will almost certainly have the opportunity to reconsider *Detroit Free Press*, given the increased litigation that the USMS's new policy will trigger on the issue.¹⁵¹ Second, the Supreme Court could weigh in on this issue, resolving the conflict among the circuits and the branches by overruling *Detroit Free Press*. Again, the increased litigation that the USMS's new policy will engender will probably present the Court with ample opportunity to do this.

Notably, both of these alternatives would take quite some time to come into effect. In the interim, a third option—which is, admittedly, only a partial remedy—might provide some protection to individual arrestees and a fair, predictable process for FOIA requesters. The majority of U.S. jurisdictions have no binding precedent on whether Exemption 7(C) allows the USMS to withhold mug shots from FOIA

¹⁵⁰ See Gregory Nathaniel Wolfe, Note, *Smile for the Camera, the World Is Going to See That Mug: The Dilemma of Privacy Interests in Mug Shots*, 113 COLUM. L. REV. 2227, 2270–72 (2013) (arguing that Congress should pass a law protecting all mug shots—state and federal—from disclosure absent some “compelling justification for release”).

¹⁵¹ See *supra* notes 86–88 and accompanying text.

requesters.¹⁵² If and when the USMS's withholding of these images is challenged in jurisdictions that have not previously ruled on the issue, those courts should adopt the approach I outline in this Note. They should carefully apply the central purpose test, remaining mindful of the burden the government bears to show that Exemption 7(C) does apply to this situation and the potential public interest in disclosure, recognizing the importance of the privacy interest at stake, and ruling accordingly.

By rebalancing the public and private interests with more careful consideration of the elements of the central purpose test, including the public interest and the burden the government agency should bear to show that Exemption 7(C) actually applies, courts would actually reaffirm the importance of the privacy interest at stake. Though this result is somewhat unexpected, it makes intuitive sense: by explaining the privacy interest thoroughly and requiring the government to fully support its withholding of allegedly private information, courts would acknowledge how truly vital the individual's privacy interest is. This underscores the real, continuing importance of the individual's control over the personal information contained in his or her mug shot by noting that the privacy interest is not merely presumed to be present in every FOIA case. Rather, it is reevaluated under the central purpose test and reaffirmed with each new application of the FOIA's privacy exemptions.

¹⁵² Indeed, the only federal courts to address the issue are the Sixth Circuit in *Detroit Free Press, Inc. v. Department of Justice*, 73 F.3d 93 (6th Cir. 1996), the Eleventh Circuit in *Karantalis v. U.S. Department of Justice*, 635 F.3d 497 (11th Cir. 2011), the Tenth Circuit in *World Publishing Co. v. U.S. Department of Justice*, 672 F.3d 825 (10th Cir. 2012), and the Eastern District of Louisiana in *Times Picayune Publishing Corp. v. United States Department of Justice*, 37 F. Supp. 2d 472 (E.D. La. 1999). This remains an open issue in every other U.S. jurisdiction.