ing such information under Exemption 2.[178] (See the additional discussion of such matters under Exemption 1, "Homeland Security-Related information," above.) Of course, such labels do not by themselves accord any necessary protection from disclosure under Exemption 2 (or any other FOIA exemption) -- meaning that agency personnel should ensure that both aspects of the "high 2" standard have been satisfied before withholding any information so labeled.[179]

EXEMPTION 3

Exemption 3 of the FOIA incorporates the various nondisclosure provisions that are contained in other federal statutes. As enacted in 1966, Exemption 3 was broadly phrased so as to simply cover information "specifically exempted from disclosure by statute."[1] Nearly a decade later, in FAA v. Robertson, the Supreme Court interpreted this language as evincing a congressional intent to allow statutes which permitted the withholding of confidential information, and which were enacted prior to the FOIA, to remain unaffected by the disclosure mandate of the FOIA; it accordingly held that a broad withholding provision in the Federal Aviation Act which delegated almost unlimited discretion to agency officials to withhold specific documents in the "interest of the public" was incorporated within Exemption 3.[2] Fearing that this interpretation could allow agencies to evade the FOIA's disclosure intent, Congress in effect overruled the Supreme Court's decision by amending Exemption 3 in 1976.[3]

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[178] See Attorney General Ashcroft's FOIA Memorandum (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (urging all federal agencies to "consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise"); cf. White House Security Memorandum, reprinted in *FOIA Post* (posted 3/21/02) (calling upon agencies to identify and then safeguard "information that could be misused to harm the security of our nation and the safety of our people").

[179] See *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (emphasizing critical distinction between "protecting" and "safeguarding" information); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 04/27/06) (Part I.21.) (suggesting "[i]n-house training on 'safeguarding label'/FOIA exemption distinctions" as potential improvement area for agencies to address in their plans developed pursuant to Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005)).

[1] Pub. L. No. 89-487, 80 Stat. 250, 251 (1966) (subsequently amended).

[2] 422 U.S. 255, 266 (1975).

[3] See Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976) (single FOIA amendment enacted together with the Government in the Sunshine Act in 1976,

(continued...)

EXEMPTION 3

As amended, Exemption 3 allows the withholding of information prohibited from disclosure by another statute only if one of two disjunctive requirements are met: the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[4] A statute thus falls within the exemption's coverage if it satisfies any one of its disjunctive requirements,[5] though courts do not always specify under which subpart of Exemption 3 a statute qualifies. Additionally, as is detailed below, in the past several years the Exemption 3 landscape has been broadened significantly with FOIA-specific nondisclosure statutes, Appropriations Acts intended to have FOIA nondisclosure results, and an increasing number of statutes enacted to protect certain intelligence agencies' "operational files."

The Electronic Freedom of Information Act Amendments of 1996[6] require agencies to list the Exemption 3 statutes upon which they rely in their annual FOIA reports each year.[7] The Office of Information and Privacy reviews those reports for consistency in this respect as well as in others.[8]

Initial Considerations

The Court of Appeals for the District of Columbia Circuit has held that records may be withheld under the authority of another statute pursu-

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[3](...continued)
5 U.S.C. § 552b (2000 & Supp. III 2003)); see also FOIA Update, Vol. XV, No. 2, at 6 (connecting disclosure policies of Government in the Sunshine Act and FOIA).

[4] 5 U.S.C. § 552(b)(3) (2000 & Supp. IV 2004) (emphasis added).

[5] See Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984); Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979); Am. Jewish Cong. v. Kreps, 574 F.2d 624, 628 (D.C. Cir. 1978).

[6] Pub. L. No. 104-231, 110 Stat. 3048.

[7] See 5 U.S.C. § 552(e)(1)(A)(ii) (2000 & Supp. IV 2004) (requiring annual FOIA reports as of Fiscal Year 1998); FOIA Update, Vol. XVIII, No. 3, at 5 (annual FOIA report guidelines issued by Department of Justice); see also *FOIA Post*, "FOIA Counselor Q&A: Annual FOIA Reports" (posted 12/19/03); *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03); *FOIA Post*, "Supplemental Guidance on Annual FOIA Reports" (posted 8/13/01).

[8] See *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (describing OIP process of "reviewing all agency annual reports . . . and then contacting individual agencies to discuss and resolve any identified question or discrepancy"); see, e.g., *FOIA Post*, "Summary of Annual FOIA Reports for Fiscal Year 2003" (posted 7/29/04) (describing agency reliance upon Exemption 3 statutes during Fiscal Year 2003).

ant to Exemption 3 "if -- and only if -- that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure."[9] The D.C. Circuit emphasized that:

> a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose to exempt matters from disclosure in the actual words of the statute (or at least in the legislative history of FOIA) -- not in the legislative history of the claimed withholding statute, nor in an agency's interpretation of the statute.[10]

That is not to say that the breadth and reach of the disclosure prohibition must be found on the face of the statute, but that the statute must at

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[9] Reporters Comm. for Freedom of the Press v. U.S. Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 37 (D.C. Cir. 2002) (holding that statute failed to qualify as withholding statute under Exemption 3 because it did not refer to "nondisclosure of information"); Essential Info., Inc. v. USIA, 134 F.3d 1165, 1168 (D.C. Cir. 1998) (ruling that statute that prohibits "dissemination" and "distribution" of certain information within U.S. is qualifying "nondisclosure" statute).

[10] Reporters Comm., 816 F.2d at 735 (citation omitted); see also Anderson v. HHS, 907 F.2d 936, 951 n.19 (10th Cir. 1990) (holding that agency interpretation of statute not entitled to deference in determining whether statute qualifies under Exemption 3). But see Doe v. Veneman, 380 F.3d 807, 818 (5th Cir. 2004) (relying on legislative history of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136i-1 (2000), as basis for determining that statute qualifies as Exemption 3 statute); Wis. Project on Nuclear Arms Control v. U.S. Dep't of Commerce, 317 F.3d 275, 284 (D.C. Cir. 2003) (finding that Congress made plain its intent to prevent the disclosure of export-application information by implementing a "comprehensive legislative scheme" and by granting the President the power to prevent a lapse of the statute's provisions, thereby satisfying Exemption 3's requirements); Times Publ'g Co. v. U.S. Dep't of Commerce, 236 F.3d 1286, 1291-92 (11th Cir. 2001) (considering the legislative history of a nondisclosure statute and related statute, together with a related executive order, to conclude that Congress intended to create a "comprehensive legislative scheme" prohibiting disclosure); Meyerhoff v. EPA, 958 F.2d 1498, 1501-02 (9th Cir. 1992) (looking to legislative history of withholding statute to determine that statutory amendment did not create new prohibition on disclosure, but rather clarified existing nondisclosure provision); cf. Essential Info., 134 F.3d at 1165-67 (surveying legislative history of Smith-Mundt Act, 22 U.S.C. § 1461-1a (2000), to bolster Exemption 3 ruling).

least "explicitly deal with public disclosure."[11] (Previously, the D.C. Circuit had found legislative history probative on the issue of whether an enactment was intended to serve as a withholding statute within the meaning of Exemption 3.[12]) More recently, the D.C. Circuit held that the Endangered Species Act[13] fails to "qualify as a withholding statute under Exemption 3" because "nothing in [the statute's] language refers to nondisclosure of information."[14] In any event, though, the legislative history of a newly enacted Exemption 3 statute may be considered in determining whether the statute is applicable to matters that are already pending.[15] And quite significantly, Exemption 3 statutes enacted during the pendency of a FOIA request or during FOIA litigation have been held to apply retroactively to the requested records.[16]

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[11] Reporters Comm., 816 F.2d at 736; see, e.g., Cal-Almond, Inc. v. USDA, 960 F.2d 105, 108 (9th Cir. 1992) (finding disclosure prohibition sought to be effectuated through appropriations limitation to be inadequate under Exemption 3); see also Nat'l Ass'n of Home Builders, 309 F.3d at 37 ("Looking first to the 'plain language of the statute,' there is nothing in the Endangered Species Act that refers to withholding information." (quoting Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd., 830 F.2d 331, 334 (D.C. Cir. 1987))).

[12] See Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1284 (D.C. Cir. 1983).

[13] 16 U.S.C. § 1533(a)(1) (2000 & Supp. IV 2004).

[14] Nat'l Ass'n of Home Builders, 309 F.3d at 37-38 (observing that the statute's plain language does not refer "to withholding information," and holding that the agency's reliance on "'legislative history will not avail if the language of the statute itself does not explicitly deal with public disclosure'" (quoting Reporter's Comm., 816 F.3d at 736)).

[15] See City of Chicago v. ATF, 384 F.3d 429 (7th Cir. 2004), vacated & remanded, 423 F.3d 777 (7th Cir. 2005) (considering congressional intent behind appropriations legislation that prohibited expenditure of appropriated funds for processing requests for firearms database information); Long v. IRS, 742 F.2d 1173, 1183-84 (9th Cir. 1984).

[16] See City of Chicago, 423 F.3d at 783 (holding that newly enacted appropriations legislation applies retroactively to requested records); Wis. Project, 317 F.3d at 284-85 (finding that agency properly relied upon statute to withhold information retroactively after Congress re-enacted statute during litigation); Sw. Ctr. for Biological Diversity v. USDA, 314 F.3d 1060, 1062 (9th Cir. 2002) (determining that agency can rely on newly enacted National Parks Omnibus Management Act, 16 U.S.C. § 5937 (2000), to withhold information, even though it was enacted after FOIA litigation had commenced); Times Publ'g, 236 F.3d at 1292 (finding that agency properly relied upon Export Administration Act, 50 app. U.S.C.A. § 2411(c)(1) (1991 & West Supp. 2006), to withhold information when Congress re-enacted

(continued...)

Exemption 3 generally is triggered only by federal statutes.[17] Federal rules of procedure, which are promulgated by the Supreme Court, ordinarily do not qualify under Exemption 3.[18] However, when a rule of procedure is subsequently modified and thereby specifically enacted into law by Congress, it may qualify under the exemption.[19] While the issue of whether a treaty can qualify as a statute under Exemption 3 has not yet been ruled on in any FOIA case, there is a sound policy basis for concluding that a treaty can so qualify.[20]

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[16](...continued)
statute during course of litigation, even though statute had lapsed at time of request); Chamberlain v. Kurtz, 589 F.2d 827, 835 (5th Cir. 1979) (applying amended version of Internal Revenue Code to pending case where court determined that no injustice would result); Am. Jewish Cong., 574 F.2d at 627 (applying amended version of Exemption 3 to pending case); Lee Pharm. v. Kreps, 577 F.2d 610, 614 (9th Cir. 1978) (same); *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (discussing Department of the Interior's legislative success with enactment of provision of National Parks Omnibus Management Act, 16 U.S.C. § 5937, as Exemption 3 statute that readily addressed problem of two appellate courts' refusal to protect nest-site locations of endangered species under Exemption 2).

[17] See Wash. Post Co. v. HHS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,047, at 81,127 n.2 (D.D.C. Dec. 4, 1980) ("[A]n Executive Order . . . is clearly inadequate to support reliance on Exemption 3."), rev'd on other grounds, 690 F.2d 252 (D.C. Cir. 1982); cf. Wis. Project, 317 F.3d at 284-85 (determining that agency properly withheld records in reliance upon legislative scheme in which executive order operated to maintain effectiveness of intermittently lapsed Exemption 3 statute); Times Publ'g, 236 F.3d at 1291-92 (same).

[18] See Founding Church of Scientology v. Bell, 603 F.2d 945, 952 (D.C. Cir. 1979) (holding that Rule 26(c) of Federal Rules of Civil Procedure, governing issuance of protective orders, is not statute under Exemption 3).

[19] See, e.g., Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981) (concluding that Rule 6(e) of Federal Rules of Criminal Procedure, regulating disclosure of matters occurring before grand jury, satisfies Exemption 3's "statute" requirement because it was specially amended by Congress in 1977); Berry v. Dep't of Justice, 612 F. Supp. 45, 49 (D. Ariz. 1985) (determining that Rule 32 of Federal Rules of Criminal Procedure, governing disclosure of presentence reports, is "statute" for Exemption 3 purposes because it was affirmatively enacted into law by Congress in 1975); cf. Lykins v. U.S. Dep't of Justice, 725 F.2d 1455, 1462 n.7 (1984) (holding that standing "order" of court has no nondisclosure effect under FOIA).

[20] Cf. Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation,
(continued...)

EXEMPTION 3

Once it is established that a statute is a nondisclosure statute and that it meets at least one of the disjunctive requirements of Exemption 3, an agency next must establish that the records in question fall within the withholding provision of the nondisclosure statute.[21] This, in turn, often will require an interpretation of the nondisclosure statute.[22] Courts have been somewhat divided over whether to construe the withholding criteria of the nondisclosure statute narrowly, consistent with the strong disclosure policies specifically embodied in the FOIA,[23] or broadly, pursuant to deferential standards of general administrative law.[24] The Court of Appeals for the Second Circuit observed that "the Supreme Court has never applied a rule of [either] narrow or deferential construction to withholding statutes."[25] Consequently, it adopted a pragmatic, and essentially neutral, stance regarding interpretation of Exemption 3 statutes, "looking to the plain language of the statute and its legislative history, in order to deter-

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[20](...continued)
with an act of legislation."); Pub. Citizen v. Office of the U.S. Trade Representative, 804 F. Supp. 385, 388 (D.D.C. 1992) (stating that trade agreement not ratified by Senate does not have status of "statutory law" and thus does not qualify under Exemption 3), appeal dismissed per stipulation, No. 93-5008 (D.C. Cir. Jan. 26, 1993).

[21] See CIA v. Sims, 471 U.S. 159, 167 (1985); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143 (2d Cir. 1994); Aronson v. IRS, 973 F.2d 962, 964 (1st Cir. 1992); Cal-Almond, 960 F.2d at 108; Fund for Constitutional Gov't, 656 F.2d at 868; Pub. Citizen Health Research Group, 704 F.2d at 1284; Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978).

[22] See A. Michael's Piano, 18 F.3d at 143-45 (interpreting section 21(f) of FTC Act, 15 U.S.C. § 57b-2(f) (2000)); see also Aronson, 973 F.2d at 965-66 (giving deference to agency interpretation of withholding statute); Anderson v. HHS, 907 F.2d 936, 950-51 (10th Cir. 1990) (interpreting section 360j(c) of Medical Devices Act, 21 U.S.C.A. § 360j(c) (1999 & West Supp. 2006), and section 301(j) of Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 331(j) (1999 & West Supp. 2006)); Grasso v. IRS, 785 F.2d 70, 74-75 (5th Cir. 1984) (interpreting section 6103 of Internal Revenue Code, 26 U.S.C.A. § 6103 (2002 & West Supp. 2006)).

[23] See Anderson, 907 F.2d at 951; Grasso, 785 F.2d at 75; Currie, 704 F.2d 523, 526-27 (11th Cir. 1983); DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 870-71 (D. Me. 1996).

[24] See Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 235 (1st Cir. 1994); Aronson, 973 F.2d at 967; White v. IRS, 707 F.2d 897, 900-01 (6th Cir. 1983) (holding that agency determination that documents in dispute fell within withholding provision of Internal Revenue Code was "neither arbitrary nor capricious"). But see DeLorme Publ'g, 917 F. Supp. at 871 (rejecting a deferential review when the statute at issue "ha[d] broad application and ha[d] been implemented by more than a dozen agencies").

[25] A. Michael's Piano, 18 F.3d at 144.

mine legislative purpose."[26]

Under Exemption 3, judicial review under the FOIA of agency action is limited to determinations that the withholding statute qualifies as an Exemption 3 statute and that the records fall within the statute's scope.[27] With respect to subpart (B) statutes -- which permit agencies some discretion to withhold or disclose records -- the agency's exercise of its discretion under the withholding statute is governed not by the FOIA, but by the withholding statute itself;[28] judicial review of that should not be within the FOIA's jurisdiction.[29]

Agencies and courts ordinarily specify the nondisclosure statute upon which Exemption 3 withholding is based. At least one court, however, found a need to conceal the nondisclosure statute that formed the basis for its ruling that the agency properly invoked Exemption 3, stating that "national security would be compromised and threats to the safety of individuals would arise" if it engaged in a specific discussion of the legal basis for Exemption 3's use in that exceptional case.[30]

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[26] Id.

[27] See Aronson, 973 F.2d at 967; Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd., 830 F.2d 331, 335 (D.C. Cir. 1987). But see Long, 742 F.2d at 1181; DeLorme Publ'g, 917 F. Supp. at 871.

[28] See Aronson, 973 F.2d at 966; Ass'n of Retired R.R. Workers, 830 F.2d at 336.

[29] Cf. Roley v. Assistant Attorney Gen., No. 89-2774, slip op. at 8 (D.D.C. Mar. 9, 1990) (determining that court's grant of permission to disclose grand jury records pursuant to Rule 6(e)(3)(C)(i) of Federal Rules of Criminal Procedure does not govern disposition of same records in FOIA suit); Garside v. Webster, 733 F. Supp. 1142, 1147 (S.D. Ohio 1989) (same). But cf. DeLorme Publ'g, 917 F. Supp. at 871 (proceeding de novo when statute at issue was administered by numerous federal agencies); Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (holding that disclosure order issued by court pursuant to 38 U.S.C. § 7332(b) (2000) requires VA to disclose records under FOIA).

[30] Simpson v. Dep't of State, No. 79-0674, 2 Gov't Disclosure Serv. (P-H) ¶ 81,280, at 81,798 (D.D.C. Apr. 30, 1981) (concluding on remand that Exemption 3 authorized withholding of State Department's entire "Biographic Register" of federal employees involved in foreign policy activities, even though court of appeals had already ruled in Simpson v. Vance, 648 F.2d 10, 17 (D.C. Cir. 1980), that Exemption 6 did not cover all such information); see also Haddam v. FBI, No. 01-434, slip op. at 28 (D.D.C. Sept. 8, 2004) (protecting twenty-three pages of documents described in agency's in camera affidavit pursuant to Exemption 3, but declining to name nondisclosure statute that agency relied upon because "no further information as to this exemption should be disclosed on the public record").

EXEMPTION 3

Exemption 3 Statutes

A wide range of federal laws qualify as Exemption 3 statutes. In the past, courts usually placed emphasis on specifying whether a statute qualifies as an Exemption 3 statute under subpart (A) (which encompasses statutes that require information to be withheld and leave the agency no discretion on the issue) or subpart (B) (which encompasses statutes that either provide criteria for withholding information or refer to particular matters to be withheld, either explicitly or implicitly). (For a further discussion of specific statutes held to qualify as either "subpart (A)" or "subpart (B)" statutes, see below.) Although this practice is by no means obsolete, courts do not always specify exactly which subpart of Exemption 3 a statute qualifies under, instead simply determining whether a statute qualifies, or does not qualify, as an Exemption 3 statute generally.[31]

For example, in 2005 one district court held that the confidentiality provision in the Federal Election Campaign Act[32] qualifies as an Exemption 3 statute, but did not state whether it qualified under subpart (A) or (B) of Exemption 3.[33] Another district court held that sections 114(s)[34] and 40119(b)[35] of Title 49 of the United States Code, qualify as Exemption 3 statutes because they provide the authority for the Secretary of Transportation and the Undersecretary of the Transportation Security Administration to protect sensitive security information from disclosure, though the court did not specify under which subpart the statutes qualified.[36] Recently, a court held that section 3610(d) of the Fair Housing Act,[37] a provision that protects information concerning ongoing discrimination investigations, qualifies as a "disclosure-prohibiting statute," but likewise did not specify

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[31] See, e.g., Nat'l Inst. of Military Justice v. DOD, 404 F. Supp. 2d 325, 335-37 (D.D.C. 2005) (holding that 10 U.S.C. § 130c (2000 & Supp. IV 2004) is an Exemption 3 statute without specifying under which subpart it qualifies); ACLU v. DOD, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same).

[32] 2 U.S.C. § 437g(a)(12)(A) (2000 & Supp. IV 2004).

[33] Citizens for Responsibility & Ethics in Wash. v. FEC, No. 04-1672, slip op. at 5 (D.D.C. May 16, 2005).

[34] 49 U.S.C.A. § 114(s) (West Supp. 2006).

[35] 49 U.S.C. § 40119(b) (2000 & Supp. III 2003).

[36] Gordon v. FBI, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004) (holding that "there is no dispute that these statutes fall within [the scope of] Exemption 3"); see also Tooley v. Bush, No. 06-306, 2006 WL 3783142, at *19 (D.D.C. Dec. 21, 2006) (holding that 49 U.S.C. § 114(s) qualifies as an Exemption 3 statute); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 110 n.10 (D.D.C. 2005) (finding that both 49 U.S.C. § 114(s) and 49 U.S.C. § 40119(b) qualify as Exemption 3 statutes generally).

[37] 42 U.S.C. § 3610(d) (2000).

either subpart of Exemption 3.[38]

Many statutes have been held to qualify as Exemption 3 statutes under the exemption's first subpart. A primary example is Rule 6(e) of the Federal Rules of Criminal Procedure,[39] which regulates disclosure of matters occurring before a grand jury and which satisfies the basic "statute" requirement of Exemption 3 because it was specially amended by Congress in 1977.[40] It is well established that "Rule 6(e) embodies a broad sweeping policy of preserving the secrecy of grand jury material regardless of the substance in which the material is contained."[41] Yet defining the parameters of Rule 6(e) protection is not always a simple task and has been the subject of much litigation. In Fund for Constitutional Government v. National Archives & Records Service, the Court of Appeals for the District of Columbia Circuit stated that the scope of the secrecy that must be afforded grand jury material "is necessarily broad" and, consequently, that "it encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal 'the identities of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like.'"[42]

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[38] West v. Jackson, 448 F. Supp. 2d 207, 212-13 (D.D.C. 2006).

[39] Fed. R. Crim. P. 6(e).

[40] See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981); see also Tel. Publ'g Co. v. U.S. Dep't of Justice, No. 95-521-M, slip op. at 16-18, 26-27 (D.N.H. Aug. 31, 1998) (citing Exemption 3 together with Rule 6(e) as a partial basis for protecting information related to a grand jury, including correspondence between the U.S. Attorney's Office and nongovernment attorneys pertaining to the grand jury, even where the correspondence was not shown to the grand jury and evidence notebooks were created by local police at the direction of an Assistant United States Attorney, because disclosure would "probably . . . reveal too much about evidence presented to the grand jury"); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 27-28 (D.D.C. 1998) (permitting agency to withhold transcripts of conversations that were taped during course of FBI investigation and were subsequently subpoenaed by grand jury); McQueen v. United States, 179 F.R.D. 522, 528-30 (S.D. Tex. May 6, 1998) (holding that all matters occurring before grand jury are protected even if records predate grand jury investigation), aff'd, 176 F.3d 478 (5th Cir. 1999) (unpublished table decision).

[41] Iglesias v. CIA, 525 F. Supp. 547, 556 (D.D.C. 1981).

[42] 656 F.2d at 869 (quoting SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1382 (D.C. Cir. 1980)); see also United States v. Kearse, 30 F. App'x 85 (4th Cir. 2002) (per curiam) (holding that Rule 6(e) prohibits FOIA disclosure of grand jury transcripts); Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 549

(continued...)

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[42](...continued)
(6th Cir. 2001) (protecting grand jury transcripts, exhibits, and identities of witnesses), cert. denied, 534 U.S. 1134 (2002); Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 235 (1st Cir. 1994) ("[D]ocuments identified as grand jury exhibits, and whose contents are testimonial in nature or otherwise directly associated with the grand jury process, such as affidavits and deposition transcripts, ordinarily may be withheld simply on the basis of their status as exhibits."); McDonnell v. United States, 4 F.3d 1227, 1246 (3d Cir. 1993) (protecting "[i]nformation and records presented to a federal grand jury . . . names of individuals subpoenaed . . . [and] federal grand jury transcripts of testimony"); Silets v. U.S. Dep't of Justice, 945 F.2d 227, 230 (7th Cir. 1991) (concluding that "identity of witness before a grand jury and discussion of that witness' testimony" is exempt from disclosure, as it "falls squarely within" Rule 6(e)'s prohibition); Boyd v. ATF, No. 05-1096, 2006 U.S. Dist. LEXIS 71857, at *19 (D.D.C. Sept. 29, 2006) (protecting grand jury transcripts); Meserve v. U.S. Dep't of Justice, No. 04-1844, 2006 U.S. Dist. LEXIS 56732, at *9 n.5 (D.D.C. Aug. 14, 2006) (protecting grand jury "correspondence, witness subpoenas, transcripts, and evidence"); Peay v. Dep't of Justice, No. 04-1859, 2006 WL 1805616, at *2 (D.D.C. June 29, 2006) (holding that agency properly protected grand jury investigation request and referral, prosecutor's recommendation based on grand jury's investigation, and unsigned grand jury indictment; agency failed to show whether segregability requirements were met); Boyd v. Criminal Div., U.S. Dep't of Justice, No. 04-1100, 2005 WL 555412, at *6 (D.D.C. Mar. 9, 2005) (protecting identities of grand jury witnesses) (appeal pending); Brunetti v. FBI, 357 F. Supp. 2d 97, 105 (D.D.C. 2004) (protecting "grand jury subpoenas, names and identifying information of the individuals named in the subpoenas, records subpoenaed by the grand jury, and the dates of grand jury meetings"); Raulerson v. Ashcroft, 271 F. Supp. 2d 17, 24 (D.D.C. 2002) (finding that the "names of individuals subpoenaed to testify before the grand jury and the names of their employers clearly are matters 'occurring before the grand jury'" (quoting Fund for Constitutional Gov't, 656 F.2d at 869)); Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *13 (S.D.N.Y. Nov. 9, 1999) (holding that identities of grand jury witnesses are protected by Rule 6(e)), appeal dismissed for failure to prosecute, No. 00-6041 (2d Cir. Sept. 12, 2000); Peralta v. U.S. Attorney's Office, 69 F. Supp. 2d 21, 33 (D.D.C. 1999) (determining that Rule 6(e) prohibited the release of identities of grand jury witnesses and descriptions of information obtained by federal grand jury subpoenas); Anderson v. U.S. Dep't of Justice, No. 95-1880, 1999 U.S. Dist. LEXIS 5048, at *8 (D.D.C. Apr. 12, 1999) (finding local police department line-up record properly withheld as it contained Assistant United States Attorney's handwritten notes regarding witness reactions to viewing individuals in line-up and, if released, would reveal "identities of witnesses or jurors"); Willis v. FBI, No. 96-1455, slip op. at 6 (D.D.C. Feb. 14, 1998) (declaring that a grand jury transcript was properly withheld even though "at one time [the requester's] counsel may have had a right of access to portions of the transcript for [witness impeachment purposes]"),
(continued...)

However, in its scrutiny of the scope of Rule 6(e) in Senate of Puerto Rico v. United States Department of Justice,[43] the D.C. Circuit firmly held that neither the fact that information was obtained pursuant to a grand jury subpoena, nor the fact that the information was submitted to the grand jury, is sufficient, in and of itself, to warrant the conclusion that disclosure is necessarily prohibited by Rule 6(e).[44] Rather, an agency must es-

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[42](...continued)
aff'd in part & remanded on other grounds, 194 F.3d 175 (D.C. Cir. 1999) (unpublished table decision); Twist v. Reno, No. 95-258, 1997 U.S. Dist. LEXIS 8981, at *5 n.1 (D.D.C. May 12, 1997) (holding that agency properly withheld information that would reveal strategy or direction of grand jury investigation even though requester was previously on investigation team and had seen some of withheld information), summary affirmance granted, No. 97-5192, 1997 WL 811736 (D.C. Cir. Dec. 9, 1997); Jimenez v. FBI, 938 F. Supp. 21, 28 (D.D.C. 1996) (protecting notes written by Assistant United States Attorney in preparation for grand jury proceeding, records of third parties provided in course of proceeding, and notes concerning witnesses who testified); Canning v. U.S. Dep't of Justice, No. 92-0463, slip op. at 6 (D.D.C. June 26, 1995) (protecting "material that, while not directly mentioning the grand jury," nevertheless mentions witness names and describes witness testimony); Helmsley v. U.S. Dep't of Justice, No. 90-2413, slip op. at 4-6 (D.D.C. Sept. 25, 1992) (finding that Rule 6(e) protected records identifying witnesses who testified or were consulted, documents and evidence not presented but obtained through grand jury subpoenas, immunity applications and orders, exhibit lists, reports and memoranda discussing evidence, correspondence regarding compliance with subpoenas, documents, notes, and research relating to litigation regarding compliance with subpoenas, and letters among lawyers discussing grand jury proceedings).

[43] 823 F.2d 574 (D.C. Cir. 1987).

[44] Id. at 584; see Wash. Post Co. v. U.S. Dep't of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988) (finding that record that was created before grand jury was impanelled did not independently reveal anything about grand jury and thus was not covered by Rule 6(e) -- even though record was subpoenaed by grand jury, was available to jurors, and was used by prosecutors to question grand jury witnesses); see also John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) ("A document that is otherwise available to the public does not become confidential simply because it is before a grand jury."), rev'd on other grounds, 493 U.S. 146 (1989); Germosen, 1999 WL 1021559, at *13 (stating that Rule 6(e) imposes "no requirement that materials actually be presented to the grand jury in order to fall within the rule's scope"); Tel. Publ'g, No. 95-521-M, slip op. at 11 (D.N.H. Aug. 31, 1998) ("Exemption 3 . . . does not protect all information that is found in grand jury files since mere exposure to a grand jury does not, by itself, immunize information from disclosure."); Isley v. Executive Office for U.S. At-
(continued...)

tablish a nexus between the release of that information and "revelation of a protected aspect of the grand jury's investigation."[45] This requirement is particularly applicable to "extrinsic" documents that were created entirely independent of the grand jury process; for such a document, the D.C. Circuit emphasized in Washington Post Co. v. United States Department of Justice, the required nexus must be apparent from the information itself,

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[44](...continued)
torneys, No. 96-0123, slip op. at 2-4 (D.D.C. Mar. 27, 1997) (ordering agency to provide further justification for withholding "transcripts, subpoenas, information provided in response to a grand jury subpoena, and information identifying who testified before a grand jury"), appeal dismissed, 203 F.3d 52 (D.C. Cir. 1997) (unpublished table decision); Butler v. U.S. Dep't of Justice, No. 86-2255, 1994 WL 55621, at *8 (D.D.C. Feb. 3, 1994) (holding descriptions of documents subpoenaed by grand jury not protected under Rule 6(e)), appeal dismissed, No. 94-5078 (D.C. Cir. Sept. 8, 1994); Astley v. Lawson, No. 89-2806, 1991 WL 7162, at *6 (D.D.C. Jan. 11, 1991) (ordering release of records even though requester might have been able to deduce purpose for which they were subpoenaed, because records on their face did not reveal grand jury's "inner workings").

[45] Senate of P.R., 823 F.2d at 584; see also Lopez v. Dep't of Justice, 393 F.3d 1345, 1349-51 (D.C. Cir. 2005) (holding that agency "failed to meet its burden of demonstrating some 'nexus between disclosure [of date of prosecutor's preliminary witness interview] and revelation of a protected aspect of the grand jury's investigation'" (quoting Senate of P.R., 823 F.2d at 584)); Tel. Publ'g, No. 95-521-M, slip op. at 11 (D.N.H. Aug. 31, 1998) (stating that agencies must show nexus between disclosure of withheld information and impermissible revelation of grand jury matters to invoke protection of Exemption 3); Burke v. DEA, No. 96-1739, slip op. at 7 (D.D.C. Mar. 30, 1998) (determining that agency established nexus by showing that release of name of subpoenaed individual and information relating to subpoenaed insurance claims would reveal information about inner workings of grand jury); Greenberg, 10 F. Supp. 2d at 27-28 (finding that a nexus was established because releasing transcripts of taped conversations would show "the direction or path the Grand Jury was taking"); Karu v. U.S. Dep't of Justice, No. 86-771, slip op. at 4-5 (D.D.C. Dec. 1, 1987) (finding that a nexus was established because "[w]ere this information to be released the very substance of the grand jury proceedings would be discernible"). But see Homick v. U.S. Dep't of Justice, No. 98-00557, slip op. at 16-17 (N.D. Cal. Sept. 16, 2004) (protecting "names and identifying information of grand jury witnesses," but ordering disclosure of information that the agency described only as "the type of records subpoenaed by the grand jury," because the agency failed to meet its burden of showing how such information "is exempt from disclosure"); Isley, No. 96-0123, slip op. at 4 (D.D.C. Mar. 27, 1997) (concluding that agency "has not sufficiently linked the exemption to the contents of the withheld documents"); LaRouche v. U.S. Dep't of Justice, No. 90-2753, 1993 WL 388601, at *5 (D.D.C. June 25, 1993) (holding that letter prepared by government attorney discussing upcoming grand jury proceedings did not reveal grand jury's "inner workings").

and "the government cannot immunize [it] by publicizing the link."[46] As a rule, an agency must be able to adequately document and support its determination that disclosure of the record in question would reveal a secret aspect of the grand jury proceeding.[47]

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[46] 863 F.2d at 100.

[47] See, e.g., Lopez, 393 F.3d at 1349-51 (holding that although agency properly withheld grand jury subpoenas and the dates of grand jury subpoenas and post-testimony witness debriefings pursuant to Rule 6(e), it failed to demonstrate how disclosure of the date of prosecutor's preliminary witness interview would reveal a secret aspect of the grand jury proceeding); Maydak v. U.S. Dep't of Justice, 254 F. Supp. 2d 23, 42 (D.D.C. 2003) (stating that court could not determine whether agency properly invoked Exemption 3 when neither Vaughn Index nor agency's declaration described specific records withheld); Hronek v. DEA, 16 F. Supp. 2d 1260, 1276 (D. Or. 1998) (requiring agency to resubmit Vaughn Index and explain how disclosure of subpoenas would "compromise the integrity of the grand jury process"), aff'd, 7 F. App'x 591 (9th Cir. 2001); LaRouche v. U.S. Dep't of Treasury, No. 91-1655, slip op. at 19-20 (D.D.C. May 22, 1998) (rejecting agency's withholding of entire category of documents and requiring agency to submit Vaughn Index sufficient to show that disclosure would reveal protected aspect of grand jury proceeding), summary judgment granted in part (D.D.C. Mar. 31, 2000) (holding that agency affidavit ultimately demonstrated nexus between disclosure and revelation of secret aspects of grand jury for most records withheld under 6(e), but ordering release where agency failed to demonstrate nexus); Kronberg v. U.S. Dep't of Justice, 875 F. Supp. 861, 867-68 (D.D.C. 1995) (ordering grand jury material released where prior disclosure was made to defense counsel and where government had not met burden of demonstrating that disclosure would reveal inner workings of grand jury); Linn, 1995 WL 417810, at *7 ("[N]owhere in its affidavit does the DEA specifically link this exemption to the contents of the documents being withheld," but rather "merely states that it applied this exemption to withhold information that names witnesses and recounts testimony given to a federal grand jury."); Canning v. U.S. Dep't of Justice, 919 F. Supp. 451, 454-55 (D.D.C. 1994) (requiring government to produce affidavits "showing a basis for knowledge that the information came from grand jury" and explain how material is protected under Rule 6(e)); cf. Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1082 n.10 (9th Cir. 2004) (lambasting counsel for not viewing the sealed documents at issue, because the court found "it perplexing that the government would choose to assign counsel to defend its position on appeal (both in its brief and at oral argument) who is totally unfamiliar with (and, presumably, denied access to) the facts upon which the government bases its claim to the law enforcement exemption") (Exemption 7(A) case incorrectly constrained administratively by grand jury secrecy); Ashton v. VA, No. 99-6018, 1999 U.S. App. LEXIS 22957, at *3 (2d Cir. Sept. 3, 1999) (finding agency affidavit sufficient because it showed that withheld records revealed "confidential materials from grand jury proceedings" and that records were within scope of Rule

(continued...)

And to do so, of course, agency FOIA personnel necessarily "must" be afforded unrestricted access to grand jury-protected information.[48]

A subsequent decision by the Court of Appeals for the First Circuit, Church of Scientology International v. United States Department of Justice, further clouds the precise contours of Rule 6(e).[49] Initially following Senate of Puerto Rico, the First Circuit rejected a position that the secrecy concerns protected by Rule 6(e) are automatically implicated for any materials "simply located in grand jury files."[50] Nevertheless, apparently operating under the premise that all grand jury exhibits constitute materials actually presented to the grand jurors, it further specified that, even with regard to "extrinsic documents," it would be "reasonable for an agency to withhold any document containing a grand jury exhibit sticker or that is otherwise explicitly identified on its face as a grand jury exhibit, as release of such documents reasonably could be viewed as revealing the focus of the grand

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[47](...continued)
6(e) and Exemption 3); Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO v. GSA, No. 97 Civ. 8509, 1998 WL 726000, at *7 (S.D.N.Y. Oct. 15, 1998) (concluding that agency's "sealed declaration makes clear the existence of a grand jury investigation and sufficiently describes the relation of the requested materials to such investigation" and that agency properly withheld grand jury exhibits and identities of grand jury witnesses); Sousa v. U.S. Dep't of Justice, No. 95-375, 1997 U.S. Dist. LEXIS 9010, at *10-11 (D.D.C. June 19, 1997) (holding that supplemental Vaughn Index adequately demonstrated that disclosure of grand jury witness subpoenas, Assistant United States Attorney's handwritten notes discussing content of witness testimony, evidence used, and strategies would reveal protected aspects of grand jury investigation).

[48] Canning v. U.S. Dep't of Justice, No. 92-0463, 1995 WL 1073434, at *2 (D.D.C. Feb. 26, 1995) (finding that FOIA officers are "among those with approved access to grand jury material" and that agency's FOIA officer therefore properly reviewed withheld documents in case at hand (citing United States Dep't of Justice, Fed. Grand Jury Practice 173 (Jan. 1993))); see also United States Dep't of Justice, Fed. Grand Jury Practice 57 (Aug. 2000) (recognizing that grand jury information properly may be disclosed to "administrative personnel who need to determine the applicability of Rule 6(e)'s disclosure prohibition for purposes of responding to requests for records under [the FOIA]"); FOIA Update, Vol. XIX, No. 3, at 2 (advising agencies of same in order to put any question on point entirely to rest); cf. Lion Raisins, 354 F.3d at 1082 & nn.10 & 12 (remanding case when agency was not prepared to present its Exemption 7(A) defense because counsel evidently was "denied access to . . . the facts," and even admitted to not knowing "what reasons justify the invocation of the law enforcement exemption," due to overly strict grand jury secrecy).

[49] 30 F.3d at 235-36.

[50] Id. at 236.

jury investigation."[51] Thus, the First Circuit has seemingly placed itself in at least some degree of conflict with the D.C. Circuit's Senate of Puerto Rico interpretation of the grand jury rule.[52]

The Court of Appeals for the Ninth Circuit has held that a provision of the Ethics in Government Act of 1978,[53] protecting the financial disclosure reports of special government employees, meets the requirements of subpart (A).[54] Another provision of the Ethics in Government Act, providing for the disclosure of financial disclosure reports of certain government employees,[55] was found to qualify as an Exemption 3 statute, allowing disclosure only if a requester met that statute's particular disclosure requirements.[56] While not actually distinguishing between the two subparts of Exemption 3, the Supreme Court in Baldrige v. Shapiro,[57] held that the Census Act[58] is an Exemption 3 statute because it requires that certain data be withheld in such a manner as to leave the Census Bureau with no discre-

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[51] Id. at 235 n.15 (dictum); cf. Rugiero, 257 F.3d at 549 (holding that "documents identified as grand jury exhibits or containing testimony or other material directly associated with grand jury proceedings fall within [Exemption 3]" and "[d]ocuments created for reasons independent of a grand jury investigation do not," without acknowledging that many grand jury exhibits are created for "reasons independent" of a grand jury); Foster v. U.S. Dep't of Justice, 933 F. Supp. 687, 691 (E.D. Mich. 1996) (protecting "final prosecution report" when "[e]ach page containe[d] a 'grand jury' secrecy label").

[52] See Senate of P.R., 823 F.2d at 584; see also Crooker v. IRS, No. 94-0755, 1995 WL 430605, at *9 n.2 (D.D.C. Apr. 27, 1995) (observing that withholding documents on basis of grand jury exhibit labels "appears to be the type of per se withholding of grand jury material expressly rejected by the D.C. Circuit").

[53] 5 U.S.C. app. § 107 (2000).

[54] Meyerhoff v. EPA, 958 F.2d 1498, 1502 (9th Cir. 1992) (construing 1978 version of statute); see also Glascoe v. U.S. Dep't of Justice, No. 04-0486, 2005 WL 1139269, at *1 (D.D.C. May 15, 2005) (protecting Assistant United States Attorney's "confidential conflict of interest certification" based on nondisclosure requirement of section 107(a) of Ethics in Government Act).

[55] 5 U.S.C. app. § 205 (repealed as of Jan. 1, 1991).

[56] Church of Scientology of Tex. v. IRS, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993), appeal dismissed per stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993).

[57] 455 U.S. 345 (1982).

[58] 13 U.S.C. §§ 8(b), 9(a) (2000).

tion whatsoever.[59]

Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964[60] have also been held to meet the subpart (A) requirement because they allow the EEOC no discretion to publicly disclose matters pending before the Commission.[61] Similarly, the statute governing records pertaining to Currency Transaction Reports[62] has been found to meet the requirements of subpart (A).[63] The International Investment Survey Act of 1976[64] has been held to be a subpart (A) statute,[65] and certain portions of the overall public disclosure provisions of the Consumer Product Safety Act[66] likewise have been found to satisfy subpart (A)'s nondisclosure requirements.[67]

Additionally, the Hart-Scott-Rodino Antitrust Improvement Amendments to the Clayton Antitrust Act[68] prohibit public disclosure of premerger-notification materials submitted to the Department of Justice or the Federal Trade Commission.[69] Similarly, a provision of the Antitrust Civil

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[59] 455 U.S. at 355.

[60] 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (2000).

[61] See Frito-Lay v. EEOC, 964 F. Supp. 236, 239-43 (W.D. Ky. 1997); Crump v. EEOC, No. 3:97-0275, slip op. at 5-6 (M.D. Tenn. May 30, 1997) (magistrate's recommendation), adopted (M.D. Tenn. June 18, 1997); Am. Centennial Ins. Co. v. EEOC, 722 F. Supp. 180, 183 (D.N.J. 1989); cf. EEOC v. City of Milwaukee, 54 F. Supp. 885, 893 (E.D. Wis. 1999) (noting that "any member of the public making a FOIA request" for materials at issue in this non-FOIA dispute "will be denied access, because Exemption 3 incorporates confidentiality provisions of sections 706(b) and 709(e) of Title VII).

[62] 31 U.S.C. § 5319 (2000 & Supp. III 2003).

[63] See Sciba v. Bd. of Governors of the Fed. Reserve Sys., No. 04-1011, 2005 WL 3201206, at *6 (D.D.C. Nov. 4, 2005); Linn, 1995 WL 631847, at *30; Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988), aff'd, 890 F.2d 419 (8th Cir. 1989) (unpublished table decision).

[64] 22 U.S.C. § 3104(c) (2000).

[65] See Young Conservative Found. v. U.S. Dep't of Commerce, No. 85-3982, 1987 WL 9244, at *3-4 (D.D.C. Mar. 25, 1987).

[66] 15 U.S.C. § 2055(a)(2) (2000).

[67] See Mulloy v. Consumer Prod. Safety Comm'n, No. C-2-85-645, 1985 U.S. Dist. LEXIS 17194, at *2-5 (S.D. Ohio Aug. 2, 1985).

[68] 15 U.S.C. § 18a(h) (2000).

[69] See Lieberman v. FTC, 771 F.2d 32, 39, n.14 (2d Cir. 1985) (dictum) (continued...)

Process Act,[70] which exempts from the FOIA transcripts of oral testimony taken in the course of investigations under that Act, has been held to qualify as a subpart (A) statute.[71] Likewise, a provision of the now-expired Independent Counsel Reauthorization Act,[72] was considered to qualify under Exemption 3, as the Department of Justice and the Independent Counsel had no discretion to disclose to the public materials supplied under it to the court.[73]

Also, a section of the Transportation Safety Act of 1974,[74] which states that the NTSB shall withhold from public disclosure cockpit voice recordings associated with accident investigations, was found to fall within subsection (A) of Exemption 3.[75] Similarly, information contained in the Social Security Administration's "Numident system," which was obtained from death certificates provided by state agencies, has been held exempt on the basis of subpart (A) on the grounds that the language of the statute[76] "leaves no room for agency discretion."[77]

In a decision construing the application of the identical Exemption 3

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[69](...continued)
(explaining that premerger information "could not be disclosed under FOIA; Congress made that intention crystal clear") (non-FOIA case); Mattox v. FTC, 752 F.2d 116, 122 (5th Cir. 1985) (observing that premerger information is exempt from disclosure under the FOIA -- government agencies are not to be "clearing house[s] for the facts" concerning mergers) (non-FOIA case).

[70] 15 U.S.C. § 1314(g) (2000) (covering "[a]ny documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this chapter").

[71] See Motion Picture Ass'n of Am. v. U.S. Dep't of Justice, No. 80 Civ. 6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981) (protecting transcripts of oral testimony under Exemption 3).

[72] 28 U.S.C. § 592(e) (2000) (expired as of June 30, 1999).

[73] Cf. Pub. Citizen v. Dep't of Justice, No. 82-2909 (D.D.C. May 18, 1983) (construing 1978 version of statute).

[74] 49 U.S.C. § 1114(c) (2000).

[75] McGilvra v. NTSB, 840 F. Supp. 100, 102 (D. Colo. 1993).

[76] 42 U.S.C.A. § 405(r) (2003 & West Supp. 2006).

[77] Int'l Diatomite Producers Ass'n v. U.S. Soc. Sec. Admin., No. 92-1634, 1993 WL 137286, at *3 (N.D. Cal. Apr. 28, 1993), appeal dismissed per stipulation, No. 93-16204 (9th Cir. Oct. 27, 1993).

language of the Government in the Sunshine Act[78] to the Defense Nuclear Facilities Safety Board Act[79] the D.C. Circuit has held that the latter statute allows no discretion with regard to the release of the Board's proposed recommendations, thus meeting the requirement of subpart (A).[80] By contrast, the D.C. Circuit found that the statute governing release by the FBI of criminal record information ("rap sheets")[81] fails to fulfill subpart (A)'s requirement of absolute withholding because the statute implies that the FBI has discretion to withhold records and, in fact, the FBI had exercised such discretion by its inconsistent manner of releasing "rap sheets" to the public.[82]

Traditionally, though, most Exemption 3 cases have involved subpart (B). For example, a provision of the Consumer Product Safety Act[83] has been held to set forth sufficiently definite withholding criteria for it to fall within the scope of subpart (B),[84] and the provision which prohibits the Commission from disclosing any information that is submitted to it pursuant to section 15(b) of the Act[85] has been held to meet the requirements of subpart (B) by referring to particular types of matters to be withheld.[86] Recently, a district court held that 10 U.S.C. § 130c,[87] a statute that protects from disclosure certain "sensitive information of foreign governments," qualifies as an Exemption 3 statute because it establishes particular criteria for withholding, thereby meeting the requirements of subpart (B).[88]

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[78] 5 U.S.C. § 552b(c)(3) (2000 & Supp. III 2003).

[79] 42 U.S.C. § 2286 (2000).

[80] Natural Res. Def. Council v. Def. Nuclear Facilities Safety Bd., 969 F.2d 1248, 1249 (D.C. Cir. 1992).

[81] 28 U.S.C.A. § 534 (1993 & West Supp. 2006).

[82] See Reporters Comm. for Freedom of the Press v. U.S. Dep't of Justice, 816 F.2d 730, 736 n.9 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, slip op. at 6 (S.D. Ohio Feb. 9, 1993).

[83] 15 U.S.C. § 2055(b)(1).

[84] See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 122 (1980).

[85] 15 U.S.C. § 2055(b)(5).

[86] See Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, No. 87-1478, slip op. at 16-17 (D.D.C. Sept. 19, 1989).

[87] (2000 & Supp. IV 2004).

[88] See Associated Press v. DOD, No. 05-5468, 2006 WL 2707395, at *9-10 (S.D.N.Y. Sept. 20, 2006).

Section 777 of the Tariff Act,[89] governing the withholding of "proprietary information," has been held to refer to particular types of information to be withheld and thus to be a subpart (B) statute.[90] Section 12(d) of the Railroad Unemployment Insurance Act[91] refers to particular types of matters to be withheld -- information which would reveal employees' identities -- and thus has been held to satisfy subpart (B).[92] Section 410(c)(2) of the Postal Reorganization Act,[93] governing the withholding of "information of a commercial nature . . . which under good business practice would not be publicly disclosed," has been held to refer to "particular types of matters to be withheld" and thus to be a subpart (B) statute.[94] Likewise, section

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[89] 19 U.S.C. § 1677f (2000 & Supp. IV 2004).

[90] See Mudge Rose Guthrie Alexander & Ferdon v. U.S. Int'l Trade Comm'n, 846 F.2d 1527, 1530 (D.C. Cir. 1988).

[91] 45 U.S.C. § 362(d) (2000).

[92] See Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd., 830 F.2d 331, 334 (D.C. Cir. 1987); Nat'l Ass'n of Retired & Veteran Ry. Employees v. R.R. Ret. Bd., No. 87-117, slip op. at 5 (N.D. Ohio Feb. 20, 1991).

[93] 39 U.S.C.A. § 410(c)(2) (1980 & West Supp. 2006).

[94] Wickwire Gavin, P.C. v. USPS, 356 F.3d 588, 589, 597 (4th Cir. 2004) (holding that agency properly withheld "quantity and pricing" information related to contract for which requester was unsuccessful bidder); Reid v. USPS, No. 05-294, 2006 U.S. Dist. LEXIS 45538, at *17-26 (S.D. Ill. July 5, 2006) (finding that agency properly protected customer's postage statements and agency's daily financial statements); Carlson v. USPS, No. 03-4113, 2005 WL 756583, at *1, *4 (N.D. Cal. Mar. 31, 2005) (holding that USPS properly withheld aggregation of information in Post Office Locator database under 39 U.S.C.A. § 410(c)(2), because disclosure of such information "may be of potential benefit to [agency's] competitors" and disclosure would not be "good business practice") (appeal pending); Airline Pilots Ass'n, Int'l v. USPS, 2004 U.S. Dist. LEXIS 26067, at *4, *22 (D.D.C. June 24, 2004) (holding that USPS properly withheld pricing and rate information, methods of operation, performance requirements, and terms and conditions from transportation agreement with FedEx); Robinett v. USPS, No. 02-1094, 2002 WL 1728582, at *5 (E.D. La. July 24, 2002) (finding that the agency properly withheld job-applicant information under 39 U.S.C.A. § 410(c)(2) because it falls within the agency's regulatory definition of "information of a commercial nature"); Weres Corp. v. USPS, No. 94-1984, slip op. at 3-6 (D.D.C. Sept. 23, 1996) (finding that agency properly withheld "unit and total prices" submitted by unsuccessful offerors for government contracts); cf. Piper & Marbury, L.L.P. v. USPS, No. 99-2383, 2001 WL 214217, at *3-5 (D.D.C. Mar. 6, 2001) (magistrate's recommendation) (finding that even if requested contract contained some "commercial information" protectible under 39 U.S.C.A. § 410(c)(2), agency could not withhold entire contract under Exemption 3), adopted (D.D.C. Mar. 30, 2001), recon-

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3509(d) of the Federal Victims' Protection and Rights Act,[95] governing the disclosure of information that would identify children who were victims of certain crimes or witnesses to crimes against others, has been held to qualify as an Exemption 3 statute because it "establishes particular criteria for withholding."[96]

Similarly, it has been held that section 12(c)(1) of the Export Administration Act, governing the disclosure of information from export licenses and applications,[97] authorizes the withholding of a sufficiently narrow class of information to satisfy the requirements of subpart (B) and thus qualifies as an Exemption 3 statute.[98] Likewise, the Collection and Publication of

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[94](...continued)
sideration denied (D.D.C. Feb. 28, 2002); Nat'l W. Life Ins. Co. v. United States, 512 F. Supp. 454, 459, 462 (N.D. Tex. 1980) (concluding that list of names and duty stations of postal employees did not qualify as "commercial information" within scope of 39 U.S.C.A. § 410(c)(2)).

[95] 18 U.S.C. § 3509(d) (2000).

[96] Tampico v. Executive Office for U.S. Attorneys, No. 04-2285, slip op. at 8 (D.D.C. Apr. 29, 2005).

[97] 50 app. U.S.C.A. § 2411(c)(1) (1991 & West Supp. 2006) (statute which most recently expired on August 20, 2001, as required by the Export Administration Modification and Clarification Act of 2000, Pub. L. No. 106-508, 114 Stat. 2360 (2000), but has been re-extended several times in past, in substantially identical form).

[98] See Wis. Project on Nuclear Arms Control v. U.S. Dep't of Commerce, 317 F.3d 275, 284 (2003) (ruling that agency properly withheld export license application information under "comprehensive legislative scheme" through which expired Exemption 3 statute, Export Administration Act, 50 app. U.S.C.A. § 2411(c)(1), continued in operation by virtue of non-Exemption 3 statute that authorized the President to issue executive orders maintaining effectiveness of Act during repeated periods of lapse); Times Publ'g Co. v. U.S. Dep't of Commerce, 236 F.3d 1286, 1289-92 (11th Cir. 2001) (same); Armstrong v. Executive Office of the President, No. 89-142, slip op. at 30-35 (D.D.C. July 28, 1995) (same); Afr. Fund v. Mosbacher, No. 92 Civ. 289, 1993 WL 183736, at *6 (S.D.N.Y. May 26, 1993) (holding that Export Administration Act protection was properly applied to agency denial made after Act expired and before subsequent re-extension); see also Lessner v. U.S. Dep't of Commerce, 827 F.2d 1333, 1336-37 (9th Cir. 1987) (construing statute as effective in 1987); cf. Council for a Livable World v. U.S. Dep't of State, No. 96-1807, slip op. at 11 (D.D.C. Jan. 21, 1998) (finding that section 12(c)(1) of Export Administration Act, as specifically incorporated by reference into Arms Export Control Act, 22 U.S.C.A. § 2778(e) (2004 & West Supp. 2006), is Exemption 3 statute that protects information concerning export license applications -- without acknowledging that Export Adminis-
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Foreign Commerce Act,[99] which explicitly provides for nondisclosure of shippers' export declarations, qualifies as an Exemption 3 statute under subpart (B).[100]

The Supreme Court has held that section 102(d)(3) of the National Security Act of 1947,[101] which required the Director of the CIA to protect "sources and methods," clearly refers to particular types of matters to be withheld and thus comes within the ambit of subpart (B),[102] and in some

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[98](...continued)
tration Act had lapsed), amended (D.D.C. Nov. 23, 1998).

[99] 13 U.S.C. § 301(g) (2000 & Supp. IV 2004).

[100] See Afr. Fund, 1993 WL 183736, at *5; Young Conservative Found., 1987 WL 9244, at *2-3.

[101] Pub. L. No. 108-458, 118 Stat. 3643 (2004) (to be codified at 50 U.S.C. § 403-1(i)) (repealing Pub. L. No. 107-56, § 901, 115 Stat. 272 (2001), relating to responsibilities of Director of the CIA, and amending 50 U.S.C. § 403-1, thereby reassigning authority for protecting intelligence sources and methods to Director of National Intelligence).

[102] See CIA v. Sims, 471 U.S. 159, 167 (1985); see also Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 60-61 (D.C. Cir. 2003) (affirming that release of CIA's five-volume compendium of biographical information on "Cuban Personalities" in its entirety would reveal intelligence sources and methods despite plaintiff's allegation that CIA previously released some of same information); Students Against Genocide v. Dep't of State, 257 F.3d 828, 835-36 (D.C. Cir. 2001) (finding that CIA properly withheld photographs purportedly taken by U.S. spy planes and satellites, including photographs that were shown to members of United Nations Security Council by U.S. Ambassador to U.N.); Maynard v. CIA, 986 F.2d 547, 554 (1st Cir. 1993) (stating that under § 403(d)(3) it is responsibility of Director of CIA to determine whether sources or methods should be disclosed); Krikorian v. Dep't of State, 984 F.2d 461, 465 (D.C. Cir. 1993) (same); Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990) (same); Morley v. CIA, 453 F. Supp. 2d 137, 149-51 (D.D.C. 2006) (protecting "intelligence sources and methods," cryptonyms, pseudonyms, and dissemination-control markings); Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *9-11 (D.D.C. Aug. 10, 2005) (protecting classification markings, dissemination control markings, organizational information, and information that could identify intelligence source); Aftergood v. CIA, 355 F. Supp. 2d 557, 562-64 (D.D.C. 2005) (finding that Exemption 3 statute protected CIA's historical budget information from 1947 to 1970, but noting that such protection did not extend to "1963 budget information" that CIA officially acknowledged in declassified "Cost Reduction Program Report"), amended, No. 01-2524, slip op. at 1 (D.D.C. Apr. 4, 2005) (ordering CIA to disclose officially acknowledged 1963 budget figure to plaintiff); Berman v. CIA, 378
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instances provides a basis for an agency refusing to even confirm or deny the existence of records.[103] (See the discussion of the use and origin of

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[102](...continued)
F. Supp. 2d 1209, 1218 (E.D. Cal. 2005) (holding that CIA properly withheld two "President's Daily Briefs" prepared by CIA during President Johnson's term of office); Judicial Watch, Inc. v. Dep't of Commerce, 337 F. Supp. 2d 146, 167-68 (D.D.C. 2004) (protecting CIA intelligence sources and methods); Aftergood v. CIA, No. 02-1146 (D.D.C. Feb. 8, 2004) (finding that CIA properly withheld aggregate fiscal-year intelligence budget information); Hogan v. Huff, No. 00-Civ-6753, 2002 WL 1359722, at *9 (S.D.N.Y. June 21, 2002) (ruling that the CIA properly withheld information from investigative reports on the death of the requester's father because "disclosure of the information could subsequently put both informants and their families in a dangerous position"); Halpern v. FBI, No. 94-CV-365, slip op. at 16-17 (W.D.N.Y. Aug. 31, 2001) (magistrate's recommendation) (protecting locations of foreign CIA stations), adopted (W.D.N.Y. Oct. 12, 2001); Schrecker v. U.S. Dep't of Justice, 74 F. Supp. 2d 26, 32-33 (D.D.C. 1999) (ruling that CIA properly refused to disclose identity of deceased intelligence sources, allegedly of historical significance, and noting that privacy concerns are not relevant), aff'd in relevant part, rev'd & remanded on other grounds, 254 F.3d 162 (D.C. Cir. 2001); Aftergood v. CIA, No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at *12-15 (D.D.C. Nov. 12, 1999) (permitting CIA to withhold total budget request for all intelligence and intelligence-related activities where Director of Central Intelligence determined that disclosure would "tend to reveal" sources and methods); Blazy v. Tenet, 979 F. Supp. 10, 23-24 (D.D.C. 1997) (protecting intelligence sources and methods located in requester's personnel file), summary affirmance granted, No. 97-5330 (D.C. Cir. May 12, 1998); Andrade v. CIA, No. 95-1215, 1997 WL 527347, at *3-5 (D.D.C. Aug. 18, 1997) (holding intelligence methods used in assessing employee fitness protectible), appeal voluntarily dismissed, No. 97-5251 (D.C. Cir. Dec. 18, 1997).

[103] See, e.g., Frugone v. CIA, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (finding that CIA properly refused to confirm or deny existence of records concerning plaintiff's alleged employment relationship with CIA despite allegation that another government agency seemed to confirm plaintiff's status as former CIA employee); Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996) (finding that agency properly refused to confirm or deny existence of records concerning deceased person's alleged employment relationship with CIA); Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992) (upholding agency's "Glomar" response to request on foreign national because acknowledgment of existence of any responsive record would reveal sources and methods); Knight v. CIA, 872 F.2d 660, 663 (5th Cir. 1989) (same); Riquelme v. CIA, 453 F. Supp. 2d 103, 105-06, 110-12 (D.D.C. 2006) (upholding CIA's "Glomar" response to request for records concerning its agents' alleged activities, involvement, and contacts in Paraguay during certain time period); ACLU, 389 F. Supp. 2d at 565 (upholding the CIA's "Glomar" response to requests for a Department of Justice memorandum specifying interrogation methods

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the "Glomar" response under Exemption 1, In Camera Submissions, above.)

Of current significance in this regard is the fact that in December 2004, Congress enacted section 102A(i) of the National Security Act of 1947, as part of the Intelligence Reform and Terrorism Prevention Act,[104] and thereby transferred authority for protecting intelligence sources and methods from the Director of Central Intelligence to the Director of National Intelligence.[105] Courts subsequently have held that this new statute provides continued protection of the CIA's intelligence sources and meth-

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[103](...continued)
that the CIA may use against top Al-Qaeda members and a "directive signed by President Bush granting the CIA the authority to set up detention facilities outside the United States and/or outlining interrogation methods that may be used against detainees"); Wolf v. CIA, 357 F. Supp. 2d 112, 117 (D.D.C. 2004) (concluding that the CIA properly refused to confirm or deny the existence of records on Jorge Elicier Gaitan, a Columbian presidential candidate assassinated in 1948, because such acknowledgment "could constitute a threat to national security or to the information-gathering process"), aff'd in pertinent part & remanded on other grounds, 473 F.3d 370 (D.C. Cir. 2007); Pipko v. CIA, 312 F. Supp. 2d 669, 678-79 (D.N.J. 2004) (holding that CIA properly refused to confirm or deny existence of records responsive to first-party request); Wheeler v. CIA, 271 F. Supp. 2d 132, 140-41 (D.D.C. 2003) (same); Kelly v. CIA, No. 00-2498, slip op. at 20 (D.D.C. Aug. 8, 2002) (finding that CIA properly refused to confirm or deny existence of any record reflecting any covert CIA relationship with UCLA); Arabian Shield Dev. Co. v. CIA, No. 3-98-CV-0624, 1999 WL 118796, at *4 (N.D. Tex. Feb. 26, 1999) (deferring to the CIA Director's determination that to confirm or deny the existence of any agency record pertaining to contract negotiations between a U.S. oil company and a foreign government would compromise intelligence sources and methods, while noting that the "Director [of Central Intelligence]'s determination in this regard is almost unassailable" and that "[a]bsent evidence of bad faith, the [CIA]'s determination 'is beyond the purview of the courts'") (quoting Knight v. CIA, 872 F.2d at 664); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 627 (S.D.N.Y. 1996) (finding agency's "Glomar" response proper because acknowledgment of records would present "danger of revealing sources"), aff'd per curiam, 128 F.3d 788 (2d Cir. 1997); see also Tooley, 2006 WL 3783142, at *20-21 (upholding TSA's reliance on Exemption 3 and 49 U.S.C. § 114(s) in its "Glomar" response to first-party request for "TSA watch-list records"). But cf. ACLU, 389 F. Supp. 2d at 566 (declining to uphold CIA's "Glomar" denial of request for Justice Department memorandum interpreting Convention Against Torture, because acknowledgment of its existence does not implicate intelligence sources or methods), reconsideration denied, 396 F. Supp. 2d 459 (S.D.N.Y. 2005).

[104] Pub. L. No. 108-458, § 1011, 118 Stat. 3638 (2004).

[105] Id.

ods.[106]

Also, section 6 of the Central Intelligence Agency Act of 1949[107] -- protecting from disclosure "the organization, functions, names, official titles, salaries or numbers of personnel" employed by the CIA -- meets the requirements of subpart (B).[108] Likewise, the identities of Defense Intelligence Agency employees have been held to be protected from disclosure pursuant to 10 U.S.C. § 424.[109] Similarly, section 6 of Public Law No. 86-36,[110] pertaining to the organization, functions, activities, and personnel of the National Security Agency, has been held to qualify as a subpart (B) statute,[111] as has 18 U.S.C. § 798(a),[112] which criminalizes the disclosure of

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[106] See e.g., Lahr v. NTSB, 453 F. Supp. 2d 1153, 1172 (C.D. Cal. 2006) (protecting CIA's intelligence sources and methods under 50 U.S.C.A. § 403-1(i) (West Supp. 2006)); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 222 (D.D.C. 2005) (protecting CIA's intelligence sources and methods documented in 2004 National Intelligence Estimate on Iraq).

[107] 50 U.S.C.A. § 403g (West Supp. 2006) (as amended by Pub. L. No. 108-458, §§ 1071(b)(1)(A), 1072(b), replacing "Director of Central Intelligence" with "Director of National Intelligence").

[108] See, e.g., Lahr, 453 F. Supp. 2d at 1172 (protecting names of CIA employees); Morley, 453 F. Supp. 2d at 150-51 (protecting CIA employee names and personal identifiers); Judicial Watch, Inc., 337 F. Supp. 2d at 167-68 (same); Minier, 88 F.3d at 801; Roman v. Dailey, No. 97-1164, 1998 U.S. Dist. LEXIS 6708, at *10-11 (D.D.C. May 11, 1998), appeal dismissed, No. 99-5083, 1999 WL 506683 (D.C. Cir. Jun. 3, 1999); Blazy, 979 F. Supp. at 23-24; Earth Pledge Found., 988 F. Supp. at 627-28; Campbell, 1996 WL 554511, at *6; Kronisch v. United States, No. 83-2458, 1995 WL 303625, at *4-6 (S.D.N.Y. May 18, 1995), aff'd on other grounds, 150 F.3d 112 (2d Cir. 1998); Hunsberger v. CIA, No. 92-2186, slip op. at 3 (D.D.C. Apr. 5, 1995); Rothschild v. CIA, No. 91-1314, 1992 WL 71393, at *2 (D.D.C. Mar. 25, 1992); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 567 (S.D.N.Y. 1989); Pfeiffer v. CIA, 721 F. Supp. 337, 341-42 (D.D.C. 1989).

[109] (2000 & Supp. IV 2004); see, e.g., Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *15 (D.D.C. Aug. 10, 2005); Wickwire Gavin, P.C. v. Def. Intelligence Agency, 330 F. Supp. 2d 592, 601-02 (E.D. Va. 2004) (holding that agency properly withheld names of Defense Intelligence Agency employees).

[110] 50 U.S.C. § 402 note (2000).

[111] See Founding Church of Scientology v. NSA, 610 F.2d 824, 828 (D.C. Cir. 1979); Hayden v. NSA, 452 F. Supp. 247, 252 (D.D.C. 1978), aff'd, 608 F.2d 1381 (D.C. Cir. 1979); People for the Am. Way Found. v. NSA, 462 F. Supp. 2d 21, 28 (D.D.C. 2006) (treating statute as providing "absolute" protection); Lahr, 453 F. Supp. 2d at 1191-93 (holding, upon in camera inspection, that NSA properly protected a computer simulation program that "re-

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any classified information "concerning the nature, preparation, or use of any code, cipher or cryptographic system of the United States."[113] And a provision of the Atomic Energy Act, prohibiting the disclosure of "restricted data" to the public,[114] refers to particular types of matters -- specifically, information pertaining to atomic weapons and special nuclear material[115] -- and thus has been held to qualify as a subpart (B) statute as well.[116]

Section 7332 of the Veterans Health Administration Patient Rights

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[111](...continued)
lated to [its] core functions and activities"); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1340 (S.D. Fla. 2005) (finding, upon in camera inspection, that NSA properly withheld one-page signal intelligence report because disclosure would reveal certain functions of NSA); see also 10 U.S.C. § 130b (2000 & Supp. IV 2004) (authorizing withholding of personally identifying information regarding any member of armed forces or employee of Department of Defense or of Coast Guard who is assigned to unit that is overseas, "sensitive," or "routinely deployable"); cf. O'Keefe v. DOD, 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006) (holding as improper DOD's blanket withholding of employees' names under 10 U.S.C. § 130b in the absence of any showing that those employees were "stationed with a 'routinely deployable unit' or any other unit within the ambit of [that statute]").

[112] (2000 & Supp. IV 2004).

[113] Winter v. NSA, 569 F. Supp. 545, 548 (S.D. Cal. 1983); see also Gilmore v. NSA, No. C 92-3646, 1993 U.S. Dist. LEXIS 7694, at *26-27 (N.D. Cal. May 3, 1993) (finding information on cryptography currently used by NSA to be "integrally related" to intelligence gathering and thus protectible).

[114] 42 U.S.C. § 2162 (2000 & Supp. III 2003).

[115] 42 U.S.C.A. § 2014(y) (2003 & West Supp. 2006) (defining "restricted data"); cf. *FOIA Post*, "Guidance on Homeland Security Information Issued" (posted 3/21/02) (reprinting Memorandum from Assistant to the President and Chief of Staff to the Heads of Executive Departments and Agencies (Mar. 19, 2002) (directing agencies to safeguard government information "that could reasonably be expected to assist in the development or use of weapons of mass destruction, including information about the current locations of stockpiles of nuclear materials that could be exploited for use in such weapons")).

[116] See Meeropol v. Smith, No. 75-1121, slip op. at 53-55 (D.D.C. Feb. 29, 1984), aff'd in relevant part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986). But see Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1401 (7th Cir. 1984) (concluding that a provision of the Atomic Energy Act, 42 U.S.C.A. § 2133(b)(3) (2003 & West Supp. 2006), stating that technical information furnished by license applicants was to be used "only for the purposes of the common defense and security and to protect the health and safety of the public" lacked sufficient specificity to qualify as Exemption 3 statute).

Statute[117] generally prohibits disclosure of even the abstract fact that medical records on named individuals are maintained pursuant to that section, but it provides specific criteria under which particular medical information may be released, and thus has been found to satisfy the requirements of subpart (B).[118] Records created by the Department of Veterans Affairs as part of a medical quality-assurance program[119] have similarly been held to qualify for Exemption 3 protection.[120] Likewise, one court has suggested that section 5038 of the Juvenile Delinquency Records Statute,[121] which generally prohibits disclosure of the existence of records compiled pursuant to that section, but which does provide specific criteria for releasing the information, qualifies as a subpart (B) statute.[122] Similarly, Section 207 of the National Park Omnibus Management Act of 1998,[123] which sets forth criteria for the Secretary of the Interior to apply when exercising discretion about release of "[i]nformation concerning the nature and specific location of [certain] National Park System resource[s]," including resources which are "endangered, threatened, rare, or commercially valuable," has been found to be within the scope of subpart (B).[124]

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[117] 38 U.S.C. § 7332 (2000).

[118] See Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992).

[119] See 38 U.S.C. § 5705(a) (2000).

[120] See Schulte & Sun-Sentinel Co. v. VA, No. 86-6251, slip op. at 3-4 (S.D. Fla. Feb. 2, 1996) (allowing agency to withhold mortality statistics); see also Goodrich v. Dep't of the Air Force, 404 F. Supp. 2d 48, 50, 51 (D.D.C. 2005) (holding that 10 U.S.C. § 1102 (2000 & Supp. IV 2004), DOD's medical quality-assurance statute, qualifies as Exemption 3 statute protecting "minutes of Credentials Functions meetings and [Medical Practice Review Boards]"); Dayton Newspapers, Inc. v. Dep't of the Air Force, 107 F. Supp. 2d 912, 917 (S.D. Ohio 1999) (finding that 10 U.S.C. § 1102, qualifies as Exemption 3 statute protecting "all 'medical quality assurance records,' regardless of whether the contents of such records originated within or outside of a medical quality assurance program").

[121] 18 U.S.C. § 5038 (2000).

[122] See McDonnell v. United States, 4 F.3d 1227, 1251 (3d Cir. 1993) (holding that state juvenile delinquency records fall outside scope of statute).

[123] 16 U.S.C. § 5937 (2000).

[124] See Sw. Ctr. for Biological Diversity v. USDA, 314 F.3d 1060, 1061 (9th Cir. 2002) (approving withholding of information concerning specific nesting locations of northern goshawks); Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 30 (D.D.C. 2003) (concluding that agency properly withheld information regarding "rare or commercially valuable" resources because resources were located within "public land" boundaries); Pease v.

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The Court of Appeals for the District of Columbia Circuit has held that a portion of the Patent Act[125] satisfies subpart (B) because it identifies the types of matters -- patent applications and information concerning them -- intended to be withheld.[126] As well, the portion of the Civil Service Reform Act concerning the confidentiality of certain labor relations training and guidance materials,[127] has been held to qualify as a subpart (B) withholding statute.[128] In addition, the United States Information and Educational Exchange Act of 1948 (the "Smith-Mundt Act")[129] qualifies as a subpart (B) statute insofar as it prohibits the disclosure of certain overseas programming materials within the United States.[130] While the Smith-Mundt Act originally applied only to records prepared by the now-defunct United States Information Agency, the Foreign Affairs Reform and Restructuring Act of 1998 applied the relevant provisions of that statute to those

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[124](...continued)
U.S. Dep't of Interior, No. 1:99CV113, slip op. at 2, 4 (D. Vt. Sept. 17, 1999) (finding that the agency properly withheld "certain information pertaining to the location, tracking and/or radio frequencies of grizzly bears" in the Yellowstone National Park ecosystem); cf. Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1089 (9th Cir. 1997) (refusing to protect wildlife maps showing endangered species locations pursuant to Exemption 2); Audubon Soc'y v. U.S. Forest Serv., 104 F.3d 1201, 1204 (10th Cir. 1997) (same); *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03) (discussing National Park Omnibus Management Act of 1998, and citing Southwest Center for Biological Diversity); *FOIA Post*, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (noting possible need for additional nondisclosure legislation to protect confidential communications between Department of the Interior and Indian tribes); FOIA Update, Vol. XVI, No. 3, at 2 (describing difficulty of protecting endangered species locations under Exemption 2 prior to legislative enactment qualifying under Exemption 3).

[125] 35 U.S.C. § 122 (2000 & Supp. III 2003).

[126] Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979); accord Leeds v. Quigg, 720 F. Supp. 193, 194 (D.D.C. 1989), summary affirmance granted, No. 89-5062, 1989 WL 386474 (D.C. Cir. Oct. 24, 1989).

[127] 5 U.S.C. § 7114(b)(4) (2000).

[128] See Dubin v. Dep't of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision); NTEU v. OPM, No. 76-695, slip op. at 4 (D.D.C. July 9, 1979).

[129] 22 U.S.C. § 1461-1a (2000).

[130] See Essential Info., Inc. v. USIA, 134 F.3d 1165, 1168 (D.C. Cir. 1998) (holding that Smith-Mundt Act qualifies as nondisclosure statute even though "it does not prohibit all disclosure of records but only disclosure to persons in this country").

programs within the Department of State that absorbed USIA's functions.[131]

The Commodity Exchange Act,[132] which prohibits the disclosure of business transactions, market positions, trade secrets, or customer names of persons under investigation under the Act, has been held to refer to particular types of matters and thus to satisfy subpart (B).[133] The D.C. Circuit has held that a provision of the Federal Aviation Act,[134] relating to security data the disclosure of which would be detrimental to the safety of travelers, similarly shields that particular data from disclosure under the FOIA.[135] It also has been held that the DOD's "technical data" statute,[136] which protects technical information with "military or space application" for which an export license is required, satisfies subpart (B) because it refers to sufficiently particular types of matters.[137]

Further, the Federal Transfer Technology Act,[138] which allows federal agencies the discretion to protect for five years any commercial and confidential information that results from a Cooperative Research And Development Agreement (CRADA) with a nonfederal party, has been held to qual-

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[131] See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended at 22 U.S.C. §§ 6501-6617) (abolishing USIA, 22 U.S.C. § 6531 (2000), transferring USIA functions to Department of State, 22 U.S.C. § 6532 (2000), and applying Smith-Mundt Act to USIA functions that were transferred to Department of State (22 U.S.C. § 6552(b)) (2000)).

[132] 7 U.S.C. § 12 (2000).

[133] See Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 49 (D.D.C. 1979).

[134] 49 U.S.C. § 40119 (2000 & Supp. III 2003), amended by Pub. L. No. 107-71, 115 Stat. 597, 603 (2001) (transferring statutory powers from Administrator of FAA to Under Secretary of Transportation for Security, and expanding criteria for nondisclosure).

[135] Pub. Citizen, Inc. v. FAA, 988 F.2d 186, 194 (D.C. Cir. 1993).

[136] 10 U.S.C. § 130 (2000).

[137] See Chenkin v. Dep't of the Army, No. 93-494, 1994 U.S. Dist. LEXIS 20907, at *8 (E.D. Pa. Jan. 14, 1994), aff'd, 61 F.3d 894 (3d Cir. 1995) (unpublished table decision); Colonial Trading Corp. v. Dep't of the Navy, 735 F. Supp. 429, 431 (D.D.C. 1990); see also Am. Friends Serv. Comm. v. DOD, No. 83-4916, 1986 WL 10659, at *4 (E.D. Pa. Sept. 25, 1986) (applying statute where only dispute was over coverage in relation to particular data at issue), rev'd on other grounds, 831 F.2d 441 (3d Cir. 1987).

[138] 15 U.S.C. § 3710a(c)(7) (2000 & Supp. IV 2004).

ify as an Exemption 3 statute.[139] Under a concurrent provision in that Act, the agency also is prohibited from disclosing any commercial and confidential information obtained from the CRADA's private-sector partner.[140] (See also the discussion of commercial information under Exemption 4, Commercial or Financial Information, below.)

By comparison, some statutes have been found to satisfy both Exemption 3 subparts. For example, while the Court of Appeals for the Third Circuit has held that section 222(f) of the Immigration and Nationality Act[141] sufficiently limits the category of information it covers -- records pertaining to the issuance or refusal of visas and permits to enter the United States -- to qualify as an Exemption 3 statute under subpart (B),[142] the Court of Appeals for the District of Columbia Circuit has held that the section satisfies subpart (A) as well as subpart (B).[143]

Similarly, Exemption 3 protection for information obtained by law enforcement agencies pursuant to the statute governing court-ordered wiretaps, Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[144] has been recognized by district courts on a variety of bases.[145] However, in

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[139] See Pub. Citizen Health Research Group v. NIH, 209 F. Supp. 2d 37, 43, 51 (D.D.C. 2002) (deciding that NIH properly withheld royalty rate information under 15 U.S.C. § 3710a(c)(7)(A), and noting that scope of Act's protection is "coterminous" with that of Exemption 4); DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 871 (D. Me. 1996) (finding that 15 U.S.C. § 3710a(c)(7)(A) qualifies as Exemption 3 statute), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996).

[140] 15 U.S.C. § 3710a(c)(7)(B).

[141] 8 U.S.C. § 1202(f) (2000 & Supp. IV 2004).

[142] DeLaurentiis v. Haig, 686 F.2d 192, 194 (3d Cir. 1982); accord Smith v. Dep't of Justice, No. 81-CV-813, 1983 U.S. Dist. LEXIS 10878, at *13-14 (N.D.N.Y. Dec. 13, 1983).

[143] Medina-Hincapie v. Dep't of State, 700 F.2d 737, 741-42 (D.C. Cir. 1983); accord Perry-Torres v. U.S. Dep't of State, 404 F. Supp. 2d 140, 143-44 (D.D.C. 2005) (protecting "information regarding the denial of plaintiff's visa application"); Marulanda v. U.S. Dep't of State, No. 93-1327, slip op. at 4-6 (D.D.C. Jan. 31, 1996) (protecting documents relating to denial of plaintiff's visa even when agency previously released certain of those records that were determined not to breach confidentiality provision).

[144] See 18 U.S.C.A. §§ 2510-2520 (2000 & West Supp. 2006).

[145] See Mendoza v. DEA, 465 F. Supp. 2d 5, 11 (D.D.C. 2006) (protecting information obtained from authorized wiretap); Jennings v. FBI, No. 03-1651, slip op. at 11 (D.D.C. May 6, 2004) (protecting transcripts of wiretapped communications); Barreiro v. Executive Office for U.S. Attorneys,

(continued...)

Lam Lek Chong v. DEA,[146] the D.C. Circuit, finding that it "clearly identifies intercepted communications as the subject of its disclosure limitations," held that "Title III falls squarely within the scope of subsection (B)'s second prong, as a statute referring to 'particular matters to be withheld.'"[147]

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[145](...continued)
No. 03-0720, slip op. at 5 (D.D.C. Dec. 31, 2003) (relying upon "wiretap statute" to protect information obtained through authorized wiretap, but not distinguishing between subparts (A) and (B) of Exemption 3), aff'd, No. 04-5071, 2004 WL 2451753, at *1 (D.C. Cir. Nov. 1, 2004); Sinito v. U.S. Dep't of Justice, No. 87-0814, slip op. at 12-14 (D.D.C. July 11, 2000) (implying that 18 U.S.C. § 2518(8)(b), which requires that Title III applications and orders be kept under court seal, is a subpart (A) statute in observing that "[t]he FBI has no discretion . . . to disclose Title III information that is under court seal"), aff'd, 22 F. App'x 1 (D.C. Cir. 2001); Gonzalez v. U.S. Dep't of Justice, No. 88-913, 1988 WL 120841, at *2 (D.D.C. Oct. 25, 1988) (holding that statute codified at 18 U.S.C. § 2511(2)(a)(ii), which regulates disclosure of existence of wiretap intercepts, meets requirements of subpart (A)); Docal v. Bennsinger, 543 F. Supp. 38, 43-44 (M.D. Pa. 1981) (relying upon entire statutory scheme of 18 U.S.C. §§ 2510-2520 but not distinguishing between Exemption 3 subparts); Carroll v. U.S. Dep't of Justice, No. 76-2038, slip op. at 2-3 (D.D.C. May 26, 1978) (holding that 18 U.S.C. § 2518(8), which regulates disclosure of contents of wiretap intercepts, meets requirements of subpart (A)).

[146] 929 F.2d 729 (D.C. Cir. 1991).

[147] Id. at 733 (quoting 5 U.S.C. § 552(b)(3) (2000 & Supp. IV 2004)); see also Willis v. FBI, No. 98-5071, 1999 WL 236891, at *1 (D.C. Cir. Mar. 19, 1999) (finding that FBI properly withheld two electronic surveillance tapes under Title III and Exemption 3); Payne v. U.S. Dep't of Justice, No. 96-30840, slip op. at 5-6 (5th Cir. July 11, 1997) (holding that tape recordings obtained pursuant to Title III "fall squarely" within scope of Exemption 3); Manna v. U.S. Dep't of Justice, No. 92-1840, slip op. at 3-4 (D.N.J. Aug. 25, 1993) (determining that analysis of audiotapes and identities of individuals conversing on tapes obtained pursuant to Title III is protected under Exemption 3), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995); Barreiro, No. 03-0720, slip op. at 5 (D.D.C. Dec. 31, 2003) (protecting transcript of wiretapped communication); Manchester v. DEA, 823 F. Supp. 1259, 1267 (E.D. Pa. 1993) (ruling that wiretap applications and derivative information fall within broad purview of Title III), aff'd, 40 F.3d 1240 (3d Cir. 1994) (unpublished table decision); cf. Smith v. U.S. Dep't of Justice, 251 F.3d 1047, 1049 (D.C. Cir. 2001) (finding that audiotapes of telephone calls made by inmate on monitored prison telephone were not "interceptions" within scope of Title III and thus were improperly withheld); Cottone v. Reno, 193 F.3d 550, 554-56 (D.C. Cir. 1999) (noting that wiretapped recordings obtained pursuant to Title III ordinarily are exempt from disclosure under Exemption 3, but holding that Exemption 3 protection was waived when FOIA requester precisely identified specific tapes that had been played in open court by
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Applications and orders for "pen registers" properly may be withheld pursuant to a sealing order issued by a court in accordance with 18 U.S.C. § 3123(d)[148] but once the sealing order is lifted, the statute no longer prohibits release under the FOIA.[149] In one case, information acquired through the use of a "pen register" was held to be protected from disclosure by Title III,[150] and was found to fall under Exemption 3.[151]

The withholding of tax return information has been approved under three different theories. The United States Supreme Court and most appellate courts that have considered the matter have held either explicitly or implicitly that section 6103 of the Internal Revenue Code[152] satisfies subpart (B) of Exemption 3.[153] The Courts of Appeals for the D.C., Fifth, Sixth, and Tenth Circuits have further reasoned that section 6103 is a subpart (A) statute to the extent that a person generally is not entitled to access to tax

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[147](...continued)
prosecution as evidence during criminal trial).

[148] (2000 & Supp. IV 2004); see Jennings, No. 03-1651, slip op. at 11-12 (D.D.C. May 6, 2004) (protecting sealed pen register and conversation log sheets); Riley v. FBI, No. 00-2378, 2002 U.S. Dist. LEXIS 2632, at *5-6 (D.D.C. Feb. 11, 2002) (protecting sealed pen register applications and orders); Manna v. U.S. Dep't of Justice, 815 F. Supp. 798, 812 (D.N.J. 1993) (same), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995).

[149] See 18 U.S.C. § 3123(d); see also Morgan v. U.S. Dep't of Justice, 923 F.2d 195, 197 (D.C. Cir. 1991) ("[T]he proper test for determining whether an agency improperly withholds records under seal is whether the seal, like an injunction, prohibits the agency from disclosing the records.").

[150] 18 U.S.C. §§ 2510-2520.

[151] McFarland v. DEA, No. 94-620, slip op. at 4 (D. Colo. Jan. 3, 1995) (protecting under Exemption 3 material "acquired through the use of a pen register").

[152] 26 U.S.C.A. § 6103 (2002 & West Supp. 2006).

[153] See, e.g., Church of Scientology v. IRS, 484 U.S. 9, 15 (1987); Aronson v. IRS, 973 F.2d 962, 964-65 (1st Cir. 1992) (finding that IRS lawfully exercised discretion to withhold street addresses pursuant to 26 U.S.C. § 6103(m)(1)); Long v. IRS, 891 F.2d 222, 224 (9th Cir. 1989) (holding that deletion of taxpayers' identification does not alter confidentiality of section 6103 information); DeSalvo v. IRS, 861 F.2d 1217, 1221 (10th Cir. 1988); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986); Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984); Ryan v. ATF, 715 F.2d 644, 645 (D.C. Cir. 1983); Currie v. IRS, 704 F.2d 523, 527-28 (11th Cir. 1983); Willamette Indus. v. United States, 689 F.2d 865, 867 (9th Cir. 1982); Barney v. IRS, 618 F.2d 1268, 1274 n.15 (8th Cir. 1980) (dictum); Chamberlain v. Kurtz, 589 F.2d 827, 843 (5th Cir. 1979).

returns or return information of other taxpayers.[154] In 2003, however, the

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[154] See Stebbins v. Sullivan, No. 90-5361, 1992 WL 174542, at *1 (D.C. Cir. July 22, 1992); DeSalvo, 861 F.2d at 1221 n.4; Linsteadt v. IRS, 729 F.2d 998, 1000 (5th Cir. 1984); Fruehauf Corp. v. IRS, 566 F.2d 574, 578 n.6 (6th Cir. 1977); see also Tax Analysts v. IRS, 410 F.3d 715, 717-22 (D.C. Cir. 2005) (finding that a "closing agreement" reached between an organization and the IRS did "not constitute a document submitted in support of the [organization's successful] application [for tax-exempt status]"; therefore, "closing agreement" is protected "return information" and is not subject to disclosure under section 6104); Landmark Legal Found. v. IRS, 267 F.3d 1132, 1135-37 (D.C. Cir. 2001) (determining that "return information" includes identities of tax-exempt organizations as well as information pertaining to third-party requests for audits or investigations of tax-exempt organizations); Stanbury Law Firm v. IRS, 221 F.3d 1059, 1062 (8th Cir. 2000) (ruling that names of contributors to public charity constitute tax return information and may not be disclosed); Lehrfeld v. Richardson, 132 F.3d 1463, 1467 (D.C. Cir. 1998) (protecting third-party "return information" submitted in support of application for tax-exempt status); Tax Analysts v. IRS, 117 F.3d 607, 611-16 (D.C. Cir. 1997) (holding that while Field Service Advice Memoranda contain some protectible "return information," any "legal analyses" contained therein do not constitute "return information" properly withholdable under Exemption 3); Kamman v. IRS, 56 F.3d 46, 49 (9th Cir. 1995) (holding appraisal of jewelry seized from third-party taxpayer and auctioned to satisfy tax liability was not "return information"); Morley, 453 F. Supp. 2d at 150-51 (protecting deceased person's W-4 tax withholding information); Judicial Watch, Inc. v. Dep't of Justice, 306 F. Supp. 2d 58 (D.D.C. 2004) (ruling that records related to bankruptcy of Enron Corporation constitute "return information"); Hodge v. IRS, No. 03-0269, 2003 U.S. Dist. LEXIS 17083, at *1-3 (D.D.C. Aug. 28, 2003) (ruling that agency withholding of third-party tax return information was proper despite claim that third party used plaintiff's social security number on third party's tax return); Mays v. IRS, No. 02-1191, 2003 WL 21518343, at *2 (D. Minn. May 21, 2003) (prohibiting disclosure of former bank's tax return information absent evidence of bank's corporate dissolution); Andrews v. IRS, No. 02-0973, 2003 U.S. Dist. LEXIS 10226, at *4-6 (D.D.C. Apr. 29, 2003) (approving agency's withholding of corporation's tax return information on basis that corporation had merged rather than dissolved); Davis, Cowell & Bowe, LLP v. Soc. Sec. Admin., No. 01-4021, 2002 WL 1034058, at *5-7, *9 (N.D. Cal. May 16, 2002) (characterizing information on W-2 and W-3 wage forms, which were sent to and used by Social Security Administration for non-tax-related purposes before being sent to IRS, as confidential tax return information), vacated as moot, 281 F. Supp. 2d 1154 (N.D. Cal. 2003) (finding that Social Security Administration's declaration that it did not possess records that plaintiff requested rendered action moot); McGinley v. U.S. Dep't of Treasury, No. 01-09493, 2002 WL 1058115, at *3-4 (C.D. Cal. Apr. 15, 2002) (refusing to allow IRS employee access to record regarding contract between IRS and third party concerning corporate taxpayer's alleged audit, because

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[154](...continued)
such record constituted tax return information); Chourre v. IRS, 203 F. Supp. 2d 1196, 1200-02 (W.D. Wash. 2002) (finding that IRS properly redacted records containing information about plaintiff and third-party taxpayers); Leveto v. IRS, No. 98-285E, 2001 U.S. Dist. LEXIS 5791, at *21-22 (W.D. Pa. Apr. 10, 2001) (ruling that IRS properly withheld information identifying third-party taxpayers); Helmon v. IRS, No. 3-00-CV-0809-M, 2000 U.S. Dist. LEXIS 17628, at *9-11 (N.D. Tex. Nov. 6, 2000) (magistrate's recommendation) (protecting third-party "return information" despite requester's claim that she was administrator of estate of third party and thus was legally entitled to requested information, because proof of her relationship to deceased did not satisfy standard established by IRS regulations), adopted (N.D. Tex. Nov. 30, 2000); Wewee v. IRS, No. 99-475, slip op. at 14-15 (D. Ariz. Oct. 13, 2000) (magistrate's recommendation) (concluding that agency properly withheld third-party tax return information, including individual and business taxpayer names, income amounts, and deductions), adopted (D. Ariz. Feb. 13, 2001); Allnutt v. U.S. Dep't of Justice, No. Y98-1722, 2000 U.S. Dist. LEXIS 4060, at *37-38 (D. Md. Mar. 6, 2000) (magistrate's recommendation) (recognizing that section 6103 prohibits disclosure of third-party taxpayer information even though IRS collected such information as part of investigation of requester), adopted in pertinent part, 99 F. Supp. 2d 673, 675 (D. Md. 2000), renewed motion for summary judgment granted, 2000 WL 852455 (D. Md. Oct. 23, 2000), aff'd sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001) (per curiam); Murphy v. IRS, 79 F. Supp. 2d 1180, 1183-84 (D. Haw. 1999) (upholding agency decision to withhold third-party return information despite requester's argument that he had "material interest" in information), appeal dismissed, No. 99-17325 (9th Cir. Apr. 17, 2000); Tax Analysts v. IRS, 53 F. Supp. 2d 449, 451-53 (D.D.C. 1999) (declaring that "closing agreements" releasing tax-exempt organizations from tax liability constitute "tax return information" within scope of section 6103(a), and that because they are distinct from "applications" or tax-exempt status, which are open to public inspection under section 6104, they may not be disclosed); Barmes v. IRS, 60 F. Supp. 2d 896, 900-01 (S.D. Ind. 1998) (protecting "transcripts containing a variety of tax data concerning third party taxpayers"); Buckner v. IRS, 25 F. Supp. 2d 893, 899-900 (N.D. Ind. 1998) (ruling that information properly was withheld where disclosure would reveal identity of third-party taxpayer); Crooker, 1995 WL 430605, at *3 (requiring IRS to confirm that redactions were not taken for aliases plaintiff used in his tax-refund scheme); Gray, Plant, Mooty, Mooty & Bennett v. IRS, No. 4-90-210, 1990 U.S. Dist. LEXIS 18799, at *8 (D. Minn. Dec. 18, 1990) (ordering public report released because it does not qualify as "return information" as it does not include data in form which can be associated with particular taxpayer), appeal dismissed, No. 91-1630 (8th Cir. May 14, 1991). But see also Ginsberg v. IRS, No. 96-2265, 1997 WL 882913, at *4 (M.D. Fla. Dec. 23, 1997) (magistrate's recommendation) (holding that the bulk of a legal memorandum responding to a "Request for Technical Assistance" was not protectible "return information" because the document form-
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EXEMPTION 3

D.C. Circuit held that "the IRS must disclose determinations denying or revoking tax exemptions, but do so in redacted form, thus protecting the privacy of the organizations involved."[155]

It should be noted that pursuant to sections 6103(c) and 6103(e)(7), individuals are not entitled to obtain tax return information even regarding themselves if it is determined that release would impair enforcement by the IRS.[156] Likewise, information that would provide insights into how

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[154](...continued)
ed "the operative body of law found applicable to [the] taxpayers in this [case]"), adopted (M.D. Fla. Jan. 27, 1998).

[155] Tax Analysts v. IRS, 350 F.3d 100, 104 (D.C. Cir. 2003).

[156] See McQueen v. United States, 264 F. Supp. 2d 502, 516 (S.D. Tex. 2003) (reasoning that the release of plaintiff's records that "discussed specifics regarding the nature of the IRS case against . . . third parties" would "effectively thwart" federal tax administration); Carp v. IRS, No. 00-5992, 2002 WL 373448, at *4 (D.N.J. Jan. 28, 2002) (finding that documents submitted by IRS in support of search warrant application in a discontinued tax-fraud investigation were return information that could not be released to subject of investigation without impairing tax administration); Warren v. United States, No. 1:99CV1317, 2000 WL 1868950, at *6 (N.D. Ohio Oct. 31, 2000) (concluding that release of return information to taxpayer would inhibit investigation of taxpayer and impair tax administration); Youngblood v. Comm'r, No. 2:99-CV-9253, 2000 WL 852449, at *9-10 (C.D. Cal. Mar. 6, 2000) (declaring that criminal tax investigation report was properly withheld where IRS demonstrated that disclosure would seriously impair federal tax administration); Anderson v. United States Dep't of Treasury, No. 98-1112, 1999 WL 282784, at *2-3 (W.D. Tenn. Mar. 24, 1999) (finding that disclosure to taxpayer of IRS-prepared "checkspread" charting all checks written by taxpayer over two-year period would seriously impair tax administration, notwithstanding IRS agent's disclosure of "checkspread" to taxpayer during interview); Brooks v. IRS, No. 96-6284, 1997 WL 718473, at *9 (E.D. Cal. Aug. 28, 1997) (upholding protection of revenue agent's notes because release "would permit Plaintiff to ascertain the extent of [IRS's] knowledge and predict the direction of [its] examination"); Gibbs Int'l, Inc. v. IRS, No. 7:96-996-13, slip op. at 1 (D.S.C. Oct. 8, 1996) (stating that "disclosure of the documents would chill future cooperation with foreign government treaty partners"), aff'd, 129 F.3d 116 (4th Cir. 1997) (unpublished table decision); Holbrook v. IRS, 914 F. Supp. 314, 316-17 (S.D. Iowa 1996) (holding IRS agent's handwritten notes protectible because disclosure would interfere with enforcement proceedings and hence seriously impair tax administration); Pully v. IRS, 939 F. Supp. 429, 434-36 (E.D. Va. 1996) (holding documents relating to civil and criminal investigation of plaintiff protectible under Exemptions 3 and 7(A)); Fritz v. IRS, 862 F. Supp. 234, 236 (W.D. Wis. 1994) (finding that disclosure of name and address of purchaser of seized automobile would impair tax administration as "people

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the IRS selects returns for audits has regularly been found to impair IRS's enforcement of tax laws.[157] Of course, it also must be remembered that

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[156](...continued)
would be less likely to purchase seized property" if their identities were revealed); Rollins v. U.S. Dep't of Justice, No. Civ.A. H-90-3170, 1992 WL 12014526, at *5-6 (S.D. Tex. June 30, 1992) (stating that IRS memoranda revealing scope and direction of investigation was properly withheld), aff'd, No. 92-2575 (5th Cir. Oct. 27, 1993); Starkey v. IRS, No. 91-20040, 1991 WL 330895, at *2-3 (N.D. Cal. Dec. 6, 1991) (same), appeal dismissed, No. 92-16162 (9th Cir. Nov. 23, 1992); Church of Scientology v. IRS, No. 89-5894, 1991 U.S. Dist. LEXIS 3008, at *3 (C.D. Cal. Mar. 4, 1991) (concluding that release of document referring to information obtainable under various treaties would chill future cooperation of foreign governments and tax-treaty partners); Casa Investors, Ltd. v. Gibbs, No. 88-2485, 1990 WL 180703, at *4 (D.D.C. Oct. 11, 1990) (holding that recommendation for settlement of tax controversies prepared by low-level IRS employees requires protection). But see LeMaine v. IRS, No. 89-2914, 1991 WL 322616, at *5 (D. Mass. Dec. 10, 1991) (deciding that release of information commonly revealed to public in tax enforcement proceedings would not "seriously impair Federal tax administration" overall).

[157] See Gillin v. IRS, 980 F.2d 819, 822 (1st Cir. 1992) (per curiam) (holding that differential function scores, used to identify returns most in need of examination or audit, are exempt from disclosure); Long v. IRS, 891 F.2d at 224 (finding that computer tapes used to develop discriminant function formulas protected); Sutton v. IRS, No. 05-C-7177, 2007 WL 30547, at *3-4 (N.D. Ill. Jan. 4, 2007) (holding discriminant function scores properly exempt from disclosure); Coolman v. IRS, No. 98-6149, 1999 WL 675319, at *5 (W.D. Mo. July 12, 1999) (holding that section 6103(b)(2) permits IRS to withhold discriminant function scores), aff'd, No. 99-3963, 1999 WL 1419039 (8th Cir. Dec. 6, 1999); Buckner, 25 F. Supp. 2d at 898-99 (concluding that discriminant function scores were properly withheld under section 6103(b)(2), even where scores were seventeen years old, because IRS continued to use scores in determining whether to audit certain tax files); Wishart v. Comm'r, No. 97-20614, 1998 WL 667638, at *6 (N.D. Cal. Aug. 6, 1998) (holding discriminant function scores protectible), aff'd, 199 F.3d 1334 (9th Cir. 1999) (unpublished table decision); Cujas v. IRS, No. 1:97CV00741, 1998 WL 419999, at *5 (M.D.N.C. Apr. 15, 1998) (recognizing that requester was likely to disseminate information about his discriminant function score, "thus making it easier for taxpayers to avoid an audit of their return[s]"), aff'd, 162 F.3d 1154 (4th Cir. 1998) (unpublished table decision); Inman v. Comm'r, 871 F. Supp. 1275, 1278 (E.D. Cal. 1994) (holding discriminant function scores properly exempt); Lamb v. IRS, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (same); In re Church of Scientology Flag Serv. Org./IRS FOIA Litig., No. 91-423, slip op. at 3-4 (M.D. Fla. May 19, 1993) (determining that "tolerance criteria" and discriminant function scores were properly withheld) (multidistrict litigation case); Small, 820 F. Supp. at 165-66 (holding discriminant function scores protected under both Exemption 3 (continued...)

section 6103 applies only to tax return information obtained by the Department of the Treasury, not to any such information maintained by other agencies that was obtained by means other than through the provisions of the Internal Revenue Code.[158]

Just over six years ago, Congress enacted section 6105 of the Internal Revenue Code,[159] which now governs the withholding of tax convention information such as bilateral agreements providing for, inter alia, the exchange of foreign "tax relevant information" with the United States and "mutual assistance in tax matters"; it, too, has been held to be an Exemption 3 statute.[160]

At least one court of appeals and several district courts have explicitly embraced a third theory based upon the reasoning of Zale Corp. v. IRS.[161] These courts have held that it is not necessary to view section 6103 as an Exemption 3 statute in order to withhold tax return information because the provisions of this tax code section are intended to operate as the sole standard governing the disclosure or nondisclosure of such information,

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[157](...continued)
and Exemption 7(E)); Ferguson v. IRS, No. C-89-4048, 1990 U.S. Dist. LEXIS 15293, at *4 (N.D. Cal. Oct. 31, 1990) (finding that standards and data used in selection and examination of returns are exempt from disclosure where they would impair IRS enforcement); see also 26 U.S.C.A. § 6103(b)(2)(D) (providing that no law "shall be construed to require the disclosure of standards used . . . for the selection of returns for examination . . . if the Secretary [of the Treasury] determines that such disclosure will seriously impair . . . enforcement under the internal revenue laws").

[158] See FOIA Update, Vol. IX, No. 2, at 5 (citing Stokwitz v. United States, 831 F.2d 893, 896-97 (9th Cir. 1987), for proposition that disclosure of tax returns that Navy obtained independently of IRS did not violate section 6103, and advising accordingly); see also 26 U.S.C.A. § 6103(b)(1)-(3) (defining "return," "return information," and "taxpayer return information" as information required by, or provided for, Secretary of the Treasury under title 26 of United States Code).

[159] Pub. L. No. 106-554, § 303, 114 Stat 2763 (2000) (codified as amended at 26 U.S.C. § 6105 (2000 & Supp. III 2003)).

[160] See Tax Analysts v. IRS, 217 F. Supp. 2d 23, 27-29 (D.D.C. 2002) (finding that IRS properly withheld international tax convention records considered confidential under such conventions but that otherwise would not be deemed confidential under laws of United States); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 12 (D.D.C. 2001) (protecting record created by IRS to respond to foreign tax treaty partner's request for legal advice, because it consisted of tax convention information that treaty requires be kept confidential).

[161] 481 F. Supp. 486, 490 (D.D.C. 1979).

thereby "displacing" the FOIA.[162]

Viewing section 6103 as a "displacement" statute permitted some courts to avoid the de novo review required by the FOIA and to apply instead less stringent standards of review pursuant to the Administrative Procedure Act,[163] and could relieve agencies from certain procedural requirements of the FOIA, such as the time limitations for responding to requests and the duty to segregate and release nonexempt information.[164] Even under this approach, though, the government likely would be required to provide detailed Vaughn Indexes of the information being withheld, rather than general affidavits; the Sixth Circuit required this despite the fact that the court below had relied solely on the "displacement" theory for its decision.[165]

However, other courts have specifically refused to adopt this "displacement" analysis on the ground that to do so, once it is already evident that section 6103 is an Exemption 3 statute, "would be an exercise in judicial futility [requiring district courts] to engage in both FOIA and Zale analyses when confronted" with such cases.[166] Most significantly, the D.C. Circuit has squarely rejected the "displacement" argument on the basis that the procedures in section 6103 for members of the public to obtain access to IRS documents do not duplicate, and thus do not "displace," those of the

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[162] See, e.g., Cheek v. IRS, 703 F.2d 271, 271 (7th Cir. 1983) (noting that section 6103 also "displaces" Privacy Act of 1974, 5 U.S.C. § 552a (2000 & Supp. IV 2004)); King v. IRS, 688 F.2d 488, 495 (7th Cir. 1982); Kuzma v. IRS, No. 81-600E, slip op. at 7-8 (W.D.N.Y. Dec. 31, 1984); see also White v. IRS, 707 F.2d 897, 900 (6th Cir. 1983) (indicating approval of Zale).

[163] 5 U.S.C. §§ 701-706 (2000).

[164] See Grasso, 785 F.2d at 73-74; White, 707 F.2d at 900; Goldsborough v. IRS, No. Y-81-1939, 1984 WL 612, at *5-6 (D. Md. May 10, 1984); Green v. IRS, 556 F. Supp. 79, 84 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (unpublished table decision); Meyer v. Dep't of the Treasury, 82-2 U.S. Tax Cas. (CCH) ¶ 9678, at 85,448 (W.D. Mich. Oct. 2, 1982); see also Anderson v. U.S. Dep't of Treasury, 1999 WL 282784, at *3 (acknowledging that if section 6103 pre-empted FOIA, then Administrative Procedure Act standard of review, rather than more stringent FOIA standard of review, would apply, but concluding that case did not require choice because agency action satisfied more stringent FOIA standard).

[165] Osborn v. IRS, 754 F.2d 195, 197-98 (6th Cir. 1985).

[166] Currie, 704 F.2d at 528; accord Grasso, 785 F.2d at 74; Long, 742 F.2d at 1181-82 (also rejecting section 701 of Economic Recovery Tax Act, 26 U.S.C.A. § 6103(b)(2), as "displacement" statute); Linsteadt, 729 F.2d at 1001-02; see also Britt v. IRS, 547 F. Supp. 808, 813 (D.D.C. 1982); Tigar & Buffone v. CIA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,172, at 81,461 (D.D.C. Feb. 23, 1981).

FOIA.[167]

The D.C. Circuit's rejection of the "displacement" theory in relation to section 6103 is consistent with previous D.C. Circuit decisions involving similar "displacement" arguments. For example, it had previously rejected a "displacement" argument involving the Department of State's Emergency Fund statutes[168] when it held that inasmuch as Exemption 3 is not satisfied by these statutes, information cannot be withheld pursuant to them, even though they were enacted after the FOIA.[169]

Yet the D.C. Circuit has held that the procedures of the Presidential Recordings and Materials Preservation Act[170] exclusively govern the disclosure of transcripts of the tape recordings of President Nixon's White House conversations, based upon that Act's comprehensive, carefully tailored procedure for releasing Presidential materials to the public.[171] Thus, the "displacement" theory may still be advanced for statutes which provide procedures for the release of information to the public that, in essence, duplicate the procedures provided by the FOIA,[172] or for statutes that com-

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[167] Church of Scientology of Cal. v. IRS, 792 F.2d 146, 148-50 (D.C. Cir. 1986); see also Maxwell v. Snow, 409 F.3d 354, 358 (D.C. Cir. 2005) (holding that "FOIA still applies to [26 U.S.C.A.] § 6103 claims").

[168] 22 U.S.C. § 2671 (2000 & Supp. III 2003); 31 U.S.C. § 3526 (2000).

[169] See Wash. Post Co. v. U.S. Dep't of State, 685 F.2d 698, 703-04 & n.9 (D.C. Cir. 1982), cert. granted, 464 U.S. 812, vacated & remanded, 464 U.S. 979 (1983); see also FOIA Update, Vol. IV, No. 4, at 11 (noting that Supreme Court granted government's petition for certiorari, that Washington Post Company then withdrew its FOIA request (which had procedural effect of nullifying D.C. Circuit's decision), and that Supreme Court thus has never substantively reviewed issue); cf. U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 153-54 (1989) (holding that FOIA, not 28 U.S.C.A. § 1914 (1994 & West Supp. 2006), governs disclosure of court records in possession of government agencies); Paisley v. CIA, 712 F.2d 686, 697 (D.C. Cir. 1983) (stating that FOIA, not Speech or Debate Clause, is definitive word on disclosure of information within government's possession); Church of Scientology of Cal. v. USPS, 633 F.2d 1327, 1333 (9th Cir. 1980) (finding that postal statute does not displace more detailed and later-enacted FOIA absent specific indication of congressional intent to that effect).

[170] 44 U.S.C. § 2111 (2000).

[171] Ricchio v. Kline, 773 F.2d 1389, 1395 (D.C. Cir. 1985); cf. Katz v. NARA, 68 F.3d 1438, 1440-42 (D.C. Cir. 1995) (holding certain President John F. Kennedy autopsy material to be personal presidential papers not subject to FOIA).

[172] See Church of Scientology, 792 F.2d at 149 (dictum).

prehensively override the FOIA's access scheme.[173] In this connection, it should be noted that the FOIA's specific fee provision referring to other statutes that set fees for particular types of records[174] has the effect of causing those statutes to "displace" the FOIA's basic fee provisions.[175] (For a further discussion of this point, see Fees and Fee Waivers, below.)

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[173] See Ricchio, 773 F.2d at 1395; cf. Essential Info., 134 F.3d at 1169-70 (Henderson, J., concurring) (suggesting displacement theory as alternate ground for affirming agency withholding); Long, 742 F.2d at 1178 (holding that FOIA does not apply to IRS private letter rulings, on basis that 26 U.S.C. § 6110 (2000) provides exclusive means of access); SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by the National Library of Medicine Act, a statute that later was repealed in 1993)); Jones v. OSHA, No. 94-3225, 1995 WL 435320 at *3-4 (W.D. Mo. June 6, 1995) (requiring release of employee complaints where Occupational Safety and Health Act, 29 U.S.C. § 657(f)(1) (2000), provided for disclosure); Gersh & Danielson v. EPA, 871 F. Supp. 407, 410 (D. Colo. 1994) (holding FOIA exemptions inapplicable where in conflict with disclosure provisions of Clean Water Act, 33 U.S.C. § 1251(e) (2000)); FOIA Update, Vol. XI, No. 3, at 7-8 n.32. But cf. Minier, 88 F.3d at 802-03 (finding that although the President John F. Kennedy Assassination Records Collection Act, 44 U.S.C. § 2107 note (2000 & Supp. III 2003), "requires agencies to release broader amounts of information relating to the Kennedy assassination" and "by its own terms, is an entirely separate scheme from the FOIA[,]" there is no indication "that Congress intended the JFK Act to override the CIA's ability to claim proper FOIA exemptions" (citing Assassination Archives & Research Ctr. v. Dep't of Justice, 43 F.3d 1542, 1544 (D.C. Cir. 1995))); accord Winterstein v. U.S. Dep't of Justice, 89 F. Supp. 2d 79, 82-83 (D.D.C. 2000) (ruling that existence of Nazi War Crimes Disclosure Act, 5 U.S.C. § 552 note (2000 & Supp. IV 2004), is not relevant to FOIA request for record pertaining to alleged Nazi war criminal except to extent that Congress's exclusion of particular class of records from Nazi War Crimes Disclosure Act was probative on subsidiary question of whether Congress considered withholding of record to be in public interest).

[174] 5 U.S.C. § 552(a)(4)(A)(vi).

[175] See Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012 (1987) (implementing 5 U.S.C. § 552(a)(4)(A)(vi)); see also, e.g., Wade v. U.S. Dep't of Commerce, No. 96-0717, slip op. at 5-6 (D.D.C. Mar. 26, 1998) (recognizing that statute authorizing National Technical Information Service (NTIS) to establish its own fee schedule, 15 U.S.C. § 1153 (2000), supersedes standard FOIA fee provisions); *FOIA Post*, "NTIS: An Available Means of Record Disclosure" (posted 8/30/02; supplemented 9/23/02) (discussing operations of NTIS in relation to special FOIA fee provision).

EXEMPTION 3

FOIA-Specific Nondisclosure Statutes

Most Exemption 3 statutes contain a broad prohibition on disclosure that operates to prohibit disclosure of specified information by a federal agency generally and universally, which in turn is accommodated through Exemption 3 as a bar to public disclosure under the FOIA.[176] Increasingly, however, in the past several years, Congress has been enacting legislation specifically focused on prohibiting disclosure under the FOIA only.[177] The most common form of such a law directs that certain particular information, often information that is provided to or received by an agency pursuant to that statute, "shall be exempt from disclosure" under the FOIA in particular.[178] For instance, a provision of the Antitrust Civil Process Act[179] states

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[176] See, e.g., 50 U.S.C.A. § 403-1(i) (West Supp. 2006) (requiring Director of National Intelligence to protect "intelligence sources and methods" from unauthorized disclosure); 18 U.S.C.A. §§ 2510-2520 (2000 & West Supp. 2006) (prohibiting disclosure of information obtained from court-ordered "Title III" wiretaps); Fed. R. Crim. P. 6(e) (establishing general rule of secrecy for matters occurring before a grand jury); 10 U.S.C. § 618(f) (2000) (prohibiting the disclosure of military promotion board proceedings "to any person not a member of the board").

[177] See, e.g., 42 U.S.C.A. § 299b-22 (West Supp. 2006) (prohibiting FOIA disclosure of patient safety work product) (enacted 2005); 6 U.S.C. § 133(a)(1)(A) (Supp. IV 2004) (prohibiting FOIA disclosure of critical infrastructure information voluntarily submitted to federal government for homeland security purposes) (enacted Nov. 25, 2002); 42 U.S.C. § 7412 (2000) (prohibiting FOIA disclosure of information submitted to EPA detailing "worst-case release scenarios" that might result from accidental or intentional releases of chemicals or fuels) (enacted Aug. 5, 1999); 16 U.S.C. § 5937 (2000) (prohibiting FOIA disclosure of information pertaining to National Park System resources such as endangered species) (enacted Nov. 13, 1998); 38 U.S.C. § 7451 (2000 & Supp. III 2003) (prohibiting FOIA disclosure of certain information collected by Department of Veterans Affairs in surveys of rates of compensation) (enacted Aug. 15, 1990); 31 U.S.C. § 5319 (2000 & Supp. III 2003) (preventing FOIA disclosure of Currency Transaction Reports) (enacted Sept. 13, 1982); 15 U.S.C. § 1314(g) (2000) (proscribing FOIA disclosure of certain records gathered in course of investigations under Antitrust Civil Process Act (enacted Sept. 30, 1976)).

[178] See, e.g., 42 U.S.C. § 300i-2 (2000 & Supp. IV 2004) (providing that certain public water system vulnerability assessments "shall be exempt from disclosure" under FOIA); 39 U.S.C. § 3016 (2000) (providing that any material provided pursuant to administrative subpoena issued by Postmaster General "shall be exempt from disclosure" under FOIA); 31 U.S.C. § 3733(k) (2000) (providing that information provided under "any civil investigation demand issued" pursuant to 31 U.S.C. § 3733(a) "shall be exempt from disclosure" under FOIA); 31 U.S.C. § 3729 (2000) (providing that certain information furnished pursuant to False Claims Act "shall be ex-

(continued...)

that "[a]ny documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this [Act] shall be exempt from disclosure under section 552 of title 5."[180] Such language also can be found in section 214 of the Homeland Security Act of 2002,[181] which protects "critical infrastructure information" that is voluntarily submitted to the federal government for homeland security purposes, by specifically providing that it "shall be exempt from disclosure" under the FOIA.[182] Another such direct statutory approach used by Congress is where the law directs that "no information shall be disclosed" or that "information shall not be disclosed" under the FOIA.[183] Additionally, although it is not as direct an approach as prohibiting disclosure under the FOIA specifically, Congress created the same type of FOIA-specific statute

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[178](...continued)
empt from disclosure" under FOIA); 15 U.S.C. § 4019(a) (2000) (providing that any information submitted in connection with export trade certificates of review "shall be exempt from disclosure" under FOIA); 15 U.S.C. § 57b-2 (2000) (providing that information received by FTC for investigative purposes "shall be exempt from disclosure" under FOIA); see also (*FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03) (discussing "disclosure prohibitions that are not general in nature but rather are specifically directed toward disclosure under the FOIA in particular").

[179] 15 U.S.C. § 1314(g).

[180] 15 U.S.C. § 1314(g) (emphasis added).

[181] Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 133(a)(1)(A)); see *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03) (citing new Homeland Security Act Exemption 3 statute among statutes specifically directed at nondisclosure under FOIA); see also *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (discussing breadth of implementation of new Exemption 3 statute).

[182] See 6 U.S.C. § 133(a)(1)(A); see also *FOIA Post*, "Homeland Security Law Contains New Exemption 3 Statute" (posted 1/27/03) (analyzing new Homeland Security Act Exemption 3 statute).

[183] See, e.g., 42 U.S.C.A. § 247d-6b(d) (2003 & West Supp. 2006) (providing directly that "[n]o Federal agency shall disclose under [the FOIA] any information identifying the location at which materials in the [strategic national] stockpile under subsection (a) are stored"); see also 41 U.S.C. § 254b(d)(2)(C) (2000) (providing that "[a] statement that any information received relating to commercial items that is exempt from disclosure under [the FOIA] shall not be disclosed by the Federal Government") (emphasis added).

when it enacted the Maritime Transportation Security Act of 2002,[184] which provides for the nondisclosure of security plans and port vulnerability assessments by mandating that such information "is not required to be disclosed to the public."[185] To the extent that such statutes have been challenged, courts have found that they qualify as Exemption 3 statutes,[186] though as yet no court has specifically discussed this more narrow legislative approach to nondisclosure.[187]

Nondisclosure Results Under Appropriations Acts

Congress also has enacted legislation evidently aimed at achieving an Exemption 3 effect in an indirect fashion -- i.e., by limiting the funds that an agency may expend in responding to a FOIA request[188] The first such statute enacted was section 630 of the Agricultural, Rural Development, and Related Agencies Development Act, 1989, which states that "none of the funds provided in this Act may be expended to release information acquired from any handler under" the Act.[189] When section 630 was tested in Cal-Almond, Inc. v. United States Department of Agriculture, the Ninth Circuit did not decide whether this statute had the effect of triggering Exemption 3, but it reacted by observing that "if Congress intended to prohibit the release of the list under FOIA -- as opposed to the expenditure of funds in releasing the list -- it could easily have said so."[190]

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[184] Pub. L. No. 107-295, § 113, 116 Stat. 2093 (codified at 46 U.S.C.A. § 70103).

[185] 46 U.S.C.A. § 70103(d) (2003 & West Supp. 2006).

[186] See, e.g., Sw. Ctr. for Biological Diversity, 170 F. Supp. 2d at 944-45 (holding that 16 U.S.C. § 5937 is Exemption 3 statute), aff'd, 314 F.3d 1060, 1062 (9th Cir. 2002); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 631847, at *30 (D.D.C. Aug. 22, 1995) (holding that 31 U.S.C. § 5319 qualifies as Exemption 3 statute); Motion Picture Ass'n of Am. v. U.S. Dep't of Justice, No. 80 Civ. 6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981) (ruling that 15 U.S.C. § 1314(g) is Exemption 3 statute).

[187] See Gina Marie Stevens & Todd B. Tatelman, Protection of Security Related Information, Congressional Research Service, Sept. 27, 2006, at 8-9 (citing statutes "specifically directed toward the [FOIA]").

[188] See *FOIA Post*, "Supreme Court Vacates and Remands in ATF Database Case" (posted 3/25/03) (discussing Supreme Court's reaction to recently enacted statute that specifically prohibits ATF from using appropriated funds to comply with any FOIA request seeking certain firearms database records).

[189] Pub. L. No. 100-460, § 630, 102 Stat. 2229 (1988) (making appropriations for programs for Fiscal Year 1989).

[190] 960 F.2d at 108 (dictum) (opining on whether section 630 is "explicit"

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More recently, during the course of litigation in City of Chicago v. United States Department of Treasury,[191] Congress enacted three appropriations bills[192] that specifically prohibited the Bureau of Alcohol, Tobacco, Firearms, and Explosives from using appropriated funds to comply with any FOIA request seeking records relating to the contested firearms sales databases that are maintained by ATF.[193] The first of these laws was enacted shortly before the scheduled oral argument before the Supreme Court, whereupon the Court vacated the Seventh Circuit disclosure order that was on appeal and remanded the case for the lower court to consider the effect of this newly enacted provision.[194] By the time the case reached the circuit court for consideration on remand, Congress enacted the Consolidated Appropriations Act of 2004[195] that likewise prohibited ATF's use of appropriated funds to disclose the same type of firearms database information, and as a result, both appropriations laws were taken into consideration on remand.[196]

On remand, the appeals court determined that although both appropriations bills prohibited ATF from expending federal funds on retrieval of the information, there was no "irreconcilable conflict" between prohibiting such expenditure and granting plaintiff access to the databases.[197] While ATF's petition for a rehearing en banc was pending, Congress passed the

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[190](...continued)
enough to qualify as Exemption 3 statute).

[191] 384 F.3d 429 (7th Cir. 2004), vacated & remanded, 423 F.3d 777 (7th Cir. 2005).

[192] Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, § 644, 117 Stat. 11; Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat 3; Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2859-2860 (2004).

[193] See id.

[194] See Dep't of Justice v. City of Chicago, 537 U.S. 1229, 1229 (2003); see also *FOIA Post*, "Supreme Court Vacates and Remands in ATF Database Case" (posted 3/25/03) (discussing extraordinary litigation development).

[195] Pub. L. No. 108-199, 118 Stat. 3 (likewise prohibiting use of appropriated funds to disclose same type of ATF firearms database information that was at issue in City of Chicago).

[196] City of Chicago, 384 F.3d at 431-32 (noting that "both parties to the litigation have rebriefed their arguments" due to the enactment of 2003 and 2004 appropriations legislation).

[197] Id. at 435-36 (ordering ATF to provide plaintiff access to the databases through novel use of court-appointed special master paid for by plaintiff).

Consolidated Appropriations Act of 2005,[198] which likewise prohibited the use of appropriated funds to disclose the same type of firearms database information, but added an appropriations rider providing that such data "shall be immune from judicial process."[199] On rehearing, the appeals court held that this new language "exempts from disclosure [firearms] data previously available to the public" and as such the new law qualified as an Exemption 3 statute.[200]

"Operational Files" Provisions

A closely related but somewhat different form of statutory protection can be found in special FOIA provisions that Congress has enacted to cover the "operational files" of individual intelligence agencies. For example, section 933(a) of the National Defense Authorization Act for Fiscal Year 2006[201] provides that "[t]he Director of the Defense Intelligence Agency, in coordination with the Director of National Intelligence, may exempt operational files of the Defense Intelligence Agency from the provisions of [the FOIA] which require publication, disclosure, search, or review in connection therewith."[202]

This special statutory protection is modeled after, and quite similar to, the CIA Information Act of 1984,[203] through which the Central Intelligence Agency was the first intelligence agency to obtain such exceptional FOIA treatment for its "operational files."[204] Three other such intelligence

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[198] Pub. L. No. 108-447, 118 Stat. 2809, 2859-2860 (2004).

[199] Id.

[200] City of Chicago, 423 F.3d at 781-82; see also Antonelli v. ATF, No. 04-1180, 2006 WL 374312, at *2 (D.D.C. Dec. 18, 2006) (protecting "firearms trace reports" in their entireties under Consolidated Appropriations Act of 2005); Watkins v. ATF, No. 04-800, 2005 WL 2334277, at *1 (D.D.C. Sept. 1, 2005) (holding that Consolidated Appropriations Act of 2005 qualifies as Exemption 3 statute based on underlying legislative history). But cf. City of N.Y. v. Beretta U.S.A. Corp., 429 F. Supp. 2d 517, 528-29 (E.D.N.Y 2006) (distinguishing the City of Chicago litigation from this litigation, and holding that the firearms database appropriations legislation for 2005 (and 2006) does not prevent the disclosure of the firearms database information that already has been "obtained by explicit order of the court" during discovery) (non-FOIA case).

[201] Pub. L. No. 109-163, § 933(a), 119 Stat. 34 (2006) (codified at 50 U.S.C.A. § 432c (West Supp. 2006).

[202] 50 U.S.C.A. § 432c.

[203] 50 U.S.C.A. § 431 (2003 & West Supp. 2006).

[204] See FOIA Update, Vol. V, No. 4, at 1-2 (noting that an underlying prin-
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agencies -- the National Security Agency, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency -- have received similar FOIA protection under counterpart statutory provisions.[205] (For a further discussion of "operational files," see Exemption 1, "Operational Files" Statutes, above.)

Additional Considerations

Certain statutes fail to meet the requisites of either Exemption 3 prong. For instance, the Court of Appeals for the District of Columbia Circuit, in holding that provisions governing the FBI's sharing of "rap sheets"[206] do not qualify as an Exemption 3 statute because they do not expressly prohibit the disclosure of "rap sheets," explained that even if the provisions met the exemption's threshold requirement, they would not qualify as an Exemption 3 statute as they fail to satisfy either of its subparts.[207] Likewise, the Copyright Act of 1976[208] has been held to satisfy neither Exemption 3 subpart because, rather than prohibiting disclosure, it specifically permits public inspection of copyrighted documents.[209]

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[204](...continued)
ciple of the Central Intelligence Agency Information Act of 1984 is to free "the CIA of the burden of processing FOIA requests for" records that "would be almost entirely withholdable anyway, upon application of the FOIA's national security exemption, Exemption 1, together with the CIA's other statutory nondisclosure provisions under Exemption 3"); see also *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (commenting on similar rationale underlying the 2002 FOIA amendment, which made an exception to the FOIA's "any person" rule in certain circumstances for requests received by "elements of the intelligence community").

[205] See 50 U.S.C.A. § 432b (West Supp. 2006) (authorizing special "operational files" treatment for National Security Agency); 50 U.S.C.A. § 432a (West Supp. 2006) (same for National Reconnaissance Office); 50 U.S.C.A. § 432 (West Supp. 2006) (same for National Geospatial-Intelligence Agency); see also *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03).

[206] 28 U.S.C.A. § 534 (1993 & West Supp. 2006).

[207] Reporters Comm. for Freedom of the Press v. U.S. Dep't of Justice, 816 F.2d 730, 736 n.9 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989).

[208] 17 U.S.C. § 705(b) (2000).

[209] See St. Paul's Benevolent Educ. & Missionary Inst. v. United States, 506 F. Supp. 822, 830 (N.D. Ga. 1980); see also FOIA Update, Vol. IV, No. 4, at 3-5 ("OIP Guidance: Copyrighted Materials and the FOIA") (emphasizing that Copyright Act should not be treated as Exemption 3 statute and that copyrighted records should be processed according to standards of Ex-
(continued...)

EXEMPTION 3

It has also been held that section 360j(h) of the Medical Device Amendments of 1976[210] is not an Exemption 3 statute because it does not specifically prohibit the disclosure of records,[211] nor is section 410(c)(6) of the Postal Reorganization Act,[212] because the broad discretion afforded the Postal Service to release or withhold records is not sufficiently specific.[213] Similarly, section 1106 of the Social Security Act[214] is not an Exemption 3 statute because it gives the Secretary of Health and Human Services wide discretion to enact regulations specifically permitting disclosure.[215] The Federal Insecticide, Fungicide, and Rodenticide Act[216] also does not satisfy either prong of Exemption 3 because the withholding of certain information is entirely discretionary under that Act.[217] Additionally, a district court has held that the "early warning disclosure provision" in the Transportation Recall Enhancement, Accountability, and Documentation Act[218] does not qualify as an Exemption 3 statute because it does not establish particular criteria for withholding information or refer to particular matters to be

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[209](...continued)
emption 4 instead); accord Gilmore v. U.S. Dep't of Energy, 4 F. Supp. 2d 912, 922-23 (N.D. Cal. 1998) (alternate holding) (protecting copyrighted computer software pursuant to Exemption 4); FOIA Update, Vol. XVIII, No. 1, at 5-6 (cautioning agencies to "guard against the possibility that [Internet] dissemination of [reading room records] might be regarded as copyright infringement" in exceptional cases).

[210] 21 U.S.C.A. § 360j(h) (1999 & West Supp. 2006).

[211] See Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1286 (D.C. Cir. 1983).

[212] 39 U.S.C.A § 410(c)(6) (1980 & West Supp. 2006).

[213] See Church of Scientology v. USPS, 633 F.2d 1327, 1333 (9th Cir. 1980) (finding section 410(c)(6), which "permits the Postal Service total discretion" regarding the disclosure of its investigatory files, not to be an Exemption 3 statute because it provides "insufficient specificity" to allow its removal from the "impermissible range of agency discretion to make decisions rightfully belonging to the legislature").

[214] 42 U.S.C. § 1306 (2000).

[215] See Robbins v. HHS, No. 95-cv-3258, slip op. at 3-4 (N.D. Ga. Aug. 13, 1996), aff'd per curiam, 120 F.3d 275 (11th Cir. 1997) (unpublished table decision).

[216] 7 U.S.C. § 136h(d) (2000).

[217] See Nw. Coal. for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 201 (D.D.C. 1996). But see Doe v. Veneman, 380 F.3d 807, 818-19 (5th Cir. 2004) (holding that Federal Insecticide, Fungicide, and Rodenticide Act is Exemption 3 statute) (reverse FOIA suit).

[218] 49 U.S.C. § 30166(m) (2000).

withheld.[219]

A particularly difficult Exemption 3 issue was put to rest by the Supreme Court in 1988. In analyzing the applicability of Exemption 3 to the Parole Commission and Reorganization Act[220] and Rule 32 of the Federal Rules of Criminal Procedure, each of which governs the disclosure of presentence reports, the Supreme Court held that they are Exemption 3 statutes only in part.[221] The Court found that they do not permit the withholding of an entire presentence report, but rather only those portions of a presentence report pertaining to a probation officer's sentencing recommendations, certain diagnostic opinions, information obtained upon a promise of confidentiality, and information which, if disclosed, might result in harm to any person, and that "the remaining parts of the reports are not covered by this exemption, and thus must be disclosed unless there is some other exemption which applies to them."[222]

Another Exemption 3 issue concerns the Trade Secrets Act[223] which prohibits the unauthorized disclosure of certain commercial and financial information. Although the Supreme Court has declined to decide whether the Trade Secrets Act is an Exemption 3 statute,[224] most courts confronted with the issue have held that it is not.[225]

In 1987, the D.C. Circuit issued a decision that "definitively" resolved the issue by holding that the Trade Secrets Act does not satisfy either of Exemption 3's requirements and thus does not qualify as a separate with-

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[219] Pub. Citizen, Inc. v. Mineta, 444 F. Supp. 2d 12, 17-18 (D.D.C. 2006) (appeal pending).

[220] 18 U.S.C. § 4208 (2000) (repealed as to offenses committed after November 1, 1987).

[221] U.S. Dep't of Justice v. Julian, 486 U.S. 1, 9 (1988).

[222] Id. at 11; see also FOIA Update, Vol. IX, No. 2, at 1-2.

[223] 18 U.S.C. § 1905 (2000 & Supp. IV 2004).

[224] Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979).

[225] See, e.g., Anderson v. HHS, 907 F.2d 936, 949 (10th Cir. 1990) ("[T]he broad and ill-defined wording of § 1905 fails to meet either of the requirements of Exemption 3."); Acumenics Research & Tech. v. U.S. Dep't of Justice, 843 F.2d 800, 805 n.6, 806 (4th Cir. 1988) (finding "no basis" for business submitter's argument that Exemption 3 and section 1905 prevent disclosure of information that is outside scope of Exemption 4) (reverse FOIA suit); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1401-02 (7th Cir. 1984) (same); accord FOIA Update, Vol. VI, No. 3, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4"); see also 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 12 (1st Cir. 1983) (specifically declining to address issue).

holding statute.[226] First, its prohibition against disclosure is not absolute, as it prohibits only those disclosures that are "not authorized by law."[227] Because duly promulgated agency regulations can provide the necessary authorization for release, the agency "possesses discretion to control the applicability" of the Act.[228] The existence of this discretion precludes the Trade Secrets Act from satisfying subpart (A) of Exemption 3.[229] Moreover, the court held that the Trade Secrets Act fails to satisfy the first prong of subpart (B) because it "in no way channels the discretion of agency decisionmakers."[230] Indeed, the court concluded, this utter lack of statutory guidance renders the Trade Secrets Act susceptible to invocation at the "whim of an administrator."[231] Finally, it was held that the Act also fails to satisfy the second prong of subpart (B) because of the "encyclopedic character" of the material within its scope and the absence of any limitation on the agencies covered or the sources of data included.[232] Given all these elements, the court held that the Trade Secrets Act simply does not qualify as an Exemption 3 statute.[233] This followed the Department of Justice's stated policy position on the issue.[234]

The D.C. Circuit's decision on this issue is entirely consistent with the legislative history of the 1976 amendment to Exemption 3, which states that the Trade Secrets Act was not intended to qualify as a nondisclosure statute under the exemption and that any analysis of trade secrets and commercial or financial information should focus instead on the applicability of Exemption 4.[235] However, some confidential business information now may be protected by the National Defense Authorization Act for Fiscal

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[226] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137-43 (D.C. Cir. 1987).

[227] Id. at 1138.

[228] Id. at 1139.

[229] Id. at 1138.

[230] Id. at 1139.

[231] Id.

[232] Id. at 1140-41.

[233] Id. at 1141.

[234] See FOIA Update, Vol. VII, No. 3, at 6 (advising that Trade Secrets Act should not be regarded as Exemption 3 statute).

[235] See H.R. Rep. No. 94-880, at 23 (1976), reprinted in 1976 U.S.C.C.A.N. 2191, 2205; see also Anderson, 907 F.2d at 949-50; Acumenics, 843 F.2d at 805 n.6; CNA, 830 F.2d at 1142 n.70; Gen. Elec., 750 F.2d at 1401-02; Gen. Dynamics Corp. v. Marshall, 607 F.2d 234, 236-37 (8th Cir. 1979).

Year 1997.[236] This statute, enacted in 1996, amended both Titles 10 and 41 of the United States Code, and provides blanket protection for the proposals of unsuccessful offerors submitted in response to a solicitation for a competitive proposal.[237] Under it, a successful offeror's proposal is also protected if it is not "set forth or incorporated by reference" in the final contract;[238] the key determinant of exempt status is whether the proposal was actually set forth in or incorporated into the contract.[239] In 2003, the District Court for the District of Columbia firmly held it to be a subpart (B) statute in Hornbostel v. Department of the Interior.[240]

One court has incorrectly treated a provision of the Procurement Integrity Act[241] as an Exemption 3 statute.[242] That provision -- encompassing pre-award contractor bids, proposal information, and source selection information -- prohibits disclosures only "other than as provided by law," and it also provides that it "does not . . . limit the applicability of any . . . reme-

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[236] Pub. L. No. 104-201, § 821, 110 Stat. 2422 (containing parallel measures applicable to armed services and most civilian agencies) (amending 10 U.S.C. § 2305 (2000) and 41 U.S.C. § 253b (2000)).

[237] See 10 U.S.C. § 2305(g) (encompassing all agencies listed in 10 U.S.C. § 2303 (2000), most notably NASA and Coast Guard); 41 U.S.C. § 253b(m) (encompassing civilian executive agencies); cf. Pohlman, Inc. v. SBA, No. 03-01241, slip op. at 26-27 (E.D. Mo. Sept. 30, 2005) (holding that 41 U.S.C. § 253b(m) "applies only to government procurement contracts, not to sales contracts" at issue in case); Ctr. for Pub. Integrity v. Dep't of Energy, 191 F. Supp. 2d 187, 190-94 (D.D.C. 2002) (rejecting applicability of 41 U.S.C. § 253b(m) to records relating to bids for sale of government property, on grounds that it applies only to government procurement contracts, not to contracts for sale of government property).

[238] Id.; see FOIA Update, Vol. XVIII, No. 1, at 2 (describing provisions of 10 U.S.C. § 2305(g) and 41 U.S.C. § 253b(m)).

[239] See id. (advising that the "underlying legislative history" of these statutory provisions "makes clear that it was Congress'[s] intent to alleviate the administrative burden imposed on agencies faced with the task of processing FOIA requests for contractor proposals").

[240] No. 02-2523, 2003 WL 23303294, at *5 (D.D.C. Aug. 7, 2003) (finding proposals to be properly withheld from disclosure because the statute "specifically prohibits the disclosure of 'a proposal in the possession or control of an agency'").

[241] 41 U.S.C. § 423 (2000 & Supp. III 2003).

[242] Legal & Safety Employer Research, Inc. v. U.S. Dep't of the Army, No. Civ. S001748, 2001 WL 34098652, at *3-4 (E.D. Cal. May 4, 2001) (dictum) (viewing statute as withholding statute under Exemption 3, but rejecting Exemption 3 applicability only because records at issue did not fall within scope of nondisclosure provision in Procurement Integrity Act).

dies established under any other law or regulation."[243] Although this one court failed to take notice of these applicable exceptions, another has found that they clearly evince congressional intent that the prohibition on disclosure is limited to those disclosures not contemplated by law, such as "leaks."[244]

Lastly, a controversial issue at one time was whether the Privacy Act of 1974[245] could serve as an Exemption 3 statute.[246] The Privacy Act authorizes an individual to obtain access to those federal records maintained under the individual's name or personal identifier, subject to certain broad, system-wide exemptions.[247] If the Privacy Act had been regarded as an Exemption 3 statute, records exempt from disclosure to first-party requesters under the Privacy Act also would have been exempt under the FOIA; if not, requesters would have been able to obtain information on themselves under the FOIA notwithstanding that such information was exempt under the Privacy Act. In the early 1980s, the Department of Justice took the position that the Privacy Act was an Exemption 3 statute within the first-party requester context.[248] When a conflict subsequently arose among the circuits that considered the proper relationship between these two access statutes, the Supreme Court agreed to resolve the issue.[249] However, these cases became moot when Congress, upon enacting the Central Intelligence Agency Information Act in 1984, explicitly provided that the Privacy

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[243] 41 U.S.C. § 423(h).

[244] Pikes Peak Family Hous., LLC v. United States, 40 Fed. Cl. 673, 680-81 (Cl. Ct. 1998) (construing the phrase "other than as provided by law" in the Procurement Integrity Act as necessarily allowing disclosures in civil discovery and noting that the statute does not apply to legal disclosures but rather "is obviously directed at a situation in which a present or former government procurement officer secretly leaks information concerning a pending solicitation to an offeror participating therein") (non-FOIA case); cf. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152, n.139 (D.C. Cir. 1987) (noting that comparable language in Trade Secrets Act, 18 U.S.C. § 1905, interrelates with FOIA so as to render any statutory prohibition inapplicable because, under it, "FOIA would provide legal authorization for" disclosure).

[245] 5 U.S.C. § 552a (2000 & Supp. IV 2004).

[246] See FOIA Update, Vol. V, No. 2, at 8-9 (discussing legal position that subsequently was abandoned).

[247] See, e.g., 5 U.S.C. § 552a(j)(2).

[248] See FOIA Update, Vol. IV, No. 2, at 3.

[249] Provenzano v. U.S. Dep't of Justice, 717 F.2d 799 (3d Cir. 1983), cert. granted, 466 U.S. 926 (1984); Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983), cert. granted, 466 U.S. 926 (1984).

Act is not an Exemption 3 statute.[250] Thus, the Supreme Court dismissed the appeals in these cases and this issue has been placed to rest.[251]

EXEMPTION 4

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[1] This exemption is intended to protect the interests of both the government and submitters of information.[2] Its very existence encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable.[3] The exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.[4] The exemption covers two broad categories of information in federal agency records: (1) trade secrets; and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

Trade Secrets

For purposes of Exemption 4, the Court of Appeals for the District of

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[250] Pub. L. No. 98-477, § 2(c), 98 Stat. 2209, 2212 (1984) (amending what is now subsection (t) of Privacy Act).

[251] U.S. Dep't of Justice v. Provenzano, 469 U.S. 14 (1984); FOIA Update, Vol. V, No. 4, at 4. But see Hill v. Blevins, No. 92-0859, slip op. at 7 (M.D. Pa. Apr. 12, 1993) (holding that subsection (f)(3) of Privacy Act, which authorizes agency to establish procedures for disclosure of medical and psychological records, is "exempting" statute under FOIA), aff'd, 19 F.3d 643 (3d Cir. 1994) (unpublished table decision).

[1] 5 U.S.C. § 552(b)(4) (2000 & Supp. IV 2004).

[2] See, e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767-70 (D.C. Cir. 1974) (concluding that the legislative history of the FOIA "firmly supports an inference that [Exemption 4] is intended for the benefit of persons who supply information as well as the agencies which collect it").

[3] See Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc).

[4] See National Parks, 498 F.2d at 768; see also Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (recognizing fundamental societal value of "protecting sensitive business information").