



## Exemption 3

Exemption 3 of the Freedom of Information Act incorporates into the FOIA certain nondisclosure provisions that are contained in other federal statutes. Specifically, Exemption 3 allows the withholding of information prohibited from disclosure by another federal statute provided that 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."<sup>1</sup> Courts have held that a statute falls within the exemption's coverage if it satisfies either of its disjunctive requirements,<sup>2</sup> although courts do not always specify under which subpart of Exemption 3 a statute qualifies.<sup>3</sup>

Agencies are required each year to list all Exemption 3 statutes that they relied upon

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<sup>1</sup> 5 U.S.C. § 552(b)(3) (2006) (emphasis added), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

<sup>2</sup> 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).

<sup>3</sup> See, e.g., *Berger v. IRS*, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (finding that "[31 U.S.C.] § 5319 [(2006)] qualifies as an exempting statute under Exemption 3," but failing to specify whether statute qualifies under subpart (A) or (B)), *aff'd on other grounds*, 288 F. App'x 829 (3d Cir. 2008), *cert. denied*, No. 08-884, 2009 WL 1650205 (U.S. June 15, 2009); *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 (2006) is Exemption 3 statute without specifying under which subpart it qualifies), *aff'd on other grounds*, 512 F.3d 677 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 775 (2008); *ACLU v. DOD*, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same); *Vosburgh v. IRS*, No. No. 93-1493, 1994 WL 564699, at \*4 (D. Or. July 5, 1994) (recognizing 31 U.S.C. § 5319 (2006) as statute qualifying under Exemption 3, but failing to identify Exemption 3 subpart under which statute qualified), *aff'd*, 106 F.3d 411 (9th Cir. 1997) (unpublished table decision); *Small v. IRS*, 820 F. Supp. 163, 166 (D.N.J. 1992) (same); *Vennes v. IRS*, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988) (same), *aff'd*, 890 F.2d 419 (8th Cir. 1989) (unpublished table decision).

during the course of the year in their annual FOIA reports.<sup>4</sup> Additionally, the FOIA requires agencies to include in their annual FOIA reports "the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld."<sup>5</sup>

### 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 pursuant 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."<sup>6</sup> In Reporters Committee for Freedom of the Press v. DOJ,<sup>7</sup> 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. [The court] 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.<sup>8</sup>

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<sup>4</sup> 5 U.S.C. § 552(e)(1)(B)(ii); see also *FOIA Post*, "2008 Guidelines for Agency Preparation of Annual FOIA Reports" (posted 5/22/08).

<sup>5</sup> 5 U.S.C. § 552(e)(1)(B)(ii).

<sup>6</sup> Reporters Comm. for Freedom of the Press v. DOJ, 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 Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n, 533 F.3d 810, 813-14 (D.C. Cir. 2008) (finding that, when analyzing statute under Exemption 3, "a court . . . must first determine whether the statute is a withholding statute at all by deciding whether it satisfies 'the threshold requirement that it specifically exempt matters from disclosure'" (quoting Reporters Comm., 816 F.2d at 734 (emphasis added))); Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 37 (D.C. Cir. 2002) (finding that, "for purposes of qualifying as a withholding statute under Exemption 3, a statute 'must on its face exempt matters from disclosure,'" and concluding that statute in question failed to qualify as withholding statute under Exemption 3 because it did not refer to "nondisclosure of information" (quoting Reporters Comm., 816 F.2d at 735)); Zanoni v. USDA, 605 F. Supp. 2d 230, 236 (D.D.C. 2009) (noting that "[w]hen determining whether FOIA Exemption (3) applies, the court 'must first determine whether the statute is a withholding statute . . . that . . . specifically exempt[s] matters from disclosure'" by "look[ing] at the language of the statute on its face" (quoting Pub. Citizen, 533 F.3d at 813)).

<sup>7</sup> 816 F.2d 730.

<sup>8</sup> Reporters Comm., 816 F.2d at 735; see also Pub. Citizen, 533 F.3d at 813-14; Nat'l Ass'n of Home Builders, 309 F.3d at 37 (finding that statute failed to qualify as withholding statute under Exemption 3, and opining that "[l]ooking first to 'the plain language of the statute,' there is nothing in the Endangered Species Act that refers to withholding information" (quoting

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In Reporters Committee, the D.C. Circuit noted that the breadth and reach of the disclosure prohibition need not be found on the face of the statute,<sup>9</sup> but that the statute must at least "explicitly deal with public disclosure."<sup>10</sup> For example, in 2002, the D.C. Circuit held that the Endangered Species Act of 1973<sup>11</sup> fails to "qualify as a withholding statute under Exemption 3" because "nothing in [the statute's] language refers to nondisclosure of information."<sup>12</sup> At times, however, the D.C. Circuit, as well as other courts, have not strictly adhered to this requirement that the "congressional purpose to exempt matters from disclosure" be found "in the actual words of the statute,"<sup>13</sup> and have looked to the legislative history of the claimed withholding statute in determining whether that statute qualified under Exemption 3.<sup>14</sup>

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Ass'n of Retired R. R. Workers, Inc. v. U.S. R.R. Ret. Bd., 830 F.2d 331, 334 (D.C. Cir. 1987)); Anderson v. HHS, 907 F.2d 936, 950, 951 n.19 (10th Cir. 1990) (holding that statute qualified under FOIA Exemption 3 based on plain language of statute in question, and noting that federal regulations, constituting agency's interpretation of statute, are not entitled to deference in determining whether statute qualifies under Exemption 3); Zanoni, 605 F. Supp. 2d at 236 (holding that, "[w]hen determining whether FOIA Exemption (3) applies, the court 'must first determine whether the statute is a withholding statute . . . that . . . specifically exempt[s] matters from disclosure'" by "look[ing] at the language of the statute on its face" (quoting Pub. Citizen, 533 F.3d at 813)). But see Wis. Project on Nuclear Arms Control v. U.S. Dep't of Commerce, 317 F.3d 275, 284 (D.C. Cir. 2003) (looking to legislative history of section 203(a)(1) of International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1) (2006), and determining that statute satisfies Exemption 3's requirements); 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., Inc. v. USIA, 134 F.3d 1165, 1168 (D.C. Cir. 1998) (surveying legislative history of Smith-Mundt Act, 22 U.S.C. § 1461-1a (2006), to bolster ruling that statute qualifies under Exemption 3).

<sup>9</sup> Reporters Comm., 816 F.2d at 735 & n.5 (noting that "it may be proper to give deference to an agency's interpretation of what matters are covered by a statute, once the court is satisfied that the statute is in fact an Exemption 3 withholding statute, i.e., that it meets both the threshold test and one prong of the proviso").

<sup>10</sup> Id. at 736; see also Nat'l Ass'n of Home Builders, 309 F.3d at 37 (observing that "there is nothing in the Endangered Species Act that refers to withholding information").

<sup>11</sup> § 4, 16 U.S.C. § 1533 (2006).

<sup>12</sup> Nat'l Ass'n of Home Builders, 309 F.3d at 37-38 (observing that statute's plain language does not refer "to withholding information," and holding that agency's reliance on "legislative history will not avail if the language of the statute itself does not explicitly deal with public disclosure" (quoting Reporters Comm., 816 F.3d at 736)).

<sup>13</sup> Reporters Comm., 816 F.2d at 735.

<sup>14</sup> See Wis. Project, 317 F.3d at 282-85 (looking to legislative history of section 12(c) of Export Administration Act of 1979, 50 U.S.C. app. § 2411(c) (2006), and section 203(a)(1) of  
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The D.C. Circuit also has looked beyond statutory text and considered congressional intent when determining whether a statute that qualified under Exemption 3 at one time should continue to be recognized as an Exemption 3 statute after that statute has lapsed.<sup>15</sup> In such situations, the D.C. Circuit has stated that, although "FOIA undoubtedly demands a liberal presumption of disclosure, . . . [an] unduly strict reading of Exemption 3 strangles Congress's intent."<sup>16</sup> Similarly, courts have looked to legislative history for guidance in how to interpret statutory terms or phrases subject to multiple interpretations.<sup>17</sup> Additionally, courts sometimes consider the legislative history of a newly enacted Exemption 3 statute in determining whether the statute is applicable to FOIA requests already pending, or litigation

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<sup>14</sup>(...continued)

International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1) (2006), and finding that both section 12(c) and section 203(a)(1) qualified under Exemption 3; with regard to section 12(c), where Congress made plain its intent to prevent disclosure of export-application information, and, with regard to section 203(a)(1), where Congress made plain its intent to authorize President to maintain confidentiality provision of Export Administration Act in times of lapse); Meyerhoff, 958 F.2d at 1501-02 (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); Jones v. IRS, No. 06-CV-322, 2008 WL 1901208, at \*3-4 (W.D. Mich. Apr. 25, 2008) (concluding that "IRS appropriately denied [plaintiff's] request for Pocket Commission information" pertaining to third-party employee, where IRS determined that reproduction of requested materials would violate 18 U.S.C. § 701 (2006), which criminalizes unauthorized reproduction of official badges, identification cards, and other insignia, but which does not refer to nondisclosure of information); cf. Essential Info., 134 F.3d at 1165-67 (surveying legislative history of Smith-Mundt Act, 22 U.S.C. § 1461-1a (2006), to bolster ruling that statute qualifies under Exemption 3).

<sup>15</sup> See Wis. Project, 317 F.3d at 283 (rejecting as "formalistic logic" argument that agency improperly withheld records pursuant to Exemption 3 statute that had lapsed, and stating that "the touchstone of the Exemption 3 inquiry is whether the statute 'is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw'" (quoting Am. Jewish Cong. v. Kreps, 574 F.2d 624, 628-29 (D.C. Cir. 1978)); Times Publ'g Co. v. U.S. Dep't of Commerce, 236 F.3d 1286, 1292 (11th Cir. 2001) (finding that "[t]he confidentiality of the export licensing information sought . . . , provided by section 12(c) of the [Export Administration Act, 50 U.S.C. app. § 2411(c)(1) (2006)], was maintained by virtue of Executive Order 12,924" where "where there is no dispute that Congress granted the President authority to extend the provisions of the [Export Administration Act] . . . and that the President has exercised this authority in signing Executive Order 12,924").

<sup>16</sup> Wis. Project, 317 F.3d at 283.

<sup>17</sup> See Doe v. Veneman, 380 F.3d 807, 818 (5th Cir. 2004) (looking to legislative history of section 1491 of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136i-1 (2006)) (reverse FOIA suit); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 144 (2d Cir. 1994) (looking to legislative history of section 21(f) of FTC Act, 15 U.S.C. § 57b-2(f) (2006)).

already commenced, at the time the statute was enacted,<sup>18</sup> and have found Exemption 3 statutes to apply retroactively to the requested records.<sup>19</sup>

In Founding Church of Scientology v. Bell,<sup>20</sup> the D.C. Circuit noted that, by its very terms, "Exemption 3 is explicitly confined to material exempted from disclosure 'by statute.'"<sup>21</sup> As such, Exemption 3 generally is triggered only by federal statutes,<sup>22</sup> although the D.C. Circuit and the Court of Appeals for the Eleventh Circuit have held that executive orders may trigger Exemption 3 protection when they are issued pursuant to a grant of authority

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<sup>18</sup> See City of Chicago v. U.S. Dep't of the Treasury, 423 F.3d 777, 779-82 (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 (9th Cir. 1984) (looking to congressional intent with regard to retroactive application of Economic Tax Recovery Act of 1981, Pub. L. No. 97-34, § 701(a), 95 Stat. 172, and noting that, "[w]hen Congress unequivocally intends retroactive application, the only limitations upon the effectuation of that intent must be rooted in the Constitution"); National Educ. Ass'n v. FTC, No. 79-959-S, 1983 WL 1883, at \*1 (D. Mass. Sept. 26, 1983) (looking to legislative history of FTC Improvements Act of 1980, 15 U.S.C. § 57b-2(f) (2006), and concluding that "[t]he legislative history of the bill supports retroactive application of its provisions").

<sup>19</sup> See City of Chicago, 423 F.3d at 783 (holding that newly enacted appropriations legislation applies retroactively); Wis. Project, 317 F.3d at 280, 284-85 (finding that agency properly relied upon statute to withhold information retroactively, where Congress re-enacted statute during litigation and where court noted that "legislative history indicates that Congress intended to preserve these confidentiality protections when it renewed the [Export Administration Act of 1979, 50 U.S.C. app. § 2411(c) (2006)] in November 2000"); Sw. Ctr. for Biological Diversity v. USDA, 314 F.3d 1060, 1062 (9th Cir. 2002) (determining that agency may rely on National Parks Omnibus Management Act, 16 U.S.C. § 5937 (2006), to withhold information, even though statute was enacted after FOIA litigation commenced); Times Publ'g Co., 236 F.3d at 1292 (finding that agency properly relied upon section 12(c)(1) of Export Administration Act of 1979, 50 U.S.C. app. § 2411(c)(1) (2006), to withhold information, even though statute had lapsed at time of request, where Congress re-enacted statute during course of litigation); Long, 742 F.2d at 1183-84 (permitting retroactive application where court determined "[t]hat Congress intended the [Economic Tax Recovery Act, Pub. L. No. 97-34, § 701(a), 95 Stat. 172,] amendment to apply to this litigation is beyond all question"); 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); Lee Pharm. v. Kreps, 577 F.2d 610, 614 (9th Cir. 1978) (same); see also Am. Jewish Cong. v. Kreps, 574 F.2d 624, 627 (D.C. Cir. 1978) (applying amended version of Exemption 3 to pending case).

<sup>20</sup> 603 F.2d 945 (D.C. Cir. 1979).

<sup>21</sup> Id. at 952.

<sup>22</sup> See id. (finding that the "Federal Rules of Civil Procedure simply do not satisfy this description"); 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) (declaring that "an Executive Order . . . is clearly inadequate to support reliance on Exemption 3"), rev'd & remanded on other grounds, 690 F.2d 252 (D.C. Cir. 1982).

contained in a federal statute.<sup>23</sup> Federal rules of procedure, which are promulgated by the Supreme Court, ordinarily do not qualify under Exemption 3.<sup>24</sup> When a rule of procedure is subsequently modified and thereby specifically enacted into law by Congress, however, it may qualify under the exemption.<sup>25</sup> No court has yet addressed the issue of whether a treaty

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<sup>23</sup> See *Wis. Project*, 317 F.3d at 283-85 (distinguishing past D.C. Circuit precedent, noting that "[Founding Church of Scientology] is inapposite because the Federal Rules were originated and written not by Congress but by the Supreme Court, whereas the executive order here continued precisely the provision originated and written by Congress," and ultimately concluding that "the comprehensive legislative scheme as a whole – the confidentiality provision of the [Export Administration Act], the intended and foreseen periodic expiration of the [Export Administration Act], and the Congressional grant of power to the President to prevent the lapse of its important provisions during such times[, the grant of authority under which the executive order in question was issued,] – exempts from disclosure the export licensing information requested" (quoting *Times Publ'g Co.*, 236 F.3d at 1292)); *Times Publ'g Co.*, 236 F.3d at 1292 (finding that "[t]he confidentiality of the export licensing information sought . . . , provided by section 12(c) of the [Export Administration Act, 50 U.S.C. app. § 2411(c)(1) (2006)], was maintained by virtue of Executive Order 12,924" where "where there is no dispute that Congress granted the President authority to extend the provisions of the [Export Administration Act] . . . and that the President has exercised this authority in signing Executive Order 12,924," and concluding "that the comprehensive legislative scheme as a whole . . . exempts from disclosure the export licensing information requested").

<sup>24</sup> See *Founding Church of Scientology*, 603 F.2d at 952 (noting that "Exemption 3 is explicitly confined to material exempted from disclosure 'by statute,' and the Federal Rules of Civil Procedure simply do not satisfy this description," and holding that Rule 26(c) of Federal Rules of Civil Procedure, governing issuance of protective orders, is not statute under Exemption 3).

<sup>25</sup> 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); *Durham v. U.S. Atty. Gen.*, No. 06-843, 2008 WL 620744, at \*2 (E.D. Tex. Mar. 3, 2008) (noting that, "[w]hile courts have held that most of the rules contained in the Federal Rules of Civil and Criminal Procedure do not qualify as a statute for the purposes of [Exemption 3], Rule 6 of the Rules of Criminal Procedure qualifies because it was enacted by Congress"); *Berry v. DOJ*, 612 F. Supp. 45, 49 (D. Ariz. 1985) (determining that Rule 32 of Federal Rules of Criminal Procedure, governing disclosure of presentence reports, is properly considered statute for Exemption 3 purposes because it was enacted into law by Congress in 1975); see also *Cozen O'Connor v. U.S. Dep't of Treasury*, 570 F. Supp. 2d 749, 776 (E.D. Pa. 2008) (stating that "Rule 6(e)[of the Federal Rules of Criminal Procedure] is a statutory mandate that automatically invokes Exemption 3"); cf. *Lykins v. DOJ*, 725 F.2d 1455, 1462 n.7 (D.C. Cir. 1984) (holding that standing order of district court has no nondisclosure effect under FOIA where "[t]here is no indication that the . . . [d]istrict [c]ourt's order had anything to do with any concrete case or controversy before it").

can qualify as a statute under Exemption 3 in a FOIA case.<sup>26</sup>

Once it is established that a statute is a nondisclosure statute and that it meets at least one of the two subparts of Exemption 3, an agency next must establish that the records in question fall within the withholding provision of the nondisclosure statute.<sup>27</sup> This, in turn, often will require an interpretation of the scope of the nondisclosure statute.<sup>28</sup> 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,<sup>29</sup> or broadly, pursuant to deferential standards of general administrative law.<sup>30</sup> As the

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<sup>26</sup> Cf. Whitney v. Robertson, 124 U.S. 190, 194 (1888) (explaining that "[i]f the treaty contains stipulations that are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment," and noting that, "[b]y the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation") (non-FOIA case); Pub. Citizen v. Office of the U.S. Trade Representative, 804 F. Supp. 385, 388 (D.D.C. 1992) (finding that "[General Agreement on Tariffs and Trade (GATT)] provisions themselves do not justify defendant's withholding either the panel submissions or the panel decisions" where "GATT procedural rules favor confidentiality of these materials, but do not require it," and stating that, "[e]ven if GATT provisions were to meet the statutory criteria set forth in [Exemption 3], . . . GATT and its subsequent modifications are not Senate-ratified treaties, and they therefore do not have the status of statutory law"), appeal dismissed per stipulation, No. 93-5008 (D.C. Cir. Jan. 26, 1993).

<sup>27</sup> See CIA v. Sims, 471 U.S. 159, 167 (1985) (requiring that, to constitute proper withholding under Exemption 3, statute must qualify as proper Exemption 3 statute by meeting requirements of subpart (A) or subpart (B) and records in question must fall within statute's scope); A. Michael's Piano, Inc., 18 F.3d at 143 (same); Aronson v. IRS, 973 F.2d 962, 964 (1st Cir. 1992) (same); Cal-Almond, 960 F.2d at 108 (same); Fund for Constitutional Gov't, 656 F.2d at 868 (same); Pub. Citizen Health Research Group, 704 F.2d at 1284 (same).

<sup>28</sup> See, e.g., A. Michael's Piano, Inc., 18 F.3d at 143-45 (interpreting section 21(f) of FTC Act, 15 U.S.C. § 57b-2(f) (2006)); Aronson, 973 F.2d at 965-66 (interpreting 26 U.S.C. § 6103 (2006)); Anderson v. HHS, 907 F.2d 936, 950-51 (10th Cir. 1990) (interpreting section 520j(c) of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360j(c) (2006), and section 301(j) of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(j) (2006)); Grasso v. IRS, 785 F.2d 70, 74-75 (5th Cir. 1984) (interpreting section 6103 of Internal Revenue Code, 26 U.S.C. § 6103 (2006)); Medina-Hincapie v. Dept of State, 700 F.2d 737, 743-44 (D.C. Cir. 1983) (interpreting section 222(f) of Immigration and Nationality Act, 8 U.S.C. § 1202(f) (2006)).

<sup>29</sup> See Anderson, 907 F.2d at 951 (taking into account "well-established rules that the FOIA is to be broadly construed in favor of disclosure[] and its exemptions are to be narrowly construed" in determining how to interpret Exemption 3 statute (citing Alirez v. NLRB, 676 F.2d 423, 425 (10th Cir. 1982)); Grasso, 785 F.2d at 75 (concluding "that section 6103 [of Internal Revenue Code, 26 U.S.C. § 6103 (2006),] was not designed to displace FOIA, which itself contains an adequate exception from disclosure for materials protected under other federal statutes," and noting that "that FOIA and section 6103 can be viewed harmoniously through the operation of Exemption 3"); Currie v. IRS, 704 F.2d 523, 527, 530 (11th Cir. 1983) (rejecting "IRS's contention that [s]ection 6103 [of Internal Revenue Code, 26 U.S.C. § 6103

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Court of Appeals for the Second Circuit observed in A. Michael's Piano, Inc. v. FTC,<sup>31</sup> "the Supreme Court has never applied a rule of [either] narrow or deferential construction to withholding statutes."<sup>32</sup> Consequently, the Second Circuit declined "to choose sides in the conflict between [its] sister circuits," and instead opted to "follow the approach taken by the Supreme Court in construing withholding statutes, looking to the plain language of the statute and its legislative history, in order to determine legislative purpose."<sup>33</sup> In interpreting the statutory provision in question, the Second Circuit began its analysis by looking at the plain language of the statute and, when it discovered that "[the statute's] plain language sheds no light on how courts should construe this withholding statute," it then looked to the statute's legislative history to discern the "legislative purpose" behind the provision.<sup>34</sup>

Under Exemption 3, judicial review under the FOIA of agency action is generally limited to determinations that the withholding statute qualifies as an Exemption 3 statute and that the records fall within the statute's scope.<sup>35</sup> 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 has been found to be governed not by the FOIA, but

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(2006),] is a self-contained scheme governing disclosure" and noting that "FOIA was designed to encourage open disclosure of public information"); DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 870-71 (D. Me. 1996) (adopting narrow approach to interpretation of Exemption 3 statute rather than apply more deferential standards of general administrative law).

<sup>30</sup> See Church of Scientology Int'l v. DOJ, 30 F.3d 224, 235 (1st Cir. 1994) (finding that, "unlike actions under other FOIA exemptions, agency decisions to withhold materials under Exemption 3 are entitled to some deference"); Aronson, 973 F.2d at 967 (determining that, "once a court determines that the statute in question is an Exemption 3 statute, and that the information requested at least arguably falls within the statute, FOIA de novo review normally ends" and "[a]ny further review must take place under more deferential, administrative law standards"); cf. 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").

<sup>31</sup> 18 F.3d 138 (2d Cir. 1994).

<sup>32</sup> Id. at 144.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> 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); see also Cozen O'Connor, 570 F. Supp. 2d at 775 (noting that, "[u]nlike other FOIA exemptions, Exemption 3's applicability does not depend upon the contents of the documents," and stating that, because "[i]t is the nature of the document, not its contents, that makes it exempt[,] . . . the agency need only show that the documents are within the category of documents specifically exempt from disclosure by the statute").



by the withholding statute itself.<sup>36</sup>

Agencies and courts ordinarily specify the nondisclosure statutes upon which Exemption 3 withholdings are based, but the District Court for the District of Columbia has on occasion concealed 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 the court engaged in a specific discussion of the legal basis for Exemption 3's use in those exceptional cases.<sup>37</sup>

#### Statutes Not Delineated as Subpart (A) or Subpart (B)

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.<sup>38</sup> Although this practice is by no means obsolete, courts do not

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<sup>36</sup> See Aronson, 973 F.2d at 966; Ass'n of Retired R.R. Workers, 830 F.2d at 336.

<sup>37</sup> 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 that Exemption 3 authorized withholding of State Department's "Biographic Register" of federal employees, but declining to "discuss the [in camera] submission [of the Exemption 3 claim]" or identify Exemption 3 statute serving as basis for withholding, where "national security would be compromised and threats to the safety of individuals would arise upon specific discussion of the in camera submission"); 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 upon which agency relied where court determined that "no further information as to this exemption should be disclosed on the public record").

<sup>38</sup> See, e.g., Lessner v. U.S. Dep't of Commerce, 827 F.2d 1333, 1336-37 (9th Cir. 1987) (finding that section 12(c)(1) of Export Administration Act of 1979, 50 U.S.C. app. § 2411(c)(1) (2006) (statutory authority most recently expired on August 20, 2001, as required by 50 U.S.C. app. § 2419 (2006), but has been re-extended several times in past, in substantially identical form), qualified as Exemption 3 statute and specifying that statute qualified under subpart (B)); 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) (same), adopted, No. 99-2383 (D.D.C. Mar. 29, 2001); McGilvra v. NTSB, 840 F. Supp. 100, 102 (D. Colo. 1993) (finding that Transportation Safety Act of 1974, 49 U.S.C. § 1114(c) (2006), qualified as Exemption 3 statute and specifying that statute qualified under subpart (A)); 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) (finding that International Investment Survey Act of 1976, 22 U.S.C. § 3104(c) (2006), qualified as Exemption 3 statute and specifying that statute qualified under subpart (A)); Motion Picture Ass'n of Am. v. DOJ, No. 80 Civ. 6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981) (finding that provision of Antitrust Civil Process Act, 15 U.S.C. § 1314(g) (2006), qualified as Exemption 3 statute and specifying that statute qualified under subpart (A)); Nat'l W. Life Ins. Co. v. United States, 512 F. Supp. 454, 459, 462 (N.D. Tex. 1980) (finding that provision of Postal Reorganization Act, 39 U.S.C. § 410(c)(2) (2006), qualified

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always specify under which subpart of Exemption 3 a statute qualifies, instead simply determining whether a statute qualifies, or does not qualify, as an Exemption 3 statute generally.<sup>39</sup>

For example, in 2004, the Court of Appeals for the Fifth Circuit held that a provision of the Federal Insecticide, Fungicide, and Rodenticide Act<sup>40</sup> qualifies as an Exemption 3 statute, but the Fifth Circuit did not state whether that provision qualified under subpart (A) or (B) of Exemption 3.<sup>41</sup> Similarly, in 2005, one district court held that the confidentiality provision in the Federal Election Campaign Act<sup>42</sup> qualifies as an Exemption 3 statute, but did not designate that statute as qualifying pursuant to subpart (A) or (B) of Exemption 3.<sup>43</sup> Other district courts have held that 49 U.S.C. § 114(s)<sup>44</sup> and 49 U.S.C. § 40119(b)<sup>45</sup> qualify as Exemption 3 statutes because they provide the authority for the Secretary of Transportation and the Undersecretary of the TSA to protect sensitive security information from disclosure, although the courts did not specify under which subpart the statutes qualified.<sup>46</sup>

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<sup>38</sup>(...continued)

as Exemption 3 statute and specifying that statute qualified under subpart (B)).

<sup>39</sup> See, e.g., Berger v. IRS, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (finding that "[31 U.S.C.] § 5319 [2006] qualifies as an exempting statute under Exemption 3," but failing to specify whether court considered statute to qualify under subpart (A) or (B)), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008), cert. denied, No. 08-884, 2009 WL 1650205 (U.S. June 15, 2009); 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 (2006) is Exemption 3 statute without specifying under which subpart it qualifies), aff'd on other grounds, 512 F.3d 677 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 775 (2008); ACLU v. DOD, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same); Vosburgh v. IRS, No. No. 93-1493, 1994 WL 564699, at \*4 (D. Or. July 5, 1994) (recognizing 31 U.S.C. § 5319 (2006) as statute qualifying under Exemption 3, but failing to identify Exemption 3 subpart by which statute qualified), aff'd, 106 F.3d 411 (9th Cir. 1997) (unpublished table decision); Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992) (same); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988) (same), aff'd, 890 F.2d 419 (8th Cir. 1989) (unpublished table decision).

<sup>40</sup> 7 U.S.C. § 136i-1 (2006).

<sup>41</sup> See Doe v. Veneman, 380 F.3d 807, 818 (5th Cir. 2004).

<sup>42</sup> 2 U.S.C. § 437g(a)(12)(A) (2006).

<sup>43</sup> See Citizens for Responsibility & Ethics in Wash. v. FEC, No. 04-1672, slip op. at 5 (D.D.C. May 16, 2005). But see FEC v. Illinois Medical Political Action Comm., 503 F. Supp. 45, 46 (N.D. Ill. 1980) (rejecting as "unpersuasive" agency's argument that same provision of Federal Election Campaign Act qualifies as Exemption 3 statute).

<sup>44</sup> (2006).

<sup>45</sup> (2006).

<sup>46</sup> See 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  
(continued...))

Courts have protected applications and orders for "pen registers," as well as to protect evidence derived from the issuance of pen registers.<sup>47</sup> Pursuant to 18 U.S.C. § 3123(d),<sup>48</sup> which provides for nondisclosure of the existence of a pen register or a trap and trace device, "an order authorizing a pen register or trap and trace device is sealed until otherwise ordered by the court and such an order prohibits disclosure of the existence of the pen register or trap and trace device."<sup>49</sup> Accordingly, applications and orders for "pen registers" have been withheld pursuant to 18 U.S.C. § 3123(d) and Exemption 3, although courts have not specified under which Exemption 3 subpart 18 U.S.C. § 3123(d) qualifies.<sup>50</sup> Once the court-ordered sealing order is lifted, however, the statute no longer prohibits release under the FOIA.<sup>51</sup> In one case, information acquired through the use of a "pen register" was held to be protected from

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generally), supplemental motion for summary judgment granted sub nom. Elec. Privacy Info. Ctr. v. TSA, No. 03-1846, 2006 WL 626925 (D.D.C. Mar. 12, 2006); Gordon v. FBI, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004) (holding that "there is no dispute that these statutes fall within 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 Exemption 3 statute), rev'd & remanded in part on other grounds sub nom. Tooley v. Napolitano, 556 F.3d 836 (D.C. Cir. 2009).

<sup>47</sup> See, e.g. Jennings, No. 03-1651, slip op. at 11-12 (D.D.C. May 6, 2004) (finding that "[t]his same reasoning [as applied to protect information obtained from authorized wiretap] applies to the evidence derived from the issuance of a pen register or trap and trace device").

<sup>48</sup> (2006).

<sup>49</sup> Jennings v. FBI, No. 03-1651, slip op. at 11 (D.D.C. May 6, 2004).

<sup>50</sup> See id. at 11-13 (protecting "28 pages of pen register and conversation log sheets" where court determined that, "[s]ince the log sheets would by necessity reveal the existence of these [pen register or trap and trace] devices, they are exempt from disclosure by [18 U.S.C. § 3123(d)] and by Exemption 3," but failing to identify under which Exemption 3 subpart statute qualified); Riley v. FBI, No. 00-2378, 2002 U.S. Dist. LEXIS 2632, at \*5-6 (D.D.C. Feb. 11, 2002) (finding that sealed pen register applications and orders were properly withheld pursuant to Exemption 3, noting that "18 U.S.C. § 3123 requires that the pen register materials at issue remain under seal," but failing to identify Exemption 3 subpart under which 18 U.S.C. § 3123 qualified); Manna v. DOJ, 815 F. Supp. 798, 812 (D.N.J. 1993) (finding that "two sealed applications submitted to the court for the installation and use of pen registers" and "two orders issued by the Magistrate Judge who granted the applications" were properly "protected by [§] 3123(d) and Exemption 3," without identifying whether statute qualified under subpart (A) or (B) of Exemption 3), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995).

<sup>51</sup> See 18 U.S.C. § 3123(d); see also Morgan v. DOJ, 923 F.2d 195, 197 (D.C. Cir. 1991) (declaring that "the 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"); Jennings, No. 03-1651, slip op. at 12-13 (D.D.C. May 6, 2004) (denying "[agency's] motion based on Exemption 3 . . . as to those 25 pages of documents [withheld as sealed by court order]" where agency did not meet "burden of demonstrating that the court issued the seal with the intent to prohibit the agency from disclosing the records as long as the seal remains in effect").

disclosure by Title III of the Omnibus Crime Control and Safe Streets Act,<sup>52</sup> and, as such, was also found to fall under Exemption 3.<sup>53</sup>

In 2006, one court held that a provision of the Fair Housing Act<sup>54</sup> that protects information concerning ongoing discrimination investigations qualifies as a "disclosure-prohibiting statute," but did not specify either subpart of Exemption 3.<sup>55</sup> Similarly, in 1982, the Supreme Court held that the Census Act,<sup>56</sup> which requires that certain data be withheld, is an Exemption 3 statute without specifying under which subpart the statute qualifies.<sup>57</sup> More recently, one district court held that the confidentiality provisions of the Gramm Leach Bliley Act of 1999<sup>58</sup> qualify as Exemption 3 statutes inasmuch as the provisions protect from disclosure customers' nonpublic personal information, but the court did not specify whether the provisions qualified pursuant to subpart (A) or (B) of Exemption 3.<sup>59</sup> Likewise, one district court has held that 18 U.S.C. § 701,<sup>60</sup> which criminalizes unauthorized reproduction of official badges, identification cards, and other insignia, is an Exemption 3 statute without identifying the subpart under which the statute qualified.<sup>61</sup>

In addition, one district court has held that section 7332 of the Veterans Health Administration Patient Rights Statute,<sup>62</sup> which generally prohibits disclosure of even the abstract fact that medical records on named individuals are maintained pursuant to that section, but which also provides specific criteria under which particular medical information

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<sup>52</sup> 18 U.S.C. §§ 2510-2520 (2006).

<sup>53</sup> McFarland v. DEA, No. 94-620, slip op. at 4-5 (D. Colo. Jan. 3, 1995) (protecting "information acquired through the use of a pen register" pursuant to Exemption 3).

<sup>54</sup> 42 U.S.C. § 3610(d) (2006).

<sup>55</sup> See West v. Jackson, 448 F. Supp. 2d 207, 212-13 (D.D.C. 2006), summary affirmance granted, No. 06-5281, 2007 WL 1723362 (D.C. Cir. 2007) (unpublished disposition).

<sup>56</sup> 13 U.S.C. §§ 8(b), 9(a) (2006).

<sup>57</sup> Baldrige v. Shapiro, 455 U.S. 345, 355, 359 (1982).

<sup>58</sup> § 501, 15 U.S.C. § 6801 (2006).

<sup>59</sup> See Hodes v. HUD, 532 F. Supp. 2d 108, 117 (D.D.C. 2008) (holding that agency properly applied Exemption 3 to protect records pertaining to individuals, but also finding that "[agency] may not invoke Exemption 3 to withhold from disclosure information associated with commercial entities").

<sup>60</sup> (2006).

<sup>61</sup> See Jones v. IRS, No. 06-CV-322, 2008 WL 1901208, at \*3-4 (W.D. Mich. Apr. 25, 2008) (concluding that "IRS appropriately denied [plaintiff's] request for Pocket Commission information" pertaining to third-party employee, where IRS determined that reproduction of requested materials would violate 18 U.S.C. § 701).

<sup>62</sup> 38 U.S.C. § 7332 (2006).

may be released, satisfies the requirements of Exemption 3, but the court did not specify whether the statute qualifies under subpart (A) or subpart (B) of Exemption 3.<sup>63</sup> Similarly, one district court found that records created by the VA as part of a medical quality-assurance program<sup>64</sup> qualify for Exemption 3 protection, without specifying whether the Exemption 3 protection was pursuant to subpart (A) or (B).<sup>65</sup> Likewise, "[m]edical quality assurance records created by or for the Department of Defense"<sup>66</sup> have also been found to qualify under Exemption 3 generally.<sup>67</sup>

Additionally, in 2005, two district courts held that 10 U.S.C. § 130c,<sup>68</sup> a statute that protects from disclosure certain "sensitive information of foreign governments,"<sup>69</sup> qualifies as an Exemption 3 statute, but neither court identified the statute as qualifying under subpart (A) or (B) of Exemption 3.<sup>70</sup> Likewise, one district court has determined that the Archaeological Resources Protection Act of 1979,<sup>71</sup> a statute which prohibits disclosure of certain information concerning archaeological resources,<sup>72</sup> qualifies under Exemption 3,

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<sup>63</sup> See Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992).

<sup>64</sup> See 38 U.S.C. § 5705(a) (2006).

<sup>65</sup> 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).

<sup>66</sup> 10 U.S.C. § 1102(a) (2006).

<sup>67</sup> See Goodrich v. Dep't of the Air Force, 404 F. Supp. 2d 48, 50, 51 (D.D.C. 2005) (holding that DOD's medical quality-assurance statute, qualifies as Exemption 3 statute protecting "minutes of Credentials Functions meetings and [Medical Practice Review Boards]," but failing to identify statute as qualifying under subpart (A) or (B)); 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," but failing to specify Exemption 3 subpart under which statute qualifies).

<sup>68</sup> (2006).

<sup>69</sup> Id. § 130c(a).

<sup>70</sup> See 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 is Exemption 3 statute without specifying under which subpart it qualifies), aff'd on other grounds, 512 F.3d 677 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 775 (U.S. 2008); ACLU v. DOD, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same).

<sup>71</sup> §§ 1-14, 16 U.S.C. §§ 470aa-470mm (2006).

<sup>72</sup> Id. § 9(a) (providing that information pertaining to certain archaeological resources "may not be made available to the public" unless "Federal land manager concerned determines that such disclosure would[:] (1) further the purposes of this chapter or the Act of June 27, 1960[, 16 U.S.C. §§ 469-469c-1], and (2) not create a risk of harm to such resources or to the site at which such resources are located").

without specifying under which subpart the Act qualifies.<sup>73</sup>

### Subpart (A) Statutes

Many statutes have been held to qualify as Exemption 3 statutes under the exemption's first subpart.<sup>74</sup> A primary example is Rule 6(e) of the Federal Rules of Criminal Procedure, which regulates disclosure of matters occurring before a grand jury.<sup>75</sup> Courts have found that this rule satisfies the basic "statute" requirement of Exemption 3 because Rule 6(e) was amended by Congress in 1977.<sup>76</sup> 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 such material is contained."<sup>77</sup>

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<sup>73</sup> Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 30 (D.D.C. 2003) (finding that agency properly "relie[d] upon Archaeological Resources Protection Act of 1979, [16 U.S.C. §§ 470aa-470mm,] which prohibits disclosure of information regarding 'archaeological resources' to protect document pertaining to Shenandoah National Park), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004).

<sup>74</sup> See 5 U.S.C. § 552(b)(3)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

<sup>75</sup> Fed. R. Crim. P. 6(e).

<sup>76</sup> See 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 Rule 6(e) was amended by Congress); Durham v. U.S. Atty. Gen., No. 06-843, 2008 WL 620744, at \*2 (E.D. Tex. Mar. 3, 2008) (noting that, "[w]hile courts have held that most of the rules contained in the Federal Rules of Civil and Criminal Procedure do not qualify as a statute for the purposes of [5 U.S.C. §] 552(b)(3), Rule 6 of the Rules of Criminal Procedure qualifies because it was enacted by Congress"); see also Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 776 (E.D. Pa. 2008) (stating that "Rule 6(e)[of the Federal Rules of Criminal Procedure] is a statutory mandate that automatically invokes Exemption 3").

<sup>77</sup> Iglesias v. CIA, 525 F. Supp. 547, 556 (D.D.C. 1981); see also Cozen O'Connor, 570 F. Supp. 2d at 776 (declaring that "[Rule 6(e)] is not discretionary"; rather, Rule 6(e) "covers not just grand jury transcripts, but all matters that could tend to reveal what occurred or was occurring in the grand jury, including identities of witnesses, questions asked by prosecutors or grand jurors, testimony of witnesses, or anything that could reveal the course of the investigation"); Tel. Publ'g Co. v. DOJ, 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 partial basis for protecting information related to grand jury, including correspondence between U.S. Attorney's Office and nongovernment attorneys pertaining to grand jury, even where correspondence was not shown to grand jury and evidence notebooks were created by local police at direction of AUSA, 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

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Defining the parameters of Rule 6(e) protection, however, is not always a simple task and has been the subject of much litigation. In Fund for Constitutional Government v. National Archives & Records Service,<sup>78</sup> 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 that, consequently, "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.'"<sup>79</sup> Subsequent to the Fund for Constitutional Government decision, many courts have adopted approaches similar to that of the D.C. Circuit, and have protected an array of information pertaining to grand jury proceedings pursuant to Exemption 3.<sup>80</sup>

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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 per curiam, 176 F.3d 478 (5th Cir. 1999) (unpublished table decision).

<sup>78</sup> 656 F.2d 856 (D.C. Cir. 1981).

<sup>79</sup> Id. at 867, 869 (quoting SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1382 (D.C. Cir. 1980)).

<sup>80</sup> See Leon v. United States, 250 F. App'x 507, 509 (3d Cir. 2007) (per curiam) (holding that "Rule 6 establishes a presumption of nondisclosure of Grand Jury materials" and concluding that district court properly dismissed complaint where "[requester's] complaint does not allege any ground for disclosure of Grand Jury materials under Rule 6(e)(3)"); Peltier v. FBI, 218 F. App'x 30, 31 (2d Cir. 2007) (finding "grand jury subpoenas, information identifying grand jury witnesses, information identifying records subpoenaed by the grand jury, and the dates of grand jury testimony" properly protected pursuant to Exemption 3); United States v. Kearse, 30 F. App'x 85, 86 (4th Cir. 2002) (per curiam) (holding that Rule 6(e) prohibits FOIA disclosure of grand jury transcripts); Rugiero v. DOJ, 257 F.3d 534, 549 (6th Cir. 2001) (protecting grand jury transcripts, exhibits, and identities of witnesses); Church of Scientology Int'l v. DOJ, 30 F.3d 224, 235 (1st Cir. 1994) (noting that "documents 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, 1246-47 (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," and recognizing "general rule of secrecy" with regard to grand jury records); Silets v. DOJ, 945 F.2d 227, 230 (7th Cir. 1991) (concluding that "identity of witness before a grand jury and discussion of that witness'[s] testimony" are exempt from disclosure, as they "fall[] squarely within" Rule 6(e)'s prohibition); Thompson v. EOUSA, 587 F. Supp. 2d 202, 208 (D.D.C. 2008) (finding grand jury transcript and grand jury exhibit properly protected pursuant to Exemption 3 and Rule 6(e)); Kishore v. DOJ, 575 F. Supp. 2d 243, 255 (D.D.C. 2008) (protecting grand jury subpoenas, names and other identifying information pertaining to individuals subpoenaed to testify before grand jury, and information identifying records subpoenaed by grand jury); Singh v. FBI, 574 F. Supp. 2d 32, 45 (D.D.C. 2008) (protecting "identities of witnesses and the records subpoenaed by a grand jury" pursuant to Exemption 3); Antonelli v. ATF, 555 F. Supp. 2d 16, 25 (D.D.C. 2008) (holding that form pertaining to securing third party's testimony before grand

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In its scrutiny of the scope of Rule 6(e) in Senate of Puerto Rico v. DOJ,<sup>81</sup> however, the D.C. Circuit 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).<sup>82</sup>

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<sup>80</sup>(...continued)

jury was properly protected pursuant to Exemptions 3 and 5); Durham, 2008 WL 620744, at \*2-3 (protecting grand jury balloting where "[plaintiff] . . . failed to demonstrate a particularized need for disclosure of the grand jury materials"); Peay v. DOJ, No. 04-1859, 2007 WL 788871, at \*3-4 (D.D.C. Mar. 14, 2007) (finding "names and other identifying information of individuals subpoenaed to testify before the grand jury, [and] information identifying specific records subpoenaed by the grand jury" properly protected); Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 WL 259941, at \*6 (D.D.C. Jan. 30, 2007) (protecting grand jury subpoenas); Boyd v. ATF, No. 05-1096, 2006 WL 2844912, at \*6 (D.D.C. Sept. 29, 2006) (protecting grand jury transcripts); Meserve v. DOJ, No. 04-1844, 2006 WL 2366427, at \*3 n.5 (D.D.C. Aug. 14, 2006) (protecting grand jury "correspondence, witness subpoenas, transcripts, and evidence"); Peay v. DOJ, 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; however, agency failed to show whether segregability requirements were met); Boyd v. Criminal Div., DOJ, No. 04-1100, 2005 WL 555412, at \*6 (D.D.C. Mar. 9, 2005) (protecting identities of grand jury witnesses), aff'd on other grounds, 475 F.3d 381 (D.C. Cir. 2007), cert. denied sub nom. Boyd v. U.S. Marshals Service, 128 S. Ct. 511 (2007); 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"); 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 AUSA in preparation for grand jury proceeding, records of third parties provided in course of proceeding, and notes concerning witnesses who testified); Canning v. DOJ, 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).

<sup>81</sup> 823 F.2d 574 (D.C. Cir. 1987).

<sup>82</sup> See id. at 584; see also Wash. Post Co. v. DOJ, 863 F.2d 96, 100 (D.C. Cir. 1988) (finding that record 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); John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) (declaring that "[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); Cozen O'Connor, 570 F. Supp. 2d at 776 (remarking that "[j]ust because information was either obtained by a grand jury subpoena or was submitted to a grand jury does not make it exempt"; rather, "[t]o be exempt, the information must reveal some aspect of the grand jury's

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Rather, an agency must establish a nexus between the release of that information and "revelation of a protected aspect of the grand jury's investigation."<sup>83</sup> As the D.C. Circuit explained in Stolt-Nielsen Transportation Group Ltd. v. United States,<sup>84</sup> "the government may not bring information into the protection of Rule 6(e) and thereby into the protection afforded

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<sup>82</sup>(...continued)

investigation" and "the connection to the investigation must be apparent, especially for documents created independent of and extrinsic to the grand jury investigation"); Tel. Publ'g, No. 95-521-M, slip op. at 11 (D.N.H. Aug. 31, 1998) (noting that "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").

<sup>83</sup> Senate of P.R., 823 F.2d at 584; see also Sussman v. U.S. Marshals Service, 494 F.3d 1106, 1113 (D.C. Cir. 2007) (vacating district court's finding that U.S. Marshals Service properly withheld category of records where agency "has failed to demonstrate disclosure would 'tend to reveal some secret aspect of the grand jury's investigation'" (quoting Senate of P.R., 823 F.2d at 582)); Lopez v. DOJ, 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)); Peay, 2007 WL 788871, at \*3-4 (finding "names and other identifying information of individuals subpoenaed to testify before the grand jury, [and] information identifying specific records subpoenaed by the grand jury" properly protected, but also holding that agency "has not . . . explained how the disclosure of the dates the grand jury convened would tend to reveal a 'secret aspect' of the grand jury investigation and therefore is not entitled to summary judgment on the redacted dates"); Homick v. DOJ, 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 agency described only as "type of records subpoenaed by the grand jury," because agency failed to meet its burden of showing how such information "is exempt from disclosure"); LaRouche v. U.S. Dept of the Treasury, No. 91-1655, 2000 WL 805214, at \*8 (D.D.C. Mar. 31, 2000) (observing that, "[a]lthough the IRS has alleged with sufficient specificity in many instances how Exemption 3 and Rule 6(e) are applicable, there are several documents for which the required nexus between the information withheld and a protected interest has not been demonstrated," and ordering release of information (e.g., location of grand jury proceedings, case number) for which agency failed to demonstrate sufficient nexus); Tel. Publ'g, No. 95-521-M, slip op. at 11 (D.N.H. Aug. 31, 1998) (requiring that agencies show nexus between disclosure of withheld information and impermissible revelation of grand jury matters to invoke protection of Exemption 3); Greenberg, 10 F. Supp. 2d at 27-28 (finding that nexus was established because releasing transcripts of taped conversations would show "direction or path the Grand Jury was taking"); LaRouche v. DOJ, No. 90-2753, 1993 WL 388601, at \*5 (D.D.C. June 25, 1993) (holding that "[agency] has not met its burden of showing that it is entitled to withhold [letter prepared by government attorney discussing upcoming grand jury proceedings]" where agency "presented no specific factual basis to support the conclusion that disclosure of this document would reveal confidential aspects of grand jury proceedings where the grand jury had not even started its work").

<sup>84</sup> 534 F.3d 728 (D.C. Cir. 2008).

by Exemption 3, simply by submitting it as a grand jury exhibit.<sup>185</sup>

This requirement, that an agency demonstrate a nexus between the release of the information and "revelation of a protected aspect of the grand jury's investigation," is particularly applicable to extrinsic documents that were created entirely independent of the grand jury process.<sup>86</sup> For such a document, the D.C. Circuit emphasized in Washington Post Co. v. DOJ,<sup>87</sup> the required nexus must be apparent from the information itself, and "the government cannot immunize [it] by publicizing the link."<sup>88</sup> 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.<sup>89</sup> Additionally, in order to document and support agencies' determinations, agency FOIA personnel necessarily must be afforded unrestricted access to grand jury-protected information.<sup>90</sup>

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<sup>85</sup> Id. at 732 (noting that "[a] contrary holding could render much of FOIA's mandate illusory, as the government could often conceal otherwise disclosable information simply by submitting the information to a grand jury").

<sup>86</sup> Senate of P.R., 823 F.2d at 584.

<sup>87</sup> 863 F.2d 96 (D.C. Cir. 1988).

<sup>88</sup> Id. at 100.

<sup>89</sup> See, e.g., Sussman, 494 F.3d at 1113; Lopez, 393 F.3d at 1349-51; Peay, 2007 WL 788871, at \*3-4; Maydak v. DOJ, 254 F. Supp. 2d 23, 42 (D.D.C. 2003) (stating that court could not determine whether agency properly invoked Exemption 3 where neither Vaughn Index nor agency's declaration described specific records withheld); LaRouche, 2000 WL 805214, at \*7-8 (holding that agency affidavit 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); 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); Sousa v. DOJ, 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, AUSA's handwritten notes discussing content of witness testimony, evidence used, and strategies would reveal protected aspects of grand jury investigation); Kronberg v. DOJ, 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).

<sup>90</sup> See Canning v. DOJ, 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); see also DOJ, Fed. Grand Jury Practice 70 (Oct. 2008) (recognizing that grand jury information 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 . . . FOIA"); FOIA Update, Vol. XIX, No. 3, at 2 (advising agencies that "[t]his restriction [on disclosure of certain grand jury materials] does not prohibit necessary access to grand jury

(continued...)

The Court of Appeals for the First Circuit, in Church of Scientology International v. DOJ,<sup>91</sup> took a different approach from the D.C. Circuit and established different standards for certain categories of grand jury records.<sup>92</sup> In Church of Scientology International, the First Circuit found that "documents 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."<sup>93</sup> The First Circuit "distinguish[ed] such materials from business records or similar documents 'created for purposes independent of grand jury investigations, which have legitimate uses unrelated to the substance of the grand jury proceedings,'" noting that "[a]lthough these documents, too, may be subject to nondisclosure under Exemption 3 if they are grand jury exhibits, the government needs to provide some basis for a claim that releasing them will implicate the secrecy concerns protected by Rule 6(e)."<sup>94</sup> With regard to any other materials "simply located in grand jury files," however, the First Circuit rejected a position that the secrecy concerns protected by Rule 6(e) are automatically implicated.<sup>95</sup>

The Court of Appeals for the Ninth Circuit has held that a provision of the Ethics in Government Act of 1978,<sup>96</sup> protecting the financial disclosure reports of special government employees, meets the requirements of subpart (A).<sup>97</sup> Another provision of the Ethics in

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(...continued)  
information by FOIA personnel").

<sup>91</sup> 30 F.3d 224 (1st Cir. 1994).

<sup>92</sup> Id. at 235-36.

<sup>93</sup> Id. at 235; see also 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] without regard to whether one of the Rule 6(e)(3) exceptions allows disclosure" but that "[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 grand jury investigation); Church of Scientology International, 30 F.3d at 235 n.15 (dictum) (finding that it is "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 jury investigation").

<sup>94</sup> Church of Scientology International, 30 F.3d at 235.

<sup>95</sup> Id. at 236; cf. Foster v. DOJ, 933 F. Supp. 687, 691 (E.D. Mich. 1996) (protecting twenty-seven page prosecution report that "identifies grand jury witnesses, reveals the direction, scope and strategy of the investigation, and sets forth the substance of grand jury testimony" where "[e]ach page containe[d] a 'grand jury' secrecy label").

<sup>96</sup> § 107, 5 U.S.C. app. § 4 (2006).

<sup>97</sup> Meyerhoff v. EPA, 958 F.2d 1498, 1500-02 (9th Cir. 1992) (finding that agency properly withheld "conflict of interest records under Exemption 3" and specifying that statute "qualifies as a withholding statute under Exemption 3(A) because it leaves no discretion to the agencies

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Government Act, providing for the disclosure of financial disclosure reports of certain other government employees,<sup>98</sup> was also found to qualify as an Exemption 3 statute under subpart (A), allowing disclosure only if a requester met that statute's particular disclosure requirements.<sup>99</sup>

Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964<sup>100</sup> have also been held to meet the subpart (A) requirement because they allow the EEOC no discretion to publicly disclose matters pending before the agency, although in one case the court did not specify which subpart it was applying.<sup>101</sup> Similarly, a provision of the Bank Secrecy Act,<sup>102</sup> the statute governing records pertaining to Currency Transaction Reports and other monetary instruments transactions, has been found to meet the requirements of subpart (A),<sup>103</sup> although,

(...continued)

on whether the confidential reports can be disclosed to the public"; see also *Concepcion v. FBI*, 606 F. Supp. 2d 14, 33 (D.D.C. 2009) (finding that "EOUSA properly withheld the two Conflict of Interest Certification reports under Exemption 3 [and section 107(a) of the Ethics in Government Act]," and holding that "[t]he Ethics in Government Act requires that these reports remain confidential and leaves the EOUSA no discretion on the issue," thereby tracking language of subpart (A) of Exemption 3 without expressly stating that statute qualifies as subpart (A) statute specifically); *Glascoe v. DOJ*, No. 04-0486, 2005 WL 1139269, at \*1 (D.D.C. May 15, 2005) (protecting AUSA's "confidential conflict of interest certification" based on nondisclosure requirement of section 107(a) of Ethics in Government Act, 5 U.S.C. app. § 4, but failing to identify under which subpart section 107(a) qualifies).

<sup>98</sup> Ethics in Government Act § 205 (repealed as of Jan. 1, 1991).

<sup>99</sup> *Church of Scientology v. IRS*, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993), appeal dismissed per stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993).

<sup>100</sup> 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (2006).

<sup>101</sup> See *Frito-Lay v. EEOC*, 964 F. Supp. 236, 240-43 (W.D. Ky. 1997) (recognizing 42 U.S.C. § 2000e-8(e) as withholding statute under FOIA, and finding that agency properly applied 42 U.S.C. § 2000e-8(e) and FOIA Exemption 3 to withhold requester's charge file); *Am. Centennial Ins. Co. v. EEOC*, 722 F. Supp. 180, 184 (D.N.J. 1989) (determining that "[sections] 706(b) and 709(e) [of the Civil Rights Act, 42 U.S.C. §§ 2000e-5(b), 2000e-8(e),] fall within Exemption 3 of the FOIA and prohibit the EEOC from disclosing the requested information to the plaintiff," and expressly rejecting argument that statute did not qualify under subpart (A) of Exemption 3); see also *Crump v. EEOC*, No. 3:97-0275, slip op. at 5-6 (M.D. Tenn. June 18, 1997) (finding that agency met its burden of demonstrating records were properly withheld pursuant to Exemption 3, through 42 U.S.C. § 2000e-5(b), but failing to identify under which Exemption 3 subpart § 2000e-5(b) qualifies); cf. *EEOC v. City of Milwaukee*, 54 F. Supp. 2d 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)").

<sup>102</sup> 31 U.S.C. § 5319 (2006).

<sup>103</sup> See *Sciba v. Bd. of Governors of the Fed. Reserve Sys.*, No. 04-1011, 2005 WL 3201206, (continued...)

yet again, in some cases courts have not specified which subpart of Exemption 3 they were applying.<sup>104</sup> The International Investment Survey Act of 1976<sup>105</sup> has been held to be a subpart (A) statute,<sup>106</sup> as have two Consumer Product Safety Act provisions<sup>107</sup> that the Court of Appeals for the Sixth Circuit found to satisfy subpart (A)'s nondisclosure requirements inasmuch as "[e]ach of these statutes, in the language of Exemption 3, 'requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue.'<sup>108</sup>

Similarly, a provision of the Antitrust Civil Process Act,<sup>109</sup> which exempts from the FOIA

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<sup>103</sup>(...continued)

at \*6 (D.D.C. Nov. 4, 2005) (finding that "[agency] correctly asserts Exemption 3(A) of the FOIA as justification for nondisclosure of the withheld documents because the two [suspicious activity reports] and four [currency transaction reports] fall within the scope of 31 U.S.C. § 5319").

<sup>104</sup> See, e.g., *Berger v. IRS*, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (reaching "natural conclusion that [31 U.S.C.] § 5319 qualifies as an exempting statute under Exemption 3," but failing to specify whether court considered statute to qualify under subpart (A) or subpart (B) of Exemption 3), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008), cert. denied, No. 08-884, 2009 WL 1650205 (U.S. June 15, 2009); Linn, 1995 WL 631847, at \*30 (finding currency transaction report properly protected pursuant to Exemption 3 and 31 U.S.C. § 5319, but failing to identify Exemption 3 subpart under which 31 U.S.C. § 5319 qualified); Vosburgh v. IRS, No. No. 93-1493, 1994 WL 564699, at \*4 (D. Or. July 5, 1994) (protecting currency transaction reports pursuant to Exemption 3 and 31 U.S.C. § 5319, but failing to identify 31 U.S.C. § 5319 as subpart (A) or (B)), aff'd, 106 F.3d 411 (9th Cir. 1997) (unpublished table decision); Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992) (finding information from Treasury Enforcement Communications System and Currency and Banking Retrieval System properly protected pursuant to Exemption 3 and 31 U.S.C. § 5319, but failing to identify 31 U.S.C. § 5319 as subpart (A) or subpart (B)); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988) (protecting currency transaction reports and records pertaining to currency transaction reports but failing to designate 31 U.S.C. § 5319 as qualifying under subpart (A) or subpart (B) of Exemption 3), aff'd, 890 F.2d 419 (8th Cir. 1989) (unpublished table decision).

<sup>105</sup> 22 U.S.C. § 3104(c) (2006).

<sup>106</sup> See Young Conservative Found. v. U.S. Dep't of Commerce, No. 85-3982, 1987 WL 9244, at \*4 (D.D.C. Mar. 25, 1987).

<sup>107</sup> § 6(a)(2), (b)(5), 15 U.S.C. § 2055(a)(2), (b)(5) (2006).

<sup>108</sup> Mulloy v. Consumer Prods. Safety Comm'n, No. 85-3720, 1986 WL 17283, at \*1 (6th Cir. July 22, 1986) (per curiam) (unpublished disposition) (quoting 5 U.S.C. § 552b(3)(A)); see also Mulloy v. Consumer Prod. Safety Comm'n, No. C-2-85-645, 1985 U.S. Dist. LEXIS 17194, at \*5-6 (S.D. Ohio Aug. 2, 1985) (finding that agency properly protected two letters pursuant to section 6(b)(5) and Exemption 3, but failing to make determination as to propriety of agency's claim that statute qualified under subpart (B)).

<sup>109</sup> 15 U.S.C. § 1314(g) (2006).

transcripts of oral testimony taken in the course of investigations under that Act,<sup>110</sup> has been held to qualify as a subpart (A) statute.<sup>111</sup> Also, a section of the Transportation Safety Act of 1974,<sup>112</sup> which states that the NTSB shall withhold from public disclosure cockpit voice recordings associated with accident investigations, was found to fall within subpart (A) of Exemption 3.<sup>113</sup> Similarly, information contained in the SSA'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<sup>114</sup> "leaves no room for agency discretion."<sup>115</sup>

In a decision construing the application of the identical Exemption 3 language of the Government in the Sunshine Act<sup>116</sup> to the Defense Nuclear Facilities Safety Board Act, the D.C. Circuit held that two provisions of the Defense Nuclear Facilities Safety Board Act<sup>117</sup> allow no discretion with regard to the release of the Board's proposed recommendations, thereby meeting the requirement of subpart (A).<sup>118</sup>

### Subpart (B) Statutes

Traditionally, most Exemption 3 cases have involved subpart (B), which provides for the withholding of information prohibited from disclosure by another federal statute if that "statute . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld."<sup>119</sup> In other words, where "[sub]part A [of Exemption 3] embraces only those statutes leaving no room for administrative discretion to disclose," federal statutes

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<sup>110</sup> See id.

<sup>111</sup> See Motion Picture Ass'n of Am. v. DOJ, No. 80 Civ. 6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981) (protecting transcripts of oral testimony under Exemption 3).

<sup>112</sup> 49 U.S.C. § 1114(c) (2006).

<sup>113</sup> McGivra v. NTSB, 840 F. Supp. 100, 102 (D. Colo. 1993).

<sup>114</sup> 42 U.S.C. § 405(r) (2006).

<sup>115</sup> Int'l Diatomite Producers Ass'n v. SSA, 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).

<sup>116</sup> 5 U.S.C. § 552b(c)(3) (2006).

<sup>117</sup> § 315(a), (g), 42 U.S.C. § 2286d(a), (g)(3) (2006).

<sup>118</sup> See Natural Res. Def. Council v. Def. Nuclear Facilities Safety Bd., 969 F.2d 1248, 1249 (D.C. Cir. 1992). But see id. at 1253 (Williams, J., dissenting) (noting that "[t]he provisions invoked by the Board, 42 U.S.C. §§ 2286d(a) and (g)(3), do not even mention withholding at all, much less require it (subsection (A) of exemption 3) or specify particular criteria to govern withholding or specific matter that the agency may withhold in its discretion (subsection (B) of exemption 3)").

<sup>119</sup> 5 U.S.C. § 552(b)(3)(B) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

allowing for administrative discretion may qualify under subpart (B) of Exemption 3, provided that the statute "either limit[s] discretion to a particular item or to a particular class of items that Congress has deemed appropriate for exemption, or . . . limit[s] it by prescribing guidelines for its exercise."<sup>120</sup>

For example, a provision of the Consumer Product Safety Act<sup>121</sup> has been held to set forth sufficiently definite withholding criteria for it to fall within the scope of subpart (B) of Exemption 3.<sup>122</sup> Likewise, the provision which prohibits the Consumer Product Safety Commission from disclosing any information that is submitted to it pursuant to section 15(b) of the Act<sup>123</sup> has been held to meet the requirements of subpart (B) by referring to particular types of matters to be withheld.<sup>124</sup>

Section 777 of the Tariff Act of 1930, which governs the withholding of certain "proprietary information,"<sup>125</sup> has been held to refer to particular types of information to be withheld and thus to be a subpart (B) statute.<sup>126</sup> Section 12(d) of the Railroad Unemployment Insurance Act<sup>127</sup> refers to particular types of matters to be withheld – specifically, information which would reveal employees' identities -- and thus has been held to satisfy subpart (B).<sup>128</sup> Similarly, 39 U.S.C. § 410(c)(2),<sup>129</sup> a provision of the Postal Reorganization Act, which governs the withholding of "information of a commercial nature . . . which under good business practice would not be publicly disclosed,"<sup>130</sup> has been held to refer to "particular types of matters to be withheld" and thus to be a subpart (B) statute.<sup>131</sup> Likewise, 18 U.S.C. § 3509(d),

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<sup>120</sup> Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984).

<sup>121</sup> 15 U.S.C. § 2055(b)(1) (2006).

<sup>122</sup> See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 122 (1980).

<sup>123</sup> 15 U.S.C. § 2055(b)(5).

<sup>124</sup> See Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, No. 87-1478, slip op. at 16-17 (D.D.C. Sept. 19, 1989).

<sup>125</sup> 19 U.S.C. § 1677f (2006).

<sup>126</sup> See Mudge Rose Guthrie Alexander & Ferdon v. U.S. Int'l Trade Comm'n, 846 F.2d 1527, 1530 (D.C. Cir. 1988).

<sup>127</sup> 45 U.S.C. § 362(d) (2006).

<sup>128</sup> 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).

<sup>129</sup> (2006).

<sup>130</sup> Id.

<sup>131</sup> Wickwire Gavin, P.C. v. USPS, 356 F.3d 588, 589, 597 (4th Cir. 2004) (holding that agency  
(continued...))

a provision of the Federal Victims' Protection and Rights Act governing the disclosure of information that would identify children who were victims of certain crimes or witnesses to crimes against others,<sup>132</sup> has been held to qualify as an Exemption 3 statute because it "establishes particular criteria for withholding."<sup>133</sup>

Section 12(c)(1) of the Export Administration Act of 1979,<sup>134</sup> governing the disclosure of information from export licenses and applications, authorized the withholding of a sufficiently narrow class of information to satisfy the requirements of subpart (B) and thus qualifies as an Exemption 3 statute.<sup>135</sup> Similarly, the D.C. Circuit has found that section

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<sup>131</sup>(...continued)

properly withheld "quantity and pricing" information related to contract for which requester was unsuccessful bidder); Reid v. USPS, No. 05-294, 2006 WL 1876682, at \*5-9 (S.D. Ill. July 5, 2006) (finding customer's postage statements and agency's daily financial statements properly protected); Airline Pilots Ass'n, Int'l v. USPS, No. 03-2384, 2004 WL 5050900, at \*5-7 (D.D.C. June 24, 2004) (holding that agency 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 agency properly withheld job-applicant information under 39 U.S.C. § 410(c)(2) because it falls within agency's regulatory definition of "information of a commercial nature"); cf. Carlson v. USPS, 504 F.3d 1123, 1127 (9th Cir. 2007) (assuming "without deciding that 39 U.S.C. § 410(c)(2) qualifies as an Exemption 3 statute," but ultimately determining that requested records fell outside statute's scope); 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) (acknowledging statute as qualifying under subpart (B) of Exemption 3 but finding that contract in question did not constitute "commercial information" within scope of 39 U.S.C. § 410(c)(2)), adopted, No. 99-2383 (D.D.C. Mar. 29, 2001); Nat'l W. Life Ins. Co. v. United States, 512 F. Supp. 454, 459, 462 (N.D. Tex. 1980) (finding that "[39 U.S.C. §] 410(c)(2) qualifies as an exemption statute under 5 U.S.C. § 552(b)(3)(B)," but concluding that list of names and duty stations of postal employees did not qualify as "commercial information").

<sup>132</sup> (2006).

<sup>133</sup> Tampico v. EOUSA, No. 04-2285, slip op. at 8 (D.D.C. Apr. 29, 2005).

<sup>134</sup> 50 U.S.C. app. § 2411(c)(1) (2006) (statutory authority most recently expired on August 20, 2001, as required by 50 U.S.C. app. § 2419 (2006), but has been re-extended several times in past, in substantially identical form); see also 50 U.S.C. app. § 2419 (2006) (providing that "[t]he authority granted by this Act [sections 2401 to 2420 of this Appendix] terminates on August 20, 2001").

<sup>135</sup> See Wis. Project on Nuclear Arms Control v. U.S. Dep't of Commerce, 317 F.3d 275, 282-84 (D.C. Cir. 2003) (ruling that agency properly withheld export license application information under "comprehensive legislative scheme" through which expired Exemption 3 statute, section 12(c)(1) of Export Administration Act, 50 U.S.C. app. § 2411(c)(1), continued in operation by virtue of section 203(a)(1) of International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1)); see also Times Publ'g Co. v. U.S. Dep't of Commerce, 236 F.3d 1286, 1289-92 (11th Cir. 2001) (same); Afr. Fund v. Mosbacher, No. 92 Civ. 289, 1993 WL 183736, at \*6 (S.D.N.Y.

(continued...)



203(a)(1) of the International Emergency Economic Powers Act,<sup>136</sup> a statute "enacted . . . out of concern that export controls remain in place without interruption" and intended "to authorize the President to preserve the operation of the export regulations promulgated under the [Export Administration Act]" during repeated periods of lapse, also qualifies under Exemption 3.<sup>137</sup> Similarly, courts have held that DOD's "technical data" statute,<sup>138</sup> 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.<sup>139</sup> Likewise, the Collection and Publication of Foreign Commerce Act,<sup>140</sup> which explicitly provides for nondisclosure of shippers' export declarations, qualifies as an Exemption 3 statute under subpart (B).<sup>141</sup>

One district court has determined that a provision of the Procurement Integrity Act,<sup>142</sup>

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<sup>135</sup>(...continued)

May 26, 1993) (holding that protection under Export Administration Act, 50 U.S.C. app. § 2411(c)(1), was properly applied to agency denial made after Act expired in 1990 and before its subsequent re-extension in 1993); Lessner v. U.S. Dep't of Commerce, 827 F.2d 1333, 1336-37 (9th Cir. 1987) (construing statute as effective in 1987 and determining that statute qualified under subpart (B) of Exemption 3); cf. Durrani v. DOJ, 607 F. Supp. 2d 77, 86 (D.D.C. 2009) (finding that "[22 U.S.C. § 2778(e) [2006] . . . , by incorporation of the Export Administration Act [, 50 U.S.C. app. § 2411(c)(1),] . . . exempts from FOIA disclosure 'information obtained for the purpose of consideration of, or concerning, license applications under [the Export Administration Act] . . . unless the release of such information is determined by the [Commerce] Secretary to be in the national interest,'" without acknowledging that Export Administration Act had lapsed); 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, 50 U.S.C. app. § 2411(c)(1), as specifically incorporated by reference into Arms Export Control Act, 22 U.S.C. § 2778(e) (2006), is Exemption 3 statute that protects information concerning export license applications -- without acknowledging that Export Administration Act, 50 U.S.C. app. § 2411(c)(1), had lapsed), amended (D.D.C. Nov. 23, 1998).

<sup>136</sup> 50 U.S.C. § 1702(a)(1) (2006).

<sup>137</sup> Wis. Project, 317 F.3d at 282-84.

<sup>138</sup> 10 U.S.C. § 130 (2006).

<sup>139</sup> 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).

<sup>140</sup> 13 U.S.C. § 301(g) (2006).

<sup>141</sup> See Afr. Fund, 1993 WL 183736, at \*5; Young Conservative Found. v. U.S. Dep't of Commerce, No. 85-3982, 1987 WL 9244, at \*2-3 (D.D.C. Mar. 25, 1987).

<sup>142</sup> 41 U.S.C. § 423 (2006).

which prohibits the disclosure of certain source selection information,<sup>143</sup> is a statute qualifying under subpart (B) of Exemption 3.<sup>144</sup> That Procurement Integrity Act 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 . . . remedies established under any other law or regulation."<sup>145</sup> Another court in a non-FOIA case, however, has found that these exceptions clearly evince congressional intent that the prohibition on disclosure is limited to those disclosures not contemplated by law, such as "leaks."<sup>146</sup>

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,<sup>147</sup> has also been recognized as a statute qualifying under subpart (B) of Exemption 3.<sup>148</sup> In Lam Lek Chong v. DEA,<sup>149</sup> 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.'"<sup>150</sup> Following the D.C. Circuit's Lam Lek Chong decision, a number of courts have recognized Title III as an Exemption 3 statute, although most did not

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<sup>143</sup> See Legal & Safety Employer Research, Inc. v. U.S. Dep't of the Army, No. Civ. S001748, 2001 WL 34098652, at \*4 (E.D. Cal. May 4, 2001) (dictum) (explaining that "Congress limited agency discretion to withhold information to[] 'source selection information,' then carefully identified documents that make up source selection information," and concluding that "court is satisfied that [41 U.S.C. §] 423 is a nondisclosure statute under Exemption 3, subsection B" (quoting 41 U.S.C. § 423(a)(1))). But see Pikes Peak Family Hous., LLC v. United States, 40 Fed. Cl. 673, 680-81 (Cl. Ct. 1998) (rejecting argument that Procurement Integrity Act, 41 U.S.C. § 423, prohibited release of the information in question, construing phrase "other than as provided by law" as necessarily allowing disclosures in civil discovery) (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 (2006), interrelates with FOIA so as to render any statutory prohibition inapplicable because, under it, "FOIA would provide legal authorization for" disclosure).

<sup>144</sup> Legal & Safety Employer Research, Inc., 2001 WL 34098652, at \*3-4 (rejecting Exemption 3 applicability where records at issue did not fall within scope of nondisclosure provision).

<sup>145</sup> 41 U.S.C. § 423(h).

<sup>146</sup> Pikes Peak Family Hous., LLC, 40 Fed. Cl. at 680-81 (noting that 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").

<sup>147</sup> See 18 U.S.C. §§ 2510-2520 (2006).

<sup>148</sup> See Lam Lek Chong v. DEA, 929 F.2d 729, 733 (D.C. Cir. 1991).

<sup>149</sup> 929 F.2d 729.

<sup>150</sup> Id. at 733 (quoting 5 U.S.C. § 552(b)(3)).

specify whether Title III qualifies under subpart (A) or (B) of Exemption 3.<sup>151</sup>

The Supreme Court has held that section 102(d)(3) of the National Security Act of

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<sup>151</sup> See Mendoza v. DEA, No. 07-5006, 2007 U.S. App. LEXIS 22175, at \*2 (D.C. Cir. Sept. 14, 2007) (per curiam) (finding "information obtained by a wiretap" properly protected pursuant to "FOIA Exemption 3" without specifying under which Exemption 3 subpart statute qualified); Cottone v. Reno, 193 F.3d 550, 553-54 (D.C. Cir. 1999) (noting that "wiretapped recordings obtained pursuant to Title III . . . are ordinarily exempt from disclosure under Exemption 3" with no mention made of Exemption 3 subpart under which statute qualified); Willis v. FBI, No. 98-5071, 1999 WL 236891, at \*1 (D.C. Cir. Mar. 19, 1999) (unpublished disposition) (citing Lam Lek Chong for proposition that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, is qualifying statute under FOIA Exemption 3, and ultimately finding that FBI properly withheld two electronic surveillance tapes under Title III and Exemption 3); Payne v. DOJ, No. 96-30840, slip op. at 5-6 (5th Cir. July 11, 1997) (protecting tape recordings "obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act," and holding that "Title III communications 'fall squarely within the scope of Exemption 3' of the FOIA" (quoting Davis v. DOJ, 968 F.2d 1276, 1280-81 (D.C. Cir. 1992)); Miller v. DOJ, 562 F. Supp. 2d 82, 111 (D.D.C. 2008) (recognizing that "information pertaining to wiretaps may be withheld under Exemption 3," but failing to identify which subpart of Exemption 3 applied); Peay v. DOJ, No. 04-1859, 2007 WL 788871, at \*3-4 (D.D.C. Mar. 14, 2007) (protecting "wiretap information obtained pursuant to Title III" but failing to identify which subpart of Exemption 3 applied); Jennings v. FBI, No. 03-1651, slip op. at 11 (D.D.C. May 6, 2004) (protecting 346 pages of transcripts of wiretapped communications pursuant to Exemption 3 and "[t]he wiretap statute, 18 U.S.C. § 2510 et seq., [which] explicitly prohibits anyone from disclosing to any other person the contents of any wire, oral or electronic communication intercepted through a wiretap," but failing to identify which subpart of Exemption 3 applied); Sinito v. DOJ, No. 87-0814, slip op. at 12-14 (D.D.C. July 11, 2000) (citing Lam Lek Chong v. DEA, 929 F.2d 729 (D.C. Cir. 1991), for proposition that Title III qualifies under subpart (B) of Exemption 3, and finding Title III applications and orders under court seal properly protected pursuant to FOIA Exemption 3 and 18 U.S.C. § 2518(8)(b)), aff'd per curiam, 22 F. App'x 1 (D.C. Cir. 2001); Manna v. DOJ, 815 F. Supp. 798, 811-12 (D.N.J. 1993) (determining that analysis of audiotapes and identities of individuals conversing on tapes obtained pursuant to Title III are protected under Exemption 3), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995); 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); Gonzalez v. DOJ, No. 88-913, 1988 WL 120841, at \*2 (D.D.C. Oct. 25, 1988) (holding that 18 U.S.C. § 2511(2)(a)(ii), which regulates disclosure of existence of wiretap intercepts, meets requirements of Exemption 3, without specifying under which subpart statute qualifies); Docal v. Benninger, 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 in protecting "written accounts of phone calls monitored pursuant to several wire intercepts"); cf. Smith v. DOJ, 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 withheld improperly); Cottone, 193 F.3d at 554-56 (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 identified specific tapes that had been played in open court by prosecution as evidence during criminal trial).

1947,<sup>152</sup> 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),<sup>153</sup>

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<sup>152</sup> Pub. L. No. 108-458, 118 Stat. 3643 (2004) (codified at 50 U.S.C. § 403-1(i) (2006)) (repealing Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 901, 115 Stat. 272, relating to responsibilities of Director of the CIA, and amending 50 U.S.C. § 403-1 (2006), thereby establishing Director of National Intelligence as authority charged with protecting intelligence sources and methods).

<sup>153</sup> See CIA v. Sims, 471 U.S. 159, 167 (1985) (finding that "[s]ection 102(d)(3) of the National Security Act of 1947, which calls for the Director of Central Intelligence to protect 'intelligence sources and methods,' clearly 'refers to particular types of matters,' and thus qualifies as a withholding statute under Exemption 3" (quoting 5 U.S.C. § 552(b)(3)(B)); Maynard v. CIA, 986 F.2d 547, 554 (1st Cir. 1993) (acknowledging statute as "an Exemption 3 statute because it specifies the types of material to be withheld under subpart (B) of the Exemption"); Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990) (recognizing that courts have determined that "[50 U.S.C. §] 403(d)(3) is an exemption statute" under 5 U.S.C. § 552(b)(3)(B), and noting that "[t]his conclusion is supported by the plain meaning of the statute, by the legislative history of FOIA, and by every federal court of appeals that has considered the matter" and, as such, "[t]here is thus no doubt that [50 U.S.C. §] 403(d)(3) is a proper exemption statute under exemption 3"); see also Larson v. Dep't of State, 565 F.3d 857, 865, 868 (D.C. Cir. 2009) (finding that agencies properly protected "information relating to 'intelligence sources and methods,'" but failing to specify Exemption 3 subpart under which statute qualifies (quoting 50 U.S.C. § 403-1(i)); Morley v. CIA, 508 F.3d 1108, 1125 (D.C. Cir. 2007) (finding that agency properly protected "intelligence sources and methods along with other internal information" pursuant to Exemption 3, without identifying Exemption 3 subpart pursuant to which statute qualifies, but ultimately reversing grant of summary judgment on other grounds); Berman v. CIA, 501 F.3d 1136, 1145 (9th Cir. 2007) (holding that CIA properly withheld two "President's Daily Briefs" prepared during President Johnson's term of office, but failing to identify Exemption 3 subpart under which statute qualifies ); 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, and recognizing that "the National Security Act of 1947 . . . meets the two criteria of Exemption 3," but failing to clarify whether "two criteria" referred to Exemption 3's two subparts or to criteria that statute meet Exemption 3 threshold requirement as well as meeting requirements of one of Exemption 3's two subparts); 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, pursuant to Exemption 3, without identifying Exemption 3 subpart under which National Security Act, 50 U.S.C.A. § 403-3(c)(6), qualifies); Earth Pledge Found. v. CIA, 128 F.3d 788, 788 (2d Cir. 1997) (per curiam), aff'd 988 F. Supp. 623, 627 (S.D.N.Y. 1996) (recognizing statute as "exemption statute[] for the purpose of [5 U.S.C. §] 552(b)(3)," but failing to specify Exemption 3 subpart under which statute qualifies ); Krikorian v. Dep't of State, 984 F.2d 461, 465 (D.C. Cir. 1993) (stating that "[i]t is well settled that [50 U.S.C. §] 403(d)(3) falls within exemption 3," but failing to identify statute as qualifying under subpart (A) or (B) of Exemption 3); Aftergood v. CIA, 355 F. Supp. 2d 557, 562-

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and in some instances provides a basis for an agency refusing to even confirm or deny the existence of records.<sup>154</sup> (For a further discussion of the use and origin of the "Glomar" response

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<sup>153</sup>(...continued)

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," and failing to state whether statute qualifies under subpart (A) or (B) of Exemption 3), 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); Schrecker v. DOJ, 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, but failing to identify statute as qualifying under subpart (A) or (B) of Exemption 3), aff'd in relevant part, rev'd & remanded in part on other grounds, 254 F.3d 162 (D.C. Cir. 2001).

<sup>154</sup> See, e.g., Wolf v. CIA, 473 F.3d 370, 378, 380 (D.C. Cir. 2007) (affirming district court's determination that CIA properly invoked Exemption 3 in refusing to confirm or deny existence of records pertaining to Jorge Eliecer Gaitan, Columbian presidential candidate assassinated in 1948, where agency established that "disclosure of information regarding whether or not CIA records of a foreign national exist would be unauthorized under Exemption 3 because it would be reasonably harmful to intelligence sources and methods," but reversing and remanding "to the extent that [the district court] held that the existence of Agency records about Gaitan was not officially acknowledged by the CIA in testimony before the Congress"); Arabian Shield Dev. Co. v. CIA, No. 99-10327, 2000 WL 180923, at \*1 (5th Cir. Jan. 28, 2000) (per curiam) (unpublished disposition), aff'g No. 3-98-CV-0624, 1999 WL 118796, at \*4 (N.D. Tex. Feb. 26, 1999) (deferring to CIA Director's determination that to confirm or deny existence of any agency record pertaining to contract negotiations between U.S. oil company and foreign government would compromise intelligence sources and methods, while noting that "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 660, 664 (5th Cir. 1989))); 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); Earth Pledge Found., 128 F.3d at 788, aff'g 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"); 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); Tooley v. Bush, No. 06-306, 2006 WL 3783142, at \*20-21 (D.D.C. Dec. 21, 2006) (upholding TSA's reliance on Exemption 3 in agency's "Glomar" response to first-party request for "TSA watch-list records"), rev'd & remanded in part on other grounds sub nom. Tooley v. Napolitano, 556 F.3d 836 (D.C. Cir. 2009); ACLU v. DOD, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005) (upholding CIA's "Glomar" response to requests for DOJ memorandum specifying interrogation methods that CIA may use against top Al-Qaeda members and "directive signed by President Bush granting the CIA the authority to set up

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under Exemption 1, see Exemption 1, In Camera Submissions and Adequate Public Record, above.)

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 of 2004,<sup>155</sup> and thereby established the Director of National Intelligence as the authority charged with protecting intelligence sources and methods.<sup>156</sup> Additionally, the Intelligence Reform and Terrorism Prevention Act amended the National Security Act of 1947 by transferring a number of duties previously assigned to the Director of Central Intelligence to the Director of National Intelligence.<sup>157</sup> Subsequent to the enactment of that statute, courts have held that the statute continues to provide protection of the CIA's intelligence sources and methods.<sup>158</sup> Furthermore, courts addressing the issue have determined that the new Director of National Intelligence is charged with the same duties and responsibilities as the Director of Central Intelligence.<sup>159</sup>

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<sup>154</sup>(...continued)

detention facilities outside the United States and/or outlining interrogation methods that may be used against detainees"); 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). But cf. ACLU, 389 F. Supp. 2d at 566 (declining to uphold CIA's "Glomar" denial of request for DOJ memorandum interpreting Convention Against Torture, because acknowledgment of its existence does not implicate intelligence sources or methods).

<sup>155</sup> Pub. L. No. 108-458, § 1011, 118 Stat. 3638, 3644-55 (codified at 50 U.S.C. § 403-1(i) (2006)).

<sup>156</sup> Id.

<sup>157</sup> Id. § 1071.

<sup>158</sup> See, e.g., Berman, 501 F.3d at 1137-38, 1140 (finding that CIA properly withheld Presidential Daily Briefing reports where disclosure would have revealed protected intelligence sources and methods); Wolf, 473 F.3d at 378, 380 (affirming district court's determination that CIA properly invoked Exemption 3 in refusing to confirm or deny existence of records pertaining to Columbian presidential candidate assassinated in 1948, where agency established that "disclosure of information regarding whether or not CIA records of a foreign national exist would be unauthorized under Exemption 3 because it would be reasonably harmful to intelligence sources and methods," but reversing and remanding "to the extent that [the district court] held that the existence of Agency records about [candidate] was not officially acknowledged by the CIA"); 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. § 403-1(i)); 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).

<sup>159</sup> See Wolf, 473 F.3d at 377 n.6 (explaining that "structure and responsibilities of the United States intelligence community have undergone reorganization" and, "[a]s a consequence, the duties of the CIA Director are described as they existed at the time of Wolf's FOIA request in 2000," and also noting that, "[u]nder the Intelligence Reform and Terrorism Prevention Act of 2004, . . . the new Director of National Intelligence is similarly required to 'protect intelligence

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Also, section 6 of the CIA Act of 1949, which protects from disclosure "the organization, functions, names, official titles, salaries or numbers of personnel" employed by the CIA,<sup>160</sup> meets the requirements of subpart (B),<sup>161</sup> and in some instances provides a basis for an agency refusing to even confirm or deny the existence of records.<sup>162</sup> Likewise, the identities of

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<sup>159</sup>(...continued)

sources and methods from unauthorized disclosure" (quoting 50 U.S.C. § 403-1(i)(1)); see also Berman, 501 F.3d at 1140 n.1 (stating that "[t]he change in titles and responsibilities has no impact on this case" (citing Wolf, 473 F.3d at 377 n.6)).

<sup>160</sup> 50 U.S.C. § 403g (2006) (codified as amended by §§ 1071(b)(1)(A), 1072(b), 118 Stat. at 3690-93, replacing "Director of Central Intelligence" with "Director of National Intelligence").

<sup>161</sup> See, e.g., Larson, 565 F.3d at 865 n.2 (recognizing CIA Act, 50 U.S.C. § 403g, as qualifying statute under Exemption 3, stating that statute "exempts the CIA from any laws that require disclosure of [certain CIA information]," and noting that "[requester] does not contest the applicability of this exemption to withhold internal CIA organizational data in the [intelligence] cables"); Minier, 88 F.3d at 801 (protecting names of CIA agents); Makky v. Chertoff, 489 F. Supp. 2d 421, 441-42 (D.N.J. 2007) (protecting responsive records where disclosure "could reveal . . . the names and locations of internal CIA components"), aff'd on other grounds, 541 F. 3d 205 (3d Cir. 2008); Lahr, 453 F. Supp. 2d at 1172 (protecting names of CIA employees); Morley v. CIA, 453 F. Supp. 2d 137, 150-51 (D.D.C. 2006) (protecting "CIA employees' names and personal identifiers"), rev'd on other grounds, 508 F.3d 1108 (D.C. Cir. 2007); Judicial Watch, Inc., 337 F. Supp. 2d at 167-68 (same); Blazy, 979 F. Supp. at 23-24 (finding that CIA properly "withheld . . . facts about the organization, its functions and personnel" pursuant to Exemption 3 and noting that "what has been deleted includes intelligence sources or methods, polygraph information, names and identifying information with respect to confidential sources, employees' names, component names, building locations and organization data"); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 627-28 (S.D.N.Y. 1996) (recognizing that 50 U.S.C. § 403(g) qualifies as "exemption statute[]" for the purpose of [Exemption 3], and finding that CIA properly applied 50 U.S.C. § 403(g) and Exemption 3, where "CIA . . . demonstrated that being forced to disclose the information the plaintiffs request would compromise its intelligence gathering methods" and "could cause a confrontation with the Dominican Republic or the disruption of foreign relations" and "would destroy the future usefulness of this [unconfirmed CIA field] station, should it in fact exist," and where "CIA . . . demonstrated that even denying the existence of this station could jeopardize national security), aff'd per curiam, 128 F.3d 788 (2d Cir. 1997); see also Cerveney v. CIA, 445 F. Supp. 772, 775 (D. Colo. 1978) (recognizing 50 U.S.C. § 403(g) as Exemption 3 statute, although failing to identify under which Exemption 3 subpart § 403(g) qualifies, and finding that agency properly applied 50 U.S.C. § 403(g) and Exemption 3 where agency determined that "disclosure of that which has been deleted and withheld would constitute a violation of this specific statutory duty).

<sup>162</sup> See Makky, 489 F. Supp. 2d at 441-42 (finding that CIA may properly "decline[]" to state whether there are any documents in its possession responsive to [plaintiff's] request, as doing so could reveal intelligence methods and activities, or the names and locations of internal CIA components . . . if its affidavits provide adequate justifications for why it refuses to confirm or deny the existence of documents"); Roman v. Daily, No. 97-1164, 1998 U.S. Dist. LEXIS 6708,

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Defense Intelligence Agency employees have been held to be protected from disclosure pursuant to 10 U.S.C. § 424,<sup>163</sup> and personally identifying information regarding certain members of the armed forces and certain DOD and U.S. Coast Guard employees has been held to be protected pursuant to 10 U.S.C. § 130b.<sup>164</sup> Similarly, section 6 of Public Law No. 86-36,<sup>165</sup> pertaining to the organization, functions, activities, and personnel of NSA, has been held to qualify as a subpart (B) statute.<sup>166</sup> Also, 18 U.S.C. § 798(a),<sup>167</sup> which criminalizes the disclosure

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<sup>162</sup>(...continued)

at \*11-12 (D.D.C. May 11, 1998) (finding that "CIA therefore properly responded to plaintiff's requests concerning its personnel and any spy satellite programs by neither admitting nor denying the existence of such information"), appeal dismissed per curiam, No. 99-5083, 1999 WL 506683 (D.C. Cir. June 3, 1999); Earth Pledge Found., 988 F. Supp. at 627-28 (finding that agency's refusal to "confirm[] or deny[] the existence of contacts with dissidents" was proper, in light of "danger of revealing sources, detailed in the CIA's public papers," and "additional information, [submitted] in camera, that convinces this Court that disclosure of the information requested by the plaintiffs would jeopardize intelligence sources").

<sup>163</sup> (2006); see, e.g., Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at \*15 (D.D.C. Aug. 10, 2005) (finding that agency properly protected identity of Defense Intelligence Agency personnel pursuant to Exemption 3 and 10 U.S.C. § 424, and indicating that 10 U.S.C. § 424 qualifies as a subpart (B) statute specifically by noting that "[§] 424 qualifies as a withholding statute because it refers to particular types of matters to be withheld, specifically the name, official title, occupational series, grade, or salary of DIA personnel"), aff'd on other grounds, 565 F.3d 857 (D.C. Cir. 2009); 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 pursuant to 10 U.S.C. § 424 and subpart (B) of Exemption 3); see also Miller v. DOJ, 562 F. Supp. 2d 82, 112 (D.D.C. 2008) (protecting names, titles, and office affiliations of Defense Intelligence Agency personnel pursuant to Exemption 3 and 10 U.S.C. § 424, but failing to identify under which Exemption 3 subpart § 424 qualifies).

<sup>164</sup> (2006) (authorizing withholding of personally identifying information regarding any member of armed forces, DOD employee, or U.S. Coast Guard employee assigned to unit that is overseas, "sensitive," or "routinely deployable"); see, e.g., Hiken v. DOD, 521 F. Supp. 2d 1047, 1062 (N.D. Cal. 2007) (finding that "non-disclosure of the names and personally identifying information of military personnel pursuant to 10 U.S.C. [§] 130b is valid under Exemption 3"); 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 absence of any showing that those employees were "stationed with a 'routinely deployable unit' or any other unit within the ambit of [that statute]").

<sup>165</sup> 50 U.S.C. § 402 note (2006).

<sup>166</sup> See Founding Church of Scientology v. NSA, 610 F.2d 824, 827-28 (D.C. Cir. 1979) (finding that "examination of [s]ection 6 and its legislative history confirms the view that it . . . satisfies the strictures of Subsection (B)"); see also Larson, 565 F.3d at 868-69 (recognizing that "[s]ection 6 qualifies as an Exemption 3 statute and provides absolute protection," but failing to identify subsection under which statute qualifies (citations ommitted)); Hayden v. NSA, 608 F.2d 1381, 1389 (D.C. Cir. 1979) (recognizing statute as qualifying under Exemption 3 but

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of certain classified information "concerning the nature, preparation, or use of any code, cipher or cryptographic system of the United States or any foreign government," has been found to qualify.<sup>168</sup> A provision of the Atomic Energy Act, prohibiting the disclosure of "restricted data" to the public unless "the data . . . can be published without undue risk to the common defense and security,"<sup>169</sup> refers to particular types of matters -- specifically, information pertaining to atomic weapons and special nuclear material<sup>170</sup> -- and thus has been held to qualify as an

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<sup>166</sup>(...continued)

failing to identify subsection under which statute qualifies); Roman v. NSA, No. 07-CV-4502, 2009 WL 303686, at \*5-6 (E.D.N.Y. Feb. 9, 2009) (noting that "it is well-established that FOIA Exemption 3 properly encompasses [s]ection 6" and "it is clear by the plain language of both FOIA Exemption 3 and [s]ection 6 of the [NSA Act] that defendant appropriately invoked the Glomar response"); Wilner v. NSA, No. 07-3883, 2008 WL 2567765, at \*4 (S.D.N.Y. June 25, 2008) (looking to statutory language and determining that "language of [s]ection 6 makes quite clear that it falls within the scope of Exemption 3"); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 512-13 (S.D.N.Y. 2007) (treating statute as providing "absolute" protection); People for the Am. Way Found. v. NSA, 462 F. Supp. 2d 21, 28 (D.D.C. 2006) (same); Lahr, 453 F. Supp. 2d at 1191-93 (holding, upon in camera inspection, that NSA properly protected computer simulation program that "related 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 signal intelligence report because disclosure would reveal certain functions of NSA).

<sup>167</sup> (2006).

<sup>168</sup> See Larson, 565 F.3d at 868-69 (finding that the agency properly protected "classified information 'concerning the communication intelligence activities of the United States' or 'obtained by the process of communication intelligence from the communications of any foreign government'" pursuant to Exemption 3 and 18 U.S.C. § 798(a)(3)-(4) (quoting 18 U.S.C. § 798(a)(3)-(4))); N.Y. Times Co., 499 F. Supp. 2d at 512-13 (finding that 18 U.S.C. § 798 qualifies as "withholding statute" and holding that agency properly applied Exemption 3 to withhold classified documents containing "information disclosure of which would reveal . . . 'the intelligence activities of the United States'" (quoting 18 U.S.C. § 798)); Winter v. NSA, 569 F. Supp. 545, 546-48 (S.D. Cal. 1983) (recognizing 18 U.S.C. § 798 as qualifying statute under Exemption 3, and concluding that agency properly protected "a document originated by . . . NSA[] which consisted of information derived exclusively from the interception of foreign electromagnetic signals" where "release of the requested information would expose the NSA's intelligence functions and activities"); see also Adejumobi v. NSA, No. 07-1237, 2007 WL 4247878, at \*3 (M.D. Fla. Dec. 3, 2007) (finding that NSA properly applied Exemption 3 and 18 U.S.C. § 798 in refusing to confirm or deny whether individual has been target of surveillance), *aff'd per curiam*, 287 F. App'x 770 (11th Cir. 2008); 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).

<sup>169</sup> 42 U.S.C. § 2162(a) (2006).

<sup>170</sup> Id. § 2014(y) (defining "restricted data").

Exemption 3 statute as well.<sup>171</sup>

Likewise, the Court of Appeals for the Third Circuit has suggested that the Juvenile Delinquency Records Statute,<sup>172</sup> 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.<sup>173</sup> Similarly, section 207 of the National Park Omnibus Management Act of 1998,<sup>174</sup> 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],"<sup>175</sup> including resources which are "endangered, threatened, rare, or commercially valuable,"<sup>176</sup> has been found to be within the scope of subpart (B).<sup>177</sup>

The Court of Appeals for the District of Columbia Circuit has held that a portion of the

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<sup>171</sup> See Meeropol v. Smith, No. 75-1121, slip op. at 53-55 (D.D.C. Feb. 29, 1984) (finding that agency properly protected "certain information involving nuclear-weapons design and gaseous diffusion technology" that "clearly constitutes 'Restricted Data' because it pertains to the design and manufacture of atomic weapons and its release would cause 'undue risk to the common defense and security'" (quoting 42 U.S.C. §§ 2014(y), 2162(a))), aff'd in relevant part & remanded in part on other grounds sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

<sup>172</sup> 18 U.S.C. § 5038 (2006).

<sup>173</sup> See McDonnell v. United States, 4 F.3d 1227, 1251 (3d Cir. 1993) (dictum) (finding that state juvenile delinquency records fall outside scope of statute).

<sup>174</sup> 16 U.S.C. § 5937 (2006).

<sup>175</sup> Id.

<sup>176</sup> Id.

<sup>177</sup> See Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 944-45 (D. Ariz. 2000) (approving withholding of information concerning specific nesting locations of northern goshawks pursuant to subpart (B) of Exemption 3 and section 207 of National Park Omnibus Management Act, 16 U.S.C. § 5937), aff'd, 314 F.3d 1060 (9th Cir. 2002); Pease v. U.S. Dep't of Interior, No. 1:99CV113, slip op. at 2, 4 (D. Vt. Sept. 17, 1999) (finding that agency properly withheld "certain information pertaining to the location, tracking and/or radio frequencies of grizzly bears" in Yellowstone National Park ecosystem pursuant to Exemption 3, subpart (B) and 16 U.S.C. § 5937); see also 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 located within "public land" boundaries pursuant to FOIA Exemption 3 and 16 U.S.C. § 5937, but failing to identify Exemption 3 subpart under which 16 U.S.C. § 5937 qualified), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); FOIA Post, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03) (discussing National Park Omnibus Management Act of 1998).

Patent Act<sup>178</sup> satisfies subpart (B) because it identifies the types of matters -- specifically, patent applications and information concerning them -- intended to be withheld.<sup>179</sup> In addition, 5 U.S.C. § 7114(b)(4), the portion of the Civil Service Reform Act concerning the confidentiality of certain labor relations training and guidance materials,<sup>180</sup> has been held to qualify as a subpart (B) withholding statute,<sup>181</sup> as has 5 U.S.C. § 7132,<sup>182</sup> a Civil Service Reform Act provision which limits the issuance of certain subpoenas.<sup>183</sup> Similarly, the U.S. Information and Educational Exchange Act of 1948 (the "Smith-Mundt Act")<sup>184</sup> qualifies as a subpart (B) statute insofar as it prohibits the disclosure of certain overseas programming materials within the United States.<sup>185</sup> While the Smith-Mundt Act originally applied only to records prepared by the former USIA, the Foreign Affairs Reform and Restructuring Act of 1998<sup>186</sup> applied the relevant provisions of that statute to those programs within the Department of State that absorbed USIA's functions.<sup>187</sup>

The Commodity Exchange Act,<sup>188</sup> which prohibits the disclosure of business transactions, market positions, trade secrets, or customer names of persons under

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<sup>178</sup> 35 U.S.C. § 122 (2006).

<sup>179</sup> See 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).

<sup>180</sup> 5 U.S.C. § 7114(b)(4) (2006).

<sup>181</sup> See NTEU v. OPM, No. 76-695, slip op. at 3-4 (D.D.C. July 9, 1979); see also Dubin v. Dep't of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981) (finding that "5 U.S.C. § 7114(b)(4) is a statute within the meaning of [s]ection (b)(3) of the FOIA, and the Labor Relations Report are [sic], therefore, exempt from disclosure pursuant to 5 U.S.C. § 552(b)(3)," but failing to identify 5 U.S.C. § 7114(b)(4) as qualifying pursuant to subpart (A) or subpart (B) of Exemption 3), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision) .

<sup>182</sup> 5 U.S.C. § 7132 (2006).

<sup>183</sup> See NTEU, No. 76-695, slip op. at 3-4 (D.D.C. July 9, 1979).

<sup>184</sup> 22 U.S.C. § 1461-1a (2006).

<sup>185</sup> 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").

<sup>186</sup> Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended at 22 U.S.C. §§ 6501-6617 (2006)).

<sup>187</sup> Id. (abolishing "[USIA] (other than the Broadcasting Board of Governors and the International Broadcasting Bureau)," 22 U.S.C. § 6531 (2006), transferring USIA functions to Department of State, 22 U.S.C. § 6532 (2006), and applying Smith-Mundt Act to USIA functions that were transferred to Department of State (22 U.S.C. § 6552(b)) (2006)).

<sup>188</sup> 7 U.S.C. § 12 (2006).

investigation under the Act, has been held to refer to particular types of matters and thus to satisfy subpart (B) of Exemption 3.<sup>189</sup> The D.C. Circuit has held that a provision of the Federal Aviation Act, relating to security data the disclosure of which would be detrimental to the safety of travelers,<sup>190</sup> similarly shields that particular data from disclosure under the FOIA.<sup>191</sup>

Further, the Federal Technology Transfer Act<sup>192</sup> contains two provisions that have been found to qualify under Exemption 3.<sup>193</sup> Specifically, 15 U.S.C. § 3710a(c)(7)(A), which prohibits federal agencies from disclosing "trade secrets or commercial or financial information that is privileged or confidential" obtained from "non-Federal part[ies] participating in [] cooperative research and development agreement[s],"<sup>194</sup> has been found to qualify under Exemption 3.<sup>195</sup> Additionally, another provision of that statute, 15 U.S.C. § 3710a(c)(7)(B), which allows federal agencies the discretion to protect for five years any commercial and confidential information that results from Cooperative Research And Development Agreements (CRADAs) with nonfederal parties,<sup>196</sup> has also been held to qualify as an Exemption 3 statute.<sup>197</sup>

#### Statutes Satisfying Both Subpart (A) and Subpart (B)

Some statutes have been found to satisfy both Exemption 3 subparts by "(A) requir[ing] that the matters be withheld from the public in such a manner as to leave no discretion on the issue" and "(B) establish[ing] particular criteria for withholding or refer[ring] to particular types

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<sup>189</sup> See Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 49 (D.D.C. 1979).

<sup>190</sup> 49 U.S.C. § 40119 (2006).

<sup>191</sup> See Pub. Citizen, Inc. v. FAA, 988 F.2d 186, 194 (D.C. Cir. 1993).

<sup>192</sup> 15 U.S.C. § 3710a(c)(7)(A), (B) (2006).

<sup>193</sup> See id.

<sup>194</sup> Id. § 3710a(c)(7)(A).

<sup>195</sup> See Pub. Citizen Health Research Group v. NIH, 209 F. Supp. 2d 37, 43, 51 (D.D.C. 2002) (deciding that agency properly withheld royalty rate information under 15 U.S.C. § 3710a(c)(7)(A), and noting that scope of Federal Technology Transfer Act's protection is "coterminous with FOIA Exemption 4"); see also DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 871-72 (D. Me. 1996) (noting that "the [Federal Technology Transfer Act] is an Exemption 3 statute," but finding that "raster compilations [i.e. compilations of agency's nautical charts] created after [agency] entered into the joint research and development agreement with [agency's private partner]" were not obtained from private party and thus did not fall within scope of 15 U.S.C. § 3710a(c)(7)(A)), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996).

<sup>196</sup> 15 U.S.C. § 3710a(c)(7)(B).

<sup>197</sup> See DeLorme Publ'g Co., 917 F. Supp. at 874, 877 (finding agency properly protected "raster files created in anticipation of the [Cooperative Research And Development Agreement]" pursuant to 15 U.S.C. § 3710a(c)(7)(B) and Exemption 3).

of matters to be withheld.<sup>198</sup> For example, the Court of Appeals for the Third Circuit and one district court in another circuit have held that section 222(f) of the Immigration and Nationality Act<sup>199</sup> 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),<sup>200</sup> and another district court has held that section 222(f) qualifies under subpart (A),<sup>201</sup> while the Court of Appeals for the District of Columbia Circuit and the District Court for the District of Columbia have held that the section satisfies both Exemption 3 subparts.<sup>202</sup> In addition, many courts have acknowledged that section 222(f) qualifies as an Exemption 3 statute while declining to identify the statute as qualifying under subpart (A) or subpart (B) of Exemption 3.<sup>203</sup>

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<sup>198</sup> 5 U.S.C. § 552(b)(3) (2006) (emphasis added), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

<sup>199</sup> 8 U.S.C. § 1202(f) (2006).

<sup>200</sup> See DeLaurentiis v. Haig, 686 F.2d 192, 194 (3d Cir. 1982); Smith v. DOJ, No. 81-CV-813, 1983 U.S. Dist. LEXIS 10878, at \*13-14 (N.D.N.Y. Dec. 13, 1983).

<sup>201</sup> See Holy Spirit Ass'n for Unification of World Christianity, Inc. v. U.S. Dep't of State, 526 F. Supp. 1022, 1031 (S.D.N.Y. 1981) (finding that section 222(f) qualifies as exempting statute under Exemption 3(A)).

<sup>202</sup> See Medina-Hincapie v. Dep't of State, 700 F.2d 737, 741-42 (D.C. Cir. 1983); accord Durrani v. DOJ, 607 F. Supp. 2d 77, 86 (D.D.C. 2009) (noting that "[a]lthough it permits discretion by the Secretary of State to disclose information under certain circumstances, [8 U.S.C. § 1202(f)] 'qualifies as a disclosure-prohibiting statute under both subsection (A) and [subsection] (B) of Exemption (b)(3) of the FOIA,'" and finding that agency properly applied Exemption 3 to three documents pertaining to determination regarding issuance or refusal of visa or permit to enter United States (quoting Perry-Torres v. U.S. Dep't of State, 404 F. Supp. 2d 140, 143 (D.D.C. 2005))); Perry-Torres v. U.S. Dep't of State, 404 F. Supp. 2d 140, 143-44 (D.D.C. 2005) (finding that "[s]ection 222(f) of the [Immigration and Nationality Act, 8 U.S.C. § 1202(f),] qualifies as a disclosure-prohibiting statute under both subsection (A) and (B) of Exemption (b)(3) of FOIA" and concluding that records pertaining to denial of plaintiff's visa application located at American Embassy were properly protected pursuant to Exemption 3).

<sup>203</sup> See El Badrawi v. DHS, 596 F. Supp. 2d 389, 393-97 (D. Conn. 2009) (finding, upon in camera review, that agencies properly applied 8 U.S.C. § 1202(f) and Exemption 3 to withhold documents "pertain[ing] to the issuance or refusal of a visa," but failing to identify statute as subpart (A) or subpart (B) statute; additionally, determining that "reliance on Exemption 3 to withhold documents relating to visa revocation was improper" and ordering release of that withheld information (citing El Badrawi v. DHS, 583 F. Supp. 2d 285, 312 (D. Conn. 2008) (concluding that "8 U.S.C. § 1202(f) does not apply to visa revocation")); Shoenman v. FBI, 573 F. Supp. 2d 119, 144 (D.D.C. 2008) (holding that agency properly withheld telegram pertaining to third party's visa application pursuant to Exemption 3, but failing to identify section 222(f) of Immigration and Nationality Act, 8 U.S.C. § 1202(f), as subpart (A) or subpart (B) statute); Perry-Torres v. U.S. Dep't of State, No. 04-1046, 2006 WL 2844357, at \*5 (D.D.C. Sept. 29, 2006)

(continued...)

Similarly, the Court of Appeals for the Tenth Circuit has held that section 301(j) of the Federal Food, Drug, and Cosmetic Act<sup>204</sup> qualifies under both subparts of Exemption 3.<sup>205</sup> First, the Tenth Circuit held that section 301(j) qualified under subpart (A) in that its "prohibition against disclosure is absolute and applies to any information within its scope."<sup>206</sup> In addition, the Tenth Circuit determined that section 301(j) met the requirements of subpart (B) because it "is specific as to the particular matters to be withheld."<sup>207</sup> By contrast, the D.C. Circuit found that another portion of the Federal Food, Drug, and Cosmetic Act<sup>208</sup> does not qualify under either subpart of Exemption 3 because it does not specifically prohibit the disclosure of records.<sup>209</sup>

### Tax Return Information

The withholding of tax return information has been approved under three different

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<sup>203</sup>(...continued)

(finding that agency properly applied 8 U.S.C. § 1202(f) and Exemption 3 to withhold in full information regarding plaintiff's visa application, but failing to identify statute as subpart (A) or subpart (B) statute); Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at \*27 (D.D.C. Aug. 10, 2005) (determining that "information redacted from Document No. E25 pertains to the issuance or refusal of a visa, is thus protected from disclosure by [§] 1202(f), and was accordingly properly exempted under Exemption 3," but failing to identify section 222(f) of Immigration and Nationality Act as subpart (A) or subpart (B) statute), aff'd on other grounds, 565 F.3d 857 (D.C. Cir. 2009); Badalamenti v. U.S. Dep't of State, 899 F. Supp. 542, 547 (D. Kan. 1995) (finding that "Defendant has adequately established the applicability of this statutory exemption to the marginal notes at issue," but failing to identify section 222(f) of Immigration and Nationality Act, 8 U.S.C. § 1202(f), as subpart (A) or subpart (B) statute); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 711-12 (W.D.N.Y. 1991) (protecting various records pertaining to plaintiff's visa application, including "notes of a consular officer relating to plaintiff's visa eligibility," pursuant to Exemption 3 but not distinguishing between Exemption 3 subparts); Meeropol v. Smith, No. 75-1121, slip op. at 61-63 (D.D.C. Feb. 29, 1984) (finding that agency properly "relied on 8 U.S.C. § 1202(f) and FOIA Exemption 3 to withhold material pertaining to the applications of certain individuals for visas to enter the United States," but failing to identify Exemption 3 subpart under which statute qualified), aff'd in relevant part & remanded in part on other grounds sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986); Times Newspapers of Gr. Brit., Inc. v. CIA, 539 F. Supp. 678, 685 (S.D.N.Y. 1982) (acknowledging that "[8 U.S.C. §] 1202(f) has been recognized as being within the scope of [E]xemption 552(b)(3)" and finding "[d]ocuments pertaining to the issuance or denial of visas" properly protected pursuant to Exemption 3 without distinguishing between subparts).

<sup>204</sup> 21 U.S.C. § 331(j) (2006).

<sup>205</sup> Anderson v. HHS, 907 F.2d 936, 950-51 (10th Cir. 1990).

<sup>206</sup> Anderson, 907 F.2d at 950.

<sup>207</sup> Id.

<sup>208</sup> § 520, 21 U.S.C. § 360j(h).

<sup>209</sup> Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1285-86 (D.C. Cir. 1983).

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,<sup>210</sup> which affords confidentiality to tax returns and tax return information,<sup>211</sup> satisfies subpart (B) of Exemption 3.<sup>212</sup> Several appellate courts have determined that section 6103 qualifies as an exempting statute under Exemption 3 without identifying section 6103 as qualifying under subpart (A) or (B) of Exemption 3.<sup>213</sup> The Courts of Appeals for the District of Columbia, 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 returns

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<sup>210</sup> (2006).

<sup>211</sup> See Ryan v. ATF, 715 F.2d 644, 645 (D.C. Cir. 1983) (characterizing 26 U.S.C. § 6103 as statute containing "the confidentiality provisions of the Internal Revenue Code").

<sup>212</sup> 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 "[t]he relevant exception [to the tax statute], read together with the rest of the statute, both 'refers to particular types of matters to be withheld' (namely, 'taxpayer identity information') and 'establishes particular criteria for withholding' (namely, that the IRS may consider release only where it would help notify taxpayers of refunds due, and, even then, only to the media)" and thus qualifies under subpart (B) of Exemption 3, and concluding that IRS lawfully exercised discretion to withhold street addresses pursuant to 26 U.S.C. § 6103(m)(1) (quoting 5 U.S.C. § 552(b)(3)(B) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524)); DeSalvo v. IRS, 861 F.2d 1217, 1221 (10th Cir. 1988) (determining that "[b]ecause section 6103 both establishes criteria for withholding information and refers to particular types of matters to be withheld, it satisfies the requirements of [Exemption 3]"); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986) (finding return information properly protected pursuant to 26 U.S.C. § 6103 and subpart (B) of Exemption 3); Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984) (acknowledging that 26 U.S.C. § 6103 qualifies as proper withholding statute pursuant to subpart (B) of Exemption 3); Chamberlain v. Kurtz, 589 F.2d 827, 839 (5th Cir. 1979) (same).

<sup>213</sup> See Stebbins v. Sullivan, No. 90-5361, 1992 WL 174542, at \*1 (D.C. Cir. July 22, 1992) (per curiam) (protecting address of third party taxpayer pursuant to Exemption 3 and 26 U.S.C. § 6103(a), but failing to identify under which Exemption 3 subpart 26 U.S.C. § 6103 qualifies); Long v. IRS, 891 F.2d 222, 224 (9th Cir. 1989) (finding check sheets and zip code information exempt from disclosure pursuant to 26 U.S.C. § 6103(a) and Exemption 3, but failing to identify under which subpart of Exemption 3 26 U.S.C. § 6103 qualifies, and noting that deletion of taxpayers' identification does not alter confidentiality of 26 U.S.C. § 6103 information); Ryan, 715 F.2d at 645-47 (recognizing 26 U.S.C. § 6103 as proper Exemption 3 statute, but failing to identify under which subpart of Exemption 3 statute qualifies); Currie v. IRS, 704 F.2d 523, 527-28 (11th Cir. 1983) (same); Willamette Indus. v. United States, 689 F.2d 865, 867 (9th Cir. 1982) (same); Barney v. IRS, 618 F.2d 1268, 1274 n.15 (8th Cir. 1980) (dictum) (stating that court "is inclined to agree" that "[§] 6103(e)(6) constitutes a special statutory exemption within the meaning of exemption 3," but failing to address issue of under which subpart of Exemption 3 that 26 U.S.C. § 6103 qualifies); see also Sutton v. IRS, No. 05-C-7177, 2007 WL 30547, at \*2 (N.D. Ill. Jan. 4, 2007) (recognizing 26 U.S.C. § 6103 as Exemption 3 statute, but failing to identify Exemption 3 subpart under which 26 U.S.C. § 6103 qualifies).

or return information of other taxpayers.<sup>214</sup> Specifically, section 6103 provides that "[r]eturns and return information shall be confidential," subject to a number of enumerated exceptions.<sup>215</sup> Courts have determined that a wide array of information constitutes "[r]eturns and return information" and properly may be withheld pursuant to Exemption 3 and section 6103.<sup>216</sup>

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<sup>214</sup> See DeSalvo, 861 F.2d at 1221 n.4 (noting that "section 6103(a)'s general prohibition on disclosure may also be viewed as an exempting statute under FOIA section 552(b)(3)(A)"); Linsteadt v. IRS, 729 F.2d 998, 1000 (5th Cir. 1984) (finding that "[t]hese nondisclosure provisions of § 6103 meet the requirement of proviso A to Exemption 3 . . . so that a person . . . is not entitled to access to the tax return or return information of other taxpayers"); Fruehauf Corp. v. IRS, 566 F.2d 574, 578 n.6 (6th Cir. 1977) (noting that inasmuch as "language of [26 U.S.C.] § 6103 contains a mandatory requirement that returns and return information be withheld from the public . . . the statute meets the § 552(b)(3)(A) criterion").

<sup>215</sup> 26 U.S.C. § 6103(a).

<sup>216</sup> See Tax Analysts v. IRS, 410 F.3d 715, 717-22 (D.C. Cir. 2005) (finding that the "closing agreement" reached between IRS and organization qualifies as protected "return information"); 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); Berger v. IRS, 487 F. Supp. 2d 482, 494-95 (D.N.J. 2007) (protecting third-party tax return information pursuant to Exemption 3), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008), cert. denied, No. 08-884, 2009 WL 1650205 (U.S. June 15, 2009); George v. IRS, No. C05-0955, 2007 WL 1450309, at \*5 (N.D. Cal. May 14, 2007) (protecting third-party tax information contained in IRS file pertaining to plaintiff); Morley v. CIA, 453 F. Supp. 2d 137, 150-51 (D.D.C. 2006) (protecting deceased person's W-4 tax withholding information); Judicial Watch, Inc. v. DOJ, 306 F. Supp. 2d 58, 67 (D.D.C. 2004) (ruling that records related to bankruptcy of Enron Corporation constitute "return information"); Hodge v. IRS, No. 03-0269, 2003 WL 22327940, at \*1 (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); 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 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 portions of one-page copy of certified mail log pertaining to plaintiff, where mail log also pertained to "other taxpayers who received Statutory Notices of Deficiency from the IRS"); Leveto v. IRS, No. 98-285E, 2001 U.S. Dist. LEXIS 5791, at \*21-22 (W.D. Pa. Apr. 10, 2001) (protecting information identifying third-party taxpayers); Helmon v. IRS, No. 3-00-CV-0809-M, 2000 WL 1909786, at \*2-4 (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 was legally entitled to requested

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As the D.C. Circuit explained in Tax Analysts v. IRS,<sup>217</sup> "the Internal Revenue Code protects the confidentiality of tax returns and return information, such as taxpayers' source of income, net worth, and tax liability," but "[a]t the same time, the Code requires the IRS to disclosure certain information."<sup>218</sup> Additionally, pursuant to 26 U.S.C. § 6103(c) and 26 U.S.C. § 6103(e)(7), individuals are not entitled to obtain tax return information regarding themselves if it is determined that release would impair enforcement of tax laws by the IRS.<sup>219</sup> As the

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<sup>216</sup>(...continued)

information, where proof of her relationship to deceased did not satisfy standard established by IRS regulations), adopted in pertinent part, No. 3:00-CV-0809-M, 2000 WL 33157844 (N.D. Tex. Nov. 30, 2000); Wewee v. IRS, No. 99-475, 2000 U.S. Dist. LEXIS 20285, 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 in pertinent part, No. 99-475, 2001 U.S. Dist. LEXIS 3230 (D. Ariz. Feb. 13, 2001); Allnut v. DOJ, No. Y98-1722, 2000 U.S. Dist. LEXIS 4060, at \*37-38 (D. Md. Mar. 6, 2000) (magistrate's recommendation) (protecting third-party taxpayer information even though IRS collected information as part of investigation of requester), adopted in pertinent part, 99 F. Supp. 2d 673 (D. Md. 2000), and renewed motion for summary judgment granted, No. Y98-1722, 2000 WL 852455 (D. Md. Oct. 23, 2000), aff'd per curiam sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001); 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); Barnes 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"). But see 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"); Long v. IRS, No. C74-724, 2008 WL 2474591, at \*2 (W.D. Wash. June 13, 2008) (ordering full disclosure of table which "may contain 'raw tax data'" where "IRS effectively reformulate[d] that data by extracting it from taxpayers' files and compil[ed] it in a statistical tabulation," inasmuch as "very act of compiling and tabulating large quantities of data converts the return information to a 'form' not associated with an individual taxpayer").

<sup>217</sup> 350 F.3d 100 (D.C. Cir. 2003).

<sup>218</sup> Id. at 104.

<sup>219</sup> See Currie, 704 F.2d at 531 (concluding that agency properly protected "internal agency memoranda reflecting the direction and scope of the investigation of the appellants' tax liability, memoranda of interviews with witnesses and confidential informants, draft affidavits of confidential informants, correspondence with a state law enforcement agency and other third parties, information received from third parties relating to financial transactions with the appellants, federal tax returns of third parties, and IRS personnels' notes and work papers concerning the scope and direction of the investigation" pursuant to Exemption 3); Batton v. Evers, No. H-07-2852, 2008 WL 4605946, at \*2-3 (S.D. Tex. Sept. 4, 2008) (determining that IRS properly withheld certain tax return information pertaining to plaintiff and various third parties where "IRS contends that the release of these documents would impair an ongoing civil tax examination of the plaintiff" and "would impede the IRS'[s] ability to collect any taxes owed by the plaintiff"); Radcliffe v. IRS, 536 F. Supp. 2d 423, 436 (S.D.N.Y. 2008) (protecting

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Court of Appeals for the Eleventh Circuit explained in Currie v. IRS,<sup>220</sup> "[t]o qualify for exemption under 5 U.S.C. § 552(b)(3) pursuant to 26 U.S.C. § 6103(e)(7), the IRS must demonstrate that two criteria have been met: (1) the documents must constitute 'return information' as defined by 26 U.S.C. § 6103(b)(2), and (2) disclosure [must] seriously impair federal tax administration."<sup>221</sup> Information that would provide insights into how the IRS selects returns for audits has regularly been found to impair the IRS's enforcement of tax laws.<sup>222</sup> The Courts of Appeals for the Ninth and Eleventh Circuits have held that section 6103

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<sup>219</sup>(...continued)

documents "generated or compiled during the identification and examination of plaintiff's tax returns for possible fraudulent offshore credit card activity" and rejecting argument that because "the records consist mainly of credit card account information gathered by Credomatic, not the IRS," they should not be considered "return information," noting that "it does not matter that the information was gathered by Credomatic, since it was received by the IRS"; Arizechi v. IRS, No. 06-5292, 2008 WL 539058, at \*8 (D.N.J. Feb. 25, 2008) (finding that defendants properly applied Exemption 3 to protect tax records pertaining to the plaintiff where "delegate of the Secretary has determined that disclosure of the documents at issue in this case would seriously impair tax administration" and where "records identify the specific activity that is the focus of their investigation"); George, 2007 WL 1450309, at \*8 (determining that release of interview notes associated with plaintiff's case "would allow Plaintiff to alter his sources of income, assets, and relationships with other individuals and entities in attempt to circumvent tax liability" and "would seriously impair federal tax administration by releasing documents the IRS is using in its ongoing investigation"); Cal-Trim, Inc. v. IRS, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting interview notes, case history notes, and other records associated with plaintiff's case pursuant to Exemption 3 and 26 U.S.C. § 6103(e)(7) where agency showed that "release of this information would constitute a serious impairment to federal 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 special agent report was properly withheld where "disclosure of the [special agent report] would seriously impair Federal tax administration"); Anderson v. U.S. 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"); Holbrook v. IRS, 914 F. Supp. 314, 316-17 (S.D. Iowa 1996) (protecting IRS agent's handwritten notes regarding interview with plaintiff where disclosure would interfere with enforcement proceedings and hence seriously impair tax administration).

<sup>220</sup> 704 F.2d 523.

<sup>221</sup> Id. at 531.

<sup>222</sup> 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  
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applies only to tax return information obtained by the IRS, not to any such information maintained by other agencies that was obtained by means other than through the provisions of the Internal Revenue Code.<sup>223</sup>

Section 6105 of the Internal Revenue Code<sup>224</sup> governs the withholding of tax convention information such as bilateral agreements providing, for example, for the exchange of foreign

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<sup>222</sup>(...continued)

disclosure); Long v. IRS, 891 F.2d at 224 (finding that computer tapes used to develop discriminant function formulas protected); Sutton, 2007 WL 30547, at \*3-4 (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 26 U.S.C. § 6103(b)(2) permits IRS to withhold discriminant function scores), summary affirmance granted, 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 26 U.S.C. § 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 per curiam sub nom. Cujas v. Internal Revenue, 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); see also 26 U.S.C. § 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").

<sup>223</sup> See Ryan v. United States, 74 F.3d 1161, 1163 (11th Cir. 1996) (non-FOIA case) (finding that "[s]ection 6103 of Title 26 protects only information filed with and disclosed by the IRS, not all information relating to any tax matter"); Stokwitz v. United States, 831 F.2d 893, 896-97 (9th Cir. 1987) (identifying "the central fact evident from the legislative history, structure, and language of section 6103 (including the definitions of 'return and return information') [is] that the statute is concerned solely with the flow of tax data to, from, or through the IRS"); see also 26 U.S.C. § 6103(b)(1)-(3) (defining "return," "return information," and "taxpayer return information" as information required by, or provided for, Secretary of Treasury under title 26 of United States Code). But see Davis, Cowell & Bowie, LLP v. SSA, No. C 01-4021, 2002 WL 1034058, at \*1, \*4-5, \*7 (N.D. Cal. May 16, 2006) (concluding that information submitted to SSA was properly withheld pursuant to Exemption 3 and 26 U.S.C. § 6103, and noting that "information from the W-2 and W-3 forms constitutes return information despite the fact they are first submitted to the SSA" where "W-2 and W-3 forms from which information is sought . . . [are] collected pursuant to the authority granted to the IRS to collect taxes" and where, "[i]n exercise of that authority, the IRS has entered into a compact with the SSA jointly to receive the tax returns"), vacated as moot, 281 F. Supp. 2d 1154 (N.D. Cal. 2003).

<sup>224</sup> 26 U.S.C. § 6105 (2006).

"tax relevant information" with the United States and "mutual assistance in tax matters."<sup>225</sup> Section 6105 has also been held to be an Exemption 3 statute.<sup>226</sup>

The D.C. Circuit several decades ago rejected the argument that the tax code "displaced" the FOIA, ruling instead 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 FOIA.<sup>227</sup> Yet the D.C. Circuit has held that the procedures of the Presidential Recordings and Materials Preservation Act<sup>228</sup> 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.<sup>229</sup>

### FOIA-Specific Nondisclosure Statutes

Most Exemption 3 statutes contain a broad prohibition on public disclosure and Exemption 3, in turn, is the means by which Congress's intent to protect that information from release is implemented in the face of a FOIA request.<sup>230</sup> Some nondisclosure statutes specifically state that they prohibit disclosure under the FOIA and, when such statutes have been challenged, courts have found that they qualify as Exemption 3 statutes.<sup>231</sup>

<sup>225</sup> Id.

<sup>226</sup> See Tax Analysts v. IRS, 217 F. Supp. 2d 23, 27-29 (D.D.C. 2002) (finding that IRS properly withheld under Exemption 3 international tax convention records considered confidential under such conventions); 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 record consisted of tax convention information that treaty requires be kept confidential), aff'd in part, rev'd & remanded in part on other grounds, 294 F.3d 71 (D.C. Cir. 2002).

<sup>227</sup> See 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.] § 6103 claims").

<sup>228</sup> 44 U.S.C. § 2111 (2006).

<sup>229</sup> Ricchio v. Kline, 773 F.2d 1389, 1395 (D.C. Cir. 1985).

<sup>230</sup> See 5 U.S.C. § 552(b)(3) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

<sup>231</sup> See, e.g., Berger v. IRS, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (reaching "natural conclusion that [31 U.S.C.] § 5319 [(2006)] qualifies as an exempting statute under Exemption 3" and finding that "[currency and banking retrieval system] reports qualify as reports under the Bank Secrecy Act that are exempt from disclosure under FOIA"), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008), cert. denied, No. 08-884, 2009 WL 1650205 (U.S. June 15, 2009); Sciba v. Bd. of Governors of the Fed. Reserve Sys., No. 04-1011, 2005 WL 3201206, at \*6 (D.D.C. Nov. 4, 2005) (finding that "the Board correctly asserts Exemption 3(A) of the FOIA as justification for nondisclosure of the withheld documents because the two [suspicious activity (continued...)]

The most common form of such FOIA-specific nondisclosure statutes direct 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.<sup>232</sup> For instance, section 21(f) of the FTC Act<sup>233</sup> provides that certain investigative materials received by the FTC and "provided pursuant to any compulsory process under this subchapter or which is provided voluntarily in place of such compulsory process shall not be required to be disclosed under section 552 of Title 5."<sup>234</sup> This statute has been determined to qualify as an Exemption 3 statute.<sup>235</sup> Similarly, a provision of the Antitrust Civil Process Act states that "[a]ny documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this chapter shall be exempt from disclosure

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reports] and four [currency transaction reports] fall within the scope of 31 U.S.C. § 5319 [(2006)]"; Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 944-45 (D. Ariz. 2000) (holding that 16 U.S.C. § 5937 (2006) is Exemption 3 statute, and finding information pertaining to northern goshawks, National Park System resources, properly protected pursuant to 16 U.S.C. § 5937 and Exemption 3), aff'd, 314 F.3d 1060 (9th Cir. 2002); Linn v. DOJ, No. 92-1406, 1995 WL 631847, at \*30 (D.D.C. Aug. 22, 1995) (holding that 31 U.S.C. § 5319 (2006) qualifies as Exemption 3 statute, and finding that agency properly protected Currency Transaction Report pursuant to 31 U.S.C. § 5319 and Exemption 3); Vosburgh v. IRS, No. 93-1493, 1994 WL 564699, at \*4 (D. Or. July 5, 1994) (finding currency transaction reports properly protected pursuant to Exemption 3 and 31 U.S.C. § 5319 (2006)), aff'd, 106 F.3d 411 (9th Cir. 1997) (unpublished table decision).

<sup>232</sup> See, e.g., 15 U.S.C. § 1314(g) (2006) (providing that "[a]ny documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this chapter shall be exempt from disclosure under section 552 of Title 5"); 31 U.S.C. § 5319 (2006) (providing that "a report [filed under Bank Secrecy Act] and records of reports are exempt from disclosure under section 552 of title 5"); 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").

<sup>233</sup> 15 U.S.C. § 57b-2 (2006).

<sup>234</sup> Id.

<sup>235</sup> See A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143-44 (2d Cir. 1994) (recognizing section 21(f) of FTC Act, 15 U.S.C. § 57b-2(f), as Exemption 3 statute, but remanding case for determination of whether responsive records fell within scope of statute); Novo Laboratories, Inc. v. FTC, No. 80-1989, 1981 WL 2214, at \*4 (D.D.C. July 21, 1981) (concluding that "agreement and information submitted to the [FTC] by Squib as well as portions of the staff memorandum which would reveal that information are properly exempt from disclosure pursuant to FOIA Exemption 3 and [section] 21(f) of the FTC Act[, 15 U.S.C. § 57b-2(f)]"); Nat'l Educ. Ass'n v. FTC, No. 79-959-S, 1983 WL 1883, at \*1 (D. Mass. Sept. 26, 1983) (protecting computer tapes containing test histories of third parties and related records, and finding that "[15 U.S.C. § 57b-2(f)] exempts from FOIA disclosure all records subpoenaed or obtained voluntarily in lieu of compulsory process in a law enforcement investigation").

under section 552 of title 5.<sup>236</sup> One district court has determined that the statute qualifies as a proper withholding statute pursuant to Exemption 3.<sup>237</sup> Likewise, 31 U.S.C. § 5319, a provision of the Bank Secrecy Act,<sup>238</sup> requires that reports pertaining to monetary instruments transactions be made available to certain agencies and organizations, but provides that "a report [filed under the Act] and records of reports are exempt from disclosure under section 552 of title 5."<sup>239</sup> Courts addressing the question of whether 31 U.S.C. § 5319 qualifies under Exemption 3 have concluded that it does.<sup>240</sup>

Additionally, section 303B(m) of the Federal Property and Administrative Services Act of 1949,<sup>241</sup> which provides that, "[e]xcept as provided in paragraph (2), a proposal in the possession or control of an executive agency may not be made available to any person under section 552 of Title 5,"<sup>242</sup> has been recognized by the District Court for the District of Columbia as a statute qualifying under Exemption 3.<sup>243</sup> Similarly, one district court has held that a nearly identical disclosure provision, 10 U.S.C. § 2305(g),<sup>244</sup> which provides that, "[e]xcept as provided in paragraph (2), a proposal in the possession or control of an agency named in

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<sup>236</sup> 15 U.S.C. § 1314(g).

<sup>237</sup> Motion Picture Ass'n of Am. v. DOJ, No. 80 Civ. 6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981).

<sup>238</sup> (2006).

<sup>239</sup> Id.

<sup>240</sup> See Berger, 487 F. Supp. 2d at 496-97; Sciba, 2005 WL 3201206, at \*6; Linn, 1995 WL 631847, at \*30; Vosburgh, 1994 WL 564699, at \*4; Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992) (finding information from Treasury Enforcement Communications System and Currency and Banking Retrieval System properly protected pursuant to Exemption 3 and 31 U.S.C. § 5319); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988) (protecting currency transaction reports and records pertaining to currency transaction reports pursuant to Exemption 3 and 31 U.S.C. § 5319), aff'd, 890 F.2d 419 (8th Cir. 1989) (unpublished table decision).

<sup>241</sup> 41 U.S.C. § 253b (2006) (codified as amended by National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 821, 110 Stat. 2422, 2609 (1996)).

<sup>242</sup> Id. § 253b(m).

<sup>243</sup> Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 30 (D.D.C. 2003) (finding proposals to be properly withheld from disclosure pursuant to Exemption 3, because statute "specifically prohibits the disclosure of 'a proposal in the possession or control of an agency'" (quoting 41 U.S.C. § 253b (m)(1)), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); cf. Pohlman, Inc. v. SBA, No. 03-01241, slip op. at 26 (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. DOE, 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 statute applies only to government procurement contracts, not to contracts for sale of government property).

<sup>244</sup> (2006).

section 2303 of this title may not be made available to any person under section 552 of title 5,<sup>245</sup> also qualifies under Exemption 3.<sup>246</sup>

### Nondisclosure Results Under Appropriations Acts

Congress also has enacted legislation that achieves 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. The first such statute enacted was section 630 of the Agricultural, Rural Development, and Related Agencies Development Act, 1989,<sup>247</sup> which states that "none of the funds provided in this Act may be expended to release information acquired from any handler under" the Act.<sup>248</sup> When section 630 was tested in Cal-Almond, Inc. v. USDA,<sup>249</sup> the Court of Appeals for the Ninth Circuit did not decide whether this statute had the effect of triggering Exemption 3, but the Ninth Circuit did observe 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."<sup>250</sup>

More recently, during the course of litigation in City of Chicago v. U.S. Department of the Treasury,<sup>251</sup> Congress enacted three appropriations bills that specifically prohibited ATF from using appropriated funds to comply with any FOIA request seeking records relating to the contested firearms sales databases that are maintained by ATF.<sup>252</sup> The first of these laws was enacted shortly before the scheduled oral argument before the Supreme Court, whereupon the Supreme 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.<sup>253</sup> By the time the case reached the circuit court for consideration on remand,

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<sup>245</sup> Id. § 2305(g)(1).

<sup>246</sup> Chesterfield Assocs., Inc. v. U.S. Coast Guard, No. 08-CV-4674, 2009 WL 1406994, at \*1-2 (E.D.N.Y. May 19, 2009).

<sup>247</sup> Pub. L. No. 100-460, 102 Stat. 2229 (1988).

<sup>248</sup> Id.

<sup>249</sup> 960 F.2d 105 (9th Cir. 1992).

<sup>250</sup> Id. at 108 (dictum) (opining on whether section 630 is "explicit" enough to qualify as Exemption 3 statute).

<sup>251</sup> 384 F.3d 429 (2004), vacated, 423 F.3d 777 (7th Cir. 2005).

<sup>252</sup> See Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 644, 117 Stat. 11, 473-74; Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 53; Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2859-60 (2004).

<sup>253</sup> DOJ 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).

Congress had enacted the Consolidated Appropriations Act, 2004,<sup>254</sup> 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 by the Seventh Circuit.<sup>255</sup>

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.<sup>256</sup> While ATF's petition for rehearing en banc was pending, Congress passed the Consolidated Appropriations Act, 2005,<sup>257</sup> 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."<sup>258</sup> The Seventh Circuit granted ATF's petition for rehearing en banc and ordered the parties to submit briefs on the impact of this new legislation.<sup>259</sup> On rehearing, the Seventh Circuit held that this new language "exempts from disclosure [firearms] data previously available to the public" and that, as such, the new law qualified as an Exemption 3 statute.<sup>260</sup>

Following the City of Chicago litigation, courts continue to recognize the Consolidated Appropriations Act, 2005, as an Exemption 3 statute.<sup>261</sup> Additionally, appropriations acts for

<sup>254</sup> 118 Stat. at 53 (likewise prohibiting use of appropriated funds to disclose same type of ATF firearms database information that was at issue in City of Chicago).

<sup>255</sup> City of Chicago, 384 F.3d at 431-32 (noting that "both parties to the litigation have rebriefed their arguments" due to enactment of 2003 and 2004 appropriations legislation).

<sup>256</sup> Id. at 435-36 (ordering ATF to provide plaintiff access to databases through use of court-appointed special master).

<sup>257</sup> 118 Stat. at 2859-60.

<sup>258</sup> Id.

<sup>259</sup> City of Chicago v. U.S. Dep't of the Treasury, No. 01-2167, 2004 U.S. App. LEXIS 28002, at \*1 (7th Cir. Dec. 21, 2004).

<sup>260</sup> City of Chicago v. U.S. Dep't of the Treasury, 423 F.3d 777, 781-82 (7th Cir. 2005).

<sup>261</sup> See, e.g., Singh v. FBI, 574 F. Supp. 2d 32, 46 (D.D.C. 2008) (finding firearms trace records properly protected pursuant to Exemption 3 and declaring that, "[b]ecause Congress prohibits the expenditure of funds for release of Firearms Transaction Records, [ATF] properly withholds them in full under Exemption 3"); Miller v. DOJ, 562 F. Supp. 2d 82, 111 (D.D.C. 2008) (protecting "Firearms Trace Reports" in their entirety pursuant to Consolidated Appropriations Act, 2005, 118 Stat. at 2859-60); Muhammad v. DOJ, No. 06-0220, 2007 WL 433552, at \*1-2 (S.D. Ala. Feb. 6, 2007) (finding that "Firearms Trace System database information" properly withheld pursuant to Exemption 3 and Consolidated Appropriations Act, 2005, 118 Stat. at 2859-60). 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 City of Chicago litigation and holding that firearms database appropriations legislation for 2005 and 2006 does not prevent disclosure of firearms

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subsequent fiscal years have continued to include both language prohibiting the use of appropriated funds to disclose this information and language providing that such data "shall be immune from judicial process."<sup>262</sup> One district court that found ATF properly protected Firearms Trace System database information pursuant to the Consolidated Appropriations Act, 2005, and Exemption 3 of the FOIA, acknowledged that a new appropriations statute had been enacted, but continued to apply the 2005 statute where the subsequent year's appropriations statute, the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, largely adopted the language of the Consolidated Appropriations Act, 2005.<sup>263</sup>

"Operational Files" Provisions

A closely related but somewhat different form of statutory protection is found in special FOIA provisions that Congress has enacted to cover the "operational files" of individual intelligence agencies. For example, the CIA Information Act of 1984<sup>264</sup> provides that "[t]he Director of the Central Intelligence Agency, with the coordination of the Director of National Intelligence, may exempt operational files of the Central Intelligence Agency from the provisions of section 552 of Title 5 (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith."<sup>265</sup> The CIA Information Act established the CIA as the first intelligence agency to obtain such exceptional FOIA treatment for its "operational files."<sup>266</sup> To the extent that the issue has been addressed in litigation,

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<sup>261</sup>(...continued)

database information that already has been "obtained by explicit order of the court" during discovery) (non-FOIA case).

<sup>262</sup>Compare Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 575-76, and Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1903-04 (2007), and Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2295-96 (2005), with 118 Stat. at 2859-60.

<sup>263</sup> Muhammad, 2007 WL 433552, at \*2 n.1 (noting that "[a] 2006 rider was passed which adds that the information 'shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data, in any civil action pending on or filed after the effective date of this Act (including the District of Columbia) or Federal court,'" but ultimately applying 2005 version of statute because Court determined that "[t]he language of the 2005 Act was not altered in any other respects and the additional language [in 2006 rider] does not appear to be applicable to the circumstances here" (quoting 119 Stat. at 2295-96)).

<sup>264</sup> 50 U.S.C. § 431 (2006).

<sup>265</sup> Id. § 431(a).

<sup>266</sup> See id. § 431; see also FOIA Update, Vol. V, No. 4, at 1-2 (noting that underlying principle of CIA Information Act of 1984 is to free "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

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courts have recognized the CIA Information Act as a qualifying statute under Exemption 3 of the FOIA.<sup>267</sup>

Following the enactment of the CIA Information Act, Congress enacted similar "operational files" statutes pertaining to records maintained by three other intelligence agencies: the National Security Agency,<sup>268</sup> the National Reconnaissance Office,<sup>269</sup> and the National Geospatial-Intelligence Agency.<sup>270</sup> This special statutory protection is modeled after, and quite similar to, the CIA Information Act.<sup>271</sup> For example, 50 U.S.C. § 432a provides that "[t]he Director of the National Reconnaissance Office, with the coordination of the Director of National Intelligence, may exempt operational files of the National Reconnaissance Office from the provisions of section 552 of title 5 which require publication, disclosure, search, or review

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<sup>266</sup>(...continued)

nondisclosure provisions under Exemption 3"); *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (commenting on similar rationale underlying 2002 FOIA amendment, which made exception to FOIA's "any person" rule in certain circumstances for requests received by "elements of the intelligence community").

<sup>267</sup> See CIA v. Sims, 471 U.S. 159, 167, 174 n.19 (1985) (dictum) (characterizing CIA Information Act, 50 U.S.C. § 431, as "exempt[ing] the [CIA]'s 'operational files' from disclosure under the FOIA"); Wolf v. CIA, 569 F. Supp. 2d 1, 8 (D.D.C. 2008) (recognizing that "[t]he CIA Information Act permits the CIA to designate certain files as 'operational files' and exempt those files from the FOIA provisions requiring 'publication or disclosure, search or review,'" and rejecting as moot "plaintiff's challenge to the adequacy of the CIA's search[] premis[ed] on its alleged failure to search the operational files" (quoting 50 U.S.C. § 431(a))); Aftergood v. Nat'l Reconnaissance Office, 441 F. Supp. 2d 37, 44 (D.D.C. 2006) (recognizing that CIA Information Act, 50 U.S.C. § 431, as statute "which . . . provides a mechanism by which operational files can be exempted from the FOIA's search and review requirement"); see also ACLU v. DOD, 351 F. Supp. 2d 265, 271 (S.D.N.Y. 2005) (acknowledging that CIA Information Act "authoriz[es] a general exemption for operational files from FOIA search and review requirements," but ultimately "declin[ing] to find that [CIA's] operational files warrant any protection from the requirements of FOIA" where court determined that CIA had not adhered "to the statutory authority for exempting operational files").

<sup>268</sup> See 50 U.S.C. § 432b (2006) (authorizing special "operational files" treatment for National Security Agency).

<sup>269</sup> See id. § 432a (authorizing special "operational files" treatment for National Reconnaissance Office).

<sup>270</sup> See id. § 432 (authorizing special "operational files" treatment for National Geospatial-Intelligence Agency); see also *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03).

<sup>271</sup> See 50 U.S.C. § 431; Aftergood, 441 F. Supp. 2d at 44 n.8 (noting that, "[a]s both the parties and the amicus agree, [50 U.S.C.] § 432a was modeled on [50 U.S.C.] § 431, and much of § 432a's language is substantially identical to corresponding provisions of § 431").

in connection therewith.<sup>1272</sup>

Of the three "operational files" statutes regarding the records of the National Security Agency, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency, only the statute pertaining to the National Reconnaissance Office has been challenged in court.<sup>273</sup> The one district court that has addressed the effect of this statute in the FOIA context concluded that "[t]he [National Reconnaissance Office] Director and the [Director of National Intelligence] are empowered by [50 U.S.C.] § 432a to exempt [National Reconnaissance Office] files both from disclosure and from the FOIA's search and review procedure so long as the files in question satisfy the definitions of 'operational files' contained in the statute."<sup>274</sup>

### Statutes Found Not to Qualify Under Exemption 3

Certain statutes have been found to fail to meet the requisites of Exemption 3. For instance, in Reporters Committee for Freedom of the Press v. DOJ,<sup>275</sup> the Court of Appeals for the District of Columbia Circuit held that the statute governing the FBI's release of criminal record information, commonly referred to as "rap sheets,"<sup>276</sup> does not qualify under Exemption 3 because the statute does not expressly prohibit the records' disclosure.<sup>277</sup> Specifically, the Reporters Committee court found that the statute fails to fulfill subpart (A)'s requirement of absolute withholding because the statute, which "gives the Department discretion, apparently unbounded, to withhold records from authorized government officials who disseminate the records to the public," implies that "it might also give the Department discretionary authority to withhold such records directly from the general public" and, in fact, the FBI had exercised such discretion by its inconsistent manner of releasing rap sheets to the public.<sup>278</sup> Furthermore, the D.C. Circuit noted that "[e]ven if [28 U.S.C. §] 534 met Exemption 3's threshold requirement ('specifically exempted from disclosure') it would not appear to satisfy either prong[, subpart (A) or subpart (B),] of the exemption's proviso."<sup>279</sup>

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<sup>272</sup> (2006).

<sup>273</sup> See Aftergood, 441 F. Supp. 2d at 46.

<sup>274</sup> Id.

<sup>275</sup> 816 F.2d 730 (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).

<sup>276</sup> 28 U.S.C. § 534 (2006).

<sup>277</sup> Reporters Comm., 816 F.2d at 736 n.9.

<sup>278</sup> Reporters Comm., 816 F.2d at 736 n.9; see also Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, slip op. at 6-7 (S.D. Ohio Feb. 9, 1993) (citing Reporters Comm. for proposition "that [28 U.S.C.] § 534 does not specifically exempt rap sheets from disclosure," and concluding rap sheets in question were not exempt from disclosure pursuant to Exemption 3).

<sup>279</sup> Reporters Comm., 816 F.2d at 736 n.9 (quoting 5 U.S.C. § 552(b)(3) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524).

Likewise, the Copyright Act of 1976<sup>280</sup> has been held to satisfy neither Exemption 3 subpart because, rather than prohibiting disclosure, it specifically permits public inspection of copyrighted documents.<sup>281</sup> The D.C. Circuit has also held that section 520 of the Federal Food, Drug, and Cosmetic Act<sup>282</sup> is not an Exemption 3 statute because it does not specifically prohibit the disclosure of records.<sup>283</sup> Similarly, 39 U.S.C. § 410(c)(6), a provision of the Postal Reorganization Act,<sup>284</sup> has been found not to qualify because the broad discretion afforded the Postal Service to release or withhold records is not sufficiently specific.<sup>285</sup> Similarly, section 1106 of the Social Security Act<sup>286</sup> has been found not to be an Exemption 3 statute because it gives the Secretary of Health and Human Services wide discretion to enact regulations specifically permitting disclosure.<sup>287</sup>

Likewise, in 2008, the District Court for the District of Columbia rejected the argument that section 210(b) of the Investment Advisers Act of 1940<sup>288</sup> qualified as a withholding statute under Exemption 3, noting that "[the statute] does not mandate the withholding of any particular type of information," and remarking that, if the court were to adopt the agency's interpretation of the statute, the agency "would have unbridled discretion regarding all

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<sup>280</sup> 17 U.S.C. § 705(b) (2006).

<sup>281</sup> 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 advising that copyrighted records should be processed in accordance with standards of Exemption 4); accord Gilmore v. DOE, 4 F. Supp. 2d 912, 922-23 (N.D. Cal. 1998) (alternate holding) (protecting copyrighted computer software pursuant to Exemption 4).

<sup>282</sup> 21 U.S.C. § 360j(h) (2006).

<sup>283</sup> See Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1286 (D.C. Cir. 1983). But see Anderson v. HHS, 907 F.2d 936, 950-51 (10th Cir. 1990) (finding that section 301(j) of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(j) (2006), qualifies as Exemption 3 statute).

<sup>284</sup> 39 U.S.C. § 410(c)(6) (2006).

<sup>285</sup> See Church of Scientology v. USPS, 633 F.2d 1327, 1333 (9th Cir. 1980) (finding 39 U.S.C. § 410(c)(6), which "permits the Postal Service total discretion" regarding disclosure of its investigatory files, not to be Exemption 3 statute because it provides "insufficient specificity" to allow its removal from "impermissible range of agency discretion to make decisions rightfully belonging to the legislature").

<sup>286</sup> 42 U.S.C. § 1306 (2006).

<sup>287</sup> 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); Fla. Medical Ass'n, Inc. v. Dep't of Health, Ed. & Welfare, 479 F. Supp. 1291, 1302 (M.D. Fla. 1979).

<sup>288</sup> 15 U.S.C. § 80b-10(b) (2006).

information obtained by a subpoena.<sup>289</sup> That same district court determined that section 10(d) of the Federal Insecticide, Fungicide, and Rodenticide Act<sup>290</sup> does not qualify as an Exemption 3 statute where withholding of the information in question is entirely discretionary under that Act.<sup>291</sup> Additionally, the Court of Appeals for the District of Columbia Circuit has held that the early warning disclosure provision in the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act<sup>292</sup> does not qualify as an Exemption 3 statute because it does not specifically exempt data from disclosure.<sup>293</sup>

A particularly difficult Exemption 3 issue was addressed by the Supreme Court in 1988. In analyzing the applicability of Exemption 3 to the Parole Commission and Reorganization Act<sup>294</sup> 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.<sup>295</sup> 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."<sup>296</sup>

Although the Supreme Court has declined to decide whether the Trade Secrets Act<sup>297</sup> is an Exemption 3 statute,<sup>298</sup> most courts confronted with the issue have held that the statute does not meet the requirements of Exemption 3.<sup>299</sup> Significantly, in 1987, the D.C. Circuit

<sup>289</sup> Aguirre v. SEC, 551 F. Supp. 2d 33, 50-51 (D.D.C. 2008).

<sup>290</sup> 7 U.S.C. § 136h(d) (2006).

<sup>291</sup> 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 section 1491 of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136i-1, is Exemption 3 statute) (reverse FOIA suit).

<sup>292</sup> 49 U.S.C. § 30166(m) (2006).

<sup>293</sup> Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n, 533 F.3d 810, 815 (D.C. Cir. 2008).

<sup>294</sup> 18 U.S.C. § 4208 (2006) (repealed as to offenses committed after November 1, 1987).

<sup>295</sup> DOJ v. Julian, 486 U.S. 1, 9 (1988).

<sup>296</sup> Id. at 11; see also FOIA Update, Vol. IX, No. 2, at 1-2.

<sup>297</sup> 18 U.S.C. § 1905 (2006).

<sup>298</sup> See Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979).

<sup>299</sup> See, e.g., Anderson, 907 F.2d at 949 (finding that "broad and ill-defined wording of [18 U.S.C.] § 1905 fails to meet either of the requirements of Exemption 3"); Acumenics Research

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 withholding statute.<sup>300</sup> First, the D.C. Circuit found that the Trade Secrets Act's prohibition against disclosure is not absolute, as it prohibits only those disclosures that are "not authorized by law."<sup>301</sup> Because duly promulgated agency regulations can provide the necessary authorization for release, the agency "possesses discretion to control the applicability" of the Act.<sup>302</sup> The existence of this discretion precludes the Trade Secrets Act from satisfying subpart (A) of Exemption 3.<sup>303</sup> 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."<sup>304</sup> Indeed, as the court concluded, this utter lack of statutory guidance renders the Trade Secrets Act susceptible to invocation at the "whim of an administrator."<sup>305</sup> Finally, the D.C. Circuit 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.<sup>306</sup> Given all these elements, the court held that the Trade Secrets Act does not qualify as an Exemption 3 statute.<sup>307</sup> This followed the Department of Justice's stated policy position on the issue.<sup>308</sup> The D.C. Circuit's decision on this issue is consistent with the legislative history of the 1976 amendment to Exemption 3, which reveals 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.<sup>309</sup>

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& *Tech. v. DOJ*, 843 F.2d 800, 805 n.6, 806 (4th Cir. 1988) (finding "no basis" for business submitter's argument that Exemption 3 and 18 U.S.C. § 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").

<sup>300</sup> *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1137-43 (D.C. Cir. 1987).

<sup>301</sup> *Id.* at 1138.

<sup>302</sup> *Id.* at 1139.

<sup>303</sup> *Id.* at 1138.

<sup>304</sup> *Id.* at 1139.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 1140-41.

<sup>307</sup> *Id.* at 1141.

<sup>308</sup> See *FOIA Update*, Vol. VII, No. 3, at 6 (advising that Trade Secrets Act, 18 U.S.C. § 1905, should not be regarded as Exemption 3 statute).

<sup>309</sup> See H.R. Rep. No. 94-880, at 23 (1976), reprinted in 1976 U.S.C.C.A.N. 2191, 2205; see also (continued...)

Lastly, at one time there was uncertainty as to whether the Privacy Act of 1974<sup>310</sup> could serve as an Exemption 3 statute. When a conflict arose among the circuits that considered the proper relationship between the FOIA and the Privacy Act, the Supreme Court agreed to resolve the issue.<sup>311</sup> These cases later became moot, however, when Congress, upon enacting the CIA Information Act in 1984, explicitly provided that the Privacy Act is not an Exemption 3 statute.<sup>312</sup> Subsequent to this, the Supreme Court dismissed the appeals in these cases, and this issue was placed to rest.<sup>313</sup>

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Anderson, 907 F.2d at 949-50 (considering legislative history of Trade Secrets Act, 18 U.S.C. § 1905, and concluding that statute does not qualify under Exemption 3); CNA Fin. Corp., 830 F.2d at 1141, 1142 n.70 (same); Gen. Dynamics Corp. v. Marshall, 607 F.2d 234, 236-37 (8th Cir. 1979) (per curiam) (same).

<sup>310</sup> 5 U.S.C. § 552a (2006).

<sup>311</sup> See Provenzano v. DOJ, 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).

<sup>312</sup> Pub. L. No. 98-477, § 2(c), 98 Stat. 2209, 2212 (1984) (amending what is now subsection (t) of Privacy Act).

<sup>313</sup> DOJ v. Provenzano, 469 U.S. 14, 15-16 (1984) (per curiam); see also Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. DOJ, 503 F. Supp. 2d 373, 380 (D.D.C. 2007) (finding that "[Privacy] Act[, 5 U.S.C. § 552a,] is not a FOIA exemption upon which DOJ can rely" to withhold records pertaining to third parties, and noting that "[i]nvoicing the Privacy Act to refuse a FOIA request does not complete the analysis that DOJ must conduct"). But see Hill v. Blevins, No. 92-0859, 1993 U.S. Dist. LEXIS 21455, at \*10 (M.D. Pa. Apr. 12, 1993) (holding that subsection (f)(3) of Privacy Act, 5 U.S.C. § 552a(f)(3), 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).