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A PICTURE SAYS A THOUSAND WORDS: APPLYING FOIA'S EXEMPTION 7(C) TO MUG SHOTS

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Joe Smith is the CEO of a hedge fund company located in New York. He is well known in both the financial business sector and his local community. Smith was arrested for tax evasion. He was booked by the United States Marshals Service (“USMS”), at which point his mug shot was taken. Upon hearing about the arrest, a New York newspaper publisher was intrigued and filed a Freedom of Information Act (“FOIA”) request for a copy of Smith’s mug shot. The USMS denied the request on the ground that the photograph was exempt from disclosure pursuant to Exemption 7(C) of FOIA because the mug shot was taken for law enforcement purposes and “could reasonably be expected to constitute an unwarranted invasion of [Smith’s] personal privacy.”¹ When Smith learned of this request and the subsequent denial, he was relieved to know that his mug shot would not be released to the public. One week later, a newspaper in Ohio made a FOIA request for the same mug shot. This time, however, the USMS granted the request because Ohio is located in the Sixth Circuit, which has ruled that the release of a mug shot does not constitute an unwarranted invasion of personal privacy. Smith’s mug shot was released to the newspaper company, and two weeks later Smith’s mug shot appeared in an Ohio newspaper. Smith had not even been convicted yet, but a photograph associating him with criminality was released to the public, potentially destroying his relationships, his business, and his reputation.²

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¹ 5 U.S.C. § 552(b)(7)(C) (2012).

² The introductory hypothetical outlines the basic problem underlying the current circuit split on mug shot disclosure pursuant to FOIA.

INTRODUCTION

Today, the mug shot is an icon of visual culture.³ Mug shots, however, were not taken or used until the mid-nineteenth century, when it was realized that photography could be used for law enforcement purposes.⁴ The Pinkerton National Detective Agency, founded in 1850, is credited with the creation of the mug shot: a close-up photograph of the individual's face from the front, alongside a photograph of the individual's profile.⁵ Up until that time, posters advertising fugitives' information only included the name of the fugitive and were only distributed locally.⁶ Law enforcement personnel attempted to describe the characteristics of the fugitives, but oftentimes the descriptions were inaccurate as to clothing, hair color, and facial features.⁷ As the population of the United States became more mobile, law enforcement agencies wanted to develop new methods for identifying criminals.⁸ It was not until the end of the Civil War that law enforcement agencies began using photographs, body measurements, and fingerprints to identify criminals.⁹ By the late 1880s, criminal mug shots were in use by most police departments in the United States.¹⁰

Today, mug shots serve two important law enforcement purposes. The first purpose is to capture an individual's appearance at the time of arrest.¹¹ A defendant's appearance may change between the time of arrest and the time of trial, so it is important that a mug shot shows the individual's physical characteristics along with the outfit worn at the time of arrest.¹²

³ JONATHAN FINN, CAPTURING THE CRIMINAL IMAGE: FROM MUG SHOT TO SURVEILLANCE SOCIETY 1 (2009).

⁴ See 1 William H. Hewitt, *Police Records Administration*, in POLICE MANAGEMENT LIBRARY 497, 498–99 (1968).

⁵ BARBARA FIFER & MARTIN KIDSTON, WANTED! WANTED POSTERS OF THE OLD WEST AND STORIES BEHIND THE CRIMES 6–7 (2003).

⁶ *Id.* at 6.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 7.

¹⁰ Beth Caldwell & Ellen C. Caldwell, "Superpredators" and "Animals": Images and California's "Get Tough on Crime" Initiatives, 2011 J. INST. JUST. & INT'L STUD. 61, 65 (2011).

¹¹ Clifford S. Fishman, *Technology and the Internet: The Impending Destruction of Privacy by Betrayers, Grudgers, Snoops, Spammers, Corporations, and the Media*, 72 GEO. WASH. L. REV. 1503, 1515 n.48 (2004).

¹² CHRISTINE HESS ORTHMANN & KÄREN MATISON HESS, CRIMINAL INVESTIGATION 54 (10th ed. 2013).

The second purpose is to assist investigators with future crime investigations.¹³ Investigators will show mug shots to victims of crimes to help the victims identify the perpetrator, or they will release a mug shot to the public to assist with the arrest of a fugitive.¹⁴

Although mug shots play an important function in the law enforcement process, the photographs portray individuals in a negative light. Due to the circumstances in which a mug shot is taken, the photographs are typically unflattering images of the individual.¹⁵ The photograph documents a private moment; specifically, it includes an individual's expression at an embarrassing moment.¹⁶ At the time the photograph is taken, the individual has been "deprived of most liberties," resulting in a shame-filled expression captured by the photograph.¹⁷ Moreover, a mug shot causes an individual to be associated with a crime, whether or not the individual is guilty, potentially harming the individual's reputation.¹⁸

This Note argues that Exemption 7(C) of the Freedom of Information Act ("FOIA"), which exempts from disclosure information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy,"¹⁹ should be categorically applied to mug shots. Part I of this Note explores the recognition of a privacy right and the regulation of public records in the United States, with a focus on FOIA. Part II discusses the conflicting viewpoints held by the circuit courts that have decided whether or not Exemption 7(C) applies to mug shots. Each court analyzed whether a personal privacy interest is implicit in a mug shot and whether the public has a substantial interest in disclosure of mug shots. Then, Part III emphasizes that, by analyzing FOIA's legislative history and

¹³ Fishman, *supra* note 11.

¹⁴ See *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 829–30 (10th Cir. 2012).

¹⁵ FINN, *supra* note 3.

¹⁶ *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, 73 F.3d 93, 99 (6th Cir. 1996) (Norris, J., dissenting).

¹⁷ *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 503 (11th Cir. 2011) (per curiam).

¹⁸ FINN, *supra* note 3. "[M]ug shots focus on and create a stereotypical criminal gaze, so that whether innocent or guilty, a mug shot actually creates an image of the convicted that appears guilty before proven innocent." Caldwell & Caldwell, *supra* note 10.

¹⁹ 5 U.S.C. § 552(b)(7)(C) (2012).

how other courts have interpreted the Exemption 7(C) privacy interest, a privacy interest exists in mug shots. Part III also discusses why policy considerations strengthen the argument for keeping mug shots confidential. Additionally, Part III explains that if there is a public interest in mug shots, then the interest is minimal and disclosure without consent is unwarranted. Finally, Part IV urges Congress to enact a categorical exemption for mug shots, such that a mug shot will only be released in two situations: (1) to the subject of the mug shot when the subject makes a request for it, or (2) to the public if the subject of the mug shot consents to release.

I. PRIVACY RIGHTS AND ACCESS TO PUBLIC RECORDS

In the United States, the public has a right to access the records of public offices, specifically the offices of government agencies and of the courts.²⁰ By making these records available, the public is better able to monitor governmental work. Nevertheless, many of these records include information on private individuals, much of which is confidential information that the individual does not intend to or want to disclose to the public. Part I.A of this Note provides a brief history of the privacy right recognized in the United States. Part I.B discusses the public's right to access government records. Specifically, Part I.B analyzes FOIA and how it regulates the disclosure of public records, including the records that contain confidential information about private individuals. Then, Part I.C analyzes the Supreme Court's decisions in *United States Department of Justice v. Reporters Committee for Freedom of the Press*²¹ and *National Archives and Records Administration v. Favish*,²² which both provide a framework for analyzing "unwarranted invasion[s] of personal privacy" under Exemption 7(C) of FOIA.²³ Finally, Part I.D briefly discusses categories of information that, according to courts' opinions, implicate a privacy interest and are exempt from disclosure pursuant to Exemption 7(C).

²⁰ See 5 U.S.C. § 552; *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).

²¹ 489 U.S. 749, 751 (1989).

²² 541 U.S. 157, 160 (2004).

²³ 5 U.S.C. § 552(b)(7)(C).

A. *The Right to Privacy*

Today, there are three general areas of privacy recognized in the United States: the constitutional guarantee of privacy, the statutory right to privacy, and the tort action that protects privacy.²⁴ The concept of privacy was introduced into American law in 1928 when Supreme Court Justice Louis Brandeis asserted the existence of “the right to be let alone” based on the protections guaranteed by the Constitution.²⁵ In 1965, the Supreme Court recognized a constitutional right to privacy.²⁶ Then, in its 1972 decision, *Eisenstadt v. Baird*,²⁷ the Supreme Court stated, “If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person”²⁸ Five years later, in *Whalen v. Roe*,²⁹ the Supreme Court recognized two types of constitutional privacy 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.”³⁰ Despite recognition of these two interests, the Court in *Whalen* failed to outline how the right could be violated and how the courts were to assess the right when confronted with cases dealing with a privacy issue.³¹ Without a clear definition of what privacy is, the concept of privacy continues to be developed by the customs, needs, and experiences of society.³²

²⁴ See Major John F. Joyce, *The Privacy Act: A Sword and a Shield but Sometimes Neither*, 99 MIL. L. REV. 113, 115 (1983).

²⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting), overruled by *Katz v. United States*, 389 U.S. 347, 353–54 (1967), and *Berger v. New York*, 388 U.S. 41, 50–51 (1967).

²⁶ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (explaining that there are penumbras in both the First Amendment and the Bill of Rights that create zones of privacy that are protected from governmental intrusion).

²⁷ 405 U.S. 438 (1972).

²⁸ *Id.* at 453.

²⁹ 429 U.S. 589 (1977).

³⁰ *Id.* at 599–600 (footnote omitted).

³¹ See Jessica C. Wilson, Note, *Protecting Privacy Absent a Constitutional Right: A Plausible Solution to Safeguarding Medical Records*, 85 WASH. U. L. REV. 653, 660 (2007).

³² Joyce, *supra* note 24.

B. Public Access to Government Records

In the United States, there is a general belief that the public has the right to access government records. Although no court has explicitly recognized this constitutional right, it has been suggested through courts' decisions.³³ American common law recognizes that individuals have a right to access public records so long as their desire for the records is not inappropriate.³⁴ Initially, an individual could only obtain government records if the individual had a "special interest" in the records³⁵ and the records were "sought for some specific and legitimate purpose."³⁶ A government official could deny access to a requested document if the purpose of the request was improper, like the desire "to satisfy idle curiosity or . . . [to create] a public scandal."³⁷ In 1978, the Supreme Court, in *Nixon v. Warner Communications, Inc.*,³⁸ emphasized that the public's right to access, although not absolute, is justified by the public's interest in overseeing the work of public agencies.³⁹ Today, however, with the passage of freedom of information laws, public officials have less discretion to deny access to government records.⁴⁰ FOIA, the primary statute that governs federal information practices, provides a more defined framework for when the public can obtain access to government information.⁴¹

FOIA was enacted in 1966⁴² to provide the public with a means to obtain access to most federal agency records.⁴³ Congress passed FOIA in part because previous legislation under

³³ Geneva Kay Loveland, Comment, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440, 1451 (1975).

³⁴ Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1160 (2002).

³⁵ *Id.* at 1155 (quoting *Nowack v. Fuller*, 219 N.W. 749, 751 (Mich. 1928)) (internal quotation marks omitted).

³⁶ *Id.* (quoting *Brewer v. Watson*, 71 Ala. 299, 305 (1882)).

³⁷ *Id.* at 1156 (quoting *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (Ky. 1974)) (internal quotation marks omitted).

³⁸ 435 U.S. 589 (1978).

³⁹ *Id.* at 597–98 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." (footnote omitted)).

⁴⁰ Solove, *supra* note 34, at 1156.

⁴¹ See generally 5 U.S.C. § 552 (2012).

⁴² *Id.*

⁴³ See U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 1 (2009) [hereinafter DOJ GUIDE TO FOIA], available at http://www.justice.gov/oip/foia_guide09.htm.

section 1 of the Administrative Procedures Act, for disclosure of certain government records, was “full of loopholes which allow[ed] agencies to deny legitimate information to the public” for the purpose of “cover[ing] up embarrassing mistakes or irregularities.”⁴⁴ President Lyndon Johnson signed FOIA into action declaring, “A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.”⁴⁵

FOIA creates a presumption that favors disclosure of records maintained by the executive branch of the United States government.⁴⁶ Such a presumption makes it easier for an individual to obtain access to government records. Whereas under the common law the public was required to state a “specific and legitimate” need for the record,⁴⁷ under FOIA, disclosure is favored in such a way that FOIA requesters typically do not have to justify or explain their reasoning for wanting a specific document.⁴⁸ The government now has a duty to disclose its records. The previous “need to know” standard, which the individual requester had to persuade the government of, has been replaced by a “right to know” standard.⁴⁹

Although FOIA requires government agencies to “provide the fullest possible disclosure of information to the public,”⁵⁰ FOIA does not mandate that all records be disclosed. There are nine exemptions in FOIA⁵¹ which allow an agency to withhold documents based on the reasonable belief that release of the documents would be harmful to one of the interests protected by the exemptions.⁵² The nine exemptions are not mandatory;

⁴⁴ S. REP. NO. 89-813, at 3 (1965).

⁴⁵ H.R. REP. NO. 104-795, at 8 (1996).

⁴⁶ H.R. REP. NO. 109-226, at 3 (2005); *see also id.* at 6 (“The executive branch includes cabinet departments, military departments, government corporations, government controlled corporations, independent regulatory agencies, and other establishments in the executive branch.”).

⁴⁷ *See Solove, supra* note 34, at 1155 (quoting *Brewer v. Watson*, 71 Ala. 299, 305 (1882)).

⁴⁸ DOJ GUIDE TO FOIA, *supra* note 43, at 44.

⁴⁹ H.R. REP. NO. 109-226, at 3 (internal quotation marks omitted).

⁵⁰ *Id.*

⁵¹ *Id.* at 15 (“The exemptions protect against the disclosure of information that would harm national defense or foreign policy, privacy of individuals, proprietary interests of business, functioning of the government, and other important interests.”).

⁵² *Id.* at 3.

rather, an agency can use discretion to disclose information if it thinks that there would be no resulting harm from disclosure of the information to the public.⁵³ Additionally, to further FOIA's purpose of full agency disclosure, when a requested document contains only some information that falls within an exemption, any "reasonably segregable portion" of the document should be released to the requester once the exempted information is redacted.⁵⁴

Two of FOIA's nine exemptions protect personal privacy interests.⁵⁵ Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁵⁶ Exemption 7(C) "recognizes that individuals have a privacy interest in information maintained in law enforcement files,"⁵⁷ such that if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy," then the agency should deny the request.⁵⁸ If a requested document falls within either of these two exemptions, then the agency that receives the request should balance the individual's privacy interest with the public's interest in disclosure.⁵⁹

There are two significant differences between the two exemptions that exemplify why Exemption 7(C) is intended to provide broader protection.⁶⁰ First, Exemption 6 protects against a "clearly unwarranted invasion," whereas Exemption 7(C) protects against *any* "unwarranted invasion."⁶¹ Second, Exemption 6 allows the government to withhold a document only if disclosure "would" invade a personal privacy interest, whereas Exemption 7(C) only requires the government to find that disclosure "could reasonably be expected to" invade a personal

⁵³ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

⁵⁴ 5 U.S.C. § 552(b)(9) (2012); see also Solove, *supra* note 34, at 1162 ("If possible, private information can be deleted from records, and the redacted records disclosed to the requester.").

⁵⁵ DOJ GUIDE TO FOIA, *supra* note 43, at 417.

⁵⁶ 5 U.S.C. § 552(b)(6).

⁵⁷ H.R. REP. NO. 109-226, at 18; see also *id.* (explaining that Exemption 7 "allows agencies to withhold law enforcement records in order to protect the law enforcement process from interference.").

⁵⁸ 5 U.S.C. § 552(b)(7)(C).

⁵⁹ H.R. REP. NO. 109-226, at 18.

⁶⁰ See *id.*

⁶¹ 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C) (emphasis added).

privacy interest.⁶² For these reasons, the balance in Exemption 7(C), more often than the balance in Exemption 6, weighs in favor of protecting individuals' privacy interests.⁶³ The burden on the government to establish that a record be exempt from disclosure pursuant to Exemption 7(C) is less than the burden placed on the government in establishing an exemption under Exemption 6.⁶⁴ The use of distinct terminology by the drafters in the two exemptions implies that there is a greater privacy interest in law enforcement records than in personnel, medical, and other similar files.⁶⁵

C. *United States Department of Justice v. Reporters Committee for Freedom of the Press and National Archives and Records Administration v. Favish: An Analysis of FOIA's Exemption 7(C)*

The Supreme Court, in both *United States Department of Justice v. Reporters Committee for Freedom of the Press* and *National Archives and Records Administration v. Favish*, set forth principles that govern Exemption 7(C) of FOIA.

In *Reporters Committee*, members of the press requested the criminal records of an individual whose family business, led by organized crime figures, had allegedly engaged in illegal dealings with a corrupt Congressman.⁶⁶ Pursuant to FOIA, the respondents requested the individual's rap sheet, which contained "certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject."⁶⁷ The Federal Bureau of Investigation ("FBI") denied the request, and the respondents filed a complaint.⁶⁸

In this landmark case, the Supreme Court was presented with the question of whether the disclosure of a rap sheet to third parties "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of

⁶² *Id.* (emphasis added).

⁶³ H.R. REP. NO. 109-226, at 18.

⁶⁴ DOJ GUIDE TO FOIA, *supra* note 43, at 562.

⁶⁵ *See id.* at 562–63.

⁶⁶ 489 U.S. at 757.

⁶⁷ *Id.* at 752 (explaining that the principal use of rap sheets is "to assist in the detection and prosecution of offenders," as well as to assist "courts and corrections officials in connection with sentencing and parole decisions").

⁶⁸ *Id.* at 757.

Exemption 7(C) of FOIA.⁶⁹ The Court held that disclosure would constitute an “unwarranted” invasion of personal privacy because the subject of the rap sheet was a private citizen and the rap sheet did not contain any information about the government’s activities or operations.⁷⁰ Rather, the rap sheet was only a record that the government happened to be storing.⁷¹ The Court emphasized that the underlying purpose of FOIA “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.”⁷²

First, the Court noted, that there is a privacy interest in a rap sheet because a person has an interest “in avoiding disclosure of personal matters.”⁷³ Although the individual events summarized in the rap sheet, as matters of public record, were previously disclosed to the public,⁷⁴ the Court rejected the “cramped notion of personal privacy” that the respondent claimed exists when data is compiled into a single record.⁷⁵ The Court recognized that privacy includes an individual’s right to control information about the individual’s person, such that a distinction must be made between the disclosure of pieces of information contained in a rap sheet and disclosure of the rap sheet as a whole.⁷⁶ The purpose of FOIA, the Court stated, is not to create a “clearinghouse of information” on private individuals.⁷⁷ Essentially, the Court found that a substantial privacy interest exists in a rap sheet even though some of the pieces of information contained in a rap sheet are public information, and also that an individual has an interest in preventing future disclosures of personal information.⁷⁸

⁶⁹ *Id.* at 751 (quoting 5 U.S.C. § 552(b)(7)(C) (2012)) (internal quotation marks omitted).

⁷⁰ *Id.* at 780.

⁷¹ *Id.*

⁷² *Id.* at 774.

⁷³ *Id.* at 762 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 763–64.

⁷⁶ *Id.*

⁷⁷ *Id.* at 764.

⁷⁸ *Id.* at 770–71.

Next, the Court found that disclosure of the rap sheet would constitute an unwarranted invasion of personal privacy under Exemption 7(C).⁷⁹ The Court articulated a “basic purpose” doctrine by which it recognized that the public’s interest in private information must coincide with FOIA’s basic purpose, “to open agency action to the light of public scrutiny.”⁸⁰ The Court found that, because the subject of the rap sheet was a private citizen and the rap sheet contained summaries of information on that private citizen, and because the rap sheet “would not shed any light on the conduct of any Government agency or official,” the public interest in disclosure was minimal and the invasion of privacy would be unwarranted.⁸¹ The basic purpose doctrine asserts that pursuant to FOIA, the public can obtain information about the activities and operations of the executive branch, but FOIA does not give the public the right to access information about private individuals just because the information happens to be in a government record.⁸²

Approximately fifteen years after the Supreme Court’s decision in *Reporters Committee*, the Court was once again faced with an Exemption 7(C) issue. The Supreme Court in *Favish* was presented with the question of whether Exemption 7(C) extends to family members, when those family members object to the release of a photograph depicting a relative’s body at the scene of his death.⁸³ The Court ruled that “the personal privacy protected by Exemption 7(C) extends to family members who object to the disclosure” of pictures that contain graphic details of a relative’s death.⁸⁴ In the opinion, the Court gave a detailed analysis of when an invasion of privacy is unwarranted under Exemption 7(C) of FOIA.⁸⁵

⁷⁹ *Id.* at 775.

⁸⁰ *Id.* at 772 (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)) (internal quotation marks omitted).

⁸¹ *Id.* at 773.

⁸² Kenleigh Nicoletta, Case Note, *Blethen Maine Newspapers, Inc. v. State: Balancing the Public’s Right To Know Against the Privacy Rights of Victims of Sexual Abuse*, 59 ME. L. REV. 235, 242 (2007).

⁸³ *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 160 (2004).

⁸⁴ *Id.* at 171.

⁸⁵ *Id.* at 171–72.

As a general rule of FOIA, an individual does not need to explain why the individual is requesting a particular document⁸⁶ and does not need to disclose personal identity to the government agency.⁸⁷ However, the Supreme Court in *Favish* explained that when exemptions to FOIA are triggered, this general rule can be overcome.⁸⁸ The Court established a two-pronged test for government agencies to use to determine whether, according to Exemption 7(C), disclosure is warranted. First, a FOIA requester must establish a "sufficient reason" for the information; the requester must show that the "public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake."⁸⁹ Significantly, the public interest must be an interest that serves the purpose of FOIA, which is to allow the public to scrutinize government work.⁹⁰ Second, the requester must establish that the information will actually advance the specific interest that satisfied the first prong.⁹¹ Specifically, the requester would have to produce evidence to overcome the "presumption of legitimacy" afforded to government conduct and records.⁹² This test gives the executive branch guidance in determining which documents serve a genuine public interest such that disclosure is warranted.⁹³

D. Categories of Information That Implicate a Privacy Interest

In light of Exemption 7(C)'s protection of personal privacy interests, a number of courts have recognized that certain categories of information should be exempt from disclosure

⁸⁶ *Id.* at 172.

⁸⁷ *Id.*; see also *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (explaining that Congress's intention was to give all members of the public access to any particular document, regardless of one person's special interest in that document).

⁸⁸ *Favish*, 541 U.S. at 172.

⁸⁹ *Id.*

⁹⁰ *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (citing *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

⁹¹ See *Favish*, 541 U.S. at 172.

⁹² *Id.* at 174. "[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties." *Id.* (alteration in original) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)) (internal quotation marks omitted); see also *U.S. Dep't of State v. Ray*, 502 U.S. 164, 178–79 (1991) (explaining that merely speculative public benefits will not justify a significant privacy invasion).

⁹³ *Favish*, 541 U.S. at 173.

because they implicate a privacy interest. One specific category of information that is exempt from disclosure is an individual's criminal history. The Supreme Court in *Reporters Committee* recognized that a person's criminal history, specifically the information contained in a rap sheet, falls within the confines of the personal privacy protected by Exemption 7(C).⁹⁴ Another category of information that courts have recognized to be exempt from disclosure is personal information about subjects of investigations. Some of the circuit courts have applied Exemption 7(C) to protect from disclosure references to third-party subjects of investigations, including suspects, witnesses, and investigators, because of their interest in not being associated with alleged criminal activities or investigations.⁹⁵

Courts have also found that individuals can invoke Exemption 7(C) to protect from disclosure information about a family member. In *Favish*, the Supreme Court stated that the personal privacy interest protected by Exemption 7(C) is not just limited to a person's interest in controlling information about himself or herself, but it also extends to family members who wish to protect a relative's information from disclosure.⁹⁶ That decision came after the D.C. Circuit's opinion in *Lesar v. United States Department of Justice*,⁹⁷ in which the court noted that if family members' reputations could be damaged or if family members could be embarrassed by the disclosure of information about their relative, then disclosure is unwarranted.⁹⁸ Less than ten years later, in *Badhwar v. United States Department of the Air Force*,⁹⁹ the D.C. Circuit acknowledged that there is certain information that would, if disclosed, "shock the sensibilities of surviving kin" and, thus, should be exempt from disclosure.¹⁰⁰

⁹⁴ *Reporters Comm.*, 489 U.S. at 771; see also *O'Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (holding that a customs law violator had a privacy interest in his home address, which qualified for Exemption 7(C)).

⁹⁵ *E.g.*, *Neely v. Fed. Bureau of Investigation*, 208 F.3d 461, 464–65 (4th Cir. 2000); *Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 297 (2d Cir. 1999); *Fitzgibbon v. Cent. Intelligence Agency*, 911 F.2d 755, 767 (D.C. Cir. 1990).

⁹⁶ *Favish*, 541 U.S. at 165.

⁹⁷ 636 F.2d 472 (D.C. Cir. 1980).

⁹⁸ *Id.* at 488.

⁹⁹ 829 F.2d 182 (D.C. Cir. 1987).

¹⁰⁰ See *id.* at 185–86 (stating that whether disclosure of information would "shock the sensibilities of surviving kin" should be determined on a case by case basis, and that autopsy reports, based on this reasoning, are not exempt from disclosure).

Additionally, courts have recognized that a privacy interest exists in information that, when released, could have a stigmatizing effect. In *Department of the Air Force v. Rose*,¹⁰¹ the Supreme Court found that a privacy right is implicated if disclosure of the information could expose the subject to “lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends.”¹⁰² In relation to this idea, in *Halloran v. Veterans Administration*,¹⁰³ the Fifth Circuit stated that the “extent of one’s privacy cannot be determined merely by making an isolated assessment of the subject nature of the information”; rather, the information should be considered in connection with a detail, statement, or event that the subject of the information would not want publicly disclosed.¹⁰⁴ In essence, if the release of information to the public could in some way harm an individual’s reputation, then a privacy right is implicated.

II. CONFLICTING INTERPRETATIONS OF “PERSONAL PRIVACY” AND “UNWARRANTED INVASION” AND THE RESULTING CIRCUIT SPLIT ON EXEMPTION 7(C)’S APPLICATION TO MUG SHOTS

Recently, Exemption 7(C) of FOIA has come into the spotlight in regard to requests for mug shots. Three circuit courts have split over whether mug shots, taken in connection with a criminal proceeding, may be disclosed to the public after a FOIA request has been made. Each of the courts applied the same three-part balancing test that has emerged and has traditionally been applied to Exemption 7(C): A court must (1) determine if the requested information was gathered for a law enforcement purpose; (2) determine if there is a personal privacy

¹⁰¹ 425 U.S. 352 (1976).

¹⁰² *Id.* at 376–77 (quoting *Rose v. Dep’t of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974)) (internal quotation mark omitted) (discussing Exemption 6). In a later opinion, the Supreme Court noted that Congress’s “primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982); *see also* *Associated Press v. U.S. Dep’t of Def.*, 554 F.3d 274, 286–88 (2d Cir. 2009) (finding that disclosure of detainees’ identities could subject the individuals to embarrassment and humiliation); *Miller v. Bell*, 661 F.2d 623, 631–32 (7th Cir. 1981) (explaining in dictum that third parties named by interviewees should not have their names revealed because revelation could stigmatize them); *Lesar*, 636 F.2d at 488.

¹⁰³ 874 F.2d 315 (5th Cir. 1989).

¹⁰⁴ *Id.* at 321.

interest inherent in the requested information, and if there is one; (3) balance that interest against the public's interest in disclosure.¹⁰⁵ Nevertheless, the three courts came to different conclusions on whether a privacy interest exists in a mug shot and whether there is a public interest in disclosure of mug shots. Specifically, the Sixth Circuit found that disclosure of mug shots is warranted,¹⁰⁶ while the Tenth and Eleventh Circuits found the opposite.¹⁰⁷

A. The Sixth Circuit Finds No Privacy Interest and Compels Disclosure

The Sixth Circuit was the first circuit court to decide whether or not a mug shot could be disclosed pursuant to FOIA. In *Detroit Free Press, Inc. v. United States Department of Justice*,¹⁰⁸ the Detroit Free Press, after its request to the United States Marshals Service (“USMS”) was denied, sought the release of the mug shots of eight individuals who had been indicted and were awaiting trial.¹⁰⁹ The Sixth Circuit focused its analysis on the privacy provision laid out in Exemption 7(C) of FOIA and ruled in favor of the Detroit Free Press, requiring the USMS to release the mug shots.¹¹⁰

First, the court established that Exemption 7(C) was the proper exemption to apply because the USMS did take mug shots for law enforcement purposes, explaining that “records compiled by a law enforcement agency qualify as records compiled for law enforcement purposes under FOIA.”¹¹¹

Next, the court determined that there was no privacy interest inherent in a mug shot.¹¹² The court came to this conclusion by analyzing whether the release of a mug shot could

¹⁰⁵ See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989); *Prison Legal News v. Exec. Office for U.S. Attorneys*, 628 F.3d 1243, 1247–48 (10th Cir. 2011).

¹⁰⁶ See *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, 73 F.3d 93, 98 (6th Cir. 1996).

¹⁰⁷ See *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 831–32 (10th Cir. 2012); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam).

¹⁰⁸ 73 F.3d 93.

¹⁰⁹ *Id.* at 95.

¹¹⁰ *Id.* at 95–96.

¹¹¹ *Id.* at 96 (quoting *Jones v. Fed. Bureau of Investigation*, 41 F.3d 238, 245 (6th Cir. 1994)) (internal quotation marks omitted).

¹¹² See *id.* at 97.

“reasonably be expected to” invade an individual’s personal privacy.¹¹³ The court reasoned that because the mug shots were of individuals who had been indicted, who had made court appearances after their arrests, and whose names had already been released to the public, there was no privacy interest in their mug shots.¹¹⁴ Further, the court stated 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.”¹¹⁵ The court emphasized that because the subjects of the requested mug shots were involved in an ongoing proceeding, the need to suppress information surrounding the arrests was low.¹¹⁶

The court found no need to determine whether an invasion of privacy was unwarranted because it found that a mug shot does not implicate a privacy interest.¹¹⁷ Nevertheless, the court briefly explained that the disclosure of mug shots serves a “significant public interest,” such that disclosure would be warranted even if a privacy interest did exist.¹¹⁸ Reiterating that the purpose of FOIA is to “subject the government to public oversight,” the court stated that a mug shot could “more clearly reveal the government’s glaring error in detaining the wrong person” or “startlingly reveal the circumstances surrounding an arrest and initial incarceration of an individual.”¹¹⁹ The court also explained that the release of mug shots would provide documentary evidence of the functions of a particular government agency.¹²⁰

In his dissent, Judge Norris recognized that a privacy right exists in a mug shot and that FOIA’s purpose is not served by disclosure of a mug shot.¹²¹ A privacy right exists, he stated, because a mug shot does not just reveal the appearance of the individual, it includes the individual’s “expression at a humiliating moment and the fact that [the individual] has been

¹¹³ *Id.* at 96.

¹¹⁴ *Id.* at 98.

¹¹⁵ *Id.* at 97.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 97–98.

¹¹⁹ *Id.* at 98.

¹²⁰ *Id.* at 96.

¹²¹ *Id.* at 99–100 (Norris, J., dissenting).

booked on criminal charges.”¹²² Judge Norris noted that a mug shot’s association with criminality leads to the conclusion that an individual has a cognizable privacy interest in preventing the disclosure of the individual’s mug shot.¹²³ The judge also noted that the majority’s recognition of a public interest was flawed because the record contained no evidence that the USMS had abused arrest and detention practices.¹²⁴ The judge reasoned that a speculative interest could not be used to balance the Exemption 7(C) interests.¹²⁵

B. The Eleventh and Tenth Circuits Recognize a Privacy Interest in Mug Shots Such That Disclosure Would Constitute an Unwarranted Invasion of Personal Privacy

In 2011, the Eleventh Circuit was confronted with the mug shot disclosure issue, and it came to a different conclusion than the Sixth Circuit. In *Karantsalis v. United States Department of Justice*,¹²⁶ a freelance reporter filed a FOIA request for the release of the mug shot of Luis Giro, an individual who pleaded guilty to securities fraud prior to the reporter’s FOIA request.¹²⁷ The USMS denied the plaintiff’s request on the ground that release of the mug shot would constitute an “unwarranted invasion of Giro’s personal privacy” under Exemption 7(C) of FOIA.¹²⁸

As a preliminary matter, the court determined that Exemption 7(C) was the proper exemption to apply because the mug shot of Giro was taken for a law enforcement purpose.¹²⁹ The court reasoned that the photograph was taken by the USMS, a law enforcement agency that has the duty to book and process arrested individuals.¹³⁰

Then, the court found that a mug shot implicates a privacy interest.¹³¹ The court relied on past rulings of the Eleventh Circuit in which the court observed that mug shots suggest that

¹²² *Id.* at 99 (Norris, J., dissenting).

¹²³ *Id.*

¹²⁴ *Id.* at 99–100.

¹²⁵ *See id.*

¹²⁶ 635 F.3d 497 (11th Cir. 2011).

¹²⁷ *Id.* at 499.

¹²⁸ *Id.*

¹²⁹ *Id.* at 502.

¹³⁰ *See id.*

¹³¹ *Id.* at 503.

the subject of a mug shot is associated with criminal activity¹³² and that a substantial privacy interest exists in an individual's criminal history.¹³³ The court distinguished mug shots from other photographs on the grounds that mug shots capture an individual "in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties."¹³⁴ The court also noted that mug shots taken by the USMS are generally not available to the public, except within the Sixth Circuit, suggesting that a personal privacy interest has been recognized in a mug shot; otherwise, federal mug shots would be more readily accessible.¹³⁵ Essentially, the court recognized a "unique privacy interest" in mug shots, such that an individual has an interest in preventing the individual's mug shot from being disclosed to the public.¹³⁶

Finally, the court determined that disclosure of a mug shot would serve no public interest that justified the invasion of Giro's personal privacy.¹³⁷ The court was not convinced that the facial expressions portrayed in a mug shot would fulfill the purpose of FOIA—to impress upon the public the operations and activities of the government.¹³⁸ The court dismissed the plaintiff's argument that the facial expression captured in a mug shot would help the public determine that a prisoner received preferential treatment because a prisoner who was receiving such treatment would probably choose not to make it obvious.¹³⁹ The court concluded that Giro had a substantial privacy interest in his mug shot and that the public had no interest in obtaining a copy of a mug shot, other than for "satisfying voyeuristic curiosities"; therefore, the disclosure of Giro's mug shot would constitute an unwarranted invasion of personal privacy.¹⁴⁰

¹³² *Id.* (citing *United States v. Hines*, 955 F.2d 1449, 1455 (11th Cir. 1992)).

¹³³ *Id.* (citing *O'Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999)).

¹³⁴ *Id.*

¹³⁵ *See id.*; *see also* *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763–64 (1989).

¹³⁶ *Karantalis*, 635 F.3d at 503.

¹³⁷ *Id.* at 504.

¹³⁸ *Id.* (citing *Reporters Comm.*, 489 U.S. at 775).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Most recently, the Tenth Circuit weighed in on the issue and agreed with the Eleventh Circuit. In *World Publishing Co. v. United States Department of Justice*,¹⁴¹ a newspaper was seeking the release of the mug shots of six pretrial detainees after the USMS denied the newspaper's FOIA request on the grounds that release of the mug shots would constitute an unwarranted invasion of personal privacy under Exemption 7(C).¹⁴² The court agreed with the USMS and ruled in favor of the Department of Justice.¹⁴³

First, the court indicated that application of the Exemption 7(C) balancing test was proper because it was "undisputed" that the mug shots were taken for a law enforcement purpose.¹⁴⁴ The court then found that a mug shot implicates a privacy interest.¹⁴⁵ In making this determination, the court compared a privacy interest in booking photographs to a recognized privacy interest in rap sheets¹⁴⁶ and autopsy photographs.¹⁴⁷ The court explained that because a mug shot taken by the USMS was not available in some other forum and because there was a high probability that other photographs of the individuals could be found, the argument in favor of mug shot disclosure was weak.¹⁴⁸

The Tenth Circuit went on to conclude that disclosure of mug shots would constitute an unwarranted invasion of personal privacy under Exemption 7(C) because there was no public interest in disclosure of mug shots.¹⁴⁹ The court explained that the release of the mug shots would do little to serve the purpose of FOIA—to "inform citizens of a government agency's adequate performance of its function."¹⁵⁰ The appellant urged that release of the photographs would serve the public interest by bringing to the public's attention the identity of the detainee, the kind of treatment the detainee received, whether discriminatory

¹⁴¹ 672 F.3d 825 (10th Cir. 2012).

¹⁴² *Id.* at 826.

¹⁴³ *Id.*

¹⁴⁴ *See id.* at 827.

¹⁴⁵ *Id.* at 828.

¹⁴⁶ *Id.* at 827 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989)).

¹⁴⁷ *Id.* (citing *Prison Legal News v. Exec. Office for U.S. Attorneys*, 628 F.3d 1243, 1252–53 (10th Cir. 2011)).

¹⁴⁸ *See id.* at 829–30.

¹⁴⁹ *See id.* at 831.

¹⁵⁰ *Id.*

profiling was made, and the appearance of the detainee.¹⁵¹ The court agreed that some of the interests indicated by the appellant were related to a public interest; however, the court stated that these interests could not inform the public of "how well the government [was] performing its duties," nor assist the public "in detecting or deterring any underlying government misconduct."¹⁵² The court concluded that the privacy interest in a mug shot outweighed the public's interest in disclosure of a mug shot.¹⁵³

C. *An Obvious Problem: Federal Mug Shots Continue To Be Released*

In response to the Sixth Circuit's ruling, the USMS issued a policy directive that sets forth when photographs of prisoners can be released to the media.¹⁵⁴ Accordingly, photographs of prisoners will not be released to the media unless a law enforcement purpose is served;¹⁵⁵ however, such a mandate does not apply in the Sixth Circuit where the circuit court has ruled to the contrary.¹⁵⁶ In the districts within the Sixth Circuit, mug shots may be disclosed, even in the absence of a law enforcement purpose, so long as: "(i) [t]he defendant has been publicly named; (ii) [t]here is an indictment of the defendant; (iii) [t]he defendant has made a court appearance in connection with the indictment; and (iv) [t]here is an on-going trial or appeal related to the indictment."¹⁵⁷

The Sixth Circuit's decision has created a loophole by which mug shots can undeniably be obtained from the USMS. First, once a request for a mug shot has been granted to an individual in the Sixth Circuit, any member of the public located in any other circuit can get access to that mug shot. The Supreme Court has opined that once a particular record is disclosed to the public, there is no mechanism in place to prevent it from being disclosed in the future: "[O]nce there is disclosure [pursuant to FOIA], the

¹⁵¹ *See id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 832.

¹⁵⁴ U.S. MARSHALS SERV., U.S. DEPT OF JUSTICE, POLICY NOTICE NO. 94-006B, MEDIA POLICY (1997).

¹⁵⁵ *See id.* at 8.

¹⁵⁶ *See id.* at supp.

¹⁵⁷ *See id.* (emphasis added). If these preconditions are satisfied, mug shots taken within the Sixth Circuit may be released to a resident of any circuit and mug shots taken elsewhere can be released to any Sixth Circuit resident. *See id.*

information belongs to the general public.”¹⁵⁸ Second, any request made from within the Sixth Circuit will be granted, even if the mug shot was taken in another circuit or a request for the same mug shot made by an individual located outside of the Sixth Circuit had previously been denied.¹⁵⁹ Third, any individual located in any circuit can request a mug shot taken within the Sixth Circuit. Essentially, to get a mug shot all one would have to do is to become friends with a person living in the Sixth Circuit and ask that person to request the mug shot, a request that would be granted.¹⁶⁰ Then, the individual located outside of the Sixth Circuit could either go and request the mug shot, at which point it would have to be disclosed since it has already been released, or ask the friend for a copy of the mug shot, since FOIA does not control future use of the disclosed information.¹⁶¹ The problem created by this situation essentially moots the courts’ holdings in *Karantsalis* and *World Publishing Co.* since the individuals’ mug shots that were denied to persons in the Tenth and Eleventh Circuits could be released to persons located in the Sixth Circuit.

III. BALANCING INDIVIDUALS’ PRIVACY INTERESTS AND THE PUBLIC’S INTEREST IN DISCLOSURE OF MUG SHOTS

Exemption 7(C) of FOIA has been the focus of substantial litigation.¹⁶² The existence of this litigation and the difference in

¹⁵⁸ See *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004); see also Brief of Plaintiff-Appellant, *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497 (11th Cir. 2011) (No. 10-10229-B), 2010 WL 4411075, at *3 [hereinafter *Karantsalis* Plaintiff-Appellant Brief] (explaining how a request for Bernie Madoff’s mug shot was granted from a requester in Michigan, and later four additional requests were granted because the photograph had already been released).

¹⁵⁹ See *Karantsalis* Plaintiff-Appellant Brief, *supra* note 158, at *3–4 (explaining how the USMS released a copy of a mug shot to the *Detroit News*, located within the Sixth Circuit, even though it had previously denied a request from the *Denver Post*, located outside of the Sixth Circuit).

¹⁶⁰ See *Beacon Journal Publ’g Co. v. Gonzales*, No. 5:05CV1396, 2005 WL 2099787, at *1 (N.D. Ohio Aug. 30, 2005) (discussing how the Department of Justice initially denied a request for a mug shot, but then recognized that it was bound by the decisions of the Sixth Circuit and indicated that it would therefore release the photograph).

¹⁶¹ See *Favish*, 541 U.S. at 174.

¹⁶² See, e.g., *Favish*, 541 U.S. 157; *U.S. Dep’t of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749 (1989); *Halloran v. Veterans Admin.*, 874 F.2d 315 (5th Cir. 1989); *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472 (D.C. Cir. 1980).

opinion as to whether the exemption specifically applies to mug shots makes it apparent that the protection afforded by Exemption 7(C) is ambiguous. Therefore, it is necessary to look at FOIA's legislative purpose and Exemption 7(C)'s legislative history. Exemption 7(C)'s language, historical application, and policy considerations should determine the scope of its application. As the analysis below makes clear, Exemption 7(C) should protect mug shots from disclosure.

Part III of this Note discusses in detail why the release of mug shots to the public "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁶³ This Part uses the Supreme Court's three-step framework¹⁶⁴ to show that mug shots implicate privacy interests that outweigh the public's interest in disclosure, and therefore should be kept confidential. Part III.A clarifies that Exemption 7(C) is the proper provision for government agencies to apply because mug shots are taken by the USMS to serve a law enforcement purpose. Then, Part III.B relies on statutory interpretation, court decisions, and policy to recognize that Exemption 7(C) protects a broad range of privacy interests, including the privacy interests inherent in a mug shot. Part III.C uses the Supreme Court's decision in *National Archives and Records Administration v. Favish* to conclude that individuals' personal privacy interests outweigh the public's interest in disclosure of mug shots. However, Part III.C considers the arguments raised by critics who are in favor of disclosure, and it suggests the compromise that disclosure be subject to consent.

A. *Mug Shots Are Taken for a Law Enforcement Purpose*

Exemption 7(C) is the proper exemption to apply when the requested record is a mug shot because Exemption 7, in general, applies to "records or information compiled for law enforcement purposes."¹⁶⁵

Originally, Exemption 7 only allowed a governmental agency to withhold "investigatory" files compiled for law enforcement purposes.¹⁶⁶ Two subsequent amendments modified that

¹⁶³ 5 U.S.C. § 552(b)(7)(C) (2012).

¹⁶⁴ See *supra* text accompanying note 105.

¹⁶⁵ 5 U.S.C. § 552(b)(7).

¹⁶⁶ Pub. L. No. 93-502, § 2, 88 Stat. 1561, 1563 (1974) (current version at 5 U.S.C. § 552(b)(7)).

threshold requirement.¹⁶⁷ First, in 1974, Congress amended the “blanket” exemption for investigatory files by creating six specific types of harms, or subparts, one of which was Exemption 7(C).¹⁶⁸ Then, in 1986, another series of amendments modified Exemption 7 even further; the threshold requirement no longer included the word “investigatory,” and the words “or information” were added.¹⁶⁹ The amendments make clear Congress’s intention that Exemption 7 is meant to protect both investigatory and non-investigatory records.¹⁷⁰ Now, records maintained and collected pursuant to an agency’s routine activities could qualify for Exemption 7 protection, so long as the record serves a law enforcement purpose for the agency.¹⁷¹ The USMS, as a federal law enforcement agency, is responsible for processing federal prisoners and taking mug shots during the booking process.¹⁷² The USMS takes mug shots for law enforcement purposes such as to help identify perpetrators or to capture fugitives.

B. Inherent in a Mug Shot Is a Personal Privacy Interest

Since mug shots are taken for law enforcement purposes, if a privacy interest exists in a mug shot, then Exemption 7(C) of FOIA is triggered. To determine if mug shots implicate a privacy interest, it is imperative to look at FOIA’s legislative history, courts’ interpretations of an Exemption 7(C) privacy interest, and policy considerations.

1. Exemption 7(C)’s Legislative History

The legislative history behind Exemption 7(C) does not make clear what constitutes an “unwarranted invasion of personal privacy.”¹⁷³ Although Congress recognized that the Exemption may be necessary to prevent the public from obtaining access to

¹⁶⁷ DOJ GUIDE TO FOIA, *supra* note 43, at 491.

¹⁶⁸ U.S. DEPT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE: EXEMPTION 7 (2004) [hereinafter 2004 FOIA GUIDE] (internal quotation marks omitted), available at <http://www.justice.gov/oip/exemption7.htm>.

¹⁶⁹ *Id.* (internal quotation marks omitted).

¹⁷⁰ *See id.* n.7.

¹⁷¹ *See id.*

¹⁷² *See* 28 C.F.R. § 0.111(j) (2014).

¹⁷³ *See* Martin E. Halstuk, *When Is an Invasion of Privacy Unwarranted Under the FOIA? An Analysis of the Supreme Court’s “Sufficient Reason” and “Presumption of Legitimacy” Standards*, 16 U. FLA. J.L. & PUB. POL’Y 361, 388 (2005) (internal quotation marks omitted).

certain aspects of an individual's private life, it failed to define what specific "personal privacy" interests are protected by the exemption.¹⁷⁴ Congress, nevertheless, through amendments to the provision, made clear that it intended for Exemption 7(C) to provide broad protection. Originally, the language in Exemption 7(C) was the same as the language in Exemption 6: Both exemptions used the phrase "*would* constitute a clearly unwarranted invasion."¹⁷⁵ In 1986, an amendment to Exemption 7(C) changed the language from "would" to "*could* reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁷⁶ Congress's choice to use this language implies that, so long as an agency reasonably believes that a privacy interest could exist in a mug shot, Exemption 7(C) should protect that interest.

2. Courts Interpret Exemption 7(C) To Find a Privacy Interest

Due to Congress's failure to establish a definition of a privacy interest under Exemption 7(C), it is necessary to look at how the courts have interpreted Exemption 7(C) and the privacy interests that it is meant to protect. Because the courts have discretionary authority to protect the privacy interests that Exemption 7(C) is intended to protect from disclosure,¹⁷⁷ their reasoning for protecting those interests in light of Exemption 7(C) should be given significant weight.

The Supreme Court has noted that Exemption 7(C) "protects a statutory privacy right that goes beyond the common law and the Constitution."¹⁷⁸ Nevertheless, the Supreme Court, in *Reporters Committee*, relied on common law and the literal meaning of "personal privacy" to interpret the right protected by Exemption 7(C).¹⁷⁹ The Court determined that "privacy encompass[es] the individual's control of information concerning

¹⁷⁴ S. REP. NO. 89-813, at 9 (1965) (internal quotation mark omitted).

¹⁷⁵ See 5 U.S.C. § 552(b)(6) (2012) (emphasis added); see also DOJ GUIDE TO FOIA, *supra* note 43, at 563–64 (explaining that the language of Exemption 7(C) gives the agency greater discretion to protect privacy interests).

¹⁷⁶ 5 U.S.C. § 552(b)(7)(C) (emphasis added); 132 CONG. REC. 27,192 (1986).

¹⁷⁷ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

¹⁷⁸ *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 158 (2004).

¹⁷⁹ See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763–64 (1989).

his or her person.”¹⁸⁰ This definition can be applied to mug shots to protect them from disclosure. Whether a mug shot is said to be an unflattering picture of an individual or a photograph associating the subject with criminality, it is certainly a piece of information that the subject of the mug shot would prefer not to have disclosed to the public.¹⁸¹ A mug shot makes clear that a person has been arrested, a matter that an individual would want to prevent from being made publicly known.

A number of courts have recognized that certain additional subjects fall within the “personal privacy” category of Exemption 7(C). Courts have found that Exemption 7(C) protects from disclosure criminal histories, information on suspects and subjects of investigations, information that when released could have a negative effect on an individual’s family members, and information that when released could have a stigmatizing effect on the individual.¹⁸² A mug shot certainly falls into each of these categories.

Of utmost significance is that courts have recognized that a person’s criminal history falls within the confines of the “personal privacy” interest protected by Exemption 7(C).¹⁸³ Mug shots, which are taken as part of the booking process and stored with information regarding the arrest, are without a doubt part of an individual’s criminal history. Additionally, they can easily be compared to rap sheets, which have been recognized as exempt from disclosure.¹⁸⁴ Like rap sheets, the principal use of mug shots is to assist law enforcement personnel with detecting or identifying offenders.¹⁸⁵ The FBI generally treats rap sheets as confidential, but it has made two exceptions. The rap sheet will be released if: (1) it is requested by the subject of the rap sheet, or (2) it is intended to assist with the capture of a

¹⁸⁰ *Id.* at 763. The Court applied this to the information contained in a rap sheet and concluded that rap sheets were exempt from disclosure pursuant to Exemption 7(C) of FOIA. *Id.* at 765.

¹⁸¹ See, e.g., Adam Tanner, *Shakedown or Public Service? Mug Shot Websites Spread*, REUTERS (Sept. 20, 2012, 7:47 PM), <http://in.reuters.com/article/2012/09/20/idINL1E8KJ5LH20120920>.

¹⁸² See *supra* Part I.D.

¹⁸³ O’Kane v. U.S. Customs Serv., 169 F.3d 1308, 1310 (11th Cir. 1999) (citing *Reporters Comm.*, 489 U.S. at 767) (explaining that individuals have a “substantial privacy interest in their criminal histories”).

¹⁸⁴ See *Reporters Comm.*, 489 U.S. at 771.

¹⁸⁵ *Id.* at 752.

fugitive.¹⁸⁶ Notably, the USMS has a similar policy regarding disclosure of mug shots: (1) mug shots are typically regarded as confidential except in the Sixth Circuit, and (2) mug shots are released when intended to serve a law enforcement purpose, such as the capture of a fugitive.¹⁸⁷ Therefore, mug shots, as part of a person's criminal history, implicate a "personal privacy" interest that is protected by Exemption 7(C).

Additionally, Exemption 7(C) has been applied to withhold references to suspects and third parties.¹⁸⁸ Courts have recognized that suspects, witnesses, and investigators have a strong interest in not being associated with alleged criminal activity or criminal investigations.¹⁸⁹ Given the presumption that individuals are innocent until proven guilty,¹⁹⁰ the accused who have only been charged with a crime should be afforded the same privacy protections as individuals who have been suspected of a crime and persons of "investigatory interest,"¹⁹¹ since none of these classifications refer to a convicted person. If a mug shot is requested and released prior to the subject's conviction, then there will be significant implications if the subject is later acquitted, given that mug shots associate an individual with criminality and FOIA does not protect against future use of already disclosed information. At least until conviction, accused individuals should be afforded the same privacy protections as suspects and third-party subjects of investigations, such that Exemption 7(C) should protect the privacy interests in mug shots.

Courts have also recognized that Exemption 7(C) protects information that could result in emotional harm to either the individual or the individual's family. In the Attorney General's

¹⁸⁶ *Id.*

¹⁸⁷ *See* U.S. MARSHALS SERV., *supra* note 154.

¹⁸⁸ *See, e.g.,* Neely v. Fed. Bureau of Investigation, 208 F.3d 461, 464 (4th Cir. 2000) (explaining there is no public interest in the disclosure of names and identifying information of third-party suspects).

¹⁸⁹ Halpern v. Fed. Bureau of Investigation, 181 F.3d 279, 296–97 (2d Cir. 1999); Fitzgibbon v. Cent. Intelligence Agency, 911 F.2d 755, 767 (D.C. Cir. 1990).

¹⁹⁰ In the United States, the "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

¹⁹¹ DOJ GUIDE TO FOIA, *supra* note 43, at 567 (internal quotation marks omitted), available at http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption7c_0.pdf.

Memorandum on the 1974 amendments, Attorney General Edward H. Levi wrote that Exemption 7(C) protects the interests of the individual who is the subject of the investigation, and in certain situations, the individual's family members as well because of the possible adverse effects that disclosure of the information could have.¹⁹² In *Lesar v. United States Department of Justice*, the D.C. Circuit noted that FOIA's privacy exemption protects against "disclosure [that] might damage reputations or lead to personal embarrassment and discomfort" of the related family.¹⁹³ Then, in *Badhwar v. United States Department of the Air Force*, the D.C. Circuit acknowledged that a FOIA privacy exemption protects information that if disclosed would "shock the sensibilities" of family members.¹⁹⁴ The release of a mug shot can easily have an effect on family members. For example, a local community may not know a person by name, but it may recognize an individual in a photograph. If a mug shot is released, then the family of the photographed individual is likely to be subjected to questioning about the arrest, ridicule, and even harassment. Members of the community may no longer want to associate with the family, since the family is now associated with criminality. This will inevitably cause emotional distress and hardships on the family. For this reason, the family members of the subject of a mug shot also have a personal privacy interest in mug shots, such that the photographs should not be disclosed to the public.

More importantly, courts have recognized that the privacy exemptions of FOIA protect information that could cause, among other things, embarrassment, unemployment, or harm to a person's reputation.¹⁹⁵ An arrestee's fear that the public, including his family, friends, and potential employers, will view his mug shot—and then pass certain judgments based on the image—is reasonable in light of the "viral nature of the Internet."¹⁹⁶ The Fifth Circuit, in interpreting Exemption 7(C),

¹⁹² Edward H. Levi, Attorney General's Memorandum on the 1974 Amendments to the FOIA (Feb. 1975), *available at* <http://www.justice.gov/oip/74agmemo.htm>.

¹⁹³ *Lesar v. U.S. Dep't of Justice*, 455 F. Supp. 921, 925 (D.D.C. 1978), *aff'd*, 636 F.2d 472 (D.C. Cir. 1980); *see also* *Halloran v. Veterans Admin.*, 874 F.2d 315, 320 (5th Cir. 1989).

¹⁹⁴ *See Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182, 185–86 (D.C. Cir. 1987); Halstuk, *supra* note 173, at 380.

¹⁹⁵ *Dep't of the Air Force v. Rose*, 425 U.S. 352, 376–77 (1976) (discussing Exemption 6); *see also supra* text accompanying note 102.

¹⁹⁶ *See Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1155 (9th Cir. 2012).

has noted that the subject nature of the requested information should be looked at in connection with a detail, statement, or event that the subject of the information would not want the public to learn about.¹⁹⁷ For this reason, a mug shot should not and will not simply be viewed as a photograph of an individual; a mug shot is associated with an arrest and will cause the subject of the photograph to be viewed as a criminal. Therefore, a mug shot will most likely generate unwanted gossip and unnecessary stigmatization¹⁹⁸ such that a “personal privacy” interest protected by Exemption 7(C) should be recognized. This argument is strengthened by the use of the phrase “could reasonably” in the Exemption, which suggests that an agency is only required to recognize that disclosure could *possibly*, not definitively, injure reputations or lead to personal humiliation and distress.¹⁹⁹

3. Policy Reasons for Recognizing a Privacy Right

Public policy considerations also suggest that a “personal privacy” interest should be recognized in mug shots. In many states, police departments automatically make mug shots available to the public by displaying them on their websites pursuant to state open records laws.²⁰⁰ Then, the media and other money-hungry companies take the photographs and post them on their own websites, most likely to use either for enhancement of a news article or for pure entertainment.²⁰¹ Although these websites are mostly displaying images of individuals charged with state crimes, the concerns in keeping mug shots confidential in the state system and in the federal system are the same. One particular concern raised by the disclosure of mug shots is that the photographs are taken before

¹⁹⁷ *Halloran*, 874 F.2d at 321.

¹⁹⁸ See *Fitzgibbon v. Cent. Intelligence Agency*, 911 F.2d 755, 767 (D.C. Cir. 1990).

¹⁹⁹ See *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 488 (D.C. Cir. 1980) (explaining that general privacy concerns can lead courts to withhold materials even when the potential harms to the individual's personal privacy are not stated with particularity).

²⁰⁰ See generally THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, POLICE RECORDS: A REPORTER'S STATE-BY-STATE ACCESS GUIDE TO LAW ENFORCEMENT RECORDS (2008), available at www.rcfp.org/rcfp/orders/docs/POLICE.pdf.

²⁰¹ See generally Stephanie Francis Ward, *Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You To Remove Them*, 98-AUG A.B.A. J. 17 (2012) (explaining the trend of websites posting people's mug shots and then soliciting money to take them down).

an individual is convicted and in some cases the individual will later be acquitted. However, once mug shots are released to the public, friends, family, and even potential employers can immediately view them. This image will not simply be erased from an individual's memory if the subject of the photograph is acquitted, and an acquittal will not undo the damage caused to the innocent individual's reputation and opportunities for employment. Regardless of whether a mug shot is removed from these websites, if the mug shot has already been viewed, then the image will remain in one's memory creating an everlasting impact, especially if the viewer of the image never follows up to find out if the subject is ever convicted.

In the cases where the federal courts were faced with determining whether mug shots could be disclosed, the requester was related to a media company.²⁰² Media companies pose a significant threat to an individual's privacy because it is completely legal for these companies to repost lawfully obtained mug shots on the Internet, even if the company's primary purpose is to embarrass someone or ruin a person's reputation.²⁰³ Although the requesters in the cases discussed in Part II of this Note suggested that they wanted the photographs to expose government wrongdoing, it is probable that the requesters were also going to publish the photographs alongside a news story, releasing them to the public at large.

Of course, some of the information disclosed on the Internet does in fact serve a legitimate public purpose, even if there is an invasion of privacy. However, a vast majority of the mug shots being published on the Internet are serving a commercial purpose, instead of an informational purpose.²⁰⁴ Robert Steel, a journalism professor at DePauw University, has warned that disclosure of these mug shots "feeds societal prurience with no journalistic value."²⁰⁵ The companies that post mug shots on their websites are on a mission to increase page views so as to

²⁰² See *supra* Part II.

²⁰³ Fishman, *supra* note 11, at 1524.

²⁰⁴ See Ward, *supra* note 201, at 17–18.

²⁰⁵ Tim Padgett, *Newspapers Catch Mug-Shot Mania*, TIME (Sept. 21, 2009), <http://www.time.com/time/magazine/article/0,9171,1921604,00.html#ixzz2AnTF0GZr> (internal quotation mark omitted).

increase their profits from advertising.²⁰⁶ If Exemption 7(C) does not work to protect mug shots from disclosure and media companies become aware of this, then the number of FOIA requests for mug shots will likely increase. Media companies and websites that publish mug shots will flock to the USMS to place FOIA requests and add more mug shots to their moneymaking collections.

As the Internet becomes more widely used by government agencies to publish government data online, the need to file a FOIA request will be diminished. Although much of the debate that is happening right now revolves around state open records laws, if the Sixth Circuit continues to disclose mug shots, more and more mug shots will be available to the public. Of course, interested parties will still have to file a FOIA request, but once a request for a mug shot is granted, the individual who requested the mug shot can do with it as the individual pleases.

C. Minimal Public Interest in Disclosure of Mug Shots: Release Constitutes an Unwarranted Invasion of Privacy

Implicit in a mug shot is a privacy interest that needs to be protected by Exemption 7(C); however, the primary reason that mug shots should not be disclosed is that disclosure would serve a public interest that is substantially outweighed by the “personal privacy” interests.

The Supreme Court in *Favish* held that when an exemption to FOIA is triggered, the usual rule of not needing to explain the reason for the request for a particular document is overcome.²⁰⁷ This Supreme Court decision came approximately eight years after the Sixth Circuit’s decision in *Detroit Free Press* and at least five years before the Tenth and Eleventh Circuits’ decisions, which could explain the difference in holdings among the courts.²⁰⁸ According to the *Favish* test, the requester of a mug shot first has to give a “sufficient reason” for requesting the information such that it serves the “public interest” and purpose

²⁰⁶ See *id.* (“[T]he newspaper sites believe they’ve found their cash cow: readers seem as eager to gawk at the average alleged DUI perp as they are to ogle celebrity mug shots on sites like the Smoking Gun.”).

²⁰⁷ Nat’l Archives & Records Admin. v. *Favish*, 541 U.S. 157, 172 (2004).

²⁰⁸ *Id.* at 159; *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 831 (10th Cir. 2012); *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam); *Detroit Free Press, Inc. v. U.S. Dep’t of Justice*, 73 F.3d 93, 98 (6th Cir. 1996).

of FOIA, and second, the requester has to produce evidence to overcome the “presumption of legitimacy” afforded to government activities and operations.²⁰⁹

A requester of a mug shot will have a difficult time overcoming the first part of the *Favish* test. A mug shot reveals little to nothing about the government, even though it is stored in government files.²¹⁰ A mug shot does not contain information about the activities and operations of government, so its release would not serve the purpose of FOIA.²¹¹ A mug shot is only a photograph of an individual at an embarrassing moment. As the Supreme Court in *Reporters Committee* noted, FOIA does not give the public the right to obtain personal information about individuals just because the information happens to be in a government record.²¹²

Critics urge, however, that the release of mug shots would reveal whether an individual received preferential treatment,²¹³ whether a prisoner was subjected to abuse,²¹⁴ whether the correct person is detained, whether the individual was subjected to discriminatory profiling, or whether the detainee took charges seriously, among others things.²¹⁵ These arguments have merit and it is true that the release of mug shots could potentially help reveal these issues, especially if the accused individual is poor, uneducated, or lacks the resources to bring an issue of the arrest to the attention of the authorities. However, the privacy interests significantly outweigh these public interests, and so mug shots should remain confidential.

Nevertheless, a compromise can be made. In creating a compromise, the importance of protecting the privacy interests cannot be forgotten because if a mug shot gets into the wrong person's hands, it can quickly and easily be circulated throughout the country. The need for a compromise is based on the resources that may or may not be available to an arrested

²⁰⁹ See *supra* text accompanying notes 88–93.

²¹⁰ See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

²¹¹ See *supra* text accompanying notes 46–54.

²¹² Nicoletta, *supra* note 82.

²¹³ *Karantsalis*, 635 F.3d at 504.

²¹⁴ *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, 73 F.3d 93, 98 (6th Cir. 1996) (discussing how if photographs of Rodney King had been released, it would have alerted the public to abuse by the police).

²¹⁵ *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 831 (10th Cir. 2012).

individual. Individuals that have access to resources will be able to raise issues of their arrest. The problem lies with the individuals who lack resources or are being represented by public defenders who are unwilling to take on a civil case. These are the individuals that need the public's assistance to expose issues of their arrest, and so for their benefit, the public needs a way to obtain their mug shots.

A reasonable compromise would be to allow a mug shot to be released to the public, but only after the subject of the mug shot consents to disclosure. Consent will protect the individual's privacy interests because the individual will have to consent to specific purposes for which the mug shot can be used. That being said, if a mug shot is improperly used, liability should be imposed. Imposing liability on individuals who improperly use a mug shot will deter individuals from requesting mug shots for legitimate purposes when their actual intention is to use the mug shots for moneymaking purposes.

Still, other critics argue that mug shot disclosure serves a purpose of FOIA because it allows the public to see that the USMS is fulfilling its duty to take mug shots.²¹⁶ In response to individuals who cite this as their reason for a request, the USMS should disclose the mug shot with both the subject's face and the USMS sign blurred. This will protect an individual's privacy interests and at the same time satisfy the public's interest in knowing that a mug shot was taken.

IV. THE SOLUTION: A CATEGORICAL EXEMPTION TO PROTECT SUBSTANTIAL PRIVACY INTERESTS FROM UNWARRANTED INVASIONS

Congress should take steps to create a categorical exemption for mug shots to close the loophole that currently exists. Without a legislative act and with the continued split between the circuit courts, a threat to individuals' privacy interests remains.

Although it may be said that agencies no longer exercise discretion in the disclosure of mug shots because of the policy statement issued by the USMS, which states that disclosure of mug shots is prohibited except in the Sixth Circuit or for law enforcement purposes,²¹⁷ Congress should create a categorical

²¹⁶ *Detroit Free Press, Inc.*, 73 F.3d at 96.

²¹⁷ U.S. MARSHALS SERV., *supra* note 154.

exemption to close the loophole that has resulted from the Sixth Circuit's decision. The Supreme Court has noted that Exemption 7(C) categorical classifications "may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance [of the private interest and the public interest] characteristically tips in one direction."²¹⁸ Inherent in a mug shot is a privacy interest, and disclosure of a mug shot would only serve a minimal public purpose of FOIA, a purpose that can be achieved through consent, such that the balance will typically weigh in favor of withholding the mug shot from disclosure.

A categorical exemption makes the most sense in terms of protecting the privacy interests in a mug shot. Although FOIA provides that segregable portions of records should be disclosed when an exemption is warranted,²¹⁹ segregability of a mug shot seems impossible without defeating the underlying purpose for which a mug shot is most likely requested. To make a mug shot segregable, the USMS would have to blur the individual's face and the USMS sign held by the individual in the mug shot. Undeniably, the person who is interested in the mug shot will no longer be interested in it if this occurs, as the photograph will only contain the body of an unidentifiable individual.

The categorical exemption should of course include a method by which the subject of the mug shot can obtain a copy of the mug shot or can consent to the release of the mug shot to another individual. The subject of a mug shot has to have the ability to bring to the attention of authorities an issue that occurred during arrest, whether it be on the subject's own or with the help of the public. If an individual chooses to further disseminate the individual's own mug shot once he or she gets a copy of it, it cannot be argued that it is an unwarranted invasion of privacy since the individual is *choosing* to share it with others. However, liability should be imposed on members of the public who receive the mug shots and then use them in a way that the subject of the mug shot did not consent to.

A categorical exemption is particularly important because mug shots are taken after arrest but before acquittal or conviction. This means that without an explicit protection, mug

²¹⁸ U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776 (1989).

²¹⁹ 5 U.S.C. § 552(b) (2012).

shots of potentially innocent individuals could be released to the public. A request may be made for the mug shot of an individual who is awaiting trial, and if that request is granted and the individual is later acquitted, then it will be too late to protect that individual's privacy interest; the mug shot will already be in the hands of the public with no secure means available to the individual to prevent its future dissemination.

CONCLUSION

Congress enacted FOIA to enable the public to access government records and to keep the public informed of the government's activities and operations. According to FOIA, the government is supposed to provide the public with the fullest possible disclosure. Nevertheless, Congress created nine exemptions to FOIA to protect personal information about private individuals and to prevent it from being disclosed to the public. Exemption 7(C) exempts from disclosure any law enforcement record that if disclosed, "could reasonably be expected to constitute an unwarranted invasion of personal privacy."²²⁰

Three circuit courts have applied Exemption 7(C) to mug shot disclosure: The Tenth and Eleventh Circuits ruled in favor of protecting privacy interests, while the Sixth Circuit ruled in favor of disclosure. Although a USMS policy directive has limited the disclosure of mug shots, individuals located within the Sixth Circuit can obtain access to a mug shot taken in any circuit and individuals located outside of the Sixth Circuit can obtain a mug shot taken by the USMS in the Sixth Circuit. With this loophole, the need for a solution is significant.

In light of FOIA's legislative purpose, Exemption 7(C)'s statutory language, and policy considerations, mug shots are a type of record that Exemption 7(C) is intended to protect from disclosure. Mug shots implicate personal privacy interests that substantially outweigh the public's minimal interest in disclosure. Congress should take immediate steps to create a categorical exemption to prevent more mug shots from being disclosed to the public. Likewise, states should take steps to modify their state open records laws to prohibit disclosure of mug shots and to prevent their inappropriate use. Until the Supreme

²²⁰ *Id.* § 552(b)(7)(C).

Court grants certiorari to overturn the Sixth Circuit's decision, a categorical exemption for mug shots that allows for an individual to consent to disclosure is the only tenable solution that will protect individuals' personal privacy interests in mug shots.

