

EXHIBIT W

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Exemption 6

Personal privacy interests are protected by two provisions of the FOIA, Exemptions 6 and 7(C). While the application of Exemption 7(C), discussed below, is limited to information compiled for law enforcement purposes, Exemption 6 permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."⁽¹⁾ These exemptions are a vitally important part of the FOIA's statutory scheme,⁽²⁾ but of course they cannot be invoked to withhold from a requester information pertaining only to himself.⁽³⁾

Initial Considerations

To warrant protection under Exemption 6, information must first meet its threshold requirement; in other words, it must fall within the category of "personnel and medical files and similar files."⁽⁴⁾ Personnel and medical files are easily identified, but there has not always been universal agreement about the meaning of the term "similar files." Prior to 1982, judicial interpretations of that phrase varied considerably and included a troublesome line of cases in the Court of Appeals for the District of Columbia Circuit, commencing with Board of Trade v. Commodity Futures Trading Commission,⁽⁵⁾ which narrowly construed the term to encompass only "intimate" personal details.

In 1982, the Supreme Court acted decisively to resolve this controversy once and for all. In United States Department of State v. Washington Post Co.,⁽⁶⁾ it firmly held, based upon a review of the legislative history of the FOIA, that Congress intended the term to be interpreted broadly, rather than narrowly.⁽⁷⁾ The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information."⁽⁸⁾ Rather, the Court made clear that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection.⁽⁹⁾ This means, of course, that this threshold is met if the information applies to any particular, identifiable individual -- which makes it readily satisfied in all but the most unusual cases of questionable identifiability.⁽¹⁰⁾

The D.C. Circuit, sitting en banc, subsequently reinforced the Supreme Court's broad interpretation of this term by holding that a tape recording of the last words of the Space Shuttle Challenger crew, which "reveal[ed] the sound and inflection of the crew's voices during the last seconds of their lives . . . contains personal information the release of which is subject to the balancing of the public gain against the private harm at which it is purchased."⁽¹¹⁾ Not only did the D.C. Circuit determine that "lexical" and "non-lexical" information are subject to identical treatment under the FOIA,⁽¹²⁾ it also concluded that Exemption 6 is equally applicable to the "author" and the "subject" of a file.⁽¹³⁾

Once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue "would constitute a clearly unwarranted invasion of personal privacy."⁽¹⁴⁾ This requires a balancing of the public's right to disclosure against the individual's right to privacy.⁽¹⁵⁾ First, it must be ascertained whether a protectible privacy interest exists that would be threatened by disclosure. If no privacy interest is found, further analysis is unnecessary and the information at issue must be disclosed.⁽¹⁶⁾

On the other hand, if a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure.⁽¹⁷⁾ If no public interest exists, the information should be protected; as the D.C. Circuit has observed, "something, even a modest privacy interest, outweighs nothing every time."⁽¹⁸⁾ Similarly, if the