From the Police Precinct to Your Neighbor's Coffee Table: Limiting Public Dissemination of Mug Shots During an Ongoing Criminal Proceeding Under the Freedom of Information Act

Whitney T. Martin[*]

ABSTRACT: The Freedom of Information Act provides public access to government agency records. Agencies have discretion, however, to withhold any information that falls under one of the Act's exemptions, including, in some instances, private individual records. While the Supreme Court has recognized that criminal detainees have a privacy interest in restricted dissemination of their criminal records, it has yet to rule on whether the same privacy interest exists for mug shots. Currently, there is a circuit split over this issue. This Note analyzes the split in light of the purpose and history of the Freedom of Information Act and argues that future courts that entertain the issue should adopt the reasoning employed by the Tenth Circuit—namely, recognizing a privacy right in detainees' mug shots in ongoing criminal proceedings. The Supreme Court has already recognized the detrimental and lasting stigma on the not-yet convicted detainee. In holding that such a privacy interest exists, the Court will maintain consistency in its tendency toward increased privacy protection under the Act, minimize negative stigma, and still adhere to the Act's purpose.

* J.D. Candidate, The University of Iowa College of Law, 2014; B.B.A., Emory University, 2010. Thank you to the student writers and editors of Volumes 98 and 99 of the *Iowa Law Review* for their hard work and to my family for their continued support.

I. INTRODUCTION

With the aid of modern technology, mug shots of the latest arrested celebrities are easily accessible through a simple online search.[1] In fact, mug shots have arguably become a source of entertainment; there are even websites dedicated to creating your own mug shot.[2] However, easily accessible mug shots are not limited to celebrities—average citizens' mug shots are accessible as well.[3]

News sources providing such easy access to mug shots obtain the photographs through the Freedom of Information Act ("FOIA" or "the Act"), which grants the public the right to agency disclosure and dissemination of government documents.[4] There are several exemptions to this right to access, including individual privacy exemptions.[5] However, the Supreme Court has not yet ruled on the issue of public access to mug shots, nor has Congress enacted any additional legislation clarifying the privacy exemption. The circuits are split over whether mug shots should receive

1. *See, e.g.*, *Celebrity Mug Shots Gallery*, N.Y. DAILY NEWS, http://www.nydailynews.com/entertainment/gossip/celebrity-mug-shots-gallery-1.14221 (last visited Jan. 8, 2014) (providing a description of each celebrity's arrest along with the accompanying slideshow photograph); *Mug Shot of the Day: Grill-Less Flavor Flav Arrested for Alleged Assault With a Deadly Weapon*, E! NEWS, http://www.eonline.com/news/354831/mug-shot-of-the-day-grill-less-flavor-flav-arrested-for-alleged-assault-with-a-deadly-weapon (last visited Jan. 8, 2014) (reporting Flavor Flav's recent arrest for alleged assault with a deadly weapon, including a copy of his mug shot); *Mug Shots*, SMOKING GUN, http://www.thesmokinggun.com/mugshots (last visited Jan. 8, 2014) (categorizing mug shots into celebrity groups, such as "B-List" or "Gangsters").

2. *See, e.g.*, *Inside Mugshot Yourself for BBC America's New Show* Copper, SocialBomb, blog.socialbomb.com/post/30871488755/mugshot-yourself (last visited Jan. 8, 2014) (explaining an application that allows site visitors to upload a photo replacing the faces of notorious seventeenth century criminals); *Mugshot Maker*, MOBILEFISH, http://www.mobilefish.com/services/mugshot/mugshot.php (last visited Jan. 8, 2014) (allowing site visitors to enter their name, height, and other information in addition to uploading a photograph to immediately produce a fake mug shot); Mary Stewart, *How to Make Your Own Mugshot Sign*, EHOW, http://www.ehow.com/how_8097756_make-own-mugshot-sign.html (last updated Dec. 17, 2013) (detailing how to create a do-it-yourself mug shot on a card).

3. *See, e.g.*, *Mug Shots*, *supra* note 1 (posting civilian mug shots side-by-side with celebrity mug shots); *Polk County Mug Shots*, DESMOINESREGISTER.COM, http://data.desmoinesregister.com/dmr/iowa-mugshots/ (last visited Dec. 25, 2013) (allowing site users to search mug shots by name, gender, age, height, weight, or date of booking); 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? r=0 (detailing the numerous websites that "monetize humiliation" and will only take down civilian mug shots in exchange for a fee, sometimes as high as $400); *World's Most Hilarious Mug Shots*, N.Y. DAILY NEWS, http://www.nydailynews.com/news/world-hilarious-mug-shots-gallery-1.14220 (last visited Jan. 8, 2014) (including pictures of embarrassing civilian mug shots).

4. *See* James R. Peacock III, Comment, *Developments Under the Freedom of Information Act—1980*, 1981 DUKE L.J. 338, 338 ("Congress enacted the Freedom of Information Act . . . to provide the public with . . . agency records." (footnote omitted)).

5. *See* 5 U.S.C. § 552(b) (2012); *id.* § 552(b)(6)–(7) (the privacy exemptions); *see also infra* Part II.B.3.

protection under the Act's exemptions, allowing agencies to properly withhold the photographs from the public.

This Note argues that the Supreme Court should adopt the holding of the Tenth Circuit, which recognizes that criminal detainees[6] have a privacy interest in their mug shots during an ongoing criminal proceeding. Part II of this Note describes the purpose and the legislative history of the Freedom of Information Act, the purpose of mug shots, and how courts balance individual privacy interests against the public's interest in disclosure. Part III examines the current circuit split between the Sixth, Tenth, and Eleventh Circuit Courts of Appeal over whether a criminal detainees' privacy right in his or her mug shots outweighs public interest in dissemination. Part IV argues criminal detainees have a privacy interest in their mug shots that outweighs public interest in dissemination, and future courts should accordingly adopt the Tenth Circuit's reasoning in withholding mug shots from public dissemination during an ongoing criminal proceeding for three reasons: (1) prevent the stigma inevitably attached to a mug shot's release regardless of the case's outcome; (2) maintain consistency with Congress's original intent in passing the Act; and (3) logically follow from Supreme Court precedent in continually broadening privacy rights. Finally, Part V briefly concludes and offers a solution for future courts addressing this issue.

II. THE FREEDOM OF INFORMATION ACT

This Part examines the Freedom of Information Act's purpose and history, privacy exemptions, and the courts' focus on properly balancing such privacy rights against the public's interest in disclosure.

A. PURPOSE AND HISTORICAL BACKGROUND

"[G]overnment by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."[7] Taken from a 1965 Senate Report on FOIA, Congress recognized that the public must have access to government-held documents if the public is to make informed decisions and hold the government accountable for its actions in a democratic society.[8]

6. I use the term "criminal detainees" throughout this Note to describe both individuals who have been convicted and those who have been merely arrested.

7. Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 512 n.8 (2006) (quoting S. REP. NO. 89-813, at 10 (1965)) (alteration in original) (internal quotation marks omitted).

8. *Id.*

Thus, Congress enacted FOIA in 1967 in response to a push for greater access to government information.[9] Leading this charge was the press.[10] Under 5 U.S.C. § 552, FOIA provides for public disclosure of all government agency information, except information that falls within any one of the nine statutory exemptions.[11] Materials that must be disclosed include those relating to agency structure, functions, rules, decisions, procedures, and policies.[12] FOIA also specifically requires disclosure to "representative[s] of the news media," defined as "any person or entity that gathers information of potential interest to a segment of the public."[13] Furthermore, the Act requires agencies to make documents "promptly available" upon request.[14] District courts have jurisdiction to order the production of any improperly withheld documents.[15]

1. Legislative History

FOIA was a long-awaited solution to a "frustrating administrative law problem."[16] The solution developed in three phases.[17] First, the Act developed agency power in the "groundwork" phase.[18] Next, Congress increased public access to information through a series of amendments in the reform phase.[19] Finally, Congress enacted FOIA in the third phase.[20] In

9. JACQUELINE KLOSEK, THE RIGHT TO KNOW: YOUR GUIDE TO USING AND DEFENDING FREEDOM OF INFORMATION LAW IN THE UNITED STATES 13–14 (2009). The Act was signed in 1966 and was implemented one year later. 1 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 3:1 n.1 (4th ed. 2013). "The Act had a phasing-in period of one year . . . during which agencies promulgated their FOIA regulations." *Id.* (citing Pub. L. No. 89-554, 80 Stat. 383 (1966)).

10. 1 O'REILLY, *supra* note 9, § 2:5.

11. 5 U.S.C. § 552(a)–(b) (2012); *see also* Elizabeth O'Connor Tomlinson, *Litigation Under Freedom of Information Act*, 110 AM. JUR. 2D *Trials* § 2 (2008) (FOIA "establishes the right of the public to obtain information from federal government agencies."). Generally, "any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that any portions of such records are protected from public disclosure" by FOIA. U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT, 1 (2013), *available at* www.justice.gov/oip/foia-guide.html.

12. 5 U.S.C. § 552(a)(1); KLOSEK, *supra* note 9, at 15.

13. 5 U.S.C. § 552(a)(4)(A)(ii).

14. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754–55 (1989) (quoting 5 U.S.C. § 552 (a)(3)) (internal quotation marks omitted).

15. 5 U.S.C. § 552(a)(4)(B); *Reporters Comm.*, 489 U.S. at 755; *see* Peacock III, *supra* note 4, at 340 ("If an agency denies a request for documents and the denial is upheld on administrative appeal, the requesting party may sue in federal district court for an injunction against withholding the requested records and for an order compelling the production of records wrongfully withheld." (citations omitted)).

16. 1 O'REILLY, *supra* note 9, § 2:1.

17. *Id.*

18. *Id.* § 2:2.

19. *Id.* § 2:3.

20. *Id.* § 2:4.

enacting FOIA, Congress believed it could cure the problem of inadequate access to information, which hindered the public from making wise decisions in assessing federal agencies' performance.[21]

a. The "Groundwork" Phase[22]

The first phase—the "groundwork" phase—included development of agencies' power to withhold information and subsequent abuse of that power.[23] This phase began when Congress passed the Housekeeping Statute in 1789, granting federal agency heads control over dissemination of their department's documents.[24] The Administrative Procedure Act of 1946 ("APA") only slightly lessened this control. It provided that the agency heads make official records available to the public, but access was subject to five qualifications.[25] The qualifications were as follows: the requested material "must be of official record"; access was granted "in accordance with published agency rules"; those seeking access had to demonstrate that they were "properly and directly concerned"; matters required by statute to remain confidential could not be accessed; and agencies could still hold documents "confidential for good cause found as they saw fit."[26]

Despite the apparent increased access to information the APA granted the public, agencies continued to use both the Housekeeping Statute and the APA as excuses to withhold newsworthy information.[27] As obscure withholding of information increased, the public became concerned that the APA was nothing but a shield for agency secrecy.[28] The APA's five qualifications—in particular the agency's broad discretion in withholding documents as it saw fit—created a catchall excuse that agencies could use to wrongly limit public access to information.[29] This situation prompted Congress to enact a second round of amendments in an attempt to alleviate wrongful agency withholding.

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21. *See id.* § 2:2.

22. *Id.*

23. *Id.*

24. *Id.*; *see also* 5 U.S.C. § 301 (2012) ("The head of an Executive department or military department may prescribe regulations for . . . preservation of its records, papers, and property.").

25. 1 O'REILLY, *supra* note 9, § 2:2.

26. *Id.* (quoting 5 U.S.C.A. § 1002 (1964)) (internal quotation marks omitted).

27. *See id.* (including "the guest list for a private party on a Navy yacht and the details of the Mohole geophysical research project" (citing Robert S. Krause & Francis M. Gregory Jr., Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 NOTRE DAME LAW. 417, 436 (1965) and H.R. REP. NO. 89-1497 (1966))).

28. *Id.*

29. *Id.* ("APA . . . qualifications had made that public information law into a large loophole for agency secrecy.").

b. Reform

The second phase in implementing FOIA was reform. Congress first amended the Housekeeping Act to include language explicitly stating, "This section does not authorize withholding information from the public or limiting the availability of records to the public."[30] This amendment did not, however, solve all withholding problems because agencies simply turned to the APA qualifications for justifying restricted dissemination.[31]

Accordingly, congressional subcommittees lobbied for APA reform.[32] One subcommittee recognized the need for a legal remedy and began using courts to enforce the public's right to access federal documents.[33] The proposal included three exemptions that covered national items, matters exempt by statute, and "matters the disclosure of which would invade privacy."[34] Various groups battled over what they wanted to get out of the reform.[35] Ultimately, however, an APA reformation proved too cumbersome, and thus Congress found a freedom-of-information bill an attractive alternative.[36]

c. Enactment

Following several revisions in phase two, Congress passed FOIA in 1966. Interestingly, reporters played an essential role in Congress's enactment of FOIA even though reporters could likely continue to produce stories without government-sanctioned access to agency documents.[37] Some believe the reporters' push to have the Act passed was rooted in "journalistic pride."[38] Reporters disliked secret practices, favoritism, and gross abuses of the APA, and thus reporters continued to expose agency abuses through the media.[39] This publicity played a crucial role in FOIA's passage by bringing attention to the APA's weaknesses and the need for reform to fairly protect the public's right to access information.[40]

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

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.* ("The press was concerned about public documents generally, while bar groups and administrative reform proponents were primarily interested in publication of agency rules and opinions. The federal bar had used APA § 3 as a lawyer's access statute and wanted it revised." (citations omitted)).

36. *Id.*

37. *See id.* § 2:5 (claiming that "[t]he reporter who is effective needs no Freedom of Information Act"). Sources would still tell reporters the contents of the files, provided that they were not attributed to the information. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

2. The Effect of FOIA's Enactment

FOIA increased government transparency and, accordingly, increased public knowledge regarding government activities. The driving theory behind the Act is that, in a democratic society, the public is "entitled to know what their government is doing."[41] The right to freedom of information is an important part of a democracy.[42] It ensures accountability within the government, and it "reflects the principle that public bodies do not hold information on their own behalf, but rather for the benefit of all members of the public."[43]

The public's ultimate statutory right to access documents turns on FOIA's definition of "agency."[44] However, the Act does not clearly define this term. FOIA defines "agency" as "includ[ing] 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*."[45] Importantly, the Act fails to specify what constitutes an independent regulatory agency. Thus, the term "agency" has produced a significant amount of case law, much of which involves quasi-agency organizations.[46] What is clear, however, is that FOIA does not provide access to records held by Congress, federal courts, presidential advisory offices, state or local governments, or private businesses or individuals.[47]

B. RESTRICTED DISSEMINATION UNDER FOIA

The initial Act gave agencies "broad discretion" in determining which governmental records could be disseminated to the public.[48] The Act also recognized "that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from

41. O'Connor Tomlinson, *supra* note 11, § 2; *see also* Halstuk & Chamberlin, *supra* note 7, at 512 (recognizing that members of a democratic society cannot make informed decisions about their government without access to government-held documents).

42. *See* KLOSEK, *supra* note 9, at 2.

43. *Id.*

44. *See* 5 U.S.C. § 552(a) (2012).

45. *Id.* § 552(f)(1) (emphasis added).

46. 1 O'REILLY, *supra* note 9, § 4:2 (recognizing that Congress's failure to clearly define agency has "produced a diversity of case law"). Disputes not only include whether quasi-agencies are included in FOIA's definition of "agency," but also whether some entities are even agencies at all. *Id.*

47. *Id.* § 4:5; *see* O'Connor Tomlinson, *supra* note 11, § 2.

48. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 & n.3 (1989) ("The section was plagued with vague phrases . . . [a]nd the section provided no remedy for wrongful withholding of information." (internal quotation marks omitted) (citing EPA v. Mink, 410 U.S. 73, 79 (1973))).

disclosure."[49] Since its enactment, Congress has amended FOIA five times,[50] each time limiting the amount of information that an agency may disclose.[51] These limitations led some to believe that the term "freedom" is a "misnomer": the Act "is so limited . . . that one cannot ever expect to fully understand . . . federal agency actions."[52] Nevertheless, the majority of courts still favor public access over exclusion.[53]

Though reporters and congressional subcommittees worked at length to enact FOIA, it was rarely used in the initial years following enactment.[54] The Act was underused for several reasons: it was a poorly worded and ambiguous document, a result of the tension surrounding its enactment; court enforcement of dissemination is expensive, and courts had a tendency to uphold agency discretion; and finally, the Act was not widely perceived as a viable means of getting government information.[55] In FOIA's initial years, law firms and corporations were the only consistent users of the Act.[56] Furthermore, agency heads still maintained an ownership attitude over government documents and were reluctant to freely disseminate them to the public.[57] The agencies developed tactics to avoid dissemination, including "intermingling withholdable items with generally available items . . . [as] a technique for withholding all."[58] They also frequently used delay tactics in producing documents, relying on a "sue us" attitude because agencies were so successful in winning FOIA in-court disputes.[59] FOIA's ambiguity

49. Halloran v. Veterans Admin., 874 F.2d 315, 318 (5th Cir. 1989) (quoting Baldrige v. Shapiro, 455 U.S. 345, 352 (1982)).

50. *FOIA Legislative History*, NAT'L SECURITY ARCHIVE, http://www2.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm (last visited Jan. 8, 2014) (listing the 1974, 1976, 1986, 1996, and 2002 amendments). This Note focuses on the 1974 and 1996 amendments to demonstrate the procedural changes that were necessary to give FOIA substantive meaning. *See infra* Part II.B.1–2.

51. *See* Peacock III, *supra* note 4, at 338 ("Together, these [amendments] show a trend toward restricting disclosure under the Act despite the Act's purpose to establish a general philosophy of full agency disclosure." (quoting S. REP. NO. 89-813 (1965)) (internal quotation marks omitted)); *see also* Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 95 (6th Cir. 1996) ("By enacting the FOIA, Congress evidenced 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976))).

52. 1 O'REILLY, *supra* note 9, § 2:1 (internal quotation marks omitted).

53. Heather MacNeil, *In Search of the Public Good: Balancing the Right to Privacy and the Right to Know*, *in* WITHOUT CONSENT: THE ETHICS OF DISCLOSING PERSONAL INFORMATION IN PUBLIC ARCHIVES 63 (1992).

54. 1 O'REILLY, *supra* note 9, § 3:2.

55. *See id.* § 3:2–3:3.

56. *See id.* § 3:2 (describing that corporate and law firm use "quickly became the majority source of FOIA requests and litigation").

57. *Id.* § 3:3.

58. *Id.*

59. *Id.*

combined with agency abuse rendered FOIA virtually ineffective, and thus prompted Congress to adopt a string of procedural amendments to the Act.

1. The 1974 Amendments

The first amendments were enacted in 1974 and helped alleviate procedural frustrations.[60] Changes included: allowance of in-camera review of classified information at the court's discretion; requirement of prompt disclosure within ten days of receiving a request; uniform search and copy fees among agencies; and, with any requested document that falls within an exemption, requirement to disclose any "reasonably segregable" portion of the document (after deleting the exempt portions).[61] While these amendments were an improvement and served the current public needs, they were not alone sufficient to keep up with increasing disclosure requests.

2. The 1996 Amendments

Again, in 1996, Congress made changes to FOIA to accommodate advances in technology.[62] Under these amendments, the public could now request electronic copies of agency documents.[63] Additionally, agencies were instructed to comply with "fast-track" requests by news media in an effort to produce timely news.[64] Congress also loosened the strict ten-day response deadline implemented in the 1974 amendments to twenty days[65] to accommodate for the backlog of requests that had developed as the public's use of FOIA increased.[66] Following the 1996 amendments, agencies now had twenty days to respond to requests, and could extend this twenty-day deadline if the agency could demonstrate that it was making "reasonable progress in reducing . . . backlog."[67] Finally, subsequent requests for data that had previously been disseminated could be processed without additional costs of the search,[68] instead only charging the subsequent requester the cost of producing copies. However, Congress rebutted these disclosure-friendly amendments with nine statutory exemptions.

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60. *Id.* § 3:8.

61. 5 U.S.C. § 552(a)–(b) (2012); *see* KLOSEK, *supra* note 9, at 16 ("[E]ven if an agency has the right to withhold certain portions of a record . . . it must provide . . . access to those parts of the record that are not covered by the exemption."); 1 O'REILLY, *supra* note 9, § 3:8. (recognizing that agencies are "required to segregate and disclose documents which were not fairly to be considered exempt").

62. 1 O'REILLY, *supra* note 9, § 3:10.

63. *Id.*

64. *Id.*

65. 5 U.S.C. § 552(a)(6)(A)(i).

66. 1 O'REILLY, *supra* note 9, § 3:10.

67. 5 U.S.C. § 552(a)(6)(C)(ii).

68. 1 O'REILLY, *supra* note 9, § 3:10; *see* 5 U.S.C. § 552(f)(5).

3. FOIA's Nine Exemptions

Congress is continually attempting to restrict disclosure, as evidenced by FOIA's nine statutory exemptions to unrestricted dissemination that the public—including news representatives—must follow.[69] These exemptions serve different interests, including protecting confidential sources,[70] preserving enforcement proceedings,[71] and ensuring fair trials,[72] but all are "discretionary exceptions from the Act's compulsory disclosure requirements."[73]

a. The Exemptions Outlined

The first exemption covers national security information, offering "protection in the interest of defense or foreign relations" as classified under an Executive Order.[74] Exemption two covers "internal personnel rules and practices of an agency,"[75] "which are more or less trivial in the sense that there is not substantial and legitimate public interest in their disclosure."[76] This exemption also covers "confidential investigatory techniques and procedures" used by agency inspectors and auditors.[77] The third exemption applies to documents "specifically exempted from disclosure by [a] statute" other than under the Act itself,[78] or if enacted after 2009, specifically cites to § 552(b)(3).[79]

The fourth exemption protects confidential "trade secrets and commercial or financial information."[80] Courts have developed two tests to determine whether information is "confidential" business information, triggering the exemption.[81] First, documents are exempt where the agency only obtained the information from voluntary cooperation on behalf of the corporation with the agency's confidentiality assurance.[82] Second, documents are exempt "where release of the information would . . .

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69. 5 U.S.C. § 552(b).

70. *Id.* § 552(b)(7)(D).

71. *Id.* § 552(b)(7)(A).

72. *Id.* § 552(b)(7)(B).

73. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 11–12 (Robert F. Bouchard & Justin D. Franklin eds., 1980) [hereinafter GUIDEBOOK]; *see also* 1 STEVEN W. FELDMAN, WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 708 (4th ed. 2002 & Supp. 2013).

74. GUIDEBOOK, *supra* note 73, at 12; 5 U.S.C. § 552(b)(1).

75. 5 U.S.C. § 552(b)(2).

76. *See* GUIDEBOOK, *supra* note 73, at 12.

77. *Id.*

78. 5 U.S.C. § 552(b)(3).

79. *Id.* § 552(b)(3)(B).

80. *Id.* § 552(b)(4).

81. GUIDEBOOK, *supra* note 73, at 13.

82. *Id.*

likely . . . cause substantial competitive injury to the business that furnished it."[83]

The fifth exemption restricts inter- or intra-agency memoranda and letters only addressed to parties litigating with the agency.[84]

Exemption six is the first of two exemptions encompassing personal privacy. It allows for the withholding of documents regarding "personnel and medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[85] The seventh exemption is the second that deals with protection of personal privacy, and it allows for withholding "records or information compiled for law enforcement purposes."[86] The Act restricts withholding to the extent that dissemination:

> (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 . . . disclose the identity of a confidential source . . .
>
> (E) would disclose [law enforcement] techniques and procedures . . . or
>
> (F) could reasonably be expected to endanger the life or physical safety of any individual.[87]

The final two exemptions—eight and nine—cover records relating to examination of financial institutions that agencies supervise and geological or geophysical information, respectively.[88]

b. Exemption 7(C)

Of central concern in this Note is exemption § 522(b)(7)(C) ("7(C)"), an exemption to the distribution of information that presents an "unwarranted invasion of personal privacy,"[89] and courts' management of the constant tension between such privacy protection and the public's interest in dissemination of information. FOIA operates on a presumption of disclosure; the only way to defeat this presumption is by demonstrating

83. *Id.*
84. 5 U.S.C. § 552(b)(5).
85. *Id.* § 552(b)(6).
86. *Id.* § 552(b)(7).
87. *Id.*
88. *Id.* § 552(b)(8)–(9).
89. *Id.* § 552(b)(7)(C).

that material falls within one of the code's nine exemptions.[90] These exemptions, however, are discretionary.[91] FOIA's exemptions do not provide bright-line rules; agencies may still disclose the information protected under an exemption unless it is explicitly prohibited by statute.[92] The agency's goal in deciding whether to disclose should be to avoid any "foreseeable harm" that could result from the information's dissemination.[93] Yet courts recognize that where disclosure does not serve a legitimate function, privacy interests will prevail.[94] It is the courts' duty to decide this issue in the event of a withholding dispute.

C. WHEN PRIVACY INTERESTS OUTWEIGH PUBLIC INTERESTS UNDER FOIA

One of the most important concerns addressed in FOIA is Congress's interest in protecting individual privacy interests,[95] as illustrated in its exemptions.[96] Overall, the Act is aimed at maintaining a fair balance between an individual's right to privacy and the public's interest in disclosure.[97] Two of the nine exemptions—exemption six and seven—explicitly address such privacy interests, while several others are implicitly motivated by privacy concerns.[98] Specifically, this Note focuses on exemption 7(C) of FOIA, which recognizes an individual's right against unwarranted privacy invasions.[99]

Exemption 7(C) protects "personal information in law enforcement records."[100] The exemption states: "[FOIA] does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the reproduction of such law enforcement records or information . . . (C) *could* reasonably be expected to constitute an unwarranted invasion of personal privacy."[101] "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that . . . involve[s] . . . balancing . . . the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right

90. 1 O'REILLY, *supra* note 9, § 9:1.

91. *Id.* "[E]xemptions 'merely mark the outer limits of information that *may* be withheld . . . .'" *Id.* § 9:39. However, agencies are still given authority to disseminate. *Id.* § 9:1.

92. *Id.* § 9:1.

93. *Id.* (citing U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 431, 436 (1998)).

94. *Id.* § 9:37.

95. Halloran v. Veterans Admin., 874 F.2d 315, 318 (5th Cir. 1989).

96. *See* 5 U.S.C. § 552(b)(6) (2012) (protecting "personnel and medical files"); *id.* § 552(b)(7)(C) (protecting disclosure of information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy").

97. *See id.* § 552.

98. *See id.* § 552(b).

99. *Id.* § 552(b)(7)(C).

100. KLOSEK, *supra* note 9, at 19.

101. 5 U.S.C. § 552(b)(7)(C) (emphasis added).

to government information."[102] This balancing test for the disclosure of information implicating personal privacy interests has emerged from case law generated by a 1986 congressional amendment.[103]

"In 1986, Congress amended exemption 7(C)" to read, "*could* reasonably be expected to constitute," where it previously read "*would* constitute."[104] Again, this demonstrates Congress's continued effort to limit privacy invasions through more restricted dissemination.[105] By amending the language, Congress granted agencies greater discretion to withhold information because the amended version provides agencies with a "more flexible standard [for determining] whether such disclosure[s] . . . constitute" an unwarranted invasion of privacy.[106] However, despite agencies' increased autonomy, "individuals should be able to access . . . information unless there is an overriding public interest reason for denying access."[107]

Generally, the balancing test used in determining if there is an unwarranted invasion of privacy is fact-specific.[108] Thus, "per se rules of nondisclosure based upon the type of document requested, the type of individual involved, or the type of activity inquired into, are generally disfavored."[109] Exemption 7(C) ensures that information sought "contribute[s] significantly to public understanding of the operations or activities of the government"[110]—the very purpose of the Act. Before a court can balance privacy interests against public interest in disclosure, it must first identify how significant of a privacy interest is at stake, if at all.

D. PRIVACY INTERESTS IN MUG SHOTS

Criminal detainees have a privacy interest in nondisclosure of their identifying information.[111] The relevant question under FOIA, then, is

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102. MacNeil, *supra* note 53, at 64 (quoting S. REP. NO. 89-813, at 9 (1965)) (internal quotation marks omitted).

103. *See id.*

104. Halloran v. Veterans Admin., 874 F.2d 315, 319 (5th Cir. 1989) (emphasis added).

105. This more restricted dissemination results in a looser standard for agencies to work with in determining if the privacy invasion is warranted. In other words, "a [f]ederal law enforcement agency's burden in invoking [Exemption 7]" is significantly reduced. *Id.* (second alteration in original) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989)) (internal quotation marks omitted).

106. *Halloran*, 874 F.2d at 319 (quoting *Reporters Comm.*, 489 U.S. at 756 & n.9).

107. *See* KLOSEK, *supra* note 9, at 2.

108. Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984).

109. *Id.* (withholding disclosure of the identities of two employee–defendants under FOIA, but permitting disclosure of the third).

110. 2 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 17:67 (Summer 2013) (quoting City of Chicago v. U.S. Dep't of Treasury, 287 F.3d 628 (7th Cir. 2002) (internal quotation marks omitted) (citing *Reporters Comm.*, 489 U.S. 749), *reh'g denied*, *amended on other grounds by* 297 F.3d 672 (7th Cir. 2002)).

111. *See* 2 O'REILLY, *supra* note 110, § 17:77.

whether such privacy interests outweigh public interest under the balancing test and qualify for exemption 7(C).[112] The privacy interest protected "encompasses the individual's control of information concerning his or her person."[113] "[O]nly a measurable interest in privacy" is needed to trigger the exemption.[114] However, a small invasion of privacy may nevertheless be unwarranted if there are no public interests supporting disclosure.[115]

Whether criminal detainees have a measureable privacy interest in nondisclosure of mug shots has produced a split among circuit courts. A mug shot is defined as a "photograph of a person's face taken after the person has been arrested and booked."[116] Historically, law enforcement was the intended user of mug shots as a means to convict criminals and compile information. [117] While police use the photos for eyewitness identification[118] and suspect identification confirmation in trial,[119] the use of mug shots has extended well beyond law enforcement.[120] For example, news sources gather mug shots from agencies under color of public record, but use the photographs as sources of public entertainment and gossip.[121] Currently, circuit courts disagree whether this entertainment—and other potential public uses—outweighs criminal-detainee privacy interests in the mug shots.

III. THE CURRENT SPLIT

The delicate balance between right to privacy and public interest has been the topic of many court opinions.[122] This Part examines the current

112. *See supra* Part II.C for a description of this balancing test.

113. 2 O'REILLY, *supra* note 110, § 17:58 (quoting Trentadue v. Integrity Comm., 501 F.3d 1215 (10th Cir. 2007)) (internal quotation marks omitted).

114. *Id.* § 16:20.

115. Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 481 (E.D. La. 1999).

116. BLACK'S LAW DICTIONARY 1111 (9th ed. 2009).

117. *See* World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 828 (10th Cir. 2012) (reasoning that "a booking photo is intended for use only by a specific and small group of people," thus, strengthening the argument for privacy interest in the photo (citing *Times Picayune*, 37 F. Supp. 2d at 477–78)); Avi Steinberg, *Hotties, Hunks, Beat Up, Celebrities: The Allure of the Mug Shot*, NEW YORKER (June 13, 2012), http://www.newyorker.com/online/blogs/culture/2012/06/mug-shot-web-sites.html.

118. *See* NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS § 10:5 (2d ed. 2011) (stating that at the "investigation" stage the witness will be allowed to examine photos selected by the police to identify a suspect).

119. *See* 2 CRIMINAL PRACTICE MANUAL § 64:12 (2013) (recognizing that the government may have a need to use mug shot photographs in trial if a "witness's in-court identification" of the defendant is in doubt).

120. *See* Steinberg, *supra* note 117.

121. *Id.*

122. *See, e.g.*, U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989) (holding that disclosure of an FBI rap sheet to a third party could constitute an unwarranted invasion of privacy under FOIA's balancing test); *World Publ'g Co.*, 672 F.3d at 831–32 (holding that the detainee's privacy interest in booking photos outweighed public

circuit split over whether criminal detainees' privacy interests in mug shots outweigh public interest in disclosure. The Sixth Circuit is the only circuit to hold that there is absolutely "no privacy interest in a booking photo [during] ongoing and public criminal proceedings."[123] In contrast, the Tenth and Eleventh Circuits have ruled that criminal detainees not only have a privacy interest in mug shots, but also that their privacy interest outweighs public interest in disclosure, thus indicating that such disclosure is unwarranted under exemption 7(C).[124] The Tenth Circuit, however, is the only circuit to restrict unwarranted invasions of privacy to ongoing criminal proceedings.[125]

A. THE COURT-CREATED PRIVACY INVASION TEST UNDER EXEMPTION 7(C)

In 1989, the Supreme Court developed the appropriate framework for determining whether information is exempt under 7(C) in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*. In *Reporters Committee*, the Court addressed whether disclosure of FBI rap sheets to the public "constitute[d] an unwarranted invasion of personal privacy within the meaning of the Freedom of Information Act."[126] The framework consists of a three-pronged test to determine whether disseminating agency information results in an unwarranted privacy invasion, thus compelling exemption under 7(C).[127] According to the Court, a privacy invasion is unwarranted when: (1) the information was gathered for a law enforcement purpose; (2) the release of the information is reasonably expected to constitute an invasion of privacy; and (3) the privacy interest outweighs public interest in disclosure.[128] This test is now used by lower courts to determine whether a

interest in disclosure); Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 97 (6th Cir. 1996) (holding that public interest in a mug shot outweighed the defendant's privacy rights).

123. *World Publ'g Co.*, 672 F.3d at 828 (discussing the circuit split).

124. *Id.* at 830–31; Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 481–82 (E.D. La. 1999).

125. *See World Publ'g Co.*, 672 F.3d at 826 (finding that "the United States Marshals Service . . . properly withheld six booking photographs" from a local newspaper, requested during the criminal proceeding). The Tenth Circuit took a more limited view of privacy protection than the Eleventh Circuit. The Eleventh Circuit held that even a *convicted* criminal's mug shots are protected from public dissemination under exemption 7(C). *See* Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497 (11th Cir. 2011) (upholding the United States Marshals Service's refusal to disseminate mug shots of a criminal already serving his jail sentence).

126. *Reporters Comm.*, 489 U.S. at 751 (quoting 5 U.S.C. § 552(b)(7)(C) (1982 & Supp. V 1987)).

127. *World Publ'g Co.*, 672 F.3d at 827; *Karantsalis*, 635 F.3d at 502; *Detroit Free Press*, 73 F.3d at 96.

128. *See generally Reporters Comm.*, 489 U.S. 749; *Detroit Free Press*, 73 F.3d at 96–98 (applying the Supreme Court's three-pronged test as outlined in *Reporters Committee*).

privacy invasion is unwarranted in instances beyond rap sheet disclosure, including dissemination of mug-shot photographs.[129]

In *Reporters Committee*, a CBS news correspondent requested a rap sheet from the FBI of a man accused of owning a business dominated by organized-crime leaders.[130] The FBI refused to disclose the rap sheet and CBS subsequently sued.[131] The Court held that disclosure of FBI rap-sheet content to third parties fell within 7(C) of FOIA, constituting an unwarranted invasion of privacy.[132] The Court indicated that the primary purpose of FOIA was to make the government's activities known to the public, not to become a "warehouse" of private information accessible by the public.[133]

The Court in *Reporters Committee* defined "private" information as "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public."[134] The Court acknowledged that privacy cases usually involve two types of privacy interests: (1) an "individual interest in avoiding disclosure of personal matters"; and (2) an "interest in independence in making . . . decisions."[135] In regard to mug shots, the former interest is at issue.

Three circuits have treated this individual privacy interest in mug shots differently. Following *Reporters Committee*, the Sixth Circuit held that the release of mug shots was not an invasion of privacy. In contrast, the Eleventh Circuit ruled that criminal detainees do have a privacy interest that outweighs public dissemination of mug shots. Finally, the Tenth Circuit also found that mug shots should be granted protection against dissemination. The Tenth Circuit, however, limited its holding to ongoing criminal proceedings.

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129. *See, e.g.*, *World Publ'g Co.*, 672 F.3d at 830–32 (holding privacy interest in mug shots outweighs public interest in disclosure under the third prong of the 7(C) exemption test); *Detroit Free Press*, 73 F.3d at 96–98 (holding that under the Supreme Court's three-pronged test, the release of mug shots to the Detroit Free Press would not reasonably constitute an invasion of privacy in an ongoing criminal proceeding); *Times Picayune*, 37 F. Supp. 2d at 479–82 (holding that public interest in disclosure of a private businessman's mug shot constituted an unwarranted invasion of privacy).

130. *Reporters Comm.*, 489 U.S. at 757.

131. *Id.* Rap sheets contain descriptive information used by law enforcement officials to identify and prosecute criminals. *Id.* at 752. Information can include date of birth, physical characteristics, history of arrests, charges, and incarceration. *Id.*

132. *Id.* at 749.

133. *Id.* at 774.

134. *Id.* at 763–64 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1804 (1976)) (internal quotation marks omitted).

135. *Id.* at 762 (quoting Whalen v. Roe, 429 U.S. 589, 598–600 (1997)) (internal quotation marks omitted).

B. THE SIXTH CIRCUIT

Following *Reporters Committee*, the Sixth Circuit was the first appellate court to specifically address the issue of privacy interests in mug shots in 1996. In *Detroit Free Press, Inc. v. Department of Justice*, a newspaper requested the release of mug shots of eight individuals awaiting trial on federal charges pursuant to FOIA.[136] Following the three-pronged test outlined by the Supreme Court in *Reporters Committee*,[137] the court held that the release of mug shots was not an invasion of the detainee's privacy rights.[138]

In *Detroit Free Press*, the court distinguished mug shots from rap sheets, stating that mug shots do not demand as much protection from public dissemination.[139] The court held that "the very nature of rap sheets demands that they be accorded a greater degree of privacy and protection" because, unlike mug shots, they are "compilations of many facts that may not otherwise be readily available from a single source."[140] The Sixth Circuit found rap sheets were distinct from mug shots. Thus, the former should be granted more privacy protection than the latter for two reasons: first, rap sheets "disclose information that extends beyond a particular, ongoing proceeding," and second, they "recreate information that . . . may have been lost or forgotten."[141] The court noted that the need to suppress a mug shot "is drastically lessened in an ongoing criminal proceeding" because no new private information is publicized by the release of the mug shots.[142] In this case, the detainees had already been identified by name and had already appeared before the court.[143] The court found that mere embarrassment resulting from disclosure of the photographs is not sufficient to implicate individual privacy rights.[144]

Furthermore, the Sixth Circuit court recognized that disclosure of mug shots could provide public benefits by highlighting government error, such as detaining the wrong person or providing evidence of police mistreatment of the detainee.[145] Because the court did not find releasing booking photos

136. Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 95 (6th Cir. 1996).

137. *See supra* Part III.A.

138. *Detroit Free Press*, 73 F.3d at 95. However, this holding was limited to the "concerns [of] 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.*

139. *Id.* at 97.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 98. The court gave two examples of how an agency's release of mug shots to the public can serve to correct government oversight: (1) it could "reveal the government's glaring error in detaining the wrong person" or (2) it could "reveal the circumstances surrounding an arrest and initial incarceration," such as providing evidence of an illegal police beating of detainees. *Id.* For example, the court recognized that had the videotape of the infamous police

to be an invasion of individual privacy, the court did not address the third prong of the Supreme Court's test—whether public interest in disclosure outweighed privacy interests.[146]

Additionally, the court in *Detroit Free Press* declined to address privacy interests of detainees not involved in an "ongoing" criminal proceeding, such as "situations involving dismissed charges, acquittals, or completed criminal proceedings."[147] Instead, the court limited its holding to an ongoing criminal proceeding where the defendant's name has already been divulged and the defendant has already appeared in court.[148]

C. THE ELEVENTH CIRCUIT

Fifteen years later, the Eleventh Circuit declined to follow *Detroit Free Press*. In *Karantsalis v. U.S. Department of Justice*, the court held that the U.S. Marshals Service properly withheld mug shot photographs of a businessman convicted of securities fraud who was serving a federal prison sentence at the time of the request.[149] The court ruled that dissemination of the booking photographs would have been an unwarranted invasion of privacy for three reasons.[150]

First, unlike in the Sixth Circuit case *Detroit Free Press*, the *Karantsalis* court found that because a mug-shot photograph is embarrassing and captures the accused at their most vulnerable moment immediately after arrest, its dissemination constitutes a deprivation of liberty implicating a privacy interest.[151] The court rebutted the reporter's claims that no privacy interest exists because the detainee had already appeared in open court, again focusing on the embarrassment mug shots create when released to the public.[152]

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beating of Rodney King never been made, the mug shot would have served the same purpose, alerting the public to police mistreatment in a routine traffic stop. *Id.* In *Times Picayune Publishing Corp. v. U.S. Department of Justice*, the plaintiff argued that public dissemination of mug shots could also result in citizens offering information to the police. Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 480 (E.D. La. 1999). The court did not refute this argument, but rather found that it was inapplicable in the case at hand. *Id.*

146. World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 830–31 (10th Cir. 2012) (citing *Detroit Free Press*, 73 F.3d at 98).

147. *Detroit Free Press*, 73 F.3d at 97.

148. *Id.*

149. Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 499, 501 (11th Cir. 2011).

150. *Id.* at 502 (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989)); *see also id.* at 503 (concluding that "information about an individual 'not freely available to the public' may implicate a personal privacy interest" (citing *Reporters Comm.*, 489 U.S. at 764)).

151. *Karantsalis*, 635 F.3d at 503. The court viewed the mug shot as a "unique and powerful type of photograph that raises personal privacy interests." *Id.*

152. *Id.*

Second, the court held that mug shots are "often equated with[] guilt."[153] It reasoned that mug shots are distinct from normal photographs because they are a "vivid symbol of criminal accusation" and when disseminated to the public they implicate guilt.[154] Third, the court placed emphasis on the fact that mug shots are not generally available to the public, suggesting a personal privacy interest exists.[155] For these reasons, the Eleventh Circuit held that "individuals have a substantial privacy interest in their criminal histories," including mug shots taken during criminal proceedings,[156]—such interest lasting beyond conviction—in sharp contrast with the Sixth Circuit's previous holding that individuals have a *decreased* right of privacy during criminal proceedings.

Third, finding that a criminal detainee does have a privacy interest in his or her mug shot, the court next balanced public interest in disclosure against the privacy interest in preventing dissemination under the third prong of the *Reporters Committee* test.[157] Relying on the core purpose of FOIA—government transparency—the court concluded that no public interest would be served by releasing the booking photographs.[158] Therefore, balancing the two interests in this case, the privacy interest prevailed. The Eleventh Circuit thus held that convicted criminals are entitled to privacy protection of their mug shots under exemption 7(C) even after criminal proceedings have terminated.[159]

D. THE TENTH CIRCUIT

Most recently, in *World Publishing v. U.S. Department of Justice*, the Tenth Circuit aligned with the Eleventh Circuit and found a pretrial detainee has a privacy interest in his or her mug shot during an ongoing criminal proceeding, and that such a privacy interest outweighed public interest in disclosure.[160] Differing from the Eleventh Circuit, however, the Tenth Circuit court did not address a convicted criminal's privacy interest in mug shots following criminal proceedings and restricted its holding to ongoing criminal proceedings.

Relying on *Reporters Committee*, the court in *World Publishing* found mug shots similar to FBI rap sheets,[161] which the Supreme Court determined

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (quoting O'Kane v. U.S. Customs Serv., 169 F.3d 1308, 1310 (11th Cir. 1999)) (internal quotation marks omitted).

157. *Id.* at 503–04.

158. *Id.* at 504 (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989)).

159. *Id.* at 503.

160. World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 827–32 (10th Cir. 2012).

161. *Id.* at 827.

warranted protection against dissemination.[162] Therefore, the court reasoned, mug shots should also be granted protection.[163] Like rap sheets, mug shots are of a "sensitive nature."[164] Furthermore, "in both cases, the government has expressed a desire to prevent public disclosure of the information," despite differing forms of protection.[165] The court held that a booking photograph is not intended for public use, but for law enforcement purposes,[166] which, as the Supreme Court already recognized in *Reporters Committee*, implicates a privacy right.[167]

Finally, the court emphasized that dissemination of mug shots can have a stigmatizing effect on the individual lasting beyond the criminal proceeding[168] because "[m]ug shots . . . are notorious for their visual association . . . with criminal activity."[169] Quoting a federal district court, the Tenth Circuit reasoned that mug shots' association with criminal activity might be "because of the unpleasant circumstances of the event or because . . . the equipment used . . . generally disclose[s] unflattering facial expressions," or even worse, because of the "sign under the accused's face with a unique Marshals Service criminal identification number."[170]

The Supreme Court has yet to rule on whether criminal detainees have a privacy interest in their mug shots that outweighs public interest in disclosure. While the Sixth Circuit does not recognize a privacy right in mug shots, the Tenth and Eleventh Circuits do. However, the Tenth and Eleventh Circuits disagree on when such privacy rights outweigh public interest in dissemination. The Eleventh Circuit does not address limits to unwarranted privacy invasion in dissemination of mug shots, and it is apparent from its case history that privacy interests endure beyond the criminal proceeding. In the Tenth Circuit, however, such rights are only implicated during an ongoing criminal proceeding. The next Part examines why courts should adopt the reasoning employed by the Tenth Circuit.

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162. *See supra* note 131 and accompanying text.

163. *World Publ'g Co.*, 672 F.3d at 829–30.

164. *Id.* at 829.

165. *Id.* ("[W]hile rap sheets are protected statutorily . . . booking photographs are protected by DOJ policies.").

166. *Id.* at 831.

167. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989).

168. *World Publ'g Co.*, 672 F.3d at 828 ("A mug shot preserves . . . [an] individual's brush with the law *for posterity*" (quoting Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 477 (E.D. La. 1999)) (internal quotation marks omitted)).

169. *Id.* at 827–28 (emphasis omitted) (quoting *Times Picayune*, 37 F. Supp. 2d at 477).

170. *Id.* at 828 (quoting *Times Picayune*, 37 F. Supp. 2d at 477).

IV. CRIMINAL DETAINEES HAVE A PRIVACY RIGHT IN MUG SHOTS THAT OUTWEIGHS PUBLIC INTEREST DURING ONGOING CRIMINAL PROCEEDINGS

The Supreme Court, and likewise all courts, should recognize, as the Tenth and Eleventh Circuits have, that criminal detainees have a privacy interest in their mug shots under FOIA.[171] However, exemptions of mug shots from FOIA requests should be limited to *ongoing* criminal proceedings in accordance with the Tenth Circuit holding. A *convicted* criminal defendant is afforded less privacy protection in light of government interest.[172] Once convicted, individuals have a reduced privacy interest[173]—one that is likely outweighed by public disclosure interests under the Court's three-pronged 7(C) exemption test. However, prior to conviction, criminal detainees should be afforded the same privacy protections as other individuals, and therefore should be entitled to a public disclosure exemption.

The Sixth Circuit is the only circuit to hold that a criminal detainee has no privacy right in his or her mug shot. The court reasoned that because the defendant had already appeared in court, no additional privacy interest could be lost in public dissemination of his mug shot.[174] Furthermore, in contrast with the Tenth and Eleventh Circuits, the court did not find embarrassment resulting from public dissemination a sufficient interest to implicate a privacy right.[175]

Subparts IV.A and B discuss why the Sixth Circuit's holding was incorrect and, conversely, why the Tenth Circuit correctly withheld mug shots from the public using the Supreme Court's balancing test. First, Subpart IV.A discusses weighty privacy interests that criminal detainees have in their mug shots because of lasting, stigmatizing effects associated with the photographs and the Supreme Court's precedent in trending towards increased privacy rights. Second, Subpart IV.B discusses potential public interests and why they do not outweigh privacy rights under the third prong of the Supreme Court's 7(C) exemption test. Thus, mug-shot disclosure per FOIA requests during ongoing criminal proceedings constitutes an unwarranted invasion of privacy.

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171. *See id.* at 827–31 (holding that the United States Marshals Service properly withheld booking photographs requested by the newspaper); Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 504 (11th Cir. 2011) (holding that the mug shots of a businessman accused of securities fraud were properly withheld).

172. *See* Banks v. United States, 490 F.3d 1178, 1182 (10th Cir. 2007) (recognizing that "parolees, supervise[es], and probationers, such as Plaintiffs, have a significantly diminished expectation of privacy"). Note, however, that the court in *O'Kane v. U.S. Customs Service*, 169 F.3d 1308, 1310 (11th Cir. 1999), did not follow the same reasoning as in *Banks*. The court "reject[ed] the notion that federal criminals are entitled to a lesser degree of privacy for purposes of the FOIA." *Karantsalis*, 635 F.3d at 503 (citing *O'Kane*, 169 F.3d at 1310).

173. *See infra* Part IV.A.

174. *See supra* text accompanying notes 142–43.

175. *See supra* text accompanying note 144.

A. SIGNIFICANT PRIVACY INTERESTS IN MUG SHOTS

Both the Tenth and Eleventh Circuits were correct in recognizing criminal detainees' privacy interest in their mug shots. This interest is implicated during ongoing criminal proceedings for two reasons: first, public dissemination of mug shots can result in lasting, stigmatizing effects, despite the outcome of the case; second, the Supreme Court has continued to increase privacy rights, demonstrating a trend towards protecting the individual that should be followed by courts in the future to maintain consistency with Supreme Court precedent.

1. "[P]resumption of innocence is a legal requirement, not a social norm"[176]

As Andrew D. Leipold recognized in the above quote, often the public does not view criminal detainees as innocent until proven guilty as our legal system promises.[177] Both the Tenth and Eleventh Circuits were correct in considering stigmatizing effects in determining the invasiveness of a mug shot's release.[178] The common public misperception is that individuals arrested or charged with a crime are guilty of that crime.[179] "In other words, while the criminal justice system presumes innocence, the general public presumes guilt."[180] Thus, public dissemination of mug shots likely results in irreparable harm to the individual due to this controlling presumption of guilt.[181] The dissemination of a mug shot alerts the public to an individual's criminal charge. Upon seeing the charge, the public presumes the individual is guilty, regardless of the outcome of the case.[182] Resulting costs

176. Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299 (2000).

177. *See id.* at 1299–1300 (discussing barriers to vindication for unconvicted defendants).

178. *See* World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 828 (10th Cir. 2012) (stating that a mug shot implicates privacy interests because its "stigmatizing effect can last well beyond the actual criminal proceedings" (quoting Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 477 (E.D. La. 1999))); Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 503 (11th Cir. 2011) ("A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt.").

179. Matthew D. Callanan, Note, *Protecting the Unconvicted: Limiting Iowa's Rights to Public Access in Search of Greater Protection for Criminal Defendants Whose Charges Do Not End in Convictions*, 98 IOWA L. REV. 1275, 1278 (2013) (citing Leipold, *supra* note 176, at 1305–07).

180. *See id.* (citing Robert Sykora, *The Invisible Worm and the Presumption of Guilt*, 37 WM. MITCHELL L. REV. 722, 735 (2011) (describing the inevitable societal presumption of guilt when the public sees, for instance, an officer patting down a man "spread-eagled on the hood of a squad car")).

181. *See supra* note 177 and accompanying text; *see also, e.g.*, Segal, *supra* note 3 (describing the lasting "taint" a drug arrest has on a college student's ability to get a job a year later due to online mug shot photos, despite earning a clean record since the arrest).

182. Callanan, *supra* note 179, at 1292 (citing Leipold, *supra* note 176, at 1297); Segal, *supra* note 3 ("Mug shots are merely artifacts of an arrest, not proof of a conviction, and many

to the individual include negative effects on personal life, reputation, employment, education, and housing.[183] The resulting harm is even more egregious when the criminal defendant is not convicted.[184]

In *Reporters Committee*, the Supreme Court withheld individuals' rap sheets under 7(C) even though they had already been convicted.[185] This demonstrates that criminal detainees should have individual privacy protections in the case of even less-proven criminality during an ongoing criminal investigation, including a privacy right in their mug shots. While the Sixth Circuit attempts to minimize this privacy interest, the Supreme Court has demonstrated that the interest is anything but insignificant.[186]

In *Detroit Free Press*, the Sixth Circuit argued that a criminal detainee in an ongoing criminal procedure has a reduced privacy interest in a mug shot.[187] Furthermore, the court held that "personal privacy . . . is not necessarily invaded simply because that person suffers ridicule or embarrassment from the disclosure."[188] In reaching the conclusion that disseminating mug shots of indicted defendants "could not reasonably . . . constitute an invasion of personal privacy," the court greatly emphasized that the indictees had already been identified by name and had appeared in court, thus dissemination of their mug shots would not provide the public with any additional information.[189] In other words, dissemination of the photos would not constitute any further invasion of privacy; thus, no privacy rights were implicated.

However, the Sixth Circuit's reasoning directly conflicts with Supreme Court precedent. In *Reporters Committee*, the Court held that there is an "inherent" privacy interest in "nondisclosure of certain information[,] even

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people whose images are now on display were never found guilty, or the charges against them were dropped.").

183. *See* Callanan, *supra* note 179, at 1292–93 (noting that "the public's 'presumption of guilt' affects more tangible areas [of life] than a defendant's personal life and reputation" (citing Robert I. Simon, *The Psychological and Legal Aftermath of False Arrest and Imprisonment*, 21 BULL. AM. ACAD. PSYCHIATRY & L. 523, 525–26 (1993))).

184. *See generally* Callanan, *supra* note 179, for a description of how unconvicted criminal defendants bear similar repercussions as convicted criminals because the public presumes guilt.

185. *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). While this Note argues that criminal detainees have a privacy interest in mug shots during an ongoing criminal proceeding, and therefore does not support withholding information of a convicted criminal, the Court's extreme holding that a privacy interest still exists in this case supports the argument that a privacy interest must also exist in cases of even less-proven criminality.

186. *See supra* Part III.A.

187. Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 97 (6th Cir. 1996) (stating that "the 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"); *see also supra* notes 142–44 and accompanying text.

188. *Detroit Free Press*, 73 F.3d at 97; *see supra* notes 142–44 and accompanying text.

189. *Detroit Free Press*, 73 F.3d at 97; *see supra* notes 142–44 and accompanying text.

where the information may have been at one time public."[190] Thus, even if parts of the criminal proceeding are public, the detainee still maintains a privacy interest in limiting a mug shot's disclosure.[191] The Tenth Circuit agreed with the Court in *World Publishing*, recognizing the sensitive nature of "the vivid and personal portrayal of a person's likeness" in a mug shot.[192] Furthermore, the Tenth Circuit placed great emphasis on the fact that mug shots are generally not available to the public, implicating privacy interests.[193]

In *Karantsalis*, the Eleventh Circuit agreed with the Tenth Circuit in finding that the booking photograph captures an "embarrassing moment" when the detainee is deprived of liberty rights,[194] therefore implicating a privacy right. However, the Eleventh Circuit goes too far in *Karantsalis*, holding that a convicted criminal serving a prison sentence has a continuing privacy interest in preventing dissemination of his or her mug shots. The court reasoned that "individuals have a substantial privacy interest in their criminal histories," and thus, despite conviction, their mug shots should be withheld from the public. [195] Therefore, in sharp contrast to the Sixth Circuit, the Eleventh Circuit places too much emphasis upon the stigmatizing effects of disseminating mug shots of an already convicted criminal.

Past criminal convictions are matters of public record, and privacy interests decrease in information available in public records. Thus, convicted criminals have a decreased privacy interest.[196] Additionally, the fear of unwarranted negative stigma is not present as in an ongoing criminal proceeding. Such an interest is so low, however, that it cannot outweigh public interest in dissemination under the Supreme Court's exemption 7(C)

190. *Reporters Comm.*, 489 U.S. at 767; *see also* Dep't of the Air Force v. Rose, 425 U.S. 352, 380–81 (1976) (recognizing the detrimental effects and "risk to [one's] privacy interests" that re-disclosure of a former cadet's discipline record to current Academy members may have when unknowing former colleagues or instructors learn of the information, despite the fact that the information was once previously available to members of the Academy). Although *Rose* dealt with FOIA's exemption 6, the Supreme Court recognized in *Reporters Committee* that much of the opinion is applicable to exemption 7(C) cases. *Reporters Comm.*, 489 U.S. at 768.

191. *Reporters Comm.*, 489 U.S. at 770 (stating that an individual still has a privacy interest in a booking photo even if the matter is not "wholly private" (internal quotation marks omitted)).

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

193. *Id.*

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

195. *Id.* (quoting O'Kane v. U.S. Customs Serv., 169 F.3d 1308, 1310 (11th Cir. 1999)) (internal quotation marks omitted).

196. Reporters Comm. for Freedom of the Press v. U.S. Dep't of Justice, 816 F.2d 730, 748 (D.C. Cir. 1987) (stating that "[t]he prevailing law of invasion of privacy generally recognizes that the interests in privacy *fade* when the information involved already appears on the public record" (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494–95 (1975)) (internal quotation marks omitted)), *aff'd in part, rev'd in part*, 489 U.S. 749 (1989).

balancing test.[197] Therefore, the Eleventh Circuit incorrectly withheld mug shots of a convicted criminal from the public.

2. The Supreme Court Trend Towards Increased Privacy Protection

The Supreme Court is continually increasing privacy protection for individuals under FOIA. The Tenth Circuit's conclusion that criminal detainees have a significant privacy interest in their mug shots during an ongoing criminal proceeding is consistent with this trend. "While the FOIA emphasizes the 'fullest disclosure' possible,"[198] Congress has enacted personal privacy exemptions since FOIA's creation, "intend[ing] to afford broad protection against the release of information about individual citizens."[199] Even since Congress enacted 7(C), the Supreme Court has continually made it more difficult for the public to access private information.[200]

In *Reporters Committee*, the Court read any request that triggered 7(C) as requiring the agency to "almost automatically reject[]" the request unless the requester could demonstrate that the requested document would shed light on government interest or performance.[201] This new requirement shifted the burden of proof from the agency to the requester.[202] As a result, the Supreme Court in *Reporters Committee* significantly reduced the number of private documents that would be released to the public.[203]

In *National Archives and Records Administration v. Favish*, the Court again increased the burden of proof required to compel production of private information.[204] In that case, Allan Favish brought a FOIA action to compel production of photographs of (deputy counsel to President Clinton) Vicent

197. See *infra* Part IV.B for a description of public interests.

198. Halstuk & Chamberlin, *supra* note 7, at 516 (quoting S. REP. NO. 813–89, at 3 (1965)).

199. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 73 F.3d 93, 99 (6th Cir. 1996) (Norris, J., dissenting) (quoting Hopkins v. U.S. Dep't of Hous. & Urban Dev., 929 F.2d 81, 86–87 (2d Cir. 1991)) (internal quotation marks omitted).

200. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 173–74 (2004) (recognizing a family right to privacy under exemption 7(C) and increasing the burden of proof that requesters must meet before they can gain access to private information protected by the exemption); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989) (creating an agency right to withhold documents under exemption 7(C) unless the document would grant the public insight into government activities).

201. Halstuk & Chamberlin, *supra* note 7, at 555.

202. *Id.*

203. *Id.* (arguing that *Reporters Committee* "dramatically reduced the scope of documents that agencies are required to disclose" (citing Charles N. Davis, *Expanding Privacy Rationales Under the Federal Freedom of Information Act: Stigmatization as Talisman*, 23 SOC. SCI. COMPUTER REV. 453, 456–57 (2005))).

204. *See id.* at 560. The authors argue that the Supreme Court grants too much protection to private documents, a result of the Court's continued restrictive precedent in FOIA disputes. *Id.* at 560–61.

Foster's death scene.[205] Favish believed "the [g]overnment's investigations were 'grossly incomplete,'" and he wanted to confirm the cause of death himself.[206] In holding that the photographs could be withheld under 7(C), the Court made three significant determinations.[207]

First, the Court extended the exemption's "personal privacy" language to include families of the individual.[208] The Court held that Foster's family had a right to privacy with respect to the death-scene images.[209] Second, the Court held that the 7(C) exemption requires "sufficient reason for the disclosure,"[210] overriding previous assertions that the agency still maintains discretion in disclosing materials protected by a FOIA exemption.[211] The requester is required to demonstrate that "the public interest sought to be advanced is [] significant"[212]—a higher burden of proof than merely proving that the requester is simply seeking a further understanding of government activities. Furthermore, the requester must demonstrate that the information is in fact likely to advance that interest.[213] Without such showings, the agency will not release the requested private documents.

Third, the Court created a presumption of legitimacy in government officials, requiring clear evidence to displace it.[214] Thus, in *Favish*, the agency could presume that government officials correctly determined Foster's cause of death. Again, this requirement significantly increases the burden of proof for requesters, further securing privacy interests.

The Supreme Court has continually supported increased privacy rights under FOIA's 7(C) exemption, as evidenced by significant changes including shifting the burden to the requester, joining families under the exemption, and increasing the standard of proof required to access information. Future courts would maintain consistency with Supreme Court precedent by recognizing privacy rights in criminal detainees' mug-shot photos during ongoing criminal investigations, as the Tenth Circuit has.

B. PRIVACY INTERESTS OUTWEIGH PUBLIC INTERESTS UNDER THE BALANCING TEST

Under the third prong of exemption 7(C)'s test, a court must balance private and public interests to determine whether dissemination is warranted. Courts have recognized three reasons that the public would be

205. *Favish*, 541 U.S. at 160–61.

206. *Id.* at 161 (quoting Appendix to Petition for Certiorari 57a).

207. *Id.* at 174.

208. *Id.* at 171; *see* 5 U.S.C. § 552(b)(7)(C) (2012).

209. *Favish*, 541 U.S. at 171.

210. *Id.* at 172.

211. *See supra* notes 90–92 and accompanying text.

212. *Favish*, 541 U.S. at 172.

213. *Id.*

214. *Id.* at 174. ("[T]he requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.").

interested in accessing mug shots. However, these reasons are not sufficient to overcome a criminal detainee's privacy interest during ongoing criminal proceedings; thus, dissemination is unwarranted.

The first public interest is the very purpose for FOIA's enactment: to increase government transparency and likewise public knowledge about agency activities.[215] The Supreme Court has recognized the importance of disclosing "information that sheds light on an agency's performance of its statutory duties."[216] Furthermore, the Court has held that disclosure should be measured "solely in terms of [the objective of the FOIA], rather than on the particular purpose for which the document is being requested."[217]

The public interest argument is that dissemination of mug shots will notify the public of enforcement officers' activity and demonstrate the agency's performance.[218] In short, dissemination will let the public know that enforcement officers are doing their job.[219] However, in all three circuit cases discussed, the public stands to learn little to nothing about the government's performance of its statutory duties from the mug shots[220] because a mug shot conveys only a facial expression to the public and does not speak to the agency's activities or general performance.

For example, in *World Publishing*, the Tenth Circuit held that disclosure of mug shots during an ongoing criminal investigation would not inform citizens of the government agency's "adequate performance of its function[s]" nor would it "contribute significantly to public understanding of federal law enforcement operations."[221] FOIA itself demonstrates "that disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind."[222] So, while maintaining consistency with FOIA's intended purpose is a valid public interest, it is not applicable to mug shots and thus loses the balancing test, rendering dissemination unwarranted.

Second, parties seeking disclosure argue that mug shot dissemination protects against government abuse and misconduct, such as physical abuse

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215. *See supra* Part II.

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

217. World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 830 (10th Cir. 2012) (alteration in original) (quoting Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 479 (E.D. La. 1999)).

218. *See id.*

219. *Id.*

220. *See id.* at 831 ("[D]isclosure of federal booking photographs is not likely to contribute significantly to public understanding of federal law enforcement operations or activities." (quoting World Publ'g Co. v. U.S. Dep't of Justice, No. 09–CV–574–TCK–TLW, 2011 WL 1238383, at *17 (N.D. Okla. Mar. 28, 2011))).

221. *Id.* (quoting *World Publ'g Co.*, 2011 WL 1238383, at *17).

222. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 765 (1989).

of prisoners or coerced confessions from detainees.[223] Again, the Tenth Circuit held in *World Publishing* that this interest was not significant enough to outweigh privacy interests, recognizing that other media coverage would be "more than adequate" to prove abuse.[224] Furthermore, as in the first public interest, a mug shot only gives the public a facial expression. It would be difficult, if not impossible, to determine the propriety of the agency's actions from one (often unflattering) picture.

Finally, at least one court has entertained giving public interest weight in the event that the accused is a fugitive.[225] In a situation where law enforcement needs public assistance in locating a fugitive, there would clearly be a significant public interest that would likely outweigh any privacy interest in restricted dissemination of a mug shot.[226] However, this interest is wholly inapplicable during an ongoing criminal proceeding when the defendant has already been apprehended.

An additional public interest, unaddressed by the courts, is safety. Mug shots can alert the public to neighbors or acquaintances that have committed crimes, allowing them the opportunity to take additional precautions as needed. However, as addressed above, the stigma attached to mug shots can be incredibly detrimental to defendants, especially in cases of acquittal or non-dangerous crimes, so that, arguably, even this safety interest does not outweigh privacy interests.

Because each of the aforementioned public interests can be rebutted and outweighed by privacy interests during an ongoing criminal proceeding, the Tenth Circuit correctly found that dissemination was unwarranted under exemption 7(C). Courts entertaining this issue in the future should follow the Tenth Circuit's reasoning and withhold mug shots from the public during ongoing criminal proceedings.

V. CONCLUSION

FOIA allows public access to agency documents, but Congress has carved out exemptions based on an individual's right to privacy. Though the Supreme Court has recognized that criminal detainees do have a privacy interest in their criminal records, whether they specifically have a privacy interest in their mug shots is an issue dividing circuit courts. Courts entertaining this issue in the future should adopt the reasoning of the Tenth Circuit, recognizing dissemination of mug shots during ongoing criminal proceedings as an unwarranted invasion of privacy exempt from public disclosure under 7(C) of FOIA.

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223. *World Publ'g Co.*, 672 F.3d at 830–31.

224. *Id.*

225. *See* Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 501 (11th Cir. 2011).

226. *See id.* (stating that the United States Marshals Service's "policy is that the only law enforcement purpose for releasing a booking photograph is . . . [to locate] a fugitive" (emphasis omitted)).