

Sixth Circuit Panel Allows FOIA Request, Urges En Banc Consideration

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Last week, in a per curiam opinion in [*Detroit Free Press v. U.S. Department of Justice*](#), the Sixth Circuit affirmed a decision granting the *Free Press*'s request for the mug shots of Detroit police officers facing federal charges. Although the case did not touch on the underlying charges against the officers, the panel took the unusual step of recommending to the full court that it reconsider the precedent that disposed of the case.

The *Free Press* requested the booking photographs of the eight indicted officers under the **Freedom of Information Act**, but the U.S. Marshals Service denied the request under FOIA's "**Exemption 7(C)**," which allows agencies to refuse requests for law enforcement records that "would constitute an unwarranted invasion of personal privacy." When the *Free Press* sued the DOJ, the district court found itself bound by the Sixth Circuit's 1996 case of *Detroit Free Press v. U.S. Department of Justice* (*Free Press I*), which held that Exemption 7(C) does not apply to booking photographs because the release of booking photographs "in an ongoing criminal proceeding" does not implicate any privacy rights.

Similarly constrained, the panel in *Free Press II* affirmed the district court. However, the panel spent over half of the short opinion delineating the problems with *Free Press I* and urging the Sixth Circuit to reconsider the case's holding en banc. Noting the split in the panel that decided *Free Press I* as well as the opposing interpretations of Exemption 7(C) from the Tenth and Eleventh Circuits, the court in *Free Press II* cited a series of cases expounding the privacy interest Congress intended to protect with Exemption 7(C). Observing the "badge of criminality" that attaches to a person through the release of his booking photograph, the court also reasoned that a person does not forfeit his interest in maintaining control over information merely because it has been made public in another form (e.g., a court appearance), nor because a criminal case remains pending. As always, we will continue to monitor this case as it possibly wends its way to en banc review.

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National Law Review, Volume V, Number 233

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