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The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act

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THE RIGHT TO PRIVACY AND THE PUBLIC'S RIGHT TO KNOW: The "Central Purpose" of the Freedom of Information Act

*Fred H. Cate**
*D. Annette Fields***
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I. Introduction

The Freedom of Information Act (FOIA or the Act) permits "any person" to obtain access to all federal agency records, subject only to nine enumerated exemptions.[1] This unprecedented right of access to government documents reflects the importance of information in a democracy. As James Madison wrote: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[2]

FOIA is intended to provide the citizenry with the knowledge necessary to govern. Although there is no single statement in the Act's legislative history of the necessary extent of that knowledge, it is clear that Congress envisioned at least three roles of the electorate for which the Act was designed to guarantee access to government information. First and most important, the FOIA plainly facilitates the watchdog function of the public over the government: The public must have access to the government information necessary to ensure that government officials act in the public interest. "This watchdog function," writes Glenn Dickinson, "was perhaps the principal inspiration for the FOIA and has remained its symbolic central pillar."[3]

Second, in addition to empowering the citizenry with the knowledge necessary to evaluate the conduct of government officials, the FOIA was intended to assure the public's access to government information concerning public policy.[4] "Citizens enjoy the benefits or suffer the consequences of public policy, so they should be able to draw their own conclusions regarding the effectiveness of that policy. The FOIA allows them to undertake this independent evaluation."[5] Third, the

1. 5 U.S.C. § 552(a)(3) (1988). The nine exemptions permit an agency to protect from disclosure information including records pertaining to national security, internal agency rules, matters exempted from disclosure by other federal acts, trade secrets, inter- or intra-agency memoranda (which includes the executive privilege), personnel and medical files, records compiled for law enforcement purposes, matters concerning the operation of financial institutions, and geological information. *Id.* §§ 552(b)(1)-(9).

2. Letter from James Madison to W. T. Barry (Aug. 4, 1822) *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed. 1910).

3. Glenn Dickinson, Comment, *The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act*, 59 U. CIN. L. REV. 191, 197 (1990).

4. *See* S. REP. NO. 813, 89th Cong., 1st Sess. (1965), *reprinted in* SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 36, 37 (Comm. Print 1974) [hereinafter FOIA SOURCEBOOK]; H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* FOIA SOURCEBOOK, *supra* at 27, 33.

5. Dickinson, *supra* note 3, at 197.

authors of the FOIA wanted to ensure that the government would not secretly create or enforce laws or administrative regulations. To this end, the Act is designed to guarantee that "those against whom administrative precedents operated would know in advance the nature of those precedents."[6]

Taken together, these three functions mark the broad purpose of the Act which, according to the United States Supreme Court, is "to open agency action to the light of public scrutiny."[7] The unanimous Court wrote in 1989 that the Act "indeed focuses on the citizens' right to be informed about 'what their government is up to.' . . . FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny. . . ."[8]

Following passage of the FOIA in 1966,[9] historians and journalists—the principal users of the Act—did exactly what Congress had intended: They used the Act to expose government activities to the sharp eye of public scrutiny. Exposés appeared on topics ranging from misuse of government funds by colleges and universities to environmental hazards resulting from radioactive wastes.[10] Authors based hundreds of books and articles on information received through FOIA disclosures. Requests were still relatively few, however, and the costs of administering the Act were manageable. For example, in 1966 costs were estimated at only $50,000.[11]

By 1981, FOIA requests had overwhelmed federal agencies. Not only had the cost to taxpayers of responding to these requests reached $50 to $250 million per year,[12] but the beneficiaries were not those originally intended by the Act's sponsors. Corporations and litigants were using the FOIA extensively as a means of acquiring information about private parties that was held within the governmental documentary warehouse. Businesses had learned that the FOIA could be used to gather information about competitors that could be used to gain a commercial advantage. In fact, the vast majority of the FOIA requests were made by business executives or their lawyers,[13] who, in the words of Judge Patricia Wald, "astutely discerned the business value of the information which government obtains from industry while performing its licensing, inspecting, regulating, and contracting functions."[14]

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6. *Id.; see* 5 U.S.C. § 552(a)(2).

7. United States Dep't of Justice v. Reporters Comm'n for Freedom of the Press, 489 U.S. 749, 772 (1989) (quoting Department of Air Force v. Rose, 425 U.S. 352, 372 (1976)).

8. *Id.* at 773-74 (quoting EPA v. Mink, 410 U.S. 73, 80 (1983)).

9. Freedom of Information Act, Pub. L. No. 90-23, 81 Stat. 54 (1967) (codified as amended at 5 U.S.C. § 552 (1988)).

10. *See* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 660-61 (1984).

11. Edward C. Schmults, U.S. Deputy Attorney General, *FOI Act Classic Example of Law That Needs Improving, reprinted in Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 880 (1981) [hereinafter *1981 Senate Hearings*].

12. Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 21 (1988).

13. *1981 Senate Hearings, supra* note 11, at 159-62 (testimony of Jonathan Rose, Assistant Attorney General, Office of Legal Policy, Department of Justice); *id.* at 776 (statement of Jack Landau, Executive Director, Reporters Committee for Freedom of the Press).

14. Wald, *supra* note 10, at 665-66.

Such an extension of the FOIA violates the purpose of the Act and transforms it "into a vehicle serving purely private interests, to the detriment of its intended public interest."[15] As a result, the government has spent billions of taxpayer dollars responding to requests that seek no information "about what the Government is up to." The privacy rights and confidentiality interests of individuals and organizations who disclose information to the government are violated when the government complies with requests for information about competitors rather than about the government. The discovery process in civil litigation, as well as judicial efforts to both improve the speed and efficiency and reduce the costs of trials, is circumvented. Voluntary compliance with government efforts to collect information about industries, products, and markets is thwarted. Responses to meaningful FOIA requests that seek information about government activities are delayed.

The United States Supreme Court took the first step toward stemming the widespread abuse of the FOIA with its unanimous decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press*.[16] In the context of evaluating the contours of Exemption 7(C), which excludes from disclosure records or information compiled for law enforcement purposes "to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy,"[17] the Court articulated three principles for evaluating future claims. First, "whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." ' "[18]

The Supreme Court's second principle focused on citizens' legitimate expectations of privacy. The Court found that when the information sought concerns a "private citizen" and "when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir."[19]

Finally, the Supreme Court in *Reporters Committee* held "that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.' "[20] In short, the release of information possessed by the government about private citizens constitutes an unwarranted invasion of those citizens' privacy; such information, therefore, is not subject to disclosure under Exemption 7(C).

Lower courts immediately extended the Court's three principles in *Reporters*

15. *The Freedom of Information Act: Hearings Before the Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 37 (1988) (statement of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, Department of Justice) [hereinafter *1988 Senate Hearings*].

16. 489 U.S. 749, 772 (1989).

17. 5 U.S.C. § 552(b)(7)(C).

18. 489 U.S. at 772 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976), quoting Rose v. Department of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)).

19. *Id.* at 780.

20. *Id.*

Committee to a wide variety of Section 7(C) cases,[21] as well as to cases involving FOIA's other personal privacy exemption, Exemption 6, which excludes personnel and medical files from disclosure.[22] The Supreme Court unanimously recognized this extension in *United States Department of State v. Ray*.[23] Presented with a claim that the State Department had violated the FOIA by redacting the names of Haitian refugees who had been interviewed by U.S. embassy personnel, the Court held that "[t]he addition of the redacted identifying information would not shed any additional light on the Government's conduct of its obligation,"[24] and therefore reversed the Eleventh Circuit Court of Appeals decision ordering release of the redacted information.[25]

This dramatic interpretation of the Act's two personal privacy exemptions—that as a categorical matter "when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted' "[26]—is an important step towards limiting the misuse of the FOIA. Its logic and force applies not only to disclosures affecting personal privacy interests, however, but to all disclosures under the Act. Moreover, 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."

In order to achieve the Act's intended purpose, the "official information" test should be the touchstone for disclosure. After all, "the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed."[27] Such a policy reflects not only the constitutionally protected right to privacy, but also protects important societal interests such as the effectiveness and efficiency of the judicial system; law enforcement and administrative regulations; the timely disclosure of appropriate information under the FOIA; and, the efficient and cost-effective operation of the government.

This article argues for expanding application of the Supreme Court's "central purpose" test beyond Exemptions 7(C) and 6, and beyond FOIA exemptions

21. *See, e.g.*, SafeCard Services, Inc. v. SEC., 926 F.2d 1197 (D.C. Cir. 1991); KTVY-TV v. United States, 919 F.2d 1465 (10th Cir. 1990); Fitzgibbon v.CIA, 911 F.2d 755 (D.C. Cir. 1990); Halloran v. Veterans Admin., 874 F.2d 315 (5th Cir. 1989); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51 (D.D.C. 1990); Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. 851 (D.D.C. 1989); Wagner v. FBI, No. 90-1314-LFO, 1991 U.S. Dist. LEXIS 7506 (D.D.C. June 4, 1991).

22. *See, e.g.*, New York Times Co. v. National Aeronautics & Space Admin., 920 F.2d 1002 (D.C. Cir. 1990); Federal Labor Relations Auth. v. United States Dep't of the Treasury, 884 F.2d 1446 (D.C. Cir. 1989); National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

23. 112 S. Ct. 541 (1991).

24. *Id.* at 543.

25. *Id.*

26. 489 U.S. at 780.

27. *Id.* at 774.

altogether. Only information that will serve the "central purpose" of FOIA—ensuring that "the *Government's* activities be opened to the sharp eye of public scrutiny"[28]—should ever be subject to disclosure under the FOIA. Part I of this article analyzes the creation and use of the FOIA, highlighting the government's use of the FOIA exemptions to justify nondisclosure. Part II examines judicial interpretations of the purpose of the FOIA, including recent Justice Department guidelines aimed at limiting the use of FOIA to its intended beneficiaries. Part III recommends a re-examination of the FOIA focusing on its "central purpose." This approach would limit the presumption in favor of disclosure to records concerning governmental action. If a desired record is not within FOIA's "central purpose," courts need never decide the application of the Act's exemptions.

I. The Creation and Use of the FOIA

A. The Creation of the FOIA

President Lyndon Johnson signed the original Freedom of Information Act into law on July 4, 1966, proclaiming that

> [a] democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.[29]

Citizens and lawmakers alike were concerned about bureaucratic unaccountability, and Congress responded with an act that would open government "to the light of public scrutiny."[30] Prior to passage of the FOIA, the Administrative Procedure Act[31] (APA) governed information requests. The APA stated that all public records could be inspected by "persons properly and directly concerned" with the subject matter unless the records were held confidential "for good cause."[32] But "good cause" was a simple standard that allowed federal agencies sufficient discretion to circumvent even the minimal inspection principle.[33]

In 1966, Congress amended the APA with the Freedom of Information Act.[34] The 1966 Act required notice of agency actions, including organization, procedures, and policies of agencies as well as final opinions rendered, and permitted the public to request records from "each agency."[35] The Act, as amended in 1967, also provided nine categories of exempted information: records pertaining to

28. *Id.*

29. Statement of the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, July 4, 1966, 2 Weekly Comp. Pres. Doc. 895 (July 11, 1966).

30. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

31. Act of June 11, 1946, ch. 324, 60 Stat. 237, *repealed by* Freedom of Information Act of 1966, Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552 (1988)).

32. *Id.* § 3(c).

33. Alfred C. Aman & William T. Mayton, Administrative Law 617 (1993) (citing Act of June 11, 1946, § 3, 60 Stat. 237, 238 (1946)).

34. Freedom of Information Act of 1966, Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. §§ 552(b), (c) (1988)).

35. 5 U.S.C. §§ 552(b)-(c), 80 Stat. at 383.

national security, internal agency rules, matters exempted from disclosure by other federal acts, trade secrets, inter- or intra-agency memoranda (which includes the executive privilege), personnel and medical files, records compiled for law enforcement purposes, matters concerning the operation of financial institutions, and geological information.[36]

These exemptions, while aimed at limiting the federal agencies' discretion, soon proved so broad that agencies could force any record into one of the exemptions. Although the federal judiciary decreed that disclosure would be "the guiding star . . . in construing the Act,"[37] the Act lacked power and was further undermined by an inconsistent legislative history: the Senate report favored disclosure while the House version was much more restrictive.[38] The culture of secrecy in Washington that the Cold War aroused remained largely untouched by the FOIA.[39]

Early decisions permitted agencies to apply the exemptions broadly. For example, in *Frankel v. Securities and Exchange Commission*,[40] plaintiff shareholders of Occidental Petroleum requested a Securities and Exchange Commission (SEC) report of a nonpublic investigation into the corporation.[41] The SEC denied the request, claiming that the records were "investigatory files compiled for law enforcement purposes"[42] under FOIA Exemption 7, even though the investigation had ended.[43] The court upheld this claim, reasoning that if the files were obtainable, future law enforcement efforts by the agency could be seriously hindered.[44]

Another example of the breadth of the exemptions arose in *Environmental Protection Agency v. Mink*.[45] Congresswoman Mink and thirty-two other Representatives had requested that the Environmental Protection Agency (EPA) release recommendations made to President Richard Nixon regarding the advisability of underground nuclear testing.[46] EPA claimed that the documents were Top Secret or Secret and were exempt from the FOIA under the "national security" exemption.[47] In upholding EPA's claim, the Court stated that since the documents were so classified, they were *per se* nondisclosable.[48] The Court denied *in camera* review, broadly deferring instead to the executive branch.[49] In a vigorous dissent, Justice Douglas objected to the "carte blanche"[50] granted the executive branch without

36. Pub. L. No. 90-23, 81 Stat. 54 (1967) (codified as amended 5 U.S.C. § 552 (1988)).
37. Consumers Union of United States v. Veterans Admin., 301 F. Supp. 796, 800 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).
38. *See* KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT 69 (1972).
39. *See* Harold C. Relyea, *Introduction to Symposium: The FOIA a Decade Later*, 39 PUB. ADMIN. REV. 310 (1979). *See also* AMAN & MAYTON, *supra* note 33, at 618.
40. 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).
41. *Id.* at 813-14.
42. *Id.* at 817.
43. *Id.* at 813.
44. *Id.* at 817.
45. 410 U.S. 73 (1973).
46. *Id.* at 75.
47. *Id.* at 81.
48. *Id.* at 83.
49. *Id.* at 84.
50. *Id.* at 110.

any "discernible relation to the interests sought to be protected by subsection (b)(1) of the Act."[51]

In 1974, Congress responded to these and other examples of broad agency interpretations of the FOIA's nine exemptions with amendments to the FOIA that unequivocally mandated greater agency disclosure. With the Watergate conspiracy still lingering, Congress reflected the national distrust by quickly moving to open executive branch files to the public. Congress passed a bill amending the FOIA,[52] and then easily overrode President Gerald Ford's veto.[53]

The 1974 amendments attempted to curb discretionary nondisclosure. Records were to be segregated so that agencies could not classify entire categories of records as exempt.[54] The amendments clarified the national security exemption,[55] requiring classification criteria and providing for *in camera* review by courts.[56] Congress enumerated six specific concerns for investigatory law enforcement records.[57] The amendments also provided uniform fee schedules (and fee waivers if the information "benefit[s] the general public"),[58] timetables for responses to requests,[59] fee-shifting to prevailing litigants whose requests are denied,[60] and disciplinary legal action against officials found to be "arbitrarily or capriciously" withholding requested records.[61] Deference to the executive branch declined in importance as the amendments strengthened the FOIA and required agencies to disclose or provide a specific exemption.

Nevertheless, after slight alterations in 1976[62] and a failed attempt in 1981, Congress once again amended the FOIA in 1986 as part of its Anti-Drug Abuse Act[63] and broadened Exemption 7 to exclude further law enforcement information.[64] This move directly contradicted Congress's attempts to force agency disclosure. While the Act no longer reflects the "disclosure at any cost" belief that resonated from Watergate, however, it still favors disclosure well beyond the 1966 Act.

B. How the FOIA Works

Obtaining information from the federal government under the FOIA is remarkably simple, at least in theory. "Any person" may request information, including foreign citizens, corporations and foreign governments.[65] The FOIA is intended

51. *Id.*
52. Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561, 1561-64 (1974).
53. *See* FOIA Sourcebook, *supra* note 4, at 396-97. The House voted 371-31 to override while the Senate followed, 65-27.
54. 5 U.S.C. § 552(b) (1988) (corresponds to Pub. L. No. 93-502, § 2(c) (1974)).
55. *Id.* § 552(b)(1).
56. *Id.* § 552(a)(4)(B).
57. *Id.* § 552(b)(7).
58. *Id.* § 552(a)(4)(A) (1982) (current version at 5 U.S.C. § 552 (a)(4)(A)(iii) (1988)).
59. *Id.* §§ 552(a)(6)(A)-(B) (1988).
60. *Id.* § 552(a)(4)(E).
61. *Id.* § 552(a)(4)(F).
62. Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976).
63. Pub. L. No. 99-570, 100 Stat. 3207 (1986).
64. 5 U.S.C. §§ 552(b)(7), (c), (a)(4)(A).
65. 5 U.S.C.S. § 552 n.157 (1989).

to provide access to "agency records": documents created or obtained by an executive agency and within the control of the agency.[66] Congress and the Judiciary are not covered by the Act.[67] A FOIA request must "reasonably describe" the records sought and must comport with published agency procedural regulations.[68]

The Act establishes a narrow window of response time for agencies. The FOIA gives requesters the right to seek immediate judicial review when an agency does not respond to a request within ten business days.[69] Practically, the stringent time limit does not mean that a final response will be forthcoming within ten days; courts have found compliance if an agency exercises "due diligence" in processing requests and is not "lax overall in meeting its obligations under the Act with all available resources."[70] This standard has resulted in a *de facto* reasonableness test for agency action in retrieving records.[71]

Agencies must provide records subject to the FOIA to requesters unless the records are specifically exempted from disclosure.[72] The Act provides nine exemptions from FOIA's disclosure provisions, including records pertaining to national security, internal agency rules, matters exempted from disclosure by other federal acts, trade secrets, inter- or intra-agency memoranda (which includes the executive privilege), personnel and medical files, records compiled for law enforcement purposes, matters concerning the operation of financial institutions, and geological information.[73] These exemptions are permissive: agencies are free to withhold information falling within one of these nine exemptions, but there is no requirement that they do so.

Requesters may be required to pay the costs of copying and searching for agency records. The 1986 amendments revised the fee guidelines to include searching, reviewing, and duplicating expenses.[74] Depending on the intended use of the records, some or all of these fees may be imposed.[75] Agencies may also waive fees on a case-by-case basis consistent with the congressional policy of liberally granting fee waivers.[76]

C. Use of the FOIA

Such a liberal presumption in favor of disclosure is not without its costs. Justice Antonin Scalia, then a Professor of Law at the University of Chicago, referred to

66. 5 U.S.C. § 552(a).

67. *Id.* § 552(f).

68. *Id.* § 552(a)(3).

69. This is the statutory time limit, absent "unusual circumstances." *Id.* § 552(a)(6).

70. Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 615 (D.C. Cir. 1976). *See also* Aman & Mayton, *supra* note 33, at 633.

71. *See* Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also* H.R. Rep. No. 876, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271-72.

72. *See* 5 U.S.C. § 552(a).

73. *Id.* §§ 552(b)(1)-(9).

74. Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3249-50 (1986).

75. 5 U.S.C. §§ 552(a)(4)(A)(ii)-(iii). For example, if the records are for commercial use, the requester may be charged for all three types of costs. If the use is noncommercial, only search and duplication costs may be assessed. If the use is for educational, scientific, or news, only duplication costs can be charged. *See* Allen R. Adler, Using the Freedom of Information Act: A Step by Step Guide 7 (1990) (explaining the practical steps toward gaining a fee waiver).

76. Adler, *supra* note 75, at 5.

the FOIA as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored."[77] Justice Scalia's statement aptly describes the onslaught of FOIA requests after 1974. Clearinghouses and commercial services appeared for FOIA requesters, and the costs skyrocketed, with the government spending between $50 and $250 million a year on processing requests.[78] The fiscal ramifications of litigating appeals of FOIA denials are so widespread that they cannot even be estimated confidently.[79] The Department of Health and Human Services alone processed over 121,000 FOIA requests in 1987 at a cost of over $8.1 million.[80] During the same period, the Federal Bureau of Investigation processed more than 60,000 FOIA requests, released nearly 800,000 pages of documents, and handled 2,000 administrative appeals from denials of FOIA requests, at a cost of over 600 employee *years*.[81] The fee waiver provisions of the FOIA have thus far blocked efforts by the government to recoup the significant costs associated with FOIA requests and litigation.

Closely related to escalating costs, the burgeoning number of FOIA requests has led to significant delays in agency responses to disclosure requests. For example, in 1987 the Central Intelligence Agency responded to FOIA requests on average within 45 days,[82] more than four times the limit set forth in the FOIA.[83] The Department of Justice failed to meet the 20-day time limit for responding to administrative appeals of FOIA denials in 75 percent of its 1987 appeals.[84]

Furthermore, the intended beneficiaries of the Act were not its principal requesters. A General Accounting Office survey found that "only one out of every twenty FOIA requests were [sic] made by a journalist, scholar or author. In contrast, four out of five requests were made by business executives or their lawyers. . . ."[85] In 1988, Assistant Attorney General Stephen J. Markman testified before the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary:

> Today, a typical FOIA scenario is not, as [originally] envisioned by the Congress, the journalist who seeks information about the development of public policy when he will shortly publish for the edification of the electorate. Rather, it is the corporate lawyer seeking business secrets of a client's competitors; the felon attempting to learn who informed against him; the drug trafficker trying to evade the law; the foreign requester seeking a benefit that our citizens cannot obtain from his country; the private litigant who, constrained by discovery limitations, turns to the FOIA to give him what a trial

77. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 14, 15.

78. Grunewald, *supra* note 12, at 21.

79. *Id.* at 22.

80. Memorandum from Otis R. Bowen, M.D., Secretary of Health and Human Services to OPDIV and STAFFDIV Heads (Apr. 21, 1988), *reprinted in 1988 Senate Hearings, supra* note 15, at 206 (statement of Russell M. Roberts).

81. *1988 Senate Hearings, supra* note 15, at 3 (statement of Stephen J. Markman).

82. *Id.* at 186 (statement of John H. Wright, Information and Privacy Coordinator, CIA).

83. 5 U.S.C. § 552(a)(6).

84. *1988 Senate Hearings, supra* note 15, at 121 (response to questions for the hearing record by Stephen J. Markman).

85. Wald, *supra* note 10, at 665.

court will not. And as if these uses do not diverge enough from the Act's original purpose, it is the public—the intended beneficiary of the whole scheme—who bears nearly the entire financial burden of honoring those requests while often reaping virtually none of the benefits from them.[86]

For example, over 85 percent of 33,000 annual FOIA requests to the Food and Drug Administration are from regulated industries or their representatives seeking information on competitors.[87] Of the 121,000 FOIA requests received by the Department of Health and Human Services during 1987, three-quarters were from "commercial use requesters."[88]

Similarly, lawyers quickly realized that FOIA requests were quicker and less complicated than civil discovery.[89] The Deputy Attorney General reported at the Second Circuit Judicial Conference that more than half of FOIA requests to the Justice Department Antitrust Division were by actual or potential litigants in private antitrust suits.[90] The Department of Defense has testified before Congress "that out of 57,000 requests annually, more than half came from businessmen or their lawyers interested in supplementing discovery in litigation over defense contracts."[91]

The unintended beneficiaries of the Act have realized a windfall as a result of the important purposes of the FOIA. These parties have stretched the FOIA beyond its intended reach, costing the federal government hundreds of millions of dollars. Judge Patricia Wald has written: "The Act has been charged with turning agencies into information brokers between companies pursuing each other, rather than acting as a window for public assessment of how government conducts itself."[92]

II. Judicial Interpretations of the Purpose of the FOIA

A. The Supreme Court's Interpretation of the Purpose of the FOIA

FOIA litigation has focused primarily not on the Act's central purpose but on the nine exemptions from disclosure. While the central purpose rationale applies

86. *1988 Senate Hearings, supra* note 15, at 37 (statement of Stephen J. Markman) (footnote omitted).
87. Wald, *supra* note 10, at 666 n.73 (citation omitted).
88. *1988 Senate Hearings, supra* note 15, at 202 (statement of Russell M. Roberts).
89. Wald, *supra* note 10, at 66465 (footnotes omitted).
90. *Id.* at 667 n.76.
91. *Id.* at 671 (footnote omitted).

> [C]ompanies complain bitterly about agency disclosure of technical cost and management details that are contained in their bids for government contracts, while universities decry the disclosure of details contained in their research grant proposals. A chemical company representative told of a request, presumably by a competitor acting through lawyers and consulting firm intermediaries, for information which he claimed could be used to deduce production capabilities, construction cost fixtures, and critical operating data. Multinational drug manufacturers are said to prefer researching and developing innovative drugs abroad for fear that processes still undergoing testing here will be prematurely disclosed under the FOIA.

Id. at 668-69 (footnotes omitted).
92. *Id.* at 667 (footnote omitted).

to all of the Act's exemptions, the Supreme Court has recently ruled on the proper scope of the FOIA in cases involving two of the nine exemptions defined in 5 U.S.C. § 552(b).

1. The Exemption 7(C) Context

Exemption 7(C) excludes records or information compiled for law enforcement purposes, "to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."[93] Prior to 1986, Exemption 7(C) applied to disclosures that "would constitute" an invasion of privacy. In 1986, Congress amended Exemption 7(C), substituting "could reasonably be expected to constitute" for the phrase "would constitute."[94] In the Supreme Court's view, the amendment represented a considered congressional effort

> "to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7]" . . . . [I]n determining the impact on personal privacy from disclosure of law enforcement records or information, the stricter standard of whether such disclosure "would" constitute an unwarranted invasion of such privacy gives way to the more flexible standard of whether such disclosure "could reasonably be expected to" constitute such an invasion.[95]

The United States Supreme Court in *United States Department of Justice v. Reporters Committee for Freedom of the Press*[96] enunciated three principles to govern application of the 7(C) exemption. The case arose out of requests made by CBS and the Reporters Committee for Freedom of the Press for information concerning the criminal records of four individuals, only so far as it contained " 'matters of public record.' "[97] The records, referred to by the Court as "rap sheets," contain "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."[98]

The Supreme Court, overturning the appellate court's decision, ruled unanimously that

> whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.' "[99] . . . [The Act] indeed focuses on the citizens' right to be informed about "what their government is up to.". . . [T]he FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.

93. 5 U.S.C. § 552(b)(7)(C).

94. Act of Oct. 27, 1986, Pub. L. No. 99-570, tit. I, § 1802, 1803, 100 Stat. 3207-48, 3207-49.

95. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989) (quoting 132 Cong. Rec. 31,424 (1986)).

96. *Id.*

97. *Id.* at 757 (citation omitted).

98. *Id.* at 752.

99. *Id.* at 772-74 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976), quoting Rose v. Department of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)).

Where a requester seeks information about a private person rather than about the conduct of a government agency or employee, that paramount interest is not served. According to the Court, "in 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."[100] The response to such a request, a unanimous Supreme Court wrote, "would not shed any light on the conduct of any Government agency or official."[101] The Supreme Court quoted approvingly from Judge Starr's dissent in the appellate court case:

> We are now informed that many federal agencies collect items of information on individuals that are ostensibly matters of public record. For example, Veterans Administration and Social Security records include birth certificates, marriage licenses, and divorce decrees (which may recite findings of fault); the Department of Housing and Urban Development maintains data on millions of home mortgages that are presumably "public records" at county clerks' offices. . . . Under the majority's approach, in the absence of state confidentiality laws, there would appear to be a virtual per se rule requiring all such information to be released. The federal government is thereby transformed in one fell swoop into the clearinghouse for highly personal information, releasing records on any person, to any requester, for any purpose. This Congress did not intend.[102]

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.

The Supreme Court's second principle focused on citizens' legitimate expectations of privacy. The Court found that when the information sought concerns a "private citizen" and "when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir."[103] As a result, the Court determined that categorical decisionmaking was appropriate: "Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided."[104] The Court held "as a categorical matter 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 pri-

100. *Id.* at 773.

101. *Id.*

102. *Id.* at 761 (quoting Reporters Comm. forFreedom of the Press v. Department of Justice, 831 F.2d 1124, 1130 (D.C. Cir. 1987)(Starr, J., dissenting)). *See also* the Supreme Court's own footnote 20 in *Reporters Comm.*, which emphasizes that the act's primary goals are to promote honesty and reduce waste by exposing government conduct to public scrutiny. The footnote further suggests that Congress never intended the Act as a means of opening up the government's collection of data to anyone who has a purpose for it. *Id.* at 772 n.20.

103. *Id.* at 780.

104. *Id.*

vacy.''[105] To the respondents' argument that prior disclosure of the records sought reduced the subject's privacy interest in avoiding their disclosure,[106] the Supreme Court responded: ''We reject respondents' cramped notion of personal privacy.''[107]

The Court continued: ''We have also recognized the privacy interest in keeping personal facts away from the public eye.''[108] The Court cited to Justice Brennan's concurrence in *Whalen v. Roe*:[109] '' 'the right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.' ''[110] The Court also cited to an article by Chief Justice Rehnquist: ''In sum, the 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.' ''[111]

Finally, the Supreme Court in *Reporters Committee* held ''that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.' ''[112] In short, the release of information possessed by the government about private citizens constitutes an unwarranted invasion of those citizens' privacy and therefore is not required under the FOIA.

The Court cited to its decision in *Department of the Air Force v. Rose*,[113] in which New York University law students sought Air Force Academy Honor and Ethics Code case summaries for a law review project on military discipline. Although *Rose* dealt with a different FOIA exemption—Exemption 6 (the exception for ''personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy''),[114] discussed below—the Court held that it was nonetheless applicable. The Academy had already publicly posted these summaries on forty squadron bulletin boards, usually with identifying names redacted (names were posted for cadets who were found guilty and who left the Academy), and with instructions that cadets should read the summaries only if necessary.[115] The Court in *Reporters Committee* noted that in *Rose*,

> All parties, however, agreed that the files should be redacted by deleting information that would identify the particular cadets to whom the summaries related. The deletions were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code;

105. *Id.*
106. *Id.* at 762-63.
107. *Id.* at 763.
108. *Id.* at 769.
109. 429 U.S. 589 (1977).
110. 489 U.S. at 770 (quoting *Whalen*, 429 U.S. at 605).
111. *Id.* (quoting William Rehnquist, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Lecture at Nelson Timothy Stephens Lectures, University of Kansas Law School, 13 (Sep. 26-27, 1974)).
112. 489 U.S. at 780.
113. 425 U.S. 352 (1976).
114. 5 U.S.C. § 552(b)(6) (1988).
115. 425 U.S. at 355.

> leaving the identifying material in the summaries would therefore have been a "clearly unwarranted" invasion of individual privacy. If, instead of seeking information about the Academy's own conduct, the requests had asked for specific files to obtain information about the persons to whom those files related, the public interest that supported the decision in *Rose* would have been inapplicable. In fact, we explicitly recognized that "the basic purpose of the [FOIA is] to open agency action to the light of public scrutiny."[116]

The Court cautioned:

> it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen. . . . [I]n at least three cases we have specifically *rejected* requests for information about private citizens.[117]

In sum, in what many commentators have regarded as a dramatic new expansion of FOIA privacy Exemption 7(C), the United States Supreme Court in *Reporters Committee* categorically excluded from mandatory disclosure information about private citizens that provides no "official information" about a government agency.[118]

2. The Exemption 6 Context

The Supreme Court's concern with protecting personal privacy and guarding against misuse of the FOIA to obtain information about private individuals has not been limited to the Exemption 7(C) context. In *United States Department of State v. Washington Post Co.*,[119] the Court considered whether Exemption 6,[120] which provides that the disclosure requirements of the FOIA do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," was in fact limited to medical and personnel records. *Washington Post* involved a request for information from the United States Department of State about whether certain Iranian nationals held valid United States passports.[121] The State Department declined to provide the information on the basis that the requested information "would be 'a clearly unwarranted invasion of [the] personal privacy' of these persons and therefore was exempt from disclosure under Exemption 6 of the FOIA."[122]

The Court surveyed the legislative history of Exemption 6 and concluded, " 'the primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters.' "[123] Therefore, it is the nature of the information, not the type of file in which it is contained, that is determinative. "In sum, we do not think that Congress meant to limit Exemption 6 to a narrow class

116. 489 U.S. at 773-74 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976)).

117. *Id.* at 774-75, 775 n.21 (footnote omitted); *see* CIA v. Sims, 471 U.S. 159, 177 (1985); FBI v. Abramson, 456 U.S. 615, 631-32 (1982); United States Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982).

118. 489 U.S. at 780.

119. 456 U.S. 595 (1982).

120. 5 U.S.C. § 552(b)(6).

121. 456 U.S. at 595.

122. *Id.* at 596 (quoting 5 U.S.C. § 552(b)(6)) (citation omitted).

123. *Id.* at 599-600 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 375 n.14 (1976)).

of files containing only a discrete kind of personal information. Rather, '[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual.' ''[124]

In *United States Department of State v. Ray*,[125] the first privacy exemption case decided by the Court after *Reporters Committee*, the Court addressed personal privacy in the context of Exemption 6, which provides that the disclosure requirements of the FOIA do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.''[126] *Ray* involved State Department records of interviews conducted by U.S. embassy personnel with Haitians who had been returned to Haiti after entering the United States illegally. The State Department released interview transcripts to the petitioner, an attorney concerned that the returned Haitians were being harassed or prosecuted upon their return, but redacted the names and other identifying information of the interviewees to protect their privacy under Exemption 6.[127]

In its unanimous opinion, the Supreme Court, citing to *Reporters Committee* and *Rose*, noted that the privacy interests of the interviewees must be measured against "the basic policy of opening 'agency action to the light of public scrutiny.' ''[128] The Court then noted:

> The unredacted portions of the documents that have already been released to respondents inform the reader about the State Department's performance of its duty to monitor Haitian compliance with the promise not to prosecute the returnees. The documents reveal how many returnees were interviewed, when the interviews took place, the contents of individual interviews, and details about the status of the interviewees.[129]

The Court therefore concluded that "[t]he addition of the redacted identifying information would not shed any additional light on the Government's conduct of its obligation,''[130] and reversed the Eleventh Circuit Court of Appeals decision ordering release of the redacted information.

The Court went on to reject petitioner's claim that the redacted information was necessary in order to judge the accuracy of the government's interview reports:

> We generally accord government records and official conduct a presumption of legitimacy. If a totally unsupported suggestion that the interest in finding out whether government agents have been telling the truth justified disclosure of private materials, government agencies would have no defense against requests for production of private information.[131]

After *Reporters Committee, Washington Post,* and *Ray*, federal agencies are not required under the FOIA to release government information about a third party

124. *Id.* at 602 (quoting H.R. REP. No. 1497, 89th Cong., 2d Sess. 11 (1966)).
125. 112 S. Ct. 541 (1991).
126. 5 U.S.C. § 552(b)(6).
127. 112 S. Ct. at 544.
128. *Id.* at 548 (quoting *Rose*, 425 U.S. at 372).
129. *Id.* at 549.
130. *Id.*
131. *Id.* at 550.

that does not provide "official information" about the Government's activities,[132] or information in government records about an individual, "which can be identified as applying to that individual."[133] These positions, however, have been extended even further by federal appellate and district courts.[134]

B. Lower Court Interpretations

The Supreme Court expounded three principles in *Reporters Committee*:

(1) "whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny;" ' "[135]

(2) "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; "[136] and,

(3) "that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.' "[137]

The strength and clarity of these principles have been clearly recognized by lower courts.

Similarly, the Supreme Court's holdings in *Washington Post* and *Ray* [that Exemption 6 was " 'intended to cover detailed Government records on an individual which can be identified as applying to that individual' "[138]] have produced a dramatic impact in subsequent cases. In fact, the cases have been read together to restrict dramatically the release of information about nongovernmental entities under Exemptions 6 and 7(C).[139]

1. The Exemption 7(C) Context

In the first United States Court of Appeals case to explicitly involve Exemption 7(C) and to interpret *Reporters Committee*, the Fifth Circuit rendered a far-reaching

132. 489 U.S. at 780.

133. 456 U.S. at 602 (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2428).

134. *See* N.Y. Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990); National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1805 (1990); Federal Labor Relations Auth. v. United States Dep't of the Treasury, 844 F.2d 1466 (D.C. Cir. 1989).

135. 489 U.S. at 772 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 372, quoting Rose v. Department of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)).

136. *Id.* at 780.

137. *Id.*

138. 456 U.S. at 602 (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2428).

139. *See* N.Y. Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990); KTVY-TV v. United States, 919 F.2d 1465 (10th Cir. 1990); Fitzgibbon v. CIA, 911 F.2d 755 (D.C. Cir. 1990); National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1805 (1990); Halloran v. Veterans Admin., 874 F.2d 315 (5th Cir. 1989); Federal Labor Relations Auth. v. United States Dep't of the Treasury, 884 F.2d 1466 (D.C. Cir. 1989); Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. 851 (D.D.C. 1989); Wagner v. FBI, No. 90-1314-LFO, 1991 U.S. Dist. LEXIS 7506 (D.D.C. June 2, 1991), *aff'd*, 976 F.2d 47 (D.C. Cir. 1992).

decision restricting the release of information. *Halloran v. Veterans Administration*[140] involved a series of transcripts produced as part of an investigation of a federal contractor. Although the transcripts had been released, the Veterans Administration had "deleted the names of, and other identifying information relating to, forty-two individuals, i.e., the three unindicted suspects of the investigation, other persons participating in the conversations, and third parties mentioned in the conversations, including one federal employee who was not involved in the investigation," as well as "medical information, relating to one person."[141]

The court held explicitly that "if disclosure of the requested information does not serve the purpose of informing the citizenry about the activities of their government, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released."[142] In the absence of a rational relationship between the information sought and the purpose of the FOIA, "even a small and potentially uncertain invasion of privacy engendered by the release of identifying information may nonetheless be 'unwarranted' if there are no public interests supporting disclosure of the particular information."[143]

The United States Court of Appeals for the District of Columbia returned to the Exemption 7(C) context in *Fitzgibbon v. Central Intelligence Agency*.[144] The court rejected the district court's ruling that the appearance of a third party's name in an FBI report " 'is not sufficiently injurious of his privacy to overcome FOIA's presumption in favor of disclosure.' "[145] Rather, the court stated, "[i]t is surely beyond dispute that 'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.' "[146] The court concluded: "We have said quite recently that 'Exemption 7(C) takes particular note of the "strong interest" of individuals, whether they be suspects, witnesses, or investigators, "in not being associated unwarrantedly with alleged criminal activity." ' "[147] The court held that the information requested would in no way allow "citizens to know 'what their government is up to.' "[148]

The United States Court of Appeals for the Tenth Circuit addressed the balance required between privacy and public interests in *KTVY-TV v. United States*.[149] In *KTVY-TV*, the requester sought the investigatory records compiled after a Postal Service Employee shot and killed fourteen fellow workers and then committed suicide in Edmund, Oklahoma.[150] The requester claimed that the "public interest

140. 874 F.2d 315 (5th Cir. 1989).
141. *Id.* at 318.
142. *Id.* at 323.
143. *Id.* at 322.
144. 911 F.2d 755 (D.C. Cir. 1990).
145. *Id.* at 767 (quoting Fitzgibbon v. CIA, 578 F. Supp. 704, 724 (D.D.C. 1983)).
146. *Id.* (quoting Branch v. FBI, 658 F. Supp. 204, 209 (D.D.C. 1987)).
147. *Id.* (quoting Dunkelberger v. United States Dep't of Justice, 906 F.2d 779, 781 (D.C. Cir. 1990) (quoting Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984))).
148. *Id.* at 768 (quoting 489 U.S. at 780).
149. 919 F.2d 1465 (10th Cir. 1990).
150. *Id.* at 1468.

at stake is the right of the public to know how the shootings occurred and whether they could have been avoided.''[151]

The appellate court, however, upheld the lower court's determination that disclosing ''the names of interviewees and persons identified in their statements . . . could be harassing, embarrassing, and, consequently, an invasion of privacy.''[152] The Tenth Circuit rejected arguments that the likelihood of an invasion of privacy had not been demonstrated and was, in fact, diminished by the fact that the assailant was dead.[153] Instead, the Court of Appeals ruled, ''the identities of witnesses and third parties do not provide information about the conduct of the government.''[154] ''Because the disclosure of the information could reasonably be expected to constitute an unwarranted invasion of privacy, the district court appropriately granted summary judgment for defendants on the Exemption 7(C) issue.''[155]

In *SafeCard Services, Inc. v. Securities and Exchange Commission*[156] the requester sought information from the SEC relating to that agency's investigation into the manipulation of SafeCard stock. The SEC withheld forty-four documents on the basis that they are exempt under Exemption 5 or Exemption 7(C) of the FOIA.[157] The appellate court refused to order the release of ''the names and addresses of third parties mentioned in witness interviews, of customers listed in stock transaction records obtained from investment companies, and of persons in correspondence with the SEC.''[158]

The court noted that the public interest in the disclosure of such information ''is not just less substantial, it is insubstantial.''[159] The court rejected the requester's justification that this information would provide the public with insight into the SEC's conduct: ''We have rejected similar claims in the past because the type of information sought is simply not very probative of an agency's behavior or performance.''[160] The court continued:

> Indeed, unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant.[161]

The court of appeals concluded: ''We now hold categorically that, unless access

151. *Id.* at 1470.
152. *Id.* at 1469.
153. *Id.*
154. *Id.* at 1470.
155. *Id.*
156. 926 F.2d 1197 (D.C. Cir. 1991).
157. *Id.* at 1200.
158. *Id.* at 1205.
159. *Id.*
160. *Id.* at 1205. *See, e.g.*, Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987); Bast v. United States Dep't of Justice, 665 F.2d 1251, 1254-55 (D.C. Cir. 1981).
161. 926 F.2d at 1205-06.

to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.''[162]

Following *Reporters Committee*, even information regarding alleged arson and drug trafficking has been found not to implicate the public interest sufficiently to warrant disclosure. In *Albuquerque Publishing Co. v. Department of Justice*,[163] United States District Court Judge John H. Pratt ruled that the Drug Enforcement Agency (DEA) properly withheld records concerning surveillance and investigation of a suspected drug trafficker.[164] The DEA had investigated Albuquerque nightclub owner Ken Gattas in connection with suspected arson and drug trafficking.[165] The records of the DEA surveillance and investigation were sought by an investigative reporter for the Albuquerque Tribune.[166] The reporter claimed that she was requesting the information to learn more about the arson charges and the amount of drug trafficking that had occurred at the club.[167] The DEA argued that the requested documents contained material that concerned third parties who were associated with the surveillance of Gattas and that disclosure of this information would be an invasion of privacy.[168]

Relying on *Reporters Committee*, Judge Pratt found that much of the requested information was protected from mandatory disclosure by Exemption 7(C).[169] The court reasoned that ''*Reporters Committee* and decisions in this Circuit indicate that individuals have a substantial privacy interest in information that either confirms or suggests that they may have been subject to a criminal investigation.''[170]

Judge Pratt observed that the Supreme Court in *Reporters Committee* had emphasized that the FOIA's main purpose was '' 'to open agency action to the light of public scrutiny.' ''[171] Even though the plaintiff sought the DEA's records on Gattas to learn '' 'the complete truth about the fire . . . and the extent of drug trafficking at the night club,' ''[172] the court found that this was not sufficiently intended ''to open agency action to the light of public scrutiny'' and, therefore, warrant disclosure.[173] As a result, Judge Pratt refused to order release of the information and granted summary judgment to the DEA on its Exemption 7(C) claim.[174]

In another recent United States District Court case, *Fitzgibbon v. United States Secret Service*,[175] Judge Harold H. Greene, Jr., ruled that disclosure of information

162. *Id.* at 1206.
163. 726 F. Supp. 851 (D.D.C. 1989).
164. *Id.* at 860.
165. *Id.* at 853.
166. *Id.*
167. *Id.* at 855.
168. *Id.*
169. *Id.* at 856.
170. *Id.* at 855.
171. *Id.* at 856 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976)).
172. *Id.* at 855 (quoting Brief of Plaintiff at 2-3 (No. 87-2590)).
173. *Id.* at 856 (quoting *Rose*, 425 U.S. at 372).
174. *Id.* at 860-61.
175. 747 F. Supp. 51 (D.D.C. 1990).

about a plot to assassinate President John F. Kennedy and kidnap his daughter Caroline would not serve the public interest. Although the plaintiff, a historian, sought Secret Service and FBI records regarding an alleged plot against President Kennedy and his family by Rafael Trujillo, former head of state of the Dominican Republic, Judge Greene concluded: "Plaintiff expressly states that his interest is in the activities of the Trujillo regime in the United States as opposed to those of the United States Government . . . . This is not a public interest within 'the basic purpose of [the FOIA] to open agency action to the light of public scrutiny.' "[176]

The United States District Court for the District of Columbia again upheld the application of Exemption 7(C) on the basis that disclosure of the requested documents failed to serve the public interest in *Wagner v. Federal Bureau of Investigation*.[177] In *Wagner*, the requester sought information that he believed would support his arguments that he received ineffective assistance of counsel and that federal agents had conducted a warrantless search of his home. Judge Louis F. Oberdorfer held that, however important that interest might be, "the purpose of FOIA is not to support the needs or purposes of the individual requester. . . . The public interest to be considered . . . is that of the public at large in investigating the actions of government agencies, not plaintiff's interest."[178] Since Judge Oberdorfer believed ineffective assistance of counsel to be purely private, he upheld the denial of information.

2. *Exemption 7(C) Principles in the Exemption 6 Context*

Federal appellate and district courts have not only interpreted the three *Reporters Committee* principles in the context of Exemption 7(C) broadly,[179] but these courts have also joined the Court in extending the principles' application to Exemption 6.[180] In *National Ass'n of Retired Federal Employees v. Horner*,[181] the United States Court of Appeals for the District of Columbia ruled that a mailing list of recently retired or disabled federal employees is protected information under Exemption 6. The case arose because of a change in policy at the Office of Personnel Management (OPM).[182] Between 1979 and 1981, OPM had assisted the National Association of Retired Federal Employees (NARFE) in recruiting new members by providing lists of newly retired federal employees.[183] OPM stopped assisting the NARFE in 1982 and subsequently NARFE's membership began to decline.[184] Using the FOIA, NARFE requested a list of names and addresses of retired employees.[185] The district court had ruled that the list was not covered by Exemp-

176. *Id.* at 59 (quoting 489 U.S. at 772).
177. Civ. A. No. 90-1314-LFO, 1991 U.S. Dist. LEXIS 7506 (D.D.C. June 4, 1991).
178. *Id.* at *8-9 (citations omitted).
179. 5 U.S.C. § 552(b)(7)(C).
180. *Id.* § 552(b)(6).
181. 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).
182. *Id.* at 874.
183. *Id.*
184. *Id.*
185. *Id.*

tion 6 because any privacy interest in such information was minor.[186] The court of appeals, relying on *Reporters Committee*, barred disclosure of government employee names and addresses under 5 U.S.C. § 552(b)(6) because the release would not inform the public about government actions.[187]

This court stated that even though the requested information promoted the public interest by facilitating federal sector collective bargaining, this was not the public interest that the FOIA was enacted to promote: "unless the public would learn something directly about the workings of the *Government* by knowing the names and addresses of its annuitants, their disclosure is not affected with the public interest."[188] Because the release of these lists failed to add to the public's knowledge about government operations, the court refused to order their release.[189]

Horner marked a dramatic new restriction on information that must be released under the FOIA by significantly expanding the Supreme Court's "official information" test in *Reporters Committee* beyond the Exemption 7(C) context before the High Court addressed the issue itself in *Ray*. This expansion is all the more notable because the Section 7(C) exemption requires that the invasion of privacy be "unwarranted,"[190] while Exemption 6 requires that the invasion of privacy be "*clearly* unwarranted"[191] and therefore has been viewed by the courts as having a higher threshold than Exemption 7(C).

The United States Court of Appeals for the District of Columbia made this expansion explicit in *Federal Labor Relations Authority v. Department of the Treasury*,[192] another case involving lists of federal employee names and addresses:

> In *Reporters Committee*, however, the Court made clear that under FOIA the disclosure interest must be measured in terms of its relation to FOIA's central purpose—"to ensure that the Government's activities be opened to the sharp eye of public scrutiny." . . . Although the context in *Reporters Committee* was the special privacy exemption for law enforcement records, exemption 7(C), we see no reason why the character of the disclosure interest should be different under exemption 6.[193]

The appellate court in *Federal Labor Relations Authority* held, as it had in *Horner*, that the disclosure interest of the names and addresses of federal employees constitutes a "clearly unwarranted" invasion of privacy.[194]

In *New York Times Co. v. National Aeronautics and Space Administration*,[195] the United States Court of Appeals for the District of Columbia again examined Exemption 6 and further expanded the information it protects. The New York Times sought a copy of the tape of the voice communications among the crew of the space shuttle

186. *Id.* (citing National Ass'n of Retired Fed. Employees v. Horner, 633 F. Supp. 1241 (D.D.C. 1986)).
187. *Id.* at 879.
188. *Id.*
189. *Id.*
190. 5 U.S.C. § 552(b)(7)(C).
191. *Id.* § 552(b)(6) (emphasis added).
192. 884 F.2d 1446 (D.C. Cir. 1989).
193. *Id.* at 1451 (citations omitted) (quoting *Reporters Comm.*, 489 U.S. at 774).
194. *Id.* at 1451-53.
195. 920 F.2d 1002 (D.C. Cir. 1990).

Challenger and between the crew and ground control prior to the explosion which destroyed the shuttle.[196] NASA provided a transcript of the recording, but declined to provide a copy of the recording itself on the basis that the voice inflections contained on the tape were personal to the astronauts.[197] Rather than any requirement that the information be "intimate" or even "detailed," the Court held that "the threshold for application of Exemption 6 is crossed if the information merely 'applies to a particular individual.' As this court subsequently put it, the threshold is 'minimal.' "[198]

Because "disclosure of the file would reveal the sound and inflection of the crew's voice,"[199] the appellate court in *New York Times* found that the request sought "personal information," and therefore held that the privacy interests involved must be balanced in subsequent proceedings against the public gain occasioned by disclosure.[200] In *New York Times Co. v. National Aeronautics and Space Administration*,[201] the District Court made that balance. Characterizing the privacy interest of the families of the space shuttle's crew as "substantial," and the likelihood that disclosure of the tape would contribute significantly to public understanding of the operations or activities of the government as "very minimal," the court granted the government's summary judgment motion and refused to order disclosure.[202]

3. Summary of Lower Court Interpretations

The United States Courts of Appeals for the District of Columbia and for the Fifth and Tenth Circuits, together with the United States District Court for the District of Columbia, have relied on *Reporters Committee* and *Ray* to significantly broaden the scope of FOIA privacy exemptions.

In the context of Exemption 6,[203] "[i]f the information [sought] 'applies to an individual,' then it might harm that individual; for that reason it crosses the threshold, and the privacy interest of the person to whom it applies must be considered and balanced against the public interest in releasing it."[204] When that balancing is undertaken, "unless the public would learn something directly about the workings of the Government"[205] by the release of the requested information, its disclosure "is not affected with the public interest"[206] and therefore is not required under the FOIA.

Similarly, in the context of Exemption 7(C), "if disclosure of the requested

196. *Id.* at 1004.
197. *Id.*
198. *Id.* at 1006 (quoting United States Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982), and Washington Post Co. v. Health and Human Services, 690 F.2d 252, 260 (D.C. Cir. 1982)) (citation omitted).
199. *Id.* at 1005.
200. *Id.* at 1009-10.
201. 782 F. Supp. 628 (D.D.C. 1991).
202. *Id.* at 632-33.
203. 5 U.S.C. § 552(b)(6).
204. 920 F.2d at 1009.
205. 879 F.2d at 879.
206. *Id.*

information does not serve the purpose of informing the citizenry about the activities of their government, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released."[207]

C. Justice Department Guidelines

The significant new restrictions imposed on the release of information by *Reporters Committee* has been the subject of an advisory issued by the United States Department of Justice Office of Information and Privacy (OIP) to FOIA offices in all federal governmental agencies. In the advisory,[208] the OIP not only offered the Justice Department's interpretation of *Reporters Committee*, but also provided practical advice to all government offices charged with responding to FOIA requests.

At the outset, the OIP noted that "[t]he Supreme Court's decision sets forth several important FOIA principles, based upon the Act's underlying policy objectives, which clarify the law in this area and should significantly strengthen the protection of personal privacy interests under Exemption 6 as well as Exemption 7(C)."[209]

The OIP continued:

> The Supreme Court in *Reporters Committee* sharply delimited the scope of the "public interest" to be considered under the Act's privacy exemptions, declaring for the first time that it is limited to "the kind of public interest for which Congress enacted the FOIA." This "core purpose of the FOIA," as the Court termed it, is to "shed light on an agency's performance of its statutory duties." Information that does not directly reveal government operations or activities, the Court stressed, "falls outside the ambit of the public interest that the FOIA was enacted to serve."[210]

This narrowing of the concept of public interest, according to the OIP advisory, was "[p]erhaps the most significant of the alterations made by the Supreme Court in *Reporters Committee*."[211] FOIA offices were warned that "[t]his new 'core purpose' public interest standard—which is satisfied where requested information 'sheds light on an agency's performance of its statutory duties'—should govern the process of balancing interests under Exemptions 6 and 7(C)."[212] The advisory continued:

> In making such "core purpose" determinations, agencies should bear in mind that a touchstone of this new standard is the "operations or activities of the government." . . . [T]he many items of personal information about private citizens that the government

207. Halloran v. Veterans Admin., 874 F.2d 315, 323 (5th Cir. 1989).

208. *Reporters Committee Decided Broadly*, FOIA Update (Off. of Info. & Privacy, U.S. Dep't of Justice, Wash., D.C.), Spring 1989, at 1.

209. *Id.*

210. *Privacy Protection Under the Supreme Court's* Reporters Committee *Decision*, FOIA Update (Off. of Info. & Privacy, U.S. Dep't of Justice, Wash., D.C.), Spring 1989, at 3 (quoting *Reporters Comm.*, 489 U.S. at 772-73, 775) (citations omitted).

211. *Id.* at 6.

212. *Id.* (quoting *Reporters Comm.*, 489 U.S. at 772) (citations omitted).

maintains—the very information likely to be considered for Exemption 6 or 7(C) protection—tend to, as the Supreme Court said of rap sheets, "reveal little or nothing about an agency's own conduct."[213]

The OIP also noted "that the Court in *Reporters Committee* rejected the 'public availability' element of the case in finding a protectible privacy interest in the first place. In doing so, it firmly recognized 'the privacy interest in keeping personal facts away from the public eye.' "[214]

III. The Central Purpose of the FOIA: A Proposal

A. The Problem of Misuse

The FOIA was designed to protect and advance three goals: first and most important, ensure public access to the information necessary to evaluate the conduct of government officials; second, ensure public access to information concerning public policy; and third, protect against secret laws, rules and decisionmaking.[215] These three functions all focus on the activities of the government, not those of private individuals or organizations. In the words of the unanimous Supreme Court, "the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed."[216]

Today, however, the FOIA has been extended by requesters, agencies, litigants, and courts far beyond its original purpose. Indeed, the vast majority of requests under the Act seek no information about the activities of the government, but rather information about business competitors, opposing parties in litigation, and the activities of other nongovernmental entities. In fact, the FOIA is used primarily today to circumvent existing disclosure rules applicable to specific contexts such as SEC public filing rules applicable to publicly traded companies, or judicial discovery rules applicable to litigants. Moreover, these inquiries most frequently elicit information that has not been created or verified by the government, but rather has been provided to the government by private parties voluntarily, subject to industry-specific disclosure obligations, or under force of subpoena.

This extension of the FOIA not only violates the purpose for which the Act was created, but also costs taxpayers the billions of dollars spent responding to requests seeking no information "about what the Government is up to." The government tramples the privacy rights and confidentiality interests of individuals and organizations when it complies with requests seeking information about private citizens and organizations, rather than about the government. Such a use of the Act circumvents the discovery process in civil litigation, subverts judicial efforts to

213. *Id.* (quoting *Reporters Comm.*, 489 U.S. at 772) (citations omitted).

214. *Privacy Protection*, *supra* note 210, at 4-5 (quoting 489 U.S. at 669) (citations omitted).

215. *See* S. Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* FOIA Sourcebook, *supra* note 4, at 37-38; H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* FOIA Sourcebook, *supra* note 4, at 27-33. *See generally* Dickinson, *supra* note 3, at 197.

216. 489 U.S. at 774.

improve the speed and efficiency and reduce the costs of trials, and thwarts government efforts to collect information about industries, products, and markets. Perhaps most importantly, this abuse of FOIA seriously delays responses to meaningful FOIA requests seeking information about government activities, the very purpose for which the FOIA was enacted.

B. The Misuse of FOIA Extended to Electronic Records

The costs associated with this misuse of the FOIA increase as more requesters use the Act to discover information about non-governmental activities and as the volume of agency records subject to the FOIA expands. Those costs threaten to increase exponentially, however, if the FOIA is applied to the increasing number of computerized agency records. The OIP concluded in 1990 that "no development in the history of the Act has held as much potential for shaping its contours, even the very future of its implementation, as that of new technology."[217] According to the OIP, the issues surrounding application of the FOIA to computerized records

> are perhaps the most complex and challenging issues ever to arise under the Freedom of Information Act, if not also the most controversial. Their emergence threatens to pose increasing difficulties in the administration of the Act as the use of "electronic record" systems becomes more and more prevalent with the passage of time.[218]

Moreover, the current debate over such an extension of the FOIA focuses on the possibility that agencies might be required not merely to search electronic records, but also to provide new and even customized computer search programs in response to specific requests and to provide information in an electronic format.[219] Federal agencies responding to an OIP survey concerning the application of the FOIA to electronic records reported concern about the impact of such a requirement.[220] As the significant majority of requests under the FOIA are inconsistent with the Act's purpose, these same requests will also be likely to account for the lion's share of increased costs associated with applying the FOIA to electronic records and providing appropriate search programs.

As government agencies and businesses increasingly computerize their recordkeeping and reporting systems, extending the FOIA to electronic agency records is likely to be appropriate and essential if the Act's central purpose—"to open agency action to the light of public scrutiny"[221]—is to be accomplished. But the considerable costs necessarily associated with such an extension will be multiplied many times if requests seeking no information about "what the Government is up to" continue to be honored. The burden on agency budgets, staffs and computing resources is likely to increase greatly the already lengthy delays

217. *Department of Justice Report on "Electronic Record" FOIA Issues*, FOIA Update (Off. of Info. & Privacy, U.S. Dep't of Justice, Wash., D.C.), Spring/Summer 1990, at 3.
218. *Id.*
219. *Id.*
220. *Id.* at 14.
221. 489 U.S. at 772.

experienced by requesters, thereby further limiting the speed and accuracy of agency responses to legitimate requests. Moreover, applying the FOIA to electronic agency records exacerbates the significant invasion of personal privacy and intrusion into organizational decision-making occasioned by requesting information having nothing to do with government activities. Such an extension of the misuse of the FOIA further interferes with the discovery process in civil litigation, impedes efforts to improve the speed and efficiency and reduce the costs of trials, and undermines compliance with government efforts to collect information about industries, products, and markets.

C. The "Central Purpose" Test

The action of the United States Supreme Court and other federal courts to stem the misuse of the FOIA in the context of the two specific privacy exemptions is an important first step. In cases evaluating the contours of Exemption 7(C)[222] and Exemption 6,[223] the Court has articulated three principles for evaluating future claims.[224] First, "whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." ' "[225] Second, when the information sought concerns a "private citizen" and "when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir."[226] Third, the Court has held "that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.' "[227]

This dramatic interpretation of the Act's two personal privacy exemptions is an important step toward limiting the misuse of the FOIA. The force of its logic applies not merely to disclosures affecting personal privacy interests, but to all disclosures under the Act. The test for whether a request seeks "official information" should be the touchstone for disclosure under the FOIA. Rather than limit the application of a "central purpose" test to one or more of the FOIA exemptions, only information that will serve the purpose of ensuring that "the *Government's* activities be opened to the sharp eye of public scrutiny"[228] should ever be subject to disclosure under the FOIA. Under this test, an agency receiving a request for documents under the FOIA would determine whether it possessed any responsive documents and, if so, whether those documents shed light "on what the Govern-

222. 5 U.S.C. § 552(b)(7)(C) (1988).
223. *Id.* § 552(b)(6).
224. *See* 489 U.S. 749; United States Dep't of State v. Ray, 112 S. Ct. 541 (1991).
225. 489 U.S. at 772 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976), quoting Rose v. Department of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)).
226. *Id.* at 780.
227. *Id.*
228. *Id.* at 774.

ment is up to." If the agency determined that the documents did not, it would deny the request and an immediate appeal could be taken by the requester.

In addition, the "central purpose" test would avoid the problems created by the Act's permissive, rather than mandatory, exemptions. Currently, because the exemptions under the FOIA are permissive, agencies act inconsistently with regard to disclosing material that falls within one of the nine exemptions. Even when a court determines that an exemption applies (e.g., that the invasion of privacy involved in the release of requested material is unwarranted), agencies are still free today to disclose that information. Under the "central purpose" test, information providing no insight on the operations of the government would not be subject to the FOIA and therefore could (and should) be categorically excluded from disclosure.

The "central purpose" model focuses the light of public scrutiny on agencies themselves, the FOIA's intended target. This test affords a clear standard, consistent with the Act's purpose, for when disclosure under the FOIA is appropriate. Agencies and courts today focus primarily on the applications of the enumerated exemptions instead of on the purpose and body of the Act. It is difficult to interpret and apply an exemption without an explicit understanding of the purposes of the Act. Applying the test to the "central purpose" FOIA as the precondition for all disclosure would refocus attention on the importance of, and reasons for, disclosure. This approach would reject attempts to gain the presumption in favor of disclosure without first determining that the desired record concerns the conduct of government. If the desired record is not within the FOIA's "central purpose," courts need never decide the application of the Act's exemptions, because the record itself would fall outside the purview of the Act.[229]

229. Rather than adopt the "central purpose" test, Congress could attempt to restrict the burgeoning use of the FOIA for entirely private purposes by requiring that requesters demonstrate a "public purpose use" for the requested information. Under such a requirement, requests seeking information that would inform the public about the conduct of government would be granted, while requests seeking information on competitors and opposing parties in litigation would be denied. The difficulties involved in implementing such an approach are many, including the control of secondary uses by the original requester of information, the transfer of information obtained under the FOIA from the original requester to another party, and practical and constitutional hurdles to government requests that would probe the motives of requesters. A motive requirement could be easily manipulated, much like the early FOIA, to prefer parties with "acceptable" viewpoints or correct reasons for requesting information. These difficulties related to the implementation of a "public purpose use" make this approach unworkable.

Alternatively, Congress could more indirectly, but also more efficiently, restrict the private purpose use of the FOIA by specifically listing in the Act categories of information that are subject to disclosure, instead of, or in addition to, providing for exemptions where disclosure is not warranted. Through such an approach, information created or collected by private parties and then provided to the government could categorically be excluded from disclosure. Such an approach, however, effectively permits the government to restrict disclosure of materials that serve the Act's important purpose. This "enumerated disclosure" approach could result in denying access to material that would expose agency action to the light of public scrutiny, for careful exclusion from the disclosure list would provide the necessary cover for potentially damaging materials. This approach also suffers from the recurring need to revise the list of disclosable materials, which not only imposes an administrative burden, but also dramatically limits the Act's effectiveness until the next set of revisions goes into effect. In short, if the "enumerated disclosure" approach were implemented, the FOIA would be likely to always lag behind the legitimate disclosure interests of the public.

The "central purpose" test goes far toward addressing the issues of escalating cost, invasions of privacy, circumvention of information disclosure mechanisms, disincentives to provide the government with information, and delay in responding to meaningful FOIA requests.

1. Cost

The "central purpose" approach promotes agency and judicial efficiency by providing for an early determination as to whether the requested information is subject to disclosure under the FOIA. Only if the agency, or a reviewing court, determines that the documents at issue are relevant to the conduct of the government would the applicability of the nine enumerated exemptions and issues concerning fees and fee waivers—the subject of the vast majority of FOIA appeals today—ever be addressed. By promoting greater efficiency and the speedier resolution of FOIA requests and appeals, the "central purpose" test would dramatically reduce the drain on the government's fiscal and personnel resources.

2. Privacy

The "central purpose" approach protects privacy by categorically exempting from disclosure those documents that shed no light on agency conduct. This is precisely the result that the constitutionally protected right of informational privacy requires. As the Supreme Court noted in *Reporters Committee*, beginning with *Whalen v. Roe*[230] the Court has recognized a constitutional interest "in avoiding disclosure of personal matters."[231] After surveying the extensive common law and statutory protections concerning nondisclosure of information, the Court concluded that its own decisions on informational privacy "recognized the privacy interest inherent in the nondisclosure of certain information *even where the information may have been at one time public.*"[232]

The United States Court of Appeals for the District of Columbia relied on *Whalen* to afford significant constitutional protection to information about both individuals and organizations. In *Tavoulareas v. Washington Post Co.*,[233] the court addressed the constitutional protection for privacy in the context of confidential documents produced during discovery in civil litigation. While noting the "presumption of openness"[234] in discovery and the significant First Amendment interests asserted by the Washington Post, the appellate court concluded that "[r]ecent Supreme Court decisions indicate that a litigant's interest in avoiding public disclosure of private information is grounded in the Constitution itself, in addition to federal statutes and the common law."[235]

The court of appeals was careful to note that in both *Whalen* and subsequent Supreme Court cases, the Court recognized the difference in intrusiveness between

230. 429 U.S. 589, 599 (1977).
231. 489 U.S. at 762 (quoting *Whalen*, 429 U.S. at 599).
232. *Id.* at 767 (emphasis added).
233. 724 F.2d 1010 (D.C. Cir. 1984).
234. *Id.* at 1015.
235. *Id.* at 1019.

disclosures only to government employees and disclosures to the general public.[236] The appellate court also held that even corporations possess constitutionally protected informational privacy rights: "In the context of confidential materials not used at trial a corporation's privacy interest in nondisclosure is essentially identical to that of an individual."[237]

In order to resolve the conflict between privacy rights and the interests in public disclosure, the appellate court determined that the propriety of a governmental intrusion must be evaluated by "balancing the need for the intrusion against its severity."[238] "Indeed, when the intrusion is severe, a *compelling* interest is required to justify the intrusion. 'Severe' intrusions include public dissemination of confidential information as opposed to disclosure of such information only to the government or other litigants."[239]

In order to overcome a constitutional privacy interest, the government must show that "a compelling governmental interest in disclosure outweighs the individ-

236. *Id.* at 1020.
237. *Id.* at 1022.
238. *Id.* at 1023.
239. *Id.* (emphasis added).

Other circuit courts have also sought to balance information disclosure laws and governmental practices against individuals' constitutional privacy rights. In Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978) *cert. denied*, 439 U.S. 1129 (1979), the United States Court of Appeals for the Fifth Circuit held that the constitutional right to privacy includes the right to confidentiality. *Id.* at 1127-28. The court, in determining the constitutionality of a state constitutional amendment that required financial disclosures by elected officials, recognized that personal financial information falls within the sphere of constitutionally protected privacy, and therefore balanced the state's interests in the amendment against the affected individuals' constitutional interest in nondisclosure. *Id.* at 1132. The United States Court of Appeals for the Third Circuit explicitly recognized a constitutional right to informational privacy in United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980). The court held that the interest of an employee in her medical records necessarily implicated that employee's constitutionally protected right of confidentiality. *Id.* at 577. *See also* Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990) ("Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy."); Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983) (holding that Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977), reaffirmed the constitutional interest in nondisclosure of personal information), *cert. denied*, 464 U.S. 1017 (1983); Duplantier v. United States, 606 F.2d 654, 669 (5th Cir. 1979) (characterizing the issue presented as "whether personal financial disclosure required by the [Ethics in Government] Act impermissibly intrudes into the sphere of family life constitutionally protected by the right of privacy"), *cert. denied*, 449 U.S. 1076 (1981); Schacter v. Whalen, 581 F.2d 35, 37 (2d Cir. 1978) (holding that a constitutional right to informational privacy exists but is not infringed by the subpoena of medical records as long as privacy protections are afforded); Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990) (holding that a prison inmate had a constitutional right to privacy in his medical records); Plowman v. United States Dep't of the Army, 698 F. Supp. 627, 633 (E.D. Va. 1988) (noting that the scope of the constitutionally protected interest in informational privacy is unsettled); Carter v. Broadlawns Medical Center, 667 F. Supp. 1269 (S.D. Iowa 1987) (holding that a hospital's policy of allowing chaplains open access to medical records violated the constitutional right to privacy), *cert. denied*, 489 U.S. 1096 (1989); Slevin v. City of New York, 551 F. Supp. 917, 930-31 (S.D.N.Y. 1982) (holding that a constitutional right to informational privacy exists and applying a balancing test); Hawaii Psychiatric Society v. Ariyoshi, 481 F. Supp. 1028, 1043-45 (D. Haw. 1979) (issuing a preliminary injunction restraining the enforcement of a statute that authorizes issuance of administrative warrants for medical records because of the high probability that the statute violated the right to informational privacy). *See generally* Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133 (1991).

ual's privacy interest."[240] Because of the constitutional and common law protections afforded to personal privacy,

> [t]he government may seek and use information covered by the right to privacy if it can show that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest. . . . The more sensitive the information, the stronger the state's interest must be.[241]

The "central purpose" test embodies the balance required under the Constitution before the government can disclose information affecting privacy interests. First, the test forces agencies to explicitly address constitutionally protected privacy interests. Second, the test only permits disclosure of information concerning government activities. All other information is not within the purpose of the FOIA and its disclosure therefore fails to serve the legitimate state interest embodied in the Act. Third, the "central purpose" test categorically exempts from disclosure those documents that shed no light on agency conduct—documents that by definition exclusively concern interests other than those of the government and are therefore more likely to involve privacy interests.

3. Discovery and Other Information Disclosure Mechanisms

The "central purpose" approach would significantly reduce use of the FOIA to circumvent other mechanisms for both encouraging and controlling disclosure in specific contexts. For example, civil litigants would not be permitted to go outside of the discovery process to obtain information about a private opposing party to which the judge presiding over the case has specifically denied the requester access. Similarly, requesters would no longer be permitted to use the FOIA to vitiate the balance made by the SEC between, on the one hand, the type, volume, and timeliness of information that publicly traded companies must provide to permit oversight by the government and markets and to enable the public to make informed investment decisions, and, on the other hand, the need to avoid stymieing industry, inhibiting innovation, exposing trade secrets, and invading privacy interests with excessive disclosure regulations.

4. Compliance

The "central purpose" test would also reduce the disincentive for compliance with governmental information collection regulations. Presently, individuals and companies—particularly publicly traded companies, government contractors, and other persons subject to governmental disclosure rules—know that the information they provide to the government is likely to be disclosed to third-party FOIA requesters. For example, even information provided to the government that is subject to guarantees of confidentiality[242] is routinely disclosed under the FOIA

240. Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990).

241. Doe v. Attorney General, 941 F.2d 780, 796 (9th Cir. 1991).

242. *See, e.g.*, 17 C.F.R. § 203.2 (1993) ("Information and documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public . . . ."); *Id.* § 203.5 ("Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public.").

to third-party requesters. As a result, private individuals and companies face a significant disincentive not to disclose private or confidential information to the government, particularly where there is no statutory duty to do so. Alternatively, private persons may be forced to couch their disclosures in protective, nonrevealing language, engage in time-consuming and costly procedures to label all confidential or private information as such, seek confidential treatment by the government, and litigate against the government in so-called "reverse FOIA" suits to prevent disclosure of proprietary information. Much, if not all, of this disincentive is avoided if the government discloses under the FOIA only such information as illuminates the activities of the government, not of private parties.

5. Delay

The "central purpose" test would reduce the delay experienced by requesters seeking records consistent with the Act's purpose and contribute to eliminating the significant backlog of FOIA requests at all federal agencies. Moreover, all of these issues—escalating costs, invasions of privacy, circumvention of information disclosure mechanisms, disincentives to comply with information collection schemes, and delay in responding to meaningful FOIA requests—are addressed without excluding from disclosure any records that would serve the public's interest in learning "what the Government is up to."

Disclosure of records that fail to satisfy the central purpose of the Act of opening federal agencies to public scrutiny is potentially more harmful than withholding requested information. "Freedom of information" is not simply freedom of acquisition but also freedom from unwarranted disclosure of private information. Records that fail to meet the central purpose of the Act should be protected from agency disclosure.

Conclusion

The United States Supreme Court in *Reporters Committee, Rose, Washington Post, Ray* and other cases has repeatedly asserted that the "basic purpose of [the FOIA is] to open agency action to the light of public scrutiny" and that determinations as to whether to release information "must turn on the nature of the requested document and its relation to 'the basic purpose of the Freedom of Information Act.' "[243] "Information that does not directly reveal government operations or activities, the Court stressed, 'falls outside the ambit of the public interest that the FOIA was enacted to serve.' "[244]

In a series of cases interpreting Exemptions 6 and 7(C), the Supreme Court and lower federal courts have applied the "central purpose" test to exempt a growing scope of information from disclosure under the FOIA. In the Exemption 6 context, "unless the public would learn something directly about the workings of the

243. *Reporters Comm.*, 489 U.S. at 774 (quoting *Rose*, 425 U.S. at 372) (1976).

244. Department of Justice, *Privacy Protection Under the Supreme Court's* Reporters Committee *Decision*, FOIA UPDATE, *supra* note 210, at 3 (quoting *Reporters Comm.*, 489 U.S. at 775).

Government'' by the release of the requested information, its ''disclosure is not affected with the public interest'' and therefore is inappropriate.[245] Similarly, in the context of Exemption 7(C), ''if disclosure of the requested information does not serve the purpose of informing the citizenry about the activities of their government, disclosure will not be warranted.''[246]

Names and addresses of federal employees, surveillance tapes from drug and fraud investigations, *redacted* disciplinary records from the Air Force Academy, a space shuttle cockpit flight recording, investigatory records bearing on the planned assassination of a President and the failure of federal authorities to prevent criminal activity by government employees, even information about who is a United States citizen have all been withheld because they involve private information that does not serve the purpose of the FOIA. These inconsistent results—reached only after years of litigation—are the product of a disclosure law that is all too frequently employed without regard for the purpose for which it was created and for its widespread and often onerous impact.

''Disclosure at all costs'' does not mean disclosure without costs. Whether measured in terms of expense, delay, litigation, circumvention of other disclosure laws, or invasion of privacy, the costs associated with responding to the tens of thousands of FOIA requests that seek no information about the conduct of government pose an enormous burden on private individuals and organizations, administrative agencies, and the courts. Those costs threaten to increase exponentially when the FOIA is applied to the increasing number of computerized agency records.

The importance of public access to government information in a democracy cannot be overstressed; it is at the heart of the First Amendment itself.[247] A workable FOIA is essential to guaranteeing timely, affordable public access to that information. The extraordinary importance of such access argues not only for not extending access to information that bears no relation to ''what the Government

245. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879, *cert. denied*, 494 U.S. 1078 (1990).

246. Halloran v. Veteran's Admin., 874 F.2d 315, 323 (5th Cir. 1989).

247. The First Amendment protects free speech, at least in part, because in a democratic society the public must have all information necessary to ''govern.'' Alexander Meiklejohn has written that a democratic society that depends on its members to be both citizens and rulers must be open to discussion about and criticism of government, even allowing for ''arguments against our theory of government.'' ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 65-66 (1948). The vital importance of self-governance speech has run through many U.S. Supreme Court opinions. The Court has repeatedly asserted that:

> expression on public issues ''has always rested on the highest rung of the hierarchy of First Amendment values.'' ''[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.'' There is a ''profound national commitment'' to the principle that ''debate on public issues should be uninhibited, robust, and wide-open.''

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (citations omitted); *see also* Carey v. Brown, 447 U.S. 455, 467 (1980); Mills v. Alabama, 384 U.S. 214, 218-19 (1966); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); Roth v. United States, 354 U.S. 476, 484 (1957); Stromberg v. California, 283 U.S. 359, 369 (1931). *See generally* Fred H. Cate, *Defining California Civil Code Section 47(3): The Resurgence of Self-Governance*, 39 STAN. L. REV. 1201, 1218-25 (1987).

is up to,'' but also for affirmatively assuring that the FOIA is not squandered on irrelevant requests and is available only for vital, proper use.

The Supreme Court's dramatic interpretation of the Act's two personal privacy exemptions—to find as a categorical matter ''that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted' ''[248]—is an important step towards both recognizing the vital importance of the proper use of the FOIA and limiting its misuse. But its logic and force applies to all disclosure requests under the Act. The test for whether a request seeks information that ''sheds light on an agency's performance of its statutory duties''[249] should be the touchstone for disclosure under the FOIA. Such a policy protects not only the constitutionally protected right to privacy, but also important societal interests in the effectiveness and efficiency of the judicial system, law enforcement and administrative regulations, the timely disclosure of appropriate information under the FOIA, and the efficient and cost-effective operation of the government. Only when agencies and courts evaluate FOIA requests in light of the central purpose of the Act will the FOIA satisfy its noble mandate of opening federal agencies to public scrutiny.

248. 489 U.S. at 780.
249. *Id.* at 773.