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Note

APPLYING THE FREEDOM OF INFORMATION ACT'S PRIVACY EXEMPTION TO REQUESTS FOR LISTS OF NAMES AND ADDRESSES

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INTRODUCTION

The Freedom of Information Act ("FOIA" or the "Act")[1] recognizes both the value of providing public access to government information and the need to protect the privacy of individual citizens.[2] The Act requires federal agencies to release requested information contained in agency files, but also specifies nine exemptions that allow the government to withhold the records.[3] FOIA's sixth exemption limits disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[4]

There is conflict concerning the weight of the privacy interest in names and addresses under exemption six.[5] Some courts have held that disclosure of lists of names and addresses contained in files held by a federal agency constitutes a clearly unwarranted invasion of personal privacy and that the agency could choose not to release such information.[6] ***1034** Other courts reviewing denials of similar FOIA requests have held that the agency must release lists of names and addresses.[7]

This Note examines whether an individual's name or address should be released from a government file pursuant to a disclosure request under the Freedom of Information Act. Part I discusses the legislative history of FOIA and judicial interpretation of the purposes and application of the Act. Part II identifies specific issues that have divided circuit courts in their application of exemption six in general and their analysis of the privacy interest in one's name and address in particular.

In Part III, this Note suggests that in reviewing a federal agency's denial of a request for names and addresses under the privacy exemption balancing test, courts should first identify the public interest in disclosure. This public interest should be limited to disclosures that allow public scrutiny of the operation of government and its agents. Next, the court should identify the private citizen's interest in non-disclosure and examine the potential impact of release of a name and address to the public. This Note concludes that denial of release would be proper if disclosure would reveal embarrassing or intimate personal details pertaining to an individual or would facilitate intrusion upon an individual's privacy through unrequested mail or telephone solicitations without furthering FOIA's intended public interest purpose.

I. THE FREEDOM OF INFORMATION ACT

A. *Historical Perspective and the Legislative Purpose*

FOIA was enacted in 1966[8] to ensure greater public access to government ***1035** information.[9] The Act amended section 3 of the Administrative Procedure Act ("APA"),[10] the original government information disclosure statute.[11] Section 3 of the APA "was generally recognized as falling short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute."[12] Both the House and Senate Reports accompanying the bill that became FOIA expressed the

sentiment that section 3 of the APA was poorly drafted and had not met its goals.[13]

FOIA was intended to permit public access to government information in order to facilitate public scrutiny of agency action.[14] The Act is also ***1036** designed to assist private citizens in their dealings with federal agencies.[15] FOIA's purpose, however, "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct."[16] The Act "was *not* intended to function as a private discovery tool,"[17] nor was it intended to assist private individuals in the furtherance of their commercial interests or endeavors.[18]

FOIA requires that requested information be released unless it falls within one of the statutory exemptions.[19] The exemptions are designed to establish concrete, workable standards for determining whether particular material may be withheld or must be disclosed.[20] These limited exemptions, however, are not to obscure the Act's basic policy favoring disclosure.[21]

B. *The Privacy Exemption*

FOIA's privacy exemption limits disclosures of "personnel and medical files and similar files" where disclosure "would constitute a clearly unwarranted invasion of personal privacy."[22] The exemption provides private citizens statutory[23] protection from unwanted intrusions upon ***1037** their personal privacy resulting from government disclosure of their affairs to third parties.[24] Congress' primary concern in drafting exemption six was to ensure the confidentiality of personal matters.[25]

Based upon statements in the House and Senate Reports,[26] the Supreme Court has held that exemption six requires a balancing of the public interest in disclosure with the private interest in non-disclosure.[27] Congress recognized that federal agencies, in compiling various records, acquire an abundance of personal information about private individuals.[28] The privacy exemption was added to FOIA to provide for a balancing of the individual's right of privacy and the public's right to governmental information.[29]

*1038 II. ISSUES DISPUTED IN APPLICATION OF PRIVACY EXEMPTION TO REQUESTS FOR NAMES AND ADDRESSES

There are five principal disputes among the circuit courts concerning application of the privacy exemption balancing test to requests for names and addresses. The first area of discrepancy is whether to consider the availability of alternative sources of information. Some courts, ignoring this factor, identify the privacy interest at stake, specify the public interest in disclosure, and consider whether public access to the information would constitute an invasion of privacy.[30] If disclosure would constitute such an invasion, they consider only whether such an invasion is justified by any countervailing benefit from disclosure.[31] Others, however, also consider the availability of alternative sources of information under the privacy exemption balancing test.[32]

***1039** The second issue in dispute is whether courts, in analyzing the invasion of personal privacy, should examine only the effect of releasing harmful or embarrassing facts, or whether they should also consider less immediate invasions such as receiving a barrage of mail solicitations. Some hold that exemption six only excludes from disclosure details that are of an "intimate" or "highly personal" nature.[33] Most courts, however, will also consider the effects of release beyond the disclosure of intimate or highly embarrassing details.[34]

The third source of controversy is whether the private interest of the requester is relevant to the exemption six balancing test. The Ninth Circuit considers both the requesting party's particular interest as well as any general public interest in obtaining disclosure.[35] Other courts consider only the general public's interest in release of the information.[36] According to these courts, weighing the requesting party's interest is improper, because a court cannot limit the disclosure of information to particular parties for particular uses.[37] Furthermore, because FOIA mandates that "any person"[38] may obtain the information, either all requesters must have access to the information or none will; the special needs of any individual submitting the requesters should be irrelevant.[39] Similarly, some circuit courts have relied on Supreme Court statements ***1040** regarding FOIA's fifth and seventh exemptions[40] to hold that the identity of the requesting party has no bearing on the privacy exemption balancing test.[41] Requesters' arguments that their planned use would not lead to a privacy invasion are considered irrelevant because the impact of disclosure to the general public is examined.[42]

There is also disagreement as to what constitutes a "public interest in disclosure" under the privacy exemption. One view holds that there is a public interest in disclosure if release of the requested information would serve the core purpose of FOIA: to enlighten the public about the workings of the government.[43] Others adopt a broader view of "public interest in disclosure."[44] These courts will sometimes find a public interest in disclosure when release would serve the public good, but not further ***1041** FOIA's purposes of revealing information about the operation of government.[45] Finally, courts are divided regarding the nature and extent of the privacy interest in one's name and address. Some courts recognize a strong privacy interest in names and addresses.[46] Others, while recognizing a "meaningful" or "cognizable" privacy interest in one's name and address,[47] allow release of the requested list if there is a stronger public interest in disclosure.[48] A third position is that the privacy interest one has in his name and home address is minimal or negligible.[49]

*1042 III. GUIDELINES FOR IMPLEMENTING THE PRIVACY EXEMPTION BALANCING TEST

Disclosure of government information to the public is necessary to maintain the democratic nature of our society.[50] There is also a need to protect the privacy of individuals who confide in their government.[51] Federal agencies have accumulated vast amounts of information that include private facts about individuals.[52] Disclosure of such personal information would not only constitute an invasion of privacy, but would also deter individuals from providing the government with similar information in the future.

Congress' intention that application of the privacy exemption entail a balancing of the public interest in disclosure and the private interest in non-disclosure is clear from the legislative history, as the Supreme Court has confirmed.[53] No bright-line rule is applicable to every consideration of the privacy interest in one's name and address under exemption six. Congress recognized this when it granted district courts jurisdiction to review *de novo* an administrative agency's decision to deny a FOIA request and withhold information from the public.[54] Nevertheless, general ***1043** guidelines must be established so that such denials are reviewed consistently.

A. *Alternative Sources Irrelevant*

In balancing the public interest in disclosure with the private interest in non-disclosure, courts should not take into account availability of the names and addresses from other sources.[55] Consideration of this factor supports conflicting conclusions. On the one hand, alternative availability of information might favor disclosure because release of the list will not significantly contribute to an invasion of personal privacy.[56] Any potential privacy invasion would, in all likelihood, already have occurred as a result of that alternative availability. At the same time, however, if alternative sources are not available, one could argue for release, in certain circumstances, because the requested information is necessary to advance the public interest purpose for which it is sought.[57]

Furthermore, consideration of alternative availability distracts the focus of the inquiry away from the primary balancing under FOIA--the invasion of privacy with the public's right to government information. The significance of alternative availability as a factor in the balancing test is lessened when there is no discernible public benefit from disclosure.[58] In addition, disclosure of names and addresses is not warranted if such release would result in a significant invasion of personal privacy, even when there is no alternative source for the list. The important issues in the balancing test, therefore, are the public benefit from disclosure and the personal privacy of the individual. Alternative sources, in comparison, are largely irrelevant to this assessment. Similar arguments support the conclusion that alternative methods of communication are also irrelevant to the privacy exemption balancing test.[59]

*1044 B. *Protection from Unwanted Intrusions of Solicitation*

Congress undoubtedly sought, through exemption six, to prevent invasions of personal privacy that would result from the disclosure of "intimate"[60] or "highly personal"[61] details about an individual. The privacy interest in controlling release of intimate or highly personal information is compelling. Most courts, however, have recognized that Congress provided protection against other types of intrusion in the privacy exemption;[62] the exemption also protects against significant but less severe invasions of privacy that are facilitated by the FOIA disclosure, such as unwanted intrusions of mailed solicitations.[63]

Those arguing that the privacy exemption does not protect against such intrusions might stress that only "clearly unwarranted" invasions of personal privacy are excepted.[64] Before the Act was passed, Congress was urged to revise the language of the exemption to broaden the scope of its protection.[65] That these proposals were ignored suggests that Congress intended to restrict only release of harmful or embarrassing facts.

The Second Circuit stated that exemption six protects against disclosure of facts that "could subject the person to whom they pertain to embarrassment, ***1045** harassment, disgrace, loss of employment or friends."[66] Whether disclosure of information results in a clearly unwarranted invasion of personal privacy, the court reasoned, is closely related to whether the information is "similar" to medical or personnel files.[67] In the court's opinion, whether the information is similar to that contained in medical and personnel files depends on the personal, intimate quality of the information.[68]

The Supreme Court, however, subsequently defined "similar files" broadly to include "'detailed Government records on an individual which can be identified as applying to that individual.'"[69] This definition undermines the Second Circuit's reasoning. Because "similar files" has been defined broadly, any request for information that can be identified as pertaining to a particular person will trigger the exemption six balancing test. Thus, information that is not intimate or highly personal would be exempt from disclosure if the invasion of privacy outweighs the public interest in disclosure.[70]

In addition, the Supreme Court has indicated that individuals have a cognizable interest in avoiding unwanted intrusions through the postal system.[71] The Court stated that "a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail,"[72] and that "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality . . . ."[73] Therefore, the privacy exemption protects individuals not only from more severe invasions resulting from disclosure of highly personal or intimate details, but also from significant but less severe intrusions resulting from unwanted solicitations. This shields private citizens from commercial opportunists who target them based on the knowledge gained by obtaining lists of names and addresses from administrative agencies.[74]

C. *Peculiar Interest of Requester Irrelevant*

The Supreme Court has stated that "Congress 'clearly intended' the FOIA to 'give any member of the public as much right to disclosure as ***1046** one with a special interest [in a particular document].'"[75] Although this statement was made in reference to FOIA generally and not to the privacy exemption, courts can properly construe the Supreme Court's decisions as encouraging a similar understanding of exemption six.[76]

Any peculiar interest of the requester that is not shared with the general public should not be considered a public interest under the privacy exemption. In fact, courts have already recognized this principle in refusing to recognize private commercial interests as justification for release.[77]

The legislative history and language of FOIA also indicate that only the interest of the entire public in disclosure is relevant to the exemption six balancing test. Both the Senate and House Reports refer to the public's right to government information.[78] Furthermore, the statute itself states that "[e]ach agency shall make available to the *public* information"[79] and that "[e]ach agency, upon any request for records . . . shall make the records promptly available to *any* person."[80]

Particular requesters might argue that their intended use would not constitute a clearly unwarranted invasion of privacy.[81] The requesters' interest in disclosure, however, is also irrelevant to the judicial estimation of the impact of disclosure on personal privacy.[82] As a practical matter, once a list of names and addresses is released, neither the federal agency providing it nor the courts can effectively limit its circulation.[83] The impact of general disclosure on privacy must be considered because a court cannot limit the disclosure of records to particular parties for particular ***1047** uses.[84]

D. *The Public Interest in Disclosure*

Under the privacy exemption, disclosures that would invade personal privacy are nevertheless required if there is a more powerful public interest in disclosure. Disclosure is "in the public interest" under FOIA's privacy exemption if it reveals something about the operation or conduct of a government entity or one of its agents.[85] While FOIA requires disclosure to "any person,"[86] it is apparent from the legislative history and subsequent Supreme Court decisions that before disclosure is

ordered, a court must balance the public's need to know about its government with the individual's right to privacy.[87] Disclosures required by the balancing test serve FOIA's purposes of ensuring the democratic nature of our government and assisting individuals in their dealings with administrative agencies.[88] Thus, the public interest in disclosure is served by the release of information concerning the workings of government, such as administrative policies, procedures and decisionmaking.

According to this understanding of "public interest in disclosure," disclosure is not warranted when release of the list neither enlightens the public about the workings of government nor assists individuals in their dealings with federal agencies, but invites intrusions consisting of phone or mail solicitations.[89] Disclosure of names and addresses that facilitates such intrusions is proper if that release also provides the public with information regarding government operations. For example, a release that would uncover racial steering through a federally-insured loan program is warranted, even though contact with private citizens would necessarily result.[90] Similarly, FOIA requires release of employee names and addresses ***1048** to unions representing them in collective bargaining with federal agency employers.[91] Although this disclosure facilitates direct communication with the employees, release also serves FOIA's intended public interest purpose.[92]

E. *Privacy Interest in Name and Address Depends Upon Context*

It is clear that Congress did not intend for FOIA to provide blanket protection of the privacy in one's name in every situation.[93] The House Report cited the refusal of government agencies to release the names and salaries of federal employees as one of the abuses that occurred under the APA's third section.[94]

According to the Supreme Court, however, other portions of FOIA ***1049** operate to protect a privacy interest in names and addresses.[95] FOIA provides for release of otherwise exempt information by allowing deletion of the exempted material and release of the remaining portion.[96] Names and addresses are sometimes deleted to allow the release of requested information.[97] These provisions, according to the Court, indicate that disclosure of records regarding private citizens identifiable by name was not intended by the framers of FOIA.[98]

That names and addresses may be deleted from a document before it is released highlights the importance of the context in which disclosure is made. Only when a court considers the context in which the list containing the names and addresses was compiled and the grounds for which disclosure was requested can it properly determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy.[99]

Individuals in our society generally have a large measure of control over the disclosure of their identities and whereabouts.[100] Private citizens have the option to rent post office boxes and remove home telephone numbers from published telephone books. These are strong indicators of the condition of privacy that an individual may want to protect.[101] ***1050** Moreover, it is clear that, in certain situations, people may have a legitimate need to protect their privacy. For example, FBI agents would not want to reveal their home addresses if their names could be associated with their occupations.[102] Seemingly innocuous lists of names and addresses may actually reveal other information which an individual may wish to keep private.[103] In addition, private citizens may reasonably want to retain control of information concerning the activities conducted within their households.[104] Those who receive entitlements from the government are potential prey to commercial opportunists, and their privacy must be protected as well.[105]

The House and Senate Reports clearly indicate that the privacy exemption prevents the disclosure of highly personal or intimate details.[106] As a result, even a disclosure that would serve the public interest would be exempted when balanced against a strong personal privacy interest. If disclosure would reveal little information besides the individual's name and address, the individual may still prefer non-disclosure because of a desire not to receive communications at home.[107] Disclosure is not exempted, however, where the somewhat weaker privacy interest in freedom from unwanted intrusions is balanced against a public interest in disclosure of information that would reveal something concerning the operation of government. "Exemption 6 does not protect against disclosure every incidental invasion of privacy-- only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy."[108]

CONCLUSION

The Freedom of Information Act's privacy exemption requires a balancing of the public interest in disclosure with the individual's interest of privacy. When weighing these interests, courts should examine, on the public side, only the interest in, and impact of, general disclosure. Such a public interest exists if disclosure reveals something about the operation of government or assists individuals in dealing with federal agencies. FOIA's privacy exemption clearly prevents disclosure of personal or intimate details about an individual. Viewed in the context of compilation of the list of names and addresses, the exemption may also protect against ***1051** invasions of privacy facilitated by disclosure that does not serve the core purpose of FOIA.

Footnotes

1 5 U.S.C. § 552 (1988).

2 *See infra* notes 50-52 and accompanying text.

3 FOIA states, in part:
(a) Each agency shall make available to the public information as follows:
(3) [E]ach agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules . . . shall make the records promptly available to any person.
(b) This section does not apply to matters that are -
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.
5 U.S.C. § 552(a)(3), (b)(6), (d) (1988).
The FOIA exemptions are not mandatory bars to disclosure. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979). Therefore, a federal agency may choose to release information that is exempted from disclosure. *See id.* For a general discussion of private individuals' ability to prevent government officials from releasing exempted information, see Silver, *Reverse Freedom of Information Act Litigation in a Non-Commercial Setting: The Case of Professor Doe,* 31 Clev. St. L. Rev. 455 (1982).

4 5 U.S.C. § 552(b)(6) (1988).

5 *See* United Ass'n of Journeymen, Local 598 v. Department of the Army, 841 F.2d 1459, 1465 & n.1 (9th Cir. 1988) (Skopil, J., concurring) ("[T] his court has recognized a privacy interest in names and addresses but has left unclear the extent of the interest. . . . Courts elsewhere have taken a more decided view. The circuits conflict over the weight of the privacy interest in names and addresses." (citations omitted)).

6 *See, e.g.,* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (organization operating to protect interests of retired federal employees held not entitled to list of names and addresses of retired or disabled federal employees), *cert. denied,* 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098); Minnis v. United States Dep't of Agric., 737 F.2d 784 (9th Cir. 1984) (owner of lodge on scenic river may not obtain names and addresses of those who applied for permits to travel on the river), *cert. denied,* 471 U.S. 1053 (1985); Heights Community Congress v. Veterans Admin., 732 F.2d 526 (6th Cir.) (umbrella organization of civic, religious and educational groups could not obtain addresses of those obtaining home financing through VA in order to determine whether blacks and whites were intentionally being segregated), *cert. denied,* 469 U.S. 1034 (1984); American Fed'n of Gov't Employees, Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931 (4th Cir. 1983) (union may not receive names and addresses of employees in representative unit); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir. 1974) (distributor of home winemaking equipment may not obtain release of names and addresses of persons who filed form with United States Bureau of Alcohol, Tobacco and Firearms to permit them to produce wine for use at home without paying tax).

7 *See, e.g.,* United States Dep't of Navy v. FLRA, 840 F.2d 1131 (3d Cir.) (union may receive list of names and addresses of employees in representative unit), *cert. dismissed,* 109 S. Ct. 632 (1988); United States Dep't of the Air Force v. FLRA, 838 F.2d 229 (7th Cir.), *cert. dismissed,* 109 S. Ct. 632 (1988) (same); United States Dep't of Agric. v. FLRA, 836 F.2d 1139 (8th Cir. 1988) (same, adding that disclosure would be prohibited if employee specifically asked employer not to release name or address),

vacated, 109 S. Ct. 831, *dismissed as moot,* 876 F.2d 50 (8th Cir. 1989); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971) (law professors entitled to names and addresses of employees eligible to vote in representation elections to study utility of NLRB regulations governing parties' behavior during the elections).

8 Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552 (1988)).

9 *See* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter *Senate Report*].

10 5. U.S.C. § 1002 (1946), *amended by* 5 U.S.C. § 552 (1966).

11 Section 3 of the APA stated, in part:
Except to the extent there is involved (1) any function of the United States requiring secrecy in the public interest . . . .
(c) Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.
5 U.S.C. § 1002(c) (1946).

12 EPA v. Mink, 410 U.S. 73, 79 (1973).

13 *See Senate Report, supra* note 9, at 5; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2418, 2421 [[[hereinafter *House Report*]; *see also* 110 Cong. Rec. 17,088 (1964) (comments of Senator Dirksen on S. 1666) (referring to "[r]efusal on top of refusal of Government agencies and departments to make available to the public that information which affects the public").
One of the loopholes employed by federal officials to deny requests for information was the exemption of "any function requiring secrecy in the public interest." 5 U.S.C. § 1002 (1946). "There is no attempt in the bill or its legislative history to delimit 'in the public interest,' and there is no authority granted for any review of the use of this vague phrase by Federal officials who wish to to withhold information." *Senate Report, supra* note 9, at 5; *accord House Report, supra,* at 5. Furthermore, section 3 of the APA provided that public records must be made available "to persons properly and directly concerned except information held confidential for good cause found." 5 U.S.C. § 1002(3)(c) (1946). This "double-barreled loophole," did not define "for good cause found" and provided government officials the excuse that the party requesting the information was not "properly directed and concerned." *See Senate Report, supra* note 9, at 5. Government officials would often interpret these vague provisions to withhold information in order to cover up embarrassing mistakes. *See id.* at 3.
As a result, the Senate Judiciary Committee concluded that section 3 of the APA is "of little or no value to the public in gaining access to records of the Federal Government." *Id.* at 5. Reaching the same conclusion, the House Committee on Government Operations stated, "[i]n fact, section 3 of the Administrative Procedure Act has become the major statutory excuse for withholding Government records from public view." *House Report, supra,* at 3.

14 *See, e.g.*, NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."); Department of the Air Force v. Rose, 425 U.S. 352, 361 (1975) (FOIA designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.") (citation omitted); EPA v. Mink, 410 U.S. 73, 80 (1973) (same, adding that Act "attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands"); *Senate Report, supra* note 9, at 3 (same).

15 *See infra* note 50.

16 United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1481 (1989).

17 NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (emphasis in original); *accord* Columbia Packing Co. v. United States Dep't of Agric., 417 F. Supp. 651, 655 (D. Mass. 1976), *aff'd,* 563 F.2d 495 (1st Cir. 1977).

[18] *See* Minnis v. United States Dep't of Agric., 737 F.2d 784, 787 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974). *But see* Consumers Union of the United States v. Veterans Admin., 301 F. Supp. 796 (S.D.N.Y. 1969) (publisher of magazine obtained records of VA hearing aid test program to inform its readers which hearing aids worked best), *dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

[19] *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 221 (1978); Department of the Air Force v. Rose, 425 U.S. 352, 360-61 (1976).

[20] EPA v. Mink, 410 U.S. 73, 79 (1973).

[21] *See Rose*, 425 U.S. at 361.

[22] 5 U.S.C. § 552(b)(6) (1988).

[23] The protection of FOIA's privacy exemption is not a constitutionally based right of privacy. The Supreme Court has noted that a constitutional right of privacy in avoiding disclosure of personal matters is sometimes recognized. *See* Whalen v. Roe, 429 U.S. 589, 598-99 & n.25 (1977) (citing Griswold v. Connecticut, 381 U.S. 479 (1965), and Stanley v. Georgia, 394 U.S. 557 (1969)). A right of privacy in information provided to a federal agency, however, is not included in that constitutionally protected zone. *cf.* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1476-77 (1989) (discussing privacy interest in personal information included in agency file without recognizing constitutional privacy protection).
Similarly, although private tort law sometimes recognizes a cause of action for invasion of privacy, nothing in the legislative history of FOIA indicates that Congress relied on private tort law in formulating the protection of exemption six. *See* Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. Legal Stud. 727, 738 n.40 (1980). In analyzing FOIA's privacy protections, the Supreme Court referred to the common law and literal understandings of "privacy," which include an interest of an individual in controlling information concerning his or her person. *See Reporters Comm.*, 109 S. Ct. at 1476-77. The Court did not suggest, however, that the statute merely codified the common-law tort into FOIA's privacy exemption. *See id.*

[24] "Privacy" may be understood as denoting a condition of limited access to one's affairs, experiences and engagements. *See* D. O'Brien, Privacy, Law, and Public Policy 16 (1979). This condition may be disturbed when personal information, disclosed by an individual to a governmental agency, is released to some third party. *See id.* at 18. This notion of privacy includes freedom from unwanted intrusions and disclosures of personal affairs as well as the freedom to limit one's engagements with others. *See id.* at 16.

[25] *See* United States Dep't of State v. Washington Post Co., 456 U.S. 595, 599-600 (1982).

[26] The Senate Report states, in part:
At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. . . . It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.
Senate Report, *supra* note 9, at 3. Similarly, the House Report states, in part:
It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests.
House Report, *supra* note 13, at 6.

[27] *See* Department of the Air Force v. Rose, 425 U.S. 352, 372-73 (1976).
The Supreme Court in *Rose* implicitly rejected a then-existing minority view eschewing the need to balance interests under the privacy exemption. The court in Robles v. EPA, 484 F.2d 843 (4th Cir. 1973), stated that "the right to disclosure under the Act is

not to be resolved by a balancing of equities or a weighing of need or even benefit." *Id.* at 848. The statute calls for disclosure to "any person." 5 U.S.C. § 552(a)(3) (1988). Balancing under the privacy exemption would be improper, according to that minority view, because "[a]ll parties are equal in satisfying the words 'any person.'" *Robles*, 484 F.2d at 847 n.6, (quoting K. Davis, Administrative Law Treatise § 3A.4, at 121 (Supp. 1970)). *But see* 1 K. Davis, Administrative Law Treatise § 5:6, at 320-21 (2d ed. 1978) (following *Rose* to require balancing interests under exemption six).

28 *See House Report*, *supra* note 13, at 11.

29 The Senate Report states, in part:
Such agencies as the Veterans' Administration, Department of Health, Education and Welfare, Selective Service, etc., have great quantities of files, the confidentiality of which has been maintained by agency rule but without statutory authority. There is a consensus that these files should not be opened to the public, and the committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'
The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.
Senate Report, *supra* note 9, at 9.
The House Report states, in part:
The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records.
House Report, *supra* note 13, at 11.

30 *See* Heights Community Congress v. Veterans Admin., 732 F.2d 526, 529 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984); Washington Post Co. v. United States Dep't of Health & Human Servs., 690 F.2d 252, 261-65 (D.C. Cir. 1982); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 136 (3d Cir. 1974).

31 *See Heights*, 732 F.2d at 529; *Washington Post*, 690 F.2d at 265; *Wine Hobby*, 502 F.2d at 137.

32 *See, e.g.*, Minnis v. United States Dep't of Agric., 737 F.2d 784, 786 (9th Cir. 1984) (court sets out four factors to be balanced in weighing a claim of exemption: 1) plaintiff's interest in disclosure; 2) public interest in disclosure; 3) degree of invasion of privacy; 4) availability of any alternative means of obtaining requested information), *cert. denied*, 471 U.S. 1053 (1985); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 746 (9th Cir. 1979) (same); Rural Housing Alliance v. United States Dep't of Agric., 498 F.2d 73, 78 (D.C. Cir. 1974) ("The District Judge should also consider any alternative sources of information which might be available."); Getman v. NLRB, 450 F.2d 670, 676-77 (D.C. Cir. 1971) ("[I] t is also significant that . . . appellees have no other source for obtaining the names and addresses . . . . "). *But see* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (not mentioning alternative availability as a factor), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098).

33 *See* American Fed'n of Gov't Employees, Local 1760 v. FLRA, 786 F.2d 554, 556 (2d Cir. 1986) (citing Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981); *Getman*, 450 F.2d at 675.

34 *See, e.g.*, *Horner*, 879 F.2d at 876 (list indicates that individual receives monthly annuity check from federal government, transforming recipient into potential target of barrage of unwanted solicitations); Minnis v. United States Dep't of Agric., 737 F.2d 784, 787 (9th Cir. 1984) (disclosure would also reveal personal interests in water sports and the out-of-doors, which could subject applicants to unwanted barrage of mailings and personal solicitations), *cert. denied*, 471 U.S. 1053 (1985); Heights Community Congress v. Veterans Admin., 732 F.2d 526, 530 (6th Cir.) (release would subject a veteran to involuntary personal involvement in investigation of racial steering), *cert. denied*, 469 U.S. 1034 (1984); American Fed'n of Gov't Employees, Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931, 932 (4th Cir. 1983) (disclosure could subject the employees to an unchecked barrage of mailings and personal solicitations); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974)

(disclosure will not only subject registrant to unsolicited, possibly unwanted mail, but also reveal information regarding registrant's in-home personal activities, family status and whether registrant lives alone).

35 *See Minnis*, 737 F.2d at 786; *Church of Scientology*, 611 F.2d at 746.
In addition, the Court of Appeals for the District of Columbia assumed that only the requesting party will receive the material and that it will not be released to any other member of the general public. *See* Getman v. NLRB, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971). That court, therefore, considered only the requesting party's interest in disclosure. *See id.* Subsequent decisions of this court, however, rejected this assumption. *See Horner*, 879 F.2d at 877; Washington Post Co. v. United States Dep't of Health & Human Servs., 690 F.2d 252, 258-59 & n.17 (D.C. Cir. 1982).

36 *See* American Fed'n of Gov't Employees, Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931, 932 (4th Cir. 1983); United States Dep't of the Air Force v. FLRA, 838 F.2d 229, 233 (7th Cir.), *cert. dismissed*, 109 S. Ct. 632 (1988).

37 *See Horner*, 879 F.2d at 875; *American Fed'n of Gov't Employees*, 712 F.2d at 932.

38 5 U.S.C. § 552(a)(3) (1988).

39 *See Dep't of Air Force v. FLRA*, 838 F.2d at 233.

40 FOIA's fifth and seventh exemptions exclude from disclosure certain agency memorandums and law enforcement records, described as follows:
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigation or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual[.]
5 U.S.C. § 552(b)(5), (7) (1988).

41 *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989) (relying on United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1480 (1989)) (Supreme Court's assessment of public interest in disclosure under FOIA's seventh exemption relied on to conclude that requester's identity should also be irrelevant under privacy exemption test), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098); Washington Post Co. v. United States Dep't of Health & Human Servs., 690 F.2d 252, 258-59 & n.17 (D.C. Cir. 1982) (relying on NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975)) (Supreme Court's determination that FOIA requester's identity irrelevant under exemption five relied on in privacy exemption analysis).

42 *See Horner*, 879 F.2d at 875.

43 *See id.* at 878-79; *see also* Halloran v. Veterans Admin., 874 F.2d 315, 323 (5th Cir. 1989) (recognizing public interest in disclosure under exemption seven only where release informs citizenry about government's activity).

44 *See* United States Dep't of Navy v. FLRA, 840 F.2d 1131, 1136 (3d Cir.), *cert. dismissed*, 109 S. Ct. 632 (1988); United States Dep't of the Air Force v. FLRA, 838 F.2d 229, 233 (7th Cir.), *cert. dismissed*, 109 S. Ct. 632 (1988); United States Dep't of Agric.

v. FLRA, 836 F.2d 1139, 1143 (8th Cir. 1988), *vacated*, 109 S. Ct. 831, *dismissed as moot*, 876 F.2d 50 (8th Cir. 1989); *see also* 1 K. Davis, Administrative Law Treatise § 5:7, at 324 (2d ed. 1978) (because individual members of public are included in "the public" to whom 5 U.S.C. § 552(a) mandates disclosure, their interests should also be taken into account).

45 For example, when a union requests lists of names and addresses of employees of the bargaining unit it represents, the employer argues that the "public interest" is limited to an interest of or benefit to the public concerning the operation or conduct of the government. *See Dep't of Navy v. FLRA,* 840 F.2d at 1136. Courts often reject this argument, relying on Congress' view articulated in the Labor-Management Relations Act of 1978, 5 U.S.C. § 7101(a) (1988), that the public interest is served by collective bargaining on behalf of government employees. *See Dep't of Navy v. FLRA,* 840 F.2d at 1134-35; *USDA v. FLRA,* 836 F.2d at 1143; American Fed'n of Gov't Employees, Local 1760 v. FLRA, 786 F.2d 554, 557 (2d Cir. 1986).
Subsequent to these circuit court decisions requiring disclosure of employees' names and addresses to the unions, regulations promulgated by the United States Department of Agriculture and the United States Defense Mapping Agency required disclosure of the names and home addresses of employees to the unions representing them. *See* 53 Fed. Reg. 44,513 (1988); 53 Fed. Reg. 39,629 (1988).
In United States Dep't of Health & Human Servs. v. FLRA, 833 F.2d 1129, 1134-35 (4th Cir. 1987), *cert. dismissed*, 109 S. Ct. 632 (1988), the court did not follow the previous Fourth Circuit holding in American Fed'n of Gov't Employees, Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931, 932 (4th Cir. 1983), that release of employees' names and addresses to a union would constitute a privacy invasion. The court in *Dep't of HHS v. FLRA* emphasized that it was not reviewing a denial of a FOIA request and deferred to the FLRA's de ermination that disclosure was required under the Federal Labor-Management Relations Act, 5 U.S.C. §§ 7107-7135 (1988). *See Dep't of HHS v. FLRA,* 833 F.2d at 1335.

46 *See, e.g.*, National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989) (privacy interest of individual in avoiding unlimited disclosure of name and address is significant), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 136-137 (3d Cir. 1974) ("[T]here are few things which pertain to an individual in which his privacy has traditionally been more respected than his own home.").

47 *See, e.g., Dep't of Navy v. FLRA,* 840 F.2d at 1136 ("[T]his court's case law recognizes that individuals generally have a meaningful interest in the privacy of information concerning their homes which merits some protection." (citations omitted)); *USDA v. FLRA,* 836 F.2d at 1143 ("Thus, we conclude that employees have a cognizable privacy interest in their home addresses.").

48 *See* United States Dep't of Navy v. FLRA, 840 F.2d 1131, 1137 (3d Cir.), *cert. dismissed*, 109 S. Ct. 632 (1988); United States Dep't of Agric. v. FLRA, 836 F.2d 1139, 1144 (8th Cir. 1988), *vacated*, 109 S. Ct. 831, *dismissed as moot*, 876 F.2d 50 (8th Cir. 1989).

49 *See, e.g.*, United States Dep't of the Air Force v. FLRA, 838 F.2d 229, 232 (7th Cir.) ("It is hard to see how the disclosure of home addresses could be 'clearly unwarranted' as a rule."), *cert. dismissed*, 109 S. Ct. 632 (1988); American Fed'n of Gov't Employees, Local 1760 v. FLRA, 786 F.2d 554, 556 (2d Cir. 1986) ("[T]he privacy interest of the average employee in his address is not particularly compelling."); Van Bourg, Allen, Weinberg & Roger v. NLRB, 728 F.2d 1270, 1274 (9th Cir. 1984) ("[T]his invasion is minimal"), *vacated*, 756 F.2d 692 (9th Cir. 1985) (unpublished opinion); Getman v. NLRB, 450 F.2d 670, 675 (D.C. Cir. 1971) ("The giving of names and addresses is a very much lower degree of disclosure").

50 *See* 110 Cong. Rec. 17,087 (1964) (remarks of Senator Long introducing S. 1666, a predecessor bill of FOIA).
Revealing administrative policies and procedures as well as the activities and decisionmaking of governmental agencies to the general public helps to eliminate any possibility of secret government, real or imagined. *See id.* This enhances the public's trust of and confidence in its government. *See id.* Responsible and efficient behavior of government officials is promoted by such disclosure. *See* Kronman, *supra* note 23, at 733.
Public disclosure also enables citizens to make informed judgments concerning the performance of their elected officials. "We must remove every barrier to information about--and understanding of--Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship." 112 Cong. Rec. 13,641 (1966) (Representative Moss, Chairman of the House Subcomm. on Foreign Operations and Government Information and a key sponsor of S. 1160, the bill that became FOIA).
Finally, disclosing government regulations and other information assists individuals in their dealings with administrative agencies.
This legislation which we have before us now is of the greatest importance because fair and just administrative proceedings require, first of all, that the people know not only what the statutory law is, but what the administrative rules and regulations are,

where to go, who to see, what is required and how they must present their matter. They must be informed in advance about the decisions which the administrative agencies and departments may use as precedent in determining their matter . . . .
110 Cong. Rec. 17,088 (1964) (comments of Senator Dirksen on S. 1666).

51 *See Senate Report*, *supra* note 9, at 3. The Senate Report states: "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records." *Id.*

52 *See* Whalen v. Roe, 429 U.S. 589, 605 (1977); *House Report*, *supra* note 13, at 11.

53 *See supra* notes 26-29 and accompanying text.

54 The statute states, in part:
On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
5 U.S.C. § 552(a)(4)(B) (1988).

55 *See, e.g.*, Heights Community Congress v. Veterans Admin., 732 F.2d 526, 529 (6th Cir.) (describing balancing test without referring to alternative means as a factor), *cert. denied*, 469 U.S. 1034 (1984); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 136 (3d Cir. 1974) (same).

56 *See* Washington Post Co. v. United States Dep't of Health & Human Servs., 690 F.2d 252, 259 (D.C. Cir. 1982).

57 *See* Getman v. NLRB, 450 F.2d 670, 676-77 (D.C. Cir. 1971).

58 *See* Minnis v. United States Dep't of Agric., 737 F.2d 784, 788 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985).

59 Some courts inquired into alternative methods of communication with those whom the requester desired to contact. *See Minnis*, 737 F.2d at 786-88; American Fed'n of Gov't Employees, Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931, 932 (4th Cir. 1983). The presence of an alternative method of communication, like the availability of alternative sources, should not be a substantial factor under exemption six. To compel disclosure all that is needed is a legitimate public interest in disclosure that is not outweighed by an individual's privacy interest. Any alternative method of communication is, therefore, irrelevant. *See* United States Dep't of the Air Force v. FLRA, 838 F.2d 229, 233 (7th Cir.), *cert. dismissed*, 109 S. Ct. 632 (1988). Furthermore, alternative means of communication are sometimes frustrated by the party attempting to prevent disclosure. For example, one court justified denial of disclosure based upon alternative methods of communication available to a union despite deliberate acts by the employer to thwart the union's attempts to use those methods to reach the employees. *See American Fed'n v. Dep't of HHS,* 712 F.2d at 932.

60 *House Report*, *supra* note 13, at 11.

61 *Senate Report*, *supra* note 9, at 9.

62 *See supra* note 34 and accompanying text.

63 *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 876-78 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098); Minnis v. United States Dep't of Agric., 737 F.2d 784, 787 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); Heights Community Congress v. Veterans Admin., 732 F.2d 526, 529 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984).

64 *See* United States Dep't of the Air Force v. FLRA, 838 F.2d 229, 232 (7th Cir.), *cert. dismissed*, 109 S. Ct. 632 (1988).

65 *See* Hearings on S. 1160, S. 1336, S. 1758 and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 491 (1965) (William Feldesman, solicitor for NLRB, urging deletion of "clearly unwarranted" because it would be unduly restrictive) [hereinafter *Senate Hearings*]; Hearings on H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, H.R. 6172, H.R. 6739, H.R. 7010, H.R. 7161 Before the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 257 (1965) (same) [hereinafter *House Hearings*]; *see also Senate Hearings*, *supra*, at 36 (Edwin F. Rains, Assistant General Counsel of Treasury Department, urging that "clearly" be stricken); *House Hearings*, *supra*, at 230 (Fred B. Smith, Acting General Counsel of Treasury Department, making same recommendation).

66 Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981).

67 *See id.*

68 *See id.*

69 United States Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (quoting *House Report*, *supra* note 13, at 11).

70 *See id.* Nevertheless, the Second Circuit has incorrectly continued to hold that exemption six only protects against disclosure of harmful or embarrassing facts. *See* American Fed'n of Gov't Employees, Local 1760 v. FLRA, 786 F.2d 554, 556-57 (2d Cir. 1986).

71 *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 736-37 (1970).

72 *Id.* at 736.

73 *Id.* at 737.

74 *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 878 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098).

75 United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1480-81 (1989) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 n.10 (1975) (applying exemption five)).

76 *See Horner*, 879 F.2d at 875; Washington Post Co. v. United States Dep't. of Health & Human Servs., 690 F.2d 252, 258-59 (D.C. Cir. 1982).

77 *See* Minnis v. United States Dep't of Agric., 737 F.2d 784, 787 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974).

78 The Senate Report states that the exemption "will involve a balancing of interests between the protection of an individual's private affairs from unnecessary *public* scrutiny and the preservation of the *public's* right to governmental information." *Senate Report*, *supra* note 9, at 9 (emphasis added). The Senate Report also states that "[f]or the great majority of different records, the public as a whole has a right to know what its government is doing." *Id.* at 5.
The House Report adds that FOIA "establishes the basic principle of a public records law by making the records available to any person." *House Report*, *supra* note 13, at 8.

79 5 U.S.C. § 552(a) (1988) (emphasis added).

80 5 U.S.C. § 552(a)(3) (1988) (emphasis added).

81 *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098).

82 *See id.*

83 Releasing a list of names and addresses with a limitation that it not be distributed to any third party under penalty of contempt is not a viable option. A finding of contempt upon such subsequent disclosure would not prevent an invasion of privacy; it would only provide punishment for an invasion that already occurred.

84 *See Horner*, 879 F.2d at 875; American Fed'n of Gov't Employees, Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931, 932 (4th Cir. 1983).

85 *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 878-79 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098); *see also* Halloran v. Veterans Admin., 874 F.2d 315, 323 (5th Cir. 1989) (providing similar assessment of public interest in disclosure under exemption seven).

86 5 U.S.C. § 552(a)(3) (1988).

87 *See supra* notes 26-29 and accompanying text.

88 *See supra* note 50 and accompanying text.

89 *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098).

90 Heights Community Congress v. Veterans Admin., 732 F.2d 526 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984), represents a classic situation in which disclosure would facilitate mail or phone intrusions but would also reveal administrative practices. There, local organizations sought, pursuant to FOIA, addresses of veterans obtaining home financing through the Veterans Administration loan program in Cleveland Heights, Ohio. *See id.* at 527-28. Those organizations wanted to investigate whether lenders and realtors were manipulating the VA loan program to steer white and black veterans into separate neighborhoods. *See id.* at 527. The Sixth Circuit upheld the VA's denial of release so as to avoid a privacy invasion. *See id.* at 531. The decision appears inconsistent with the purpose of FOIA. Disclosure would have enabled monitoring of a federally-insured loan program to uncover any racial steering that might have occurred. Whether the VA sought to detect such practices might also come to light. This would have fulfilled FOIA's purpose of facilitating public scrutiny of agency action. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); Department of the Air Force v. Rose, 425 U.S. 352, 361 (1975); EPA v. Mink, 410 U.S. 73, 80 (1973).

91 *See* United States Dep't of Navy v. FLRA, 840 F.2d 1131, 1137 (3d Cir.), *cert. dismissed*, 109 S. Ct. 632 (1988); United States Dep't of Agric. v. FLRA, 836 F.2d 1139, 1144 (8th Cir. 1988); *vacated*, 109 S. Ct. 831, *dismissed as moot*, 876 F.2d 50 (8th Cir. 1989); American Fed'n of Gov't Employees, Local 1760 v. FLRA, 786 F.2d 554, 557 (2d Cir. 1986). *But see* FLRA v. United States Dep't of the Treasury, 884 F.2d 1446, 1453 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990).

92 Courts ordering release in such cases sometimes recognize a public interest in disclosure based on Congress' view, stated in the Labor-Management Relations Act of 1978, 5 U.S.C. § 7101(a) (1988), that collective bargaining in public employment is in the public interest. *See Dep't of Navy v. FLRA,* 840 F.2d at 1136; *USDA v. FLRA*, 836 F.2d at 1143; *American Fed'n v. FLRA,* 786 F.2d at 557. While collective bargaining in federal employment may serve the public good, this alone should not support a finding of a public interest in disclosure under the balancing test. The privacy exemption will not recognize a public interest in disclosure unless release would reveal information about the operation of government or assist persons in their dealings with federal agencies. Disclosure in these cases, however, would serve the public interest because it would assist unions and the persons they represent in their dealings with federal agencies. *Cf. USDA v. FLRA*, 836 F.2d at 1142 (disclosure would enable union to communicate with unit employees, assisting them in their representation of interests of all members of bargaining unit); United States Dep't of Health & Human Servs. v. FLRA, 833 F.2d 1129, 1132 (4th Cir. 1987) (release needed to facilitate communication between union and employees during negotiations with federal employer as well as during periods between negotiations). Release of the lists would facilitate communication between the unions and those they represent; the unions will learn the views and concerns of the unit members and be able to represent their interests more effectively in negotiations with federal agency employers. *See Dep't of Navy v. FLRA*, 840 F.2d at 1137; *USDA v. FLRA*, 836 F.2d at 1141-42.

93 *See House Report*, *supra* note 13, at 6.

94 *See id.* The House Report states, in part:
The statutory requirement that information about routine administrative actions need be given only to 'persons properly and directly concerned' has been relied upon almost daily to withhold Government information from the public. A most striking example is the almost automatic refusal to disclose the names and salaries of Federal employees. Shortly after World War II the western office of a Federal regulatory agency refused to make available the names and salaries of its administrative and supervisory employees.
Id.

95 *See* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1477-78 (1989) (citing 5 U.S.C. §§ 552(a)(2), 552(b) (1988)).

96 *See* 5 U.S.C. §§ 552(a)(2), 552(b) (1988). Section 552(a)(2) states, in part: "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction." 5 U.S.C. § 552(a)(2) (1988). Similarly, after specifying situations in which disclosure is exempted, section 552(b) states, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b) (1988).

97 A principal sponsor of the 1974 FOIA amendments referred to the possibility of utilizing the statutory segregation provision of section 552(b) to delete names and identifying characteristics to protect personal privacy. *See* 120 Cong. Rec. 17,018 (1974) (statement of Senator Kennedy).
Names and addresses may also be deleted pursuant to FOIA's provision that permits an agency to delete identifying details to prevent a clearly unwarranted invasion of personal privacy. *See Reporters Comm.*, 109 S. Ct. at 1477 (citing 5 U.S.C. § 552(a)(2) (1988)).

98 *See Reporters Comm.*, 109 S. Ct. at 1477.

99 *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 876 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098). The D.C. Circuit emphasized:

> Every list of names and addresses sought under FOIA is delimited by one or more defining characteristics, as reflected in the FOIA request itself; no one would request simply all 'names and addresses' in an agency's files, because without more, those data would not be informative. The extent of any invasion of privacy that release of the list might occasion thus depends on the nature of the defining characteristics . . . .
> *Id.*

100 *See Horner*, 879 F.2d at 875.

101 *See id.* at 875; Heights Community Congress v. Veterans Admin., 732 F.2d 526, 529 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 n.15 (3d Cir. 1974). *But see* United States Dep't of the Air Force v. FLRA, 838 F.2d 229, 232 (7th Cir.), *cert. dismissed*, 109 S. Ct. 632 (1988).

102 *See Dep't of Air Force v. FLRA*, 838 F.2d at 232.

103 *See* Minnis v. United States Dep't of Agric., 737 F.2d 784, 787 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985).

104 *See Wine Hobby*, 502 F.2d at 137.

105 *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 878 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3654 (U.S. Apr. 17, 1990) (No. 89-1098).

106 *See House Report*, *supra* note 13, at 11; *Senate Report*, *supra* note 9, at 9.

107 *See* United States Dep't of Agric. v. FLRA, 836 F.2d 1139, 1144 (8th Cir. 1988), *vacated*, 109 S. Ct. 831, *dismissed as moot*, 876 F.2d 50 (8th Cir. 1989).

108 Department of the Air Force v. Rose, 425 U.S. 352, 382 (1976).