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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FRIENDS OF ANIMALS,

Plaintiff - Appellant,

v.

DAVID BERNHARDT; U.S. FISH AND WILDLIFE SERVICE,

Defendants - Appellees.

No. 20-1182

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CV-01443-MEH)

Stephen Russel Hernick (Michael R. Harris, Andreia Marcuccio, with him on the briefs), Friends of Animals, Centennial, Colorado, for Plaintiff-Appellant.

Marissa Rose Miller, Assistant United States Attorney (Jason R. Dunn, United States Attorney, with her on the brief), Denver, Colorado, for Defendants-Appellees.

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **BACHARACH**, Circuit Judges.

EBEL, Circuit Judge.

Under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, animal rights organization Friends of Animals requested the disclosure of Form 3-177s submitted to the U.S. Fish and Wildlife Service (FWS) by wildlife hunters and traders (the

"submitters") seeking to import elephant and giraffe parts. FWS disclosed the forms with redactions. Most relevant here, it withheld the names of the individual submitters under FOIA Exemptions 6 and 7(C), which prevent disclosure of information when a privacy interest in withholding outweighs the public interest in disclosure, as well as information on one Form 3-177 under Exemption 4, which prevents the disclosure of material that is commercial and confidential. Friends of Animals challenged these redactions in the district court, which granted summary judgment in favor of FWS, upholding the redactions. Exercising jurisdiction under 28 U.S.C. §§ 636(c)(3) and 1291, we AFFIRM in part and REVERSE in part.

I. BACKGROUND

Friends of Animals is a nonprofit organization that advocates for animal rights. It endeavors to protect endangered or threatened wildlife in Africa, such as by tracking the amount of trophy hunting occurring each year. To that end, the organization relies upon FOIA to obtain information from FWS about wildlife trade. FWS, an agency within the Department of the Interior, is charged with the conservation of wildlife and wildlife habitats.

In order to import elephant and giraffe parts into the United States, whether the importation is for commercial, educational, personal, scientific, or zoological purposes, importers must fill out a Declaration for Importation or Exportation of Fish and Wildlife, or Form 3-177, to submit to FWS. Information requested on Form 3-177 includes the date of shipment, port of clearance, names of the importer and exporter, species, quantity, monetary value, and permit numbers. FWS's Office of

Law Enforcement (OLE) collects this information and enters it unaltered into FWS's Law Enforcement Management Information System (LEMIS). FOIA is the only means through which Friends of Animals can access LEMIS information.

In 2018, Friends of Animals made two requests for information from FWS under FOIA. The first was a request for information regarding the import of African elephant skins and products from 2012 to 2018, including all Form 3-177s (the "Elephant Request"). The second request was for all records, including Form 3-177s, of private citizens importing African giraffe parts or products through certain U.S. ports between January 2014 and November 2018 (the "Giraffe Request"). FWS compiled the requested information and notified the submitters, asking them to identify any confidential information.

FWS then sent Friends of Animals 847 pages of records in response to the Elephant Request. FWS redacted information on 496 of those pages, on the grounds that it was protected by FOIA Exemptions 6 and 7(C). Withheld information included, among other things, the names of the individual U.S. importers. In addition, FWS redacted part of one three-page Form 3-177, including the name of the U.S. importer, under Exemption 4. This form was submitted by an exotic-leather business which informed FWS that the redacted information was commercial and confidential.

FWS also sent Friends of Animals a spreadsheet containing the information sought in the Giraffe Request. FWS redacted the names of 373 individual importers, again because it believed they were protected under FOIA Exemptions 6 and 7(C).

Previously, FWS had released Form 3-177 data to Friends of Animals without redacting the submitters' names.

In response to the redactions, Friends of Animals filed administrative FOIA appeals regarding both requests. FWS did not respond to the former and denied the latter. Friends of Animals has therefore exhausted its administrative remedies as to both requests.

Friends of Animals then brought the instant lawsuit, challenging FWS's redactions of importer names. Both parties moved for summary judgment. The district court denied Friends of Animals' motion but granted FWS's, entering judgment for FWS on all claims.[1] Friends of Animals timely appealed.

II. STANDARD OF REVIEW

In a FOIA-suit appeal in which, as here, the district court has entered summary judgment in favor of a government agency, this Court reviews "de novo the district court's legal conclusions that the requested materials are covered by the relevant FOIA exemption." Herrick v. Garvey, 298 F.3d 1184, 1190 (10th Cir. 2002) (quoting Anderson v. Dep't of Health & Hum. Servs., 907 F.2d 936, 942 (10th Cir. 1990)). In doing so, we view the facts in the light most favorable to Friends of Animals, the nonmoving party, and we draw all reasonable inferences in its favor. Brown v.

[1] Prior to granting summary judgment in favor of FWS, the district court concluded that Secretary Bernhardt, secretary of the U.S. Department of the Interior, was not a proper FOIA defendant, leaving FWS as the only remaining defendant. (App. vol. 2 at 468 n.1.) Friends of Animals does not challenge this on appeal.

Perez, 835 F.3d 1223, 1230 (10th Cir. 2016). It is FWS's burden to justify the nondisclosure. Herrick, 298 F.3d at 1189.

III. DISCUSSION

Congress enacted FOIA to promote public access to federal agency records and information upon request. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 221 (1978). Its purpose is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." Id. at 242. Given this purpose, FOIA is broadly construed in favor of disclosure. Id. at 220.

FOIA contains nine exemptions under which agencies may withhold requested information when disclosure would harm legitimate government or individual interests. Trentadue v. Integrity Comm., 501 F.3d 1215, 1225–26 (10th Cir. 2007); 5 U.S.C. § 552(b). These exemptions are exclusive and we construe them narrowly. Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976). As such, they do not displace FOIA's dominant objective of disclosure. Id. Nonetheless, we recognize that the FOIA exemptions serve important interests. See John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989).

Turning to the merits, we address (A) whether FWS's withholding of the submitters' names in response to the Elephant Request and the Giraffe Request was proper under Exemptions 6 and 7(C); and (B) whether FWS's withholding of information on one business's Form 3-177 was proper under Exemption 4. We

conclude that withholding was proper as to the Giraffe Request, but not proper as to the Elephant Request generally or as to the one form under Exemption 4.

A. Exemptions 6 and 7(C)

Friends of Animals first challenges the district court's grant of summary judgment in favor of FWS as to the names of the individual submitters withheld under Exemptions 6 and 7(C).[2]

Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Here, Form 3-177s are considered "similar files." See Forest Guardians v. FEMA, 410 F.3d 1214, 1217 (10th Cir. 2005). To determine if a disclosure qualifies as a "clearly unwarranted invasion of personal privacy," and thus whether Exemption 6 applies, we must balance the public interest in disclosure against the individual privacy interest. Trentadue, 501 F.3d at 1233.

Exemption 7(C) is highly similar. It protects "records or information compiled for law enforcement purposes, but only to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). We apply a three-part test to determine if information is covered by Exemption 7(C): (1) the information must have been gathered for a law enforcement purpose; (2) there must be a personal privacy interest at stake; and, if so,

[2] Although FWS redacted more than just the submitters' names, Friends of Animals only challenges the withholding of those names. Accordingly, we, like the district court, review only the propriety of withholding as to the names specifically, as opposed to any other redacted information.

(3) the privacy interest must outweigh the public interest in disclosure. World Pub. Co. v. U.S. Dep't of Just., 672 F.3d 825, 827 (10th Cir. 2012).

If the threshold law-enforcement inquiry is satisfied, the analysis under Exemptions 6 and 7(C) is largely the same. See Watters v. Dep't of Just., 576 F. App'x 718, 724 (10th Cir. 2014) (unpublished). Yet Exemption 7(C) is slightly more protective of privacy than Exemption 6, because under Exemption 7(C) a disclosure need only be "reasonably expected" to constitute an unwarranted invasion of privacy, whereas under Exemption 6 the invasion of privacy must be "clearly unwarranted."[3] But withheld information must meet Exemption 7(C)'s additional law-enforcement-purpose requirement to benefit from that stronger protection.

In light of this framework, we begin by analyzing FWS's withholding of the submitters' names under Exemption 7(C). If the disclosure cannot be said to be "reasonably expected" to result in an unwarranted invasion of privacy, it necessarily cannot meet the stricter "clearly unwarranted" standard, either.

Ultimately, we conclude that the district court erred by overemphasizing the risks from disclosure and, as to the Elephant Request only, undervaluing the public interest in the submitters' names—in other words, it got the balance wrong. As a result, we reverse the district court's grant of summary judgment in favor of FWS under Exemptions 6 and 7(C) as to the Elephant Request, because under either standard the public interest in disclosure outweighs the privacy interest at stake and

[3] For this reason, both the district court and the parties in their briefing focus on Exemption 7(C). (See Aplt. Br. 20–21; Aple. Br. 11–12.)

thus any minimal invasion of privacy resulting from disclosure is not unwarranted. But we affirm the district court's grant of summary judgment in favor of FWS as to the Giraffe Request because the lack of a public interest in the context of giraffe imports means that any invasion of privacy would be unwarranted.

(1) Elephant Request

For the reasons we address above, we first consider the applicability of Exemption 7(C). Generally, the threshold inquiry under this exemption is whether the agency compiled the withheld information for a law enforcement purpose. Although the district court answered this question in the affirmative below, we decline to address it in the context of the Elephant Request, assuming without deciding that FWS collected the Form 3-177s for law enforcement purposes. In any event, Exemption 7(C) cannot support withholding the submitters' names in response to the Elephant Request because the personal privacy interest at stake is outweighed by the public interest in disclosure.

We reach that conclusion in three steps: First, we identify the existence of a personal privacy interest at stake, concluding that that interest is supported primarily by speculation and is weakened by the nature of the information. Second, we identify the countervailing public interest in disclosure. Finally, we weigh the private interest against the public one, concluding that the latter is weightier.

a. Privacy Interest

Application of Exemption 7(C) requires that there be a personal privacy interest in the withheld information—here, the submitters' names. Significantly,

there is no inherent privacy interest in a list of names. Brown, 835 F.3d at 1235. Instead, the existence of a privacy interest depends upon "the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue." Id. (quoting News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1199 (11th Cir. 2007)); see also U.S. Dep't of State v. Ray, 502 U.S. 164, 176 n.12 (1991). Here, the disclosure of the submitters' names would connect those individuals to the importation of elephant parts already revealed on the Form 3-177s. See U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 762–63 (1989) (recognizing an "individual [privacy] interest in avoiding disclosure of personal matters" and controlling "information concerning his or her person").[4]

As to the potential consequences of disclosure, FWS's principal argument is that the submitters could be subjected to harassment and public shaming or scorn for their involvement in wildlife hunting and the importation of wildlife products and sport trophies, highly controversial activities. See Brown, 835 F.3d at 1234 (stating in the context of Exemption 6 that "[t]he primary purpose of this exemption is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." (quoting Prison Legal News v. Samuels, 787 F.3d 1142, 1147 (D.C. Cir. 2015))).

[4] Friends of Animals seeks to limit the cognizable privacy interest under Exemption 7(C) to the interest in not being associated with a criminal investigation, but we decline to do so as contrary to precedent.

We agree with Friends of Animals, however, that this harassment is primarily speculative. And because FWS bears the burden of proving that an exemption applies, Herrick, 298 F.3d at 1189, it must demonstrate more than a mere possibility of harm. Rose, 425 U.S. at 380 n.19 ("Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities."); see also Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 37 (D.C. Cir. 2002) (declining to find an unwarranted invasion of privacy under Exemption 6 where the agency "established only the speculative potential of a privacy invasion without any degree of likelihood").

In fact, FWS offers no evidence that the submitters themselves believe they have a privacy interest in their names on the Form 3-177s, fear harassment, or wish to keep their names private. See Brown, 835 F.3d at 1235 (in rejecting an agency's withholding of physician names and business addresses, observing that "the agency has not provided any testimony from physicians . . . to support its assertion that treating physicians have a privacy interest in their business addresses" (emphasis added)). For example, FWS asserts in its briefing that "many of the individuals involved with this practice [hunting and import of animal parts] would prefer that fact not be widely publicized," but it offers not a single piece of evidence from a submitter to that effect. (Aple. Br. 24.) We cannot consider pure speculation.

FWS does, however, submit some evidence that it asserts proves a likelihood of harassment if the submitters' names are disclosed. First, FWS points to the fact that Friends of Animals has previously published the names of those involved in

wildlife trade on its website. (Aple. Br. 24 (citing App. vol. 1 at 189, 240–41; App. vol. 2 at 474).) But this alone does nothing to demonstrate that those individuals faced or will face harassment or other negative consequences as a result of that publication.

To attempt to show that, FWS points to several online newspaper articles and social media posts and comments criticizing big-game hunters. (Aple. Br. 24–25 (citing App. vol. 1 at 64 n.3) (local newspaper articles and NPR interview); id. at 25–26 (citing App. vol. 1 at 43; vol. 2 at 452) (online criticism of a high-profile hunter); id. at 26 n.4 (online comments).) These sources are insufficient to prove more than a mere speculation of harassment.[5] The news articles reporting on big-game hunting either did not mention the names of hunters and importers at all, mentioned only the names of certain high-profile hunters,[6] or reported on local hunters in a somewhat neutral manner, recognizing both sides of the debate. More concerning are the comments on websites like Tumblr or Reddit, but these, although vulgar and threatening, are not directed at any named individual. Further, if generally intemperate or hostile comments on Tumblr or Reddit were the test, it would probably negate the utility of this test in nearly every situation.

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[5] To the extent some of these online sources are not in the record, we take judicial notice of their existence. See United States v. Burch, 169 F.3d 666, 671 (10th Cir. 1999) ("Judicial notice may be taken at any time, including on appeal.").

[6] Negative publicity about a small number of high-profile individuals does little to demonstrate the possibility of harassment across the entire group of submitters here. Not only do those instances appear relatively rare in comparison to the hundreds of released names, those individuals likely reach the public spotlight in ways other than through a FOIA disclosure.

FWS is also missing the vital link connecting these news outlets and Internet posts to resulting harassment or threats targeted directly at the big-game hunters. FWS fails to connect its evidence of past publicity of the names to any evidence of, say, members of the public contacting wildlife hunters or importers personally. Indeed, all that is at issue is the submitters' names—their addresses and contact information would remain redacted.

Further, FWS asserts that members of Friends of Animals' "community of animal rights activists" would and do "engage in threats or harassment." (Aple. Br. 25.) This contention is inappropriate for two reasons. First, it is again purely speculation, because, for the reasons already discussed, FWS has not submitted any evidence of harassment targeted at the submitters and arising from the disclosure of their names via FOIA. And second, the identity of the person or entity requesting information is not relevant to a FOIA analysis. Reps. Comm., 489 U.S. at 771.

There are a few additional factors that cause us to conclude the district court overvalued the privacy interest in this case. First, the private individuals engaging in elephant hunting and import—a highly regulated activity—are doing so voluntarily. FWS is correct that individuals still possess a privacy interest in voluntary conduct, but the examples it gives (Botox, erotic novels, strip clubs, hemorrhoid cream), do not contain an analogous level of regulation to the import of elephant parts. See, e.g., 50 C.F.R. §§ 10.1, 14.1. An individual is not required, for example, to apply for a special federal permit to purchase an erotic novel, and does not need an import declaration to ship that erotic novel across state or country lines. Obtaining a federal

permit and complying with federal regulations is a known cost of receiving the benefit of participating in international wildlife trade, and there is a known risk of disclosure as a result of that voluntary but regulated participation.[7] See Agency Information Collection Activities, 84 Fed. Reg. 36,616, 36,617 (July 29, 2019) ("[T]he Service considers the information requested on [Form 3-177] to be voluntary, in order to obtain or retain a benefit.").

Finally, importing trophies from endangered species requires not only a Form 3-177 but also a special permit. Under the Endangered Species Act, FWS must publish endangered species permit applications (Form 3-200-20, which requires similar information as Form 3-177) in the Federal Register. 16 U.S.C. § 1539(c); see also 50 C.F.R. § 17.22. FWS also publishes permit applications for the import of

[7] Although we conclude that voluntary participation in a highly regulated activity reduces the strength of the privacy interest at stake, we reject Friends of Animals' argument that by filling out the mandatory Form 3-177, the submitters waived their privacy interest entirely. The FWS website does inform submitters that the information on Form 3-177s "may be subject to disclosure under [FOIA]," but it also states, "[W]e do not give, sell, or transfer any personal information to a third party except as might be required by law." (App. vol. 2 at 395–96.) FWS also informs its website visitors that it will carefully handle collected information to "ensure the greatest protection of personal privacy in the face of any required disclosure." (Id.) Submitters therefore had assurances of privacy when they filled out the Form 3-177s. If the possibility of disclosure under FOIA alone was enough to defeat that privacy interest, no information could ever be protected under this exemption. (See App. vol. 2 at 488 ("The fact that the information could be disclosed pursuant to FOIA is true of all information held by the government.").)

Further, we also reject Friends of Animals' argument that FWS's prior disclosure of the names on Form 3-177s must necessarily prevent withholding now. Past disclosures are not determinative. See Mobil Oil Corp. v. E.P.A., 879 F.2d 698, 701 (9th Cir. 1989) ("[T]he circuits that have addressed this issue generally have found that the release of certain documents waives FOIA exemptions only for those documents released.").

African elephant trophies on its website, including the unredacted name and city of residence of the applicants. (Aple. Br. 40 (citing Elephant Trophy Import Material, FWS, https://www.fws.gov/irm/bpim/foiaelephant.html (last updated June 17, 2020)).) Thus, the names of the submitters regarding the Elephant Request specifically are already public knowledge, and any disclosure via FOIA is unlikely to be a significant further unwarranted invasion of privacy when the information disclosed is already available. See Reps. Comm., 489 U.S. at 763 & n.15 ("The common law recognized that one did not necessarily forfeit a privacy interest in matters made part of the public record, albeit the privacy interest was diminished . . . .").

In sum, although individuals certainly have some privacy right in information about their personal activities, we conclude that the submitters' interest here is weak.[8] FWS relies upon speculation, provides no evidence from the submitters themselves, and fails to link its evidence of publicity to evidence that the submitters will be personally targeted, contacted, or harassed. Further, the voluntary and highly regulated nature of the activity and the fact that similar information is already public, bolster our conclusion.

[8] We accordingly reject FWS's argument that the privacy interest here is at its "apex" because the information sought is a compilation. (Aple. Br. 28–29 (quoting Reps. Comm., 489 U.S. at 780).) FWS does not summarize or otherwise alter the Form 3-177 information when it is entered into LEMIS, nor is this data assembled from multiple sources. The Form 3-177s are therefore distinguishable from the rap sheets in Reporters Committee, which were summaries compiled using information from courthouse files, county archives, and local police stations throughout the country. 489 U.S. at 764.

b. Public Interest

The district court also undervalued the usefulness of disclosure of the submitters' names as part of the Elephant Request when it found that it "would not likely advance a significant public interest." (App. vol. 2 at 503.) So, there was significant weight on the public interest side of the scale that the district court did not adequately address in its balancing.

The relevant public interest is narrowly defined: it is "the public's interest in obtaining information likely to contribute to its understanding of an agency's performance of its duties." Prison Legal News v. Exec. Office for U.S. Attorneys, 628 F.3d 1243, 1250 (10th Cir. 2011); Audubon Soc. v. Forest Serv., 104 F.3d 1201, 1203 (10th Cir. 1997) (FOIA only permits access to "information that sheds light upon the government's performance of its duties").

In light of that narrow public interest, it is relevant that the information at issue here involves private citizens. FOIA's purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." Reps. Comm., 489 U.S. at 773 (emphasis added); accord Trentadue, 501 F.3d at 1233 ("Obviously, information regarding private citizens will contribute far less to public understanding of the operations or activities of the government . . . than would information about public employees." (quotations omitted)).

That the withheld information concerns private individuals, however, does not necessarily mean that a substantial public interest in that information cannot exist.

See Forest Guardians v. DOI, 416 F.3d 1173, 1178 (10th Cir. 2005) (recognizing a public interest in information about private transactions in a FOIA fee-waiver case because the information had a direct connection to agency operations and shed light on potential influence by private groups).

Our analysis of the public interest starts with the recognition that the import of elephant trophies requires a permit. 50 C.F.R. § 17.40(e)(6)(i)(B). Although the collection of Form 3-177s is separate from the permitting process, the public still has an interest in knowing the identities of the submitters to ensure that FWS is fulfilling its duty to oversee the import of elephant parts consistently with the law. For example, knowing the submitters' names would assist the public in ensuring that FWS is not allowing individuals to import products besides what has been approved on the permit, beyond the scope of the permit, or without a permit at all. This second check is not superfluous, as it further contributes to the understanding of FWS operations and decision-making. And for elephant trophies imported after April 11, 2016, FWS has a duty to ensure that no one individual imports more than two African elephant trophies in a single year, as prohibited by 50 C.F.R. § 17.40(e)(6)(i)(E).

There are thus at least four potential uses for the submitters' names in the Elephant Request: (1) the names could address whether FWS officials have conflicts of interest, such as if a form was submitted by an agent's relative; (2) the names could reveal consistent favoritism or bias towards or influence by industries or individual persons; (3) the names could reveal inconsistent, arbitrary, or sloppy decision-making regarding imports and whether the forms were carefully reviewed;

and (4) as to forms dated after April 11, 2016, the names could inform the public if FWS is enforcing 50 C.F.R. § 17.40(e)(6)(i)(E).

By any measure, Form 3-177s serve an important function in FWS's mission to "conserve, protect, and enhance fish, wildlife, and plants and their habitats" by regulating the wild animal parts entering the country. (App. vol. 2 at 397.) Friends of Animals and other members of the public can hold FWS accountable to serving that purpose by using the requested disclosures to ensure that FWS is regulating the import of elephant parts in accordance with the law. The public has a significant interest in making sure that FWS performs its duties lawfully and fairly, and for the reasons stated above, disclosure of the submitters' names would further that interest.

We thus conclude that Friends of Animals' request for disclosure of the submitters' names in the Elephant Request would enable the public to be "informed about what their government is up to" and would serve FOIA's purpose of "shed[ding] light on an agency's performance of its statutory duties." Reps. Comm., 489 U.S. at 773 (quotations omitted). The public's ability to inform itself about government activity is "vital to the functioning of a democratic society," Trentadue, 501 F.3d at 1225, and "a structural necessity in a real democracy," Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 172 (2004). It should not be taken lightly.

c. Balancing

Exemption 7(C) does not protect against all invasions of privacy, just those disclosures that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added). "[W]hether

disclosure of a private document under [this exemption] is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of [FOIA],'" which is to "open agency action to the light of public scrutiny." Reps. Comm., 489 U.S. at 772 (quoting Rose, 425 U.S. at 372).

Disclosure of the submitters' names would not constitute an unwarranted invasion of privacy as to the Elephant Request. Balancing the important public interest in ensuring the proper regulatory performance of FWS's duties against the weak personal privacy interest—based largely on mere speculation of harassment without actual evidence—supports a conclusion that disclosure here is required. See Forest Guardians, 410 F.3d at 1218 ("If there is an important public interest in the disclosure of information and the invasion of privacy is not substantial, the private interest in protecting the disclosure must yield to the superior public interest." (quotation omitted)).

Indeed, the required balance is not an even one. Because FOIA's core purpose is to shed light on the government's performance of its duties, it is "to be broadly construed in favor of disclosure." Trentadue, 501 F.3d at 1226. We must therefore start with a presumption of disclosure. If the private and public interest were otherwise equal—which we have already determined is not the case here—the public interest in disclosure must prevail.

For these reasons, we hold that disclosure of the submitters' names in the Elephant Request on this record could not be reasonably expected to constitute an

unwarranted invasion of privacy and thus withholding was not proper under Exemption 7(C).

As a result, we also reject FWS's argument that withholding was justified under Exemption 6. The Exemption 6 inquiry involves the same balancing of public and private interests as under Exemption 7(C), just through the lens of a stricter standard. Jud. Watch v. U.S. Dep't of Just., 365 F.3d 1108, 1125 (D.C. Cir. 2004). Because withholding as to the Elephant Request cannot be justified under the more lenient Exemption 7(C) test, the more stringent Exemption 6 test is likewise unsatisfied.

Accordingly, regarding the Elephant Request, we reverse the district court's grant of summary judgment in favor of FWS as to the withholdings under Exemption 6 as well as under Exemption 7(C).[9]

(2) Giraffe Request

We again begin with the Exemption 7(C) analysis. Applying the same framework as above, we reach a different result. Here, we conclude that there is no public interest in disclosure, such that any invasion of privacy resulting from disclosure would be unwarranted. Accordingly, we agree with FWS and the district court that withholding was proper under Exemption 6 as to the Giraffe Request.

[9] FWS requested in its briefing that should Exemption 7(C) not apply, "the district court be permitted to consider the application of Exemption 6 on remand" because its analysis was focused on Exemption 7(C). (Aple. Br. 21 n.3.) We reject this request. Our above conclusions as to Exemption 7(C) foreclose any possibility that Exemption 6 might justify the withholdings in this case.

Because we uphold withholding under this exemption, we cannot simply assume that the information was compiled for law enforcement purposes. We first address that threshold inquiry, concluding that it is satisfied here.

a. Law Enforcement Purpose

For an agency whose primary function is law enforcement, this Court employs a per se rule whereby all information compiled by such an agency is inherently compiled for law enforcement purposes. Jordan v. U.S. Dep't of Just., 668 F.3d 1188, 1193, 1195–97 (10th Cir. 2011). Both parties agree that the per se rule is inapplicable here because FWS's primary purpose is not law enforcement. Nonetheless, FWS could still rely on Exemption 7(C) if it can meet its burden of showing that it specifically compiled the Form 3-177s for law enforcement purposes. Id. at 1197 n.5.

We have never identified the precise burden required for a mixed-function agency to prove that certain information was compiled for a law enforcement purpose. See id. In its brief, FWS relies on the plain text of Exemption 7(C), articulating the test for "compiled for a law enforcement purpose" as whether "(1) the information was collected by an office that enforces federal law, and (2) the office uses that information to enforce the law." (Aple. Br. 14.)[10] Because this test is

[10] FWS seems to derive this test from the tests used by the Third, Ninth, and D.C. Circuits, which use a rational nexus test. See Jordan, 668 F.3d at 1193–94. Under that test, mixed-function agencies like FWS can benefit from Exemption 7(C) only if the agency can "demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document." Id. at 1194 (quotation omitted).

consistent with the exemption's language and Friends of Animals does not challenge it or offer a different articulation, we employ FWS's suggestion here.

Friends of Animals makes a two-pronged argument that the information at issue was not compiled for a law enforcement purpose. First, it notes that the Form 3-177s are not investigatory in nature. But Friends of Animals' emphasis on investigatory records is misplaced. Although Exemption 7(C) initially only applied to "investigatory records" compiled for law enforcement purposes, later amendments removed that phrase and replaced with the broader "records or information." Tax Analysts v. IRS, 294 F.3d 71, 79 (D.C. Cir. 2002) (explaining that the 1986 FOIA amendments permitted wider application of Exemption 7 by deleting any requirement that information be investigatory).

Second, Friends of Animals argues that FWS must show that the specific records at issue were compiled for law enforcement purposes. It contends that although some Form 3-177s might be compiled for law enforcement purposes, not all of them are, nor is there any evidence addressing giraffe import forms specifically. Because all importers are required to complete a Form 3-177, Friends of Animals argues that many of the forms represent lawful activity and are used merely to track imports, not to enforce the law. Indeed, Friends of Animals takes special issue with the giraffe import records because at the time in question, the import of giraffe parts was not prohibited or limited by federal law. (Aplt. Br. 22–25.)

Notwithstanding these arguments, one of FWS's purposes, even if not its primary one, is to enforce federal wildlife law and regulations. So the Form 3-177s

were compiled for a law enforcement purpose if their collection related to or served that purpose. This threshold requirement has been met here because FWS's Office of Law Enforcement (the name is not determinative, but it is somewhat illuminating) collects Form 3-177s in part to prevent illegal wildlife trade. (App. vol. 2 at 469–70.) Even if, as Friends of Animals points out, the import is legal, Form 3-177 is what allows FWS to make that determination of legality in the first place. It also allows OLE officials to be present at the time of import to perform inspections and ensure that the shipment matches the import declaration. (Aple. Br. 16.)

Verifying compliance with the law and preventing illegal activity is as much a part of law enforcement as is investigating violations of the law. And although Friends of Animals can attempt to nitpick the purposes behind the collection of specific Form 3-177s, we do not think such an individualized analysis is necessary or helpful, given that FWS requires all wildlife importers to submit Form 3-177s as part of FWS's overall function of overseeing wildlife trade by monitoring imports, verifying compliance, deterring smugglers, and allowing for physical inspections.

b. Privacy Interest

The privacy interest at stake here is largely the same as in the Elephant Request—discounting only the additional factors relevant to elephants and the heightened regulations that apply to them—and will not be repeated here. As before, we recognize that the submitters have a privacy interest in their names and personal activities, but that interest is relatively weak as based primarily on speculation regarding the negative consequences of disclosure.

c. Public Interest

The principal difference between the Elephant Request and the Giraffe Request is in the strength of the public interest at stake. For the Elephant Request, the public interest in disclosure is strong, as this disclosure will shed light on FWS's operations and decision-making—the purpose of FOIA and a bedrock of our democracy. In contrast, because at the time the Form 3-177s were filed giraffe imports were not regulated in the way that elephant imports were, we can identify no similar, cognizable public interest that disclosure of the submitters' names in the Giraffe Request would serve.

The basis for our conclusion is the fact that, at the time period at issue in the Giraffe Request, the import of giraffe parts, unlike elephant parts, was not regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), the Endangered Species Act, or any other federal law. (Aplt. Br. 24 ("For the time periods at issue in this case, giraffes were not protected by CITES, the ESA, or other species-specific law, which impose restrictions on the imports of certain species. Because giraffes were not listed under the ESA or other species-specific laws, federal law did not prohibit or limit the import of giraffe parts.").) As such, Friends of Animals does not and cannot identify a federal law or regulation that FWS was required to adhere to in its oversight of giraffe imports. FWS did not engage in any decision-making regarding who was eligible to import giraffe parts or how many parts any such individual could import, foreclosing the need to assess FWS's actions for influence, bias, arbitrariness, or conflict of interest.

In other words, the only cognizable FOIA public interest—"the public's interest in obtaining information likely to contribute to its understanding of an agency's performance of its duties," Prison Legal News, 628 F.3d at 1250—was not implicated here because FWS had no duty to perform with respect to giraffe imports, other than the duty to require import declarations. The performance of that ministerial duty, however, can be adequately assessed through FWS's response to the Giraffe Request as redacted. Thus, because the giraffe-import submitters' names cannot be linked to permits or permitting decisions, nor to FWS's duties to allow only a certain number of imports as in the elephant context, disclosure of the names would not aid the public's understanding of FWS operations.

Friends of Animals claims several other putative public interests in the Giraffe Request submitters' names, but most are not cognizable under FOIA. See id. These interests include the desire to be informed about who is importing wildlife due to the public controversy surrounding wildlife trade and a public interest in knowing importers' demographics and wildlife criminal history. (Aplt. Br. 35–46.) This information would no doubt be useful to Friends of Animals for various reasons, but that is insufficient to require disclosure under FOIA when those interests are not connected to information about the agency's performance of its duties.

To be sure, Friends of Animals also points to some relevant FOIA interests: the public interest in understanding how FWS makes policy decisions, uncovering influences on FWS, and assessing how FWS oversees and regulates imports. (Id. at 34–35.) But Friends of Animals fails to explain how those interests would be

furthered by learning the names of submitters importing parts from an unregulated animal. Because the public would gain little understanding of FWS decision-making, influence, or oversight from the giraffe-import submitters' names where there are no regulations for FWS to follow or enforce, we hold that there is minimal public interest in the submitters' names as to the Giraffe Request specifically.[11]

d. Balancing

Because the public interest in the giraffe-import submitters' names is negligible, it cannot outweigh the submitters' limited privacy interest in their names: "If . . . the public interest in the information is 'virtually nonexistent' or 'negligible,' then even a 'very slight privacy interest would suffice to outweigh the relevant public interest.'" Forest Guardians, 410 F.3d at 1218 (quoting U.S. Dep't of Def. v. FLRA, 510 U.S. 487, 497 (1994)). Thus, although we emphasize the important public interest in obtaining information about our government and its operations, where no such interest exists, the privacy interest—however small—must prevail. Accordingly, we hold that disclosure of the giraffe-import submitters' names was reasonably expected to constitute an unwarranted invasion of privacy and thus withholding was proper under Exemption 7(C).[12]

[11] Our conclusion is limited to the period of time when giraffe imports were not subject to special regulations. Since then, giraffe imports have in fact become subject to regulation. CITES, Summary Record of the Eleventh Session of Committee I, CoP18 Com. I Rec. 11 (Rev. 1) (2019), https://cites.org/sites/default/files/eng/cop/18/Com_I/SR/E-CoP18-Com-I-Rec-11-R1.pdf.

[12] Because Exemption 7(C) justifies withholding, we need not address the applicability of Exemption 6.

* * *

For these reasons, we affirm the district court's grant of summary judgment in favor of FWS as to the Giraffe Request but reverse as to the Elephant Request.

B. Exemption 4

Friends of Animals lastly challenges FWS's withholding of information under Exemption 4 on one Form 3-177 submitted by an exotic leather business. Because we conclude that FWS's evidence to satisfy Exemption 4's confidentiality requirement consisted almost entirely of hearsay that we cannot consider, we reverse.

Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). To receive protection under Exemption 4, information, if not a trade secret, must be: "(a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." Anderson, 907 F.2d at 944 (quotation omitted). On appeal, Friends of Animals argues only that FWS failed to establish confidentiality.

The Supreme Court has identified two factors for testing whether information is "confidential": (1) whether it "is customarily kept private, or at least closely held, by the person imparting it"; and (2) whether "the party receiving it provides some assurance that it will remain secret." Food Mktg. Inst. v. Argus Leader Media,

139 S. Ct. 2356, 2363 (2019).[13] Id. Because we conclude that FWS does not have evidence to satisfy the first factor for confidentiality, we need not address the second.

Addressing the first factor, Friends of Animals argues that the primary evidence FWS provided to prove confidentiality came from inadmissible hearsay in an affidavit erroneously considered by the district court. We agree. Tenth Circuit precedent dictates that hearsay contained within an affidavit remains inadmissible hearsay beyond judicial consideration at summary judgment. And because the hearsay was FWS's primary evidence that the withheld information "is customarily kept private, or at least closely held, by the person imparting it," Food Mktg. Inst., 139 S. Ct. at 2363, the error was not harmless.

(1) The Hearsay Problem

In its attempt to demonstrate the confidential nature of the redacted material, FWS provided an affidavit from FWS's FOIA Officer, Cathy Willis (the "Willis Affidavit"). (App. vol. 1 at 214–46.) In the affidavit, Willis declared that OLE contacted the submitter, who explained that:

- The information at issue "was not public information, and that release of this information would cause it substantial competitive harm." (Id. at 232.)
- The submitter "'actually and customarily' treat[ed] the withheld information as private." (Id.)

[13] This Court had previously applied the confidentiality test set forth in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). See Anderson, 907 F.2d at 946 & n.14 (adopting that test). The Supreme Court recently abrogated that test and announced its new two-factor test. Food Mktg. Inst., 139 S. Ct. at 2364–66. The Supreme Court held that the first factor must be met but did not resolve whether the second is also required. Id. at 2363.

- The submitter was a business in the exotic leather market that filed the Form 3-177 to declare a shipment purchased in the course of its business operations, that "as a matter of actual and customary practice," it keeps the information at issue private, and that the information is not displayed on its website or communicated to the public. (Id. at 232–33.)

- A "representative of the company would be willing to testify to this same information in camera before the Court." (Id. at 232.)

Willis also declared that she visited the submitter's website to confirm its business type and verify that the information at issue was not accessible therein. (Id. at 233.)

On appeal, Friends of Animals argues that because Willis relayed what the submitter-business told her, her affidavit constitutes inadmissible hearsay that cannot be considered in the summary-judgment determination.[14] Friends of Animals admits that an affidavit, which would normally be considered hearsay, can generally be considered on summary judgment. Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1199 (10th Cir. 2006). Nonetheless, it maintains that the hearsay testimony within the affidavit—i.e., the content of the affidavit—remains off limits. See Fed. R. Civ. P. 56(c)(4) (allowing for use of an affidavit to support or oppose a motion for summary judgement so long as it is "made on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant or declarant is competent to testify on the matters stated").

To support its argument that hearsay within an affidavit cannot be considered by the court, even at the summary judgment stage, Friends of Animals relies upon

[14] FWS does not dispute that the submitter's statements are hearsay to which no exception or exclusion applies.

Johnson v. Weld County, 594 F.3d 1202 (10th Cir. 2010). In Johnson, we considered a plaintiff's attempt to defeat summary judgment via testimony that third parties told her certain information establishing a sex discrimination claim. Id. at 1208. After concluding that no hearsay exclusion applied, we rejected the plaintiff's argument that the hearsay could be considered at summary judgment because it could later be replaced at trial by admissible live testimony. Id. at 1208–10. We observed that the plaintiff's argument misconstrued Supreme Court precedent, drawing an important distinction between form and content:

> [W]hile Celotex[Corp. v. Catrett, 477 U.S. 317 (1986),] indicates that the form of evidence produced by a nonmoving party at summary judgment may not need to be admissible at trial, the content or substance of the evidence must be admissible. That is, Rule 56 permits parties at summary judgment to produce their evidence by means of affidavit, a form of evidence that is usually inadmissible at trial given our adversarial system's preference for live testimony. Yet, at the same time, Rule 56 does not suggest we enjoy a license to relax the content or substance of the Federal Rules of Evidence when viewing a summary judgment affidavit: the Rule does nothing to intimate hearsay testimony that would be inadmissible at trial somehow becomes admissible simply by being included in an affidavit to defeat summary judgment.

Id. at 1210 (citations and quotations omitted); accord Adams v. Am. Guarantee & Liab. Ins. Co., 233 F.3d 1242, 1246 (10th Cir. 2000) ("Hearsay testimony that would be inadmissible at trial cannot be used to defeat a motion for summary judgment because 'a third party's description of a witness' supposed testimony is 'not suitable grist for the summary judgment mill.'"); Argo, 452 F.3d at 1199 ("[A]t summary

judgment courts should disregard inadmissible hearsay statements contained in affidavits, as those statements could not be presented at trial in any form.").

Johnson thus establishes that although affidavits are permissible in form, "the content or substance of the affidavit must be otherwise admissible, and any hearsay contained in a summary judgment affidavit remains hearsay, beyond the bounds of the court's consideration." 594 F.3d at 1210 (emphasis added).[15]

In an effort to overcome Johnson, FWS points to dicta in Brown v. Perez, 835 F.3d 1223 (10th Cir. 2016), arguing that it supports consideration of the hearsay within the Willis Affidavit at the summary judgment stage. In Brown, a FOIA defendant sought at summary judgment to use a letter written by a third-party business to prove the confidentiality of withheld information. 835 F.3d at 1232. This Court deemed the letter hearsay that could not be considered because the defendant failed to show that the letter could be presented in an admissible form at trial. Id. We suggested in dicta, however, that had a representative of the business filed its own affidavit or, more significantly, had "the agency's affidavit . . . suggest[ed] that a representative of [the business] would testify . . . at trial," the result would have been different. Id.

[15] To be sure, there are differences between this case and Johnson. For instance, Johnson involved a double hearsay problem, 594 F.3d at 1208, whereas here, the affiant (Willis) heard the hearsay statements directly from the declarant. And unlike in Johnson, the affiant here swore that the hearsay declarants told her they were willing to testify. But Johnson's clear holding—that hearsay within an affidavit cannot be considered when making a summary-judgment determination—controls here nonetheless.

FWS contends that Brown thus stands for the proposition that hearsay can be considered at summary judgment if contained within an affidavit stating that the hearsay declarant would testify at trial. And here, the Willis Affidavit indeed stated that "a representative of the company would be willing to testify to this same information in camera before the Court." (App. vol. 1 at 232.) But Brown does not support FWS's position because there, the letter that the defendant sought to submit came directly from the business, in its own words, whereas here the submitter's statements were relayed by a third party within an affidavit.[16] And in any event, the Brown dictum FWS relies upon is not precedential and, regardless, the clear rule established previously in Johnson must prevail. See Haynes v. Williams, 88 F.3d 898, 900 n.4 (10th Cir. 1996) ("[A] panel should follow earlier, settled precedent over a subsequent deviation therefrom."). Brown could not and did not intend to conflict with this controlling prior precedent and did not hold that a court can

[16] FWS's position would, troublingly, create a rule where parties moving for summary judgment could succeed by submitting affidavits containing favorable, but unsworn, hearsay statements or even multiple levels of hearsay, all of which would be acceptable as long as the affidavit also stated (through more inadmissible, unsworn hearsay) that each hearsay declarant would be willing to testify. Avoiding such a result is simple: parties need only obtain an affidavit directly from the hearsay declarant. The added expense of doing so is minimal when the declarants have already expressed a willingness to testify and would actually have to do so if summary judgment was not granted. And although requiring an affidavit directly from the declarant might be less protective of privacy, the affidavit could be redacted or viewed in camera as needed.

consider hearsay within an affidavit. We remain bound by Johnson's holding that hearsay within an affidavit cannot be considered.[17]

We therefore hold that it was error for the district court to consider the hearsay in the Willis Affidavit when evaluating FWS's redactions under Exemption 4.

(2) Harmless-Error Analysis

Finally, we address FWS's argument that even if it was error to consider the hearsay in the Willis Affidavit, that error was harmless because there was enough additional evidence to conclude that the withheld information was confidential. We disagree. The only other evidence of confidentiality FWS identifies are inferences it asks this Court to make based on the fact that the submitter is a distributer, as well as Willis's verification that the submitter's website did not display the withheld information. The former fails to speak to the specific business and confidentiality practices of the submitter, and the latter, although certainly probative of

[17] FWS additionally cites several out-of-circuit cases to support its contrary position. Only one is on point. In Fraternal Order of Police, Lodge 1 v. City of Camden, 842 F.3d 231 (3d Cir. 2016), the Third Circuit reversed a district court's refusal to consider hearsay within an affidavit at summary judgment, holding that statements by plaintiffs regarding what officers told them could be considered where the plaintiffs identified the declarants and said they would be willing to testify. Id. at 238–39. We acknowledge this circuit split but are bound by Johnson. We also think policy considerations favor our rule, as explained below.

FWS also borrows from other circuits to argue that hearsay within an affidavit is allowed in FOIA cases specifically. See DiBacco v. U.S. Dep't of the Army, 926 F.3d 827, 833 (D.C. Cir. 2019); Carney v. U.S. Dep't of Just., 19 F.3d 807, 814 (2d Cir. 1994); Russell v. U.S. Dep't of State, 651 F. App'x 667, 668 (9th Cir. 2016) (unpublished). These FOIA cases, however, involve hearsay from subordinates within the agency rather than from an unrelated third party. We decline to decide if an exception to the Johnson rule exists in such cases; at the very least, no such exception applies where the hearsay declarant is a party outside the agency.

confidentiality, does not foreclose the possibility that the submitter could have revealed the information to the public in other ways or at other times.

FWS suggests that "it is difficult to imagine any business that discloses th[e] information" at issue, i.e., details of a shipment including date, port, exporter, and contents. (Aple. Br. 57.) But this Court cannot base a confidentiality determination upon its imagination. Because FWS is the party moving for summary judgment, we make inferences in Friends of Animals' favor, not FWS's. Brown, 835 F.3d at 1230. And as the district court below noted elsewhere, "[t]he fact that the submitter is a business, without more, provides no insight into whether this particular submitter actually and customarily keeps the withheld information confidential." (App. vol. 2 at 487.)

FWS also asserts that the hearsay statements were superfluous because the district court cited them only once. This ignores the four additional "id." citations that followed the one full citation. (App. vol. 2 at 486–87.) Indeed, the district court relied heavily on the Willis Affidavit in assessing confidentiality: it was the only evidence the court cited in determining that the submitter customarily and actually treated the withheld information as private. (Id. at 485–87.)

Accordingly, without the hearsay statements, FWS's confidentiality evidence was clearly insufficient. We thus conclude that the error was not harmless and we reverse the district court's grant of summary judgment in favor of FWS as to the material withheld under Exemption 4.

IV. CONCLUSION

For these reasons, we conclude that the district court erred in granting summary judgment in favor of FWS as to the withholdings in the Elephant Request under Exemptions 6 and 7(C) and as to the withholdings under Exemption 4. We REVERSE on those issues but AFFIRM the district court's grant of summary judgment in favor of FWS as to the withholdings in the Giraffe Request. We remand to the district court for further proceedings.

20-1182, *Friends of Animals v. Bernhardt*
TYMKOVICH, Chief Judge, concurring in part and dissenting in part

I agree with the majority that Friends of Animals does not have a cognizable FOIA interest in the Form 3-177s with respect to giraffe imports. And I agree that we cannot rely on the hearsay statements in the Willis Affidavit to support the district court's decision to apply Exemption 4 to one Form 3-177. Finally, I also agree FOIA is crucial in ensuring accountability and fostering governmental candor. But Congress did not intend FOIA to be used as a tool of public exposure, ridicule, and harassment—under the pretense of government transparency—against private individuals whose information is collected by agencies. Because the Form 3-177 submitters for elephant imports have a privacy interest that is not outweighed by the public interest in disclosure, I dissent in part.

Exemption 7(C) of FOIA "requires us to protect, in the proper degree, the personal privacy of citizens against the uncontrolled release of information compiled through the power of the State." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Thus, the second and third prongs of our test for Exemption 7(C) oblige us to "determine whether there is a personal privacy interest at stake[,] and if there is[, . . .] balance the privacy interest against the public interest in disclosure." *World Pub. Co. v.*

U.S. Dep't of Just., 672 F.3d 825, 827 (10th Cir. 2012). In my view, the majority both undervalues the submitters' privacy interest and overvalues the theory of the public interest in disclosure advanced by Friends of Animals.[1]

For the privacy interest prong, privacy "encompass[es] the individual's control of information concerning his or her person." *U.S. Dep't of Just. v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 763 (1989). This is the case even when compiled information is otherwise publicly available. In *Reporters Committee*, for example, the Supreme Court held although criminal "rap sheets" contain a great deal of information that is a matter of public record, an individual still has a privacy interest in a rap sheet because "compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information." *Reporters Comm.*, 489 U.S. at 764. Indeed, compilation itself imputes additional value onto such information. *See id.* ("Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of

[1] Before Exemption 7(C) applies, we have said as a threshold matter that the agency compiled the withheld information for a law enforcement purpose. *See World Pub. Co.,* 672 F.3d at 827. I believe this requirement is easily met here. The majority assumes without deciding that FWS collected the Form 3-177s regarding elephant imports for such a purpose. *See* Maj. Op. at 8. By contrast, the majority addresses this threshold inquiry for giraffe imports and concludes the forms do serve a law enforcement purpose. *See id.* at 20–22. All of the majority's reasons for finding that Form 3-177s for giraffe imports serve a law enforcement purpose would be precisely the same for elephant imports.

information."). Consequently, the Court held as a "categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no official information about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is unwarranted." *Id.* at 780 (internal quotation marks omitted).

It is true that "the release of a list of names and other identifying information does not inherently and always constitute a clearly unwarranted invasion of personal privacy." *Brown v. Perez*, 835 F.3d 1223, 1235 (10th Cir. 2016), *as amended on reh'g* (Nov. 8, 2016) (internal quotation marks omitted). But the analysis cannot stop there. Rather, "whether disclosure of a list of names is a significant or a de minimis threat [to privacy] depends upon the characteristics revealed by virtue of being on the particular list, and the consequences likely to ensue." *Id.* (internal quotation marks omitted; alterations incorporated). In other words, the foreseeable repercussions of disclosure are proper considerations for the privacy interest.

The third prong requires us to "balance the privacy interest against the public interest in disclosure." *World Pub. Co.*, 672 F.3d at 827; *see also Reporters Comm.*, 489 U.S. at 776; *Prison Legal News v. Exec. Office for U.S. Att'ys*, 628 F.3d 1243, 1248 (10th Cir. 2011). Thus, "[w]here the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a

sufficient reason for the disclosure."[2] *Favish*, 541 U.S. at 172. First, the requester must demonstrate "that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake." *Id.* Second, the requester must also "show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted." *Id.*

In this inquiry, we must focus on precisely what information is sought and what it reveals about the *agency and its function*. This is because the balance between the privacy interest and the interest in disclosure "turn[s] on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny[,] . . . rather than on the particular purpose for which the document is being requested." *Reporters Comm.*, 489 U.S. at 772 (internal quotation marks and citation omitted). Information that reveals how an agency is performing its duties "falls squarely within [FOIA's] statutory purpose" of "the citizens' right to be informed about what their government is up to." *Id.* at 773 (internal quotation marks omitted). But this purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals

[2] When an agency declines to release information sought through a FOIA request, the burden is on the agency to justify its withholding of the information pursuant to an exemption. 5 U.S.C. § 552(a)(4)(B); *see also Jordan v. U.S. Dep't of Just.*, 668 F.3d 1188, 1197 (10th Cir. 2011). But—as the Supreme Court in *Favish* makes clear, in the context of Exemption 7(C), the requester bears the burden of establishing the existence of the public interest in disclosure.

little or nothing about an agency's own conduct." *Id.* As a result, the public interest advanced by the requester must be in the agency's conduct—not in the conduct of private individuals whose information has been collected.

The majority agrees with Friends of Animals that submitters have a de minimis privacy interest in their names, addresses, and contact information on the Form 3-177s. But in failing to consider the likely *consequences* of disclosure for submitters, the majority misapplies our precedent. That the redacted information would be used to personally identify individuals seeking to import animal products is all but certain. Indeed, Friends of Animals openly relies on the disclosure of personal information—and the predictable reaction by the public—for some of its advocacy work. The affidavit of Friends of Animals's president, attached as Exhibit A to the organization's motion for summary judgment, states as much:

> [S]ince the killing of Cecil the Lion by Walter Palmer of Minnesota in 2015, and then the killing of a rare black rhino by Texas hunter Corey Knowlton in 2018, the public has been fascinated by, as well as appalled at, America's continued role in the hunting of these animals for sport and pleasure. Undoubtedly, over the past five years, our work to end this type of sport hunting has gained Friends of Animals a significant amount of attention by both the national press as well as with the local press in locations where these hunters reside. Friends of Animals relies on, among other information, the information obtained from FWS under FOIA regarding issuance of import permits when assisting on these news reports.

Aplt. App., Vol. I at 64. In a footnote, the affidavit cites multiple news articles, including an article from the *Santa Cruz Sentinel* titled "Former Pleasure Point Homeowner Sought

Permit to Import African Lion Parts" and another from *The Salt Lake Tribune* titled "Utah Man Denies Plans to Hunt Elephant, Claims He Sought Permit to Import African Trophies for a Filmmaking Project." *Id.* at 64–65. Both articles provide the names, professions, and information about the private residences of these individuals.

The release of such information to the press purportedly furthers Friends of Animals's advocacy goals. But the resulting articles demonstrate that disclosure of this type of information is almost certain to result in social media shaming, disapproval, and harassment.[3] Importing elephant and giraffe parts is controversial, as evidenced by these

[3] Online harassment and the weaponization of social media have been on the rise in recent years. *See* Kurt Thomas et al., *SoK: Hate, Harassment, and the Changing Landscape of Online Abuse*, *in* Proceedings of the IEEE Symposium on Security and Privacy 8 (2021) (finding a marked increase in online harassment in all 12 countries surveyed from 2016 to 2018); Winhkong Hua, *Cybermobs, Civil Conspiracy, and Tort Liability*, 44 Fordham Urb. L.J. 1217, 1227 (2017) ("Social networking sites also provide a ready-made audience for harassment campaigns. The Internet in general and social networks in particular give cyber harassment campaigns the ability to go viral, because they allow for near instantaneous, widespread dissemination." (internal citations and quotation marks omitted)). Doxxing, or the "use of the Internet to search for and publish identifying information about a particular individual, typically with malicious intent," is no exception. Jeffrey Pittman, *Privacy in the Age of Doxxing*, 10 S. J. of Bus. & Ethics 53, 54 (2018); *see also* Nellie Bowles, *How 'Doxxing' Became a Mainstream Tool in the Culture Wars*, N.Y. Times (Aug. 30, 2017), https://www.nytimes.com/2017/08/30/technology/doxxing-protests.html. Indeed, as Justice Thomas wrote in a case in which a state law required identifying information of referenda signers, "the state of technology today creates at least some probability that signers of every referendum will be subjected to threats, harassment, or reprisals if their personal information is disclosed. 'The advent of the Internet' enables rapid dissemination of 'the information needed' to threaten or harass every referendum signer." *John Doe No. 1 v. Reed*, 561 U.S. 186, 242–43 (2010) (Thomas, J., dissenting) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010)).

articles and by Friends of Animals's work—and Friends of Animals *intends* to spark outrage against these individuals and their conduct. It is not "mere speculation that a submitter could conceivably be subjected to harassment" upon disclosure of this information, as Friends of Animals contends. Aplt. Br. at 29. Rather, it is the organization's intended objective—as well as the natural result of the disclosure. Whatever the efficacy or propriety of such tactics, I think it clear that FOIA is not designed to advance this type of battle.

And the public interest in disclosure does not outweigh this privacy interest. The way in which Friends of Animals describes the public interest is telling: the organization claims that the public interest is "in knowing who is importing elephant and giraffe parts." Aplt. Br. at 34. But this interest is aimed at the conduct of the *submitters*, not the agency. As our precedent dictates, FOIA is meant to shed light on *agency* conduct, not on the actions of individuals whose information is collected by the government. Friends of Animals claims "it is undeniable that it is in the public's interest to know details about the imports of the remains of imperiled wildlife such as African elephants and giraffes and how FWS is overseeing and regulating their import." Aplt. Br. at 35. But FWS released the other information from the Form 3-177s, including the names of companies who have imported wildlife, descriptions and volumes of the parts, and the number of permits and forms submitted. The personal identifiers shed no additional light on FWS's conduct. Friends of Animals also asserts that disclosure of the submitters' names is important

because (1) the "public has an interest in knowing how many different individuals are responsible for the imports" and (2) the "names would help the public understand whether importers represent a wide cross-section of Americans or whether certain classes or demographics dominate these imports." Aplt. Br. at 35–36. As interesting as this information might be, it is still about the conduct of the submitters—not FWS.[4] And finally, Friends of Animals contends that "the public has an interest in knowing whether wildlife traffickers are importing these wildlife parts" and knowing "whether FWS and U.S. law are permitting individuals who have been convicted of wildlife crimes to import these wildlife parts." Aplt. Br. at 36. But this, too, is aimed at knowledge of the submitters' conduct—and lawful conduct (*i.e.*, submitting a Form 3-177) at that.

Moreover, a number of these forms have been filled out and submitted by an individual employee who works for a company importing these wildlife parts. Employee

[4] The same is true of the purported public interest in the submitters' political affiliations and membership in private clubs, an interest Friends of Animals advanced before the district court. *See* Order at 35. Friends of Animals does not expressly offer this interest on appeal but still claims that "[d]isclosure of the names would reveal whether FWS is favoring certain categories of people when it grants permits, and whether permit decisions are subject to undue influence of any outside groups such as prominent trophy hunting organizations." Aplt. Br. at 36. But it is not clear why such information—not disclosed on the forms—would influence FWS's permitting decisions, which is precisely why it does not shed light on the agency's conduct. It is simply directed at collecting information about individuals who submit these forms. As the district court held, "[Friends of Animals] can request and possesses permitting information from the division of FWS that issues permits in its pursuit of insight into FWS's permitting process, rather than seek such insight through enforcement data properly withheld under Exemption 7(C)." Order at 35.

X at Christie's, *see, e.g.*, Aplt. App., Vol. I at 96–97, and Employee Y at Montana Silversmiths, *see, e.g.*, Aplt. App., Vol. I at 86, for example, have a high privacy interest because their work duties may simply include filling out these forms. These employees may have no influence or control whatsoever about the decision to import wildlife parts. That they, as individuals, have completed these forms bears little on the theories of public interest in their personal information advanced by Friends of Animals. Their privacy interest will always outweigh any claimed public interest in the existence of their names on these forms. For these reasons, Friends of Animals does not meet its burden of establishing why the names and addresses of the form submitters have anything to do with FWS's conduct.

As the Supreme Court has held, "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *Reporters Comm.*, 489 U.S. at 765. Even if a public interest in this information does exist, it is still outweighed by the likelihood of extensive and potentially ruinous harassment. When the objective of the requester is to expose individuals—not agencies—through FOIA-obtained information, the balance should tilt toward privacy. I therefore respectfully dissent.