IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5317

ELLEN W. SCHRECKER,

Plaintiff/Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant/Appellee.

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., ET AL., IN FAVOR OF APPELLANT

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June 24, 2003

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STATEMENT OF INTEREST

Public Citizen, Inc., is a national, nonprofit, nonpartisan consumer membership organization founded in 1971. Among other activities, Public Citizen regularly challenges, on behalf of itself, and on behalf of others it represents, agency actions withholding information on the basis of personal privacy. *See, e.g, Armstrong v. Executive Office of the President*, 97 F.3d 575 (D.C. Cir. 1996). In addition, Public Citizen frequently represents others seeking historically important information contained in agency records of significant age. *See*, *e.g.*, *In re American Historical Ass'n*, 49 F. Supp.2d 274 (S.D.N.Y. 1999) (ordering disclosure of 1948 grand jury testimony of alleged Soviet spy Alger Hiss).

The National Coalition for History ("NCH") is a coalition of more than fifty historical organizations. NCH seeks to serve as the national voice for professional historians by providing a clearinghouse of news and information of interest to history-related professionals, and advocating on behalf of its members on national issues that affect the history profession.

The American Historical Association ("AHA") is a nonprofit membership organization founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies, the collection and preservation of historical documents and artifacts, and the dissemination of historical research. As the largest

historical society in the United States, with approximately 15,000 members, the AHA serves as the umbrella organization for historians working in every period and geographical area.

The American Studies Association is a membership organization founded in 1951 to promote the study of American culture through the encouragement of research, teaching, and publication. The Association's over 5,000 members include teachers and other professionals in the fields of history, literature, religion, art, philosophy, music, science, folklore, ethnic studies, anthropology, material culture, museum studies, and sociology.

The Association for Documentary Editing was created in 1979 to promote documentary-editing by setting standards, encouraging federal funding of documentaries, and promoting federal policies that are in the interests of the documentary editing professions. Its members include more than 450 editors, teachers and archivists.

The Organization of American Historians ("OAH") is a nonprofit membership organization that promotes the study and teaching of American history. OAH publishes the leading scholarly journal in the field, the *Journal of American History*, and its 11,000 members include individual historians working

in a variety of scholarly settings in the U.S. and abroad, and institutions, such as libraries, museums, and historical societies.

The Reporters Committee for Freedom of the Press was created in 1970 to defend news journalists' First Amendment rights. The Reporters' Committee has played a role in virtually every significant press freedom case that has come before the Supreme Court, including cases concerning the personal privacy exemptions to FOIA. *E.g., Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 749 (1989).

The Society of American Historians promotes literary distinction in historical writing. The Society awards several prizes for historical works including the Francis Parkman Prize for the best book in American history and the James Fenimore Cooper Prize for the best historical novel.

The organizations described above, and their respective members, often rely on access to historical government records for their respective professional pursuits. Amici file this brief pursuant to the May 15, 2003 order of the Clerk of Courts granting Public Citizen's Motion for Leave to File Amicus Curiae Brief in Support of Appellant, and the June 24, 2003, Motion requesting permission to for the remaining Amici to join that brief.

BACKGROUND

This case concerns the standards used to determine whether the identity of individuals named in 50-year old agency records may be withheld under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (b)(7)(C), to protect the individuals' personal privacy. The case law recognizes that persons whose names appear in law enforcement records generally have a personal privacy interest in not having their association with the investigation disclosed to the public. *The Nation Magazine v. United States Customs Service*, 71 F.3d 885, 894 (D.C. Cir. 1995). However, this Circuit and the Department of Justice have recognized that these privacy interests are not substantial enough to support withholding the identity of deceased individuals. For example, in a case involving a FOIA request for the records of a 1960s FBI investigation, this Court held the agency could not invoke Exemption 7(C) on behalf of FBI agents whom the agency had not determined were still living. *Campbell v. Department of Justice*, 164 F.3d 20, 33-34 (D.C. Cir. 1999). In accord with these cases, the Department of Justice does not invoke FOIA's privacy exemptions to withhold an individual's identity if it determines that the individual is deceased. JA 35, Fifth Hodes Decl. ¶12.[1]

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[1]The Department's policy and this Circuit's decisions recognize that the personal privacy exemptions may justify withholding information about deceased individuals in circumstances that are not presented here, namely where the records

Nevertheless, the Department presumes that an individual is still alive unless the agency has obtained proof from outside the responsive records showing that the specific individual is dead, or it has discovered, in the responsive records, a birth date indicating the person was born more than 100 years ago. JA 35, Fifth Hodes Decl. ¶11. The agency applies this "100-year rule" in all of its FOIA processing, without regard to the age of the records. *Id.*

This appeal illustrates the problem with the Department's 100-year rule. Appellant Ms. Schrecker submitted a FOIA request for records of two Federal Bureau of Investigation (FBI) investigations that occurred more than 50 years ago, the investigation of Gerhart Eisler in 1947, and the investigation of Clinton Jencks in 1953. The Department redacted from the records information that identified individuals based on FOIA Exemption 7(C), which provides that information in law enforcement records is exempt from disclosure only to the extent that disclosure of such information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

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contain particularly sensitive, often graphic, personal details about the individual's death. *See* Department of Justice, "FOIA Post," *available at http://www.usdoj.gov/oip/foiapost/2003foiapost17.htm* (describing this exception as "survivor privacy"); FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW, 337-38 (May 2002 ed.); *see also Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999).

In the first appeal of this case, *Schrecker v. Dep't of Justice*, 254 F.3d 162, 166-67 (D.C. Cir. 2001) ("*Schrecker I*"), this Court remanded the case because the Department's evidence did not show that it had taken adequate steps to determine whether the individuals on whose behalf it asserted personal privacy interests are still alive. On remand, the Department submitted two new declarations asserting that its decision to research whether the individuals whose privacy rights are being asserted under Exemption 7(C) are still alive is a matter of "administrative discretion." JA 50, Sixth Hodes Decl. ¶14; JA 34, Fifth Hodes Decl. ¶10. The Department stated that it had exercised its discretion to release information about individuals in two instances. First, it would release information about individuals whom it determined, by consulting a limited set of sources, are no longer living.[2] JA 35-36, Fifth Hodes Decl. ¶13. Second, if the individual's birth date was revealed in the responsive pages, and that birth date was more than 100 years ago,

[2]The Department identified three sources that it uses to determine if an individual is deceased: (1) "the FBI's institutional knowledge," which it describes as the processing of prior FOIA requests or internal records; (2) a book listing famous deceased individuals, entitled WHO WAS WHO; and (3) for individuals for whom the responsive pages revealed a social security number, a database known as the Social Security Death Index. JA 34-36, Fifth Hodes Decl. ¶¶ 11-13. Although the agency's declarations state that the FBI may consult all three of these sources, it is not clear whether it consulted these sources for each and every individual identified within the 100-page sample, or whether it selectively checked names at its discretion. *See* JA 49-52, Sixth Hodes Decl. ¶¶ 13-16.

the Department would release information about that person. *Id.* The district court upheld the Department's decision to presume that individuals who did not meet either of these two criteria still have sufficient privacy interests to trigger Exemption 7(C). *Schrecker v. Department of Justice*, 217 F. Supp.2d 29, 37-38 (D.D.C. 2002).[3]

The "100-year rule" described in the Department's declarations does not appear in FBI FOIA regulations or published policy statements, and the agency did not identify any basis for presuming that, absent proof to the contrary, individuals named in 50-year old agency records are still alive. In one of its declarations, the Department stated that it applies its 100-year rule in spite of the fact that "many individuals live to be older than 100," JA 35, Fifth Decl. ¶11, but it gave no account of how, when or why it selected 100 as the appropriate cutoff age. *Id.*; *see also* JA 50, Sixth Hodes Decl. ¶14.

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[3]It is unclear whether the Department determined, according to these methods, that *any* of the individuals named in the 50-year old records are no longer living. The agency indicated that it did not find sufficient proof that any of the 113 individuals identified in the 100 pages selected for a *Vaughn* index are deceased or had a birth date more than 100 years ago. *See* JA 34, 38-46, Fifth Hodes Decl. ¶10 and Exhibit A. For the rest of the 24,000 pages of responsive records, the agency's declarations concerning review of the records refer generally to external sources and the presumptions created by the 100-year rule, but do not state whether or how these criteria were applied to each individual identified on these pages. *See* JA 19-20, Davis Decl. ¶29; Hodes Decl. ¶17.

Actuarial data indicate that it is unlikely that the individuals named in these McCarthy-era records are still alive. Census and other official vita records make it possible to determine what portion of individuals who were adults at the time these records were created are still alive today. *See* Felicitie C. Bell and Michael. L. Miller, LIFE TABLES FOR THE UNITED STATES SOCIAL SECURITY AREA 1900-2100 (Social Security Administration Actuarial Study No. 116, August 2002), *available at http://www.ssa.gov/OACT/NOTES/as116/as116_Foreword.html*. These government statistics on longevity indicate that the chance that an adult male who was 30 years old in 1950 is still alive today is only 28 percent, and for adult females who were 30 years old in 1950, the chance that the individual is still alive is only 47 percent. *Id.* Table 7, Cohort Life Tables for U. S. Social Security Area by Year of Birth and Sex, *available at http://www.ssa.gov/OACT/NOTES/ as116/as116LOT.html#wp1002064.* For individuals who were not this young at the time of the investigations, the chances they are still alive are dramatically lower: Only 4 percent of males who were 40 years old in 1950 are alive today, and only 13 percent of females. *Id.* The chance that any males or females who were 50 years old in 1950 are still alive today is less than one percent. *Id*.[4]

[4]These percentages were calculated in accordance with the description of the meaning of cohort-based life tables set forth by the Office of the Chief Actuary of the Social Security Administration in LIFE TABLES FOR THE UNITED STATES

Life expectancy statistics also confirm that it is unlikely that these individuals lived to be 100. The median life expectancy for males who were 30 and 40 years old in 1950 is about 74 years old. Because an individual who was this age in 1950 would be 83 or 93 today, the statistics indicate that more than half of these individuals died several years ago. The median life expectancy for females who were 30 and 40 in 1950 is approximately 82 years old, so more than half were expected to die before this year. *Id.*[5] Thus, except for individuals who were as young as 25 years old in 1950, most adults alive during the investigations are no longer alive today.

SUMMARY OF ARGUMENT

In this brief, Amici do not seek to supplement Appellant's arguments concerning the burden on the agency to consult external sources to determine

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SOCIAL SECURITY AREA 1900-2100, Actuarial Study No. 116, "Basic Concepts," *available at http://www.ssa.gov/OACT/NOTES/as116/as116_I_II_III.html #wp998366.* Using the cohort life table, the number of individuals in a population of 100,000 expected to be alive at ages 30 to 40 in 1950 (I_x)was divided into the number of individuals expected to be alive at ages 83 and 93 (the respective ages those individuals would be in 2003), thus determining what percentage of the individuals who were 30 and 40 in 1950 are expected to be alive now.

[5] Median life expectancy for individuals still living in 1950 was calculated by determining, using the method described in note 4, the age at which less than 50 percent of the individuals of a particular age who were alive in 1950 would still be living.

whether individuals are alive before asserting privacy exemptions. Instead, Amici address whether names should be disclosed in the "default" circumstances in which additional information has not been uncovered in external sources. The Department's "100-year rule" implicitly imposes two presumptions in such cases, (i) a presumption that persons whose birth dates do not appear in the requested records are still alive; and (ii) a presumption that persons whose birth dates do appear will live to be 100.

The Department's reliance on these unsubstantiated presumptions is contrary to the statute, the law of this case, and other Circuit case law, under which agencies asserting the privacy interests of individuals named in older records have the burden of showing that the individuals on whose behalf they invoke the exemption are still alive. Moreover, even if agencies may rely on reasonable presumptions in place of individualized evidence, the Department's presumptions are not reasonable. Statistics show that individuals named in 50-year agency records are unlikely to be living, and the Department has failed to provide any justification for using its contrary presumption. The Department's 100-year cutoff age also exceeds the age attained by most adults who were alive when these records were created, and the Department should be required to use a cutoff age that reflects a normal life span. The only reasonable presumption here is that the individuals mentioned in

these 50-55-year-old investigations are deceased and, therefore, their privacy interest would not be invaded by disclosure.

ARGUMENT

I. THE AGENCY IMPROPERLY PRESUMES THE INDIVIDUALS IDENTIFIED IN 50-YEAR OLD RECORDS ARE STILL ALIVE.

Under the practice described in the Department's declarations, the Department assumes that a person is still alive merely because it does not have proof of the person's date of birth or death. The absurd results that flow from this assumption demonstrate that it is irrational. For example, only two birth dates were listed in the 100-page *Vaughn* index (the only pages for which the Department revealed whether any dates of birth were listed), and neither birth date was more than 100 years ago. JA 34, 39-46, Fifth Hodes Decl. ¶10 and Exhibit A. Consequently, the Department's Exemption 7(C) claims presume all of the individuals identified on these pages are alive, even though most if not all, of the persons associated with Mr. Eisler and Mr. Jencks in the 1930s through the 1950s were born in the early part of the twentieth century. If the Department is permitted to apply a cutoff date only for those individuals whose birth date is known, the names of these individuals whose birth date cannot be verified will not be released

today, *or any time in the future*, even though it is unlikely that any of these individuals are still alive.

Three considerations show that the Department's presumption is not just irrational, it is also unlawful under the standards of proof established by FOIA. First, the Department, 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 I*, 254 F.3d at 166-67, and the Department 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. *Id.; see also Summers v. Department of Justice,* 140 F.3d 1077, 1084-85 (D.C. Cir. 1998).[6]

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[6]The Department's presumption that information about individuals named in the records is exempt because those individuals are all still alive is, in effect, a categorical application of Exemption 7(C). *See The Nation Magazine*, 71 F.3d at 894. However, an agency may not assume a category of information is exempt unless "the range of circumstances included in the category 'characteristically support[s] an inference' that the statutory requirements for exemption are satisfied." *Id.* at 893 (quoting *Dep't of Justice v. Landano*, 508 U.S. 165, 176-80 (1993)). Thus, while an agency might be permitted to categorically withhold information about individuals under Exemption 7(C) when agency records are

Second, where there is doubt, Circuit case law places the burden on the agency to show that individuals about whom the agency seeks to withhold information under Exemption 7(C) are still alive. In the first appeal of this case, this Court held that the Department may not assume that the individuals whose names it withheld under Exemption 7(C) are still alive because the age of the records involved makes this necessary fact uncertain. *Schrecker I*, 254 F.3d at 166-67; *accord Campbell*, 164 F.3d at 33-34; *Summers*, 140 F.3d at 1084-85; *id.* at 1085. Thus, where there is a reasonable possibility that some individuals are no longer alive, the agency has a burden of verifying that its Exemption claims are supported by facts showing that the individuals whose identities are being withheld in the name of personal privacy are likely to still be alive.

In *Hall v. Dep't of Justice*, 26 F. Supp.2d 78 (D.D.C. 1998), Judge Robertson recognized that the burden of proving that an individual is alive is properly placed on the agency. 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. Judge Robertson established a rebuttable

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recent because it is reasonable to infer that individuals who were alive when the records were created are still alive today, such an inference is not reasonble here because 50 years have passed since the records were created.

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. *Id.* at 81-82; *see also Hall v. Dep't 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 Department rebuts the presumption.

Finally, the government's own statistics on longevity indicate that the chances that a man who was 30 in 1950 is alive today is only 28 percent, and for a 40-year-old man it is 4 percent. *See supra* note 4. Thus, it is more likely than not that the individuals about whom the Department withheld information are no longer 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 the individuals whose names have been redacted are still alive. Moreover, these statistics show that it is appropriate to presume that the individuals named are dead and to require that the names be released because the Department has produced no persuasive evidence to the contrary.[7]

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[7]Imposing a presumption that the agency must rebut in a case like this 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

II. THE DEPARTMENT'S PRACTICE OF WITHHOLDING NAMES UNLESS THERE IS PROOF THAT AN INDIVIDUAL IS DEAD OR WAS BORN MORE THAN 100 YEARS AGO HAS NO BASIS IN LAW OR FACT.

The Department stated in its declarations that it would also release the names of individuals whose birth dates appeared in responsive pages if the birth date was more than 100 years ago. Sixth Hodes Decl. ¶¶13-14. While it is rational to presume that privacy interests no longer justify withholding information if an individual has reached a certain age, 100 years is excessive.

The Department's papers below did not directly articulate a justification for selecting 100 years as the age until which the agency presumes privacy interests are substantial. We can only guess at the Department's theory from its statement that it uses 100 years as the cutoff even though "many" individuals may live to be more than 100. JA 35, Fifth Hodes Decl. ¶11. If the Department contends that it should be entitled to use a cutoff age after which some small number of individuals

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searching for a particular record") (quoting *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986)). 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 these McCarthy-era investigations 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.

might still be living, this is unjustified, because the Department cannot sustain its burden under FOIA by presuming circumstances that make this information exempt. *E.g., Schrecker I*, 254 F.3d at 166-67. If the Department contends that it is more likely than not that a given individual named in these records will live more than 100 years, it has submitted no evidence in support of this premise. The government's longevity data indicate the opposite: median life expectancy for adult males living in 1950 was only 72 to 74 years old. *See supra* note 5. Thirty-year old males living in 1950 had only a minuscule--less than one one-hundredth of a percent--chance of living to age 100. *See supra* note 4. Thirty-year old females living in 1950 similarly had only a two percent chance of living to 100. *Id.*

The Department may only use an evidentiary presumption that is consistent with the facts concerning how long people lived during this period. Statistical information indicates the median life span for adults who were 30 or 40 years old in 1950 is closer to 74 years than 100 years. *See supra* note 5. That cutoff age is met here, because even the individuals who were the youngest at the time of the investigations, at age 30, would be more than 80 years old today.

We also call the Court's attention to federal standards outside the FOIA context that recognize that the interest in concealing information generally expires long before 100 years have passed. 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* 44 U.S.C. § 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*; *see also http://www.census.gov/pubinfo/www/1930facts.html*. (Census data from 1930s). Classified historical documents are subject to automatic declassification when they become 25 years old. Exec. Order No. 13292, § 3.3, 68 Fed. Reg. 15,320-21 (March 28, 2003). 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). The Department's presumption that privacy interests should be given the same weight 100 years after the date of birth is inconsistent with these analogous cutoffs, and completely arbitrary in light of the data on longevity.

CONCLUSION

The judgment below should be reversed because the Department may not use the presumptions it employed here to withhold information under Exemption 7(C).

Respectfully submitted,

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CERTIFICATE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I hereby certify that the number of words in the foregoing Brief for Amici, as determined from the word counts reported by the word processing system used to produce the brief, is 4,141.

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Michael E. Tankersley

Dated: June 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2003, I caused copies of the foregoing Brief of Amici Curiae In Support Of Appellant to be served upon the following counsel by first class mail, postage prepaid.

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