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NOTE

RECLAIMING THE RIGHT TO KNOW: THE CASE FOR CONSIDERING DERIVATIVE BENEFITS IN FOIA'S PERSONAL PRIVACY EXEMPTIONS

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The Freedom of Information Act provides the public with a statutory right to access troves of government information with nine limited exemptions. Two of those exemptions—Exemption 6 and Exemption 7(C)—protect the personal privacy of people mentioned within the government's files, allowing the government to withhold personally identifiable information if disclosure would cause an "unwarranted" invasion of privacy. Under the Supreme Court's precedent, courts must conduct a balancing test to determine whether disclosure is unwarranted, weighing the privacy interests of the individuals mentioned in the requested documents against the public's interest in disclosure. The Supreme Court has clarified that disclosure can only serve the public interest if disclosure will reveal something about the government's actions, thus allowing the public to oversee the government's performance.

The Supreme Court has acknowledged that it has left a critical aspect of the balancing test undefined, however. It has never explicitly decided whether disclosure must directly and immediately reveal something about the government's conduct, or whether the public interest can be served derivatively by using the requested information to uncover additional information outside of the requested documents that reveals the government's actions.

This Note argues that the Supreme Court actually has answered this question and that courts must consider derivative benefits as part of the public interest. The Supreme Court has repeatedly, though tacitly,

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considered indirect and derivative harms to personal privacy. After identifying the Court's tacit pattern, this Note argues that the statute's language and the Court's own logic require derivative benefits to receive the same treatment as derivative harms. Finally, this Note examines how this problem has been dealt with by the federal circuits and identifies the fault lines along which the circuits are beginning to split.

INTRODUCTION

Even the most popular federal agency in the country[1] is not without its controversies. When President Trump named Louis DeJoy Postmaster General, Democrats quickly raised objections about his fitness for the office, based on financial conflicts of interest and an alleged history of

[1] Lydia Saad, Postal Service Still Americans' Favorite Federal Agency, Gallup (May 13, 2019), https://news.gallup.com/poll/257510/postal-service-americans-favorite-federal-agency.aspx [https://perma.cc/UL33-X7N7].

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illegal political contributions.[2] In a hearing before a House Oversight subcommittee, for instance, experts testified that DeJoy held investments worth tens of millions of dollars in private contractors working with the Postal Service, and other witnesses testified that as a private businessman DeJoy had pressured his employees to donate to certain political candidates and then illegally reimbursed them through company bonuses.[3]

Citizens for Responsibility & Ethics in Washington ("CREW"), a nonpartisan nonprofit dedicated to government accountability,[4] decided to investigate DeJoy's conflicts of interest.[5] CREW filed a request with the Postal Service under the Freedom of Information Act ("FOIA"), seeking both the agency's records regarding financial interests from which DeJoy was obligated to divest and records of any communications between DeJoy and the USPS regarding certain stock holdings of his.[6]

The Postal Service denied the request because it determined that disclosure would not be in the public interest.[7] DeJoy, the agency explained, had a personal privacy interest in his financial transactions, bringing the requested records within the scope of FOIA's Exemption 6. Furthermore, the denial said, CREW "did not provide any information about how release of this record would contribute to the public's

[2] Alison Durkee, Postmaster General Louis DeJoy Should Resign Over 'Obvious Financial Conflicts of Interest,' Experts Testify, Forbes (Sept. 14, 2020), https://www.forbes.com/sites/alisondurkee/2020/09/14/postmaster-general-louis-dejoy-should-resign-over-obvious-financial-conflicts-of-interest-experts-testify/?sh=7acc7503147c [https://perma.cc/D9ZC-X7DF].

[3] Id.

[4] About CREW, Citizens for Resp. & Ethics in Wash., https://www.citizensforethics.org/about/ [https://perma.cc/K4YX-W9ZH] (last visited Apr. 14, 2021).

[5] See E-mail from Meredith Lerner, Rsch. Assoc., Citizens for Resp. & Ethics in Wash., to USPS FOIA Officer, Re: Freedom of Information Act Request (Aug. 11, 2020), https://www.citizensforethics.org/wp-content/uploads/legacy/2020/08/2020.08.11-Louis-DeJoy-USPS-FOIA-final.pdf [https://perma.cc/88VT-BTNH].

[6] Id.

[7] Nikhel Sus (@NikhelSus), Twitter (Sept. 9, 2020, 12:38 PM), https://twitter.com/NikhelSus/status/1303734508018110464 [https://perma.cc/Q2UD-2MFD]; Letter from Jessica Y. Brewster-Johnson, Senior Ethics Couns., USPS, to Meredith Lerner, Rsch. Assoc., Citizens for Resp. & Ethics in Wash., Re: FOIA Case No. 2020-FPRO-01619 (Sept. 9, 2020) (on file with author). Nikhel Sus serves as CREW's Senior Counsel over Complaints & Litigation. Our Team, Citizens for Resp. & Ethics in Wash., https://www.citizensforethics.org/about/our-team/ [https://perma.cc/BSH8-KUCN] (last visited Apr. 4, 2021). Many thanks to Nikhel Sus for providing the complete text of the Postal Service's denial of the FOIA request.

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understanding of the operations or activities of the Postal Service."[8] CREW has since filed suit to compel USPS to disclose the records.[9]

The Postal Service's explanation defies common sense. How can the public not have an interest in the head of a federal agency's potential conflicts of interest? Why did CREW have to justify its request with any public interest, much less one that would "contribute to the public's understanding of the operations" of the Postal Service? And how can CREW show such an interest in order to justify a request? Those are the questions this Note seeks to answer.

The Freedom of Information Act grants the public a judicially enforceable right to access information gathered and stored by the executive branch of the federal government, with nine limited exceptions.[10] Two of those exceptions—Exemption 6 and Exemption 7(C)—revolve around personal privacy and permit the government to withhold personally identifiable information from certain types of records if disclosure of those records would constitute "an unwarranted invasion of personal privacy."[11] The Supreme Court has found that this requires courts to determine whether to disclose or withhold records based on a balancing test between the public interest in disclosure and the privacy interests of the individuals identified in the records.[12]

However, in practice, the Supreme Court's balancing test is weighted against disclosure. The Supreme Court has gradually expanded the scope of the privacy interests protected by the personal privacy exemptions while narrowing what weighs in favor of the public interest. Under the Supreme Court's current interpretation, often called the "core purpose doctrine," there is no public interest in disclosure unless disclosure would shed light on the government's conduct and activities.[13] This narrow conception of the public interest is a fixture of the FOIA landscape, which raises the question of how best to assert a cognizable public interest.[14]

[8] Brewster-Johnson, supra note 7.

[9] See CREW Sues USPS on Louis DeJoy Conflicts, Citizens for Resp. & Ethics in Wash. (Oct. 13, 2020), https://www.citizensforethics.org/legal-action/lawsuits/usps-louis-dejoy-conflicts/ [https://perma.cc/M5AT-85E3].

[10] 5 U.S.C. § 552(b)(1)–(9).

[11] Id. § 552(b)(6), (b)(7)(C).

[12] See U.S. Dep't of Def. v. Fed. Lab. Rels. Auth., 510 U.S. 487, 497 (1994).

[13] U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 773–75 (1989).

[14] The core purpose doctrine has drawn its fair share of critics, but the Supreme Court shows no signs of revising it. See, e.g., Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in

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One central ambiguity remains in the balancing test under the core purpose doctrine: must disclosure of the requested information directly shed light on the government's conduct, or may it shed light indirectly after a series of intervening causal steps? The Supreme Court has acknowledged, but not answered, the question of what it calls "derivative uses."[15] The U.S. Court of Appeals for the Second Circuit has described derivative use as the idea "that the public interest can be read more broadly to include the ability to use redacted information to obtain additional as yet undiscovered information outside the government files."[16] For instance, to return to the CREW example, one argument for disclosure based on derivative benefits would be that, while the requested information about DeJoy would not directly show how the USPS was performing its duties, disclosure would indirectly allow the public to better oversee the USPS by further investigating the relationship between the agency's actions and the Postmaster General's own financial interests. The idea of derivative benefits recognizes the reality that the personally identifiable information protected by the privacy exemptions will rarely, by itself and directly, give the public a better understanding of government decision making. Nevertheless, derivative benefits can frequently add to the public's capacity to monitor government performance when combined with other available information or when used for further investigation to uncover new information.

This Note explores the Supreme Court's interpretation of the personal privacy exemptions and concludes that courts must consider derivative uses when conducting the balancing test. In fact, there are two types of derivative uses, and both must be considered. The first type, derivative benefits, is when the derivative use of requested information advances the public interest. Conversely, derivative harms occur when someone uses the requested information after its disclosure in a way that further invades the privacy of the individuals identified in the records. These two types of derivative use weigh in favor of disclosure and nondisclosure, respectively.

Access to Personally-Identifiable Information in Government Records, 12 Wm. & Mary Bill Rts. J. 1, 8–9 (2003); Christopher P. Beall, The Exaltation of Privacy Doctrines Over Public Information Law, 45 Duke L.J. 1249, 1251–52 (1996); Martin E. Halstuk, When Secrecy Trumps Transparency: Why the Open Government Act of 2007 Falls Short, 16 CommLaw Conspectus 427, 428–29 (2008) [hereinafter Halstuk, Secrecy Trumps Transparency].

[15] U.S. Dep't of State v. Ray, 502 U.S. 164, 178 (1991).

[16] Associated Press v. U.S. Dep't of Def., 554 F.3d 274, 290 (2d Cir. 2009) (citing *Ray*, 502 U.S. at 178).

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As this Note demonstrates, the Supreme Court has repeatedly factored in derivative harms as justification for nondisclosure without ever explicitly recognizing that it has done so. At the same time, however, the Court has failed to recognize the corresponding value of derivative benefits, though the caselaw implies that there is an appropriate role for derivative benefits in limited circumstances. Because FOIA embodies a pro-disclosure policy, and because there is no principled reason to consider one type of derivative use without the other, courts must consider derivative benefits, just as they follow the Supreme Court's lead in considering derivative harms.

This Note makes three main contributions to this field. First, while this is not the first piece to advocate for the consideration of derivative uses, it is the first to do so for a narrow conception of derivative uses that is consistent with current Supreme Court doctrine. Broader versions of derivative use, as others have championed, would unrealistically require either the Court or Congress to overrule the core purpose doctrine. Second, this Note brings existing literature up to date by analyzing the impact of the Supreme Court's latest disclosure case under the personal privacy exemptions. No other article has touched on this topic in any depth for roughly two decades. Finally, this Note is the first to discuss in any detail the treatment of derivative uses by the lower courts. This is critical to understanding the direction the doctrine is developing and is all the more pressing because this issue has the potential to cause a circuit split.

Part I of this Note provides a brief look at the history of FOIA and explains how the Supreme Court interprets the two personal privacy exemptions. Part II examines *United States Department of State v. Ray*,[17] the one case in which the Supreme Court discussed derivative uses directly, while Part III analyzes the implications of the Court's caselaw after *Ray*. Part IV lays out how and why courts should consider derivative benefits, and, finally, Part V analyzes the most important derivative use cases at the circuit level and predicts where the circuits are likely to split in the future.

I. A BRIEF HISTORY OF FOIA AND THE PERSONAL PRIVACY EXEMPTIONS

Congress passed FOIA in 1966 as an amendment to the Administrative Procedure Act ("APA"), intending to give private citizens a judicially

[17] 502 U.S. 164 (1991).

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enforceable right to access information held by the executive branch of the federal government with only narrow exceptions.[18] FOIA supplanted the system of disclosure that had existed under the APA, which was marred by vague phrasing and primarily left disclosure to the discretion of the government.[19] For example, the APA allowed the government to withhold disclosure for "good cause" (a phrase it did not define) and required requestors to be "properly and directly concerned" with the requested information.[20] Because the APA also lacked a mechanism for judicial review of an agency's decision to withhold information, agencies wielded almost limitless discretion in their handling of requests.[21] Even the Supreme Court observed that the APA effectively served as a withholding statute.[22]

Congress created FOIA to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[23] It concluded that this was fundamentally necessary for the success of a democratic society.[24] A 1964 Senate report observed that "an informed electorate is so vital to the proper operation of a democracy" that the country needed a statute that "affirmatively provides for a policy of disclosure."[25] Congress drafted FOIA fully cognizant of the tradition of, and need for, a

[18] Hoefges et al., supra note 14, at 9–11 (quoting 5 U.S.C. § 552(f)). The "right" to access information gathered and held by the government is purely statutory. The Supreme Court has rejected the idea that citizens have any legally enforceable right under the Constitution to access government information. Barry Sullivan, FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know," 72 Md. L. Rev. 1, 14 (2012).

[19] See Hoefges et al., supra note 14, at 9 n.42.

[20] John C. Brinkerhoff, Jr., FOIA's Common Law, 36 Yale J. on Regul. 575, 594 (2019) (quoting 5 U.S.C. § 1002 (repealed 1966)); see also Halstuk, Secrecy Trumps Transparency, supra note 14, at 434–35. The government used the "properly and directly concerned" requirement in particular to withhold information. Id. at 434. If the requested information did not pertain to the requestor himself, the government denied disclosure. This effectively excluded all third parties such as journalists and attorneys. Id.

[21] Brinkerhoff, supra note 20, at 594. One famous example, which demonstrates how toothless the disclosure requirements of the APA were, involved the government finding good cause to withhold the contents of telephone books. Id. at 594 n.141 (quoting James E. Hakes, Note, Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill, 40 Notre Dame L. Rev. 417, 436 (1965)).

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

[23] Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (quoting Rose v. Dep't of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)).

[24] See Martin E. Halstuk & Charles N. Davis, The Public Interest Be Damned: Lower Court Treatment of the *Reporters Committee* "Central Purpose" Reformulation, 54 Admin. L. Rev. 983, 991 (2002).

[25] S. Rep. No. 88-1219, at 8 (1964).

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transparent government achieved through scrutiny by the public and the press.[26]

To ensure transparency and remedy the defects of the APA, Congress included a number of provisions in FOIA designed to effectuate a policy of broad disclosure.[27] FOIA mandates that disclosure of government records be available to "any person" in any format and that the requestor need not show any purpose or provide any justification for the request in the first instance.[28] If the government denies disclosure because it believes the requested information falls within one of the nine statutory exemptions, the requestor may file a complaint in federal court and the burden then rests on the government to justify its withholding. The court reviews the government's determination *de novo* and has the authority to order production of any improperly withheld agency records.[29] Thus, FOIA effectively takes final disclosure decisions out of the hands of the executive branch and places them in the courtroom instead, making judges the ultimate arbiters of disclosure.[30]

Despite FOIA's strong pro-disclosure purpose and structure, Congress exempted nine specific areas of government records from disclosure.[31] The focus of this Note is FOIA's two personal privacy exemptions, Exemption 6 and Exemption 7(C). Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which

[26] Hoefges et al., supra note 14, at 9–10.

[27] Id. Over the ensuing decades, Congress has amended FOIA a number of times in order to generate more disclosure and twice has done so expressly to overrule the Supreme Court. However, these amendments have not significantly dented the advantage that the government enjoys in court. Brinkerhoff, supra note 20, at 610 (citing Laurence Tai, Fast Fixes for FOIA, 52 Harv. J. on Legis. 455, 456–57 (2015)); see also Halstuk, Secrecy Trumps Transparency, supra note 14, at 427–28 (noting that the OPEN Governance Act of 2007, which amended FOIA, improved access to government-held information in a number of ways but still failed to "address systemic obstacles to a transparent government").

[28] 5 U.S.C. § 552(a)(3)(A)–(B); Hoefges et al., supra note 14, at 10.

[29] 5 U.S.C. § 552(a)(4)(B).

[30] See Brinkerhoff, supra note 20, at 594. Brinkerhoff argues persuasively that a central reason for FOIA's failure to promote disclosure to the extent Congress intended is its connection to the APA. The judiciary has interpreted FOIA using an approach similar to administrative common law. This approach runs contrary to the statutory text and employs doctrines that empower the executive, leading to a weakening of FOIA's presumption in favor of disclosure and giving the government a marked advantage in litigation. This Note does not touch on FOIA's background of administrative law. Rather, it examines one way in which the Supreme Court has unduly narrowed the two personal privacy exemptions. Still, it is worth bearing in mind that there are larger nondisclosure forces at work that apply to all of FOIA and not simply the two exemptions discussed here.

[31] 5 U.S.C. § 552(b)(1)–(9).

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would constitute a clearly unwarranted invasion of personal privacy."[32] Similarly, Exemption 7(C) protects "records or information compiled for law enforcement purposes" but only to the extent that their disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[33] Because of the exemptions' similar language and purpose, courts interpret them in tandem, with only minor variations in application to reflect the slight differences in their texts.[34]

The largest difference between the two is that Exemption 7(C) provides greater protection to personal privacy than Exemption 6, making disclosure harder to obtain under the former.[35] Where Exemption 6 only allows withholding if disclosure "would constitute"[36] an invasion of privacy, Exemption 7(C)'s standard is less stringent, allowing withholding if disclosure "could reasonably be expected"[37] to do so. Likewise, Exemption 7(C) requires only an "unwarranted" invasion of privacy, not a "clearly unwarranted" one as Exemption 6 does.[38] Congress intended these varying levels of privacy protection, and the courts have recognized the difference.[39]

Congress included Exemption 6 because it recognized the need to offer some level of protection for the troves of personally identifiable information contained in the files of various government agencies.[40] The House Report recommending FOIA's passage noted that a number of federal agencies collected intimate data about citizens and that, while those agencies maintained confidentiality through a system of regulations, the information was not protected by statute.[41] Congress later amended FOIA in 1974 to add Exemption 7(C) as a counterpart to

[32] Id. § 552(b)(6).

[33] Id. § 552(b)(7)(C).

[34] See U.S. Dep't of Def. v. Fed. Lab. Rels. Auth., 510 U.S. 487, 496–97 n.6 (1994) (noting that the differences between the two exemptions are "of little import" because they differ only in "the magnitude of the public interest that is required" to justify disclosure).

[35] See U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 756 (1989).

[36] 5 U.S.C. § 552(b)(6).

[37] Id. § 552(b)(7)(C).

[38] Id. § 552(b)(6), (b)(7)(C).

[39] See *Reps. Comm.*, 489 U.S. at 756. Congress' initial draft of Exemption 7(C) contained the same language and therefore offered the same level of privacy protection as Exemption 6, but President Gerald Ford insisted on more stringent protections in return for his support for the bill. Hoefges et al., supra note 14, at 13 n.67 (citing 120 Cong. Rec. 17,033 (1974); H.R. Rep. No. 93-1380, at 4 (1974) (Conf. Rep.)).

[40] See Hoefges et al., supra note 14, at 11–12 (citing H.R. Rep. No. 89-1497, at 11 (1966)).

[41] H.R. Rep. No. 89-1497, at 11 (1966).

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Exemption 6 because of similar concerns, recognizing that law enforcement records often contain personal information about witnesses, suspects, and investigators that is in need of special protection.[42]

At the same time, Congress realized that providing protection for personal privacy would cause tension with the statute's overall purpose of disclosure. Accordingly, Congress settled on a formula that permits disclosure unless the invasion of privacy would be "unwarranted" in order to balance those two competing interests. As a Senate report explained it, the language of Exemption 6 was meant to balance "protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information."[43] Exemption 6, and by extension Exemption 7(C), thus reflect Congress' attempt to balance the public's interest in access to government data against personal privacy rights while maintaining a broad right to disclosure.[44]

The language of the two privacy exemptions is general, and Congress did not define what it means for disclosure to cause an unwarranted invasion of personal privacy. The Supreme Court, however, has found that the exemptions must be construed narrowly in light of FOIA's pro-disclosure purpose.[45] Because the exemptions' text and legislative history show concern for the competing interests of public access and personal privacy, they seem to call for judicial balancing and a common law-like approach to interpretation,[46] and, indeed, that is exactly what the Supreme Court has done. The Court has gradually developed and refined its own process for determining whether disclosure would cause an unwarranted invasion of privacy.[47]

Both exemptions have a threshold requirement that must be met in order for the government to invoke the exemption at all. For Exemption 6, the threshold is whether the requested records contain information that

[42] See U.S. Dep't of Just., Department of Justice Guide to the Freedom of Information Act: Exemption 7(C), at 1–2 (2019), https://www.justice.gov/oip/page/file/1206756/download [https://perma.cc/VE85-4NWX] [hereinafter DOJ Guide to Exemption 7(C)]; Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 166 (2004).

[43] S. Rep. No. 89-813, at 9 (1965).

[44] Hoefges et al., supra note 14, at 12–13.

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

[46] See Brinkerhoff, supra note 20, at 579–82.

[47] See *Rose*, 425 U.S. at 380–81 (creating a balancing test which weighs public interests against personal-privacy interests); U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 776–80 (1989) (defining the scope of public interests and privacy interests).

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"applies to a particular individual" who can be identified from the records.[48] While Exemption 6 covers "personnel and medical files and similar files,"[49] the Supreme Court has found that the purpose of the protection is too broad to turn upon the type of file in which the information is stored.[50] Accordingly, "[whenever] disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy."[51] Importantly, information need not be intimate or inherently personal in nature to meet the threshold; it is enough that it pertains to an identifiable individual.[52]

The courts have taken a similarly broad approach to Exemption 7(C), which protects personally identifiable information contained in "records or information compiled for law enforcement purposes."[53] While the Supreme Court has not offered a strict definition of what it means for a record to be "compiled for law enforcement purposes," in practice, this threshold is quite broad; the exemption has been invoked, for instance, to protect records compiled by agencies such as the Internal Revenue Service, the National Park Service, and the Office of Independent Counsel.[54] Additionally, the Supreme Court has made it clear that once a

[48] U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982); U.S. Dep't of Just., Department of Justice Guide to the Freedom of Information Act: Exemption 6, at 4 (2019), https://www.justice.gov/oip/page/file/1207336/download [https://perma.cc/L8BW-S4DL] [hereinafter DOJ Guide to Exemption 6].

[49] 5 U.S.C. § 552 (b)(6).

[50] *Wash. Post*, 456 U.S. at 601 (noting that Exemption 6 "surely was not intended to turn upon the label of the file which contains the damaging information"); see also N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 920 F.2d 1002, 1004, 1009–10 (D.C. Cir. 1990) (en banc) (holding that an audio tape of the final moments of the astronauts aboard the *Challenger* space shuttle qualified as a "similar file" under Exemption 6).

[51] *Wash. Post*, 456 U.S at 602.

[52] Id. at 600–02 (rejecting the argument that "similar files" only protect intimate information). How to interpret and apply Exemption 6's threshold requirement had been a point of contention among the lower courts for some time. A number of lower courts had held that records must contain intimate information before they could fall within the scope of "personnel and medical files and similar files." See Hoefges et al., supra note 14, at 20.

[53] 5 U.S.C. § 552 (b)(7)(C).

[54] See Lauren Bemis, Note, Balancing a Citizen's Right to Know with the Privacy of an Innocent Family: The Expansion of the Scope of Exemption 7(C) of the Freedom of Information Act Under *National Archives & Records Administration v. Favish*, 25 J. Nat'l Ass'n Admin. L. Judges 507, 511 (2005); Richard L. Huff & Craig E. Merutka, Freedom of Information Act Access to Personal Information Contained in Government Records: Public

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record meets the threshold, it continues to do so even if its contents are reproduced in a new document not prepared for law enforcement purposes.[55] And even when a record contains personally identifiable information but fails to meet the threshold for Exemption 7(C), it ordinarily will still meet the broad threshold requirement for Exemption 6.[56] Consequently, it is relatively easy for the government to satisfy the threshold requirement to invoke one of the personal privacy exemptions, though if the government fails to reach the threshold then the court's inquiry ends and the requested information must be disclosed.[57]

This article's concern is with what follows the threshold inquiry: a balancing test. The Supreme Court held in *Department of the Air Force v. Rose* that if the threshold requirement is met, the court must still determine whether disclosure would constitute an unwarranted invasion of personal privacy through "a balancing of the individual's right of privacy" against the public's interest in "open[ing] agency action to the light of public scrutiny."[58] The same test is employed for both privacy exemptions, and courts have found that any privacy interest greater than de minimis is sufficient to trigger the balancing test.[59] Accordingly, how courts define the public interest at stake in disclosure and the scope of the individual's privacy protected by the statute is of paramount importance to the result.

In a landmark case, *Department of Justice v. Reporters Committee*, the Supreme Court "changed the FOIA calculus"[60] by adopting an expansive view of privacy interests while simultaneously narrowing the scope of the public interest inquiry.[61] The Court rejected the idea that FOIA protects merely a "cramped notion of personal privacy" and instead emphasized

Property or Protected Information?, Army L., Jan. 2010, at 2, 5 (noting that the threshold can be met by more than just criminal investigations).

[55] FBI v. Abramson, 456 U.S. 615, 631–32 (1982).

[56] Huff & Merutka, supra note 54, at 5.

[57] See DOJ Guide to Exemption 6, supra note 48, at 2.

[58] 425 U.S. 352, 372 (1976).

[59] See, e.g., Multi Ag Media LLC v. U.S. Dep't of Agric., 515 F.3d 1224, 1229–30 (D.C. Cir. 2008) (establishing that any privacy interest greater than de minimis triggers the balancing test); Fed. Lab. Rels. Auth. v. U.S. Dep't of Veterans Affs., 958 F.2d 503, 510 (2d Cir. 1992) ("Hence, once a more than de minimis privacy interest is implicated the competing interests at stake must be balanced in order to decide whether disclosure is permitted under FOIA."); see also DOJ Guide to Exemption 6, supra note 48, at 71–72; DOJ Guide to Exemption 7(C), supra note 42, at 27.

[60] U.S. Dep't of Def. v. Fed. Lab. Rels. Auth., 510 U.S. 487, 505 (1994) (Ginsburg, J., concurring in the judgement).

[61] 489 U.S. 749, 763, 769 (1989).

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that privacy entails an "individual's control of information concerning his or her person."[62] On the other hand, the Court found that the only public interest cognizable under FOIA is one that advances the "core purpose" of the statute by "contribut[ing] significantly to public understanding *of the operations or activities of the government*."[63] The core purpose doctrine significantly limits the types of public interest that requestors can assert to justify disclosure, and in effect it rejects the notion that FOIA's right to public access of government records serves any societal interests other than government oversight.[64] The core purpose doctrine is one of several factors that tilt the scales of the balancing test toward nondisclosure.

The holding in *Reporters Committee* was no doubt driven in part by its difficult facts—it involved a request for a government-compiled criminal history of a private citizen who was an organized-crime figure—nonetheless, it has drawn criticism for straying from FOIA's text and for its unimaginative, and therefore anti-disclosure, conception of the public interest.[65] Justice Ginsburg observed that the core purpose doctrine "is not found in FOIA's language" and that, prior to *Reporters Committee*, the Court ordered disclosure in cases where doing so added nothing to the public's knowledge of the government's actions.[66] Despite its critics, *Reporters Committee* remains a fixture of FOIA's balancing test, informing both the public interest and the personal privacy sides of the analysis. Under its guidance, the only relevant public interest is whether disclosure will shed light on government conduct. Conversely, the exemptions protect a broad privacy right that extends from home addresses to voice recordings and mugshots.[67]

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[62] Id. at 763.

[63] Id. at 775; see also id. at 774 ("FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed."). The Supreme Court's core purpose doctrine is also often called the central purpose test. The two phrases are interchangeable.

[64] See Hoefges et al., supra note 14, at 56–57.

[65] For a few critiques, see Hoefges et al., supra note 14, at 25–26; Beall, supra note 14, at 1258; Halstuk, supra note 14, at 463–68. *Reporters Committee* was at least partially a response to the flood of FOIA requests by private individuals seeking information only for their own benefit. The core purpose doctrine prevents these kinds of requests. See infra note 170 and accompanying text.

[66] U.S. Dep't of Def. v. Fed. Lab. Rels. Auth., 510 U.S. 487, 507–08 (Ginsburg, J., concurring in the judgement).

[67] Id. at 502 (withholding disclosure of home addresses); N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 782 F. Supp. 628, 633 (D.D.C. 1991) (withholding disclosure

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While *Reporters Committee* answered critical questions about the scope of the opposing interests in the balancing test, it left a significant detail unanswered: it failed to define the necessary relationship between disclosure of the requested information and the public's interest in being informed about government conduct. On the narrow end, it could be that disclosure must directly shed light on government conduct; there can only be one causal step between disclosure and the advancement of the public interest. But *Reporters Committee* left open the possibility that the public interest could be served indirectly, too, through a series of causal steps beginning with disclosure and ending with the advancement of the public interest after the disclosed information has been used to uncover further information about what the government is up to. This is the concept of derivative benefits. The Supreme Court has expressly declined to answer this question but, as the following Part argues, the Court implicitly recognizes a role both for derivative benefits and its counterpart, derivative harms.

II. DODGING THE QUESTION: *RAY* AND THE RECOGNITION OF DERIVATIVE USE

In *Department of State v. Ray*,[68] the Supreme Court expressly acknowledged the derivative use issue for the first and only time in its first disclosure case decided after *Reporters Committee*. Officially, the Court declined to reach the issue, but it tacitly considered derivative harms while not finding any corresponding value in derivative benefits, a pattern that the Court has consistently repeated since. But while the Court declined to determine the validity of derivative benefits, it implied that consideration of derivative benefits may be acceptable under narrow circumstances when the requestor can present evidence of government misconduct.[69]

Ray involved a request for documents containing the identifying information of Haitian nationals who had attempted to illegally immigrate

of recordings of the astronauts aboard the *Challenger*); World Pub'g Co. v. U.S. Dep't of Just., 672 F.3d 825, 831–32 (10th Cir. 2012) (withholding "mug shots" of arrestees). Courts also routinely protect more mundane information such as social security numbers, telephone numbers, and medical information. See DOJ Guide to Exemption 6, supra note 48, at 73–75 for a more thorough list.

[68] 502 U.S. 164 (1991).

[69] Id. at 178–79.

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to the United States but had been returned to Haiti.[70] The respondent was a lawyer in Florida representing undocumented Haitian nationals in immigration proceedings. He argued that his clients faced a well-founded threat of persecution if deported to Haiti, and therefore qualified for asylum in the United States. The government denied the existence of the threat based on an assurance by the Haitian government that returnees would not be prosecuted, and the State Department monitored Haiti's compliance by interviewing returnees after their return to Haiti. The lawyer filed a FOIA request for transcripts of the interviews and filed suit after the State Department produced only summaries without any identifying information.[71]

The district court ordered the release of the redacted information, and the U.S. Court of Appeals for the Eleventh Circuit affirmed based on the significant public interest in learning whether the government was properly monitoring its agreement with Haiti and was being truthful to the public about the results of that agreement.[72] The Eleventh Circuit acknowledged the weighty privacy interests of the interviewed Haitians, who had been promised confidentiality by the United States, but found that the public interest outweighed their privacy interests.[73] The court reached its conclusion through a derivative benefit analysis, admitting that the disclosure of the names and addresses would not directly reveal anything about the government's conduct, but nevertheless finding that the use of the requested information would ultimately result in public oversight of the government's relocation of Haitians.[74]

The Supreme Court, in an opinion by Justice Stevens, reversed the Eleventh Circuit by narrowly applying the core purpose doctrine. The Court first found that the appellate court had underestimated the privacy interests at stake by failing to consider that release of the redacted information would reveal who had cooperated with the State Department's monitoring of the Haitian government.[75] Public exposure of the cooperants could potentially lead to "embarrassment in their social and community relationships" or to government retaliation.[76] The Court

[70] Id. at 166.
[71] Id. at 167–69.
[72] Ray v. U.S. Dep't of Just., 908 F.2d 1549, 1554–55 (11th Cir. 1990).
[73] Id. at 1554.
[74] Id. at 1555–56.
[75] *Ray*, 502 U.S. at 176–77.
[76] Id.

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admitted that "[h]ow significant the danger of mistreatment may now be is, of course, impossible to measure" but that the possibility of retaliation must be given "great weight."[77] In effect, the Court partially rested its analysis on derivative harms. While disclosure could directly cause social embarrassment, any threat of government retaliation was speculative and would require further action by a third party after disclosure in order to bring about the contemplated harm.[78] Because retaliation is an indirect result of disclosure, it is derivative in nature.

The Court, however, did not find any value in potential derivative benefits when it determined the weight of the public interest at stake. While it conceded that the public interest in knowing whether Haiti was honoring its agreement was cognizable under FOIA, the Court concluded that the public interest had been sufficiently served by the information already released and that disclosure of the withheld information would not shed further light on the government's actions.[79] In doing so, the Court applied its recently enshrined core purpose doctrine, but it did so narrowly. Not only did disclosure have to shed light on government activity, the Court found, but it had to reveal new information not already available to the public from other sources. The Court effectively created a de facto requirement of novelty for the public interest, a development that complemented the core purpose doctrine but was not required by *Reporters Committee*'s holding. The Court also acknowledged the derivative nature of the asserted public interest, noting the fact that it came not from the requested information itself but from the "hope" that it could be used "to obtain additional information outside the Government files."[80] Justice Stevens dismissed this argument as "[m]ere speculation about hypothetical public benefits," finding that there was no evidence that respondents would discover any new information if they were able to re-interview the returnees interviewed by the State Department.[81] While the Court's assessment was accurate, it overlooked the fact that its discussion of potential government retaliation against the returnees was also mere speculation about hypothetical harms.

Although finding no value in derivative benefits on the facts at hand, the Court declined the government's request to adopt a categorical rule

[77] Id.
[78] See id. at 180–81 (Scalia, J., concurring in part and concurring in the judgement).
[79] Id. at 178–79.
[80] Id. at 178.
[81] Id. at 178–79.

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excluding the consideration of "derivative use" when balancing the public interest and the interest in privacy.[82] Instead, the Court avoided the question, writing, "we need not address the question whether a 'derivative use' theory would ever justify release of information about private individuals."[83] It has never directly addressed the question since.

The Court also rejected the argument that the requested information could be used to ascertain the veracity of the State Department's reports. The Court found that there was no evidence to suggest that the reports were illegitimate and accordingly a speculative attempt to verify their contents could not overcome the privacy interests at stake.[84] The Court stated that government records possess a "presumption of legitimacy," otherwise FOIA's privacy exemptions could be readily circumvented by unsupported assertions that it would be in the public interest to verify the records.[85] The Court thus created a rebuttable presumption of legitimacy in any government records sought through a FOIA request, but it declined to offer any guidance as to "[w]hat sort of evidence of official misconduct might be sufficient to identify a genuine public interest in disclosure."[86]

While the Court declined to adopt a categorical rule regarding derivative use, Justice Scalia wrote separately in a concurrence joined by Justice Kennedy to argue for a wholesale exclusion of both derivative benefit and derivative harm analysis.[87] He reasoned that since Exemption 6 applies to information the disclosure of which would "*constitute* a clearly unwarranted invasion of personal privacy," as opposed to "cause" or "lead to" an unwarranted invasion, then the Court should only examine what the requested information directly reveals.[88] He considered this the correct result both in light of the statutory language and because the Court's precedent dictated that FOIA exemptions must be construed narrowly.[89]

[82] Id. at 178.
[83] Id. at 179.
[84] Id.
[85] Id.
[86] Id. See the discussion of *Favish*, infra at Section III.C, for the Court's most recent guidance on what evidence can overcome the presumption of legitimacy.
[87] Id. at 180 (Scalia, J., concurring in part and in judgement) ("The majority does not, in my view, refute the persuasive contention that consideration of derivative uses, whether to establish a public interest or to establish an invasion of privacy, is impermissible.").
[88] Id.
[89] Id. at 180–81.

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Moreover, Scalia criticized the majority for ostensibly avoiding the derivative use question while actually applying derivative harm analysis. He pointed out the majority's "speculation" about harms that the returnees might suffer in retaliation if their identities became known, finding this derivative use analysis unnecessary to the decision. Instead, he suggested that the Court could have simply relied on the inherently private nature of the requested information—the identities of attempted immigrants reporting to a foreign power about the actions of their own government.[90] It was inconsistent for the majority to accord weight to derivative harms while ignoring derivative benefits, he reasoned, because "derivative use on the public-benefits side, and derivative use on the personal-privacy side must surely go together (there is no plausible reason to allow it for the one and bar it for the other) . . . ."[91] Despite this double standard, Scalia concluded, "I choose to believe the Court's explicit assertion that it is not deciding the derivative-use point."[92]

Ray is critical to interpreting FOIA's personal privacy exemptions for several reasons. First, it reaffirmed and applied a narrow conception of the core purpose doctrine—only information that exposes new government action to public scrutiny can be weighed in favor of the public interest. Second, it is the first and only time that the Court has explicitly addressed the issue of derivative use. Both the majority and the concurrence recognized that considering derivative benefits or derivative harms could alter the balancing process. Though the Court was unwilling to decide the question, its recognition of its importance is significant. Additionally, the Court began a pattern of tacitly weighing derivative harms without explicit recognition of doing so.

Finally, the Court, without even seeming to realize the implications of doing so, implied that consideration of derivative benefits to the public interest may be appropriate under certain circumstances. The Court created a rebuttable presumption of legitimacy for government records in order to prevent a hollowing out of the privacy exemptions. However, the very creation of this presumption implies a court-sanctioned role for derivative benefit analysis: if a requesting party were able to rebut the presumption of legitimacy, the Court's reasoning suggests that disclosure

[90] Id.

[91] Id.; see also Eric J. Sinrod, Blocking Access to Government Information Under the New Personal Privacy Rule, 24 Seton Hall L. Rev. 214, 226 (1993) (noting the Court's double standard on the derivative use issue).

[92] *Ray*, 502 U.S. at 182.

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of personal information could then be justified so that the government's records could be verified.

That is simply derivative benefit analysis. The disclosure of the personal information itself could not confirm or undermine the integrity of the government's records; only the additional use of that information could. Thus, while the majority claimed to leave the derivative use question untouched, it actively employed derivative harm analysis, and it implied that there is room for consideration of derivative benefits, at least when the government's legitimacy has been discredited.

III. THE BALANCING TEST IN A POST-*RAY* WORLD

Since *Department of State v. Ray*, the Supreme Court has not explicitly addressed the permissibility of derivative uses, but its privacy exemption cases have had significant implications for the issue nonetheless. In all three post-*Ray* cases, the Court has remained committed to a narrow application of the core purpose doctrine and has continued to tacitly consider derivative harms as weighing against disclosure without finding pro-disclosure value in derivative benefits. At the same time, the Court has gradually expanded the scope of FOIA's privacy exemptions.[93] These cases amount to a rejection of the Scalia-Kennedy concurrence in *Ray* advocating against either kind of derivative use, and they demonstrate the need for the revitalization of public interest analysis under the personal privacy exemptions. The Supreme Court's current approach to the balancing test places a thumb on the scales in the government's favor by minimizing the public interest cognizable under FOIA and ignoring the potential value of derivative benefits.

A. An Inelastic Conception of the Core Purpose Doctrine

Three years after *Ray*, the Court returned to Exemption 6 in *Department of Defense v. Federal Labor Relations Authority* ("*FLRA*") to reinforce its holding in *Ray* in even stronger terms.[94] The case involved a request by two unions for the addresses of federal employees whom they

[93] The one exception to this expansion of privacy rights came in the Court's most recent privacy exemption case, FCC v. AT&T Inc., 562 U.S. 397 (2011). In this decision, the Court held that "personal privacy" as protected by Exemption 7(C) does not extend to corporations. Because the Court found that the exemption did not apply, that case does not impact the derivative use issue.

[94] 510 U.S. 487 (1994).

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represented, and the Court denied disclosure in an opinion that relied heavily on *Reporters Committee* for both its public interest and privacy analysis.[95] Applying the core purpose doctrine strictly, the Court declined to consider possible public interests contained in federal statutes other than FOIA, and it did not consider plausible derivative benefits. However, the Court did accord weight to derivative harms in its privacy analysis, finding the prospect of indirect threats to privacy enough to justify withholding the addresses.

FLRA involved a simple request but a complex interplay of statutes. Two unions filed a request for the addresses of the federal employees in their bargaining unit through the Federal Service Labor-Management Relations Statute ("Labor Statute"), which provided that agencies must disclose data necessary for collective-bargaining purposes "to the extent not prohibited by law."[96] While the government argued that the Privacy Act of 1974 barred the disclosure, the Privacy Act contained an exception allowing the disclosure of personal information if its disclosure were mandated by FOIA.[97] The U.S. Court of Appeals for the Fifth Circuit held that FOIA did mandate disclosure, but it did not reach that conclusion under the core purpose doctrine. Rather, the Fifth Circuit reasoned, since the request originated under the Labor Statute, the relevant public interest was the public's interest in effective collective bargaining. The Fifth Circuit thus found that the Labor Statute embodied Congress' concern for collective bargaining and that this interest dwarfed any privacy interest the employees had in their addresses.[98]

The Supreme Court disagreed and held that *Reporters Committee* controlled. The Court found that, despite the interplay of the different statutes, the sole question was whether disclosure would constitute a "clearly unwarranted" invasion of privacy under Exemption 6.[99] Accordingly, the Court found that "[t]he principles . . . followed in *Reporters Committee* can be applied easily to this case."[100]

The Court assessed the public interest narrowly and focused only on the direct effects of disclosure without addressing the potential derivative benefits of releasing the addresses. While the Court conceded that

[95] Id. at 487, 497.
[96] Id. at 490 (quoting 5 U.S.C. § 7114(b)(4)).
[97] Id. at 490–91.
[98] Id. at 491–92.
[99] Id. at 495.
[100] Id. at 497.

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disclosure of the addresses "might allow the unions to communicate more effectively with employees," it found that this fell outside the scope of the public interest cognizable under FOIA because it would "reveal little or nothing" about the federal agencies at which the employees worked as required by the core purpose doctrine.[101] This analysis shows a concern only for the direct and immediate effects of disclosure, not what disclosure might ultimately lead to. In the Court's view, because disclosure of the requested addresses would not directly result in the public obtaining new knowledge about the agency's conduct, there was no public interest at stake.

But such a view narrow-mindedly ignores the goal behind the unions' request for the addresses, which, if the Court had allowed disclosure, would have likely resulted in derivative benefits. With the addresses, the unions intended to contact employees by mail to more effectively represent them.[102] More effective representation necessarily entails learning new information about the federal agencies in question. Unions frequently concern themselves with issues such as working conditions, wages, and the enforcement of safety provisions and anti-discrimination statutes, all of which relate back to how the agencies manage their employees and attempt to fulfill their missions. Thus, the addresses likely could have allowed the unions to better gather employees' feedback and concerns about their place of employment, thereby advancing a FOIA-cognizable public interest derivatively by shedding light on the government's conduct.[103] But the Court (and, unfortunately, even the unions) did not recognize the value of derivative benefits, and so the Court left them unaddressed.

By contrast, the Court's assessment of the privacy interests at stake was more generous. The Court reiterated that under *Reporters Committee*, individuals have a right to the "control of information concerning his or her person."[104] Accordingly, the employees possessed "*some* nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that

[101] Id.

[102] Id. at 502.

[103] See Karl J. Sanders, Note, *FOIA v. Federal Sector Labor Law*: Which "Public Interest" Prevails? 62 U. Cin. L. Rev. 787, 813–15 (1993) (arguing that the facts of *FLRA* presented a strong opportunity for considering derivative benefits).

[104] *Fed. Lab. Rels. Auth.*, 510 U.S. at 500 (quoting U.S. Dep't of Just. v. Reps. Comm., 489 U.S. 749, 763 (1989)).

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would follow disclosure."[105] Even if the union limited their contact to the mail, the Court concluded, the employees would still experience an invasion of privacy through this unsolicited contact.[106]

The Court's framing of the employees' privacy interest implicitly rested on derivative harm analysis. The focus was not on what disclosure would immediately cause (as it was with the public interest analysis) but on what the unions were likely to do with the addresses in the future after disclosure. The harm that the Court contemplated flowed secondarily and indirectly from disclosure because it would result from letters sent by the unions arriving in the mail, not from disclosure itself. The receipt of unwanted mail was the privacy harm that the Court felt would cause a "clearly unwarranted" invasion of personal privacy. *FLRA* thus demonstrates the Court's divergent approach to the balancing test: a capacious and indirect privacy interest weighed against a restricted and direct public interest.[107]

B. Limiting Who Benefits from Derivative Benefits

The Supreme Court's next privacy exemption case, *Bibles v. Oregon National Desert Association*, extended *FLRA* in a new direction.[108] While the Court had rejected an attempt to sidestep the core purpose doctrine in *FLRA*, in *Bibles* it rejected an attempt to enlarge the core purpose doctrine. The Court reversed the U.S. Court of Appeals for the Ninth Circuit, which had allowed disclosure of the Bureau of Land Management's newsletter mailing list on a theory of the public interest that implicated both the core purpose doctrine and derivative benefits to the recipients of the mailing list. The Court's terse reversal made it clear that the scope of the core purpose doctrine cannot be expanded.

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[105] Id. at 501.

[106] Id. In contrast, the Fifth Circuit had found it hard to see how receiving mail could ever be an unwarranted invasion of privacy. Anyone uninterested in the mail could simply "send it to the circular file." Fed. Lab. Rels. Auth. v. U.S. Dep't of Def., 975 F.2d 1105, 1110 (5th Cir. 1992).

[107] Justice Ginsburg, although concurring in the judgement, wrote separately to express her unease about the direction of the Court's FOIA jurisprudence. *Fed. Lab. Rels. Auth.*, 510 U.S. at 504–09 (Ginsburg, J., concurring in the judgement). She observed that *Reporters Committee* had "changed the FOIA calculus" by implementing a core purpose doctrine that had no origin in the statutory language. Id. at 505–07. Nevertheless, she concurred because she felt that *Reporters Committee* was controlling precedent and that the other members of the Court were committed to preserving it. Id. at 509.

[108] Bibles v. Or. Nat'l Desert Ass'n, 519 U.S. 355, 355–56 (1997) (per curiam).

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The case involved an environmental group's request for the names and addresses of people who received the Bureau of Land Management's ("BLM") newsletter regarding its activities and plans for the Oregon desert. The group believed that the BLM's views were "propaganda" and wished to provide the newsletter recipients with its own point of view.[109] The Ninth Circuit upheld disclosure, reasoning that there was "a substantial public interest in knowing to whom the government is directing information . . . so that those persons may receive information from other sources that do not share the BLM's self-interest in presenting government activities in the most favorable light."[110]

The court's reasoning tried to follow the core purpose doctrine while expanding upon it. Knowing whom the government is contacting does shed light on government activity and therefore is at least cognizable as a public interest under the core purpose test, even if the weight of that interest is uncertain. But the court's true focus seemed to be on the public interest that it found in ensuring that the newsletter recipients received alternative points of view. That justification was based on derivative benefits, in that the benefit of multiple viewpoints accrued indirectly through the use of the names and addresses to send additional information, but it was an argument that went beyond the core purpose doctrine. Any benefit of exposing people to alternative points of view is a benefit to those individuals, not to the public's knowledge of government activities.

The Supreme Court reversed the Ninth Circuit's de facto expansion of *Reporters Committee* in a terse decision, citing *FLRA* and *Reporters Committee* to reiterate that the public interest can only be advanced by shedding light on the government's conduct.[111] The Court also quoted and emphasized the Ninth Circuit's language about exposing the newsletter recipients to alternative points of view, thus making it clear which part of the Ninth Circuit's reasoning with which it took issue.[112]

Bibles still left the door open for the consideration of derivative benefits, but only under strict circumstances. For derivative benefits to permissibly weigh in favor of disclosure, they must comply with the core purpose doctrine by shedding light on government activity. The benefits

[109] Or. Nat'l Desert Ass'n v. Bibles, 83 F.3d 1168, 1169–71 (9th Cir. 1996), rev'd, 519 U.S. 355 (1997).
[110] Id. at 1171.
[111] *Bibles*, 519 U.S. at 355–56.
[112] Id.

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cannot accrue to any other interest. Additionally, read in conjunction with *FLRA*, *Bibles* makes it clear that courts may not attempt to circumvent the core purpose doctrine by looking to other types of public interests or by expanding the doctrine's scope through weighing other benefits in addition to government oversight benefits. The core purpose doctrine must be followed, and it must be followed in accordance with the Supreme Court's narrow formulation.

C. Opening the Door to the Recognition of Derivative Benefits

The Supreme Court's most recent privacy exemption disclosure case is also the most important, and a close reading shows that consideration of derivative benefits is compatible with the Court's precedent. In *Favish v. National Archives & Records Administration*, the Supreme Court made it harder to obtain disclosure by shifting the burden of proof for disclosure onto the requestor and by imposing an evidentiary standard that must be met to allege government misconduct in support of a FOIA request.[113] At the same time, however, the Court further opened the door to the consideration of derivative benefits by shifting its attention from the direct results of disclosure to the nexus between the requested documents and the asserted public interest. [114]

In *Favish*, a unanimous Supreme Court ruled that Exemption 7(C) shielded photographs of the death scene of Vincent Foster, Jr., President Clinton's deputy counsel, from disclosure.[115] This decision expanded FOIA's privacy protections by extending them to the family of deceased persons. Most importantly, the decision effectively repudiated the conclusion of the *Ray* concurrence, which had advocated against considering derivative uses. The logic of *Favish* allows for the

[113] Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 158 (2004).

[114] Id. at 172. While *Favish* altered the Court's doctrine in important ways, it left the basic foundation of *Reporters Committee* intact despite an amicus brief arguing that a recent amendment to FOIA effectively overruled the core purpose doctrine. Brief for Reporters Committee for Freedom of the Press as Amicus Curiae at 24, Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157 (2004) (No. 02-954). When Congress amended FOIA to clarify that it also extended to records in an electronic format, it added that the purpose of the statute was to provide a right to access non-exempt records "for *any* public *or private* purpose." Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (emphasis added). Senator Patrick Leahy, who introduced the amendment, wrote in a Senate report that this language was specifically intended to counter the Court's erroneous core purpose doctrine, but the Court brushed past this without comment in *Favish*. See S. Rep. No. 104-272, at 26–27 (1996); Halstuk & Davis, Public Interest Be Damned, supra note 24, at 1015–16.

[115] *Favish*, 541 U.S. at 174–75.

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consideration of derivative benefits, provided that the benefits comply with the core purpose doctrine.

The case revolved around a FOIA request for photographs taken at the death scene of President Clinton's deputy counsel in 1993. While five government investigations ruled the death a suicide, speculation abounded, and an attorney by the name of Allen Favish filed suit to compel disclosure of the photographs so that he could investigate the truth of the government's conclusion.[116] After a series of appeals and remands, the Ninth Circuit ultimately ordered disclosure of four hitherto unreleased photographs.[117]

The Supreme Court reversed in a unanimous opinion by Justice Kennedy. As a threshold matter, the Court first found that Exemption 7(C)'s privacy protections did extend to Foster's family, rather than only applying to Foster himself, as Favish contended.[118] The Court emphasized the expansive conception of privacy embodied in the exemption, a conception which exceeded the right to privacy under the common law and the Constitution. Since even at common law close relatives had privacy rights related to the deceased and because the Department of Justice had long interpreted FOIA as encompassing the relatives of those to whom the information pertained, the Court found that FOIA's privacy interests were not limited to Foster himself.[119]

The Court then proceeded to the balancing test, where it had no difficulty finding that the privacy interests of Foster's family outweighed the public interest in disclosure. The Court's privacy analysis rested on derivative harms and focused on the violation of privacy that would result for Foster's family. Rather than emphasize the inherently private and personal nature of the photographs, the Court instead focused on what the media would do to Foster's family if the photographs were disclosed. The family wanted "refuge from a sensation-seeking culture for their own peace of mind and tranquility," the Court explained.[120] Since Foster's death, they had been harassed by media outlets and inundated with requests from opportunists trying to profit from the tragedy. The Court

[116] See U.S. Dep't of Just. Off. of Info. & Priv., Supreme Court Decides to Hear "Survivor Privacy" Case (2003), https://www.justice.gov/archive/oip/foiapost/2003foiapost17.htm [https://perma.cc/48K3-SHTX].

[117] *Favish*, 541 U.S. at 161–64.

[118] Id. at 165.

[119] Id. at 165–69.

[120] Id. at 166.

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concluded that the release of additional photographs would trigger another barrage of the same kind of unwanted contact and scrutiny.[121]

Thus, the harm that the Court foresaw in disclosure was an indirect one predicated on third parties making contact with the Foster family as a result of disclosure. The Court's concern was not with the deeply personal content of the photographs but with the derivative harm of unwanted contact. The Court's analysis ignored the intimate nature of suicide-scene photographs and overlooked the direct effect of disclosure: the photographs being released and viewed by the entire nation. The Court's focus on the probable post-disclosure actions of third parties, such as media outlets and commercial opportunists, to the exclusion of all other privacy considerations, shows the Court's comfort with relying solely on derivative harms in its privacy analysis.

On the public interest side of the equation, the Court's reasoning mirrored its analysis in *Ray*: the Court acknowledged that Favish's goal of uncovering misfeasance in the government's investigation of Foster's death was cognizable under FOIA, but the Court accorded that public interest no weight because Favish had not provided any evidence to warrant belief that the government had acted improperly.[122] The Court denied that disclosure could be justified by Favish's bare assertions of government misconduct when five official inquests had all reached the same conclusion. Accordingly, the Court held that the presumption of legitimacy afforded to government conduct by *Ray* requires a requestor alleging government misconduct to "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" before his asserted public interest can be given weight.[123] Only "clear evidence" and a "meaningful evidentiary showing" can rebut the presumption of legitimacy.[124] Because Favish had not presented any convincing evidence of government misconduct, the Court

[121] Id. at 166–67.

[122] Id. at 173–75.

[123] Id. at 174. The Department of Justice has found that most plaintiffs fail to meet this heightened evidentiary standard. DOJ Guide to Exemption 6, supra note 48, at 67. However, for one example in which this standard was found to have been met, see Union Leader Corp. v. United States Department of Homeland Security, 749 F.3d 45 (1st Cir. 2014), discussed infra at Section V.D.

[124] *Favish*, 541 U.S. at 174, 175. The Court's requirement places requestors in a Catch-22. To be allowed to investigate government misconduct, they must first be able to offer significant evidence of government misconduct. This requirement, while tracking with common sense by refusing to let bare allegations trump concrete privacy interests, has no roots in FOIA's text. See Halstuk, Secrecy Trumps Transparency, supra note 14, at 468.

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found no public interest at stake in the request and reversed the Ninth Circuit.[125]

In reaching this conclusion, the Court altered its own FOIA precedent in significant ways that further tilt the scales toward nondisclosure. In addition to increasing the evidentiary standard necessary for requestors to gain disclosure by alleging government misconduct, the Court shifted the burden of proof from the government onto the requestor.[126] The Court acknowledged that as a general rule, requestors are not required to explain why they seek the requested information, but nevertheless it decided that that rule is "inapplicable" once the privacy concerns of Exemption 7(C) are raised. The Court replaced the general rule with a twofold requirement:

> [T]he person requesting the information [must] establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest.[127]

If the requestor cannot meet this standard, the Court instructed, then disclosure would automatically qualify as an unwarranted invasion of privacy.[128]

These instructions are in direct tension with FOIA's statutory text.[129] The statute makes no requirement that the requestor bear the burden of showing a "significant" public interest merely because the government has invoked one of the privacy exemptions.[130] Indeed, the statute specifically places the burden on the governmental agency to justify its reliance on the exemption. During judicial review of requests, the statute

[125] *Favish*, 541 U.S. at 175.

[126] Id. at 172.

[127] Id.

[128] Id. While the Court contextualized its requirement as applying to Exemption 7(C), it is probable that it would interpret Exemption 6 in the same way because of their similarity, which the Court has repeatedly recognized. See *Fed. Lab. Rels. Auth.*, 510 U.S. at 496 n.6 (explaining that the difference between the two exemptions is purely in the magnitude, not kind, of privacy protection provided).

[129] Bemis, supra note 54, at 539–40.

[130] See *Fed. Lab. Rels. Auth.*, 510 U.S. at 507 (Ginsburg, J., concurring in the judgement) ("A FOIA requester need not show in the first instance that disclosure would serve *any* public purpose." (emphasis added)).

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states that "the burden is on the agency to sustain its action."[131] With these instructions, *Favish* again shifted the goalposts in the government's favor.

But even as the Supreme Court made obtaining disclosure more difficult, it opened further opportunities for the consideration of derivative benefits by effectively, though not explicitly, sounding the death knell of the *Ray* concurrence. Indeed, the Department of Justice characterized *Favish* as a *sub silentio* repudiation of the *Ray* concurrence.[132] There, Justices Scalia and Kennedy had argued against allowing derivative use on either side of the balancing test and criticized the majority for giving weight to derivative harms.[133] But in *Favish*, neither made any objection to the Court repeating the same pattern it followed in *Ray*. Justice Kennedy wrote the opinion, which relied heavily on derivative harms in its privacy analysis, and Justice Scalia joined it in full. *Favish* dispelled any lingering doubt that the Court might decide to categorically prohibit consideration of derivative uses.

Like in *Ray*, the Supreme Court's discussion of alleged government misfeasance specifically implied an acceptable role for the consideration of derivative benefits under certain circumstances. While the Court withheld the requested photographs because Favish had not presented any evidence of government misconduct in the course of its investigations of Foster's death, it suggested that reasonable evidence of misconduct can justify disclosure of personally identifiable information.[134] Whether in the context of Exemption 6 or Exemption 7(C), the release of personally identifiable information will rarely by itself directly prove or disprove allegations of government misconduct; only further investigation using the disclosed information will do that. For instance, the requestor in *Ray* intended to use the requested list of names to re-interview the State Department's witness list.[135] By recognizing that there are times in which a FOIA request should be granted so that the requestor and the public can investigate the government's conduct, the Supreme Court has created space for considering derivative benefits. At a minimum, under the narrow circumstances of plausible evidence of government misconduct,

[131] 5 U.S.C. § 552(a)(4)(B).

[132] U.S. Dep't of Just., Freedom of Information Act Guide & Privacy Act Overview 432–33, 432 n.47 (Pamela Maida ed., May 2004 ed.) (citing Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 878 (D.C. Cir. 1989)).

[133] See the discussion of *Ray* supra Part II for a full analysis of the Scalia-Kennedy concurrence.

[134] See supra notes 122–25 and accompanying text.

[135] U.S. Dep't of State v. Ray, 502 U.S. 164, 178–79 (1991).

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what matters for the balancing test is not the immediate effect of disclosure but the potential for future discoveries after further investigation.

In fact, the Court's language in *Favish* seemed to go even further than that, suggesting that disclosure need not directly shed light on government activity in order to weigh in favor of the public interest even outside the narrow circumstances of plausible evidence of misconduct. While the Court did not relax the core purpose doctrine from *Reporters Committee*, it shifted its attention to the relationship between the requested information and the likelihood that disclosure would actually result in exposing government conduct to public scrutiny.[136] The Court introduced a new term into its FOIA vocabulary—nexus—and emphasized that the requestor must show a sufficient nexus between the requested documents and the asserted public interest.[137] While the Court declined to define what the nexus must be or how it could be shown, it had stated earlier in the opinion that a requestor must show that the requested information is "likely" to advance the public interest.[138]

This emphasis on a necessary nexus moderated the Court's previous approach to showing a public interest. In *Ray* and *FLRA*, for instance, the Court focused purely on whether the requested information, if disclosed, would immediately reveal something about the government's conduct. The Court allowed no room for causal steps between disclosure and revelation. While the use of the term nexus still implies that a strong causal link between the requested information and the asserted public interest must exist, it also implies that as long as a requestor can demonstrate a strong relationship, more than one causal step may be permissible. This is precisely what consideration of derivative benefits takes into account: sometimes disclosure can advance the public interest, but only in pieces rather than all at once. *Favish* signaled that the Supreme Court may be willing to recognize the importance of derivative benefits as it has consistently for derivative harms. The following Parts discuss why the Court should do so and the conflicting ways in which the circuit courts have addressed derivative benefits.

[136] Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 172–75 (2004).

[137] Id.

[138] Id. at 172–73 ("We do not in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the requested information and the asserted public interest that would be advanced by disclosure.").

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IV. THE PATH FORWARD FOR DERIVATIVE BENEFITS

The Supreme Court has never ruled for the disclosure of personally identifiable information under Exemption 6 or 7(C) since it introduced the core purpose doctrine.[139] Moreover, the government wins nine out of every ten FOIA suits, a rate far in excess of its win rate in other areas where the judiciary reviews administrative decisions.[140] The previous Parts have outlined some of the reasons why this is so. The privacy exemptions' threshold requirements are easy to meet, and only a minimal privacy interest is necessary to trigger the balancing test. But, the balancing test is out of balance. Individuals possess a broad statutory right of privacy to control any identifying information regarding their person, and this right even extends to their families after death. In contrast, the only countervailing public interest is for disclosure to uncover new information about the government's actions. In effect, even if not by intent, the Supreme Court has created an uphill battle for any FOIA requestor under the privacy exemptions.

That should not be the case, even under exemptions tailored to protect personal privacy. The Supreme Court has observed that the exemptions must be construed narrowly in light of FOIA's overarching purpose in promoting disclosure to the greatest extent possible. Even during Exemption 6 analysis, the pro-disclosure presumption remains strong because Congress only authorized withholding requested information if its release would cause a "clearly unwarranted" invasion of privacy.[141] By the statute's plain language, such a standard should be hard to meet. Congress did not intend for the privacy exemptions to become "shields to repel requests."[142]

Accordingly, to rebalance the scales and help restore FOIA to its pro-disclosure purpose, courts must begin considering derivative benefits in favor of the public interest. If the requestor can demonstrate a reasonable likelihood that he can use the requested information to investigate further

[139] See Hoefges et al., supra note 14, at 39. While this was noted pre-*Favish*, it is still true after that case.

[140] Brinkerhoff, supra note 20, at 577.

[141] See Wash. Post Co. v. U.S. Dep't of Health & Hum. Servs., 690 F.2d 252, 261 (D.C. Cir. 1982).

[142] See Lillian R. BeVier, Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection, 4 Wm. & Mary Bill Rts. J. 455, 485 (1995) (arguing that the Supreme Court had turned the privacy exemptions into shields for nondisclosure).

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and ultimately shed light on the government's conduct, then that derivative use should weigh in favor of disclosure.[143] Similarly, if requested information can be combined with other sources of information to reveal something about the government's conduct that the requested information alone could not show, that should weigh in favor of disclosure. Such an approach is doctrinally necessary and can be carried out within the bounds of the Supreme Court's precedent.

It is necessary because FOIA's text and pro-disclosure purpose dictate that the public interest analysis must be placed on at least equal footing with the privacy analysis. The Supreme Court tacitly weighed derivative harms in *Ray*, *FLRA*, and *Favish*. But weighing derivative harms without considering derivative benefits puts the requestor at a distinct disadvantage because it gives the court a greater opportunity to find reasons for nondisclosure than disclosure. The unequal treatment effectively holds the requestor to a more demanding standard than that to which the government is held. Nothing in FOIA's text supports this lopsided standard. As Justices Scalia and Kennedy observed in the *Ray* concurrence, there is no principled reason why the two kinds of derivative uses should not receive equal treatment; surely, their consideration must go together.[144] Even though the Court has since rejected the *Ray* concurrence's conclusion, it has not refuted that logic. Because the Supreme Court has repeatedly chosen to weigh derivative harms, it follows that it must do the same for derivative benefits.

Additionally, it is necessary that courts consider derivative benefits in favor of the public interest because the Court has already recognized a role for derivative benefits. In both *Ray* and *Favish*, the Court suggested that disclosure is justified when the requestor can present evidence of government misconduct.[145] Because disclosure of personally identifiable information alone is unlikely to shed any direct light on the government's misfeasance, it implies that the requestor must use the disclosed information to investigate further and uncover the misconduct, which is to say that it implies a role for derivative use. Admittedly, this context is narrow, but there is no reason why this logic should only apply to

[143] Cf. Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 878 (D.C. Cir. 1989) ("Where there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain.").

[144] See U.S. Dep't of State v. Ray, 502 U.S. 164, 181 (1991) (Scalia, J., concurring).

[145] See *supra* Part III and Section IV.C for a discussion of the Court's implicit acceptance of derivative benefits in certain circumstances.

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situations involving misconduct allegations. Especially since the Court has not limited the situations in which it has considered derivative harms, the narrow grounds of recognition in *Ray* and *Favish* do not impose limits on when courts can consider derivative benefits.

The Supreme Court has imposed some limits on the consideration of derivative benefits, however. Most importantly, derivative benefits must still fully comply with the core purpose doctrine. *Bibles* makes it clear that derivative benefits do not weigh in favor of disclosure unless they expose government conduct to public scrutiny, which is the only cognizable public interest under *Reporters Committee*.[146] Additionally, the Supreme Court has also placed the burden of proof upon the requestor to show the likelihood that disclosure will, in fact, advance the public interest. In *Favish*, the Court emphasized that there must be a sufficient nexus between disclosure and the public interest; mere speculation about hypothetical benefits is not enough, nor is an attenuated relationship between the requested records and the asserted public interest.[147] For derivative benefits to merit any weight in the balancing process, they must comply with all of these requirements.

There are at least two primary objections to this proposal, but neither is convincing. First, some may object that derivative benefits are inherently speculative.[148] There is no guarantee that disclosed information will ultimately uncover anything; indeed, there is no way for the court to ensure that the requestor will use the information in the way that he claimed he would once he has obtained it.[149] Especially since courts are forbidden from taking into account the identity of the requestor in order to avoid ad hoc discrimination,[150] the objection goes, how are courts to tell whose request predicated on derivative benefits is genuine and whose is in bad faith or spurious?

The Supreme Court has unintentionally provided an answer to this objection. One rebuttal is that derivative benefits are no more speculative than derivative harms, which the Supreme Court has considered for

[146] Bibles v. Or. Nat'l Desert Ass'n, 519 U.S. 355, 355–56 (1997) (per curiam).

[147] See Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 172–74 (2004).

[148] See, e.g., Hopkins v. U.S. Dep't of Hous. & Urb. Dev., 929 F.2d 81, 88 (2d Cir. 1991) (dismissing a derivative benefits argument because "[w]ere we to compel disclosure of personal information with so attenuated a relationship to governmental activity, however, we would open the door to disclosure of virtually all personal information, thereby eviscerating the FOIA privacy exemptions").

[149] See *Favish*, 541 U.S. at 174.

[150] Id. at 170–72.

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decades. The Court's privacy analysis in *Ray*, *FLRA*, and *Favish* rested on the Court's own prediction of how the requesting party would use the requested information to infringe upon the privacy rights of those mentioned in the documents. The Court did not know that any of these harms were certain or inevitable; it simply looked to the facts of the case, the stated intentions of the parties, and its own experience and intuition. As discussed above, there is no reason that courts should be allowed to speculate about some things (privacy harms) while lamenting the inappropriateness of speculating about other topics (derivative benefits).

The more convincing rebuttal is that the Supreme Court has already accounted for this problem by placing the burden on the requestor to show that disclosure is likely to serve the public interest. Courts need not disclose information to requestors who assert attenuated or unlikely theories to satisfy the public interest requirement. While courts cannot make this determination based upon the identity of the requestor, the identity of the requestor and the public interest he asserts are distinct.[151] Under the Supreme Court's requirements, courts are free to probe the evidence offered by the requestor about the asserted public interest, the resources the requestor intends to devote to making use of the requested information, and the sincerity of the requestor's intentions. In other words, courts need not close their eyes when requestors assert an improbable theory of derivative benefits or show no signs of intending to use the requested information to vindicate the public interest.[152] Judicial scrutiny and the burden of proof are sufficient to keep consideration of derivative benefits from becoming a magic formula for disclosure.

The second possible objection is that the former conception of derivative benefits is too narrow and that what is really called for is overturning *Reporters Committee*. Under this theory, courts should consider all the possible ways that information can be valuable and weigh that value in favor of the public interest.[153] For instance, a business could ask the court to consider the commercial value of the information it is

[151] See U.S. Dep't of Def. v. Fed. Lab. Rels. Auth., 510 U.S. 487, 508–09 (1994) (Ginsburg, J., concurring in the judgement).

[152] See Navigator Publ'g v. U.S. Dep't of Transp., 146 F. Supp. 2d 68, 70–71 (D. Me. 2001) (rejecting an argument based on derivative benefits in part because the court doubted the requestor's sincerity, believing that the requestor would use the requested information for personal profit rather than to vindicate the public interest).

[153] See, e.g., Hoefges et al., supra note 14, at 60–63 (advocating for an expansive conception of public interest).

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requesting, or an academic could convince the court of the value that the requested information would bring to her scholarship.

This broad conception of derivative use is both unrealistic and undesirable. It is unrealistic because the Supreme Court has no appetite for reexamining the core purpose doctrine. Neither of the two justices who sporadically criticized the Court's approach to FOIA remains on the bench.[154] Moreover, the core purpose doctrine, despite all the justified criticisms leveled against it, serves as a shield against the abuse of FOIA.[155] Prior to *Reporters Committee*, parties frequently used FOIA as an end run around the rules of discovery in civil litigation,[156] and criminals filed requests for information about their victims[157] or to try to discover the identity of those who informed on them.[158] Critiques of *Reporters Committee* tend to ignore that it reached its holding for a reason and so its demise would carry negative side effects. The limited conception of derivative benefits advocated for here charts a middle course by making disclosure more likely without calling for a revolution in FOIA jurisprudence.[159]

[154] See John Doe Agency v. John Doe Corp., 493 U.S. 146, 161 (1989) (Scalia, J., dissenting) (remarking that courts treat the need to narrowly construe FOIA's exemptions as "a formula to be recited rather than a principle to be followed"); *Fed. Lab. Rels. Auth.*, 510 U.S. at 507 (Ginsburg, J., concurring in the judgement) ("The *Reporters Committee* 'core purpose' limitation is not found in FOIA's language.").

[155] Whether this shield should have been created by Congress rather than the Supreme Court is irrelevant to the overall point that the core purpose doctrine has certain benefits as a matter of policy. Early commentators on FOIA often viewed it as a sort of Pandora's box which had released all number of unforeseen consequences and threatened to inundate government agencies with requests. *Reporters Committee* was an attempt to put the lid back on the box. See Beall, supra note 14, at 1253–56.

[156] See Hoefges et al., supra note 14, at 10 n.49.

[157] See Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 170 (2004).

[158] See Manna v. U.S. Dep't of Just., 51 F.3d 1158, 1165 (3d Cir. 1995).

[159] Other scholars have suggested rebalancing the disclosure scales through an opposite approach: narrowing the relevant privacy interests rather than expanding the conception of the public interest. See Hoefges et al., supra note 14, at 63. Under this approach, the privacy exemptions cannot be triggered merely by the existence of personally identifiable information in the requested documents. Instead, the government can only invoke the privacy exemptions if the requested documents contain personal information that is intimate in nature or inherently private. Id. at 63 & n.435. While such a proposal is outside the scope of this article, there are reasons to believe that the Supreme Court has expanded the protected zone of privacy beyond the statute's text and purpose. However, this proposal runs into the same difficulty as the calls to overturn the core purpose doctrine—it would require dismantling *Reporters Committee*, which is highly unlikely. See U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989) (indicating that FOIA's privacy exemptions protect more than what is inherently private).

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The circuits are beginning to recognize the necessity and potential value of derivative benefits, though not all go as far in their consideration as this Note recommends. The following Part examines the principles just described as they are currently applied by the circuits. The circuits provide concrete examples of derivative benefits in action, which gives us a glimpse at the future trajectory of the doctrine.

V. FUTURE FAULT LINES: DERIVATIVE BENEFITS IN THE LOWER COURTS

The question of derivative benefits has received relatively little attention among the circuits, but it has the potential to grow into a circuit split. I suggest that the circuits that have addressed derivative benefits are drifting into three main categories. The U.S. Court of Appeals for the District of Columbia lies at one end of the spectrum: it is the most supportive of derivative benefits, and to date it has not placed any limit on the circumstances in which it considers them. The U.S. Court of Appeals for the D.C. Circuit's approach aligns with this Note's proposal for derivative benefits. The Ninth Circuit represents the middle camp: it has allowed disclosure based on derivative benefits analysis but has consistently refused to do so when the derivative benefits depend on the requestor directly contacting the subjects of the government records. Similarly, while the Second Circuit seems the most hostile to derivative benefits, all of its cases have involved direct contact. Consequently, at least until it addresses derivative benefits in a different context, the Second Circuit can be categorized with the Ninth Circuit as drawing the line at direct contact. Finally, the First and Eleventh Circuits, while each having extremely limited precedent on the subject, have only allowed disclosure predicated on derivative benefits when the requestor has shown evidence of government misconduct. While none of those circuits have said so outright, it is probably no coincidence that government misconduct is the one area in which the Supreme Court has implicitly recognized a role for derivative benefits.

Thus, while no circuit has categorically prohibited the consideration of derivative benefits yet, they show signs of splitting along three distinct approaches. The two wedge issues that divide the groups are the permissibility of direct contact with the subjects of requested records and whether consideration of derivative benefits is proper outside the narrow context of compelling evidence of government misconduct. This Note suggests that these wedge issues deserve special attention as a bellwether

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of how derivative benefits doctrine will develop in the future.[160] The following Section further fleshes out the distinctions between the three approaches and describes how each circuit has approached derivative benefits in practice.[161]

A. The D.C. Circuit

The D.C. Circuit comes closest to adopting the unrestricted consideration of derivative benefits advocated for in this Note. Recently, it breathed new life into derivative benefits even though many commentators had left that doctrine for dead.[162] In 2011 in an opinion written by Judge (now Attorney General) Merrick Garland, the D.C. Circuit declared: "[T]his court takes derivative uses into account in evaluating the impact of disclosure on the public interest, just as both this court and the Supreme Court do in evaluating the impact of disclosure on personal privacy."[163] Because other circuits sometimes defer to the experience and expertise of the D.C. Circuit in FOIA matters,[164] it is

[160] A number of district courts across the country have also allowed disclosure based on derivative benefits. For a substantial but far from comprehensive list, see DOJ Guide to Exemption 6, supra note 48, at 57–59.

[161] In contrast to the limited caselaw on derivative benefits, consideration of derivative privacy harms is ubiquitous among the circuits, even if courts seldom acknowledge it as such. See, e.g., Prudential Locations LLC v. U.S. Dep't of Hous. & Urb. Dev., 739 F.3d 424, 426, 431 (9th Cir. 2013) (finding that disclosing the names of those who had alleged a certain business had broken federal law would risk exposing them to retaliation, stigma, and harassment); Forest Guardians v. U.S. FEMA, 410 F.3d 1214, 1216, 1220 (10th Cir. 2005) (finding that privacy interests would be invaded by disclosure of electronic mapping files because lot numbers could be manipulated to reveal home addresses). Only the Fifth Circuit, citing the *Ray* concurrence approvingly, has expressed doubt over whether derivative harms should be accorded any weight. See Cooper Cameron Corp. v. U.S. Dep't of Lab., 280 F.3d 539, 554 n.68 (5th Cir. 2002) (noting that the court's ruling accorded with the *Ray* concurrence); Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 365 n.14 (5th Cir. 2001) (citing the *Ray* concurrence and expressly disclaiming that Court's holding involved weighing derivative harms). However, the Fifth Circuit has not addressed the issue since the Supreme Court's decision in *Favish*, and one of its district courts has more recently found that weighing derivative harms is permitted. See Inclusive Cmtys. Project, Inc. v. U.S. Dep't of Hous. & Urb. Dev., No. 3:14-cv-3333, 2016 U.S. Dist. LEXIS 123779, at *21–22 (N.D. Tex. Sept. 13, 2016) (choosing to consider derivative privacy harms because the Supreme Court and the D.C. Circuit do so). Because derivative harms are not a serious point of contention among the circuits, the following discussion is limited to derivative benefits.

[162] See, e.g., Beall, supra note 14, at 1259–60 (arguing that *FLRA* was the death knell for derivative benefits).

[163] ACLU v. U.S. Dep't of Just., 655 F.3d 1, 15 (D.C. Cir. 2011).

[164] See *Cooper Cameron Corp.*, 280 F.3d at 543.

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possible that this decision will mark the beginning of a trend, but to date no other circuits have followed suit.

The case revolved around a FOIA request made by the ACLU to investigate the government's use of cell phone tracking in criminal prosecutions.[165] The ACLU requested the case names and docket numbers for all prosecutions of individuals tracked by the government using location data from cell phones without first securing a warrant.[166] The Department of Justice invoked both of the personal privacy exemptions, and the district court ordered disclosure only for the cases in which the defendant was convicted or pled guilty and not for those in which the defendant was acquitted.[167] Both parties appealed.[168]

The D.C. Circuit began by finding that the subjects of the case names and docket numbers did have a privacy interest at stake, but only if the court took derivative harms into account.[169] The court noted that disclosure of case names and docket numbers alone would reveal nothing personal or private about an individual, but nonetheless it found a privacy interest existed because the information could easily be used derivatively to find the underlying case files containing personal information. The court also took notice of the fact that the ACLU planned to contact the defendants to ask them whether they were aware of being the subjects of warrantless tracking, but it considered even this direct invasion of privacy minimal and insufficient to prevent disclosure.[170]

The court then found that there was a significant public interest in the disclosure of the case information, and it did so expressly on a theory of derivative benefits. The court admitted that disclosure of docket numbers and case names by itself would not reveal anything about the government's conduct, as required by *Reporters Committee*.[171] However, the court reasoned that the ACLU could satisfy the public interest derivatively; through the requested information, the ACLU would likely shed light on which types of crimes the government investigated using tracking data, the success rate of those prosecutions, and the

[165] *ACLU*, 655 F.3d at 3.
[166] Id. at 3–4.
[167] Id. at 4–5.
[168] Id. at 5.
[169] Id. at 6–12.
[170] Id. at 11–12. But cf. Union Leader Corp. v. U.S. Dep't of Homeland Sec., 749 F.3d 45, 53 (1st Cir. 2014) (finding that because the requestor did not intend to directly contact the subjects of the requested documents, the privacy interests at stake were diminished).
[171] *ACLU*, 655 F.3d at 15.

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government's standards for employing warrantless tracking.[172] In light of the strong public interest and weak privacy concerns, the court found that disclosure would not constitute an unwarranted invasion of privacy.

While the court spent little time justifying its decision to weigh derivative benefits, it suggested that consideration of derivative benefits and derivative harms must go together. The court commented that it chose to consider derivative benefits in the same way that the Supreme Court and the D.C. Circuit alike consider derivative harms, implying that the two are connected.[173] And when the government objected to the consideration of derivative benefits, the court cited the *Ray* concurrence's argument that both kinds of derivative uses must be weighed or ignored alike. In fact, the court observed, the government would lose the case if it were granted its wish and derivative uses were ignored. Because the court had already established that disclosure would only invade the defendants' privacy rights derivatively, the government would not be able to invoke the privacy exemptions at all without the consideration of derivative uses. Consequently, the government could not invoke the privacy exemptions on account of derivative harms and simultaneously cry foul at the ACLU's same reliance on derivative benefits.[174]

The court's analysis suggests that, while the Supreme Court has rejected the conclusion reached in the *Ray* concurrence, its logic regarding the equal treatment of both kinds of derivative uses still carries weight. The D.C. Circuit's position is that the weighing of derivative harms and derivative uses must be accepted or excluded together, as the *Ray* concurrence argued. And since both the Supreme Court and the D.C. Circuit routinely factor in derivative harms, derivative benefits must receive equal treatment.

In fact, the D.C. Circuit began tacitly considering derivative benefits well before openly endorsing them in *ACLU*.[175] For instance, in a 2008 case, the D.C. Circuit ruled for disclosure where the plaintiffs requested government databases containing agricultural data used to determine

[172] Id. at 13–14.

[173] Id. at 15.

[174] Id. at 15–16.

[175] See Multi AG Media LLC v. U.S. Dep't of Agric., 515 F.3d 1224, 1226 (D.C. Cir. 2008) (allowing disclosure on a derivative benefits theory); Painting & Drywall Work Pres. Fund v. U.S. Dep't of Hous. & Urb. Dev., 936 F.2d 1300 (D.C. Cir. 1991) (denying disclosure but finding that the ability of a journalist to use the requested information to further investigate governmental action weighed in favor of the public interest).

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eligibility for certain subsidies.[176] The court found that there was a significant public interest at stake because the plaintiffs could use the data to monitor the government's performance of its duty to administer the subsidy program, spot check measurements for data accuracy, and prevent fraud.[177] Without the data, the court reasoned, it would be very difficult for the public to verify anything about how the government ran the program.[178] While the court did not refer to derivative benefits by that name, its public interest analysis rested on them.

Finally, the D.C. Circuit has gone beyond derivative benefits and recognized a narrow exception to the core purpose doctrine.[179] In a 1999 case, *Lepelletier v. FDIC*, the D.C. Circuit held that the balancing test under Exemption 6 must take into account any personal interest that the subjects of the requested information have in disclosure. The case involved a FOIA request by an independent money finder for the names of depositors at three banks taken over by the FDIC. The depositors' assets totaled approximately $3.5 million, which would be forfeited to the FDIC if they remained unclaimed.[180] The court rejected the plaintiff's argument that release was in the public interest, finding that disclosure of the names would shed no light on the FDIC's performance of its duties or management of the accounts.[181]

In an unusual move, however, the court found that disclosure was still justified despite the lack of public interest in the release of information. Instead, the court relied on the depositors' own personal interest in disclosure. The court reasoned that "the individuals whom the government seeks to protect have a clear interest in the release of the requested information," and accordingly, the government could not claim a privacy exemption on behalf of the depositors when the depositors would likely prefer to suffer the invasion of privacy if it resulted in being reunited with their assets.[182] Consequently, the court held that Exemption 6 analysis "must include consideration of any interest the individual might

[176] *Multi AG Media LLC*, 515 F.3d at 1224.

[177] Id. at 1231–32.

[178] Id. at 1231. But see McCutchen v. Dep't of Health & Hum. Serv., 30 F.3d 183, 188 (D.C. Cir. 1994) (observing that the mere desire to oversee how the government is performing its duties does not create a public interest that can outweigh privacy concerns).

[179] See Lepelletier v. FDIC, 164 F.3d 37, 48 (D.C. Cir. 1999); see also Halstuk & Davis, The Public Interest Be Damned, supra note 24, at 1011–13.

[180] *Lepelletier*, 164 F.3d at 39.

[181] Id. at 47.

[182] Id. at 48.

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have in the release of the information, particularly when the individuals who are 'protected' under this exemption are likely unaware of the information that could benefit them."[183]

It would have been possible for the D.C. Circuit to view *Lepelletier* as a case that failed to meet Exemption 6's threshold requirement because there was no true privacy interest at stake, thus reconciling its result with *Reporters Committee*, but the court did not do so. In fact, the court found that the depositors did have a privacy interest, and the D.C. Circuit remanded to the district court to determine the dollar amount below which a depositor's privacy interest outweighed his interest in recovering his money.[184] Accordingly, *Lepelletier* constitutes an aberration from *Reporters Committee*, which held that disclosure must reveal something about the government's actions in order for it to outweigh an individual's privacy interest. The D.C. Circuit found that no public interest existed and yet ordered disclosure because of the pecuniary interests of private individuals. Strictly speaking, the court reached this result through privacy analysis and not public interest analysis, but the result is the same regardless. In most instances, the identifiable subjects of FOIA requests have no personal interest in disclosure, but *Lepelletier* suggests that the D.C. Circuit is willing to circumvent the letter of *Reporters Committee* when they do.

B. The Second Circuit

In contrast to the D.C. Circuit, the Second Circuit has come closest to categorically prohibiting consideration of derivative benefits.[185] However, nearly all of the Second Circuit's cases on the subject have come in the context of requestors whose asserted theory of derivative benefits depended on contacting the subjects of the requested records. While the Second Circuit has rejected this argument repeatedly, voicing concerns over its speculative nature and the threat to privacy that direct contact poses, it is at least possible that the Second Circuit may look more favorably on derivative benefits that do not require direct contact.

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[183] Id.

[184] Id. The D.C. Circuit also forbade the district court from releasing the depositors' names in conjunction with the amount owed to them by the government, another sign that it believed the depositors did possess a privacy interest. Id.

[185] See Long v. Off. of Pers. Mgmt., 692 F.3d 185, 198 (2d Cir. 2012); Associated Press v. U.S. Dep't of Def., 554 F.3d 274, 293 (2d Cir. 2009); Hopkins v. U.S. Dep't of Hous. & Dev., 929 F.2d 81, 88–89 (2d Cir. 1991).

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For instance, in one early case, the Second Circuit seemed prepared to reject derivative benefits entirely because of the threat their consideration poses to the privacy exemptions.[186] The plaintiff union sought the names and addresses of workers on a government project so that it could ensure the government was following wage laws. The court, however, found that disclosure of that information would shed no light on the government's enforcement of the wage laws; rather, it would only allow the union to contact individual workers to ask about their compensation.[187] The court decided that to allow disclosure on such an attenuated theory of the public interest would be to render the privacy exemptions a dead letter. The court denied disclosure and held that "disclosure of information affecting privacy interests is permissible only if the information reveals something *directly* about the character of a government agency or official,"[188] which would seem to forbid consideration of derivative benefits under any circumstances.

The Second Circuit has since backtracked on the finality of its holding in *Hopkins*, but its distrust of derivative benefits remains. More recently, the Second Circuit cited *Hopkins* approvingly but characterized its holdings as simply casting doubt on the permissibility of derivative benefits, not prohibiting their consideration outright.[189] But there, too, the Second Circuit rejected a derivative use theory predicated on direct contact. While the Associated Press had successfully obtained documents in government possession alleging mistreatment of detainees at Guantanamo Bay, the government redacted all identifying information related to the detainees.[190] The Associated Press argued, among other things, that disclosure of the identifying information would allow it to contact the allegedly mistreated detainees and to report on their side of the story rather than just the government's view. The Second Circuit cited *Hopkins* in its rejection of that argument and assessed such a public interest as "minimal."[191]

[186] *Hopkins*, 929 F.2d at 82.

[187] Id. at 88.

[188] Id.

[189] *Associated Press*, 554 F.3d at 290 ("Although this Court has not addressed the issue of whether a derivative use theory is cognizable under FOIA as a valid way by which to assert that a public interest is furthered, we have indicated that it may not be.").

[190] Id. at 279–80.

[191] Id. at 290. See also Long v. Off. of Pers. Mgmt., 692 F.3d 185, 194 (2d Cir. 2012) ("The use of personnel files to contact government employees in the hopes of uncovering malfeasance does not serve FOIA's objectives."). But see Kuzma v. U.S. Dep't of Just., 692

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Thus, while the Second Circuit has rejected derivative use arguments on several occasions, often with facially broad language, the context of its rejections is actually fairly narrow. Its skepticism has always come in the context of the requestor's intention to directly contact the subjects of requested documents in order to advance the public interest.

C. The Ninth Circuit

Like the Second Circuit, the Ninth Circuit has proven reluctant to accept derivative benefits arguments that rely on direct contact.[192] However, unlike the Second Circuit, the Ninth Circuit has ordered disclosure where the requestor can secure derivative benefits without direct contact.[193] The Ninth Circuit thus takes a more moderate position than the D.C. Circuit does, and it is possible that the Second Circuit will do the same when the right case arises.

In one relatively recent case, for example, the Ninth Circuit outlined its view that derivative benefits are impermissible if they require direct contact with the subjects of the requested records in order to generate benefits.[194] The plaintiff sought the government's report regarding its response to a wildfire, but the government redacted the names of the government employees mentioned in the report. The court pointed out that disclosure of the names would not by itself shed any light on the government's response to the fire; plaintiff's only hope of advancing the public interest was to use the disclosed names to interview the employees himself about the fire. Accordingly, the public interest and the employees' privacy interests were "inseparable"; the former could only be advanced at the expense of the latter.[195] Any new information about the government's response to the fire would require the plaintiff to track down the government employees and interview them about the fire,

F. App'x 30, 35 (2d Cir. 2017) (rejecting a derivative use argument that would merely "provide further avenues for research" into alleged government misconduct). While the Second Circuit's comments here seem broad enough to go beyond skepticism just related to direct contact, the plaintiff's derivative benefits argument was so threadbare and the court's analysis so perfunctory that it is unlikely that this case hints at anything larger. See id.

[192] See Forest Servs. Emps. v. U.S. Forest Serv., 524 F.3d 1021, 1028 (9th Cir. 2008) (rejecting a direct contact argument); Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964, 979 (9th Cir. 2009) (same).

[193] See Elec. Frontier Found. v. Off. of the Dir. of Nat'l Intel., 639 F.3d 876, 888–89 (9th Cir. 2010); Rosenfield v. U.S. Dep't of Just., 57 F.3d 803, 815 (9th Cir. 1995).

[194] See *Forest Servs.*, 524 F.3d at 1027–28.

[195] Id at 1028.

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thereby invading their privacy. The Ninth Circuit found that a derivative use of that type could not justify disclosure.[196]

In contrast, the Ninth Circuit has allowed disclosure based on derivative benefits when the public interest can be separated from the privacy interests.[197] At issue in one recent case was a FOIA request for the identities of the representatives of telecommunications firms involved in lobbying for a bill that would shield those companies from certain liabilities.[198] The court ordered disclosure on what amounted to a derivative benefits theory, finding that with the requested information, "the public will be able to determine how the Executive Branch used advice from particular individuals and corporations in reaching its own policy decisions."[199] While the release of the lobbyists' names alone would not shed light on their level of influence over the White House and key members of Congress, the court found that the names could be used in combination with outside information about the lobbyists' campaign contributions and political activity to serve the public interest.[200] Because the Ninth Circuit has been willing to weigh derivative benefits in contexts such as this one, the dividing line seems to be whether the derivative benefits can be achieved without direct contact with the individuals identified in the requested records.

D. The First Circuit

The U.S. Court of Appeals for the First Circuit typifies the final and most limited view of permissible derivative benefits, considering them only when the requestor provides evidence of government misconduct. While the First Circuit's precedent on the subject is extremely limited, it may signal a reluctance to go beyond the narrow role for derivative benefits that the Supreme Court tacitly accepted in *Ray* and *Favish*.

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[196] Id. See also *Lahr*, 569 F.3d at 975 (finding *Forest Services* to be binding precedent and similarly denying disclosure where the public interest could only be advanced at the expense of privacy via direct contact); Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of the Air Force, 26 F.3d 1479, 1485 (9th Cir. 1994) (rejecting a derivative benefits argument predicated on direct contact because the public interest and the privacy interest were "intertwined").

[197] See *Elec. Frontier Found.*, 639 F.3d at 887–88; see also *Rosenfield*, 57 F.3d 803, 815 (allowing disclosure of names so that the public could ascertain whether the FBI improperly targeted the leadership of a political movement).

[198] *Elec. Frontier Found.*, 639 F.3d at 880–81.

[199] Id. at 888.

[200] Id. at 887–88.

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In the First Circuit's one case on the subject, a New Hampshire newspaper called *Union Leader* filed a FOIA request for the names of six illegal aliens arrested by Immigrations and Customs Enforcement ("ICE") in New Hampshire, and ICE withheld the names under Exemption 7(C).[201] The court found that the public interest justified disclosure because *Union Leader* was able to meet the evidentiary standards imposed by *Favish* regarding allegations of government misconduct.[202]

The newspaper put forward a derivative benefits theory of the public interest, arguing that with the names it would be able to monitor the arrestees' outcome before immigration courts and track how ICE processed them.[203] The court accepted that this would advance the public interest because *Union Leader* was able to present evidence that some of the arrestees had been convicted of crimes or ordered removed from the United States as long as twenty-three years before their recent arrest by ICE. The court found this evidence met the *Favish* standard of proof that would warrant a reasonable belief of government impropriety.[204] Consequently, it ordered disclosure so that *Union Leader* could "investigate public records pertaining to the arrestees' prior convictions and arrests, potentially bringing to light the reasons for ICE's apparent torpor in removing these aliens."[205]

Union Leader, while its only case on the subject, signals that the First Circuit is willing to give weight to derivative benefits when the requestor can show reasonable evidence of government misconduct. This aligns with Supreme Court precedent, but only time will tell if the First Circuit will venture beyond this circumscribed role for derivative benefits.

E. The Eleventh Circuit

Similar to the First Circuit, the Eleventh Circuit has limited appellate precedent on derivative benefits, but it, too, has allowed disclosure in one case after factoring in derivative benefits revolving around allegations of government misconduct.[206]

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[201] Union Leader Corp. v. U.S. Dep't of Homeland Sec., 749 F.3d 45, 48 (1st Cir. 2014).

[202] For analysis of the evidentiary standards laid out by the Supreme Court in *Favish*, see the discussion supra Section III.C.

[203] *Union Leader*, 749 F.3d at 54.

[204] Id. at 55–56.

[205] Id. at 56.

[206] News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1174 (11th Cir. 2007). The Eleventh Circuit also allowed disclosure based on derivative benefits in *Ray* before the

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In *News-Press v. Department of Homeland Security*, the plaintiffs were newspapers seeking the names and addresses of Floridians who applied for disaster aid from FEMA or submitted claims to a FEMA-administered flood insurance program in the wake of a series of federally declared disasters.[207] The court recounted at length how FEMA's disbursement of over one billion dollars of disaster relief was marred by allegations of fraud and abuse, leading to numerous federal investigations.[208] Accordingly, the court found a significant public interest in the newspapers' plan to take the addresses of recipients of the disaster relief and then superimpose the paths of the hurricanes and other disasters over street-level maps to check for outliers—houses which were not in the path of a disaster and yet received aid.[209] Ultimately, the court ordered disclosure of the addresses, but not of the names, which it found were not necessary for the investigation and carried greater privacy risks.[210]

While the court did not expressly address the issue of derivative uses, the newspapers' argument, which the court accepted, completely relied on that approach because the addresses alone were insufficient to shed light on FEMA's administration of aid. As the district court observed, the release of addresses would, by itself, reveal little about whether FEMA had properly dispersed aid to that address or not.[211] Any public interest depended on the combination of the addresses with other sources of information. Accordingly, the Eleventh Circuit seems to join the First Circuit in, at a minimum, recognizing a role for derivative benefits when presented with evidence of government misconduct.

In short, two circuits, the First and Eleventh, currently weigh derivative benefits only in the narrow context of evidence of government misconduct. The Ninth and (potentially) the Second Circuits go further

Supreme Court reversed. Because of that reasoning, at least one district court in the aftermath of *Ray* found that considering derivative benefits was still permissible until the Eleventh Circuit ruled otherwise, since the Supreme Court had declined to answer that question. See Ray v. U.S. Dep't of Just., INS, 852 F. Supp. 1558, 1564–65 (S.D. Fla. 1994).

[207] *News-Press*, 489 F.3d at 1177–78.

[208] Id. at 1178–81.

[209] Id. at 1192–93. The court reached its decision even while knowing that the newspapers would likely need to contact some recipients directly in the course of their investigation. See id. at 1203. This stands in contrast to the decisions of the Ninth Circuit, which generally do not allow disclosure where the derivative benefits entail direct contact with the identifiable subjects of the requested documents.

[210] Id. at 1205.

[211] News-Press v. U.S. Dep't of Homeland Sec., 2005 U.S. Dist. LEXIS 27492, at *54 (M.D. Fla. Nov. 4, 2005).

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but draw the line when derivative benefits can only be achieved through contacting the subjects of the government records. The D.C. Circuit has not yet imposed any limit and seems willing to consider derivative benefits under any circumstances, which is the correct outcome under this Note's framework. The amount of appellate precedent is admittedly limited, but what does exist shows these fault lines spreading, potentially drawing the circuits into conflict. Accordingly, the role and scope of derivative benefits deserves further attention in the future as the circuits continue to explore this question.

CONCLUSION

FOIA was born amid deepening distrust in the government as a way to restore public oversight. It gave citizens a judicially enforceable right to the government's information, with certain limited exceptions, including two exemptions related to personal privacy. Over the past few decades, the Supreme Court's interpretation of the privacy exemptions has tended to favor nondisclosure. It has consistently expanded the scope of privacy rights protected by the exemptions while narrowing the cognizable public interests that can justify disclosure. As a result, the scales are out of balance; they tilt toward the side of privacy and nondisclosure.

A promising way for courts to rebalance the scales consistent with Supreme Court precedent is by considering how derivative benefits can advance the public interest. Courts should not limit their analysis to the direct results of disclosure; they should look at all the probable results that requestors can achieve through the use of requested information. The Supreme Court has consistently followed this approach with derivative harms and hinted a willingness to do so with derivative benefits.

A number of circuits, led by the D.C. Circuit, are beginning to consider derivative benefits and weigh them in favor of disclosure. The rest of the circuits should follow, and the Supreme Court should explicitly endorse the consideration of derivative benefits and provide further guidance about the nexus required between the requested information and the public interest. A uniform acknowledgement of the ways in which derivative benefits can serve the public interest would go a long way toward restoring the promise of FOIA and reclaiming the people's right to know.