No.

IN THE

Supreme Court of the United States

DETROIT FREE PRESS, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act (FOIA) exempts from the FOIA's disclosure obligation law enforcement records that, if publicly released, "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In *Detroit Free Press, Inc. v. United States Department of Justice*, the Sixth Circuit held that the booking photographs of indicted federal defendants in ongoing criminal proceedings who have already appeared in court and whose names have already been made public are, as a categorical matter, not exempt from disclosure under 7(C). 73 F.3d 93, 98 (6th Cir. 1996). It held that there is no cognizable privacy interest in such photos and that the public interest would in any event outweigh any privacy interest. *Id.* at 97-98. In the decision below, a fractured nine-to-seven en banc court overruled its prior precedent, concluding that the possible personal "embarrass[ment] and humiliat[ion]" that could be caused by disclosure of such booking photos outweighs the public's interest in disclosure. Pet. App. 6a.

The question presented is:

Does the Freedom of Information Act require disclosure of booking photos of publicly named, federal indictees who have already appeared in open court?

CORPORATE DISCLOSURE STATEMENT

Pursuant to S. Ct. Rule 29.6, Detroit Free Press states that it is a wholly owned subsidiary of Gannett Co., Inc. Gannett Co. is a publicly traded company. BlackRock, Inc., has a 10 percent or greater ownership interest in Gannett Co. No other publicly traded entity has a 10 percent or greater ownership interest in Detroit Free Press or Gannett Co.

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INTRODUCTION

The purpose of the Freedom of Information Act (FOIA) is to "ensure an informed citizenry, vital to the functioning of a democratic society." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quotation marks omitted). Pursuant to its "general philosophy of full agency disclosure," *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (quotation marks omitted), the FOIA broadly requires that "each agency," upon receipt of a proper request for records, "shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). This obligation to make government records public is subject to several "limited exemptions," *Rose*, 425 U.S. at 361, including exemptions for records that, if disclosed, might unduly invade personal privacy. 5 U.S.C. § 552(b)(6), (7)(C).

In *United States Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989), *United States Department of State v. Ray*, 502 U.S. 164 (1991), and *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), this Court established a framework for assessing and balancing the individual interest in privacy and the public interest in disclosure under Exemptions 6 and 7(C). This Court recognized that Congress did not simply give over to judges the authority to impose their own notions of privacy. Rather, when Congress enacted the privacy exemptions, it legislated against a backdrop of legal and cultural traditions and incorporated those norms into the FOIA. Likewise, the question whether disclosure is in the "public interest" is properly examined based on the FOIA's foundational purpose of shining light on government activity

so that the people can know what their government is up to.

The Sixth Circuit was faithful to these principles twenty years ago in *Detroit Free Press, Inc. v. United States Department of Justice*, 73 F.3d 93 (6th Cir. 1996) ("*Free Press I*"). The court held there that booking photos of federal defendants who have been charged with a felony, indicted by a grand jury, and appeared in open court are not exempted from disclosure under 7(C). But in the last five years, two other circuit courts, and now the Sixth Circuit itself, have diverged from *Free Press I* and the principles it embodied. By cherry-picking isolated statements from this Court's opinions and ignoring the thrust of its holdings, the Tenth and Eleventh Circuits disagreed with *Free Press I* and held that booking photos were properly withheld under 7(C). And now the Sixth Circuit, in a deeply divided nine-to-seven en banc opinion, has overruled its prior precedent.

These circuit decisions approach the privacy interests protected by the FOIA in a manner unmoored from tradition, common law, and legal background, instead embracing their own notions of whether the records at issue would be "embarrassing." On the other side of the balance, the rulings misread this Court's decisions as holding that there is a public interest in disclosure only where the requester has first made a compelling showing of government wrongdoing. In doing so, those court of appeals decisions have significantly impaired the ability of the press and public to obtain records under the FOIA in the critical context of the government's arrest, detention, and prosecution of its citizens.

The upshot of these rulings is that federal government agencies—in the booking photo context, the U.S. Marshals Service—are left to determine, in their sole discretion, whether disclosure of any particular record is warranted. Instead of obtaining a broad view of the people the federal government is choosing to arrest and prosecute, the public will see only the sliver of activity that the government decides to share. Such limited access to federal law enforcement activity prevents the public from monitoring trends in prosecutions and the treatment of indictees more generally. These are powerful public interests to which the courts of appeals have given short shrift.

Review is needed for the Court to retake the reins on the FOIA's privacy exemptions and restore the proper balance established by this Court's precedents.

OPINIONS AND ORDERS BELOW

The panel opinion affirming the district court's grant of summary judgment for Petitioner is reported at 796 F.3d 649 (6th Cir. 2015), and reproduced at Pet. App. 42a-49a. The en banc decision overturning the panel's decision is reported at 829 F.3d 478 (6th Cir. 2016), and reproduced at Pet. App. 1a-34a. The district court's decision is reported at 16 F. Supp. 3d 798 (E.D. Mich. 2014), and reproduced at Pet. App. 50a-83a.

JURISDICTION

The panel rendered its decision on August 12, 2015, and the court of appeals rendered its en banc decision on July 14, 2016. Pet. App. 1a-34a, 42a-49a.

On September 19, 2016, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including November 26, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 5 U.S.C. § 552, which is reproduced in its entirety at Pet. App. 84a-114a.

Section 552(a)(3)(A) contains the government's disclosure obligation:

> (a) Each agency shall make available to the public information as follows: …
>
> (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3)(A) (Pet. App. 87a-88a).

This case involves FOIA Exemption 7(C):

> (b) This section does not apply to matters that are …
>
> (7) records or information compiled for law enforcement purposes, but only to the extent

> that the production of such law enforcement records or information … (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy ….

5 U.S.C. § 552(b)(7)(C) (Pet. App. 102a-103a).

STATEMENT OF THE CASE

The Sixth Circuit Holds That Booking Photos Of Criminal Defendants In Ongoing Proceedings Must Be Disclosed

In *Free Press I*, the Sixth Circuit held that FOIA Exemption 7(C) does not permit the government to withhold booking photos of a defendant in "ongoing criminal proceedings" where the defendant's name has "already been made public" and the defendant has "already made [a] court appearance[]." 73 F.3d at 95.

The Sixth Circuit held that there was no invasion of personal privacy in such circumstances because the defendant "had already been identified by name by the federal government and [his or her] visage[] had already been revealed during prior judicial appearances." *Id.* at 97. The Sixth Circuit rejected the proposition that "the release of mug shots of individuals under indictment in federal court … disclose[s] personal information unrelated to the daily work of the Marshals Service," reasoning instead that "such disclosure provides documentary evidence of the designated responsibilities of an agency of the federal government." *Id.* at 96. Indeed, because the person had already been publicly named in the charge or in-

dictment and appeared in open court, the Sixth Circuit concluded that "[n]o *new* information … would, therefore, be publicized by release of the mug shots." *Id.* at 97.

Because divulging a mugshot in such circumstances would implicate no cognizable privacy interests, the court did not need to reach the question whether the public interest in disclosure outweighed any possible encroachment upon personal privacy. But the Sixth Circuit considered that question and explained that the "significant public interest" in disclosure would nevertheless "justify the release of that information to the public." *Id.* at 97-98. Releasing booking photos in the "limited circumstances" presented, the court observed, fosters the FOIA's purpose of "subject[ing] the government to public oversight." *Id.* at 98. Releasing booking photos "can startlingly reveal the circumstances surrounding an arrest and initial incarceration of an individual in a way that written information cannot." *Id.* Moreover, in cases of mistaken identity, disclosure of booking photos "can more clearly reveal the government's glaring error in detaining the wrong person for an offense than can any reprint of only the [arrestee's] name." *Id.* And alluding to events that were timely then but continue to resonate to this day, the court elaborated: "Had the now-famous videotape of the Rodney King beating in Los Angeles never been made, a mug shot of Mr. King released to the media would have alerted the world that the arrestee had been subjected to much more than a routine traffic stop and that the actions and practices of the arresting officer should be scrutinized." *Id.*

The Marshals Service Follows* Free Press I*, But Only In The Sixth Circuit

After *Free Press I*, the Marshals Service adopted a "bifurcated policy" for responding to FOIA requests for booking photographs. Pet. App. 45a. Under that policy, Marshals Service offices within the Sixth Circuit and those receiving requests from residents of the four states in the Sixth Circuit "honor[ed]" FOIA requests for booking photos "in their possession." *Id.* In contrast, offices outside the Sixth Circuit that received FOIA requests from residents of the other 46 states continued to withhold booking photos.

"For fifteen years, *Free Press I* was the only circuit-level decision to address whether Exemption 7(C) applied to booking photographs." *Id.* In 2011 and 2012, however, the Tenth and Eleventh Circuits considered the issue and concluded that the federal government could withhold booking photos under Exemption 7(C). *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1141 (2012).

In the wake of those decisions, the Marshals Service "abandoned its bifurcated policy in 2012." Pet. App. 46a. Instead, seeking to generate a test case to challenge *Free Press I,* the Marshals Service refused to disclose booking photos requested under the FOIA even where Sixth Circuit law governed and mandated their release. *Cf.* SG Brief in Opposition at 15, *Karantsalis v. U.S. Dep't of Justice*, No. 11-342 (U.S. Dec. 19, 2011), 2011 WL 6417735.

The Marshals Service Withholds The Booking Photos Of Four Police Officers Indicted For Corruption, Prompting This Litigation

In 2013, Petitioner Detroit Free Press (DFP) requested under the FOIA the booking photos of four Michigan police officers who had been indicted on federal public corruption and drug conspiracy charges. Pet. App. 5a. Each officer's name had already been made public and each had already appeared in open court. C.A. Rec. at 99-100 (Am. Compl.). The Marshals Service nonetheless denied the FOIA request. Pet. App. 46a. After exhausting its administrative appeals, DFP commenced this litigation to enforce compliance with binding Sixth Circuit precedent. *Id.*

Relying on the Sixth Circuit's decision in *Free Press I*, the district court granted summary judgment for DFP, and the Sixth Circuit affirmed. Pet. App. 42a-49a; Pet. App. 50a-83a. The panel explained that *Free Press I* "held that [FOIA] requires governmental agencies to honor requests for the booking photographs of criminal defendants who have appeared in court during ongoing proceedings." Pet. App. 44a. The FOIA thus mandated disclosure of the officers' booking photos.

The Marshals Service's Gambit Pays Off, The Sixth Circuit Grants Rehearing, And A Deeply Divided En Banc Court Overturns Its Settled Prior Precedent

Though the panel affirmed based on controlling Sixth Circuit precedent, it "urge[d] the full court to reconsider … *Free Press I*." *Id.* The court granted the

government's petition for rehearing en banc, and a highly fractured nine-to-seven court reversed. Pet. App. 1a-34a.

The majority reasoned that Exemption 7(C) is intended to avoid disclosure of "[e]mbarrassing and humiliating facts." Pet. App. 6a. "Booking photos," the majority stated, "fit squarely within this realm of embarrassing and humiliating information." *Id.* Analogizing to this Court's decision in *Favish*, which held that family members have a "privacy interest in death-scene images of their loved one," the majority held that courts must consider the privacy "'consequences that would follow' from unlimited disclosure." Pet. App. 7a (quoting and discussing *Favish*, 541 U.S. at 170). The majority believed that "booking photos convey *guilt*" and "cast[] a long, damaging shadow over the depicted individual." Pet. App. 6a-8a.

The majority justified its departure from *Free Press I* in large part due to developments in modern technology. It observed that "an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection." Pet. App. 8a. Since most people would prefer their booking photo not appear on the internet, the court reasoned, booking photos implicate privacy interests under the FOIA. Pet. App. 8a-9a.

In finding "a non-trivial privacy interest" in the "embarrass[ment]" associated with the release of booking photos, Pet. App. 3a, 6a, the en banc majority rejected DFP's argument that "[1] the Constitution, [2] the common law and traditional understandings of privacy, [3] the absence of a 'web of federal statutory

and regulatory provisions' limiting disclosure, and [4] the fact that most states allow mug-shot disclosure" all prove there is no cognizable privacy interest in such photos. Pet. App. 9a-12a. The majority acknowledged that there is no constitutional privacy right in booking photos. Pet. App. 9a. The majority likewise recognized that "booking photos form part of the public record and [that] the common law recognizes no invasion-of-privacy tort remedy for publicizing facts in the public record." Pet. App. 10a. And the majority noted as well that many "states … mandate the release of booking photos." Pet. App. 11a. The majority nonetheless concluded that "[i]ndividuals enjoy a non-trivial privacy interest in their booking photos," because these kinds of photographs are potentially embarrassing. Pet. App. 12a.

Turning to the public-interest prong of Exemption 7(C), the majority rejected a categorical approach under which the public interest in access to booking photos always outweighs the asserted privacy interest a person may have in his booking photo after being publicly charged with a federal felony and publicly appearing in court. Pet. App. 12a-13a. The majority dismissed as "phantoms" the interests in ferreting out the "mistaken identity" of arrestees, documenting "impermissible profiling," and revealing "arrestee abuse." Pet. App. 13a. The majority ultimately left it up to federal agencies to decide on a "case-by-case basis" whether the public interest in disclosure warrants the release of a particular photo. *Id.*

Seven judges dissented. The dissent explained that, for purposes of assessing privacy interests under the FOIA, it is "well settled that not every personal

privacy interest counts, and the mere possibility that information might embarrass is not sufficient." Pet. App. 18a (collecting cases). It cited this Court's admonitions to "look[] not to some pliable, amorphous notion of privacy, but rather to history, the common law, and state and federal practice, which together comprise the background against which Congress legislated." Pet. App. 19a (citing *Favish* and *Reporters Comm.*). Detailing the historical treatment of booking photos, Pet. App. 19a-21a, the common law, Pet. App. 22a-24a, as well as noting that "the *vast majority* of states do not recognize a statutory privacy interest … [in] booking photographs," Pet. App. 24a (emphasis added), the dissent would have held that there was "no cognizable privacy interest" in booking photos, Pet. App. 26a.

The dissent also would have found, as a categorical matter, that "whatever invasion of privacy disclosure occasions is not 'unwarranted' in light of the weighty public interests that disclosure serves." Pet. App. 29a. "Booking photographs play an important role in educating the public about its government," and specifically "whom the government is prosecuting." Pet. App. 29a-30a. Releasing booking photos "can help to clear the names of innocent individuals" through public recognition of "[c]ases of mistaken identity." Pet. App. 30a. Booking photos can "reveal what populations the government prosecutes—black or white, young or old, female or male—and for what sorts of alleged crimes" as well as "raise questions about prosecutorial decisions, enabling the public to detect and hold to account prosecutors who disproportionately charge or overlook defendants of a particular background or demographic." Pet. App. 30a-31a.

Finally, harkening back to *Free Press I*, the dissent observed that booking photos can educate the public about possible abuse of arrestees. *Id.*

The dissent specifically rejected the majority's premise that the decision whether to release a person's booking photo should be left to the very agencies whose activities are at issue. Pet. App. 32a. Not only does such an approach "undermine[] FOIA's goal of disclosure by effectively making [the agency] the arbiter of whether a booking photograph will be made public," it flips the FOIA on its head by putting the burden on the requester to justify disclosure when "the burden of justifying *non*disclosure should always fall on the government." *Id.*

Finally, the dissent pointed out the numerous practical difficulties with the majority's approach. A requester who has to "wrangle with" the agency and then pursue "onerous" administrative and district court litigation will not "timely" receive the information and may well decide it is not worth the effort, *id.*—a result that thwarts Congress's objective "of 'opening agency action to the light of public scrutiny,'" Pet. App. 17a (quoting *Rose*, 425 U.S. at 361).

Because the majority's approach is fundamentally at odds with the FOIA and its underlying purposes, DFP files this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Possibility Of Embarrassment Alone Is Not A Cognizable Privacy Interest.

Statutory interpretation must "give effect to the intent of Congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). In discerning Congress's intent, courts may not simply impose their own policy preferences. Rather, courts anchor their inquiry by looking to the statute's text, and its "structure, history, and purpose." *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) (quoting *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013)).

This Court has previously applied these established rules of construction to the FOIA and its exemptions for records that are shown to unduly invade personal privacy. The Court's cases hold that, to determine whether Congress intended to recognize a privacy interest in a given record, courts must start by examining the legal and cultural traditions at the time the FOIA was enacted. *See, e.g.*, *Favish*, 541 U.S. at 169; *Reporters Comm.*, 489 U.S. at 763-67. If a particular type of record was traditionally treated as open to public view, Congress likely assumed individuals would reasonably expect that record to be available to the public. *See Favish*, 541 U.S. at 169. And the opposite is equally true. *Id.*

The historical treatment of booking photos demonstrates that there is no tradition of treating them as private or closed from public view. Quite the contrary. Booking photos are part of a criminal pro-

cess that has for centuries been open to public scrutiny. The vast majority of states provide for the disclosure of booking photos by either posting them on public websites or permitting public access through open-disclosure laws. There is simply no basis for an individual to expect that a photo capturing his or her arrest and booking will remain private, especially after the person has been publicly indicted and appeared in open court. The Sixth Circuit correctly held as much 20 years ago in *Free Press I*.

Three courts of appeals, however—including the Sixth Circuit sitting en banc here—have disagreed. Rather than look to legal and cultural privacy norms to determine whether *Congress* recognized a privacy interest in booking photos, these courts substituted their own policy preferences for those of Congress and held that booking photos should be exempted under 7(C) because they might be "embarrassing." Because that amorphous and wholly subjective test would, if followed, unmoor the FOIA from its history and purposes, this Court's intervention is needed.

A. Exemption 7(C) must be construed narrowly and consistent with legal and cultural privacy norms.

The FOIA reflects "a structural necessity in a real democracy": the right of "citizens to know 'what their Government is up to.'" *Favish*, 541 U.S. at 171-72 (quoting *Reporters Comm.*, 489 U.S. at 773). It was enacted to revise and replace the prior public disclosure provision in the Administrative Procedure Act, which was "generally recognized as falling far short of its disclosure goals." *Rose*, 425 U.S. at 360 (quoting

EPA v. Mink, 410 U.S. 73, 79 (1973)). The FOIA was thus "broadly conceived … to permit access to official information long shielded unnecessarily from public view." *Id.* at 361 (quoting *Mink*, 410 U.S. at 80). Although the FOIA exempts specific categories of records from mandatory disclosure, its history and purposes require that "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective." *Id.* "These exemptions are explicitly made exclusive" by the FOIA itself and "must be narrowly constructed" by the courts. *Id.* (citations and quotation marks omitted).

As originally enacted, the FOIA contained a broad exemption for "investigatory files compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7) (1970); Pub. L. No. 89-487, 80 Stat. 250, 251 (1966). Congress had intended that the exemption would apply *only* when disclosure would "significantly harm … governmental interests." H. Comm. on Gov't Operations & S. Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 335 (Pub. L. No. 93-502) (J. Comm. Print 1975) [hereinafter "1974 FOIA Amendments"] (excerpting Senate debate and votes on 1974 FOIA amendments). In the years following the FOIA's enactment, however, lower courts began to interpret the law enforcement records exception broadly, and several held the exception to apply to *all* records compiled for law enforcement purposes. *Id.* at 335-36.

In 1974, Congress amended the FOIA to "clarify Congressional intent disapproving certain court interpretations which have tended to expand the scope of" the exemption for law enforcement records. *Id.* at

229 (reprinting H.R. Rep. No. 93-1380 (1974) (Conf. Rep.)). The amendment narrowed the law enforcement records exemption to a few specific circumstances, including the circumstance codified in Exemption 7(C). *See* An Act to Amend the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974). In its current form, Exemption (7)(C) permits the withholding of "records or information compiled for law enforcement purposes," to the extent that they:

> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy ….

5 U.S.C. § 552(b)(7).[1]

Like all FOIA exemptions, Exemption 7(C) "must be 'narrowly construed.'" *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982)). In the context of 7(C) specifically, this Court has given clear guidelines for determining whether disclosure of a record would implicate privacy interests cognizable under the FOIA. Courts are not free to adopt a free-floating notion of privacy based on judges' personal intuitions or sensibilities. Rather, courts must look to the privacy interests reflected in our laws and traditions and "assume Congress legislated against this background of law,

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[1] That Exemption was clarified in 1986 by changing the prior language, "would" constitute an unwarranted invasion of personal privacy, to "could reasonably be expected to." *See* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, tit. I, § 1802(a), 100 Stat. 3207, 3207-48.

scholarship, and history when it enacted FOIA and … Exemption 7(C)." *Favish*, 541 U.S. at 169.

Accordingly, in *Reporters Committee*, in holding that detailed criminal history accounts of individuals (commonly referred to as "rap sheets") are exempt from disclosure under 7(C), this Court looked to the "common law and the literal understandings of privacy," the "web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information," and "the fact that most States deny the general public access to their criminal-history summaries." 489 U.S. at 763-67. Similarly, in *Favish*, this Court examined "common law" protections and "well-established cultural tradition[s]" in holding that family members have a cognizable privacy interest in death-scene images of their loved ones. 541 U.S. at 167-69. While FOIA protections may in certain instances go "beyond the common law and the Constitution," *id.* at 170, they are at all times rooted in the privacy interests that *Congress* sought to protect, as informed by the legal and cultural traditions in place at the time Congress enacted the FOIA and its relevant exemptions.

B. There is no cognizable privacy interest in the booking photo of a federal indictee who has appeared in open court.

1. Public access to criminal proceedings is a longstanding American legal tradition. This "tradition of accessibility" predates the Republic itself and was fundamental at common law. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 605 (1982); *see Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984) ("The

open trial ... play[ed] a[n] important ... role in the administration of justice ... for centuries before our separation from England."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567 (1980) ("[T]he openness of trials was explicitly recognized as part of the fundamental law of the Colony."). The tradition is not limited to criminal trials: For purposes of the FOIA, "[a]rrests, indictments, convictions, and sentences are [all] public events." *Reporters Comm.*, 489 U.S. at 753.

Early police practices with respect to booking photos built on this tradition of open criminal proceedings. Beginning in the mid-19th century, police began to collect and publicly exhibit booking photos in order to aid investigations. *See* Jonathan Finn, *Capturing the Criminal Image: From Mug Shot to Surveillance Society* 10 (2009). When disclosures were challenged, courts consistently held that there is "no right of privacy" in one's booking photograph. Pet. App. 21a (Boggs, J., dissenting) (quoting *Publication of Bertillon Measurements and Photographs of Prisoners, Innocent or Acquitted of the Crimes Charged Against Them*, 57 Cent. L.J. 261, 261 (1903)). Thus, indictees have never had an established expectation that their booking photos will remain private or that they will not be in the public eye as individuals publicly accused of wrongdoing by the government and the grand jury. *See Free Press I*, 73 F.3d at 97.

Over time, legal rules specifically addressing booking photos confirmed the well-established tradition of disclosure. In 1976, this Court held that the Constitution does not create a privacy interest or expectation in one's booking photo. *Paul v. Davis*, 424

U.S. 693 (1976). "None" of the Court's prior "substantive privacy decisions" recognize any constitutionally protected privacy interest preventing the state from "publiciz[ing] a record of an official act such as an arrest." *Id.* at 712-13. Nor is there any constitutionally protected interest in this context in avoiding "'stigma' to one's reputation." *Id.* at 701. The Restatement (Second) of Torts (1977) likewise addressed booking photos in the context of privacy torts: "Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed." § 652D, cmt. f. Accordingly, when a "[n]ewspaper publishes daily reports of [a murder trial], together with pictures and descriptions of [the defendant] and accounts of his past history and daily life prior to the trial," it is "not an invasion of [the defendant]'s privacy." *Id.*, illus. 13.

2. Given this history, it is unsurprising that current state laws and practices weigh decisively against treating booking photos as reflecting any cognizable privacy interests. *Reporters Committee* relied heavily on the fact that "47 States place substantial restrictions on the availability of criminal-history summaries." 489 U.S. at 753. Here, state practice points exactly the opposite way: "The vast majority of states do not recognize a statutory privacy interest that would require state and local authorities to withhold booking photographs in the ordinary case." Pet. App. 17a.

In fact, states and localities often release booking photos of all those arrested, not just indictees.[2] In limiting its holding to the booking photos of indictees—i.e., those whom a grand jury has found probable cause to charge with a federal crime—*Free Press I* already provides for a dramatically more restrictive disclosure regime than the prevailing norm under state law. There is no reason to think that Congress, in enacting FOIA's privacy exemption for law enforcement records, intended to depart even further from that practice and from prevailing privacy norms in the States.

Thus, in holding that "no privacy rights are implicated" by disclosure of the narrow category of booking photos of federal indictees, *Free Press I* got it exactly right. A long history of public access to booking photos as well as modern state practice compel that conclusion.

C. The Sixth Circuit's new rule is at odds with the FOIA's purposes and misconstrues this Court's precedents.

The Sixth Circuit acknowledged the legal and cultural backdrop weighing in favor of disclosure. It recognized that "booking photos form part of the public record"; that there is no constitutional right to privacy in a booking photograph; and that "the common law

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[2] *See, e.g.*, Corrections, LouisvilleKY.gov, louisvilleky.gov/government/corrections (last visited Nov. 18, 2016) (select "Search Our Current Inmates," then "Booked Today"); Arrest Search, Broward County Sheriff's Office, http://www.sheriff.org/apps/arrest/index.cfm (last visited Nov. 18, 2016).

recognizes no invasion-of-privacy tort remedy for publicizing facts in the public record." Pet. App. 10a (maj. op.). And it cited only five states that exempt booking photos from public-disclosure laws, Pet. App. 11a, effectively conceding that the "vast majority of states do not recognize a statutory privacy interest" in booking photos. Pet. App. 24a (Boggs, J., dissenting).

Nevertheless, the en banc court overturned longstanding Sixth Circuit precedent and departed from the traditions underpinning it. Its rationale relies entirely on the theory that disclosing booking photos might be "embarrassing and humiliating" to the person who has been charged with a federal felony, indicted by a grand jury, and appeared in court to answer for those charges. Pet. App. 6a. The judges did what this Court has said time and again that judges may not do: "substitute [their] personal notions of good public policy for those of Congress." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008). Congress has never authorized the government to evade its disclosure obligations purely because records might be personally embarrassing.

1. The legislative history of the 1974 amendment narrowing the exemption for law enforcement records makes clear Congress did not intend the exemption to apply to all records that might be embarrassing. One Senator who thought there *should* be such a broad-sweeping exemption warned colleagues in a floor debate that the amendments would result in "release of … material into the public domain … likely to cause embarrassment to individuals mentioned in FBI files." 1974 FOIA Amendments at 340 (excerpting

Senate debate and votes on 1974 FOIA amendments). But Senator Hruska's colleagues did not share his view. Senator Weicker, speaking next, declared that whatever the downsides of bringing "the job of the law enforcement agencies … out into the open," the "far greater danger lies behind closed doors and in locked files." *Id.* at 346; *see also id.* at 462-63 (excerpting Senate debate and vote overriding President Ford's veto) (explaining that the very purpose of the 1974 amendments was to address the "insidious effects of government secrecy run rampant" and to "open the public's business to public scrutiny"). The Senate agreed to the amendment over Sen. Hruska's objection, *id.* at 352, 366, and the revised privacy exemption was enacted into law, Pub L. No. 93-502, 88 Stat. 1561 (1974).

2. The Sixth Circuit en banc majority, echoing the Tenth and Eleventh Circuits in *World Publishing Co.* and *Karantsalis*, mistakenly asserted that its embarrassment test—unmoored from history, tradition, and common law—was supported by this Court's decisions in *Reporters Committee* and *Favish*. App. 5a-7a (citing *Reporters Comm.* and *Favish*); *World Publ'g. Co.*, 672 F.3d at 827 (citing *Reporters Comm.*); *Karantsalis*, 635 F.3d at 503 (citing *Reporters Comm.*). But neither of this Court's decisions comes close to suggesting that subjective feelings of embarrassment alone may give rise to a cognizable privacy interest under the FOIA.

Reporters Committee held that detailed rap sheets were exempt under 7(C) because the common law, as well as current state and federal statutes and regulations, created the expectation that they would not be

disseminated to the public. The Court emphasized that the case involved *compiled* information about criminal histories—information that even public officials themselves could not freely access without aggregating technologies, and for which there was no tradition of public disclosure. *See* 489 U.S. at 764; *id.* at 760, 766-67, 769. The Court found a meaningful "distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole." *Id.* at 764. *Reporters Committee* thus supports *Free Press I*'s conclusion that discrete "bits of information" about one stage of a criminal proceeding, like mugshots, are *not* exempt.

Like *Reporters Committee*, *Favish* based its holding on common law and cultural traditions—there, the tradition of protecting a family's privacy in the death-scene images of a loved one. 541 U.S. at 169. The Court also explained that there was an *additional* reason to recognize a privacy interest in death-scene photographs: "[C]hild molesters, rapists, murderers, and other violent criminals often make FOIA requests for autopsies, photographs, and records of their deceased victims." *Id.* at 170. The Court concluded that Congress must have "intended a definition of 'personal privacy'" broad enough to "allow the Government to deny these gruesome requests in appropriate cases." *Id.*

The en banc court suggested that *Reporters Committee* and *Favish* permit the government to withhold records if disclosure would mean potentially embarrassing information could be found years later by conducting an internet search. *See* App. 5a-6a. Neither

case supports that view. *Favish* considered "the consequences that would follow" from disclosure, and held that the particularly "gruesome" nature of some requests for death-scene images was further reason to reconfirm a privacy interest in images that common law and tradition already protected. 541 U.S. at 170. *Reporters Committee* was concerned with "the accumulation of vast amounts of personal information in computerized data banks," 489 U.S. at 770 (quoting *Whalen v. Roe*, 429 U.S. 589, 605 (1977))—the storage of detailed criminal histories that were protected from disclosure by state and federal law, *id.* at 764-65. It explicitly distinguished records regarding any individual arrest or conviction. *Id.* at 764.

If the circuit courts' mistaken readings of *Favish* and *Reporters Committee* are left to stand, Exemption 7(C) will swallow the FOIA's disclosure provisions. According to those courts, a record is "private" and may be withheld if that record once disclosed will be freely available to the public. That, however, is the point of the FOIA: to disclose information to the public (not just academics) and to allow the public to see what the government is up to. Indeed, the FOIA *requires* disclosure to the public at large once the record has been disclosed in response to a FOIA request. 5 U.S.C. § 552(a)(2).

The purpose of the FOIA is defeated if the possibility of subjective embarrassment and the potential availability of a record on the internet are the touchstones for exempting disclosure. Of course, the release of records that document a person being indicted on a federal felony charge will almost always result in *some* measure of *subjective* embarrassment to the

criminal defendant. And once such records are disclosed, they will potentially be available by an internet search. Under the en banc majority's ruling here, that will be enough to bar disclosure in the first instance and thus deprive the public of vital information regarding how the government employs its police powers.

This Court's intervention is urgently needed to clarify that Exemption 7(C) does not afford the government free rein to withhold virtually all law enforcement records based on subjective notions of possible embarrassment and the existence of the internet. This Court should make clear that congressional intent in favor of broad disclosure to the public and limited exemptions needs to be honored. The exemption that Congress enacted here speaks only to those records for which there is a cognizable privacy interest grounded in tradition and consistent with the FOIA's purposes. It does not license the type of common-law legislating of broader privacy protections that is represented by the en banc majority ruling. Review should be granted and the judgment of the Sixth Circuit reversed.

II. The Lower Courts Have Substantially Weakened The FOIA By Improperly Disregarding Its Monitoring Purpose.

Even if there were a cognizable privacy interest in the booking photos at issue, the public interest in disclosure would categorically outweigh it. Public access to booking photos gets at the heart of the FOIA's overriding purpose: informing the people what their government is up to. Nowhere is an informed citizenry

more essential than in criminal proceedings, where the government wields the potent power of placing citizens in jeopardy of imprisonment and depriving them of liberty. Booking photos provide an important window into that exercise of governmental police power.

Dismissing the public's interests as "hypothetical," *World Publ'g Co.*, 672 F.3d at 831; or "phantoms," Pet. App. 13a; or "voyeuris[m]," *Karantsalis*, 635 F.3d at 504, the recent court of appeals decisions instead demanded that individual requesters prove, on a case-by-case basis, that the particular booking photo sought would provide evidence of government misconduct. *See infra* 29-30. In so doing, the courts have seriously misconstrued this Court's precedents and frustrated the FOIA's fundamental purpose of monitoring government activity.

A. Opening the criminal justice system to public scrutiny is central to the FOIA's purposes.

Even assuming privacy interests are implicated, numerous "weighty public interests" compel disclosure of booking photos. Pet. App. 29a (Boggs, J., dissenting). At the most fundamental level, public disclosure of booking photos, like open courts and open hearings, "play[s] an important role in educating the public about its government" and provides the "[p]ublic oversight … essential in criminal proceedings." *Id.* "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

An open criminal justice system both maintains the integrity of the system and "enhances … the appearance of fairness so essential to public confidence in the system." *Press-Enter.*, 464 U.S. at 508. The government wields power through the criminal justice system to take away a person's liberty—even his life. "The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (addressing deportation proceedings). Exemption 7(C) is properly read to enable the FOIA to serve the public interest in open government for which it was enacted.

People have a right to know who the federal government is prosecuting, and for what. Booking photos tell the "who" story in a way that an indictee's name alone cannot; they literally put a face on the government's prosecutorial activities. This is not voyeurism. Rather, such disclosures allow the public to see what their government is up to. Indeed, there is undeniable public interest in "information about the kinds of crimes the government" enforces and the people it prosecutes for those crimes. *ACLU v. U.S. Dep't of Justice*, 655 F.3d 1, 13 (D.C. Cir. 2011). That knowledge can add legitimacy by assuring the public that law enforcement is properly keeping its citizens safe. *See Press-Enter.*, 464 U.S. at 509. Conversely, openness may appropriately call the prosecutorial decisions of the government into question, such as if it appears that defendants of a particular race are disproportionately prosecuted (or not prosecuted) for certain offenses. Pet. App. 30a-31a.

"Booking photographs can also help the public learn about what the government does to those whom it detains." Pet. App. 31a. Booking photos allow the press and public to assess whether a particular arrestee, or arrestees of a particular race or ethnicity, show signs of being treated properly or with excessive force. *See Free Press I*, 73 F.3d at 98; Pet. App. 31a (collecting examples where release of booking photos depicting injuries to arrestees led to public inquiry into potential physical abuse). They can also provide evidence of a pattern of abuse in certain facilities. These are categorical public interests that strongly support public disclosure.

The facts of this case underscore why the release of booking photos is so important. DFP sought the booking photos of police officers indicted on serious charges of corruption and misconduct. Though the names of the officers have been made public, those names alone may not have registered with residents reading the paper the day after the indictments were unsealed. If, however, the booking photos had been published, some residents may have recognized one of the indicted defendants as one who, say, often patrolled their neighborhood. Having access to the booking photos, residents might have provided additional information supporting the officer's conviction. They might simply have been pleased that the FBI is doing a fine job and that the corrupt officers are now off the streets and not threatening others in the community. Alternatively, residents may have had exculpatory information because they actually saw one of the officers on the day he allegedly committed a crime. In any event, with access to the photos, the residents would

be better informed as to how and against whom the government is using its awesome police powers.

B. The circuit court opinions fail to follow this Court's precedents.

The Tenth and Eleventh Circuits, and now the Sixth Circuit, have either directly rejected or ignored these categorical public benefits. The Sixth Circuit dismissed the public interests identified by the dissent as "phantoms." Pet. App. 13a (maj. op.). The Tenth Circuit saw no public interest in using booking photos to monitor for "racial, sexual, or ethnic profiling in arrests" because there was "little to indicate" that release of a booking photo would detect profiling "without more information," and because "profiling ha[d] not been alleged" in that case. *See World Publ'g Co.*, 672 F.3d at 831. And the Eleventh Circuit brushed aside the public interests in booking photos as mere "voyeuristic curiosities." *Karantsalis*, 635 F.3d at 504.

These courts were prepared to recognize a public interest in booking photos only if the FOIA requester could provide evidence of some specific government wrongdoing that the disclosure of the requested photo might address.[3] But this Court has never held that a

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[3] *See World Publ'g Co.*, 672 F.3d at 831 & n.1 (applying a categorical approach but noting that it might consider an "as-applied approach" if there were "case-specific 'compelling evidence' of illegal activity"); Pet. App. 16a (Cole, C.J., concurring) (explaining that the majority opinion "does not foreclose the possibility that, in the appropriate case, a requestor might make a

FOIA requester, seeking to monitor "what its government is up to," *Favish*, 541 U.S. at 162, must put forth proof of government misconduct to overcome an asserted privacy interest. The lower courts' conclusions to the contrary fundamentally misapprehend this Court's precedents.

United States Department of State v. Ray, an Exemption 6 case examining the privacy interest in "personnel and medical files," 5 U.S.C. § 552(b)(6), fully supports disclosure of federal booking photos for the purpose of monitoring law enforcement practices. The records at issue in *Ray* were interviews of Haitian immigrants who had been sent from the U.S. back to their home country upon Haiti's agreement not to prosecute them. 502 U.S. at 175. The Court *acknowledged* that there was a "cognizable" public interest in "knowing whether the State Department has adequately monitored Haiti's compliance with its promise not to prosecute returnees," and it did not require evidence of State Department misconduct before recognizing that interest. *Id.* at 178. The Tenth Circuit

meaningful showing of [a] 'significant public interest'" in disclosure, such as "'in uncovering deficiencies or misfeasance' in government investigations" (quoting *Favish*, 541 U.S. at 173-75)).

It is unclear whether the Eleventh Circuit, which engaged in no independent analysis but simply adopted in full the district court's underlying opinion, would in future cases undertake a case-by-case balancing of the public interest in disclosure of a particular booking photo. The district court ultimately held only that "[i]n this case, the balance weighs heavily against disclosure," but it also included sweeping statements that on their face would seemingly preclude almost any requester of booking photos from prevailing. *Karantsalis*, 635 F.3d at 503-04.

seized on *Ray*'s rejection of "hypothetical" or "speculati[ve]" public interests, *World Publ'g Co.*, 672 F.3d. at 831, but *Ray* said only that it was speculative that the requested *redacted* portions of interview summaries would provide any additional public value apart from "[t]he unredacted portions of the documents that have already been released." 502 U.S. at 178. That statement has no bearing on the booking photos sought here, which allow the public to "see" what the government is up to in a way that other public records do not. *See* Pet. App. 29a (Boggs, J., dissenting).

Favish also supports disclosure of booking photographs. The circumstances of *Favish* were unique. The FOIA requester was conspiracy theorist Allan Favish, who sought to prove a massive government cover-up relating to its investigation into the death of Vince Foster, Jr., President Clinton's deputy counsel. 541 U.S. at 162. "Skeptical" of the "unanimous finding of … five investigations" ruling Foster's death a suicide, Favish sought a number of images depicting Foster's dead body. *Id*. Carefully cabining its holding, this Court held that *if*, as in that case, the public interest asserted by the FOIA requester was "to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, … the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 174.

The courts of appeals erroneously read *Favish* as changing the balancing test and requiring the requester to make a showing of government misconduct

to overcome an asserted privacy interest. That misreading of *Favish* substantially narrows the scope of the documents subject to mandatory disclosure under the FOIA and should be soundly rejected by this Court. *Favish* did *not* hold that the *only* legitimate public interest was exposing official malfeasance, or that evidence of misconduct was required in every case. Such holdings would have no basis in the FOIA's text or legislative history or in this Court's cases construing the FOIA. Rather, in *Favish*, this Court affirmed that, in the general case, the Exemption 7(C) balancing inquiry requires only that requester "show that the public interest sought to be advanced is a significant one" and that "the information is likely to advance that interest." *Id.* at 172.

Nothing in the text of the FOIA or in any of this Court's decisions suggests that the FOIA is merely a discovery tool for those who accuse the government of a specific wrong. The lower courts' conclusions to the contrary directly undercut Congress's intent to enable the public to know what the government is doing. *See Rose*, 425 U.S. at 361. As Senator Weicker urged his colleagues in support of the 1974 amendments, "We should make sure that we get into what every Government agency is doing. Otherwise, how can we tell whether they are performing their function under the Constitution? I cannot assure my constituents that I am performing my duty if I am not allowed to look here or not allowed to look there." 1974 FOIA Amendments at 345.

"Booking photographs play an important role in educating the public about its government." Pet. App.

29a; *supra* II.A. They allow citizens to "see" and connect with these individuals in a way a name on a piece of paper does not, furthering "public understanding of the rule of law and … comprehension of the functioning of the entire criminal justice system," *Richmond Newspapers*, 448 U.S. at 573. The public has a strong interest in knowing whom the government uses its police powers against to haul to court to face felony charges. As discussed above (at 27-29), a name alone does not provide that identification the way that a booking photo does.

The availability of law enforcement records informs "ongoing public policy discussion[s]" by allowing the public to monitor how the government is doing its job. *ACLU*, 655 F.3d at 13. The public cannot detect a pattern of misconduct or impermissible profiling, either in specific localities or on a larger scale, if it sees only the photos of those who have come forward and specifically alleged profiling or abuse. *See* Pet. App. 30a-31a (booking photos "reveal what populations the government prosecutes—black or white, young or old, female or male—and for what sorts of alleged crimes"). And, conversely, it is hard to confirm the government is fairly doing its job if the public sees only evidence to the contrary.

Ensuring meaningful monitoring by the public and the accountability of our criminal justice system is not mere public curiosity. It is essential to a well-functioning republic and is at the heart of the FOIA's purposes.

III. This Is An Issue Of Exceptional Importance Warranting This Court's Intervention.

The Sixth Circuit's nine-seven en banc decision leaves almost entirely to the government's discretion the question of whether and in what circumstances federal booking photos will be disclosed. The result is that the public sees only those booking photos the government wants it to see. It will be up to the U.S. Marshals Service whether a news outlet like the Detroit Free Press will be able to publish booking photos of those charged with federal felonies, who have been indicted by a grand jury, and have appeared in open court. Those charged with *state* crimes will have their booking photos freely disclosed, but those charged with the most serious federal offenses will have their photos withheld from the press and public. This discrepancy makes no sense.

DOJ maintains it will exercise its prerogative to release a booking photo if, in its view, a valid "law enforcement function" is served. 28 C.F.R. § 50.2(b)(7). In the government's view, a "law enforcement function" exists, among other settings, anytime it wants to advertise to the public that it has apprehended a "notorious" criminal. Memorandum from Gerald Auerbach to U.S. Marshals Re: Booking Photograph Disclosure Policy (Dec. 12, 2012), https://www.usmarshals.gov/foia/policy/booking_photos.pdf. Indeed, DOJ "routinely issu[es] press releases that name the individuals that it has indicted." *ACLU*, 655 F.3d at 10. But the government can withhold booking photos of, say, fellow law-enforcement officers (as here) or other well-connected defendants,

or photos that would reveal mistreatment. Intentionally or unintentionally, officials could release or withhold photographs in a manner that disproportionately implicates persons of certain races or backgrounds. The very existence of this ad hoc approach deprives the public of the ability to obtain a full and aggregate picture of what the government is up to.

Although the circuit courts' rule purports to leave room for a FOIA requester to put forth evidence on a case-by-case basis that the public interest in a particular photo is strong enough to warrant disclosure, in practice this solution is unworkable. No newspaper could timely publish booking photos alongside an article about a new indictment if it had to wrangle with an agency first over the relative public interest in the case, and then potentially litigate that case-specific question for years. Pet. App. 32a. That is why this Court has read Exemption 7(C) as embracing categorical rules, with "generic determinations" in which "individual circumstances" of a given request can be "disregarded." *Reporters Comm.,* 489 U.S. at 776; *see also id.* at 777 n.22 (describing Congress's creation of an "objective" standard focused on "disclosure of a particular type of document," not the "effect of a particular disclosure").

Here, the "generic" determinations are clear: Booking photos, by their "nature," serve the important public interest in shedding sunlight on who is being prosecuted under federal law while their disclosure implicates no cognizable privacy interests supported by tradition, common law, or state practice. *Id.* at 772. Thus, the appropriate categorical rule is that,

with respect to federal indictees who have already appeared in open court, disclosure of their booking photographs under the FOIA is required.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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Date November 22, 2016

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0164p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DETROIT FREE PRESS INC,
Plaintiff-Appellee,

No. 14-1670

v.

UNITED STATES
DEPARTMENT OF JUSTICE
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:13-cv-12939–Patrick J. Duggan, District Judge.

Argued: March 9, 2016

Decided and Filed: July 14, 2016

Before: COLE, Chief Judge; GUY, BOGGS, BATCHELDER, MOORE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE,

GRIFFIN, KETHLEDGE, WHITE, STRANCH,
and DONALD, Circuit Judges.

COUNSEL

ARGUED: Steve Frank, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Robert M. Loeb, ORRICK, HERRINGTON & SUTCLIFFE LLP, Washington, D.C., for Appellee. **ON BRIEF:** Steve Frank, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Robert M. Loeb, Thomas M. Bondy, ORRICK, HERRINGTON & SUTCLIFFE LLP, Washington, D.C., Paul R. McAdoo, AARON & SANDERS PLLC, Nashville, Tennessee, Brian P. Goldman, Cynthia B. Stein, ORRICK, HERRINGTON & SUTCLIFFE LLP, San Francisco, California, Herschel P. Fink, DETROIT FREE PRESS, INC., Detroit, Michigan, for Appellee. Daniel J. Klau, MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, Hartford, Connecticut, David Marburger, MARBURGER LAW LLC, Cleveland, Ohio, for Amici Curiae.

COOK, J., delivered the opinion of the court in which COLE, C.J., and GUY, GIBBONS, ROGERS, SUTTON, McKEAGUE, KETHLEDGE, and WHITE, JJ., joined. COLE, C.J. (pp. 10-11), delivered a separate concurring opinion. BOGGS, J. (pp. 12-23), delivered a separate dissenting opinion in which BATCHELDER, MOORE, CLAY, GRIFFIN, STRANCH, and DONALD, JJ., joined.

OPINION

COOK, Circuit Judge. In 1996, we held that the Freedom of Information Act (FOIA), 5 U.S.C. § 552, required the release of booking photos of criminal defendants who have appeared in court during ongoing proceedings, finding that criminal defendants lack any privacy interest in the photos. *Detroit Free Press, Inc. v. Dep't of Justice (Free Press I)*, 73 F.3d 93 (6th Cir. 1996). Twenty years and two contrary circuit-level decisions later, we find *Free Press I* untenable. Individuals enjoy a non-trivial privacy interest in their booking photos. We therefore overrule *Free Press I.*

I.

FOIA implements "a general philosophy of full agency disclosure" of government records, *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360 (1976)), requiring federal agencies to make their records "promptly available" to any person who requests them, 5 U.S.C. § 552(a)(2)-(3). An agency may withhold or redact information that falls within one of nine statutory exemptions. *Id.* § 552(b). Exemption 7(C), at issue here, permits agencies to refuse requests for "records or information compiled for law enforcement purposes" if public release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C).

Free Press I held that “no privacy rights are implicated” by releasing booking photos “in an ongoing criminal proceeding, in which the names of the defendants have already been divulged and in which the defendants themselves have already appeared in open court.” *Free Press I*, 73 F.3d at 97. Under those conditions, booking photos reveal “[n]o *new* information that … indictees would not wish to divulge” to the public. *Id.* The court bypassed deciding whether releasing the images following acquittals, dismissals, or convictions would implicate privacy interests. *Id.*

Bound by *Free Press I*, the United States Marshals Service (USMS) adopted a “bifurcated policy” for releasing booking photos. Within the Sixth Circuit’s jurisdiction, the USMS would honor all requests for photos under the circumstances outlined in *Free Press I.* Outside the Sixth Circuit, however, the USMS continued to follow its long-standing policy of refusing requests for booking photos. “Straw man” requesters in Michigan, Ohio, Kentucky, and Tennessee accordingly exploited the policy to obtain photos maintained in other jurisdictions, securing Bernie Madoff’s booking photo in one prominent example.

The USMS’s patchwork disclosure system persisted until the Tenth and Eleventh Circuits considered booking-photo disclosure and disagreed with *Free Press I’s* analysis. *See World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497 (11th Cir. 2011) (per curiam) (adopting district court opinion), *cert. denied*, 132 S. Ct. 1141 (2012). Bolstered by these decisions, the USMS abandoned the

bifurcated policy in 2012 and refused—nationwide—to honor FOIA requests for booking photos.

Accordingly, when Detroit Free Press (DFP) requested the booking photos of four Michigan police officers charged with bribery and drug conspiracy, the Deputy U.S. Marshal for the Eastern District of Michigan denied the request. In the lawsuit that followed, both the district court and the panel, constrained by *Free Press I*, ordered disclosure. We granted rehearing en banc to reconsider whether there is a personal-privacy interest in booking photos.

II.

A. Exemption 7(C)'s Personal-Privacy Interest

Exemption 7(C) prevents disclosure when: (1) the information was compiled for law enforcement purposes and (2) the disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Neither party disputes that booking photos meet the first requirement. The second requires that we "balance the public interest in disclosure against the [privacy] interest Congress intended [Exemption 7(C)] to protect." *Reporters Comm.,* 489 U.S. at 776. The government shoulders the burden of showing that Exemption 7(C) shields the requested information from disclosure. 5 U.S.C. § 552(a)(4)(B).

The Supreme Court has described Exemption 7(C) as reflecting privacy interests in "avoiding disclosure of personal matters," *Reporters Comm.*, 489 U.S.

at 762, maintaining "the individual's control of information concerning his or her person," *id.* at 763, avoiding "disclosure of records containing personal details about private citizens," *id.* at 766, and "keeping personal facts away from the public eye," *id.* at 769. Embarrassing and humiliating facts—particularly those connecting an individual to criminality—qualify for these descriptors. *See*, *e.g.*, *id.* at 771 (finding a privacy interest in criminal rap sheets); *Union Leader Corp. v. U.S. Dep't of Homeland Sec.*, 749 F.3d 45, 53 (1st Cir. 2014) (the names of arrestees); *Rimmer v. Holder*, 700 F.3d 246, 257 (6th Cir. 2012) (the names and identifying information of individuals associated with investigation of a murder); *ACLU v. U.S. Dep't of Justice*, 655 F.3d 1, 8 (D.C. Cir. 2011) (the fact of an individual's conviction and corresponding docket number); *McCutchen v. U.S. Dep't of Health & Human Servs.*, 30 F.3d 183, 187-88 (D.C. Cir. 1994) (a researcher's investigation and exoneration for academic-integrity concerns); *Kiraly v. FBI*, 728 F.2d 273, 277 (6th Cir. 1984) (FBI files identifying individuals suspected of criminal activity but not indicted or tried).

Booking photos—snapped "in the vulnerable and embarrassing moments immediately after [an individual is] accused, taken into custody, and deprived of most liberties"—fit squarely within this realm of embarrassing and humiliating information. *Karantsalis*, 635 F.3d at 503. More than just "vivid symbol[s] of criminal *accusation*," booking photos convey *guilt* to the viewer. *Id.* (emphasis added). Indeed, viewers so uniformly associate booking photos with guilt and criminality that we strongly disfavor showing such photos to criminal juries. *See United States*

v. Irorere, 69 F. App'x 231, 235 (6th Cir. 2003) ("[T]he Sixth Circuit has condemned the practice of showing 'mug shot' evidence to a jury 'as effectively eliminating the presumption of innocence and replacing it with an unmistakable badge of criminality."' (quoting *Eberhardt v. Bordenkircher*, 605 F.2d 275, 280 (6th Cir. 1979))); *see also United States v. McCoy*, 848 F.2d 743, 745-46 (6th Cir. 1988) (finding the district court erred in overruling an objection to lineup photos, which "suggest that [the defendant] is a 'bad guy' who belongs in jail"). This alone establishes a non-trivial privacy interest in booking photos.

Other considerations gleaned from Supreme Court decisions strengthen our conclusion. For example, the Court noted that the Exemption 7(C) privacy interest "must be understood … in light of the consequences that would follow" from unlimited disclosure. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004); *see also ACLU*, 655 F.3d at 7 ("[C]ourts have taken into consideration potential derivative uses of that information."). In *Favish*, the Court recognized family members' privacy interest in death-scene images of their loved one, noting that the deceased's abusers or murderers could request records under FOIA. 541 U.S. at 170. Leaving the government leeway "to deny these gruesome requests in appropriate cases" factored into the Court's decision to recognize a statutory privacy interest. *Id*. And modern technology only heightens the consequences of disclosure—"in today's society the computer can accumulate and store information that would otherwise have surely been forgotten." *Reporters Comm.,* 489 U.S. at 771; *see also Favish*, 541 U.S. at 167.

A disclosed booking photo casts a long, damaging shadow over the depicted individual. In 1996, when we decided *Free Press I*, booking photos appeared on television or in the newspaper and then, for all practical purposes, disappeared. Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection.[1] In fact, mug-shot websites collect and display booking photos from decades-old arrests: BustedMugshots and JustMugshots, to name a couple. *See* David Segal, *Mugged by a Mug Shot Online*, N.Y. Times, (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online html. Potential employers and other acquaintances may easily access booking photos on these websites, hampering the depicted individual's professional and personal prospects. *See ACLU*, 655 F.3d at 7 (noting that Exemption 7(C)'s privacy interest includes facts that "may endanger one's prospects for successful reintegration into the community" (internal quotation marks omitted)). Desperate to scrub evidence of past arrests from their online footprint, individuals pay such sites to remove their pictures. Indeed, an online-reputation-management industry

[1] Beginning in 1997, the U.S. Census Bureau asked Americans about internet access and found that less than one-fifth of American households had internet access at home. By 2013, that number jumped to 74.4%. Thom File & Camille Ryan, Computer and Internet Use in the United States: 2013, U.S. Census Bureau, 2 (2014), http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf; Thom File, Computer and Internet Use in the United States, U.S. Census Bureau, 1 (2013), http://www.census.gov/prod/2013pubs/p20-569.pdf.

now exists, promising to banish unsavory information—a booking photo, a viral tweet—to the third or fourth page of internet search results, where few persist in clicking. *See* Jon Ronson, *So You've Been Publicly Shamed* 263-74 (2015). The steps many take to squelch publicity of booking photos reinforce a statutory privacy interest.

B. DFP's Arguments

Against the privacy interest elucidated above, DFP interposes the Constitution, the common law and traditional understandings of privacy, the absence of a "web of federal statutory and regulatory provisions" limiting disclosure, and the fact that most states allow mug-shot disclosure. DFP posits that FOIA facilitates a free flow of information lacking a background of privacy protection in state and federal law. *See Favish*, 541 U.S. at 169 (noting that "Congress legislated against [a] background of law, scholarship, and history when it enacted FOIA").

1. The Constitution

DFP overemphasizes the Constitution's role in defining statutory privacy rights. Indeed, in *Reporters Committee*, the Court shrugged off the lack of a *constitutional* right to privacy in information connecting an individual to criminal activity before recognizing a *statutory* right to privacy in the same type of information. 489 U.S. at 762 n.13 (citing *Paul v. Davis*, 424 U.S. 693,712-14 (1976)).

2. The Common Law and Legal Traditions

Next, DFP invokes the common law and legal traditions as sanctioning publication of criminal activity. Closely intertwined with public trials, booking photos form part of the public record, and the common law recognizes no invasion-of-privacy tort remedy for publicizing facts in the public record. *See* Restatement (Second) of Torts § 652D cmt. b (1977); *see also id*. cmt. f, illus. 13.

The common law and American legal traditions leave undisturbed an existing statutory privacy interest. Even when information concerning an individual's person becomes part of the public record, "one d[oes] not necessarily forfeit a privacy interest," though the interest "diminishe[s]." *Reporters Comm.*, 489 U.S. at 763 n.15. Further, the common law differentiates between "facts about the plaintiff's life that are matters of public record," and matters of public record "not open to public inspection." Restatement (Second) of Torts § 652D cmt. b. Booking photos, like rap sheets, fit into the latter category, to which the Supreme Court extended privacy protection under Exemption 7(C). *See Reporters Comm.*, 489 U.S. at 763-64 ("[I]nformation may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons ....'" (quoting Webster's Third New International Dictionary 1804 (1976))). And we already noted the criticism of using mug shots in open trials. *See Eberhardt*, 605 F.2d at 280.

The dissent's focus on the historic use of "rogues' galleries" only confirms the risks at hand—

that the public has long wanted to look at these photos. But that says nothing about the individual's privacy interest. Surely there can exist both a strong public interest in a mug-shot's disclosure *and* a strong privacy interest.

3. State and Federal Laws

Persisting, DFP highlights that some states statutorily mandate the release of booking photos and urges us to follow their lead. *See, e.g.*, Minn. Stat. § 13.82(26)(b) ("[A] booking photograph is public data."); Neb. Rev. Stat. § 29-3521(1) (noting that "photographs taken in conjunction with an arrest" are public records); Va. Code Ann. § 2.2-3706(A)(1)(b) (ordering release of "[a]dult arrestee photographs taken during the initial intake" unless certain exceptions apply). True, but other states require FOIA-like balancing of public and private interests before disclosing booking photos. *See, e.g.,* 21 Kan. Op. Atty. Gen. 9, No. 87-25, 1987 WL 290422, at *4 (Feb. 9, 1987) (opining that Kan. Stat. Ann. § 45-221(a)(10)(A) allows nondisclosure of booking photos); *Prall v. N.Y.C. Dep't of Corr.*, 10 N.Y.S.3d 332, 335 (N.Y. App. Div. 2015) (balancing public and private interests under N.Y. Pub. Off. Law § 89(2)(b) to determine that booking photos need not be disclosed to mug-shot websites). And several states exempt booking photos from public-record disclosure laws. *See* Del. Code Ann. fit. 29 § 10002(*l*)(4); Ga. Code Ann. § 50-18-72(a)(4); 65 Pa. Stat. Ann. § 67.708(b)(16); S.D. Codified Laws § 1-27-1.5(5); *see also* Kean Exec. Order No. 123 (Nov. 12, 1985) (exempting booking photos from the New Jersey public-records law), http://www.state.nj.us/infobank/circular/eok123.shtml.

Decidedly mixed, state laws favor neither wholesale disclosure nor nondisclosure. Regardless, "[s]tate policies… do not determine" Exemption 7(C)'s meaning, but can evidence broad acceptance of a significant privacy interest. *Reporters Comm.,* 489 U.S. at 767. More important to the FOIA analysis are the *federal* regulations and policies drafted by the U.S. Department of Justice and the USMS, *see Reporters Comm.*, 489 U.S. at 764-65 (noting that the "web of *federal* statutory and regulatory provisions" limiting rap-sheet disclosure supported a privacy interest (emphasis added)); *see also World Publ'g Co.*, 672 F.3d at 829, and these prevent mug-shot disclosure absent a law-enforcement purpose, *see* 1987 USMS Publicity Policy at 8.1-2(a); 28 C.F.R. § 50.2(b)(7). A mixed bag of state privacy laws cannot extinguish FOIA personal-privacy protections.

Free Press I's finding that "no privacy rights are implicated" by booking photos embodies an impermissibly cramped notion of personal privacy that is out of step with the broad privacy interests recognized by our sister circuits. *See, e.g., Union Leader Corp.*, 749 F.3d at 53 (the names of arrestees); *World Publ'g Co.*, 672 F.3d at 830 (booking photos); *ACLU*, 655 F.3d at 8 (convicted individual's docket numbers); *Karantsalis*, 635 F.3d at 503 (booking photos). Individuals enjoy a non-trivial privacy interest in their booking photos, and we overrule *Free Press I's* contrary holding.

III.

Having found a non-trivial privacy interest, the court must balance that interest against the public's

interest in disclosure. The USMS favors balancing these interests on a case-by-case basis, while DFP advances a categorical approach with the public interest always outweighing the privacy interest. *See Reporters Comm.*, 489 U.S. at 776 ("[C]ategorical decisions *may be* appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." (emphasis added)). We agree with the USMS and adopt a case-by-case approach, elucidating the public interest at issue.

The public's interest in disclosure depends on "the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding *of the operations or activities of the government.*'" *U.S. Dep't of Def v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (alteration in original) (quoting *Reporters Comm.*, 489 U.S. at 775). If disclosure is not "likely to advance [a significant public] interest …, the invasion of privacy is unwarranted." *Favish*, 541 U.S. at 172. "[S]hed[ding] light on an agency's performance of its statutory duties falls squarely within" FOIA's core purpose. *Reporters Comm.*, 489 U.S. at 773. On the other hand, that purpose "is not fostered by disclosure of information about private citizens… that reveals little or nothing about an agency's own conduct." *Id.*

Favoring a categorical rule over case-by-case balancing, the dissent highlights the public importance of disclosure by pointing to the possibility of mistaken identity, impermissible profiling, and arrestee abuse. But these are phantoms. In cases of mis-

taken identity, arrestees are not going to protest using their booking photos to show that they are not the villain. Such arrestees undoubtedly will want the booking photo released so that they too can be released. The same goes for profiling and arrestee abuse. The privacy interest in a booking photo is the defendant's, and he or she can waive that interest.

IV.

In 1996, this court could not have known or expected that a booking photo could haunt the depicted individual for decades. *See Free Press I*, 73 F.3d at 97 (finding that, unlike booking photos, rap sheets include information "that, under other circumstances, may have been lost or forgotten"). Experience has taught us otherwise. As the Tenth and Eleventh Circuits recognize, individuals have a privacy interest in preventing disclosure of their booking photos under Exemption 7(C). Of course, some public interests can outweigh the privacy interest, but *Free Press I* wrongly set the privacy interest at zero. We overrule *Free Press I*, reverse the grant of summary judgment, and remand to the district court for proceedings consistent with this opinion.

CONCURRENCE

COLE, Chief Judge, concurring. I agree with the majority that criminal defendants have a non-trivial privacy interest in their booking photographs. And I agree that the time has come to overrule our decades-old decision in *Detroit Free Press, Inc. v. Dep't of Justice (Free Press I*), 73 F.3d 93 (6th Cir. 1996). I

write separately only to emphasize two points touched upon by the majority.

First, Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), plainly extends to a private individual's desire to avoid disclosure of personal details that may be humiliating, embarrassing, or painful. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 166-67 (2004); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989). Mugshots fit the bill.

Twenty years ago, we thought that the disclosure of booking photographs, in ongoing criminal proceedings, would do no harm. But time has taught us otherwise. The internet and social media have worked unpredictable changes in the way photographs are stored and shared. Photographs no longer have a shelf life, and they can be instantaneously disseminated for malevolent purposes. Mugshots now present an acute problem in the digital age: these images preserve the indignity of a deprivation of liberty, often at the (literal) expense of the most vulnerable among us. Look no further than the online mugshot-extortion business. In my view, *Free Press I*—though standing on solid ground at the time—has become "inconsistent with the sense of justice." *See* B. Cardozo, The Nature of the Judicial Process 150 (1921). These evolving circumstances permit the court to change course.

Second, I understand the majority's approach as simply "providing a workable formula which encompasses, balances, and protects all interests." *See* S. Rep. No. 89-813, at 38 (1965). Congress structured

Exemption 7(C) to at once promote "a general philosophy of full agency disclosure" and "protect certain equally important rights of privacy." *Id.*; *see also U.S. Dep't of Def v. FLRA*, 510 U.S. 487, 494 (1994).

Today's opinion, as I read it, does not foreclose the possibility that, in the appropriate case, a requester might make a meaningful showing of the "significant public interest" in "reveal[ing] the circumstances surrounding an arrest and initial incarceration." *See Free Press I*, 73 F.3d at 97-98 (noting, in dicta, the potential for "public oversight" of law enforcement conduct); *see also Favish*, 541 U.S. at 173-75 (discussing the showing required to substantiate an "asserted public interest in uncovering deficiencies or misfeasance" in government investigations). There will be time enough to deal with such a situation. The majority rightly gives the lower courts the chance to balance, in the first instance, the equally important values of public disclosure and personal privacy. Neither is abrogated.

With this explanation, I join the majority's persuasive opinion in full.

DISSENT

BOGGS, Circuit Judge, dissenting. More than twenty years ago, this court determined that the Freedom of Information Act, a federal statute dedicated to open government, requires the release of federal indictees' booking photographs. The Supreme Court did not correct our reading, and neither did Congress. Nevertheless, today's majority reverses that determination, citing as justification only a vague privacy interest in inherently non-private matters. Today's decision obscures our government's most coercive functions—the powers to detain and accuse—and returns them to the shadows. Open government is too dear a cost to pay for the mirage of privacy that the majority has to offer. I respectfully dissent.

I

Congress passed the Freedom of Information Act (FOIA), 5 U.S.C. § 552, with the purpose of "open[ing] agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). The Act's role in promoting democracy is no less critical than in years past, as democracy always "works best when the people have all the information that the security of the Nation permits." Lyndon B. Johnson, Statement Upon Signing the "Freedom of Information Act" (July 4, 1966), *in* 2 The Public Papers of the Presidents of the United States, Lyndon B. Johnson: 1966, at 699 (1967); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004). To further Congress's overriding goal of "full agency disclosure," *Rose*, 425 U.S.

at 360 (quoting S. Rep. No. 89-813, at 3 (1965)), FOIA "mandates" that agencies disclose records on request unless the government can prove that one of nine "narrowly construed" exemptions applies, *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (quoting *FBI v. Abramson*, 452 U.S. 615, 630 (1982)).

One of those "narrow" exemptions, Exemption 7(C), allows federal agencies to refuse requests for "records or information compiled for law enforcement purposes" when their public release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Because neither party disputes that booking photographs are "records or information compiled for law enforcement purposes," Exemption 7(C) prompts only two questions in this case. The first is whether booking photographs contain the sort of "intimate personal" information that the law has traditionally considered to be private. *Favish*, 541 U.S. at 166. If the government overcomes that burden, it must also show that disclosing such photographs would result in an *unwarranted* invasion of privacy. *Id.* at 171. In my view, the Department of Justice (DOJ) has not met its burden as to either question.

II

Exemption 7(C) allows the government to withhold only those records that invade a cognizable personal privacy interest. 5 U.S.C. § 552(b)(7)(C). It is well settled that not every personal privacy interest counts, and the mere possibility that information might embarrass is not sufficient. *See Schell v. U.S. Dep't of Health & Human Servs.*, 843 F.2d 933, 939

(6th Cir. 1988); *Sims v. CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980). We assume that when Congress enacted Exemption 7(C), it was aware of state and federal privacy law, and the deep cultural and legal traditions that that law reflects. *See Favish*, 541 U.S. at 169. For this reason, when considering what privacy interests Congress intended Exemption 7(C) to protect, the Supreme Court has looked not to some pliable, amorphous notion of privacy, but rather to history, the common law, and state and federal practice, which together comprise the background against which Congress legislated. *See id.* at 167-69; *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763-70 (1989). As I see it, this background does not support the recognition of a privacy interest in booking photographs.

A

Controversy surrounding booking photographs, which began soon after American police departments acquired photographic technology in the second half of the nineteenth century, is nothing new. Simone Browne, *Race and Surveillance*, *in* Routledge Handbook of Surveillance Studies 72, 74 (Kirstie Ball et al. eds., 2012). By the end of that century, police had begun to compile booking photographs of detainees—convicted or not—and created books and rooms of the portraits called "rogues' galleries." *See, e.g., Blume v. State*, 56 N.E. 771, 773 (Ind. 1900); *State v. Smith*, 90 S.W. 440, 442 (Mo. 1905); *Rogues' Gallery Pictures*, N.Y. Times, Mar. 29, 1903, at 12. Police departments across the country shared booking photographs with one another, *see, e.g., State ex rel. Bruns*

v. Clausmier, 57 N.E. 541, 542 (Ind. 1900), and occasionally opened rogues' galleries to the public for "both technical and moral purposes," Browne, *supra*, at 74 (quoting Christian Parenti, The Soft Cage 39 (2003)); *see also* Simon A. Cole, Suspect Identities 20 (2d prtg. 2002).

Just as today, these early booking photographs brought with them consequences for those depicted. In 1859, the *American Journal of Photography* observed that "[a]s soon as a rascal becomes dangerous to the public, he is taken to the Rogues' Gallery and is compelled to leave his likeness there, and from that time on he may be known to any one." Alan Trachtenberg, Reading American Photographs 29 (6th prtg. 1999) (quoting 2 Am. J. Photography 75, 75-77 (1859)). That likeness would remain on public display long after conviction, *see* Pa. Prison Soc'y, One Hundred and Second Annual Report, *reprinted in* 28 J. Prison Discipline 5, 29 (1889), and those photographed often endured "shame, humiliation, and disgrace," *Leger v. Warren*, 57 N.E. 506, 507 (Ohio 1900). Even those subsequently cleared of wrongdoing occasionally found themselves subjected "to ridicule … and to the constant suspicions of police." *The Fateful Photograph of Duffy*, 47 Current Literature 120, 120 (1909).

Nevertheless, the collection and exhibition of booking photographs went unchallenged for decades, and in the absence of a common-law right to privacy, courts rejected early efforts to enjoin the practices. *See Owen v. Partridge,* 82 N.Y.S. 248, 250-53 (Sup. Ct. 1903); *People ex rel. Joyce v. York,* 59 N.Y.S. 418,

418 (Sup. Ct. 1899); *Publication of Bertillon Measurements and Photographs of Prisoners, Innocent or Acquitted of the Crimes Charged Against Them,* 57 Cent. L.J. 261, 261 (1903) ("Under th[e] state of the law [a] … man has no right of privacy that can be violated by a publication of his picture and measurements in the rogue's gallery …."). In 1904, for example, New York's highest court decided one of the first appeals involving an acquitted man's suit to force police to return his booking photograph. *In re Molineux,* 69 N.E. 727, 728-29 (N.Y. 1904). The court rejected the man's claim, explaining that his photograph was a matter of public record in which he had no legitimate interest. *Id.* at 728.

The court's view was by no means singular. *See Shaffer v. United States,* 24 App. D.C. 417, 426 (D.C. Cir. 1904); *Mabry v. Kettering,* 117 S.W. 746, 747 (Ark. 1909) (per curiam). As one leading treatise explained, police could lawfully disseminate the booking photographs of even suspected criminals, so long as the suspicion was well founded. *See* 1 Christopher G. Tiedeman, A Treatise on State and Federal Control of Persons and Property in the United States 157 (1900); *accord* Leading Legal Article, 17 Harv. L. Rev. 142, 142 (1903) ("So far as the subjects are really suspicious characters, the system cannot be criticised …."); *Publication of Bertillon Measurements, supra,* at 261.

Early reluctance to interfere with police photography is perhaps unsurprising given that the common law has traditionally protected public access to criminal proceedings. This "tradition of accessibility" was a fundamental aspect of English common law, *Globe Newspaper Co. v. Superior*

Court, 457 U.S. 596, 605 (1982) (quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 589 (1980) (Brennan, J., concurring in the judgment)), and played "a[n] important ... role in the administration of justice ... for centuries before our separation from England," *Press-Enter. Co. v. Superior Court,* 464 U.S. 501, 508 (1984). *See generally Richmond Newspapers,* 448 U.S. at 567 (plurality opinion) ("[T]he openness of trials was explicitly recognized as part of the fundamental law of the Colony."). Nor was the tradition of openness limited to criminal trials. As the Supreme Court has emphasized, "[a]rrests, indictments, convictions, and sentences" are all "public events." *Reporters Comm.,* 489 U.S. at 753; *see also Paul v. Davis,* 424 U.S. 693, 713 (1976) (finding no due-process right to privacy in a "record of an official act such as an arrest"); *Sorrentino v. City of Philadelphia,* No. Civ. A. 96-6604, 1997 WL 597990, at *7 (E.D. Pa. Sept. 16, 1997) ("[A]n individual's mug shot photo is a matter of public record not subject to constitutional protection." (citing *Davis,* 424 U.S. at 712-14)).

B

The result of the traditional common-law rule was not universally popular, *see, e.g.,* Editorial, 16 Am. Law. 51, 52 (1908); Recent Cases, 13 Yale L.J. 51, 51 (1904), and some courts and legislatures intervened to protect the likenesses of "honest" individuals who had not been convicted, *Itzkovich v. Whitaker,* 39 So. 499, 500 (La. 1905); *see also* N.Y. Penal Law § 516(1909); *Downs v. Swann,* 73 A. 653, 656 (Md. 1909). But even after the development of invasion-of-privacy torts that created a remedy for misleading

representations, *see* 3 Restatement (Second) of Torts § 652E ill. 7, at 397 (Am. Law Inst. 1977), courts recognized that public authorities could disseminate truthful information about a criminal defendant who had already appeared in open court, given that an individual's life "ceases to be private by reason of indictment and becomes a matter of public interest," *McGovern v. Van Riper,* 54 A.2d 469, 472 (N.J. Ch. 1947); *see, e.g., E.B. v. Verniero,* 119 F.3d 1077, 1099-1100 (3d Cir. 1997); *Detroit Free Press, Inc. v. Oakland Cty. Sheriff,* 418 N.W.2d 124, 127-30 (Mich. Ct. App. 1987); *City of Carrollton v. Paxton,* No. 03-13-00838-CV, 2016 WL 1566400, at *3 (Tex. App. Apr. 14, 2016); *Fernicola v. Keenan,* 39 A.2d 851, 851-52 (N.J. Ch. 1944); *Bridges v. State,* 19 N.W.2d 529, 539 (Wis. 1945).

Thus the outcome of lawsuits against newspapers for publishing photographs of those accused of crimes. Rejecting the notion that arrestees have a legitimate privacy interest in their photographs after indictment, courts have explained that, once indicted, individuals become figures of public interest. Publishing their photographs is thus not an invasion of privacy. *See Frith v. Associated Press*, 176 F. Supp. 671, 676 (E.D.S.C. 1959); *Kapellas v. Kofman,* 459 P.2d 912, 924 (Cal. 1969) (en banc); *Coverstone v. Davies*, 239 P.2d 876, 880 (Cal. 1952) (en banc); *Lincoln v. Denver Post*, 501 P.2d 152, 154 (Colo. App. 1972); *Barbieri v. News-Journal Co.*, 189 A.2d 773, 774-75 (Del. 1963); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1119 (Md. Ct. Spec. App. 1986).

The Restatement of Torts confirms that individuals accused of criminal activity have no cognizable privacy interest with respect to their prosecution because they are "persons of public interest, concerning whom the public is entitled to be informed." 3 Restatement (Second) of Torts § 652D cmt. f, at 389. In one particularly apposite illustration, the Restatement provides:

> A is tried for murder and acquitted. During and immediately after the trial B Newspaper publishes daily reports of it, together with pictures and descriptions of A and accounts of his past history and daily life prior to the trial. This is not an invasion of A's privacy.

Id. § 652D ill. 13, at 390.

In sum, it appears that the common law did not, and does not now, recognize an indicted defendant's interest in preventing the disclosure of his booking photograph during ongoing criminal proceedings.

C

Consistent with historical practice and state common law, the vast majority of states do not recognize a statutory privacy interest that would require state and local authorities to withhold booking photographs in the ordinary case. *See, e.g.,* Opinion No. 03-205, 68 Op. Cal. Att'y Gen. 132, 132-37 (2003); Opinion of June 14, 2007, 92 Md. Op. Att'y Gen. 26, 49. Booking photographs are either available, or presumptively available, to the public under the law of

most states. Br. of Amici Curiae Reporters Committee for Freedom of the Press et al. 7; *see, e.g.,* Minn. Stat. § 13.82, subdiv. 26(b); N.D. Cent. Code § 44-04-18.7(2)(i); Neb. Rev. Stat. § 29-3521; Okla. Stat. tit. 51, § 24A.8(A); Va. Code Ann. § 2.2-3706(A)(1)(b); *Patterson v. Allegan Cty. Sheriff,* 502 N.W.2d 368, 369 (Mich. Ct. App. 1993); *State ex rel. Borzych v. Paluszcyk,* 549 N.W.2d 253, 254 (Wis. Ct. App. 1996); Opinion No. 2004-108, 2004 WL 771846 (Op. Ala. Att'y Gen. 2004); Opinion No. 03-09, 2003 WL 21642768 (Op. Haw. Office Info. Practices 2003); Opinion of June 14, 2007, 92 Md. Op. Att'y Gen. at 49-50; Opinion No. 2012-22, 2012 WL 6560753 (Op. Okla. Att'y Gen. 2012); Clayton Norlen, *Judge Orders Release of Photos,* Deseret Morning News, May 16, 2009, at B6 (discussing Utah law).

The majority counters that state policies are not conclusive as to Exemption 7(C)'s meaning, and urges that DOJ's regulations and policies are "[m]ore important to the FOIA analysis." Majority Op. at 8. But DOJ's own actions undercut its position that individuals have a strong privacy interest in their booking photographs. It was not long ago that DOJ sought to use booking photographs as evidence in criminal proceedings, *see, e.g., United States v. Rodriguez,* 925 F.2d 1049, 1054 (7th Cir. 1991), and the ATF and FBI maintain a small number of booking photographs on their websites, *see* Br. of Amici Curiae Reporters Committee for Freedom of the Press et al. 10-11. What is more, although DOJ's current policy is to not release booking photographs except "when a law enforcement purpose is served," Appellant Reply Br. 19 n.1; *see also* 28 C.F.R. § 50.2(b)(7)—(8), even before we ruled on Exemption 7(C)'s applicability, at least

one DOJ office appears to have routinely made such photographs available to the media without any law-enforcement rationale at all. *See* Lou Gefland, *Noriega's Mug Shot Was a Photograph Worth Printing,* Minneapolis-St. Paul Star Trib., Jan. 21, 1990, at 23A.

D

The above-described background of history, common law, and state and federal practice gives meaning to the words "personal privacy" in Exemption 7(C), and suggests that an individual has no cognizable privacy interest in his booking photograph once he has already been indicted and has appeared in open court. Disregarding this legal backdrop, the majority emphasizes the embarrassment that a booking photograph may cause to the depicted individual. Majority Op. at 4-5. Even if an individual's booking photograph conveys embarrassing information that the public fact of his indictment and his appearance in open court do not, *but see Detroit Free Press, Inc. v. Dep't of Justice (Free Press I),* 73 F.3d 93, 97 (6th Cir. 1996), the majority's emphasis on embarrassment misses the point. Information can be both public and embarrassing, *see Sims,* 642 F.2d at 575, and the fact that a record is embarrassing does not answer the question whether an individual can reasonably expect that record to remain private, *see Schell,* 843 F.2d at 939.

In an age in which law enforcement routinely makes booking photographs available to the press, the public has come to expect that such photographs will be accessible. *See, e.g.,* Larry McDermott, *Where*

Are Photos of Church Fire Suspects?, The Republican, Jan. 5, 2009, at C7. Those who are arrested are aware of this reality, and some even use their booking photographs as a way to communicate with the public. *See, e.g.,* Giacomo Papi, Under Arrest 177 (2006) (describing booking photograph in which "Steve McQueen raises his hand in a peace sign"); Joe Tacopino, *Perry's Mug of Defiance,* N.Y. Post, Aug. 20, 2014, at 25 ("Texas Gov. Rick Perry gave a confident smile as he posed for his mug shot ...."); *Snippets,* Hous. Chron., Apr. 15, 1996, at 2 (describing booking photograph in which Jane Fonda "do[es] [a] 'Power to the People' raised-fist salute"). Unlike deeply personal matters, such as the death-scene images at issue in *National Archives & Records Administration v. Favish,* 541 U.S. 157 (2004), individuals simply do not expect their booking photographs to remain shielded from public view.

Of course, an individual can have a statutory privacy interest in information that is public. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court found a cognizable privacy interest in rap sheets that contained publicly available information about individuals' arrests, charges, convictions, and incarcerations. *Id.* at 752, 770-71. But it does not follow that all public information "connecting an individual to criminality" is protected by a statutory right to privacy. Majority Op. at 4. The *Reporters Committee* Court emphasized that rap sheets are different from other sorts of publicly available records because they compile "otherwise hard-to-obtain" information from multiple offices in multiple jurisdictions into one document, thus "alter[ing] the privacy

interest implicated by the disclosure of that information." 489 U.S. at 764. The booking photographs at issue here, by contrast, do not compile any information that is difficult to find.

The majority also puts great emphasis on the fact that "an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection." Majority Op. at 5. That is undoubtedly true. But the same could be said of any of the now-digitized information that was once hidden away in the dusty basements of courthouses and libraries. Surely the majority would not agree that an individual has a cognizable privacy interest in his court filings or public statements simply because they too may turn up in an "idle internet search." If anything, the ease with which a third party today can find an individual's indictment and arrest would seem to cut against finding a cognizable privacy interest in booking photographs. *Cf. ACLU v. U.S. Dep't of Justice,* 655 F.3d 1, 12 (D.C. Cir. 2011) (observing that public disclosure of docket-sheet numbers of selected criminal cases "will simply provide one more place in which a computerized search will find the same person's name and conviction").

In sum, the majority is able to find a privacy right in booking photographs only by espousing a narrow conception of public information that is out of step with the "literal understandin[g]" of privacy. *Reporters Comm.,* 489 U.S. at 763; *see also* Webster's Ninth New Collegiate Dictionary 936 (1986) (defining "private" as "not … intended to be known publicly" or "unsuitable for public use or display"); *Reporters Comm.,*

489 U.S. at 753 (explaining that "[a]rrests" and "indictments" are "public events"). An individual who has already been indicted, and who has already appeared in open court, has no cognizable privacy interest in his booking photograph because neither he nor society expects that it will remain hidden from public view.

III

Even if an indicted individual has a privacy interest in his booking photograph, whatever invasion of privacy disclosure occasions is not "unwarranted" in light of the weighty public interests that disclosure serves. Public oversight is essential in criminal proceedings, in which the government wields the power to place the individual in jeopardy of imprisonment. Closing a window into such proceedings undermines the public confidence that is essential to any effective criminal-justice system, for it is "difficult for [citizens] to accept what they are prohibited from observing." *Richmond Newspapers,* 448 U.S. at 572 (plurality opinion); *see also Press-Enter. Co.*, 464 U.S. at 508-09. Applying this principle, we have emphasized the role of "the public, deputizing the press as the guardians of their liberty," in shielding the individual from governmental abuse. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). Booking photographs play an important role in educating the public about its government, just as open courts and open hearings do.

Measured against the photographed individual's meager interest in avoiding the disclosure of

matters that are largely available in the public domain, *see ACLU,* 655 F.3d at 12, the public's interest in knowing whom the government is prosecuting is strong. The regular release of booking photographs helps to avoid cases of mistaken identity, by prompting individuals to assist the government in finding the actual perpetrator. Cases of mistaken identity are all too common, *see, e.g.*, Topher Sanders, *Name Mix-Up in Sexual Battery Case Sends Wrong Clay County Teen to Jail for 35 Days*, Fla. Times-Union, Feb. 24, 2014; Christopher N. Osher, *Mistaken Identities Errors Clutter Denver Arrests,* May 24, 2009, Denver Post, at A1, and photographs can help to clear the names of innocent individuals, *see, e.g.,* Joyce Purnick, *Few Answers After Settling a Bad Arrest,* N.Y. Times, Mar. 15, 2001, at B 1.

Moreover, booking photographs also reveal what populations the government prosecutes—black or white, young or old, female or male—and for what sorts of alleged crimes. Their release may raise questions about prosecutorial decisions, enabling the public to detect and hold to account prosecutors who disproportionately charge or overlook defendants of a particular background or demographic. Such oversight is important in a system such as ours, in which prosecutors enjoy wide discretion in choosing whom to charge. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). Indeed, giving public authorities discretion to release booking photographs may even create the potential for, or the perception of, unfairness. *Cf.* Todd Wallack, Bost. Globe, Mar. 11, 2015, at A (recounting allegations that "police … treat [disclosure of] charges against their own officers differently than the general public"); Alex Zielinski, *The Brock*

Turner Mug Shot Police Really Didn't Want You to See, ThinkProgress (June 6, 2016, 6:09 PM), http://thinkprogress.org/justice/2016/06/06/3785310/brock-turner-mug-shot ("One Twitter user… posted screenshots from past *Washington Post* articles to make the point that [the white defendant] was being treated differently….").

Booking photographs can also help the public learn about what the government does to those whom it detains. In *Free Press I,* we explained that "[h]ad the now-famous videotape of the Rodney King beating in Los Angeles never been made, a mug shot of Mr. King released to the media would have alerted the world that the arrestee had been subjected to much more than a routine traffic stop and that the actions and practices of the arresting officers should be scrutinized." 73 F.3d at 98. Our observation was not conjecture. In one recent example, the release of a New Mexico booking photograph that showed an arrestee's bloodied and scratched face prompted local media to inquire into the circumstances of his arrest. *See* Royale Da, *MDC: State Fair Worker Assaulted by Inmate Prior to Mugshot,* KOAT 7 Albuquerque (Sept. 18, 2014), http://www.koat.com/news/mdc-state-fair-worker-assaulted-by-inmate-prior-to-mugshot/28141730. In another, the publication of an Alabama booking photograph that showed an individual with "two black eyes" led "viewers [to] expres[s] outrage" because "[t]hey think authorities used excessive force." Rae Larkins, *Large Amount of "Spice" Recovered in Dothan Bust,* KCBD 11 (Feb. 19, 2016, 3:08 PM), http://www.kcbd.com/story/31199484/large-amount-of-spice-recovered-in-dothan-bust. These anecdotes suggest that booking photographs

play a role in building public awareness of what law enforcement does and why, which in turn enables the public to hold authorities to account.

The majority ignores these benefits and omits the question of balancing altogether, leaving it to DOJ to make a case-by-case determination of whether it believes that the release of a particular booking photograph serves its own purposes. *See* Majority Op. at 8-9. That decision undermines FOIA's goal of disclosure by effectively making DOJ the arbiter of whether a booking photograph will be made public. Under FOIA, the burden of justifying *non*disclosure should always fall on the government. *Reporters Comm.,* 489 U.S. at 755, 778. But if newspapers like the *Detroit Free Press* have to "wrangle with" DOJ "over the relative public interest" of every single booking photograph that they seek to publish, few, if any, booking photographs that DOJ withholds will become public because "[n]o newspaper could ever timely publish booking photos alongside an article about a new indictment." Appellee Supp. Br. 25.

Even if news organizations bear the time and expense of taking DOJ to court, "assigning federal judges the task of striking a proper case-by-case … balance between individual privacy interests and the public interest in" disclosure is likely to be onerous, especially as the basis of these "ad hoc" decisions would be largely standardless. *Reporters Comm.,* 489 U.S. at 776. Nor does it help much that a detainee may "waive" his or her privacy interest. Majority Op. at 9. FOIA does not require agencies to notify an individual when a third party requests his records. Maj. John F. Joyce, *The Privacy Act,* 99 Mil. L. Rev.

113, 156 (1983). In the absence of such notice, few indictees in the midst of organizing a defense will know to request their own booking photographs under FOIA or the Privacy Act, 5 U.S.C. § 552a. Moreover, the release of one individual booking photograph could never reveal the structural disparities in prosecutorial discretion that the regular release of many could. *Cf. Floyd v. City of New York,* 861 F. Supp. 2d 274, 290 (S.D.N.Y. 2012). For these reasons, the Supreme Court has suggested that in cases such as this one, where the "individual circumstances" of a given request are less important than the effect of disclosure on the whole, Exemption 7(C) allows for categorical determinations. *Reporters Comm.,* 489 U.S. at 776.

IV

I am not unaware of the consequences of releasing booking photographs in the Internet Age. Ever since the nineteenth century, booking photographs have proven to be a source of discomfort to those depicted. *See, e.g., Warren,* 57 N.E. at 507; Pa. Prison Soc'y, *supra,* at 29; *The Fateful Photograph of Duffy, supra,* at 120. But today's decision does nothing to prohibit DOJ from using its broad discretion to release booking photographs when it chooses. Nor does today's decision do anything to protect the likenesses of those arrested by state authorities, the majority of which disclose booking photographs to the media upon request. *See, e.g.,* Carissa Wolf et al., *FBI Seals Off Ore. Refuge After Arrests,* Wash. Post, Jan. 28, 2016, at A1 (depicting state booking photographs of individuals awaiting disposition of federal charges).

All that today's decision does is provide DOJ with a tool to selectively shield itself from public scrutiny.

It is possible that other means could be used to achieve a sensible balance between reputational concerns and the free flow of public information. *See, e.g.,* Act of May 6, 2013, § 1, 2013 Ga. Laws 613, 614 (requiring website owners to remove booking photographs of those acquitted of criminal activity); *Taha v. Bucks County,* 9 F. Supp. 3d 490, 494 (E.D. Pa. 2014) (holding that individual depicted on "bustedmugshots.com" with the "legend 'BUSTED!' in large bold letters over his mugshot" could maintain state-law "false light" tort claim where individual's arrest record had in fact been expunged). But today's decision, which deprives the public of vital information about how its government works and does little to safeguard privacy, is not the correct answer. For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
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CINCINNATI, OHIO 45202-3988

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Filed: October 19, 2016

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Re: Case No. 14-1670, *Detroit Free Press, Inc. v. USDOJ* Originating Case No.: 2:13-cv-12939

Dear Counsel,

A correction has been made to page 17 of the published opinion that was filed in this case on July 14, 2016. Enclosed is a copy of the page with marks to indicate what correction has been made. Also enclosed is a copy of the opinion bearing this correction in print.

Please note that the date the opinion is deemed to have been filed remains July 14, 2016.

Yours very truly,
Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

Cc: Mr. David J. Weaver

Enclosures

In sum, it appears that the common law did not, and does not now, recognize an indicted defendant's interest in preventing the disclosure of his booking photograph during ongoing criminal proceedings.

C

Consistent with historical practice and state common law, the vast majority of states do not recognize a statutory privacy interest that would require state and local authorities to withhold booking photographs in the ordinary case. *See, e.g.,* Opinion No. 03-205, 68[1] Op. Cal. Att'y Gen. 132, 132-37 (2003); Opinion of June 14, 2007, 92 Md. Op. Att'y Gen. 26, 49. Booking photographers are either available, or presumptively available, to the public under the law of most states. Br. Of Amici Curie Reporter Committee for Freedom of the Press et al. 7; *see, e.g.*, Minn. Stat. § 13.82 subdiv. 26(b); N.D. Cent. Code § 44-04-18.7(2)(i); Neb. Rev. Stat. § 29-3521; Okla. Stat. tit. 51, § 24A8(A); Va. Cod3e Ann. § 2.2-3709(A)(1)(b); *Patterson v. Allegan Cty. Sheriff*, 502 N.W.2d 368, 369 (Mich. Ct. App. 1993); *State ex rel. Borzych v. Paluszcyk*, 549 N.W.2d 253, 254 (Wis. Ct. App. 1996); Opinion No. 2004-108, 2004 WL 771846 (Op. Ala. Att'y Gen. 2004); Opinion No. 03-09, 2003 WL 21642768 (Op. Haw. Office Info. Practices 2003); Opinion of June 14, 2007, 92 Md. Op. Att'y Gen. at 49-50; Opinion No. 2012-22, 2012 WL 6560753 (Op. Okla.

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[1] [h/w change to 86]

Att'y Gen. 2012) Clayton Norlen, *Judge Orders Release of Photos*, Deseret Morning News, May 16, 2009, at B6 (discussing Utah law.)

The majority counters that state policies are not conclusive as to Exemption 7(c)'s meaning, and urges that DOJ's regulations and policies are "[m]ore important to the FOIA analysis." Majority Op. at 8. But DOJ's own actions undercut its position that individuals have a strong privacy interest in their booking photographs. It was not long ago that DOJ sought to use booking photographs as evidence in criminal proceedings, *see, e.g.*, *United States v. Rodriquez*, 925 F.2d 1049, 1054 (7th Cir. 1991), and the ATF and FBI maintain a small number of booking photographs on their website, *see* Br. of Amici Curiae Reporters Committee for Freedom of Press et al. 10-11. What is more, although DOJ's current policy is to not release booking photographs except "when a law enforcement purpose is served," Appellant Reply Br. 19 n.1; *see also* 28 C.F.R. § 50.2(b)(7)-(8), even before we ruled on Exemption 7(c)'s applicability, at least on DOJ office appears to have routinely made such photographs available

APPENDIX C

No. 14-1670

UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

DETROIT FREE PRESS, INC., Plaintiff-Appellee,	**FILED** Nov 20, 2015 DEBORAH S. HUNT, Clerk
v.	
UNITED STATES DEPARTMENT OF JUSTICE, Defendant-Appellant	ORDER

BEFORE: COLE, Chief Judge; BOGGS, BATCHELDER, MOORE, CLAY, GIBBIONS, ROGERS, SUTTON, COOK McKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, and DONALD, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(b) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgement of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is **ORDERED**, that the previous decision and judgement of this court is vacated,

the mandate is stayed and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT

__/s/______________________
Deborah S. Hunt, Clerk

APPENDIX D

RECOMMENDED FOR FULL-TEXT PUBLICA-
TION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0183p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DETROIT FREE PRESS, INC., Plaintiff-Appellee, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant-Appellant.	No. 14-1670

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 2:13-cv-12939—Patrick J. Duggan, District
Judge.

Argued: April 22, 2015

Decided and Filed: August 12, 2015

Before: GUY, COOK, and McKEAGUE,
Circuit Judges.

COUNSEL

ARGUED: Steve Frank, U.S. DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Herschel P. Fink, DETROIT FREE PRESS, INC., Detroit, Michigan, for Appellee. **ON BRIEF:** Steve Frank, U.S. DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Herschel P. Fink, DETROIT FREE PRESS, INC., Detroit, Michigan, Paul R. McAdoo, McADOO LAW PLLC, Ypsilanti, Michigan, for Appellee. Bruce D. Brown, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Washington, D.C., for Amici Curiae.

OPINION

PER CURIAM. *Detroit Free Press v. United States Department of Justice*, 73 F.3d 93 (1996) (*Free Press I*), held that the Freedom of Information Act requires government agencies to honor requests for the booking photographs of criminal defendants who have appeared in court during ongoing proceedings. Despite that holding, the United States Marshals Service denied the Free Press's 2012 request for the booking photographs of Detroit-area police officers indicted on federal charges. The district court, bound by *Free Press I*, granted summary judgment to the news-

paper in the ensuing lawsuit. We are similarly constrained and therefore AFFIRM, but we urge the full court to reconsider the merits of *Free Press I*.

I.

Congress enacted the Freedom of Information Act (FOIA) in 1966 to "implement a general philosophy of full agency disclosure" of government records. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 754 (1989). The statute requires federal agencies to make their opinions and policy statements generally available to the public and to make other records "promptly available" to any person who requests them. 5 U.S.C. § 552(a)(2)-(3). An agency may withhold or redact information that falls within one of nine statutory exemptions. *Id.* § 552(b). Exemption 7(C), the provision at issue here, permits agencies to refuse requests for "records or information compiled for law enforcement purposes" if public release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C).

Free Press I held that Exemption 7(C) did not apply to booking photographs created by federal law-enforcement agencies. Specifically, the court held that "no privacy rights are implicated" by releasing booking photographs "in an ongoing criminal proceeding, in which the names of the defendants have already been divulged and in which the defendants themselves have already appeared in open court." *Free Press I*, 73 F.3d at 97. It reasoned that booking photographs of individuals who have "already been identified by name by the federal government" and whose

"visages ha[ve] already been revealed during prior judicial appearances" reveal "[n]o new information that … indictees would not wish to divulge" to the public. *Id.* The court expressly declined to address whether releasing the images following acquittals, dismissals, or convictions would implicate privacy interests. *Id.* Judge Norris dissented, maintaining that a booking photograph conveys "much more than the appearance of the pictured individual," including his "expression at a humiliating moment." *Id.* at 99 (Norris, J., dissenting).

In the wake of *Free Press I*, the United States Marshals Service adopted a "bifurcated policy" for releasing booking photographs. It required agency offices located within the Sixth Circuit's jurisdiction to honor all requests for photographs in their possession, and mandated that offices in other jurisdictions release photographs to residents of the four states within the Sixth Circuit. The government suggests that national media organizations exploited that policy by employing "straw man" requesters in Michigan, Ohio, Kentucky, and Tennessee to obtain records maintained in other jurisdictions.

For fifteen years, *Free Press I* was the only circuit-level decision to address whether Exemption 7(C) applied to booking photographs. But the Tenth and Eleventh Circuits recently considered the issue, and both disagreed with this court's analysis. *See World Publ'g Co. v. Dep't of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantsalis v. Dep't of Justice*, 635 F.3d 497 (11th Cir. 2011) (*per curiam*) (adopting district court opinion), *cert. denied*, 132 S. Ct. 1141 (2012). The

United States Marshals Service abandoned its bifurcated policy in 2012 in light of the circuit split.

The Free Press submitted the FOIA request at issue here after the policy's demise. When the Deputy U.S. Marshal for the Eastern District of Michigan denied the request, the Free Press sued, the district court granted the newspaper summary judgment, and the government timely appealed.

II.

Although we must follow *Free Press I*, *see* 6th Cir. R. 32.1(b), we urge the full court to reconsider whether Exemption 7(C) applies to booking photographs. In particular, we question the panel's conclusion that defendants have no interest in preventing the public release of their booking photographs during ongoing criminal proceedings. *See Free Press I*, 73 F.3d at 97.

Exemption 7(C) protects a non-trivial privacy interest in keeping "personal facts away from the public eye," *Reporters Comm.*, 489 U.S. at 769, particularly facts that may embarrass, humiliate, or otherwise cause mental or emotional anguish to private citizens, *see Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 166-71 (2004) (families have a privacy interest in photographs of a relative's death scene); *Rimmer v. Holder*, 700 F.3d 246, 257 (6th Cir. 2012) (suspects and third parties have a privacy interest in avoiding embarrassment, humiliation, or danger that could result from releasing records of an investigation); *Assoc. Press v. U.S. Dep't of Def.*, 554 F.3d 274, 287-88 (2d Cir. 2009) (abused detainees and their

abusers both possess privacy interests in avoiding embarrassment and humiliation resulting from the public release of records detailing abuse). Booking photographs convey the sort of potentially embarrassing or harmful information protected by the exemption: they capture how an individual appeared at a particularly humiliating moment immediately after being taken into federal custody. *See Karantsalis*, 635 F.3d at 503; *Free Press I*, 73 F.3d at 99 (Norris, J., dissenting); *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999). Such images convey an "unmistakable badge of criminality" and, therefore, provide more information to the public than a person's mere appearance. *United States v. Irorere*, 69 F. App'x 231, 235 (6th Cir. 2003); *cf. N.Y. Times Co. v. Nat'l Aeronautics & Space Admin.*, 920 F.2d 1002, 1006 (D.C. Cir. 1990) (en banc) (explaining that an audio recording conveys more than a verbatim transcript of the recording, because "information recorded through the capture of a person's voice is distinct and in addition to the information contained in the words themselves").

A criminal defendant's privacy interest in his booking photographs persists even if the public can access other information pertaining to his arrest and prosecution. Individuals do not forfeit their interest in maintaining control over information that has been made public in some form. *See Am. Civil Liberties Union v. U.S. Dep't of Justice*, 750 F.3d 927, 932 (D.C. Cir. 2014) ("[T]he fact that information about [individuals who were indicted but not convicted] is a matter of public record simply makes their privacy interests [in their case names and docket numbers] 'fade,' not disappear altogether."); *Prison Legal News v.*

Exec. Office for U.S. Attorneys, 628 F.3d 1243, 1249–50 (10th Cir. 2011) (holding that Exemption 7(C) permitted the government to withhold autopsy photographs and a portion of a video depicting a brutal prison murder even though the images and video were displayed publicly in a courtroom during two trials); *see also Reporters Comm.*, 489 U.S. at 770 ("[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.").

Further, criminal defendants do not forfeit their interest in controlling private information while their cases remain pending. Even if an individual possesses a *heightened* interest in controlling information about his past entanglements with the criminal justice system, *see Free Press I*, 73 F.3d at 97, it does not follow that he has *zero* interest in controlling what information becomes public during ongoing proceedings. Moreover, booking photographs often remain publicly available on the Internet long after a case ends, undermining the temporal limitations presumed by *Free Press I.*[1] *Cf. Reporters Comm.*, 489 U.S. at 771 (noting that the advent of technology allowing computers to store information about an individual's criminal history "that would otherwise have surely

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[1] We doubt that the panel accounted for Internet search and storage capabilities when deciding *Free Press I*. Notably, the panel issued its opinion nearly two years before Google registered as a domain in September 1997. *See* Google, *Our history in depth*, http://www.google.com/about/company/history/ (last visited Aug. 5, 2015).

been forgotten" contributes to a "substantial" privacy interest in FBI-compiled rap sheets).

III.

In sum, several factors merit revisiting *Free Press I*. But we remain bound by our precedent and therefore AFFIRM.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DETROIT FREE PRESS, INC.,

Plaintiff,

Case No. 13-12939

v.

Hon. Patrick J. Duggan

UNITED STATES
DEPARTMENT OF JUSTICE,

Defendant.

OPINION AND ORDER

The present dispute involves Plaintiff Detroit Free Press's ("Free Press") January 25, 2013 request for booking photographs (colloquially referred to as "mug shots") of four individuals then under indictment and awaiting trial on federal drug and public corruption charges in the United States District Court for the Eastern District of Michigan. The request was made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. At the time of the request, the four individuals—all police officers with the City of Highland Park, Michigan—had been indicted, their names had been made public, they had appeared in

open court, and they were being actively prosecuted by the United States Attorney's Office. The United States Marshal Service ("USMS"), a subordinate law enforcement bureau within Defendant Department of Justice ("DOJ"), denied the request, citing the FOIA's Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), despite controlling Sixth Circuit precedent holding that the subjects of the booking photographs do not have a privacy interest warranting nondisclosure.

After exhausting administrative remedies, Free Press filed a three-count complaint containing the following causes of action against DOJ: Count I Violation of the FOIA; Count II—Contempt; and Count III—Declaratory Judgment. (Am. Compl.) The parties subsequently filed cross motions for summary judgment pursuant to Federal Rule of Civil Procedure 56 and the motions have been fully briefed. Having determined that that oral argument would not significantly aid the decisional process, the Court dispensed with oral argument pursuant to Local Rule 7.1(f)(2). For the reasons stated herein, the Court grants summary judgment in favor of Free Press on Counts I and III but grants summary judgment in DOJ's favor on Count II.

I. BACKGROUND

A. Legal Framework

1. Statutory

a. The Freedom of Information Act ("FOIA")

"The statute known as the FOIA is actually a part of the Administrative Procedure Act (APA). Section 3 of the APA as enacted in 1946 gave agencies broad discretion concerning the publication of governmental records." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754, 109 S. Ct. 1468, 1472 (1989). Congress subsequently amended section 3 in furtherance of a stated intention to promote "'a general philosophy of full agency disclosure[.]'" *Id.* (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360, 96 S. Ct. 1592, 1599 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965))); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151, 110 S. Ct. 471, 475 (1989) (describing public access to government documents as "the fundamental principle… that animates the FOIA[]"); *CIA v. Sims*, 471 U.S. 159, 166-67, 105 S. Ct. 1881, 1886 (1985) ("The mandate of the FOIA calls for broad disclosure of Government records."); *Rose*, 425 U.S. at 361, 96 S. Ct. at 1599 (explaining that Congress enacted the FOIA to "open agency action to the light of public scrutiny[]") (quotation omitted).

Despite the principle of transparency animating the FOIA, there are certain instances in which Congress has deemed disclosure inappropriate. *Sims*,

471 U.S. at 166-67, 105 S. Ct. at 1886 ("Congress recognized, however, that public disclosure is not always in the public interest[.]"). Accordingly, in amending the FOIA, "Congress exempted nine categories of documents from the FOIA's broad disclosure requirements." *Reporters Comm.*, 489 U.S. at 755, 109 S. Ct. at 1472. These exemptions are delineated in 5 U.S.C. § 552(b).[1] One of those exemptions is relevant to this case: Exemption 7(C).[2]

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[1] "If an agency improperly withholds any documents," by, for example, invoking an exception that is inapplicable, "[federal] district court[s] ha[ve] jurisdiction to order their production." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755, 109 S. Ct. 1468, 1472 (1989). Contrary to the typical standards of review of agency action set forth in the APA instructing that agency action "must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the [withholding governmental] agency to sustain its action[.]'" *Id.* (quoting 5 U.S.C. § 552(a)(4)(B)).

[2] Although DOJ cited both Exemption 6 and Exemption 7(C) in its initial denial of Free Press's FOIA request, (FOIA Denial, Def.'s Mot. Ex. 20), the former protects "personnel and medical files and similar files" while the latter excludes from disclosure "records or information compiled for law enforcement purposes[.]" 5 U.S.C. § 552(b)(6), (7)(C). There is no indication that the records sought in this action fit the types of documents described in Exemption 6. After the instant action was filed in this Court, however, DOJ's Office of Information Policy ("OIP") affirmed the denial, albeit "on partly modified grounds[.]" (Def.'s Mot. Ex. 23.) In the letter affirming the denial, OIP did not cite Exemption 6 but rather relied exclusively on Exemption 7(C). *(Id.)*

Exemption 7(C) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to constitute an unwarranted invasion of personal privacy.",[3] 5 U.S.C. § 552(b)(7)(C). DOJ denied the request giving rise to the instant suit on the basis that the disclosure of the booking photographs "could reasonably be expected to constitute an unwarranted invasion of personal privacy." (FOIA Denial, Def.'s Mot. Ex. 20.) As explained more fully below, however, despite USMS's policy regarding the disclosure of booking photographs, the United States Court of Appeals for the Sixth Circuit has explicitly rejected the notion that Exemption 7(C) applies in circumstances such as those existing in this case.

Both exemptions referenced in this footnote protect personal privacy interests, although, "Exemption 7(C) is more protective of privacy than Exemption 6[.]" *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496 n.6, 114 S. Ct. 1006, 1013 n.6 (1994) (explaining that these exemptions "differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions[]").

[3] This exemption recognizes that "[t]he focus of the FOIA is to ensure that the Government's actions are open for scrutiny, not to reveal private third party information[] which happens to be in the warehouse of the Government." *Joseph W. Diemert, Jr. & Assocs. Co. v. FAA*, 218 F. App'x 479, 482 (6th Cir. 2007) (unpublished) (citing *Reporters Comm.*, 489 U.S. at 765-66, 109 S. Ct. 1477-78).

b. The Privacy Act

The Privacy Act of 1974, codified at 5 U.S.C § 552a, "delineates duties and responsibilities for federal agencies that collect, store, and disseminate personal information about individuals." *Butler v. U.S. Dep't of Justice*, 368 F. Supp. 2d 776, 782 (E.D. Mich. 2005). It prohibits federal agencies from disclosing personal information about individuals that is maintained in systems of records except pursuant to written authorization from the individual or if the disclosure fits within one of the statutory exceptions. Importantly, it is not a violation of the Privacy Act to disclose documents that must be released under the FOIA. 5 U.S.C. § 552a(b)(2). As will become clear in reading this Opinion and Order, the Privacy Act is relevant because DOJ argues that if, for example, USMS were to disclose the booking photographs in one of the two federal circuits that have held that such photographs are exempted from disclosure pursuant to Exemption 7(C), USMS's disclosure would be in violation of the Privacy Act. (Def.'s Br. 6 ("The effect of the Privacy Act is to bar discretionary release of [] information under the FOIA, limiting the disclosure of personal information to the public to what is mandatory.").)

B. Factual and Procedural Background

1. *The Parties*

Plaintiff Detroit Free Press ("Free Press") is a Michigan corporation that publishes the Detroit Free Press, a newspaper of general circulation in the State of Michigan. Defendant United States Department of

Justice ("DOJ") is a cabinet-level department within the Executive Branch of the United States Government. The United States Marshal Service ("USMS") is a law enforcement bureau within the DOJ. 28 U.S.C. § 561(a) ("There is hereby established a United States Marshals Service as a bureau within the Department of Justice under the authority and direction of the Attorney General.").

2. *Sixth Circuit Precedent*

In 1993, Free Press submitted a FOIA request for the booking photographs of eight individuals who were then under indictment and awaiting trial on federal charges. USMS, citing Exemption 7(C), denied the request. Subsequently, Free Press filed a lawsuit challenging the nondisclosure. Upon concluding that the information divulged by dissemination of the photographs did not implicate privacy interests, Judge Anna Diggs Taylor of the Eastern District of Michigan granted the newspaper summary judgment and awarded attorney's fees to Free Press. *Detroit Free Press v. Dep't of Justice*, No. 93-74692 (E.D. Mich. Apr. 29, 1994) (Taylor, J.) (Order attach. Def.'s Mot. Ex. C). DOJ appealed and, in a decision accompanied by a vigorous dissent, a panel of the Sixth Circuit affirmed. *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93 (6th Cir. 1996) (hereinafter, "*Free Press I*"). The Sixth Circuit denied DOJ's request for rehearing and rehearing en banc and DOJ declined to seek certiorari in the Supreme Court.

The court began its analysis by setting forth the prerequisites to application of Exemption 7(C):

> To be exempt from disclosure under the privacy provision of § (b)(7)(C), information must first be "compiled for law enforcement purposes." Second, the release of the information by the federal agency must *reasonably* be expected to constitute an invasion of personal privacy. Finally, that intrusion into private matters must be deemed "unwarranted" after balancing the need for protection of private information against the benefit to be obtained by disclosure of information concerning the workings of components of our federal government.

Id. at 96 (emphasis in original). Citing a *per se* rule within the circuit, the *Free Press I* panel quickly dismissed any notion that the booking photographs sought by the newspaper were not "compiled for law enforcement purposes." *Id.* (citing *Jones v. FBI*, 41 F.3d 238, 245-46 (adopting rule enunciated in three sister circuits "under which records compiled *by* a law enforcement agency qualify as 'records compiled *for* law enforcement purposes' under FOIA[]") (emphasis in original). Because USMS created the booking photographs after arresting the subjects as a routine part of the process of taking them into federal custody, the eight photographs sought easily satisfied the first requirement. *See* 28 CFR § 0.111(j) (including the "[r]eceipt, processing and transportation of prisoners held in the custody of a marshal" in a list of USMS activities).

With respect to the second element, the Sixth Circuit concluded that the release of booking photographs "could not reasonably be expected to constitute an invasion of personal privacy[]" "to the extent that

the FOIA request … concerns ongoing criminal proceedings in which the names of the indicted suspects have already been made public and in which the arrestees have already made court appearances." *Id.* at 97, 95.

Having determined that the release of the booking photographs at issue did not result in an invasion of any personal privacy interest, the majority opinion did not conduct a balancing analysis as part of its holding. It did, however, address in dicta the possibility that a "significant public interest in the disclosure of the mug shots of the individuals awaiting trial *could*, nevertheless, justify the release of that information to the public." *Id.* at 97-98 (emphasis in original); *id.* at 98 (noting that the release of booking photographs might, "in limited circumstances[,]" "serve to subject the government to public oversight[]").[4]

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[4] This is consistent with the Supreme Court's application of a categorical balancing approach in *Reporters Committee*. 489 U.S. at 776-77, 109 S. Ct. at 1483-84 (explaining that "[o]ur cases provide support for the proposition that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction[]" and concluding that such a categorical approach may be undertaken pursuant to Exemption 7(C)). As the Tenth Circuit explained in *World Publishing Company v. United States Department of Justice*, "while we apply a categorical approach as required by *Reporter's Committee*, it is possible to envision a narrow set of circumstances that might justify an as applied approach." 672 F.3d 825, 832 n.1 (10th Cir. 2012) (citations omitted). For instance, "[i]f a request was made on the basis of case-specific 'compelling evidence' of illegal activity, release might be appropriate[.]" *Id.*

Prior to the Sixth Circuit's decision in *Free Press I*, USMS had a policy of not disclosing booking photographs of federal arrestees unless the subject of the photograph was a fugitive and its release would aid in the fugitive's capture. (3/21/1994 USMS Policy Notice, No. 94-006 ¶ I, attach. Def.'s Mot. Ex. A-4 ("As a general rule, post-arrest photographs of prisoners or fugitives are not made available to the news media unless … release of the photograph is for the purpose of locating that individual[.]").) After *Free Press I* and in effort to accommodate the court's ruling therein, USMS adopted a bifurcated approach to the disclosure of booking photographs, adjusting its policy for claims arising out of the jurisdiction of the Sixth Circuit. *(See* 9/20/1997 USMS Policy Notice, No. 94-006B, attach. Def.'s Mot. Ex. A-7.) With the exception of a one-year period between August 2004 and August 2005, USMS released booking photographs in accordance with *Free Press I.* The circumstances of this period are described immediately below.

3. *Subsequent Cases within the Sixth Circuit*

In 2004, the Supreme Court decided *National Archives & Records Administration v. Favish*, 541 U.S. 157, 124 S. Ct. 1570 (2004), a case involving death scene photographs of then-President William Clinton's deputy counsel Vincent Foster, Jr. Investigators concluded that Foster had committed suicide but the plaintiff in the case was skeptical and requested the photographs pursuant to the FOIA. The Government invoked the FOIA's Exemption 7(C) in denying the request, a decision the Supreme Court ultimately upheld upon finding that the requested photographs implicated privacy interests.

After *Favish*, USMS suspended the Sixth Circuit exception upon guidance from DOJ's Office of Information Policy ("OIP"). (Def.'s Mot. 13 n.3 (citing Bordley Decl. ¶ 15, n.2, Def.'s Mot. Ex. A and *id.* Ex. A-10).) The new policy expressed an opinion that *Favish*, coupled with "the overwhelming weight of case law broadly interpreting Exemption 7(C)'s privacy protection," undermined *Free Press I* to such an extent that the decision "should no longer be regarded as authoritative even within the Sixth Circuit." (Pl.'s Br. 11-12 (citing 2004 FOIA Act Guide 3-4, Pl.'s Mot. Ex. D).) Subsequent to this policy revision, USMS denied two separate FOIA requests from within the Sixth Circuit and both requesters brought enforcement actions in federal district court.

One request was made by Free Press and the enforcement action was once again heard by Judge Taylor in the Eastern District of Michigan. *Detroit Free Press v. Dep't of Justice*, No. 05-71601 (E.D. Mich. 2005) (hereinafter "*Free Press II*"). The other request was made in the Northern District of Ohio by the Akron Beacon Journal. The other case involved the Akron Beacon Journal and was filed in the Northern District of Ohio. *Beacon Journal Publ'g Co. v. Gonzalez*, No. 05-1396 (N.D. Ohio 2005). By the time the cases were heard, USMS had restored the Sixth Circuit exception because OIP rescinded its previous guidance. (Def.'s Mot. 13 n.3 (citing Bordley Decl. ¶ 15, n.2, Def.'s Mot. Ex. A and *id.* Ex. A-11).) Thus, in both cases the requested booking photographs were released prior to the issuance of any opinions by the respective courts. Judge Taylor granted summary judgment in favor of DOJ on the grounds that the request was moot but awarded Free Press attorney's

fees. (Pl.'s Mot. Ex. B.) Judge Dowd disagreed that the case was moot, ruled that the denial violated the FOIA, and awarded the newspaper attorney's fees. (Pl.'s Mot. Ex. C.)

4. *Circuit Split and Subsequent USMS Policy Revision*

Between USMS's reinstatement the Sixth Circuit exception and the events giving rise to this lawsuit, two federal courts of appeals addressed whether Exemption 7(C) prevents disclosure of federal booking photographs—the precise issue raised in *Free Press I*—and answered that question in the affirmative thereby creating a circuit split on the issue. *See World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497 (11th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1141 (U.S. Jan. 23, 2012). After these decisions, USMS issued a memorandum "supersed[ing] all prior memoranda regarding USMS policy with respect to the release of USMS booking photographs (mug shots) to the public or media." (12/6/2012 Mem. Def.'s Mot. Ex. A-1.) This memorandum provides:

> Until now, the USMS has employed an exception for FOIA requests originating within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit. …
>
> In light of the weight of legal precedent now supporting the Department of Justice's conclusion that booking photographs generally should not be disclosed under the FOIA, the Department has decided that a uniform policy

> should be applied. Accordingly, effective immediately, the USMS will not disclose booking photographs under the FOIA, regardless of where the FOIA request originated. …

(*Id.* at 2-3.)

5. *The FOIA Request Giving Rise to the Instant Action* [5]

On January 25, 2013, Free Press submitted a FOIA request to the Deputy United States Marshal in the Eastern District of Michigan seeking the booking photographs of four Highland Park police officers who had made their initial appearance in a case charging them with bribery and drug conspiracy. (FOIA Request, Def.'s Mot. Ex. 19.) DOJ, acting through the Office of General Counsel of the USMS, denied this request on January 29, 2013 pursuant to USMS's newly-promulgated policy. (FOIA Denial, Def.'s Mot. Ex. 20.) Specifically, DOJ, citing Exemptions (b)(6) and (b)(7)(C) of FOIA, explained that the release of the four requested booking photographs "could rea-

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[5] The original complaint filed in this action sought the booking photographs of former Detroit Mayor Kwame Kilpatrick, his father Bernard Ferguson, and his friend and contractor Bobby Ferguson. (7/6/2013 Compl., ECF No. 1.) Free Press's FOIA request was denied by USMS pursuant to its new policy. After the complaint was filed, USMS discovered that each of the photographs had been previously released and therefore re-released them. (Def.'s Br. 14 n.4 (citing Bordley Decl. ¶¶ 35-37, 39-40, Def.'s Mot. Ex. A); Pl.'s Br. 6-7.) As a result, Free Press amended its complaint to focus on the booking photographs of the Highland Park police officers.

sonably be expected to constitute an unwarranted invasion of personal privacy[.]" *(Id.* (citing 5 U.S.C. § 552(b)(7)(C).) On March 15, 2013, Free Press filed a timely appeal with DOJ's Office of Information Policy ("OIP"), which DOJ acknowledged receiving on March 25, 2013. *(See* Def.'s Mot. Exs. 21-22.) DOJ did not issue a determination on the appeal within the twenty days provided by statute and Free Press, therefore, exhausted its administrative remedies. *See* 5 U.S.C. § 552(a)(6)(A)(ii). On August 19, 2013, subsequent to the filing of the operative complaint (Free Press's Amended Complaint), OIP affirmed, albeit "on partly modified grounds," USMS's denial of Free Press's January 25, 2013 FOIA request. (Def.'s Mot. Ex. 23.) In affirming USMS's initial denial of the request, OIP explained:

> To the extent that responsive records exist, without consent, proof of death, official acknowledgment of an investigation, or an overriding public interest, disclosure of law enforcement records concerning an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy. Because any records responsive to your client's request would be categorically exempt from disclosure, USMS properly asserted Exemption 7(C) and was not required to conduct a search for the requested records.

(Id. (internal citations omitted).)

6. *Legal Proceedings*

Free Press filed its Amended Complaint on August 10, 2013.[6] (ECF No. 7.) The Amended Complaint contains three causes of action in connection with DOJ's rejection of Free Press's FOIA request for the booking photographs of the four Highland Park police officers: Count I—Violation of the FOIA; Count II—Contempt; and Count III—Declaratory Judgment.[7] As relief, Free Press seeks an order directing USMS to produce the photographs of the subjects listed in its January 25, 2013 request, an order finding DOJ in contempt of this Court's and the Sixth Circuit's directive in *Free Press I*, and assessing appropriate penalties, a declaratory judgment that *Free Press I* remains in force and that DOJ's 2012 policy is invalid to the extent it is inconsistent with that case, and an award of attorney's fees and costs. The parties eventually filed cross motions for summary judgment pursuant to Federal Rule of Civil Procedure 56 and it is these motions that are presently before the Court.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 instructs courts to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as

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[6] *See* note 5, *supra.*

[7] At the time the Amended Complaint was filed, only one of the four Highland Park police officers had been sentenced and judgment entered. Case No. 13-20212-1 (judgment entered July 2, 2013).

a matter of law." Fed. R. Civ. P. 56(a). A court assessing the appropriateness of summary judgment asks "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Amway Distribs. Benefits Ass'n v. Northfield Ins. Co.*, 323 F.3d 386, 390 (6th Cir. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512 (1986)).

Courts evaluate cross motions for summary judgment under the same standard. *La Quinta Corp. v. Heartland Props., L.L.C.*, 603 F.3d 327, 335 (6th Cir. 2010) (citing *Beck v. City of Cleveland*, 390 F.3d 912, 917 (6th Cir. 2004)).

When faced with cross motions for summary judgment, each motion is examined on its own merits. *Id.*

III. ANALYSIS

A. Count I—Violation of FOIA

The issue in the typical FOIA enforcement action is whether the nondisclosing agency has proven that the documents sought are exempt from disclosure under any of the nine exemptions set forth in 5 U.S.C. § 552(b). As noted elsewhere in this Opinion and Order, unlike the substantial evidence and arbitrary and capricious standards of review typically triggered under the APA, the FOIA (which is part of the APA) places the burden on the withholding agency, here DOJ, "to sustain its action[.]" *Reporters Comm.*, 489 U.S. at 755, 109 S. Ct. at 1472 (quoting 5 U.S.C. § 552(a)(4)(B)). It is beyond doubt that *Free*

Press I, a published panel decision, remains controlling precedent "unless an inconsistent decision of the United States Supreme Court requires modification of the decision or [the Sixth Circuit] sitting en banc overrules the prior decision." *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (citations omitted). As DOJ acknowledges, this Court, which is squarely situated within the Sixth Circuit, is bound by *Free Press I* as the law of this circuit. *(See*, *e.g.*, Def.'s Br. 2.) It necessarily follows that DOJ is unable to discharge its burden of justifying its nondisclosure of the four booking photographs at issue. Accordingly, the Court grants summary judgment in favor of Free Press on Count I.

Because the Court has rendered its decision with respect to Count I on the basis of *stare decisis*, the Court declines to address the merits of the parties' arguments regarding whether *Free Press I* was correctly decided. The Court does, however, believe that it is necessary to address the issue of issue preclusion, or collateral estoppel, as it has been extensively briefed. To the extent that Free Press contends that principles of *res judicata* preclude DOJ from seeking en banc review of *Free Press I* in the Sixth Circuit, this Court does not agree. (Pl.'s Br. 15.)

First, two federal appellate courts interpreting the privacy interest protected by Exemption 7(C) have reached a conclusion contrary to that reached by the Sixth Circuit. *Karantsalis*, 635 F.3d at 499 ("We take note of the opinion in *Detroit Free Press* [] and respectfully reject its holding."); *World Publ'g Co.*, 672 F.3d at 829 ("[T]his court is not bound by the Sixth Circuit's decision in *Detroit Free Press*, though it should

be carefully considered. [] The two federal courts to address this issue since *Detroit Free Press* rejected its holding that there is no privacy interest in USMS booking photos, and held that Exemption 7(C) prevents disclosure in circumstances similar or identical to this case.") (citing *Karantsalis*, 635 F.3d at 497 and *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F. Supp. 2d 472, 492 (E.D. La. 1999)); *see also Times Picayune*, 37 F. Supp. 2d at 477 (holding that the subject of a USMS booking photograph has a protectable privacy interest under the FOIA). Due to the FOIA's liberal venue provision,[8] DOJ contends that USMS's continued compliance with *Free Press I* creates a risk that USMS will take action in direct conflict with the law as articulated in both the Tenth and Eleventh Circuits.[9] (Def.'s Reply 11 (indicating that

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[8] Title 5 U.S.C. § 552(a)(4)(B) provides that venue and jurisdiction are proper "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia[.]"

[9] DOJ points out that various media entities, many of which are national conglomerates with local affiliates, have circumvented the USMS policy and the decisions of the Tenth and Eleventh Circuits by employing a "straw man" requester. (Def.'s Br. 13.) Reporters Committee for Freedom of the Press filed an *amicus* brief in support of a pending petition for rehearing en banc in *Karantsalis* explaining the conundrum: "The only option for requesters outside the states of the Sixth Circuit then is use of a 'straw man'—a Kentucky, Michigan, Ohio or Tennessee resident willing to request and provide the information to out-of-state journalists and others." (Amicus Br. of Reporters Comm. for Freedom of the Press at 6, *Karantsalis,* No. 10-10229 (11th Cir. May 2, 2011), Def.'s Br. Ex. A-17.) Further, as the district court noted in *Karantsalis*, USMS released the booking photographs of Bernard Madoff and Joe Nacchio—whose photographs

such circumstances would arise where the requester resides in the Sixth Circuit and seeks a booking photograph taken in either the Tenth or Eleventh Circuit).) Because "a conflict has emerged between different circuits," and this conflict gives rise to a Catch-22 (in the event a requester lives in the Sixth Circuit and seeks a photograph from the Tenth Circuit, for example), "the government should be free to relitigate the issue[.]" 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4425 (2d ed. 1986) (further explaining that "[t]his argument is most persuasive when the common defendant has become involved with two conflicting decisions on the merits, lest one party be able to enjoy different rules in different circuits[.]"). The Court finds this argument to be DOJ's most persuasive because in addition to acting in contravention to the rule enunciated in the Tenth and Eleventh Circuits, USMS would also be in violation of its statutory duties as described in the Privacy Act. (Def.'s Br. 41.)

Further, collateral estoppel does not prevent DOJ, the "dissatisfied party[,]" from "seek[ing to redress what it believes was a] wrongly decided question." *Rutherford v. Columbia Gas*, 575 F.3d 616, 625

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were not taken within the Sixth Circuit—"pursuant to FOIA requests from within the jurisdiction of the Sixth Circuit." No. 10-10229, 2009 U.S. Dist. LEXIS 126576, at *7. The district court also indicated that "[t]he fact that Plaintiff has purportedly filed a new request for the booking photographs of [a federal indictee] from a postal mailbox in the Sixth Circuit is immaterial to this case, which involves a request arising from within the jurisdiction of the Eleventh Circuit." *Id.* at *7-8 (internal citation omitted).

(6th Cir. 2009) (Clay, J., concurring in part and dissenting in part). As DOJ succinctly states:

> The crux of [] Free Press's argument is that the Sixth Circuit's decision more than seventeen years ago controls this case and cannot be disturbed. That the Sixth Circuit's decision controls in district court as a matter of *stare decisis* is of course true. That it can never be disturbed is equally untrue.

(Def.'s Br. 34.) Free Press's implicit suggestion that *Free Press I* is somehow indelible runs counter to the development of law in this country. Although courts within the Sixth Circuit have consistently applied *Free Press I* to FOIA requests, as explained, two other circuits have weighed in on the precise question resolved in *Free Press I* and have respectfully rejected the Sixth Circuit's holding. *Karantsalis*, 635 F.3d at 499; *World Publ'g Co.*, 672 F.3d at 829. These two cases, decided fairly recently and years after *Free Press II* and *Beacon Publishing*, may serve as the impetus to reconsideration en banc by the Sixth Circuit. While axiomatic that the Sixth Circuit is not bound by the legal interpretations expressed by co-equal appellate courts elsewhere in this country, this alteration to the legal landscape, in addition to other events unnecessary to this Court's determination,[10] may provide the requisite grounds to grant a rehearing en banc should the Sixth Circuit decide that the issue is

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[10] For example, the dramatic technological changes brought about by the rise of the internet. (Def.'s Br. 37.)

sufficiently important to hear anew. *See* Fed. R. App. P. 35(b)(1)(B).

Second, DOJ contends that collateral estoppel is inappropriate because *Free Press I* "remains in anomaly in Sixth Circuit jurisprudence." (Def.'s Br. 37.) While the Court need not address the merits of this argument, if true, this provides further justification for en banc review. Fed. R. App. P. 35(a)(1) (providing that en banc review is appropriate if "necessary to secure or maintain uniformity of the court's decisions[]").

Lastly, DOJ argues that the Supreme Court's decision in *Favish* renders *Free Press I*'s public interest analysis questionable. (Def.'s Br. 37.) This is DOJ's least persuasive argument in support of its position that alterations to the legal landscape militate against strict application of collateral estoppel as the public interest portion of *Free Press I* was dicta and is therefore not binding. The argument is not, however, wholly without merit.

For all of these reasons, the Court finds that DOJ is not collaterally estopped from seeking review of the Sixth Circuit's decision in *Free Press I*.

B. Count II—Contempt

In Count II, Free Press asks this Court to hold DOJ in contempt for promulgating USMS's 2012 booking photograph policy in violation of both *Free Press I*

and *II*.[11] (Pl.'s Br. 19 ("The DOJ's December 12, 2012 policy itself, signed by [USMS] General Counsel Gerald M. Auerbach [] evidence contempt for those rulings.") (citing Pl.'s Mot. Ex. E).) In support of its argument, Free Press contends that DOJ has a "repeated history over the years of 'disrespecting' (to adopt a popular slang term) *Detroit Free Press I* [.]" *(Id.* at 18.) Further, DOJ's purported "intent" to violate these court orders is evidenced by DOJ's filing of a brief in opposition to a petition for certiorari with the Supreme Court in connection with the *Karantsalis* case. *(Id.* at 19 (citing DOJ's Br. in Opp. Pl.'s Mot. Ex. J).)

DOJ, on the other hand, contends that contempt is inappropriate for two general reasons. First,

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[11] Free Press argues that DOJ's "2012 policy declaration that it no longer needs to respect the law of this Circuit" warrants application of 5 U.S.C. § 552(a)(4)(G). (Pl.'s Br. 18.) This provision provides:

> In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee[.]

5 U.S.C. § 552(a)(4)(G). The language of this provision is discretionary and does not appear to expand the Court's inherent power to punish by way of contempt. *Cf. Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 18 n.18, 94 S. Ct. 1028, 1037 n.18 (1974) (noting that a Senate Report discussing the FOIA's contempt provision states, "This is another addition which has been made to avoid any possible misunderstanding as to the courts' powers[]") (citing S. Rep. No. 1219, 88th Cong., 2d Sess., 7 (1964)); *id.* at 20, 94 S. Ct. at 1038 ("With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest … that Congress sought to limit the inherent powers of an equity court.").

DOJ explains that "the legal predicate for contempt is absent[]" because the orders in *Free Press I* and *II* applied specifically to the photographs requested in those cases. (Def.'s Br. 3.) Second, DOJ argues that its considered litigation strategy of seeking rehearing en banc in the Sixth Circuit does not amount to contemptuous conduct.

"The movant in a civil contempt proceeding bears the burden of proving by clear and convincing evidence that the respondent violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order."[12] *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 550 (6th Cir. 2006) (internal quotation marks omitted). "[T]he prior order [must] be clear and unambiguous to support a finding of contempt." *Id. at* 551.

Free Press does not identify a clear and unambiguous order requiring the release of the booking photographs sought in *this* case. Rather, Free Press indicates that DOJ's "refusal to obey the law of the Circuit should be treated as contempt of Judge Tay-

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[12] In its Motion for Summary Judgment, Free Press intimates that this Court should hold USMS General Counsel Gerald M. Auerbach in contempt, (Pl.'s Br. 19), however in its conclusion it asks that the Court find "the Marshals Service of the DOJ in contempt[,]" *(id.* at 26). In its Reply and Opposition to DOJ's Cross Motion for Summary Judgment, Free Press "suggests that it is … appropriate for this Court to order the author of the … Booking Disclosure Policy, Marshals Service General Counsel [] Auerbach … to show cause why he should not be held in contempt." (Pl.'s Reply 8.)

lor's [1994] order, as it was affirmed and made categorical by the Sixth Circuit in [] *Free Press I*." (Pl.'s Reply 7.) The 1994 order, however, was limited to the photographs requested in that case. (*See* 1994 Order, Def.'s Mot. Ex. C ("Defendant is … ordered to forthwith make available to plaintiff the eight booking photographs … requested in July 1993.").) Further, while the Sixth Circuit affirmed Judge Taylor's order to the extent that the requested photographs comported with the criteria set forth in the Sixth Circuit's opinion, the order was, of course, limited to the facts and circumstances of that case. The order issued in *Free Press II is* equally unhelpful to Free Press's position. In that case, DOJ provided Free Press with the requested photographs after DOJ's OIP rescinded its guidance stating that *Free Press I* was no longer controlling in the Sixth Circuit. Because Judge Taylor dismissed *Free Press II as* moot, there was accordingly no order to produce the photographs. (Pl.'s Mot. Ex. B.) Without a "definite and specific order of the court" requiring the production of the photographs at issue in *this* case, there is simply no cause to hold any entity or individual—DOJ, USMS, or Mr. Auerbach—in contempt of court. *Liberte Capital*, 462 F.3d at 550.

Despite seeking to convince this Court that contempt is proper under the circumstances presented, Free Press's "real contention is that the disposition of the four booking photographs at issue here should be controlled by [*Free Press* I], not by the specific disclosure orders in prior cases directed at different records." (Def.'s Br. 44.) As explained in relation to Count I, Free Press is correct: the Sixth Circuit's decision controls the disposition of this case. However, it is an entirely proper litigation strategy to seek the

reversal of an arguably incorrect panel decision by petitioning for an en banc hearing. In other words, it is not contempt to try to change the law through appropriate channels. The precedential effect of *Free Press I* is unquestioned, and while this Court understands Free Press's frustration with what it views as DOJ's obstruction with its rights, enforcement of a party's failure to adhere to principles articulated in prior cases is effectuated by a ruling on the merits, not by way of contempt.[13]

Accordingly, the Court grants summary judgment in favor of DOJ and against Free Press on Count II.

C. Count III—Declaratory Judgment

In Count III, Free Press seeks a declaratory ruling that the 2012 USMS Booking Photograph Policy is invalid insofar as it directs that *Free Press I*

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[13] The Federal Rules of Civil Procedure expressly contemplate that attorneys may seek to reverse existing case law. Fed. R. Civ. P. 11(b)(2) ("By presenting to the Court a pleading, written motion, or other paper … an attorney … certifies that … the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law[.]"). In such circumstances, a court considering sanctions under Rule 11 should consider whether the "litigant has researched the issues and found some support for its theories even in minority opinions," and whether the litigant indicates that it is seeking to change the law. Fed. R. Civ. P. 11 Advisory Comm. Note, 1993 Amend. While Free Press has not moved for Rule 11 sanctions, the Court finds this discussion illustrative of the point that even though this Court is constrained by *Free Press I*, DOJ may permissibly seek to alter existing law.

shall not be followed for booking photograph requests originating in the districts of the Sixth Circuit.[14] (Pl.'s Br. 26; *see also* Am. Compl. ¶ 29 ("The DOJ has a continuing obligation, under the holdings of this Court and the Sixth Circuit in *Free Press I*, to comply with FOIA requests for mug shots of defendants in ongoing criminal proceedings, at least as to requests made within the Sixth Circuit").) Free Press is concerned that without a declaratory judgment, "DOJ is likely to continue to deny FOIA requests similar to those at issue here." (Am. Compl. ¶ 30.) Notably, Free Press did not pray for injunctive relief in its Amended Complaint. To the extent Free Press seeks a ruling that the 2012 policy violates circuit precedent, this has been accomplished in resolving Count I. The Court, therefore, grants summary judgment in favor of Free Press on Count III.

D. Relief

1. Disclosure of Requested Photographs

DOJ acknowledges that this Court "is bound by Sixth Circuit precedent with regard to Count I and paragraph B of [Free Press]'s prayer for relief[,]" (Def.'s Br. 45), which seeks "[a]n order directing the DOJ and the Marshals Service to produce to the Free Press the mug shots listed in the Request[,]" (Am. Compl. 10). In its Reply Brief, DOJ asks "that any order requiring the release of the booking photographs be stayed pending appeal." (Def.'s Reply 22-23.) This

[14] Free Press does not specifically indicate whether Count III is brought pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

request came after Free Press's opportunity to respond.

Federal Rule of Appellate Procedure 8(a) provides that a party seeking to stay a judgment or order of a district court pending appeal must ordinarily move first in the district court. Fed. R. App. P. 8(a)(1)(A). The Sixth Circuit reviews four factors when evaluating a stay pending appeal under this rule:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

SEIU Local 1 v. Husted, 698 F.3d 341, 343 (6th Cir. 2012) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). The moving party has the burden of demonstrating entitlement to a stay. *Id.* (citing *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002)).

With respect to the first factor, DOJ has presented persuasive arguments in support of its contention that *Free Press I* should be reconsidered en banc. Despite this, en banc hearings and rehearing are "not favored[.]" Fed. R. App. P. 35(a). Accordingly, the Court finds that the first factor is neutral.

The second factor does not fit the circumstances of this case very well. Because the photographs were taken in the Sixth Circuit and the prosecutions took place in a district embraced by the Sixth Circuit, DOJ does not face the Catch-22 described elsewhere in this Opinion and Order. In other words, DOJ does not face the potential of violating its Privacy Act obligations by releasing the photographs because Exemption 7(C) does not authorize nondisclosure in the Sixth Circuit. However, the subjects of the four booking photographs may be irreparably harmed absent the granting of a stay. This is particularly true because as of the date of this Opinion and Order, all four defendants have entered guilty pleas and all but one has commenced serving his sentence. Case No. 13-20212 (last guilty plea entered on March 11, 2014, officially closing the case). If the Sixth Circuit ultimately agrees with the Tenth and Eleventh Circuits, the disclosure of the booking photographs may harm the four subjects thereof.

Turning now to the third factor, the Court does not believe that granting the stay would harm others. This belief is rooted in part in the Court's recognition that *Free Press I* specifically declined to address "whether the release of a mug shot by a government agency would constitute an invasion of privacy in situations involving dismissed charges, acquittals, or completed criminal proceedings." 73 F.3d at 97. As mentioned, since the institution of this action, all four Highland Park police officers have pleaded guilty and judgment has been entered. Although Free Press had a right to the photographs pursuant to Sixth Circuit precedent, the public interests it asserts in support of its position that *Free Press I* was correctly decided

would not be furthered by the release of the photographs at this time. (Pl.'s Br. 23-24.)

The last factor involves the public's interest in granting a stay, which the Court touched upon above. While the public has an interest in DOJ adhering to law as articulated by the Sixth Circuit and this undercuts the propriety of granting the stay, the Court does not believe that the public's interest in the photographs at this juncture is very great.

In sum, while the Court does not endorse DOJ's conduct, which, as this Court has stated numerous times herein, was in violation of Sixth Circuit precedent, the Court does not believe that further delay in obtaining the photographs will harm cause any harm to either Free Press or the public. Accordingly, although DOJ must release the requested photographs, the Court grants DOJ's request to stay this order pending appeal.

2. *Attorney's Fees*

Free Press asks this Court to award attorney's fees and costs for DOJ's FOIA violation. Instead of arguing why such an award is proper in this case, Free Press relies on Judge Taylor's award of fees in both *Free Press I* (which the Sixth Circuit affirmed) and *Free Press II*, as well as Judge Dowd's decision awarding fees and costs in *Beacon Publishing*. In the two latter decisions, DOJ *explicitly* acknowledged that the refusal to disclose the requested booking photographs was a violation of the FOIA.

Similar to Free Press's briefs, DOJ's briefs are strikingly silent as to why it believes that the imposition of fees is not merited in this case. DOJ appears to acknowledge that its course of conduct in invoking Exemption 7(C) is incompatible with the court's holding in *Free Press I.* It follows that DOJ *implicitly* acknowledges that it violated the FOIA as interpreted in the Sixth Circuit.

The FOIA, as amended by the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007), provides a "court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). "[A] complainant has substantially prevailed if the complainant has obtained relief through … a judicial order, or an enforceable written agreement or consent decree[.]" *Id.* at § 552(a)(4)(E)(ii)(I).[15]

Although the OPEN Government Act permits courts to assess fees and costs in a case such as this where the complainant, here Free Press, has obtained a judicial order, the language is not obligatory. *Id.* Accordingly, the Court turns to the factors district courts are to consider in determining whether a pre-

[15] Prior to the OPEN Government Act, the FOIA had a basic fee provision: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552 (a)(4)(E) (prior to amendment).

vailing FOIA complainant should be awarded attorney's fees. *Free Press I*, 73 F.3d at 98. These factors include: "'the benefit to the public deriving from the case; the commercial benefit to the complainant and the nature of its interest in the records; and whether the agency's withholding had a reasonable basis in law.'" *Id.* (quoting *Am. Commercial Barge Lines Co. v. NLRB*, 758 F.2d 1109, 1111 (6th Cir. 1985)).

The Court does not believe that the newspaper's request of the booking photographs at issue was of benefit to the public.[16] Contrary to the conclusions of Judge Taylor in *Free Press I*, the Court does not agree that the booking photographs of federal arrestees provide "'insight into the criminal justice administration conducted in this district.'" *Id.* (quoting district court). Further, the Court "cannot discern how disclosure of [the four booking photographs] would serve the purpose of informing the public about the activities of their government." *Times Picayune*, 37 F. Supp. at 481 (citing *Reporters Comm.*, 489 U.S. at 774, 109 S. Ct. at 1482 (noting that disclosure may serve to "provide details to include in a news story, but [this] … is not the kind of public interest for which Congress enacted the FOIA[]")); *see also Karantsalis*, No. 10-10229, 2009 U.S. Dist. LEXIS 126576, at *15 (finding that "the public obtains no discernable interest from

[16] Judge Taylor reached the opposite conclusion in *Free Press I*. However, this Court is not bound by the decisions of other judges on the bench. While the Court certainly gives these decisions respectful consideration, the Court does not find Judge Taylor's reasoning persuasive. Further, although the Sixth Circuit affirmed the lower court's imposition of attorney's fees, it reviewed the award for an abuse of discretion.

viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities[]"), *aff'd Karantsalis*, 635 F.3d 497. Nor is the Court convinced that the disclosure of booking photographs provides "'further impetus to people who might come forward with evidence in criminal prosecutions.'" *Free Press I*, 73 F.3d at 98 (quoting district court). In addition to finding this suggestion entirely speculative, the Court is unable to ascertain how or why a booking photograph achieves this result better than an ordinary photograph. This factor favors DOJ.

The second factor district courts are to consider is "'the commercial benefit to the complainant and the nature of its interest in the records[.]'"[17] *Id.* (quoting *Am. Commercial Barge Lines*, 758 F.2d at 1111). Although the Court recognizes that Free Press may "reap some commercial benefit from its access to the mug shots[,]" *id.*, the Court does not believe that this factor is particularly weighty given that the Sixth Circuit provided the newspaper with a right to the records in question. This right endows Free Press with a strong interest in the requested photographs. While DOJ's litigation strategy may be the best way to resolve the circuit split and the concomitant risks created by that split, the law in this circuit has been clear since 1996. This factor weighs in favor of Free Press.

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[17] Whether this factor is a proper one in the FOIA context is called into question by the Supreme Court's admonition that the identity of a requesting party has no bearing on the merits of his or her FOIA request. *Reporters Comm.*, 489 U.S. at 771, 109 S. Ct. at 1481.

Lastly, the Court examines "'whether the agency's withholding had a reasonable basis in law.'" *Id.* (quoting *Am. Commercial Barge Lines*, 758 F.2d at 1111). On this point, the balance could fairly tilt in either direction. On the one hand, Sixth Circuit precedent provides Free Press with a right to the four requested photographs. On the other hand, DOJ's withholding does have a reasonable basis in law, just not the law of the Sixth Circuit.

This Court is cognizant of the fact that in order to change the law, DOJ must appeal to a higher authority, whether that authority is the Supreme Court or the Sixth Circuit sitting en banc. Obviously, review in the Supreme Court is discretionary. Thus, review in the Sixth Circuit may be DOJ's best option. Standing alone, however, that is not enough for this Court to find that this factor weighs in DOJ's favor.

Accordingly, the Court will award attorney's fees and costs to Free Press should it prevail on appeal or in the event that an appeal is not taken, because, in either circumstance, Free Press will have substantially prevailed as that term is used in the FOIA's fee statute. At the time that this decision is affirmed on appeal or after DOJ's time to file a notice of appeal has expired, Free Press should file with this Court and serve upon DOJ a verified statement of any fees and/or costs sought in accordance with Federal Rule of Civil Procedure 54(d)(2). DOJ shall have the right to object to Free Press's request as provided in the applicable statutes and court rules.

IV. CONCLUSION AND ORDER

For the reasons stated herein, the Court concludes that DOJ, acting through USMS, violated the FOIA as interpreted by the Sixth Circuit.

Accordingly,

IT IS ORDERED that Free Press's Motion for Summary Judgment is **GRANTED** on Counts I and III and **DENIED** on Count II;

IT IS FURTHER ORDERED that DOJ's Motion for Summary Judgment is **GRANTED** on Count II and **DENIED** on Counts I and III;

IT IS FURTHER ORDERED that DOJ must produce the four booking photographs that were the subject of Free Press's January 25, 2013 FOIA request but that this order is **STAYED PENDING APPEAL**;

IT IS FURTHER ORDERED that Free Press is entitled to request attorney's fees and reasonable costs should it prevail on appeal or should an appeal not be taken.

Date: April 21, 2014.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Herschel P. Fink, Esq.
Galen Thorp, Esq.

APPENDIX F

TITLE 5-GOVERNMENT ORGANIZATION AND EMPLOYEES

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

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

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of

general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person

under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and

make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in

accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4) (A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term “a representative of the news media” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication

record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the in-formation is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(IV) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(V) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, that the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such

agency records in camera to determine whether such records or any part thereof shall be withheld under any of the ex-emptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98-620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E) (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F) (i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that

determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B) (i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C) (i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set

forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D) (i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E) (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on

the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the

request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

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

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

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

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D)

could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption

under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c) (1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an in-formant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as

long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) (1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B) (i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a de-termination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a de-termination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that

have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer tele-communications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under sub-paragraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h) (1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can

raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.