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NOTES

Collective Bargaining in the Federal Public Sector: Disclosing Employee Names and Addresses Under Exemption 6 of the Freedom of Information Act

In 1978, Congress enacted the Federal Labor-Management Relations Statute (Fed. L-M Statute),¹ which regulates labor relations in the federal public sector.² The Fed. L-M Statute requires that federal agencies disclose to a certified union, "to the extent not prohibited by law," data "reasonably available and necessary" for collective bargaining.³ Although employee name and address lists are generally considered available and necessary,⁴ debate continues over whether release of this information is "prohibited by law," specifically by the Privacy Act.⁵

In general, the Privacy Act prohibits government agencies from disseminating personal information without the written permission of the person to whom the information pertains.⁶ Two enumerated exceptions to the Act, however, may permit disclosure of employee

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1. 5 U.S.C. §§ 7101-7135 (1988).

2. 5 U.S.C. § 7101(b) (1988) states, in part, "It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government." Public and private sector labor relations are two separate and distinct areas and are regulated under different statutory schemes. The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-168 (1988), controls labor relations in the private sector.

3. 5 U.S.C. § 7114(b)(4) (1988). The Fed. L-M Statute defines collective bargaining as the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached . . . . 5 U.S.C. § 7103(a)(12) (1988).

4. Every circuit court to review the matter has held that employee names and addresses are "necessary" for collective bargaining. See *FLRA v. United States Dept. of the Treasury*, 884 F.2d 1446, 1449 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 863 (1990); *United States Dept. of Navy v. FLRA*, 840 F.2d 1131, 1138 (3d Cir.), *cert. dismissed*, 488 U.S. 881 (1988); *United States Dept. of the Air Force v. FLRA*, 838 F.2d 229, 231-32 (7th Cir.), *cert. dismissed*, 488 U.S. 880 (1988); *United States Dept. of Agric. v. FLRA*, 836 F.2d 1139, 1142 (8th Cir. 1988), *vacated and remanded*, 488 U.S. 1025, *vacated as moot*, 876 F.2d 50 (8th Cir. 1989); *United States Dept. of Health & Human Servs. v. FLRA*, 833 F.2d 1129, 1133 (4th Cir. 1987), *cert. dismissed*, 488 U.S. 880 (1988); *American Fedn. of Govt. Employees, Local 1760 v. FLRA*, 786 F.2d 554, 557 (2d Cir. 1986).

5. 5 U.S.C. § 552a (1988).

6. 5 U.S.C. § 552a(b) (1988) states, "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ."

names and addresses to unions. Section 552a(b)(3) allows disclosure for a "routine use"⁷ and section 552a(b)(2)⁸ authorizes an agency to release information otherwise obtainable under the Freedom of Information Act (FOIA).⁹ This Note will not address the "routine use" exception because courts generally have avoided consideration of this issue by granting disclosure under FOIA.¹⁰

FOIA is a general disclosure statute, requiring that federal agencies release all requested information contained in agency files.¹¹ Nine narrow exemptions to the Act, however, allow the government to withhold records under certain circumstances.¹² Exemption 6, which is most relevant here, limits disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹³ If Exemption 6 does not apply and FOIA renders employee names and addresses obtainable, the Privacy Act does not prevent their disclosure. Because release would therefore not be "prohibited by law," the Fed. L-M Statute would require that federal agencies disclose employee names and addresses to unions.

Until recently, with the exception of the Fourth Circuit,¹⁴ every circuit court to consider the question of whether FOIA exempts employee names and addresses from the Privacy Act's restrictions an-

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7. 5 U.S.C. § 552a(b)(3) (1988). The "routine use" exception allows disclosure of records for uses that are "compatible with the purpose for which [the information] was collected." 5 U.S.C. § 552a(a)(7) (1988). An agency maintaining a system of records must describe in a Federal Register notice "each routine use of the records . . . including the categories of users and the purpose of such use." 5 U.S.C. § 552a(e)(4)(D) (1988).

8. 5 U.S.C. § 552a(b)(2) (1988).

9. 5 U.S.C. § 552 (1988).

10. See *United States Dept. of Navy v. FLRA*, 840 F.2d 1131, 1137 n.4 (3d Cir.), *cert. dismissed*, 488 U.S. 881 (1988); *United States Dept. of Air Force v. FLRA*, 838 F.2d 229, 232 (7th Cir.), *cert. dismissed*, 488 U.S. 880 (1988); *United States Dept. of Agric. v. FLRA*, 836 F.2d 1139, 1142 n.2 (8th Cir. 1988), *vacated and remanded*, 488 U.S. 1025 (1989), *vacated as moot*, 876 F.2d 50 (8th Cir. 1989); *United States Dept. of Health & Human Servs. v. FLRA*, 833 F.2d 1129, 1134 n.6 (4th Cir. 1987), *cert. dismissed*, 488 U.S. 880 (1988); *American Fedn. of Govt. Employees, Local 1760 v. FLRA*, 786 F.2d 554, 556 n.2 (2d Cir. 1986). But see *FLRA v. United States Dept. of the Treasury*, 884 F.2d 1446, 1453-56 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 863 (1990) (holding that names and addresses are not subject to disclosure under the Privacy Act's routine use exception).

11. For more information on the history and purposes of FOIA, see *infra* section IV.A.

12. 5 U.S.C. § 552(b)(1)-(9) (1988).

13. 5 U.S.C. § 552(b)(6) (1988).

14. In *American Fedn. of Govt. Employees, Local 1923 v. United States Dept. of Health & Human Servs.*, 712 F.2d 931 (4th Cir. 1983), the Fourth Circuit did not require disclosure. In *Local 1923*, the Union requested the information directly under FOIA and not by way of the Fed. L-M Statute. Four years later, however, in *United States Dept. of Health & Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), the Fourth Circuit distinguished *Local 1923* and required disclosure when the Union initiated its request under the Fed. L-M Statute. For a more complete discussion of *Local 1923* and the later Fourth Circuit decision, see *infra* notes 36-42, 52-55 and accompanying text.

swered in the affirmative.¹⁵ In permitting disclosure, the courts reasoned that any individual interest in privacy was either minimal or outweighed by the public interest in collective bargaining. In September 1989, however, the D.C. Circuit held otherwise in *Federal Labor Relations Authority v. United States Department of the Treasury*.¹⁶ Relying on the Supreme Court's decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,¹⁷ the D.C. Circuit did not require disclosure, finding that the public interest in collective bargaining was not within FOIA's central purpose of opening government activity to public scrutiny.¹⁸

This Note examines the application of FOIA and the Privacy Act to union requests for employee names and addresses under the Fed. L-M Statute. Part I briefly explores the importance of employee names and addresses to collective bargaining. This Part also examines the increasingly significant role of public sector unions due to the growth in federal public sector employment and the decline of private sector unionization. Part II analyzes the various circuit court decisions supporting disclosure in the federal public sector. Part III examines *Reporters Committee* and *Department of the Treasury* and discusses the potential policy implications resulting from the D.C. Circuit's application of *Reporters Committee* in the collective bargaining context. Finally, Part IV proposes an alternative reading of FOIA that removes the barrier of *Reporters Committee* and better serves the goals of both the Privacy Act and the Fed. L-M Statute.

I. COLLECTIVE BARGAINING IN THE FEDERAL PUBLIC SECTOR

Through enactment of the Fed. L-M Statute, Congress gave federal employees the statutory right to bargain collectively.¹⁹ In so do-

15. *United States Dept. of Navy v. FLRA*, 840 F.2d 1131 (3d Cir.), cert. dismissed, 488 U.S. 881 (1988); *United States Dept. of the Air Force v. FLRA*, 838 F.2d 229 (7th Cir.), cert. dismissed, 488 U.S. 880 (1988); *United States Dept. of Agric. v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), vacated and remanded, 488 U.S. 1025, vacated as moot, 876 F.2d 50 (8th Cir. 1989); *United States Dept. of Health & Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), cert. dismissed, 488 U.S. 880 (1988); *American Fedn. of Govt. Employees, Local 1760 v. FLRA*, 786 F.2d 554 (2d Cir. 1986); *Local 1923*, 712 F.2d 931; see *infra* Part II for a detailed discussion of these cases.

16. 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 863 (1990).

17. 109 S. Ct. 1468, 1481 (1989) (noting that whether disclosure constitutes an unwarranted invasion of privacy under Exemption 7(C) turns on the nature of the requested document and its relationship to the basic purpose of FOIA to "open agency action to the light of public scrutiny"); see *infra* notes 75-86 and accompanying text for a detailed discussion of *Reporters Committee*.

18. 884 F.2d at 1456.

19. Prior to the enactment of the Fed. L-M Statute, Executive Order 10,988 and 11,491 governed federal sector union activity. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963), repealed by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970). Executive Order 11,491 was amended by Exec. Order No. 11,616, 3 C.F.R. 605 (1971-1975); Exec. Order No. 11,636, 3 C.F.R. 634 (1971-1975); and Exec. Order No. 11,838, 3 C.F.R. 957 (1971-1975). Under the Orders, the "collective bargaining process was saddled with limitations and viewed with skepti-

ing, Congress recognized the importance of employee collective bargaining, stating:

the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them[;] (A) safeguards the public interest[;] (B) contributes to the effective conduct of public business[;] and (C) facilitates and encourages the amicable settlement[ ] of disputes between employees and their employers involving conditions of employment . . . .²⁰

Congressional support of union activity by federal employees has assumed increasing significance due to the growth in public sector employment. From 1970 to 1988, the number of paid federal civilian employees increased from 2,645,000 to 2,981,000.²¹ During roughly the same period, public sector union membership remained relatively stable at approximately 40%.²² Because of the decline in private sector unionization, however, public sector unions actually increased their proportion of total union membership from 23.2% to 35.8% between 1973 and 1987.²³ Thus, as the public sector labor force grows, collective bargaining efforts have the potential to reach more people and may thus become a more important mechanism for safeguarding employee rights.²⁴ In addition, with the predicted continued demise of private sector unionization,²⁵ the public sector may become the last stronghold for organized labor in the United States.²⁶ Indeed, as commentators have noted, labor relations in the public sector is "where the action is."²⁷

Placed in this context, the significance of releasing employee names

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cism by employees." McMillion, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 M.L. L. REV. 169, 188 (1990). Dissatisfied with the existing labor-management program, Congress sought through the Fed. L-M Statute to expand the rights of federal employees beyond those contemplated by the Orders and to give labor organizations more latitude in the labor-management arena. *Id.* at 197. For further discussion of Executive Orders 10,988 and 11,491, see *id.* at 176-99.

20. 5 U.S.C. § 7101(a) (1988).

21. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 324 (Table No. 522) (110th ed. 1990).

22. Troy, *Public Sector Unionism: The Rising Power Center of Organized Labor*, 9 GOVT. UNION REV. Summer 1988, at 1, 3. The percentage of the public sector that is unionized decreased to 36% in 1987. *Id.* at 3.

23. *Id.*

24. For a discussion of the effects of collective bargaining and unionization on employee rights, see A. REES, *THE ECONOMICS OF TRADE UNIONS* 186-87 (2d ed. 1977) (Unions protect employees from abuses of managerial authority.); Freeman & Medoff, *The Two Faces of Unionism*, PUB. INT., Fall 1979, at 71-74, 78, 82 (Unions provide workers with a means of communicating with management. In addition, as a result of collective bargaining, unionized workers make about 10-15% more than otherwise comparable nonunion workers and are much more likely to receive important fringe benefits like pensions and life and health insurance.).

25. See Troy, *supra* note 22, at 7.

26. See *id.* at 1, 7.

27. 4 D. WOLLETT & D. SEARS, *LABOR RELATIONS & SOCIAL PROBLEMS: COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* ix (1971).

and addresses to unions representing federal employees is clear. Failure to disclose this information could seriously hamper union efforts to represent employees effectively, thereby decreasing the force of organized labor in the federal public sector. Indeed, the National Labor Relations Board (NLRB) focused on this concern when requiring the routine release of employee names and addresses by private-sector employers during union organizational campaigns. The NLRB noted:

As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. . . . In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.²⁸

Employee names and addresses are equally necessary for effective union representation in the public sector.²⁹ As the Eighth Circuit noted in *United States Department of Agriculture v. FLRA*,³⁰ "direct communication with employees at home without the possibility of interference by management will best serve the purposes underlying the [Fed. L-M Statute]."³¹ Moreover, the need for employee names and addresses continues despite the fact that federal sector unions have generally initiated their requests after being certified as the exclusive bargaining representative. Thus, direct communication with employees is equally necessary for collective bargaining both before and after the election campaign. When commenting on this fact in *United States Department of Health and Human Services v. FLRA*,³² the Fourth Circuit observed, "[c]ommunication between the [u]nion and bargaining unit employees appears to be as important to the performance of the [u]nion's representational duties in the interim between negotiations as it is during negotiations."³³

Given the increasing significance of public sector unionization and given that employee names and addresses are necessary for effective collective bargaining, resolution of whether the Privacy Act bars re-

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28. *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236, 1240-41 (1966).

29. *See supra* note 4.

30. 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 488 U.S. 1025, *vacated as moot*, 876 F.2d 50 (8th Cir. 1989).

31. 836 F.2d at 1142.

32. 833 F.2d 1129 (4th Cir. 1987), *cert. dismissed*, 488 U.S. 880 (1988).

33. 833 F.2d at 1132.

lease of this information is particularly important. The remainder of this Note focuses on this question.

II. PRE-DEPARTMENT OF THE TREASURY DECISIONS

As noted above, prior to the D.C. Circuit's decision in *FLRA v. United States Department of the Treasury*, with the exception of the Fourth Circuit,³⁴ every circuit court to address the issue held in favor of disclosure when deciding whether the Privacy Act prohibited release of employee names and addresses to a union.³⁵ Although generally the courts required disclosure, their reasoning differed. This Part examines chronologically the various rationales and tests advanced in the circuit court opinions prior to *Department of the Treasury*.

In *American Federation of Government Employees, Local 1923 v. United States Department of Health and Human Services*,³⁶ the Fourth Circuit was first to consider whether FOIA requires disclosure of employee names and addresses to a union. Unlike subsequent cases involving this issue, the union requested disclosure of the names and home addresses directly under FOIA and not under the Fed. L-M Statute. The employer refused to release the addresses, arguing that to do so would constitute a "clearly unwarranted invasion of personal privacy" under FOIA's Exemption 6.

To determine whether government information falls within Exemption 6, Congress requires that courts balance the public and personal privacy interests at stake.³⁷ After weighing these factors, the Fourth Circuit concluded that employees have a "strong" privacy interest in their home addresses because "[d]isclosure could subject [them] to an unchecked barrage of mailings and . . . personal solicitations [and because] no effective restraints could be placed on the range of uses to which the information, once revealed, might be put."³⁸ On the public interest side of the equation, the court found that while

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34. See *infra* notes 36-42 and accompanying text for a description of the Fourth Circuit decision.

35. See *supra* note 15 for citations to the circuit court opinions.

36. 712 F.2d 931 (4th Cir. 1983).

37. When drafting FOIA, Congress did not provide a blanket exemption for information which fell within Exemption 6. Rather, the Senate and House Reports reveal that Congress intended that the individual's right to privacy be balanced against the public's interest in disclosure. The Senate Report states, "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. REP. NO. 813, 89th Cong., 1st Sess. 9 [hereinafter SENATE REPORT 813]. Similarly, the House Report notes, "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information . . . ." H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 [hereinafter HOUSE REPORT 1497], reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2428. The Supreme Court first applied the balancing test in *United States Dept. of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

38. 712 F.2d at 932.

"collective bargaining is a matter of grave public concern, any benefits flowing from disclosure . . . would inure primarily to the union, in a proprietary sense, rather than to the public at large."³⁹ The court also stated, in language foreshadowing *Department of the Treasury*, that the requested records were not the kind that must be disclosed under FOIA. The court noted:

The purpose of the Act is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny . . . ." The home addresses sought by [the union] have nothing to do with the agency's 'work,' and disclosure thereof would shed no significant light on the agency's inner workings.⁴⁰

The union was therefore not entitled to disclosure of the employees' home addresses.

In dissent, Judge Winter observed:

With rare exception, there is little privacy in one's name and home address. Such information is a matter of public record in motor vehicle registration and licensing records, voting lists, and real property records. Other sources from which it may often be obtained are telephone directories and city directories. In short, it is the rare individual who has any real privacy interest in the identity of his residence.⁴¹

Judge Winter did not view FOIA's disclosure requirements as limited solely to "opening agency action to the light of public scrutiny." Rather, he argued the Fed. L-M Statute was a congressional determination that collective bargaining is in the public interest. Because the union could not satisfactorily communicate with all the employees in its bargaining unit without their names and addresses, Judge Winter concluded that disclosure of the addresses would be in the interest of the union, and in turn in the public interest.⁴²

In *American Federation of Government Employees, Local 1760 v. FLRA*,⁴³ the Second Circuit rejected the Fourth Circuit's conclusion. As in *Local 1923*, the union requested the names and addresses of all employees in the bargaining unit. The union in *Local 1760*, however, initiated its request under the Fed. L-M Statute and not directly under FOIA. The employer released the employee names but argued that the Privacy Act barred disclosure of the addresses.⁴⁴ In response, the union asserted that the FOIA exception to the Privacy Act required disclosure since release of the requested information would not constitute a "clearly unwarranted invasion of personal privacy" under Ex-

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39. 712 F.2d at 932.

40. 712 F.2d at 933 (quoting *United States Dept. of Air Force v. Rose*, 425 U.S. at 361).

41. 712 F.2d at 934 (Winter, J., dissenting).

42. 712 F.2d at 934 (Winter, J., dissenting).

43. 786 F.2d 554 (2d Cir. 1986).

44. The Privacy Act applies here because the records at issue are contained within a "system of records" as defined by the meaning of the Act. See *supra* note 6 for the relevant statutory text.

emption 6.⁴⁵ Thus, although the case reached the court by way of the Fed. L-M Statute, the Second Circuit was forced to address basically the same question the Fourth Circuit had decided earlier.

The Second Circuit agreed with the union, finding the privacy interest of the average employee “not particularly compelling” given the ready availability of addresses through other public records.⁴⁶ In addition, the court noted that the union already had access to other information, such as employee salary levels, which could more easily threaten personal privacy.⁴⁷

In weighing the public interest, the court held that the mere availability to the union of alternative means of communication did not justify the employer’s refusal to release the addresses, particularly since an administrative law judge had already found those means inadequate.⁴⁸ The court also pointed out that in private sector cases, the existence of alternatives did not preclude disclosure.⁴⁹ Finally, in response to the employer’s argument that the release of the addresses would not serve the public interest, the Second Circuit noted that Congress had determined, when enacting the Fed. L-M Statute, that collective bargaining was in the public interest.⁵⁰ In so doing, the court implicitly rejected the Fourth Circuit’s narrow interpretation of FOIA

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45. 786 F.2d at 556. Before appeal to the Second Circuit, an administrative law judge ruled in favor of the union after noting that the addresses were crucial to the union’s ability to frame proposals for collective bargaining and that other means of communication open to the union were inadequate. 786 F.2d at 555. The FLRA, which is the public sector equivalent to the National Labor Relations Board (NLRB), overruled the administrative law judge and held that the Privacy Act prevented disclosure of the requested information. 19 F.L.R.A. No. 108 (Aug. 22, 1985); 786 F.2d at 555. The FLRA drew support from the Fourth Circuit’s decision in *Local 1923*. The FLRA concluded that the strong privacy interest of the employees in their home addresses outweighed the union’s need for disclosure. After *Local 1760*, however, the FLRA reversed this stance and has since consistently held that employers must release employee names and addresses. For a description of the FLRA and its duties, see 5 U.S.C. §§ 7104-7105 (1988).

46. 786 F.2d at 556. *But see infra* text accompanying notes 81-82 (noting that in *United States Department of Justice v. Reporters Committee for the Freedom of the Press* the Supreme Court held that an individual may have a privacy interest in public information).

47. 786 F.2d at 556.

48. *See United States Dept. of Agric. v. FLRA*, 836 F.2d 1139, 1142 (8th Cir. 1988), *vacated and remanded*, 488 U.S. 1025, *vacated as moot*, 876 F.2d 50 (8th Cir. 1989) (Although adequate alternative means existed, “direct communication with employees at home without the possibility of interference by management will best serve the purposes underlying the labor statute.”); *United States Dept. of Health & Human Servs. v. FLRA*, 833 F.2d 1129, 1133 (4th Cir. 1987), *cert. dismissed*, 488 U.S. 880 (1990) (mere existence of other means of communication insufficient to rebut presumption of union need for employee names and addresses); *supra* note 37.

49. The court stated that “the privacy implications of address release are essentially the same in either the public or private sector.” 786 F.2d at 557. For private sector cases allowing disclosure when alternative means exist, see *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1205-06 (2d Cir. 1970), *cert. denied*, 401 U.S. 993 (1971); *Prudential Ins. Co. v. NLRB*, 412 F.2d 77 (2d Cir.), *cert. denied*, 396 U.S. 928 (1969).

50. 786 F.2d at 557; *see American Fedn. of Govt. Employees, Local 1923 v. United States Dept. of Health and Human Serv.*, *supra* text accompanying notes 41-42 (Winter, J., dissenting); *United States Dept. of Agric. v. FLRA*, 836 F.2d at 1143 (noting that § 7101(a)(1) of the Fed. L-M Statute promotes the public interest by protecting the right of employees to organize and bargain collectively); *supra* text accompanying notes 19-20.

and implied that the Act's purpose may be broader than merely providing a mechanism for public scrutiny of agency action. Because of the "modest" privacy interest involved and the strong public interest in collective bargaining, the court concluded that disclosure of the employees' addresses was not "prohibited by law" within the meaning of the Fed. L-M Statute.⁵¹

The Fourth Circuit reconsidered the applicability of Exemption 6 to the disclosure of employee names and addresses in *United States Department of Health and Human Services v. FLRA*.⁵² In this case, the union sought release of the names and addresses through the Fed. L-M Statute and not directly under FOIA as its counterpart had done in *Local 1923*.⁵³ The employer refused to release the addresses, arguing that the Privacy Act prohibited disclosure.

The court distinguished *Local 1923*, and affirmed an earlier FLRA ruling requiring disclosure.⁵⁴ The court emphasized that the case at hand did not involve a request for information brought directly under FOIA, but rather concerned a FLRA ruling on a request brought under the Fed. L-M Statute. Because the suit arose under the labor statute, the court stated, "[c]onsiderable weight is due the Authority's interpretation of the [Fed. L-M Statute] . . . [A]lthough this matter involves the Authority's interpretation of statutes other than its enabling act, we perceive that the interpretation bears directly on the 'complexities' of federal labor relations and we accordingly defer to the Authority's rulings."⁵⁵ Thus, by focusing on the procedural posture of the case and by deferring to the FLRA, the Fourth Circuit finessed its way around its earlier determination in *Local 1923*.

In *United States Department of Agriculture v. FLRA*,⁵⁶ the Eighth Circuit questioned whether the privacy interests of employees should receive little "solicitude" solely because the information could usually be obtained from other sources. While generally agreeing with the Second and Fourth Circuits' conclusion that a union is entitled to employee home addresses when requested under the Fed. L-M Statute,

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51. 786 F.2d at 557.

52. 833 F.2d 1129 (4th Cir. 1987), *cert. dismissed*, 488 U.S. 880 (1988).

53. 712 F.2d 931 (4th Cir. 1983); see *supra* notes 36-42 and accompanying text.

54. The court stated, "[w]e find that the Authority has, as required by 5 U.S.C. § 7114(b)(4), properly applied the FOIA balancing test and we find no error in its conclusion that disclosure is warranted under the Federal Labor-Management Relations Act." 833 F.2d at 1135.

55. 833 F.2d at 1135. *But see* *United States Dept. of Navy v. FLRA*, 840 F.2d 1131, 1134 (3d Cir.), *cert. dismissed*, 488 U.S. 881 (1988) ("[N]o deference is owed an agency's interpretation of a general statute. . . . We will . . . give considerable deference to the FLRA's reading of the Fed'l L-M Statute, but will not grant it any presumption of special expertise in applying the Privacy Act or FOIA."). In *Department of Navy*, however, the Third Circuit ultimately held in favor of disclosure. Thus, deference was not critical to the outcome in that case. For a more detailed discussion of the Third Circuit's decision, see *infra* notes 69-73 and accompanying text.

56. 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 488 U.S. 1025, *vacated as moot*, 876 F.2d 50 (8th Cir. 1989).

the court nonetheless believed that employees have a “cognizable” privacy interest in their home addresses.⁵⁷

“That society recognizes the individual’s interest in keeping his address private is indicated in such practices as non-listing of telephone numbers and the renting of post office boxes.” Furthermore, while we might not violently disagree with the Second Circuit’s statement that the average employee’s privacy interest in his home address is not particularly compelling, not all employees are “average.” Some may well have more compelling interests in privacy which are entitled to protection.⁵⁸

Despite this concern, the court concluded that the “interests in privacy and disclosure will be optimally served by requiring disclosure of the names and addresses of only those employees who do not request their employers . . . keep the information confidential.”⁵⁹

The union disagreed with the Eighth Circuit’s determination that individual employees could request that their names be kept confidential and sought a writ of certiorari in the U.S. Supreme Court.⁶⁰ Before the Supreme Court considered the merits of the case, however, the defendant governmental agencies promulgated regulations requiring disclosure of all employee names and home addresses.⁶¹ In contrast to the Eighth Circuit’s opinion, the regulations did not permit individual employees to prevent disclosure even if they so desired. Evidently, the Department was persuaded by court decisions granting full disclosure in other circuits.⁶²

The Supreme Court vacated the Eighth Circuit’s judgment and remanded the case for further consideration in light of the regulations.⁶³ On remand, the court of appeals dismissed the petitions for review⁶⁴

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57. 836 F.2d at 1143.

58. 836 F.2d at 1143 (quoting *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 n.15 (3d Cir. 1974)).

59. 836 F.2d at 1144. *But see* 836 F.2d at 1145 (Lay, C.J., dissenting in part) (Chief Judge Lay argued that no legal authority supports a ruling requiring disclosure of the names of those employees who do not request that the information be kept confidential. “The court must decide whether disclosure is prohibited by law, because that is the only statutory circumstance in which disclosure is not required.”).

60. *United States Dept. of Agric. v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3242 (U.S. Aug. 26, 1988) (No. 88-349).

61. 53 Fed. Reg. 39,629, 44,513-44,514 (1988).

62. *Id.* at 39,629 (“In a number of judicial proceedings, it has been held that bargaining unit representatives’ access to the names and addresses of bargaining unit employees was necessary to union representation of those employees, and that agencies must disclose such information, upon request, pursuant to [the Fed. L-M Statute] and [FOIA].”). The regulations cited *United States Dept. of Navy v. FLRA*, 840 F.2d 1131 (3d Cir.), *cert. dismissed*, 488 U.S. 880 (1988); *United States Dept. of Air Force v. FLRA*, 838 F.2d 229 (7th Cir. 1988); *United Assn. of Journeymen, Local 598 v. Department of the Army*, 841 F.2d 1459 (9th Cir. 1988); *United States Dept. of Health & Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), *cert. dismissed*, 488 U.S. 880 (1988); and *American Fedn. of Govt. Employees, Local 1760 v. FLRA*, 786 F.2d 554 (2d Cir. 1986). See *infra* notes 66-73 and accompanying text for a discussion of the Third and Seventh Circuit opinions.

63. *FLRA v. United States Dept. of Agric.*, 488 U.S. 1025 (1989).

64. *United States Dept. of Agric. v. FLRA*, 876 F.2d 50 (8th Cir. 1989).

observing, "[t]he [agencies] appear satisfied that the legality of full disclosure has been established and by all indications are willing to comply."⁶⁵

The Seventh Circuit, in *United States Department of the Air Force v. FLRA*,⁶⁶ was next to consider whether FOIA requires disclosure of employee names and addresses. Although the case was brought under the Fed. L-M Statute, the court treated it as though the union had sought disclosure solely under FOIA. Thus, when holding in favor of disclosure, the court determined that FOIA would compel release of the names and addresses independent of the Fed. L-M Statute.⁶⁷

In reaching this conclusion, the Seventh Circuit invoked a more limited balancing test in contrast to the previous courts that had addressed the issue. The court stated:

We do not believe that the phrase "public interest" as used in the balancing in Exemptions 6 and 7(C) of the Act, means anything more or less than the general disclosure policies of the statute. Since Congress gave us no standard against which to judge the public interest in disclosure, we do not believe Congress intended the federal judiciary — when applying . . . Exemptions 6 and 7(C) of the Act — to construct its own hierarchy of the public interest in disclosure of particular information. . . . [A court should balance interests only to] consider whether there is a cognizable privacy interest in the information sought, and then appraise the impairment to that interest that would result from disclosure.⁶⁸

Applying this approach, the court determined that although employees do have a privacy interest in their names and addresses, release of the information to the union would only slightly impair this interest. The court therefore required disclosure, recognizing that collective bargaining served the public interest and that this interest was properly within the scope of FOIA.

Finally, in *United States Department of Navy v. FLRA*,⁶⁹ the last relevant case before the Supreme Court decided *Reporters Committee*, the Third Circuit held that the Fed. L-M Statute required disclosure of employee addresses. The court began with a presumption in favor of disclosure, a position necessary in any balancing of the public interest in disclosure and the privacy interests of employees.⁷⁰ With this

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65. 876 F.2d at 52.

66. 838 F.2d 229 (7th Cir.), cert. dismissed, 488 U.S. 880 (1988).

67. 838 F.2d at 231-33. The court thus rejected the Fourth Circuit's reasoning in *Local 1923*, discussed *supra* at notes 36-42 and accompanying text.

68. 838 F.2d at 233 (quoting *Reporters Comm. for Freedom of the Press v. Department of Justice*, 831 F.2d 1124, 1126 (D.C. Cir. 1987), revd. on other grounds, 109 S. Ct. 1468 (1989)).

69. 840 F.2d 1131 (3d Cir.), cert. dismissed, 488 U.S. 881 (1988).

70. 840 F.2d at 1135-36. In drafting FOIA, Congress sought to secure for the public the maximum disclosure possible. When commenting on the balancing of public and private interests, the drafters noted that "[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." SENATE REPORT 813, *supra* note 37, at 3 (emphasis added).

presumption in mind, the court then considered the employer's argument that collective bargaining was not the kind of interest served by FOIA because it did not help the public to scrutinize government activity. Rejecting this narrow interpretation of the public interest, the court noted that Congress, in enacting the Fed. L-M Statute, expressed its view that collective bargaining was in the public interest. The court thus concluded that "if disclosure . . . will further collective bargaining, such disclosure would be in the public interest."⁷¹

When weighing the employees' privacy concerns, the Third Circuit recognized that individuals generally have a "meaningful" interest in their home addresses which merits some protection.⁷² Nonetheless, after balancing the public and private interests, the court determined that disclosure of this information would not constitute such a "clearly unwarranted invasion of personal privacy" as to be prohibited by Exemption 6. Thus, since FOIA required release of the addresses, the Privacy Act did not bar disclosure.⁷³

As this summary of cases indicates, prior to the D.C. Circuit's decision in *Department of the Treasury*, the circuit courts agreed that the Privacy Act did not bar disclosure of employee names and addresses when requested by a certified union under the Fed. L-M Statute.⁷⁴ While the courts recognized that employees have some privacy interest in their names and addresses, they also believed that the impairment to this interest did not outweigh the congressionally recognized public interest in collective bargaining. As a result, release of employee names and addresses would not constitute a "clearly unwarranted invasion of personal privacy" under Exemption 6. Accordingly, the courts reasoned that FOIA required disclosure.

Yet, although these circuit courts concluded that collective bargaining is in the public interest and that the disclosure of employee names and addresses outweighs an employee's privacy interest, the question remains whether collective bargaining is the type of public interest served by FOIA. While the Second, Third, Fourth, Seventh, and Eighth Circuits answered this question affirmatively, the D.C. Circuit in *Department of the Treasury*, following the Supreme Court's decision in *Reporters Committee*, held otherwise. The arguments on both sides of the current debate on this issue can best be understood through analysis of *Reporters Committee* and *Department of the Treasury*.

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71. 840 F.2d at 1136; see *supra* note 50 for citations to other court opinions expressing this conclusion.

72. 840 F.2d at 1136.

73. 840 F.2d at 1137.

74. Recall that in *United States Dept. of Health & Human Servs. v. FLRA*, the Fourth Circuit ultimately distinguished its earlier ruling in *Local 1923*, where disclosure had been sought directly under FOIA and not under the Fed. L-M Statute. See *supra* notes 52-55 and accompanying text.

III. REPORTERS COMMITTEE AND THE APPLICATION OF FOIA IN DEPARTMENT OF THE TREASURY

Until recently, the circuit court decisions discussed in Part II appeared to establish with certainty that FOIA required disclosure of employee names and addresses when a union requested this information under the Fed. L-M Statute. The Supreme Court's interpretation of FOIA in *United States Department of Justice v. Reporters Committee for Freedom of the Press* and the D.C. Circuit's subsequent decision in *FLRA v. United States Department of the Treasury*, however, cast doubt on this conclusion. This Part begins by examining *Reporters Committee* and concludes by exploring the problems resulting from the D.C. Circuit's application of FOIA in *Department of the Treasury*.

In *Reporters Committee*, the Supreme Court held that Exemption 7(C)⁷⁵ of FOIA categorically prevents disclosure of FBI "rap sheets."⁷⁶ Exemption 7(C) excludes from disclosure "records or information compiled for law enforcement purposes . . . [the release of which] could reasonably be expected to constitute an unwarranted invasion of personal privacy."⁷⁷ In *Reporters Committee*, a CBS news correspondent and the Reporters Committee for Freedom of the Press requested information concerning the rap sheets of Charles Medico. A company owned by Medico's family, Medico Industries, allegedly had obtained a number of defense contracts from a corrupt congressman.⁷⁸ The Reporters Committee argued that any record of bribery, embezzlement, or other financial crimes committed by Charles Medico would potentially be of special public interest. The Department of Justice asserted that it had no record of any financial crimes concerning Medico and refused to comment on whether it had any information regarding nonfinancial crimes.⁷⁹

The Supreme Court held in favor of the Justice Department.⁸⁰ In denying release of the requested information, the Court balanced Medico's privacy interest in nondisclosure against the public interest to be furthered by release of the rap sheets. The Court rejected the Reporters Committee's contention that Medico's privacy interest was "nil" because the information contained in the rap sheets had previously been disclosed to the public. In so doing, the Court asserted that

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75. 5 U.S.C. § 552(b)(7)(C) (1988). Because Exemption 7(C) covered the case, the Court did not address the applicability of Exemption 6. *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1475 (1989).

76. Rap sheets contain descriptive information about an individual. Among other things, the sheets include an individual's date of birth and physical characteristics, as well as history of arrests, charges, convictions, and incarcerations. 28 U.S.C. § 534(a)(4) (1988).

77. 5 U.S.C. § 552(b)(7)(C) (1988). For analysis of the differences between Exemptions 6 and 7(C), see *infra* text accompanying notes 139-41.

78. 109 S. Ct. 1468, 1481 (1989).

79. 109 S. Ct. at 1473.

80. 109 S. Ct. at 1475.

just because “an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.”⁸¹ Moreover, the Court observed, “[a]lmost every . . . fact, however personal or sensitive, is known to someone else. Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure, but with an interest in selective disclosure.”⁸² After also considering the nature of the information to be revealed, the Court concluded that Medico had a “substantial” interest in the privacy of his rap sheets.⁸³

The Court next considered whether disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy” under Exemption 7(C). The Court stated that this determination did not turn on the purposes for which the information was requested,⁸⁴ but rather on “the nature of the requested document and its relationship to ‘the basic purpose of the [FOIA]’ to open agency action to the light of public scrutiny.”⁸⁵ Given this interpretation of FOIA, the Court reasoned that while Medico’s rap sheets could conceivably provide information newsworthy enough to be included in a news story, this interest alone did not help the public scrutinize agency activity.⁸⁶ Thus, because the public interest served by disclosure of the

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81. 109 S. Ct. at 1480 (quoting Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, p. 13 (Sept. 26-27, 1974)).

82. 109 S. Ct. at 1476 n.14 (quoting Karst, “*The Files*”: *Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROBS. 342, 343-44 (1966)). This statement supports the argument that, in the collective bargaining context, employees may have a privacy interest in their names and addresses even though this information may be publicly available, for example, in the telephone directory. The question remains, however, whether this interest in privacy is outweighed by the public interest in collective bargaining.

83. The Court found that the “substantial character of [this] interest [was] affected by the fact that in today’s society, the computer can accumulate and store information that would otherwise have surely been forgotten long before . . . rap sheets are discarded.” 109 S. Ct. at 1480.

84. The Court stated, “the identity of the requesting party has no bearing on the merits of his or her FOIA request. . . . Congress ‘clearly intended’ the FOIA ‘to give any member of the public as much a right to disclosure as one with a special interest [in a particular document]’. . . . The Act’s sole concern is with what must be made public or not made public.” 109 S. Ct. at 1480-81 (quoting respectively *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 765 (1966-67)).

In the context of this Note, the unions are not arguing that the identity of the requestor should alter the disclosure interest, but rather that the disclosure mandate in the Fed. L-M Statute might do so. Thus, the focus has not been on the fact that a *Union* is doing the requesting, but rather on the fact that Congress has recognized that collective bargaining is in the public interest and has provided for the disclosure of all information necessary to promote this interest. See, e.g., *FLRA v. United States Dept. of the Treasury*, 884 F.2d 1446, 1453 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 863 (1990).

85. 109 S. Ct. at 1481 (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

86. The Court stated:

[I]f Medico [had] . . . been arrested or convicted . . . that information would neither aggravate nor mitigate his allegedly improper relationship with the Congressman; more specifically, it would tell us nothing directly about the character of the Congressman’s behavior.

rap sheets did not fall within the public interest that FOIA seeks to promote, disclosure "could reasonably constitute an unwarranted invasion of privacy" under Exemption 7(C).

In *Department of the Treasury*,⁸⁷ the D.C. Circuit applied the reasoning of *Reporters Committee* in the collective bargaining context and concluded that Exemption 6 prohibits release of employee names and addresses to a union.⁸⁸ The court first determined that the employees' privacy interests outweighed any benefits to be gained from disclosure since collective bargaining did not fall within FOIA's central purpose of opening government activity to public scrutiny.⁸⁹

The court then addressed whether this balance should be altered in light of the fact that Congress, in the Fed. L-M Statute, had established an additional public interest in disclosure.⁹⁰ The court rejected this approach, finding that the Privacy Act prohibits disclosure unless FOIA alone requires release.⁹¹ The court feared that if it considered the disclosure interest embodied in the Fed. L-M Statute, the Privacy Act would be read to exempt information obtainable "under FOIA or any agency decision based on a disclosure-related statute."⁹² Alternatively, the court asserted that consideration of other interests might extend the FOIA exemption to the Privacy Act to situations "where the disclosure value under FOIA, and under any congressionally authorized agency disclosure decision, in the aggregate outweigh[ed] the privacy interest."⁹³ Because the Privacy Act refers only to an exemption under FOIA, the court concluded it was not "entitled to engage in

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Nor would it tell us anything about the conduct of the *Department of Defense* (DOD) in awarding . . . contracts to the Medico Company. Arguably a FOIA request to the DOD for records relating to those contracts, or for documents describing the agency's procedures, if any, for determining whether officers of a prospective contractor have criminal records, would constitute an appropriate request for "official information."

109 S. Ct. at 1482.

87. 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 863 (1990).

88. 884 F.2d at 1456. In *Reporters Committee*, the Supreme Court held that Exemption 7(C) prevented disclosure. The D.C. Circuit extended *Reporters Committee* to Exemption 6 by noting that "[w]hile [E]xemption 6 precludes only a 'clearly unwarranted invasion of personal privacy,' that difference between it and [E]xemption 7(C) goes only to the *weight* of the privacy interest needed to outweigh disclosure." 884 F.2d at 1451-52.

89. 884 F.2d at 1451-53.

90. The court stated that according to *Reporters Committee*, "the identity of the requesting party has no bearing on the merits of his or her FOIA request." 884 F.2d at 1453 (quoting *Reporters Committee*, 109 S. Ct. at 1480). Yet, the court went on to note:

[T]he statement does not necessarily mean that there is no exception to the general rule that the public interest in disclosure under FOIA should be defined exclusively in terms of finding out what the "government is up to." Nothing in the passage suggests that the Court had considered and rejected the relevance of public interest objectives identified by Congress in other disclosure statutes.

884 F.2d at 1453. The D.C. Circuit, however, found that it could not square this broad view of FOIA with the language of the Privacy Act.

91. 884 F.2d at 1453.

92. 884 F.2d at 1453.

93. 884 F.2d at 1453.

the sort of imaginative reconstruction that would be necessary [in order] to introduce collective bargaining values into the balancing process.”⁹⁴

Judge Ruth Bader Ginsburg concurred. While stating that the court’s logic was “irreproachable,”⁹⁵ Judge Ginsburg nonetheless expressed three concerns with the court’s holding. First, she asserted that Congress probably did not intend to deny public sector unions information that is routinely available to unions in the private sector.⁹⁶

Next, Judge Ginsburg pointed out that the result in *Reporters Committee* is inconsistent with the Supreme Court’s decision in *United States Department of Justice v. Tax Analysts*.⁹⁷ In *Tax Analysts*, the Court held that FOIA required the Department of Justice to disclose its compilations of district court tax decisions to publishers of a weekly magazine.⁹⁸ Although *Tax Analysts* did not involve a FOIA privacy exemption, Judge Ginsburg nonetheless observed:

The juxtaposition of *Tax Analysts* and [our decision today] reveals a tension in the Supreme Court’s interpretation of the FOIA: the Information Act, in the first instance, demands no showing at all of “public interest”; yet, once a privacy interest, however modest, is implicated, the Act forbids disclosure of information that advances a significant public interest (here, the interest in informed collective bargaining), if that interest is unrelated to FOIA’s “core purpose.”⁹⁹

Finally, Judge Ginsburg contended “the most persuasive indication” that neither Congress nor the Supreme Court anticipated the result in *Department of the Treasury* lay in the fact that when viewed “unfiltered by the lens of *Reporters Committee*,” the balance between the public interest in disclosure and the individual’s interest in privacy

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94. 884 F.2d at 1453. Richard Posner used the phrase “imaginative reconstruction” to describe an alternative method of statutory interpretation. Under this two-part approach, instead of strictly applying the canons of construction when analyzing a statute, a judge should first attempt to place herself “in the shoes of the enacting legislators and figure out how they would have wanted the statute applied” to the dispute before her. If this initial approach fails, then the judge must decide what “attribution of meaning” to the statute will produce the most reasonable result from the viewpoint of the enacting legislator. See R. POSNER, *THE FEDERAL COURTS: CRISES AND REFORM* 286-87 (1985).

95. Judge Ginsburg observed, “[t]he broad cross-reference in 5 U.S.C. § 7114(b)(4) — ‘to the extent not prohibited by law’ — picks up the Privacy Act unmodified . . . .” 884 F.2d at 1457 (Ginsburg, J., concurring).

96. See *supra* text accompanying note 28. Judge Ginsburg asserted, “the public interest in the bargaining representative’s ready access to unit employees appears no less vital in federal employment than in private employment.” 884 F.2d at 1458 (Ginsburg, R., J., concurring). Moreover, she noted that “[p]rivate sector labor-relations case law . . . provides strong guidance in parallel public sector matters. This is so because Congress modeled the [Fed. L-M Statute] on the Labor Management Relations Act.” 884 F.2d at 1458 (Ginsburg, R., J., concurring) (citation omitted).

97. 109 S. Ct. 2841 (1989); see *infra* notes 121-30 and accompanying text for a more complete discussion of *Tax Analysts*.

98. 109 S. Ct. at 2853.

99. 884 F.2d at 1459 (Ginsburg, R., J., concurring).

"overwhelmingly favors disclosure."¹⁰⁰ Judge Ginsburg argued that the privacy interest involved in the release of the names and addresses of bargaining unit employees was much less compelling than that involved in *Reporters Committee* and other cases where disclosure was prohibited.¹⁰¹ She noted, "the list[s] would reveal nothing more than the name, address, and bargaining unit of each individual. . . . [N]o additional, personal information [such as pay levels] that might be embarrassing or enhance the value of the list for solicitation purposes" would be disclosed.¹⁰² In addition, Judge Ginsburg observed that in all but one instance where the circuit courts concluded that an individual's privacy interest in her name and address was sufficient to bar disclosure, the requested information would have imparted more "revealing and commercially valuable" information.¹⁰³ Given that the balance of public and private interests strongly favored disclosure and given the Supreme Court's seemingly inconsistent application of FOIA, Judge Ginsburg argued for either a qualification of *Reporters Committee* or a congressional broadening of the disclosure provisions of the Fed. L-M Statute.¹⁰⁴

The decisions in *Reporters Committee* and *Department of the Treasury* suggest that the FOIA exception to the Privacy Act may not require disclosure of employee names and addresses for collective bargaining purposes in the federal public sector. In *Reporters Committee*, the Supreme Court made clear that FOIA's primary purpose was to ensure that government activity be open to public scrutiny, and that the weight of an individual's privacy interest depended in part on whether disclosure would further this goal. Applying this formulation in *Department of the Treasury*, the D.C. Circuit determined that collective bargaining did not serve this purpose. Thus, the court held that a federal agency was not required to disclose employees names and addresses to a union.

This issue, however, is far from resolved. As Judge Ginsburg pointed out, neither Congress nor the Supreme Court could have anticipated the result in *Department of the Treasury*.¹⁰⁵ Because logically public sector unions should not be treated differently from private sector unions, at least in regards to the release of employee

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100. 884 F.2d at 1459 (Ginsburg, R., J., concurring).

101. 884 F.2d at 1460 (Ginsburg, R., J., concurring).

102. 884 F.2d at 1460 (Ginsburg, R., J., concurring).

103. 884 F.2d at 1459-60 (Ginsburg, R., J., concurring).

104. 884 F.2d at 1461 (Ginsburg, R., J., concurring). Apparently Judge Ginsburg concurred because she agreed with the court's argument that the only public interest to be served by FOIA is that of helping the public to scrutinize government activity and that the Act does not promote public interests recognized in other disclosure statutes. Under this mode of analysis, FOIA would not require release of employee names and addresses. The Privacy Act would therefore bar disclosure and release would be "prohibited by law" within the meaning of the Fed. L-M Statute. See *supra* notes 90-94 and accompanying text.

105. See *supra* notes 96-103 and accompanying text.

names and addresses,¹⁰⁶ the D.C. Circuit's application of *Reporters Committee* warrants further analysis.

Reporters Committee and *Department of the Treasury* deserve closer scrutiny for an additional reason. Although FOIA's central or basic purpose may be to open government activity to public scrutiny, the Act may seek to promote other interests as well. By narrowly interpreting *Reporters Committee* and FOIA, the D.C. Circuit may be foreclosing consideration of other important congressionally identified public interests — such as the interest in collective bargaining recognized in the Fed. L-M Statute. This Note now turns to consideration of this issue.

IV. FOIA AND DISCLOSURE OF EMPLOYEE NAMES AND ADDRESSES

As noted above, when applying *United States Department of Justice v. Reporters Committee for Freedom of the Press* in *FLRA v. Department of the Treasury*, the D.C. Circuit concluded that when disclosure would invade personal privacy, FOIA only requires release of that information which aids public scrutiny of government activity. Because collective bargaining does not further this purpose, the court prohibited disclosure of employee names and addresses to the union. Neither *Reporters Committee* nor the history of FOIA, however, require that the Act's disclosure provisions be read so narrowly. After examining FOIA's legislative history and case law interpreting the Act, this Part argues that FOIA may promote public interests embodied in other disclosure statutes. This Part concludes by demonstrating that under an Exemption 6 balancing test, the release of employee names and addresses does not constitute a "clearly unwarranted invasion of personal privacy."

A. *Interpreting FOIA's Purpose*

In *Reporters Committee*, the Supreme Court stated that whether FOIA warrants disclosure turns not on the identity of the requesting party, but rather on "the nature of the requested document and its relationship to the 'basic purpose of [FOIA] to open agency action to the light of public scrutiny.'"¹⁰⁷ The D.C. Circuit noted, in *Department of the Treasury*, that the Supreme Court did not necessarily mandate that the public interest in disclosure always be defined in terms of the "watchdog" function. Rather, the court observed that nothing in the Supreme Court's formulation suggested that the Court had "considered and rejected the relevance of public interest objectives identi-

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106. See *supra* text accompanying notes 28-33.

107. *United States Dept. of Justice v. Reporters Comm. for the Freedom of the Press*, 109 S. Ct. 1468, 1480-81 (1989) (quoting *United States Dept. of Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

fied by Congress in other disclosure statutes."¹⁰⁸

Yet, while appearing to recognize that FOIA may promote public interests embodied in other disclosure statutes, the D.C. Circuit nonetheless rejected the FLRA's contention that the Fed. L-M Statute was evidence of a public interest in collective bargaining that Congress thought should be considered when balancing under Exemption 6.¹⁰⁹ By refusing to take account of this public interest, the court in effect concluded that FOIA's sole purpose is to promote the watchdog interest.

The D.C. Circuit's interpretation of FOIA and *Reporters Committee* may not have been accurate. The court asserted that consideration of the public interest and the disclosure provisions in the Fed. L-M Statute would in effect cause the FOIA exemption to the Privacy Act to encompass disclosures required "under FOIA or any agency decision based on a disclosure-related statute."¹¹⁰ Yet, if FOIA has multiple purposes, then the Act's disclosure provisions, taken alone, can legitimately promote interests embodied in other disclosure statutes, like the Fed. L-M Statute. Through examination of FOIA's legislative history and case law interpreting the statute, this section seeks to uncover the proper scope of FOIA.

1. FOIA's Legislative History

Congress enacted FOIA in 1966 as an amendment to the public information section of the Administrative Procedure Act (APA).¹¹¹ The APA was originally enacted to ensure public access to government information.¹¹² By 1966, however, the Act had become "the major statutory excuse for withholding government records from public view."¹¹³ Congress drafted FOIA in order to close the "loopholes which allow[ed] agencies to deny legitimate information to the public."¹¹⁴

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108. 884 F.2d at 1453.

109. 884 F.2d at 1453.

110. 884 F.2d at 1453.

111. 5 U.S.C. § 552 (1988) (originally codified at 5 U.S.C. § 1002 (1964)).

112. See HOUSE REPORT 1497, *supra* note 37, at 3, reprinted at 2420.

113. HOUSE REPORT 1497, *supra* note 37, at 3, reprinted at 2420; see also SENATE REPORT 813, *supra* note 37, at 3 ("[T]he Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute."). The major flaws with the APA were succinctly stated in the congressional debates by Representative Moss, who observed:

The law now permits withholding of Federal Government records if secrecy is required "in the public interest" or if the records relate "solely to the internal management of an agency." Government information also may be held confidential "for good cause found." Even if no good cause can be found for secrecy, the records will be made available only to "persons properly and directly concerned." These phrases are the warp and woof of the blanket of secrecy which can cover the day-to-day administrative actions of the Federal agencies.

112 CONG. REC. 13,642 (1966) (statement of Rep. Moss).

114. SENATE REPORT 813, *supra* note 37, at 3.

Although FOIA's legislative history supports the view that a central purpose of the Act is to ensure that government activity be open to public scrutiny,¹¹⁵ no congressional statements support that this was the sole aim of the Act's disclosure provisions. Rather, the general philosophy behind FOIA's enactment appears to have been a commitment to increase *generally* public access to government information by providing for the fullest possible disclosure.¹¹⁶ Indeed, Congress explicitly provided in section 552(c) that nothing in the Act should be read to "authorize withholding of information or limit the availability of records to the public, except as specifically stated. . . ."¹¹⁷ This section provides additional support for a broad interpretation of FOIA's disclosure provisions.¹¹⁸

The type of information Congress was concerned about when drafting the Act also supports a broad vision of disclosure under FOIA. The House Report lists the following as examples of cases where information had been improperly withheld under the APA: (1) the National Science Foundation's decision not to disclose cost estimates submitted by unsuccessful contractors; (2) the Secretary of Navy's refusal to release telephone directories; and (3) the Postmaster General's refusal to disclose names and salaries of postal employees.¹¹⁹ The watchdog theory does not justify disclosure in all of these instances.

As the above analysis shows, FOIA's legislative history does not support the contention that the watchdog function is the only public interest to be served by disclosure. Rather, the Act's history reveals that Congress was concerned with promoting the maximum disclosure

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115. See, e.g., HOUSE REPORT 1497, *supra* note 37, at 12, reprinted at 2429 (FOIA "provides the necessary machinery to assure the availability of Government information necessary to an informed electorate"); SENATE REPORT 813, *supra* note 37, at 5 ("[t]he public as a whole has a right to know what its Government is doing."); 112 CONG. REC. 13,641 (1966) (statement of Rep. Moss) ("We must remove every barrier to information about — and understanding of — Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.").

116. See SENATE REPORT 813, *supra* note 37, at 3 (emphasizing Congress' intent to insure full agency disclosure).

117. 5 U.S.C. § 552(c) (1988); see also SENATE REPORT 813, *supra* note 37, at 3 ("It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . .").

118. The Supreme Court has agreed with this view of § 552(c). See *United States Dept. of Justice v. Tax Analysts*, 109 S. Ct. 2841, 2851 (1989) ("Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass."); *United States Dept. of Justice v. Julian*, 108 S. Ct. 1606, 1611 (1988) ("The mandate of the FOIA calls for broad disclosure of Government records, and for this reason we have consistently stated that FOIA exemptions are to be narrowly construed." (quoting *CIA v. Sims*, 471 U.S. 159, 166 (1985))); *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 366 (1976); see also *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

119. HOUSE REPORT 1497, *supra* note 37, at 5-6, reprinted at 2422-23; *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 385 (1980).

possible. To narrow the scope of FOIA's disclosure provisions so as to encompass only the watchdog function would severely compromise this goal.¹²⁰

2. Case Law Interpreting FOIA

In addition to FOIA's legislative history, case law developed subsequent to the Act's enactment also supports the idea that FOIA's disclosure provisions may have several functions. Most notably, in *United States Department of Justice v. Tax Analysts*,¹²¹ the first FOIA decision following *Reporters Committee*, the Supreme Court did not consider the nature of the public interest served by disclosure. There, the Court required the Department of Justice to release federal district court tax opinions and orders to the publisher of a nonprofit tax magazine.¹²² In reaching this conclusion, the Court first determined that the tax opinions were "agency records" within the meaning of section 552(a)(4)(B) of FOIA. The Court then noted that, because none of FOIA's exemptions applied to the tax opinions, the decisions had been improperly withheld.¹²³ The Court emphasized that because FOIA's exemptions are explicitly exclusive, an agency must disclose any records not specifically exempted by the Act. In addition, the Court stated that courts are not "in every case to engage in balancing, based on public availability and other factors, to determine whether there has been a[n] unjustified denial of information. The FOIA invests courts neither with the authority nor the tools to make such determinations."¹²⁴

In dissent, Justice Blackmun¹²⁵ argued that the majority holding resulted from "an almost gross misuse of the FOIA."¹²⁶ He noted, "What respondent demands, and what the Court permits, adds nothing whatsoever to public knowledge of government operations. That, I had thought, and the majority acknowledges, . . . was the real purpose of the FOIA and the spirit in which the statute has been interpreted thus far."¹²⁷

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120. At least one commentator has argued that release of employee names and addresses to unions serves FOIA's public interest purpose by assisting unions and the employees that they represent in their dealings with federal agencies. See Note, *Applying the Freedom of Information Act's Privacy Exemption to Requests for Lists of Names and Addresses*, 58 *FORDHAM L. REV.* 1033, 1048 & n.92 (1990).

121. 109 S. Ct. at 2841.

122. 109 S. Ct. at 2844. The Department received the court opinions in the course of its litigation of tax cases on behalf of the federal government.

123. 5 U.S.C. § 552(a)(4)(B) (1988) grants United States district courts jurisdiction to order the production of "any agency records improperly withheld."

124. 109 S. Ct. at 2853.

125. Justice Blackmun cast the single dissenting vote.

126. 109 S. Ct. at 2854 (Blackmun, J., dissenting).

127. 109 S. Ct. at 2854 (Blackmun, J., dissenting) (citation omitted).

In *Department of the Treasury*, the D.C. Circuit acknowledged that the Supreme Court in *Tax Analysts* demanded no showing of any public interest at all, observing, “admittedly [the release of the tax decisions] ‘add[ed] nothing whatsoever to public knowledge of government [executive branch] operations.’”¹²⁸ The D.C. Circuit, however, did not find its interpretation of FOIA inconsistent with that of the Supreme Court in *Tax Analysts*. According to the court, *Tax Analysts* and *Department of the Treasury* were distinguishable because “[i]n *Tax Analysts* . . . the Court was not considering any FOIA exemption at all, but was defining statutory phrases such as ‘agency records.’ It chose to do so in rather neutral terms, independent of FOIA’s overarching purpose.”¹²⁹

The D.C. Circuit’s reasoning, however, is unpersuasive. If the court was contending that it will only consider the public interest in disclosure when a FOIA exemption is invoked, then the court’s interpretation of FOIA appears somewhat illogical. As Judge Ginsburg pointed out, under the D.C. Circuit’s analysis, if no privacy exemption is at issue, the court will grant any request for information regardless of whether any public interest is served.¹³⁰ Yet, when even the most minimal privacy interest is alleged, the court will prohibit all disclosure — even that which serves an important public interest — unless it falls within FOIA’s watchdog function. Surely, neither the Supreme Court nor Congress could have intended this result. If the court does not restrict the public interest that FOIA seeks to further when no privacy exemption is present, then the court should not so drastically limit the Act’s purpose upon the assertion of the most minor privacy concern. Rather, when a privacy exemption is asserted, the public interest being served, whatever it may be, should merely be balanced against the likely impairment to individual privacy. Under this formulation, while disclosures which serve the watchdog function would be given the greatest deference, other public interests would also be taken into account.

The argument that FOIA promotes multiple public interests is particularly compelling in contextual settings similar to that involved in *Department of the Treasury*, where the union sought disclosure of employee names and addresses through another disclosure statute, the Fed. L-M Statute, and not directly under FOIA. As Part II points out, prior to *Department of the Treasury*, when determining whether a government agency must release its employee names and addresses to a union under the Fed. L-M Statute, all but one of the circuit courts read the public interest requirement as being broader than merely as-

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128. 884 F.2d 1446, 1452 (D.C. Cir. 1989) (quoting 109 S. Ct. at 2854 (Blackmun, J., dissenting)).

129. 884 F.2d at 1452.

130. See *supra* notes 97-99 and accompanying text.

sisting the public in monitoring government activity. Indeed, in *Department of Navy v. FLRA*,¹³¹ the Third Circuit, which was the only circuit court to comment explicitly on the scope of FOIA's disclosure provisions, summarily rejected such a narrow reading of FOIA's purpose.

In *Department of Navy*, the governmental agency advanced the very argument later adopted by the D.C. Circuit in *Department of the Treasury*: that collective bargaining did not fall within FOIA's disclosure interest because it did not concern "the operation or conduct of government or its agencies."¹³² The Third Circuit rejected this "crabbed" interpretation of the public interest, noting:

Congress[, in the Fed. L-M Statute,] . . . explicitly articulated its view that the public interest is served by collective bargaining on behalf of government employees. It follows that if disclosure of the requested information will further collective bargaining, such disclosure would be in the public interest . . . [this] interest would have to be weighed against the relevant privacy interests under the balancing analysis required by the Supreme Court for FOIA cases.¹³³

Although not directly addressing the nature or scope of the public interest FOIA seeks to further, other circuit courts implicitly agreed with the Third Circuit's analysis. Indeed, until *Department of the Treasury*, no court had followed the Fourth Circuit's interpretation of FOIA in *American Federation of Government Employees, Local 1923 v. United States Department of Health and Human Services*, where disclosure was denied.¹³⁴ As Part II points out, the Fourth Circuit distinguished its *Local 1923* ruling four years later in *FLRA v.*

131. 840 F.2d 1131, 1136 (3d Cir.), *cert. dismissed*, 488 U.S. 881 (1988).

132. 840 F.2d at 1136.

133. 840 F.2d at 1136-37. The court also noted Judge Starr's observation in *Reporters Comm. for Freedom of the Press v. United States Department of Justice*, 831 F.2d 1124 (D.C. Cir. 1987) (Starr, J., dissenting), *rev'd*, 109 S. Ct. 1468 (1989), that to consider all releases as "per se" in the public interest would "reduce[] the balancing test to a single-factor test." To this, the Third Circuit court responded that "[b]ecause we ground our conclusion that disclosure is warranted on Congress' own expression of the public interest in the Fed'l L-M Statute, we need not address the concern of the *Reporters* majority about the absence of congressional standards by which to determine the public interest in disclosure." 840 F.2d at 1136-37 n.2.

134. Recall that in *Local 1923* the union sought the employee names and addresses directly under FOIA and not by way of the Fed. L-M Statute. The court held that FOIA did not require disclosure because collective bargaining did not assist the public in scrutinizing agency action. See *supra* notes 36-42. Even in *Local 1923*, the court noted that "[the union] may be entitled to [employee names and addresses] under some other federal law. . . . We hold only that [FOIA] is not a proper vehicle for the disclosure of that information." *American Fedn. of Govt. Employees, Local 1923 v. United States Dept. of Health & Human Servs.*, 712 F.2d 931, 933 n.3 (4th Cir. 1983). Interestingly, when later confronted with an identical request under the Fed. L-M Statute, the Fourth Circuit held that FOIA required disclosure. See *United States Dept. of Health & Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987). Thus, the primary difference between the later Fourth Circuit opinion and the D.C. Circuit's decision in *Department of the Treasury* lies in the fact that the Fourth Circuit deferred to the FLRA's interpretation of FOIA in the collective bargaining context. See *supra* notes 52-55 and accompanying text. The D.C. Circuit, however, did not. *FLRA v. United States Dept. of the Treasury*, 884 F.2d 1446, 1450-51 (D.C. Cir. 1989). But see *United States Dept. of Navy v. FLRA*, 840 F.2d 1131 (3d Cir.) (The

Department of Health and Human Services by emphasizing that in the later case the union had sought disclosure under the Fed. L-M Statute. When confronted with a similar union request for names and addresses under the Fed. L-M Statute, the Seventh Circuit went further and held that it would require disclosure even in an independent suit under FOIA.¹³⁵

Thus, although the presence of another disclosure statute makes the release of employee names and addresses more compelling, a union's request should not be barred even when initiated directly and solely under FOIA. As noted above, neither the legislative history of the Act nor subsequent cases interpreting it have established the watchdog interest as the exclusive disclosure interest promoted by FOIA. Indeed, if the legislative intent of FOIA's drafters governed and the Act were interpreted to provide for the "fullest possible disclosure," then no agency records would be withheld unless they fell within one of FOIA's nine clearly delineated exemptions. Thus, the critical inquiry in deciding whether federal agencies must disclose employee names and addresses to unions should focus on whether the requested data are exempted from disclosure by Exemption 6.

B. *Exemption 6 Balancing*

Thus far, this Note has argued that neither FOIA's legislative history nor case law interpreting the statute supports the notion that the watchdog function is the only public interest FOIA seeks to promote. Rather, FOIA's disclosure provisions promote other public interests, particularly those that are congressionally recognized and statutorily protected. Thus, when weighing the public and private concerns under Exemption 6, interests other than the watchdog function may enter the public interest side of the balance. This section begins by exploring the legislative history and case law interpreting Exemption 6 and concludes by demonstrating that Exemption 6 does not protect employee names and addresses from disclosure under FOIA.

In brief, Exemption 6 bars release of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹³⁶ When drafting the exemption, Congress noted:

The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental in-

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Third Circuit refused to defer to the NLRB's interpretation of FOIA and yet still held in favor of disclosure.), *cert. dismissed*, 488 U.S. 881 (1988).

135. *United States Dept. of the Air Force v. FLRA*, 838 F.2d 229 (7th Cir.), *cert. dismissed*, 488 U.S. 880 (1988); *supra* notes 66-68.

136. 5 U.S.C. § 552(b)(6) (1988).

formation. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved . . . ."¹³⁷

Notably, Congress exempted only "clearly unwarranted" invasions of personal privacy. Before FOIA's enactment, however, Congress was encouraged to revise the language of Exemption 6 in order to broaden the scope of its protection.¹³⁸ The fact that the wording was not modified strongly suggests that Congress intended to restrict only the release of particularly harmful or embarrassing information.

A comparison of the wording of Exemption 6 and Exemption 7(C), which the Supreme Court interpreted in *Reporters Committee*, also reveals Congress' intent that Exemption 6 prevent disclosure of only a very narrow class of information. Exemption 7(C)'s privacy language is broader than that of Exemption 6 in two respects. First, while Exemption 6 demands a "clearly unwarranted" invasion of privacy, Exemption 7(C) only requires that the invasion be "unwarranted." The striking of the word "clearly" from Exemption 7(C) resulted from a presidential concern that an individual's right to privacy would be inadequately protected under the more demanding "clearly unwarranted" standard.¹³⁹

Second, Exemption 6 applies to disclosures that "would constitute" an invasion of privacy. In contrast, Exemption 7(C) encompasses only those disclosures that "could reasonably be expected to constitute" such an invasion. The legislative history reveals that at the time the language "could constitute" was changed to "could reasonably be expected to constitute," members of Congress differed over the effect of the change. Senator Leahy noted that although the changes in 7(C) might create problems with regard to interpretations of Exemption 6, "I am confident that the courts will recognize this change as simply codifying their present objective approach to assessing the degree of risk, rather than calling for a departure to a less rigorous standard."¹⁴⁰ In contrast, Senator Hatch argued that the amendments would "enhance the ability of all Federal Law enforcement agencies to withhold additional law enforcement information . . . . There should

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137. SENATE REPORT 813, *supra* note 37, at 9.

138. See *Administrative Procedure Act: Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 491, 36 (1965) (Edwin Rains, Assistant General Counsel of Treasury Department, encouraging deletion of the word "clearly" from the phrase "clearly unwarranted" because it would be unduly restrictive); *Administrative Procedure Act: Hearings on H.R. 5012 Before the Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations*, 89th Cong. 1st Sess. 257, 230 (1965) (William Feldesman, NLRB solicitor, and Fred B. Smith, Acting General Counsel of Treasury Department doing same).

139. 120 CONG. REC. 33,158-59, 34,162-63 (1974) (letter from President Ford).

140. 132 CONG. REC. S16,496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy).

be no misunderstanding that . . . [the amendments] are intended to broaden the reach of [Exemption 7(C)] and to ease considerably a Federal law enforcement agency's burden in invoking it."¹⁴¹

Thus, when formulating Exemption 6, Congress intentionally employed language suggesting that Exemption 6 was to have a very limited scope. In other words, the exemption covers only a very narrow category of extremely private information. Indeed, as noted above, the legislative history reveals that Congress was primarily concerned with protecting the confidentiality of personal matters contained in files kept by agencies like the Veteran's Administration, the Department of Health, Education and Welfare, and the Selective Service.¹⁴² Subsequent court decisions interpreting Exemption 6 support this assertion.

For example, in *Getman v. NLRB*,¹⁴³ the D.C. Circuit noted:

[T]he real thrust of Exemption (6) is to guard against unnecessary disclosure of files of such agencies as the Veterans Administration or the Welfare Department or Selective Service or Bureau of Prisons, which would contain "intimate details" of a "highly personal" nature. The giving of names and addresses is a very much lower degree of disclosure; in themselves a bare name and address give no information about an individual which is embarrassing.¹⁴⁴

Nine years later, in *Sims v. CIA*,¹⁴⁵ the D.C. Circuit reiterated:

Exemption 6 was intended by Congress to protect individuals from public disclosure of "intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files." . . . [T]he disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation, and so on" falls within the ambit of Exemption 6.¹⁴⁶

Employee names and addresses do not contain such "intimate personal details." Indeed, the cases in which the Supreme Court held that FOIA did not require disclosure, such as the release of case summaries of military cadet honors and ethics hearings¹⁴⁷ and the release

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141. 132 CONG. REC. S16,504 (daily ed. Oct. 15, 1986) (statement of Sen. Hatch).

142. See, e.g., *United States Dept. of the Air Force v. Rose*, 425 U.S. 352, 375 (1976).

143. 450 F.2d 670 (D.C. Cir. 1971).

144. 450 F.2d at 675.

145. 642 F.2d 562 (D.C. Cir. 1980).

146. 642 F.2d at 573-74 (quoting *Rural Hous. Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974)); see also *Robles v. EPA*, 484 F.2d 843, 845 (4th Cir. 1973) ("[E]xemption [6] applies only to information which relates to a specific person or individual, to 'intimate details' of a 'highly personal nature' in that individual's employment record or health history or the like, and has no relevancy to information that deals with physical things . . .").

147. See *United States Dept. of the Air Force v. Rose*, 425 U.S. 352 (1976).

of FBI rap sheets,¹⁴⁸ involved intimate details whose disclosure could have readily led to significant embarrassment or loss of reputation. As the Supreme Court noted in *United States Department of the Air Force v. Rose*,¹⁴⁹ "identification of disciplined cadets — a possible consequence of even anonymous disclosure — could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends."¹⁵⁰ A similar concern about the release of deeply personal information led the Court not to require disclosure in *Reporters Committee*, where release of the FBI rap sheets would have disclosed information concerning Charles Medico's history of arrests, charges, convictions, and incarcerations.¹⁵¹

As noted above, employee names and addresses do not involve the same or even similar privacy concerns. Release of such information should normally produce no undue embarrassment or disgrace. Consequently, given congressional recognition that collective bargaining for federal employees is in the public interest, and given the relatively minor privacy concerns implicated by the release of employee names and addresses, analysis under Exemption 6 demonstrates that the public interest in collective bargaining outweighs individual privacy concerns. Therefore, Exemption 6 does not exempt employee names and addresses from disclosure under FOIA.

This result is consistent with the conclusions reached by the circuit courts prior to the D.C. Circuit's decision in *Department of the Treasury*. As Part II noted, all of these courts recognized that employees have some privacy interest in their names and addresses. No court, with the exception of the Fourth Circuit in *Local 1923*, however, believed that this interest outweighed the public interest in collective bargaining. As a result, the courts found that disclosure of employee names and addresses did not constitute a "clearly unwarranted invasion of personal privacy" under Exemption 6. FOIA therefore required disclosure. Because this result more accurately comports with FOIA's legislative history, these decisions are the better rulings.

CONCLUSION

In enacting FOIA, Congress sought to establish a general philosophy of full agency disclosure. Thus, when balancing public and private interests under FOIA's Exemption 6, the public interest in disclosure should not be limited solely to enabling the public to scrutinize government activity. Although the watchdog function is un-

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148. See *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468 (1989).

149. 425 U.S. at 352.

150. 425 U.S. at 377.

151. See *supra* note 76 and accompanying text.

doubtedly a major goal of FOIA, the Act serves other public interests as well, particularly those interests embodied in disclosure statutes such as the Fed. L-M Statute. Indeed, to hold that Exemption 6 bars disclosure which is congressionally mandated by another disclosure statute would thwart Congress' intent to provide the fullest possible disclosure.

Because Congress has determined that collective bargaining is in the public interest, when considering whether employee names and addresses are to be released to a union, courts should balance this interest against any impairment to individual privacy. Although employees may have some minor privacy interest in their names and addresses, this information does not contain intimate details the release of which will lead to significant embarrassment or loss of reputation. Thus, under an Exemption 6 balance, the privacy concerns of individual employees do not outweigh the public interest in collective bargaining and disclosure of employee names and addresses does not constitute a "clearly unwarranted invasion of personal privacy." Because FOIA therefore requires disclosure of the names and addresses, the Privacy Act does not bar their release.

— *Trina Jones*