

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL A. ADAMS,)
)
 Plaintiff,)
) Civil Action No. 02-320 (RWR)
 v.)
)
 U. S. DEPARTMENT OF JUSTICE,)
)
 Defendant.)

**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT**

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INTRODUCTION

This case presents the issue whether the disclosure of the names of persons mentioned in historical law enforcement records constitutes an “unwarranted invasion of personal privacy” under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (b)(7)(C), when the records are so old that it is unlikely that the persons mentioned are alive.

The Department of Justice has asserted that privacy interests justify withholding names and other identifying information from records of a Federal Bureau of Investigation (FBI) murder investigation that occurred seventy-three years ago, in 1929. The only privacy interest at issue, however, is the general interest in avoiding being identified with a law enforcement investigation, an interest that the Department itself recognizes does not apply if the individual is dead. The individuals at issue were born around or before 1900, so it is extremely unlikely that anyone on whose behalf the Department has asserted a privacy interest is still alive. Because the Department has offered no evidence that these individuals are still alive, it has not met its burden of showing there is a cognizable privacy interest that would be invaded by the release of the disputed information. Indeed, the Department has offered no evidence that it even considered the age of the records or inquired into whether the individuals were alive before withholding their names. Accordingly, plaintiff moves for summary judgment on his claim that the agency has unlawfully withheld information under Exemption 7(C) to the FOIA. Id.

Plaintiff also seeks summary judgment on his claim for disclosure of the material the Department has withheld under FOIA Exemption 3 and Rule 6(e) of the Federal Rules of Criminal Procedure. Id. § 552 (b)(3); FED. R. CRIM. P. 6(e). Plaintiff does not challenge the Department’s decision to withhold a “symbol number source code” under Exemptions 2 and

7(D), 5 U.S.C. §§ 552 (b)(2), (b)(7)(D), or to withhold “return information” under Exemption 3 and section 6103(a) of the Internal Revenue Code. Id. § 552 (b)(3); 26 U.S.C. § 6103(a).

BACKGROUND

Plaintiff Daniel A. Adams is a former FBI agent who is now a writer and film maker. Mr. Adams is researching a documentary and book about a seminal event in early FBI history, the murder of FBI Agent Paul Reynolds in Arizona in 1929. The death of Agent Reynolds is the only unsolved murder of an agent in the Bureau’s history. Mr. Adams believes that the records at issue here provide an explanation for Agent Reynolds’ death that has never been brought to light by the Bureau. See Exhibit 1, Decl. of Daniel A. Adams (“Adams Decl.”).¹

The 1929 “Murder” of FBI Agent Reynolds

FBI Agent Paul Reynolds lived during an entirely different era in American history. Prohibition was in effect and bootlegging was at its height. Id. ¶ 3. The FBI was in its infancy and still had its original name, the Bureau of Investigation (BOI). Id. J. Edgar Hoover had been the director for only five years, and was still attempting to transform the agency into a professional federal law enforcement body. Id. The agency’s jurisdiction was limited because there was little federal law to enforce. The Bureau nevertheless used the laws it could enforce, such as the Mann Act (which criminalized crossing state lines in connection with “white slavery”), and the Stolen Motor Vehicles Act, to pursue prominent crime figures of the day like Al Capone in “frontier” states like Arizona, where Agent Reynolds died. Id.

¹The following abbreviations are used to identify government declarations previously filed:

FBI Decl. Doc. No. 9, Declaration of Christine Kiefer
USMS Decl. Doc. No. 13, Declaration of Florastine P. Graham.

Reynolds' personal life was a colorful one, filled with drinking, other law-breaking, and philandering, all of which conflicts with the clean-cut image of a Hoover "G-Man." Reynolds was 30 years old when his body was found floating in an Arizona canal with a gunshot through his heart. *Id.* ¶ 6. The FBI identifies Reynolds as the second FBI agent ever killed in the line of duty; the first killing of an agent in the line of duty occurred in 1925, just four years before Reynolds' death. *Id.* ¶ 3. Today Reynolds' death is still billed by the FBI – at least publicly – as the unsolved murder of an FBI agent “killed in the line of duty as the direct result of adversarial action.” See FBI “Hall of Honor,” [available at http://www.fbi.gov/libref/hallhonor/hallhonor.htm](http://www.fbi.gov/libref/hallhonor/hallhonor.htm) and [reynolds.htm](#).

FBI records indicate that the Bureau initially suspected Reynolds was murdered by bootleggers, corrupt politicians, or a criminal gang. Adams Decl. ¶¶ 6-12. However, as Mr. Adams explains in his declaration, his research suggests that the real story may be very different: The FBI's initial leads turned out to be dead-ends and, instead, agents uncovered evidence that Reynolds may have committed suicide but orchestrated his death to look like murder so that his wife could collect on a recently purchased life insurance policy. *Id.* ¶¶ 13-15.

Plaintiff's FOIA Request

In a letter dated February 8, 2000, Mr. Adams submitted a FOIA request to the FBI for its records of the Reynolds murder investigation. After negotiations with Mr. Adams in which he narrowed the scope of his request in order to expedite the agency's response through its “fast track” — which was nevertheless was thirteen months in coming — the FBI finally released approximately 537 pages to Mr. Adams in March 2001. See Doc. No. 9, Declaration of Christine Kiefer of the FBI (“FBI Decl.”), Exh. E, F.

The FBI redacted portions of these pages on the grounds that the information is exempt from disclosure under FOIA Exemptions 2, 3, 7(C), and 7(D) and Rule 6(e) of the Federal Rules of Criminal Procedure. 5 U.S.C. §§ 552 (b)(2), (b)(3), (b)(7)(C-D); FED. R. CRIM. P. 6(e). The FBI also referred some of the responsive records to the United States Marshals Service (USMS), which also redacted names pursuant to Exemption 7(C) before releasing the records to Mr. Adams.

The most numerous and important of these exemption claims involve the redaction of names and other identifying information under Exemption 7(C). Exemption 7(C) provides that the government is not required to release, under FOIA, “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).

Mr. Adams appealed the partial denial of his request. The Department denied his appeal. Mr. Adams then filed this suit under FOIA to compel disclosure, after which the Department agreed to reprocess his request. After an additional eleven months, the FBI released its new response to Mr. Adams with substantially the same withholdings and redactions under the same exemptions it asserted in its first response.

In his appeal letter, Mr. Adams informed the FBI of the results of his independent research, stating that he could not find any evidence that anyone who was associated with the Reynolds investigation is still alive, and that he determined specific dates of death for twelve individuals identified in press reports and in the Social Security Death Index. Adams Decl. ¶¶ 17-19. When the FBI reprocessed Mr. Adams’ request, it released previously withheld

information about these twelve individuals, but it did not alter its decision to withhold information about individuals other than the twelve named in Mr. Adams' appeal. Id. ¶ 19.

The FBI and USMS have filed Vaughn indices purporting to show their respective withholdings are justified under the exemptions they claim. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). The Department did not state in those declarations what steps it took, if any, to determine whether the individuals whose names it withheld are still alive. See FBI Decl.; Doc. No. 13, Declaration of Florastine P. Graham of the USMS ("USMS Decl."). With respect to some of the names that were released, the FBI stated in correspondence that it had released names where it "could determine [those individuals] were deceased or over 100 years of age." FBI Decl., Exh. L. However, neither the correspondence nor the Department's declarations reveal what steps, if any, the agencies took to determine those individuals' birth dates or that they were dead.

The Individuals Associated with Agent Reynolds

The Vaughn index prepared by the FBI states that the individuals whose names have been redacted under 7(C) fall within eight categories, which include sources, potential witnesses, suspects, and law enforcement personnel. FBI Decl. ¶ 25. For each category of individuals, the index describes the privacy interests that the Department asserts would be invaded by the release of identifying information. The declaration prepared by the United States Marshals Service states that the names withheld under Exemption 7(C) are former law enforcement personnel and other third parties involved in the 1929 investigation. USMS Decl. ¶ 12.

It is extremely unlikely that these individuals, who were contemporaries of Reynolds in 1929, are still alive. The murder occurred seventy-three years ago. All the individuals involved

were undoubtedly adults when they were associated with Agent Reynolds, and were probably 25 to 30 years old in 1929, if not considerably older. If these individuals were alive today, they would be 98 to 100 years old. These ages far exceed modern average life expectancy, which is 78 years old. *See* Exhibit 2, United States Life Tables 1999, National vital statistics reports, vol. 50, no.6 at 2 (National Center for Health Statistics 2002).² The average life expectancies for people born around 1900 and alive in 1929 was substantially lower, between 67 and 68 years. *Id.* at 29. Thus, if these individuals had an average life span, they died three decades ago, in the late 1960's and early 1970's.

Actuarial data also indicate that the chance that anyone named in these records is still alive is extremely small. The United States government's official statistics on longevity indicate that the chance of an adult who was 25 years old in 1929 still being alive today is 0.7%, less than one percent. *Id.* at 25. Even more dramatically, the chances that a 30-year old alive in 1929 is alive today is 0.007 % — seven-thousandths of one percent. *Id.*³

Research that Mr. Adams conducted independently reinforces the conclusion that no one associated with Reynolds is still alive. Adams Decl. ¶¶ 17-18. Mr. Adams identified several

² The life tables report prepared by the National Center for Health Statistics of the Center for Disease Control is an official Federal document that is self-authenticating under Federal Rule of Evidence 902 and “is fully admissible as evidence in Federal court.” Exhibit 2, National Center for Health Statistics, 1999 United States Life Tables at 40.

³ These percentages were calculated in accordance with the description of the meaning of survivorship rates set forth by the National Center for Health Statistics in Exhibit 2, 1999 Life Tables at 2-4. Using survivorship rates for 1929-31, the number of individuals in a population of 100,000 expected to be alive at age 100 (the oldest age for which survivor rates are predicted) is divided by the number of individuals expected to be alive at age 25 (in 1929-31), thus determining what percentage of the individuals who were alive in 1929 at age 25 are expected to be alive at age 100.

individuals whose names the Department had withheld from newspaper articles published at the time of the Reynolds investigation. Id. Mr. Adams found birth dates for eleven of the twelve individuals, the youngest of which was born 98 years ago. Id. Moreover, Mr. Adams confirmed that twelve of these individuals are dead by consulting the Social Security Death Index and determining their death dates. Id. Indeed all but two of these individuals, one of whom lived to the ripe age of 103, died before 1983, two decades ago. Id. Mr. Adams could not find any indication that anyone associated with Reynolds is still alive. Id.

Withholdings under Exemption 3

The FBI also redacted portions of two pages under FOIA Exemption 3. 5 U.S.C. § 552(b)(3). That Exemption provides that the government is not required to release under FOIA materials “specifically exempted from disclosure by statute” The agency asserts that the materials it has withheld under Exemption 3 are specifically exempt from disclosure under Rule 6(e) of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 6(e). That rule protects the secrecy of federal grand jury proceedings. Id.

ARGUMENT

The Department’s claims that it may withhold the challenged material under Exemptions 3 and 7(C) are subject to de novo review. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989) (citing 5 U.S.C. § 552 (a)(4)(B)). The FOIA statute expressly gives the agency the burden of sustaining its decision to withhold information under a FOIA exemption. Id. (citing 5 U.S.C. 552 (a)(4)(B)); see also Summers v. Department of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (“When an agency declines to produce a requested document, the agency bears the burden before the trial court of proving the

applicability of claimed statutory exemptions.”). To carry this burden, an agency must submit a Vaughn index to explain why it has withheld information. Summers, 140 F.3d at 1080. If the Vaughn index submitted by the agency does not contain information sufficient for the court to conclude the agency has met its burden, the requester is entitled to summary judgment. Public Citizen Health Research Group v. Food & Drug Admin., 185 F.3d 898, 906 (D.C. Cir. 1999) (requester entitled to summary judgment where affidavits contain only conclusory assertions).

The only issue in this case is whether the Department has met its burden of demonstrating that the materials it withheld fall within Exemptions 3 and 7(C) as it claims. The Department has not met this burden with respect to Exemption 7(C) because it has asserted categorical privacy interests that apply only if the individuals whose privacy would be affected are alive, and the Department has produced no evidence that the individuals named in this 73-year old investigation are still alive. The Department has not shown that Exemption 3 applies because that Exemption protects only information that is required to be kept secret by statute, and the information withheld is not information required to be kept secret under Federal Rule of Criminal Procedure 6(e).

I. THE DEPARTMENT’S EXEMPTION 7(C) CLAIMS FAIL BECAUSE IT HAS NO EVIDENCE THAT THE PERSONS WHOSE NAMES ARE BEING WITHHELD ARE, OR ARE LIKELY TO BE, ALIVE

An agency’s claim that disclosure of information would constitute “an unwarranted invasion of personal privacy” under Exemption 7(C), 5 U.S.C. § 552 (b)(7)(C), is subject to a balancing test, under which the agency must “balance the type of privacy interest at stake against the public interest in release of the type of information involved.” Schrecker v. Department of Justice; 254 F.3d 162, 166 (D.C. Cir. 2001) (citing Reporters Comm., 489 U.S. 749). In

reviewing a claim that an agency has improperly withheld information under 7(C), the district court conducts its own de novo balancing of these interests. Lesar v. Department of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980).

The murder of Agent Reynolds has obvious historical importance and interest. The specific information the Department withheld — the identifying information about individuals who figure prominently in the events connected with Reynolds’ death — is necessary for Mr. Adams to adequately research this historical event and convey it to the public. Adams Decl. ¶ 21. Without the names of the individuals most closely connected to Reynolds and his murder investigation, it will be difficult for Mr. Adams to follow the course of the investigation and establish what actually happened to Agent Reynolds. Id. This, in turn, will make it difficult for Mr. Adams to make a documentary or write a book that has reasonable factual support, or to relate this historical course of events to the public in a complete and coherent way. Id. Further, although the Department categorized many of the individuals whose names it withheld as Reynolds’ colleagues or other employees of the state or federal government, many of these individuals appear in portions of the records that discuss Mr. Reynolds’ personal life. While all of the names of individuals associated with Reynolds are part of the narrative of his life and death, the names of people associated with Reynolds’ personal life are particularly important because Mr. Adams’ theory is that the solution to Reynolds’ mysterious death lies in his personal, not his professional, activities. Id. ¶¶ 13-16.

Three considerations show that the Department has not asserted privacy interests that could justify the Exemption 7(C) claims it asserts. First, the Department has based its claims on “categorical” privacy interests that are only valid if the persons whose names are at issue are

alive. The Department itself impliedly concedes that these privacy interests do not apply if the persons mentioned in the records are no longer alive because it routinely releases names if it confirms that the individual is dead. Moreover, the categories themselves, by their own terms, do not apply to individuals who are not living. The Department has not asserted the existence of any other privacy interests that justify withholding the names of individuals who are not alive.

Second, the Department has not offered any evidence that any of the individuals whose names have been withheld are alive. Consequently, the agency has failed to satisfy the burden of showing that Exemption 7(C) applies to these names. Moreover, the evidence produced by plaintiff shows that it is unlikely that any one associated with Agent Reynolds is alive today. In cases involving older records, this Circuit has required the agency to demonstrate that it has taken reasonable steps to determine whether an individual is alive before withholding names under Exemption 7(C). See Schrecker, 254 F.3d at 166-67. Consequently, when the records are so old that it is unlikely that the individuals are still alive, an agency should not be permitted to withhold names based on an unsupported assumption that persons mentioned in the records are still alive. See Hall v. Department of Justice, 26 F. Supp.2d 78, 81-82 (D.D.C. 1998) (Robertson, J.) (presuming 7(C) exemptions are justified only if individuals are still alive).

Finally, although the Department's declarations are silent on this issue, its actions imply that it does not withhold names under Exemption 7(C) if it has confirmed that the individual was born over 100 years ago. This presumption demonstrates that the agency recognizes that a cutoff should be applied when withholding names in historical records. However, the Department's choice of 100 years is arbitrary and has no factual relationship to how long people are actually likely to live. A rational cutoff, one tied to actual life expectancy and the probability anyone is

still living, would require disclosure thirty years earlier. Because the records at issue here concern persons who were adults 73 years ago, any reasonable cutoff has been met. Therefore the Department should be ordered to release the information it has withheld under Exemption 7(C).

A. THE PRIVACY INTERESTS THAT ARE THE BASIS FOR THE DEPARTMENT'S CLAIMS APPLY ONLY IF THE PERSONS NAMED ARE STILL ALIVE

The Department's declaration pertaining to the FBI's redactions describes the privacy interests it claims are at stake using eight different categories of individuals with the same purported privacy interests. FBI Decl. ¶¶ 25, 31-42. The categories of individuals are: 1) FBI special agents and support personnel; 2) third parties who provided information; 3) third parties merely mentioned; 4) persons of investigative interest to the FBI or local authorities; 5) local law enforcement personnel; 6) non-FBI federal law enforcement personnel; 7) state government personnel; and 8) a postal service employee. *Id.* The declaration submitted by the Marshals Service shows that that agency applied a similar categorical approach in redacting names from these records. USMS Decl. ¶¶ 10-11.⁴

The case law recognizes that persons whose names appear in law enforcement records in these contexts generally have a personal privacy interest in not having their association with the investigation disclosed to the public if the person is alive. See, e.g., Safecard Serv., Inc. v. Securities & Exchange Comm'n, 926 F.2d 1197 (D.C. Cir. 1991) (applying categorical exemption to identities of private third parties mentioned in law enforcement records); Senate of

⁴ The USMS describes its claims using two categories, one for government personnel and a second for other third parties, but the privacy interests are substantially identical to those described in the FBI declaration. *Id.*

Puerto Rico v. Department of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987) (citing cases recognizing privacy interest for informants, witnesses, agents, and suspects). Based on this general privacy interest, courts have approved of categorical decisions to withhold information under Exemption 7(C) where “the case fits into a genus in which the balance [of privacy interests versus public interest in disclosure] characteristically tips in one direction.” Reporters Comm., 489 U.S. at 775; The Nation Magazine v. United States Customs Serv., 71 F.3d 885, 893 (D.C. Cir. 1995).

However, categorical rules may be applied only where “the range of circumstances included in the category ‘characteristically support[s] an inference’ that the statutory requirements for exemption are satisfied.” The Nation Magazine, 71 F.3d at 893 (citing Department of Justice v. Landano, 508 U.S. 165, 176-80 (1993)). Applying this rule, this Circuit held in The Nation that information about Ross Perot contained in Customs Service records could not be withheld under a categorical rule exempting information about “private individuals” under Exemption 7(C) because the circumstances were different than for most private individuals mentioned in government records, and therefore did not support the usual inference that the category applied. Id. at 894-96. That is, the fact that government records contained information about a private individual, Ross Perot, did not support the inference that release of the information would cause an unwarranted invasion of privacy merely because the subject of that information was a private individual. See id. at 894-95 (“the mere fact that records pertain to an individual’s activities does not necessarily qualify them for exemption”); see also Armstrong v. Executive Office of the President, 97 F.3d 575, 582 (D.C. Cir. 1996) (holding agency had not articulated a basis for a categorical rule for exempting information about all low-

level FBI agents “no matter what the context.”); Kimberlin v. Department of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998) (rejecting categorical exemption for all Office of Professional Responsibility files under Exemption 7(C)).

If the person identified in records is not alive, the privacy interests that support categorically redacting names under Exemption 7(C) are not present. This Circuit has implicitly recognized this in a series of cases rejecting Exemption 7(C) claims. See Schrecker, 254 F.3d at 166-67; Campbell v. Department of Justice, 164 F.3d 20, 33-34 (D.C. Cir. 1999), Summers, 140 F.3d at 1084-85 (Silberman, C.J., concurring); id. at 1085 (Williams, J., concurring). In Schrecker, a case involving a FOIA request for FBI records from the 1940's and 50's, the Court refused to affirm summary judgment for the agency on withholdings it had made under Exemption 7(C) because the agency had not investigated and documented whether the subjects of those withholdings were still alive, and therefore had not properly balanced the privacy and public interests. Schrecker, 254 F.3d at 166-67. In so ruling, the Court impliedly held that disclosure would not result in an unwarranted invasion of personal privacy if the persons identified are dead. Id. Campbell and Summers similarly involved FOIA requests for decades-old records, in which the judges opined that the agency had failed to show Exemption 7(C) applied because it had not determined whether the individuals whose names were withheld were alive or dead. Campbell, 164 F.3d at 33-34 (agency affidavits insufficient for court to “account for the death of a person on whose behalf the FBI invokes exemption 7(C)”); Summers, 140 F.3d at 1084-85 (Silberman, C.J., concurring) (“targets of the FBI’s dirt-gathering activities may have an overwhelming privacy interest. The FBI, however, has made no reasonable effort to determine whether these targets are now dead or alive.”); id. at 1085 (Williams, J., concurring)

(“one of the obstacles to granting the government’s motion for summary judgment may be that its affidavits are obscure about how much effort it makes to find out if the persons whose privacy it invokes are alive or dead.”); see also Hall, 26 F. Supp.2d at 81-82 (Robertson, J.) (presuming 7(C) exemptions are justified only if individuals are still alive) (citing Summers, 140 F.3d at 1084). Thus privacy interests that government agents, targets of government investigations, and private third parties possess in not having their names disclosed in investigatory files do not justify withholding information if the person is no longer alive.

The Department implicitly acknowledges that the categories it has advanced do not apply to individuals who are no longer alive. First, the FBI stated in a letter to Mr. Adams that it had released the names of anyone it knew was dead or had been born more than 100 years ago. FBI Decl., Exh. L; Schrecker, 254 F.3d at 166 (noting agency stated in its affidavit that it had presumed an individual’s death after 100 years and released those names). The agency has not asserted at any point that Exemption 7(C) supports withholding the names of persons who are confirmed dead or presumed dead under its 100-year cutoff.

Second, by their own terms, the agency’s categories apply only to individuals who are still living. For example, both the FBI and the USMS have withheld the names of their agents. FBI Decl. ¶ 33; USMS Decl. ¶ 12. The Department states that withholding the names of FBI agents and the field offices where they worked is necessary to preserve the agents’ effectiveness in future investigations. FBI Decl. ¶ 33. It is highly doubtful that a person who was an FBI agent in 1929, even if he or she were living today, is still employed as an FBI agent and conducting investigations. More to the point, the agency’s interest in preserving that person’s effectiveness as an agent certainly ended when that person died. This interest therefore does not

apply to any FBI agents who are no longer living, and provides no justification for withholding their names.

The Department similarly asserts that revealing FBI agents' identities would subject them to harassment, retaliation, unauthorized inquiries, and "could rekindle animosity toward that Agent." Id. These reasons for protecting all FBI agents as a category sound compelling until one remembers that the investigation the records discuss occurred more than seven decades ago, and the dangers of which the agency warns cannot affect someone who is dead.

In defending the other seven categories described in the FBI declaration, the Department similarly identifies interests — avoiding embarrassment, preventing unanticipated public attention or inquiries, compromising future agency access to a source — that apply only to individuals who are still alive. Id. ¶¶ 34-42. Thus, under case law and the Department's own characterization, the categorical privacy interests the agency asserts here assume that the persons whose names have been withheld are still alive. The privacy interests described in the USMS declaration are substantially the same as in the FBI declaration, and therefore also do not apply to individuals who are no longer alive. USMS Decl. ¶¶ 10-12.

The Department has not asserted any other privacy interest, categorical or otherwise, that would apply if the individuals are no longer alive. The Court of Appeals for this Circuit has stated that privacy interests are not necessarily entirely extinguished at death. Schrecker, 254 F.3d at 166. However, it has also emphasized that death must be taken into account in determining whether there is a privacy interest that warrants withholding the information, id. at 166-67, and has never endorsed withholding information on deceased individuals based on a categorical claim that would apply independent of the context in which an individual is

identified. To the contrary, the Circuit has recognized that privacy may justify withholding information about a deceased individual in only one case, Accuracy in Media v. National Park Serv., 194 F.3d 120 (D.C. Cir. 1999), and suggested it might do so in a second case, New York Times Co. v. National Aeronautics & Space Admin., 920 F.2d 1002 (D.C. Cir. 1990) (en banc). Both of those cases involved a particular kind of privacy interest: preventing the release of graphic details of a person's violent death, shortly after that death, to protect the deceased person's dignity and spare the surviving family the pain of reliving their relative's traumatic death. See Accuracy in Media, 194 F.3d at 122-23; New York Times Co., 920 F.2d at 1005-06. The circumstances are dramatically different here: the death was three-fourths of a century ago and the information withheld is in no way graphic. Moreover, the claimed privacy interests discussed in these two cases was based on the particular information disclosed about specific individuals, in contrast to the categorical claims that the Department has invoked to withhold names in the records at issue here. Accordingly, these two cases illustrate the extreme circumstances in which privacy interests may warrant withholding information about a deceased individual, and do not provide a basis for applying Exemption 7(C) where, as here, there is no showing that the information is graphic or involves recent events.

B. THERE IS NO EVIDENCE THAT THE PERSONS WHOSE NAMES HAVE BEEN WITHHELD ARE STILL ALIVE.

Although the categorical privacy interests that the Department invokes apply only if a person is living, the agency has not offered any evidence to demonstrate that the names withheld identify individuals who are living. Indeed, neither of the Department's declarations discuss whether the Department considered this issue. FBI Decl.; USMS Decl. Where, as here, it is

unlikely that any of the individuals about whom information has been withheld are still alive, the Department may not carry its burden under Exemption 7(C) without such evidence.

Three considerations demonstrate that the Department's failure to show that the individuals whose names have been withheld are alive defeats its Exemption 7(C) claim here.

First, the agency, by statute, has the burden of proving that Exemption 7(C) applies. 5 U.S.C. § 552 (a)(4)(B). Whether the persons whose names have been withheld are living is an essential factual element of the agency's Exemption 7(C) claim, see Schrecker, 254 F.3d at 166-67, and the agency has the burden of proving this element. In cases that involve relatively recent investigations, an agency may be justified in assuming that government officials, targets, or witnesses are still living. However, such an assumption is not defensible where, as in this case, the records concern an event that occurred several generations ago. See, e.g., Summers, 140 F.3d at 1084-85.

Judge Robertson recognized that the burden of proving that an individual is alive is properly placed on the agency in Hall v. Department of Justice, 26 F. Supp.2d 78. In Hall, the FBI asserted that Exemption 7(C) justified withholding the names of agents, sources, and other individuals mentioned in historical documents concerning individuals investigated by the agency in the 1940s and 1950s. To determine whether the individuals whose names had been withheld are still alive, Judge Robertson established a rebuttable presumption that an individual was deceased if 50 years have passed since the date of the document or the event that it describes, whichever is earlier. 26 F. Supp. at 81-82; see also Hall v. Department of Justice, 63 F. Supp.2d 14 (D.D.C. 1999) (denying FBI's motion to alter ruling establishing 50-year rebuttable

presumption). Under this 50-year rule, the individuals named in the files at issue here would be presumed dead unless the FBI rebuts the presumption.

Second, even if the Department does not have the initial burden of production on this issue, it still has the ultimate burden of proof and must overcome plaintiff's evidence that these individuals are not alive. Mr. Adams' research indicating that twelve of twelve identifiable individuals associated with Reynolds are now dead shows that it is unlikely that the individuals discussed in the 1929 investigation records are alive. Adams Decl. ¶¶ 17-18. His research is reinforced by the government's own statistics on longevity, which indicate that the chances that an individual who was 25 in 1929 is alive today is less than one percent, and for a 30-year old is less than one one-hundredth of a percent. Exhibit 2, National Center for Health Statistics, 1999 United States Life Tables at 25. Thus the preponderance of the evidence — and then some — supports the conclusion no one is still alive. Because the Department has cited no contrary evidence, it has not met its burden of proving that it is more likely than not that all of the individuals whose names have been redacted are still alive.

The statistical improbability that the individuals are still living seventy-three years after Reynolds' death, and Mr. Adams' corroborative research, Adams Decl. ¶¶ 17-18, certainly preclude the Department from relying on an exemption claim founded on an unsubstantiated assumption. To the contrary, the evidence shows that it is appropriate to presume that the individuals named are dead and require that the names be released because the Department has produced no persuasive evidence to the contrary.

Third, Circuit precedent confirms that an agency may not simply assume that the individuals whose names are withheld under Exemption 7(C) are still alive when this is

uncertain. In Schrecker, the Court of Appeals held the privacy interests asserted by the agency were inadequate because of its uncertainty about whether the purported holders of those privacy interests were still alive. 254 F.3d at 166-67. The Court refused to assume that the individuals were alive or even accept the agency's unsworn representations to this effect. Instead, the Court directed the FBI to both take reasonable steps to determine whether the individuals were still alive and document those steps in its affidavit. Id.; see also Campbell, 164 F.3d at 33-34; Summers, 140 F.3d at 1084-85; id. at 1085.⁵ Thus, where there is a reasonable possibility that some individuals are no longer alive, this Circuit has placed the burden on the agency to verify that the privacy interests it asserts are supported by facts showing whether the individuals are still alive.

In the three cases above in which the Court was unwilling to assume that individuals whose names were withheld were alive, the records were as recent as 14 to 30 years old. Schrecker, 254 F.3d at 162 (FOIA request in 1988 for 1940's and 50's FBI records); Campbell, 164 F.3d at 20 (1988 FOIA request for 1960's FBI records); Summers, 140 F.3d at 1070, (1986 FOIA request for political files of FBI Director Hoover, whose tenure ended in 1972). In contrast, the records here are at least seventy years old, and it is not merely uncertain, but extremely unlikely, that any of the individuals on whose behalf the agency invokes Exemption

⁵This Circuit has not required the agency to undertake such an investigation in cases that have not involved old records. See, e.g., King v. Department of Justice, 830 F.2d 210, 234 n.174 (D.C. Cir. 1987) (upholding agency's application of 7(C) and noting FBI's uncontroverted representation it had withheld information to protect only individuals who were living); Lesar v. Department of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980) (protecting names of FBI personnel was warranted in light of the "contemporary character" of the information); id. at 488 (identity of those who cooperated in FBI investigation of Dr. Martin Luther King warrant protection under 7(C) "at this time.").

7(C) are still alive. To satisfy its burden of proof here, the agency must overcome the evidence showing that it is unlikely that these individuals are still alive.

Imposing a burden on the Department to show that the individuals here are still alive in this case is also supported by FOIA cases that hold that a requester may expand the agency's duty to search for records under the FOIA by presenting a "sufficient predicate" for believing the records exist. Campbell, 164 F.3d at 28-29 ("the proper inquiry is whether the requesting party has established a sufficient predicate to justify searching for a particular record") (quoting Meeropol v. Meese, 790 F.2d 942, 953 (D.C. Cir. 1986)). Similarly, in a case involving recent records, an agency may be permitted to assume that the individuals named in the records are alive because the age of the records would not establish a "sufficient predicate" for questioning this assumption. The age of the records in this case, however, does establish a sufficient predicate for presuming individuals involved in a 1929 investigation are no longer alive, making it reasonable to require that Department to demonstrate that individuals are alive to claim their privacy interests will be invaded.

The Department has offered no evidence that the individuals whose names it has withheld 73 years after Agent Reynolds' death are still alive. Indeed, the Department's declarations do not mention the issue at all. Accordingly, the Department has failed to meet its burden of showing Exemption 7(C) applies to any of the redactions it made under that Exemption.

C. THE DEPARTMENT'S PRACTICE OF WITHHOLDING NAMES UNLESS THERE IS PROOF AN INDIVIDUAL IS DEAD OR WOULD BE 100 YEARS OLD HAS NO BASIS

In a letter to Mr. Adams, the FBI stated that it released names of those it knew were dead and that it knew had birth dates more than 100 years ago. FBI Decl., Exh. L. It is not clear

whether the Department relies on this 100-year cutoff here, because it makes no mention of it in either of its declarations. Id.; USMS Decl. Moreover, it is not clear whether the Department made any effort to determine birth dates or find evidence of death, or if it instead took “death into account only if the fact has happened to swim into [its] line of vision.” Summers, 140 F.3d at 1085 (Williams, J., concurring). However, if the Department were to rely on a 100-year cutoff to justify its actions here, its claim would be fatally defective because it is not supported by the Department’s Vaughn indices, the Department has provided no evidence to support such a cutoff, and the Department has provided no evidence showing how it applied such a cutoff.

Even if the Department were to cure these defects, a practice of releasing names in these seventy-three year old records only if it was shown that the individual was born more than 100 years ago would be inadequate and unreasonable for two reasons.

First, the 100-year period suggested in the FBI’s letter has no basis in reason or fact. The chance that someone who was an adult in 1929 lived to be a hundred is minute. See above at 6. A evidentiary presumption such as this must be consistent with the facts concerning how long people lived during this period. That evidence indicates that the appropriate period would be at least two decades shorter than the 100 years identified in the FBI’s letter.

This Court need not decide an exact cutoff, however, because any cutoff shorter than 100 years would be met in this case — anyone who was 25 years old in 1929 would be nearly 100 now — so any cutoff more reasonable than the one the agency has used would be satisfied. We note, for example, that according to government-published life tables, after 50 years (in 1979) the chance that an individual who was 25 in 1929 was still alive was only 35 percent. Exhibit 2,

Table 2, National Center for Health Statistics, 1999 United States Life Tables at 25.⁶ See also Hall, 26 F. Supp.2d at 81-82 (in case involving records from 1940's and 50's, applying presumption that names contained in any record older than 50 years does not warrant 7(C) exemption unless agency rebuts the presumption)

Second, it is irrational to limit a presumption based on the passage of time to those individuals whose birth dates the agency confirmed, and indefinitely withhold the names of other individuals whose birth dates are not available. Independent of the issue of the length of the cutoff period is the issue of whether proof of a person's birth date is required. Under the practice described in the FBI's letter, the agency would assume that a person is still alive merely because the agency does not have proof of the person's date of birth or death, an assumption that has no basis in fact and leads to absurd results.

For example, the birth dates that are available for individuals named in the Reynolds file indicate that the overwhelming majority of persons associated with Reynolds were, like Reynolds himself, born before 1900. Adams Decl. ¶¶ 17-18. Like the individuals whose birth dates are known, the other individuals named in the file almost certainly were adults who were at least 25 to 30 years old in 1929. The fact that the FBI does not know a particular individual's birth date does not indicate that this individual lived longer or was born later than these other individuals whose birth dates have been identified by Mr. Adams. Moreover, if a 100-year

⁶ This percentage was calculated by dividing the number of individuals out of 100,000 who had survived to age 25 in 1929 into the number of individuals expected to survive to age 75 (age 25 plus fifty years), based on 1929-31 survival rates contained in Table 10. Exhibit 2, National Center for Health Statistics, 1999 Life Tables at 2-4, 25.

cutoff is applied only to individuals whose birth date is known, the names of these individuals whose birth date cannot be verified a century later would never be released.

We also call the court's attention to federal standards outside the FOIA context that recognize it is appropriate to presume that confidential information in government records should be released after a few decades, at least in the absence of a special showing that the original reasons for confidentiality have not been extinguished by the passage of time. For example, classified historical documents are subject to automatic declassification when they become 25 years old. Exec. Order No. 12,958, § 3.4, 3 C.F.R. 333 (1995). Federal law provides that statutory and other restrictions on historical records transferred to the National Archives should ordinarily expire after 30 years. 44 U.S.C. § 2108(a). Congress, the Archivist and the Census Bureau have concluded that surveys from the decennial census, including the detailed personal information that is collected for the census, can be released to the public after 72 years. See id. § 2108(b) and Correspondence Between the Director of the Census and the Archivist of the United States available at http://www.archives.gov/about_us/basiclaws_and_authorities/1952.html. Thus, the government has made public names and extensive personal information from the Census taken in 1930, a year after Reynolds was killed. See <http://www.census.gov/pubinfo/www/1930facts.html>.

The Department's position that privacy should be presumed despite the age of these records cannot be justified. Because the Department has not provided any evidence to show that individuals identified in this 73-year old investigation are still alive, the Court should reject its

Exemption 7(C) claims and order it to release the information withheld pursuant to this Exemption.⁷

II. THE AGENCY’S APPLICATION OF EXEMPTION 3 IS NOT JUSTIFIED BECAUSE THE RECORDS IT WITHHELD ARE NOT ACTUALLY OF GRAND JURY PROCEEDINGS REQUIRED TO BE KEPT SECRET

The FBI redacted three lines from records it released to Mr. Adams under Exemption 3. FBI Decl., Exh. M, vol. 3 at 427-28. Exemption 3 provides that an agency is not required to release, under FOIA, materials “specifically exempted from disclosure by statute . . . provided that such statute [requires withholding] in such a manner as to leave no discretion on the issue.” 5 U.S.C. § 552 (b)(3). The statute that the Department claims provides the basis for the redaction is Federal Rule of Criminal Procedure 6(e), which prohibits the disclosure of matters that occur before a federal grand jury. FED. R. CRIM. P. 6(e). The Department stated in its declaration that Exemption 3 and Rule 6(e) apply because the redacted material reveals the name of a party who was being investigated by a federal grand jury and to reveal this information “would reveal the inner workings of the [federal grand jury] . . .” FBI Decl. ¶ 30.

⁷We do not believe the court will need to reach the issue, but if it does find the agency has asserted viable privacy interests for the individuals on whose behalf it withheld information, the agency also has not properly assessed the public interest at stake or properly balanced it against the privacy interests at stake. See Schrecker, 254 F.3d at 166. For every redaction it made under Exemption 7(C), the agency stated there was no public interest whatsoever in releasing that information. To the contrary, the murder investigation of the only unsolved FBI agent in the entire history of the Bureau, is of singular historical interest and importance, as the prominence the FBI gives this event on its website attests. See FBI “Hall of Honor,” available at <http://www.fbi.gov/libref/hallhonor/reynolds.htm>. Further, as stated above, the particular pieces of information withheld by the agency — the identities of many of the key characters in this fascinating story — are vital to the plaintiff’s ability to discover and confirm what actually happened, and create from this a concrete and comprehensible narrative. See Adams Decl. ¶¶ 5-16, 21-22. Because the Department denied that Mr. Adams’ FOIA request involves any public interest, it failed to properly identify and weigh the public interest at stake.

This claim should be rejected because the context in which the information appears indicates that the Department's description is inaccurate. Indeed, the three lines the FBI redacted do not appear to be direct information about a grand jury proceeding at all.

The information at issue is three lines that appear in a report prepared by FBI Agent Wren regarding his investigations in April and May 1931. Id., Exh. M, vol. 3 at 416. In part of the report, Agent Wren recounts a conversation with a "prominent attorney" in Phoenix whose identity the agent kept secret by referring to the attorney only as "Mr. B." Id. at 426. The redaction appears to be Mr. B's third-hand account of what he believed occurred at the grand jury, not a report by any government official concerning the actual proceedings. The relevant portion of the report reads as follows:

Mr. B further stated that he knew absolutely beyond a reasonable doubt that the Federal Grand Jury sitting at Phoenix, Ariz., was postponed from July 11, 1929, to January 9, 1930; that [Assistant U.S. Attorney] Guy Axline was in constant fear that he would be indicted for his irregularities while he, Axline, was Assistant U.S. Attorney; that Paul Reynolds was making an investigation of the matter shortly before his death. Further, that Mr. John C. Gung'l, U.S. Attorney, told the Federal Judge that the Axline matter would not be presented, and the Court ordered the Grand Jury to convene on January 2 to January 9, 1930; that the Court said that

[redaction of approximately three lines]

The Federal Judge is a close friend of former Asst. U.S. Attorney Guy Axline.

Id. at 427-28.

It appears from the above passage that the information the FBI redacted was a statement by Mr. B, a private attorney about what a federal judge stated either during or about grand jury proceedings. This kind of third- or fourth-hand hearsay is too attenuated from the internal

proceedings of the grand jury to justify withholding the information under Exemption 3. As this Circuit stated in Senate of Puerto Rico:

The touchstone is whether disclosure would ‘tend to reveal some secret aspect of the grand jury’s investigation’ such matters as the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like. The disclosure of information . . . which can be revealed in such a manner that its revelation would not elucidate the inner workings of the grand jury is not prohibited.

823 F.2d at 582 (quotations and citations omitted). Under Senate of Puerto Rico, the agency must establish a “nexus between disclosure and revelation of a protected aspect of the grand jury’s investigation.” Id. at 584. The third-hand hearsay statement here falls far short of that standard. Even if it did not, there may be no continued interest in protecting third-hand information about a grand jury that was convened in the early 1930’s. See, e.g., In re American Historical Ass’n, 49 F. Supp.2d 274 (S.D.N.Y. 1999) (historical interest and passage of time justified ordering disclosure of records related to investigation of Alger Hiss under the “special circumstances” exception to rule 6(e)).

Because the Department’s declaration fails to establish that the portions of the records it redacted under Exemption 3 are in fact matters that occurred before a grand jury and therefore prohibited from being disclosed under rule 6(e), the plaintiff is entitled to summary judgment on this claim as well.

CONCLUSION

This Court should declare that the Department's claims under Exemptions 3 and 7(C) are unfounded, and order the Department to release the records without redacting this information, within twenty days from the date of this Court's ruling.

Respectfully submitted,

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November 1, 2002

* Public Citizen Litigation Group wishes to acknowledge the work of Marka Peterson, candidate for the bar of Texas and Abraham Fuchsberg Fellow, in researching and writing this motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)
DANIEL A. ADAMS,)
)
Plaintiff,)
) Civil Action No. 02-320 (RWR)
v.)
)
U. S. DEPARTMENT OF JUSTICE,)
)
Defendant.)
_____)

ORDER

Upon consideration of Plaintiff's Motion For Summary Judgment, defendant's response thereto, and the entire record in this case, it is this ___ day of _____.

ORDERED that Plaintiff's motion is granted; and it is further

ORDERED that, within thirty days from the date of this Order, the Department of Justice shall release to Plaintiff copies of the records identified in response to Plaintiffs' FOIA request concerning the investigation of the death of Paul Reynolds that reveal the information that the Department has previously redacted from those records based on 5 U.S.C. § 552(b)(7)(C); and it is further

ORDERED that, within thirty days from the date of this Order, the Department of Justice shall release to Plaintiff the paragraph that the Department has redacted from the records concerning the investigation of the death of Paul Reynolds pursuant to 5 U.S.C. § 552(b)(3) and Federal Rule of Criminal Procedure 6(e).

JUDGE RICHARD W. ROBERTS
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

I, Michael E. Tankersley, hereby certify that on November 1, 2002, I caused copies of Plaintiff's Motion For Summary Judgment to be served by delivering an electronic copy to the CM/ECF system for the District Court for the District of Columbia.

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