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NOTES

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MUGSHOTS OR PUBLIC INTEREST? WHY FOIA EXEMPTION 7(C) DOES NOT CATEGORICALLY EXEMPT BOOKING PHOTOGRAPHS FROM DISCLOSURE

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INTRODUCTION

Booking photographs are a distinct category of records that individuals have requested from the U.S. Marshals Service under the Freedom of Information Act ("FOIA").[1] While FOIA provides for broad disclosure of agency documents, 5 U.S.C. § 522(b)(7)(C) ("exemption 7(C)" or "7(C)") protects personal information from being disclosed under FOIA when there is a privacy interest in nondisclosure of law enforcement records, and if a corresponding public interest exists, when the privacy interest in nondisclosure of the photograph prevails over the public interest.[2] In recent years, there has been a surge of "mugshot websites," which exploit such

* J.D. Candidate, 2017, University of Pittsburgh School of Law; B.A., 2013, *magna cum laude*, University of Pittsburgh.

[1] *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press II*), 16 F. Supp. 3d 798, 800 (E.D. Mich. 2014), *aff'd*, 796 F.3d 649 (6th Cir. 2015), *vacated for rehearing en banc*, No. 14-1670, 2015 U.S. App. LEXIS 20224 (6th Cir. Nov. 20, 2015).

[2] Administrative Procedure Act, 5 U.S.C. § 552(b)(7)(C) (2012).

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records by publishing them online and requiring individuals to pay money to have the photographs removed.[3]

This occurrence, coupled with the extensive availability of public records online, has led to more strict protection of U.S. Marshals Service booking photographs, as well as some state legislation[4] prohibiting the use of booking photographs for exploitive mugshot websites.[5] Despite the strong privacy interest in protecting individuals from humiliation, in some circumstances there is an equally strong public interest that fits within the meaning and purpose of FOIA.[6] A limited number of federal courts have considered this issue, resulting in a split among the circuits.[7]

In 2015, the Sixth Circuit affirmed the precedent set forth in *Detroit Free Press I*, providing that booking photographs are not exempt from disclosure, but also urging the court to rehear the case en banc.[8] This request was met, and now, the Sixth Circuit will rehear *Detroit Free Press II*, ultimately deciding whether or not to overrule its precedent that booking photographs are not exempt under 7(C) of FOIA.[9] Due to the significant public interest at stake, courts must not take a categorical approach to whether or not these documents are available; in some circumstances, these records contain useful evidence regarding the interworking of a federal agency.[10] Additionally, states and the federal government can enact legislation prohibiting exploitive websites from publishing booking photographs and making

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[3] Steve Osunsami, *Mug Shot Websites: Profiting off People in Booking Photos?*, ABC NEWS (Mar. 7, 2013), http://abcnews.go.com/Technology/mug-shot-websites-profting-off-people-booking-photos/story?id=18669703.

[4] *See, e.g.*, GA. CODE ANN. § 35-1-19 (2015).

[5] Deanna K. Shullman & Mark R. Caramanica, *Mug Shots on Lockdown: Government and Citizen Backlash to "Exploitation" Websites Surges, Free Speech Is the Casualty*, 30 COMM. LAW. 13, 13–14 (2014).

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

[7] *Id. See also* Karantsalis v. U.S. Dep't of Justice, No. 09-CV-22910, 2009 U.S. Dist. LEXIS 126576, at *11–*13 (S.D. Fla. Dec. 14, 2009), *aff'd*, 635 F.3d 497 (11th Cir. 2011); World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 832 (10th Cir. 2012); Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 479 (E.D. La. 1999).

[8] *See Detroit Free Press II*, 16 F. Supp. 3d 798 (E.D. Mich. 2014), *aff'd*, 796 F.3d 649 (6th Cir. 2015), *vacated for rehearing*, No. 14-1670, 2015 U.S. App. LEXIS 20224 (6th Cir. Nov. 20, 2015).

[9] *Detroit Free Press II*, 2015 U.S. App. LEXIS 20224, at *1.

[10] *See Detroit Free Press I*, 73 F.3d at 97–98.

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money from their removal.[11] Since these records could be crucial in evaluating agency conduct, courts must preserve the ability for booking photographs to be available under FOIA, even if only in very limited circumstances, instead of completely excluding such documents from disclosure. These documents must not be categorically exempt from disclosure under FOIA in order to protect individual privacy and still retain possible access to booking photographs when warranted. A more reasonable approach would provide for ad hoc balancing in circumstances when a significant public interest exists in the disclosure of such records.

I. *DETROIT FREE PRESS II* AND POTENTIAL RESOLUTION AMONG THE CIRCUITS

On January 25, 2013, the Detroit Free Press submitted a request for booking photographs of four individuals awaiting trial on federal drug and corruption charges.[12] The request was made pursuant to FOIA, which provides that individuals are entitled to records and information from government agencies.[13] The request was for booking photographs of four City of Highland Park, Michigan police officers.[14] The officers had been indicted, publically named, had appeared in court, and, at the time, were being prosecuted by the U.S. Attorney's Office.[15] The U.S. Marshals Service denied disclosure pursuant to an exemption within FOIA, despite established Sixth Circuit precedent holding that the potential privacy interests of the individuals did not meet the requirements of the narrow exemption under 5 U.S.C. § 522(b)(7)(C).[16] The district court followed the Sixth Circuit precedent, finding that the photographs must be disclosed.[17] On appeal, a three-judge panel of the Sixth Circuit affirmed, but urged the court to review the issue en banc.[18] As a result, the

[11] *See Jails Stop Posting Mug Shots to End "Extortion" by Profiteering Websites*, PRISON LEGAL NEWS, Aug. 12, 2014, at 48, *available at* https://www.prisonlegalnews.org/news/2014/aug/12/jails-stop-posting-mug-shots-end-extortion-profiteering-websites/.

[12] *Detroit Free Press II*, 16 F. Supp. 3d at 800.

[13] *Id.* at 800–01.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 801–02.

[17] *Id.*

[18] *Detroit Free Press II*, 796 F.3d 649, 650.

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Sixth Circuit decided to grant a rehearing of the case en banc to revisit the issue of whether the privacy exemption warrants nondisclosure of booking photographs.[19]

Whether or not booking photos are protected by the privacy exemption is a contested issue among federal circuits.[20] Some courts have held that booking photographs contain sensitive and potentially humiliating information, which individuals have an interest in protecting from disclosure to the public.[21] The Sixth Circuit, on the contrary, held that release of booking photos in such circumstances could not reasonably be expected to constitute an invasion of personal privacy and further explained that disclosure in some circumstances would serve the purpose of FOIA.[22]

The Sixth Circuit's decision to rehear *Detroit Free Press II* indicates the potential for the precedent to be overturned, which would prevent individuals from having the ability to request booking photographs under FOIA.[23] While there are certainly privacy interests at stake, there are also substantial public interests that demand disclosure of these photographs. Booking photographs could be the only documentation of police brutality against a federally detained individual, could identify a person who was wrongfully or incorrectly apprehended, or could be the only available photograph of an indicted criminal on the run.[24] Additionally, courts are meant to construe FOIA exemptions narrowly, in favor of disclosure of agency documents to the public.[25] Based on the purpose of FOIA, which includes public oversight of agency action, the Sixth Circuit must not completely overturn its precedent in *Detroit Free Press I* because that could lead to booking photographs being categorically exempted from disclosure under FOIA in all circumstances.

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[19] *Detroit Free Press II*, No. 14-1670, 2015 U.S. App. LEXIS 20224.

[20] *See* World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 832 (10th Cir. 2012) (holding that the privacy exemption applies to booking photographs). *But cf. Detroit Free Press I*, 73 F.3d 93, 98 (holding that disclosure could not reasonably be anticipated to constitute an unwarranted invasion of person privacy).

[21] *See World Publ'g Co.*, 672 F.3d at 829.

[22] *See Detroit Free Press I*, 73 F.3d at 98.

[23] *See Detroit Free Press II*, 796 F.3d at 651–52 ("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.").

[24] *Id.*

[25] U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

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II. THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act ("FOIA") was enacted in 1966 and affords individuals the right to request a wide variety of information and records from federal agencies.[26] If an individual submits a written request for records, the relevant federal agency is obligated to disclose such information.[27] In 1966, Congress amended FOIA to promote "a general philosophy of full agency disclosure."[28] The amendment required agencies to publish their rules of procedure in the Federal Register and make unpublished statements of policy, interpretations, staff manuals, and instructions available for public inspection.[29] Agencies are also required "upon any request for records which . . . reasonably describes such records" to make such records "promptly available to any person."[30] If an agency wrongly rejects a document request under FOIA, the federal district court has jurisdiction to order its production.[31] In one case, the Supreme Court considered a document request under FOIA and stated: "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, [] FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'"[32] Courts reviewing requests under FOIA owe the agency no deference.[33]

The requirement that an agency disclose requested information is only limited by nine exemptions or three exclusions of FOIA.[34] When FOIA requests consist of mugshots or other information obtained by law enforcement, the two exemptions most often cited to excuse the disclosure of such documents are 5 U.S.C. § 552(b)(6)

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[26] 5 U.S.C. § 552 (2012).

[27] *Id.*

[28] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 (1989).

[29] *Id.*

[30] *Id.* at 754–55.

[31] *Id.* at 755.

[32] *Id.*

[33] *See* Margaret B. Kwoka, *Deference,* Chenery*, and FOIA*, 73 MD. L. REV. 1060, 1061–62 (2014) ("FOIA litigation is one of the few instances in which judges reviewing agency actions owe no deference to the agency's position. FOIA's strong review provision was meant to serve as a check on agency power and to protect the public's right to information.").

[34] U.S. GENERAL SERVICES ADMIN. & U.S. DEP'T OF JUSTICE, YOUR RIGHT TO FEDERAL RECORDS, 1 (Nov. 2009), *available at* http://www.gsa.gov/graphics/staffoffices/Your_Right_to_Federal_Records.pdf.

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and (b)(7)(C).[35] Pursuant to these exemptions, the requirement that agencies disclose information requested under FOIA does not extend to "personnel and medical files and similar files[,] the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," or to "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."[36] Few cases have considered booking photographs in relation to FOIA, however, in those cases, the U.S. Marshals Service denied the document request pursuant to exemption 7(C), asserting that the release of such photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy.[37] The courts are currently split regarding whether or not the release of booking photographs in relation to FOIA does, in fact, constitute such invasion, and thus, are exempt from release.[38]

III. DISCLOSURE OF BOOKING PHOTOGRAPHS UNDER FOIA

The first case that considered whether booking photographs are exempt from disclosure under FOIA was *Detroit Free Press I*.[39] The court considered the purpose of FOIA and stated that disclosure was the dominant objective of the act and that any exemptions must be narrowly construed.[40] The three-part test that is used when determining whether a request is exempted under 7(C) is as follows: first, the information seeking to be disclosed must be compiled for law enforcement purposes; second, the release of the information must reasonably be expected to constitute an invasion of personal privacy; third, that intrusion must be deemed "unwarranted" after balancing the privacy concerns with the public interest in the information.[41] The public interest in the information being sought must necessarily involve a "benefit to

[35] *See, e.g.*, *Detroit Free Press I*, 73 F.3d 93, 96; World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 826 (10th Cir. 2012); Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 499 (11th Cir. 2011); *Detroit Free Press II*, 796 F.3d 649, 651.

[36] 5 U.S.C. § 552(b)(6)–(b)(7)(C) (2012).

[37] *See, e.g.*, *World Publ'g Co.*, 672 F.3d at 826.

[38] *Detroit Free Press I*, 73 F.3d at 99; *World Publ'g Co.*, 672 F.3d at 831–32; *Karantsalis*, 635 F.3d at 499.

[39] *Detroit Free Press I*, 73 F.3d at 95.

[40] *Id.*

[41] *Id.* at 96.

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be obtained by disclosure of information concerning the workings of components of our federal government."[42]

Booking photographs are documents compiled for law enforcement purposes; therefore, the first prong of the test is always met in these circumstances.[43] The next consideration is whether disclosure would reasonably be expected to constitute an invasion of personal privacy.[44] This inquiry is a limited one since the only issue to be resolved is whether disclosure of booking photographs of defendants—who are currently being prosecuted in an ongoing criminal proceeding, have appeared in open court, and had their names already divulged in the media—"could reasonably be expected to constitute an . . . invasion of personal privacy."[45] The court ultimately determined that under these specific circumstances, no privacy rights are implicated, and thus the FOIA request must be honored.[46]

The personal privacy of a defendant in ongoing proceedings is not necessarily invaded simply because of potential embarrassment suffered as a result of the disclosure of information in the possession of government agencies.[47] There have been other cases where privacy rights were implicated in regards to FOIA requests, such as when the documents sought to be withheld contained sensitive personal information like names of defendants who had not been previously announced,[48] rap sheets containing a list of all of the individual's criminal charges not available to the public, and information that extended beyond the ongoing proceeding.[49] When the information sought is not available to the public or has little to no connection to the ongoing proceeding, there may be an interest on the part of the individual depicted to keep that information private.[50] However, when the individual has already been identified, is in the process of being prosecuted, and has appeared publicly in open

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 97.

[46] *Id.*

[47] Schell v. U.S. Dep't of Health and Human Servs., 843 F.2d 933, 938–39 (6th Cir. 1988).

[48] U.S. Dep't of State v. Ray, 502 U.S. 164, 170–71 (1991).

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

[50] *See Detroit Free Press I*, 73 F.3d at 97.

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court, that individual's identity and likeness are no longer available to be protected, and therefore, no privacy interest is at stake.[51]

Since the court in *Detroit Free Press I* found that no privacy interest was at stake, there was no need to balance the privacy interest and relevant public interest.[52] Yet, the court discussed various situations where the public interest at stake would, on balance, outweigh any privacy right under the exemption.[53] In certain situations, disclosure of booking photographs would expose the government to public oversight—such photographs could indicate a person who was wrongfully detained based on mistaken identity, or they could be the only documentation of the circumstances surrounding a suspect detainment.[54] Booking photographs document the daily work of a federal agency, are factually distinct from many of the circumstances where requests have been denied, and in some circumstances, serve the exact purpose of FOIA—disclosure of records that indicate the agency's actions and whether the agency is adequately performing its statutory duties.[55] Thus, even in the event of a privacy interest, there are significant public interests, which would require balancing. The court in *Detroit Free Press I* indicated that in limited situations the public interest could outweigh the privacy interest in the photographs.[56]

Despite the outcome in *Detroit Free Press I*, three other courts have considered whether booking photographs are exempt from disclosure under FOIA. These courts held that there is an invasion on personal privacy if booking photographs are disclosed, and that there is not sufficient public interest to allow the disclosure of such photographs.[57] In *World Publishing Co.*, the requester (a newspaper) argued

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[51] *Id.* ("[T]he need or desire to suppress the fact that the individual depicted in a mug[]shot has been booked on criminal charges is drastically lessened in an ongoing criminal proceeding . . . .").

[52] *Id.* at 97–98.

[53] *Id.*

[54] *Id.* at 98 ("[Mugshots] can startlingly reveal the circumstances surrounding an arrest and initial incarceration of an individual in a way that written information cannot. Had the now-famous videotape of the Rodney King beating in Los Angeles never been made, a mug[]shot . . . 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.").

[55] *Id.*

[56] *Id.*

[57] *See* Karantsalis v. U.S. Dep't of Justice, No. 09-CV-22910, 2009 U.S. Dist. LEXIS 126576, at *11–*13 (S.D. Fla. Dec. 14, 2009), *aff'd*, 635 F.3d 497 (11th Cir. 2011); *see also* World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 826 (10th Cir. 2012); Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 479 (E.D. La. 1999).

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that the privacy interest in a booking photograph is diminished because "there has been an explosion of camera phones and video which allow persons to be photographed . . . at any time."[58] The court neglected to consider whether the broad availability of an individual's likeness in relation to a criminal proceeding reduces the extent to which a privacy interest exists; instead, the court stated: "Given easy access to photographs and photography, surely there is little difficulty in finding another publishable photograph of a subject."[59] The court was not persuaded by the argument that the availability of other photos is not the relevant inquiry to determine if a privacy interest exists, and the extent to which the information requested is publicly available could reduce an interest in withholding it.[60]

In *Karantsalis*, a privacy interest was found to exist because booking photos are an embarrassing moment for recently detained individuals.[61] Most records and information collected for law enforcement purposes involving a criminal defendant are embarrassing and could be associated with the criminal activities or guilt of the individual,[62] and yet, that is not a sufficient reason on its own for nondisclosure. The court in *Karantsalis* also noted that booking photographs should not be disclosed under FOIA because "booking photographs taken by the Marshals Service are generally not available for public dissemination[,] an attribute which suggests the information implicates a personal privacy interest."[63] Whether the agency itself agrees on disclosure should have little value to the courts when considering a provision that was passed for the purpose of agency oversight and broad public availability of agency documents and records.[64] In relation to whether the documents are generally available, the court considered *Reporters Committee*, explaining that "information about an individual 'not freely available to the public' may still

[58] *World Publ'g Co.*, 672 F.3d at 830.

[59] *Id.*

[60] *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769 (1989) ("If a cadet has a privacy interest in past discipline that was once public but may have been 'wholly forgotten,' the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten."). The internet enables society to have broad accessibility to information, and such information is not subject to being truly "forgotten." If information is eternally available, does this interest of preserving later secrecy even still exist?

[61] *Karantsalis*, 2009 U.S. Dist. LEXIS 126576 at *13.

[62] *Detroit Free Press I*, 73 F.3d 93, 97.

[63] *Karantsalis*, 2009 U.S. Dist. LEXIS 126576 at *13. In *World Publ'g Co.*, the court rejected Tulsa World's argument that the DOJ's policies perpetuate a self-fulfilling prophecy. 672 F.3d at 829.

[64] Kwoka, *supra* note 33, at 1061–62.

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implicate a personal privacy interest."[65] Thus, booking photographs were determined to implicate a significant privacy interest.

In addition to disagreeing with the Sixth Circuit that there was no privacy interest at stake, the court in *Karantsalis* also disagreed that booking photographs could constitute a compelling public interest. In *Karantsalis*, the court stated that booking photos only serve "voyeuristic curiosities," and serve no public interest regarding knowledge of a government agency's operations.[66] The plaintiff requesting the booking photograph explained to the court that the defendant, who pleaded guilty to securities fraud, was alleged to have federal connections and that the booking photographs were sought to be examined for potential indications of preferential treatment.[67] Smirks and smiles in booking photographs of two other individuals implicated in securities fraud in similar investigations—Bernard Madoff and Joe Nacchio—led one journalist to investigate the possibility that the U.S. Marshals Service gives high profile federal criminals preferential treatment.[68] The court quickly dismissed the possibility that disclosure of these documents could constitute a public interest concerning statutory duties of an agency, and stated: "Common sense suggests that if a prisoner were receiving preferential treatment, he or she would not flagrantly display—and risk losing—such preferential treatment by smiling or smirking in a booking photograph."[69]

The court rejected the argument that the defendant depicted in the mugshot, who pleaded guilty to securities fraud in 2009 after six years as a fugitive, had no continuing privacy interest related to his crime.[70] While the court agreed that releasing photos "which show his appearance and expression while being processed . . . could result in humiliation[,]" it rejected the submission that facial expressions could reveal whether the individual received preferential treatment or other indications of treatment while in custody.[71] The court held that the photos are an

[65] *Karantsalis*, 2009 U.S. Dist. LEXIS 126576 at *12.

[66] *Id.* at *15.

[67] *Id.* at *1–*2, *8–*9.

[68] *Id.* at *13–*15.

[69] *Id.* at *14–*15.

[70] *Id.* at *11–*14.

[71] *Id.* at *8, *14–*15.

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embarrassing moment, and that they do not provide insight into the operations of a government agency.[72] As a result, disclosure was denied.[73]

In *Times Picayune*, the Louisiana Eastern District Court determined that disclosure of a booking photograph could reasonably be expected to constitute an invasion of personal privacy.[74] The individual pictured in the requested booking photograph had entered into a plea deal, and despite broad publicity of the individual and his federal crimes, the court disagreed that this exposure indicated that the privacy interest was diminished.[75] Despite agreeing that there are possible public interests,[76] the court did not feel that they were significant enough to outweigh the privacy interest at stake in that case.[77] The court discussed a variety of reasons why the mugshot could lead to embarrassment, yet rejected, as "hypothetical," the possibility that public access to mugshots could indicate how the U.S. Marshals Service is carrying out one of its statutory duties.[78]

In *World Publishing Co.*, the Tenth Circuit examined the mugshot issue, and while it considered *Karantsalis*, *Times Picayune*, and *Detroit Free Press I*, it stated that the court was not bound by any precedent and ultimately ruled that the exemption did in fact apply.[79] The court determined that there was a legitimate privacy interest implicated by booking photographs, and that the privacy interest outweighed any possible public interest.[80] World Publishing Co. (publisher of the Tulsa World newspaper) requested six mugshots, a request that was denied by the U.S. Marshals Service and appealed to federal district court.[81] The newspaper cited multiple distinct public interests in the booking photos: (1) determining the arrest of the correct detainee; (2) detecting favorable, unfavorable, or abusive treatment;

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[72] *Id.* at *15–*16.

[73] *Id.*

[74] Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 479 (E.D. La. 1999).

[75] *Id.* at 476–79.

[76] "The Court recognizes, as did the Sixth Circuit in *Detroit Free Press*, that 'public disclosure of mug[]shots in limited circumstances can . . . serve to subject the government to public oversight.'" *Id.* at 480.

[77] *Id.*

[78] *Id.* at 479–80.

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

[80] *Id.* at 830–32.

[81] *Id.* at 826.

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(3) detecting fair versus disparate treatment; (4) racial, sexual, or ethnic profiling in arrests; (5) the outward appearance of the detainee and whether they may be competent, incompetent, or impaired; (6) a comparison in a detainee's appearance at arrest and at the time of trial (showing possible mistreatment); (7) allowing witnesses to come forward and assist in other arrests and solving crimes based on recognition of such individuals; (8) capturing a fugitive thanks to public involvement; and (9) to show whether the indictee took the charges seriously.[82] The court was not persuaded that any of these public interests—or any other potential public interests not enumerated by World Publishing Co.—were sufficient, and thus denied that any legitimate public interest was at stake.[83]

Instead, the court held that exemption 7(C) did apply, and that any hypothetical interests in the photos were not outweighed by the privacy interest that individuals could have in their booking photographs.[84] The purpose of FOIA is disclosure of documents from federal agencies to allow public oversight into agency action, and the court found that there was "little to suggest that disclosing booking photos would inform citizens of a government agency's adequate performance of its function."[85] The court dismissed the fact that booking photos are generally available from state law enforcement agencies, and it rejected the newspaper's argument that these policies perpetuate a "self-fulfilling prophecy"—"DOJ establishes a rule that [mugshots] shall not be disclosed except for 'law enforcement purposes' and then uses its own rule to 'determine' conclusively that [mugshots] are not generally available . . . ."[86] Ultimately, it was determined that the disclosure of federal booking photographs could not contribute "significantly to public understanding of federal law enforcement operations or activities."[87]

The court was able to distinguish a number of the various public interests set forth by World Publishing Co. from public interests that are valid under the act. For example, the court argued that public assistance of law enforcement agencies—the public being able to identify criminals, assist federal law enforcement agencies with relevant evidence, or be aware of potential risks—is not a significant public interest

[82] *Id.* at 831.

[83] *Id.* at 830–32.

[84] *Id.*

[85] *Id.* at 831–32.

[86] *Id.* at 829.

[87] *Id.* at 831.

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because it does not provide insight into the daily work of the agency.[88] This interpretation of the purpose of FOIA is extremely narrow and, even still, World Publishing Co. put forth other relevant and persuasive arguments for why these documents are evidence of the inner workings of agency action.[89] These arguments included the possibility of public oversight of police in situations of potential police brutality. For example, the Sixth Circuit considered this to be a possible public interest for oversight and stated: "Had the now-famous videotape of the Rodney King beating in Los Angeles never been made, a mug[]shot of Mr. King . . . would have alerted the world . . . that the actions and practices [of the agency] should be scrutinized."[90] This argument was rejected, and the court ultimately concluded that pictures taken by authorities at the time the individuals were apprehended, for the purposes of identifying such individuals, could not indicate how the agency performed its day-to-day work.[91]

In *Detroit Free Press II*, the Sixth Circuit reaffirmed its precedent, but stated: "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."[92] The court particularly questioned the previous determination that there is no privacy interest in keeping the photographs secret, even in light of media coverage, the internet, and publicity.[93] Several considerations, including the fact that the photographs could be embarrassing for the individual, led the court to recommend a

[88] *Id.*

[89] *Id.*

[90] *Detroit Free Press I*, 73 F.3d 93, 97. In *Detroit Free Press I*, the Sixth Circuit determined that the privacy interest of the individual depicted in the booking photograph was diminished due to that individual's conviction, appearance in open court, and widespread public involvement in said case. However, the court went on to explain that there were possible public interests, for example that a booking photograph would have indicated that Mr. King was mistreated by authorities. 73 F.3d 93 at 98 (6th Cir. 1996). *World Publ'g Co.* explicitly rejected this as a possible public interest in favor of disclosure of federal booking photographs, indicating this could not provide any indication of what the government is up to. 672 F.3d at 831.

[91] *World Publ'g Co.*, 672 F.3d at 831; *see also Fact Sheet: Prisoner Operations*, U.S. MARSHALS SERVICE (Mar. 11, 2016), http://www.usmarshals.gov/duties/factsheets/overview.pdf. The fact sheet states that the U.S. Marshals Service ensures "safe, humane care and custody of federal prisoners in its custody," yet the courts assert that a booking photograph taken at the time of custody would not indicate whether the U.S. Marshals Service is adequately performing this statutory duty. *Fact Sheet: Prisoner Operations* at 2. A booking photograph could be the last record of an individual before dying in custody, in that circumstance the photograph would be extremely relevant evidence.

[92] *Detroit Free Press II*, 796 F.3d 649, 651.

[93] *Id.*

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rehearing of the case.[94] That request was granted, and the Sixth Circuit vacated the judgment of *Detroit Free Press II*. It will now rehear the case en banc in order to reconsider whether there is a privacy interest on the part of the individual depicted in the booking photograph, and, if a privacy interest does exist, whether it is outweighed by the potential public interests in the document.

IV. SUPREME COURT JURISPRUDENCE ON FOIA

Although the Supreme Court has not ruled squarely on this issue, a few circuit court cases have considered the Court's FOIA and privacy jurisprudence in relation to booking photograph disclosure.[95] The Court's analysis of both the privacy and public interests, as well as its explanation of why some documents are not available under FOIA, may be illustrative of the correct approach to the balancing of these important interests.[96]

The Court has determined that in relation to potential public interests and FOIA requests, the actual reason for the request is not relevant, and, instead, a court must consider whether there are *any* legitimate public interests for disclosure of such documentation.[97] In *Reporter's Committee*, the Court determined that rap sheets—a document compiled by federal law enforcement listing all of a defendant's accused and charged crimes—are exempted from disclosure under FOIA.[98] Congress intended FOIA "to give any member of the public as much right to disclosure as one with a special interest [in a particular document]."[99] To determine whether rap sheets

[94] *Id.* at 652–53.

[95] *See generally Detroit Free Press I*, 73 F.3d 97; *Detroit Free Press II*, 796 F.3d 649; Karantsalis v. U.S. Dep't of Justice, No. 09-CV-22910, 2009 U.S. Dist. LEXIS 126576 (S.D. Fla. Dec. 14, 2009), *aff'd*, 635 F.3d 497 (11th Cir. 2011); Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 479 (E.D. La. 1999); *World Publ'g Co.*, 672 F.3d 825.

[96] *See*, *e.g.*, U.S. Dep't of State v. Ray, 502 U.S. 164 (1991); U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989); U.S. Dep't of the Air Force v. Rose, 425 U.S. 352 (1976).

[97] *See Reporter's Comm.*, 489 U.S. at 772 ("Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny' rather than on the *particular purpose for which the document is being requested*." (emphasis added)); *see also Rose*, 425 U.S. at 372.

[98] *Reporter's Comm.*, 489 U.S. at 775.

[99] *Id.* at 771 (alteration in the original) (citation omitted); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 221 (1978); FBI v. Abramson, 456 U.S. 615 (1982).

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specifically warrant nondisclosure, the Court focused on the purpose of FOIA, which is to open agency action to the light of public scrutiny.[100] Rap sheets list all the crimes of an individual, but they do not contain any information regarding the work of the agency, and the purpose of FOIA is not to disclose information about private individuals that is accumulated in various governmental files that reveals little to nothing about an agency's own conduct.[101]

Additionally, the Court determined that in relation to rap sheets, a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy.[102] It stated that when the request seeks "no official information about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is unwarranted."[103] Two justices concurred, agreeing with the majority opinion that this request is exempted under 7(C), but rejecting the Court's bright line rule.[104] Instead, they opted for an ad hoc approach.[105] The concurrence was not convinced that the language, legislative history, or case law of exemption 7(C) supported interpreting it to categorically exempt all rap sheet information from FOIA's disclosure requirements.[106]

Certainly rap sheets and booking photographs have similarities and differences. However, booking photographs are distinct from other types of documents requested under FOIA because, although there is a privacy interest in preventing the publishing of one's booking photograph, there is also potential for that document to indicate police brutality, mistreatment, or preferential treatment of apprehended individuals.[107] A booking photograph could be the only documentation of the

[100] *Reporter's Comm.*, 489 U.S. at 774.

[101] *Id.* at 773.

[102] *Id.* at 780 (citation omitted).

[103] *Id.*

[104] *Id.* at 780–81 (Blackmun & Brennan, JJ., concurring).

[105] *Id.*

[106] *Id.* at 780 (Blackmun & Brennan JJ., concurring) (considering a situation where a rap sheet discloses a congressional candidate's previous conviction of tax fraud. While this would invade that individual's privacy, this could not be an unwarranted invasion since the candidate abandoned any interest in preventing the dissemination of that information when that individual chose to run for Congress). Ad hoc balancing would allow a court to consider the availability of a booking photograph considering the facts and circumstances of each case.

[107] *See Detroit Free Press I*, 73 F.3d at 98.

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circumstances surrounding a suspect detainment, and thus disclosure would allow for public oversight of how the agency is performing its statutory duties.[108] Additionally, booking photographs are more likely to provide information about an agency's performance than rap sheets that only list the crimes an individual committed.[109] The potential information and evidence that booking photographs provide differs from that of rap sheets, and the Supreme Court's jurisprudence on FOIA should not be considered binding, specifically on the availability of booking photographs.[110]

V. MUGSHOT WEBSITES AND EXPLOITATION OF FOIA

One possible reason that federal agencies are pushing back on requests for booking photographs involves the rise of "mugshot websites," such as mugshots.com, which obtain mugshots, post them on their websites, and charge people to have them removed.[111] This use of booking photographs exploits FOIA and the purpose of disclosure, as well as generates profits from innocent individuals (for example, those that were acquitted) who are willing to pay hundreds of dollars to have the photographs removed.[112]

The rise of these websites has caused a variety of responses. State legislatures have introduced measures restricting the availability of such information, as well as how mugshots and criminal record information can be used.[113] A few states, including Georgia, Texas, Oregon, Illinois, Colorado, and Utah, have passed legislation[114] limiting the commercial use of mugshots.[115] Since the rise of these websites, there have been at least thirty-three bills filed in state legislatures

[108] *Id.*

[109] *Id.*

[110] The vast differences between booking photographs and rap sheets are enough to distinguish *Reporter's Committee* from the issues posed in *Detroit Free Press I*.

[111] *Jails Stop Posting Mug Shots to End "Extortion" by Profiteering Websites*, *supra* note 11.

[112] Dan Gallo, *Mugshot Websites: Free Speech or Extortion?*, FOXNEWS.COM (May 6, 2014), http://www.foxnews.com/us/2014/05/06/mugshot-websites-free-speech-or-extortion.html.

[113] Shullman & Caramanica, *supra* note 5, at 13–14.

[114] 43 GA. CODE ANN. § 35-1-19 (West Supp. 2015); 48 ILL. COMP. STAT. ANN. 815 ILCA 505/2QQQ (LexisNexis Supp. 2015); 14 OR. REV. STAT. § 646A.806 (2015); TEX. BUS. & COM. CODE ANN. §§ 109.001–109.008 (West 2015); UTAH CODE ANN. § 17-22-30 (LexisNexis 2015).

[115] *See* statutes cited *supra* note 114.

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nationwide attempting to restrict access to or limit the use of booking photographs.[116] In Georgia, for example, booking photographs were eliminated from law enforcement websites, and although people can still obtain these photographs through public records requests, they must provide a signed statement to the state promising that they will not post the photos online and charge a removal fee.[117]

The rise of state legislation limiting the availability and potential uses for mugshots is not the only form of pushback due to these websites. Individuals have also sued these websites, often attempting to achieve class action status, seeking relief for claims ranging from defamation and appropriation, unfair trade practices violations, and federal civil rights claims.[118] In addition to individuals seeking relief from the destructive consequences of these websites,[119] the federal government, specifically the U.S. Marshals Service, is aggressively pushing to have booking photographs declared exempt under FOIA.[120]

Certainly, websites profiting off of FOIA disclosure is not the purpose of the act requiring disclosure of agency documents; it is exploitive and invades personal privacy. However, some argue that legislation limiting the availability of criminal records may unintentionally impact traditional media, and such legislation may be overly broad.[121] There are potential free speech concerns as well, as "such laws raise general constitutional concerns over whether the government is improperly making judgment calls on the value of certain speech and attempting to ban speech it finds

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[116] *See Mug Shots and Booking Photo Websites*, NAT'L CONF. ST. LEGIS. (Apr. 21, 2014), http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx. Measures have been proposed in the 2014 legislative session to limit the use of booking photographs in Alabama, California, Colorado, Florida, Georgia, Kentucky, Minnesota, Missouri, New Jersey, New York, South Carolina, Virginia, and Wyoming. *Id.* In 2013, bills were introduced in the District of Columbia, Florida, Georgia, Illinois, New Jersey, Oregon, South Carolina, Texas, and Utah. *Id.*

[117] 43 GA. CODE ANN. § 35-1-19 (West Supp. 2015); *see also* Shullman & Caramanica, *supra* note 5, at 14.

[118] Shullman & Caramanica, *supra* note 5, at 13.

[119] *See Jails Stop Posting Mug Shots to End "Extortion" by Profiteering Websites*, *supra* note 11. For example, Mugshots.com has an "unpublish" link on its site, which lets people submit a form requesting removal of their mugshot for a fee that starts at $399. This applies even when the individual depicted in the photo was found not guilty, the charges are dismissed, acquitted, or expunged. Additionally, prisoner rights groups argue that these sites are damaging to individuals' reputations, often making it difficult to obtain gainful employment. *Id.*

[120] Shullman & Caramanica, *supra* note 5, at 13.

[121] *Id.* at 14.

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objectionable. These laws also dangerously encroach on media independence . . . ."[122]

The current approach by state legislatures and the U.S. Marshals Service ignores the public function that booking photographs serve in crime reporting. As a result of the free speech implications and the concern that these laws could be overbroad, state legislators should be aware that legislation seeking to restrict the availability of booking photographs to the public may infringe on the ability of the media to fully report the news.[123] On the other hand, these websites illustrate exactly how important the privacy exception is, as well as demonstrate how destructive public availability of booking photographs can be—especially when the individual was acquitted, found not guilty, wrongfully accused, or had their record expunged.[124] In these situations, a person's reputation could be irreparably damaged, despite their attempt to move past such an unfortunate experience. Yet, there are other avenues for preventing such exploitation without categorically exempting booking photographs from disclosure under FOIA.

VI. PRIVACY OR PUBLIC INTEREST?

The exploitation of booking photographs increases the concern about whether booking photographs should be available, specifically due to the heightened privacy interests at stake for an individual. When considering a request for law enforcement documents under FOIA, the court must consider whether there is a privacy interest at stake.[125] Most of the courts that have considered this issue have found that an individual has a privacy interest in keeping their booking photographs from public dissemination.[126]

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[122] *Id.* at 15.

[123] *Id.* at 18.

[124] *Jails Stop Posting Mug Shots to End "Extortion" by Profiteering Websites*, *supra* note 11. It must be noted that the fact pattern regarding *Detroit Free Press* only considers a narrow and specific set of facts involving defendants who have already faced broad publication and media coverage, and does not extend to those found not guilty or that have been acquitted. *See generally Detroit Free Press I*.

[125] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755–56 (1989).

[126] Karantsalis v. U.S. Dep't of Justice, No. 09-CV-22910, 2009 U.S. Dist. LEXIS 126576 *10 (S.D. Fla. Dec. 14, 2009), *aff'd*, 635 F.3d 497 (11th Cir. 2011); *see also* World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 827–30 (10th Cir. 2012); Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 482 (E.D. La. 1999).

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In *Detroit Free Press I*, the court ruled that there was no privacy interest in the limited circumstances presented: the request at issue was for booking photographs of individuals who were indicted, made court appearances after their arrests, and whose names had already been made public in connection with a criminal prosecution.[127] This finding was limited to such circumstances because the court determined that a criminal prosecution that was highly publicized diminished the privacy interest since there was no longer any need to suppress from the public the fact that an individual had been booked on federal charges.[128] Requests for booking photographs under FOIA regarding individuals with "dismissed charges, acquittals, or completed criminal proceedings" would require a different analysis.[129]

In *Reporter's Committee*, the Supreme Court put forth a rationale for limiting accessibility to law enforcement records based on the privacy interest individuals have in their criminal records.[130] "Practical obscurity" refers to the idea that government documents not compiled in a centralized database are private because it would take exceptional effort and expense to independently recreate a centralized record, providing that eventually certain records will be forgotten and creating a stronger reason to protect the privacy interest related to such documents.[131] In relation to rap sheets, the Court stated: "[T]here is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[132] Although it has not been considered by the Court, internet distribution and records may heighten some concerns—because there is less availability for such information to be forgotten—but this concept of practical obscurity in public information may only be attributable to the world before the proliferation of electronic modes of communication. Anything made public, even once, is eternally documented on the internet. This might further diminish an individual's privacy interest in a booking photograph, since their likeness and association with a criminal proceeding is perpetually documented and available for public examination.

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[127] *Detroit Free Press I*, 73 F.3d 93, 98.

[128] *Id.* at 97–98.

[129] *Id.* at 97.

[130] *Reporter's Comm.*, 489 U.S. at 762–67.

[131] *Id.*

[132] *Id.* at 764.

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However, the courts have not thoroughly analyzed the effect of the internet with regard to practical obscurity or potential privacy interests in criminal records.[133] In all likelihood, an individual still would retain at least some privacy interest in their booking photograph. Even in the event of a cognizable privacy interest, the courts must still engage in a balancing test weighing the potential privacy interests and the public interests.[134]

The potential public interests in some circumstances are great enough to outweigh any potential privacy interests; however, those are limited circumstances that have not been considered by a court.[135] If there is a contention of police brutality or mistreatment, access to the booking photograph falls directly within the purpose and language of FOIA—"to ensure that the Government's activities be opened to the sharp eye of public scrutiny."[136] Release of a booking photograph could reveal an error by the U.S. Marshals Service in detaining the wrong person for an offense more effectively than simply releasing the name would.[137] As argued in *Detroit Free Press I*, booking photographs could reveal potentially suspect circumstances surrounding an arrest of an individual more successfully than written information.[138]

The release of exclusively private information, such as home addresses, is not indicative of how an agency is performing its duties, nor would it shed light on the operations of the government. The objective of FOIA is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[139] At this point, the courts have not adequately addressed whether, in the circumstances of potential police misconduct, the public interest involved would outweigh any privacy interest and meet the purposes of disclosure under FOIA. However, in light of *Detroit Free Press II* and the pushback against FOIA requests, this consideration is extremely important.

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[133] In none of the cases considering mugshots and FOIA did a court consider the potential effects of the internet on whether a privacy interest exists and the applicability of *Reporter's Committee*.

[134] World Publ'g Co. v. U.S. Dep't. of Justice, 672 F.3d 825, 827 (10th Cir. 2012).

[135] *Detroit Free Press I*, 73 F.3d 93, 98.

[136] *Id.* (citation omitted).

[137] *Id.*

[138] *Id.*

[139] U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

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Certainly, the potential public interests involved will not prevail in every circumstance regarding a request for a booking photograph under FOIA. The Supreme Court has stated:"[W]hether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made."[140] Thus, the fact that some of these documents are being used improperly does not ultimately determine whether the invasion of privacy is warranted. The fact that there are significant public interests in these documents, including agency oversight, precludes the courts and U.S. Marshals Service from mandating that these documents are wholly unavailable categorically. Instead, the courts should opt for ad hoc balancing based on the circumstances at issue.[141]

This approach would allow for the refusal to provide booking photographs when there is no certifiable public interest involved—such as releasing old photographs for the purpose of putting them on a "mugshot website"—while retaining the ability for the public to request such records when there is the need for public oversight of agency action that would be evidenced by the photograph.[142] Although bright line rules are certainly preferable, not all FOIA considerations are black and white. The changes in technology and media provide serious doubts about whether the current jurisprudence on privacy and obscurity can continue without some reformulation on how privacy interests should be protected. Additionally, categorical exemption of booking photographs might undermine the purpose of FOIA when the records contain the only useful evidence of circumstances of an individual's arrest. Therefore, a bright line rule cannot be adopted in the case of booking photographs—as was adopted with regards to rap sheets—and the potential availability of such documents must be preserved.

CONCLUSION

The Sixth Circuit will reconsider the issue of booking photo requests under FOIA, and this case could potentially close the gap between the circuits on this issue, as well as foreclose public availability of booking photographs.[143] The few other courts that have considered this issue have determined that booking photographs are

[140] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989).

[141] In *Reporter's Committee*, the concurrence opts for a more flexible balancing approach even to rap sheets; with regard to booking photographs, allowing for such flexibility could provide privacy safeguards while preserving disclosure in some circumstances. 489 U.S. at 780–81 (Blackmun & Brennan, JJ., concurring).

[142] *See id.*

[143] *See Detroit Free Press II*, 16 F. Supp. 3d 798, 809.

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not available under FOIA due to the significant privacy interest coupled with the lack of any substantial public interest.[144] However, it is worth pursuing whether these requests always lack the public interest related to the inner workings of agency action evidenced by booking photographs. If an individual was wrongfully detained or mistreated, and the only evidence of such an incident is the booking photograph, that document would show whether the misconduct occurred, as well as provide insight into whether the U.S. Marshals Service was properly performing statutory duties—specifically, the safe, humane care and custody of federal prisoners each year.[145] It should not be up to the U.S. Marshals Service to determine when or why a booking photograph will be released to the public. In order to protect individual privacy, yet retain possible access to booking photographs when warranted, it is imperative that the Sixth Circuit does not dictate that these documents should be categorically exempt from disclosure under FOIA. A more reasonable approach would be to assert that ad hoc balancing must be employed in circumstances where a significant public interest exists.

[144] *See, e.g.*, World Publ'g Co. v. U.S. Dep't. of Justice, 672 F.3d 825, 830–31 (10th Cir. 2012).

[145] *Fact Sheet: Prisoner Operations*, *supra* note 91, at 2.

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