Reverse FOIA*

The Court of Appeals for the District of Columbia Circuit has defined a reverse Freedom of Information Act action as one in which the "submitter of information – usually a corporation or other business entity" that has supplied an agency with "data on its policies, operations or products – seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request."[1] Such reverse FOIA challenges generally arise from situations involving pending FOIA

* This section primarily includes case law, guidance, and statutes up until January 31, 2023. While some legal authorities after this date may be included, for a comprehensive accounting of all recent court decisions, please visit OIP's Court Decisions webpage (https://www.justice.gov/oip/court-decisions-overview). Please also note that this section generally only includes subsequent case history in the citations when it is relevant to the point for which the case is being cited.

[1] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987); accord Mallinckrodt Inc. v. West, 140 F. Supp. 2d 1, 4 (D.D.C. 2000) (declaring that "[i]n a 'reverse FOIA' case, the court has jurisdiction when a party disputes an agency's decision to release information under FOIA") (internal citation omitted); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 11 (D.D.C. 1996) (holding that in reverse FOIA actions "courts have jurisdiction to hear complaints brought by parties claiming that an agency decision to release information adversely affects them"); cf. Am. Farm Bureau Fed'n v. EPA, 836 F.3d 963, 969 (8th Cir. 2016) (holding that allegation that EPA's disclosure of personal information was based on misapplication of FOIA exemption designed to protect personal privacy together with undisputed evidence of nonconsensual disclosures or impending disclosures "suffice to establish an injury in fact that was caused by the agency and is redressable by the court"); Entergy Gulf States La., L.L.C. v. EPA, 817 F.3d 198, 206 (5th Cir. 2016) (holding that requester was entitled to intervene of right in reverse FOIA case because adversity of interest exists due to dispute between requester and agency over stay of case and, therefore, despite ultimate goal of disclosure, "any same-ultimate-objective presumption of adequate representation is overcome, and the requirement that [the requester's] interests be inadequately represented by EPA is satisfied").

requests, but they are occasionally brought by parties challenging other types of prospective agency disclosures as well.[2]

An agency's decision to release submitted information in response to a FOIA request ordinarily will "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the information falls within one or more of the statutory exemptions."[3]

Typically, the submitter contends that the requested information falls within Exemption 4 of the FOIA.[4] Notably, in Food Marketing Institute v. Argus Leader Media,[5] the Supreme Court held that "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."[6] In doing so, the Supreme Court overturned the definition of "confidential,"[7] which was established in National Parks & Conservation Association v. Morton.[8] While the majority of cases discussed in this chapter predate the Supreme

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[2] See, e.g., AFL-CIO v. FEC, 333 F.3d 168, 172 (D.C. Cir. 2003) (submitter organization challenged agency decision to place investigatory file, which included information on individuals, in agency's public records room); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C. Cir. 1997) (submitter challenged agency order requiring it to publicly disclose information, which was issued in context of federal licensing requirements) (non-FOIA case); McDonnell Douglas Corp. v. Widnall, No. 94-0091, slip op. at 13 (D.D.C. Apr. 11, 1994) (submitter challenged agency release decision that was based upon disclosure obligation imposed by Federal Acquisition Regulation (FAR)), remanded for further development of the record, 57 F.3d 1162, 1167 (D.C. Cir. 1995); cf. Tripp v. DOD, 193 F. Supp. 2d 229, 233 (D.D.C. 2002) (challenging disclosure of federal job-related information pertaining to plaintiff *after* disclosure already had been made to media).

[3] CNA Fin. Corp., 830 F.2d at 1133 n.1; see also Pinson v. DOJ, 236 F. Supp. 3d 338, 359-60 (D.D.C. 2017) (same); Taylor Energy Co. v. U.S. Dep't of Interior, 734 F. Supp. 2d 112, 119 (D.D.C. 2010) (same).

[4] 5 U.S.C. § 552(b)(4) (2018).

[5] 588 U.S. 427 (2019).

[6] Id. at 440.

[7] Id. at 436-37; see also OIP Guidance: Exemption 4 after the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media (posted 10/3/2019); OIP Guidance: Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA (posted 10/3/2019).

[8] 498 F.2d 765 (D.C. Cir. 1974) (establishing the historical "substantial competitive harm" standard for determining Exemption 4 confidentiality).

Court's ruling on the meaning of "confidential" under Exemption 4, the Court of Appeals for the Fifth Circuit vacated and remanded a reverse FOIA action back to the district court for consideration of the confidentiality analysis announced in Argus Leader Media.[9] (For a discussion of Exemption 4 after the Argus Leader Media decision, see Exemption 4.)

Reverse FOIA actions have also been brought by plaintiffs challenging a contemplated agency disclosure of information that the plaintiffs contended was exempt

[9] Ryan, L.L.C. v. U.S. Dep't of Interior, No. 22-10373, 2022 WL 17250186, at *2 (5th Cir. Nov. 28, 2022) (per curiam).

under other FOIA exemptions.[10] Plaintiffs have also used the Privacy Act of 1974[11] as a basis to bring a reverse FOIA claim.[12] (See further discussion of this issue under Exemption 6, Privacy Interest.)

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[10] See, e.g., Am. Farm Bureau Fed'n v. EPA, 836 F.3d 963, 972 (8th Cir. 2016) (holding that agency abused its discretion in deciding that information at issue was not exempt from mandatory disclosure under Exemption 6 because, even though some information about individuals might be obtained through publicly available sources, "[t]here is an important distinction 'between the mere *ability* to access information and the likelihood of actual public *focus* on that information'" (quoting ACLU v. DOJ, 750 F.3d 927, 933 (D.C. Cir. 204))); Doe v. Veneman, 380 F.3d 807, 816-18 & n.39 (5th Cir. 2004) (affirming that requested information was protected under Exemption 3, but finding it unnecessary to decide applicability of Exemption 6 or Privacy Act, 5 U.S.C. § 552a, because "the result would be the same"); Campaign for Fam. Farms v. Glickman, 200 F.3d 1180, 1187-89 (8th Cir. 2000) (agreeing with submitter that Exemption 6 should have been invoked, given the court's holding that Exemption 6 applies to the information, in combination with agency regulation that prohibited release of requested information, and ordering, upon remand, permanent injunction requiring agency to withhold requested information); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (rejecting submitter's claim that agency's balancing of interests under Exemption 6 was "arbitrary or capricious," and holding that "even were [the submitter] correct that its submissions fall within Exemption 6, the [agency] is not *required* to withhold the information from public disclosure," because "FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information"); Tripp v. DOD, 193 F. Supp. 2d 229, 238-39 (D.D.C. 2002) (dismissing plaintiff's claim that agency's prior disclosure of information about plaintiff "violated" Exemptions 5, 6, 7(A), and 7(C); concluding that with exception of information covered by Exemption 7(C) – which was found inapplicable to information at issue – plaintiff could "not rely on a claim that a FOIA exemption requires the withholding" of information, inasmuch as FOIA merely permits withholding but does not "require" it); AFL-CIO v. FEC, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001) (agreeing with plaintiffs that identities of third parties mentioned in agency's investigative files should have been afforded protection under Exemption 7(C); rejecting agency's argument that "the public interest in disclosure outweighs the privacy interest" of named individuals, because the D.C. Circuit "has established a *categorical* rule" for protection of such information; and holding agency's "refusal to apply Exemption 7(C) to bar release" was "arbitrary, capricious and contrary to law" (citing SafeCard Servs. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991))); Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1411-13 (D. Haw. 1995) (denying plaintiff's request to enjoin release of information that plaintiff contended was exempt pursuant to Exemptions 3 6); Church Universal & Triumphant, Inc. v. United States, No. 95-0163, slip op. at 2, 3 & n.3 (D.D.C. Feb. 8, 1995) (rejecting submitter's argument that documents are "protected from disclosure under" Exemption 3, but sua sponte asking agency "to consider whether any of the materials proposed for disclosure are protected by" Exemption 6); Alexander & Alexander Servs., Inc. v. SEC, No. 92-1112, 1993 WL 439799, at *10-12 (D.D.C. Oct. 19, 1993) (agreeing with submitter that Exemption 7(C) should have been invoked, and ordering agency to withhold additional information; finding that submitter failed to "timely provide additional substantiation" to justify its claim that Exemption 7(B) applied; and holding that deliberative process privilege of Exemption 5 "belongs to the governmental

Courts have held that in a reverse FOIA suit, the party seeking to prevent the disclosure of information the government intends to release assumes the burden of justifying that nondisclosure.[13] A submitter's challenge to an agency's disclosure decision is reviewed in light of the "basic policy" of the FOIA to "'open agency action to the light of public scrutiny'" and in accordance with the "narrow construction" afforded to the FOIA's exemptions.[14] Courts have also held that they lack jurisdiction if an agency has not made

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agency to invoke or not," absent "any record support" that agency "as a general matter, arbitrarily declined to invoke that privilege").

[11] 5 U.S.C. § 552a (2018).

[12] See, e.g., Tripp, 193 F. Supp. 2d at 238-40 (rejecting plaintiff's argument brought after disclosure occurred that reverse FOIA claim was properly predicated on "'reverse FOIA' request" previously sent to the President and the Attorney General requesting "DOD's compliance with its obligations" under the FOIA and the Privacy Act) (internal citation omitted); Recticel Foam Corp. v. DOJ, No. 98-2523, slip op. at 15-16 (D.D.C. Jan. 31, 2002) (enjoining disclosure of FBI's criminal investigative files pertaining to plaintiffs because Privacy Act generally prohibits public disclosure of covered information that falls within Privacy Act exceptions); see also Doe v. Veneman, 230 F. Supp. 2d 739, 751-53 (W.D. Tex. 2002) (recognizing claim that disclosure of identities of ranchers utilizing livestock-protection collars would be "violation of" Privacy Act, after concluding that "FOIA does not require release of the information"), aff'd in part & rev'd in part on other grounds, 380 F.3d 807, 816-18 & n.39 (5th Cir. 2004) (declining to consider applicability of either Exemption 6 or Privacy Act after concluding that Exemption 3 protects requested information).

[13] See Frazee v. U.S. Forest Serv., 97 F.3d 367, 371 (9th Cir. 1996) (declaring that the "party seeking to withhold information under Exemption 4 has the burden of proving that the information is protected from disclosure"); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (explaining that the "statutory policy favoring disclosure requires that the opponent of disclosure" bear the burden of persuasion); TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1097 (E.D. Mo. 1998) (explaining that "the party seeking to prevent the government from disclosing information it is willing to disclose bears the burden to justify nondisclosure"); Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997) ("In 'reverse-FOIA' cases, the party seeking to prevent a disclosure the government itself is otherwise willing to make assumes that burden.") (internal citation omitted); cf. Stevens v. DHS, No. 14-3305, 2017 WL 1397549, at *4 (N.D. Ill. Apr. 19, 2017) (rejecting intervenor's argument that agency "show how disclosure would not cause competitive harm to [intervenor]").

[14] Martin Marietta Corp., 974 F. Supp. at 40 (quoting U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976)); see, e.g., TRIFID Corp., 10 F. Supp. 2d at 1097 (reviewing submitter's claims in light of FOIA principle that "[i]nformation in the government's possession is presumptively disclosable unless it is clearly exempt"); Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, 1997 WL 578960, at *1 (W.D. Ark. Feb. 5, 1997) (examining submitter's claims in light of "the policy of the United States government to release records

a final determination to release the requested information.[15] When the underlying FOIA request is subsequently withdrawn, the D.C. Circuit has held that the basis for the court's jurisdiction dissipates and the case should be dismissed as moot.[16] The Court of Appeals for the Ninth Circuit has concluded that a submitter cannot obtain relief in a subsequent reverse FOIA claim where the district court already ordered the document at issue to be released because it was not withholdable under Exemption 4 of the FOIA.[17]

The landmark reverse FOIA case is Chrysler Corporation v. Brown,[18] in which the Supreme Court held that jurisdiction for a reverse FOIA action cannot be based on the FOIA itself because "Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a submitter "any right to enjoin

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to the public except in the narrowest of exceptions," and observing that "[o]penness is a cherished aspect of our system of government"), aff'd, 133 F.3d 1081 (8th Cir. 1998).

[15] See, e.g., Doe v. Veneman, 380 F.3d 807, 814-15 (5th Cir. 2004) (reversing injunction after concluding that district court had "exceeded its jurisdiction" by enjoining release of information that agency had in fact decided "*not* to release"); United States v. N.Y. City Bd. of Educ., No. 96-0374, 2005 WL 1949477, at *1 (E.D.N.Y. Aug. 15, 2005) (holding that court "did not have jurisdiction to enjoin disclosure of" requested documents until "a final determination to disclose the documents" had been made by the agency, and consequently denying a motion for protective order or injunctive relief); cf. Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1234, 1238 (5th Cir. 1979) (holding that agencies' asserted failure to "assure" plaintiff that requested information was exempt from disclosure was not "reviewable by statute" or "final" – which court described as "exhaustion of administrative remedies requirement" of Administrative Procedure Act, 5 U.S.C. §§ 701-706 and not "jurisdictional requirement" – and dismissing count of complaint seeking declaratory judgment that agencies abused their discretion).

[16] See McDonnell Douglas Corp. v. NASA, No. 95-5288, slip op. at 1 (D.C. Cir. Apr. 1, 1996) (ordering a reverse FOIA case "dismissed as moot in light of the withdrawal of the [FOIA] request at issue"); Gulf Oil Corp. v. Brock, 778 F.2d 834, 838 (D.C. Cir. 1985) (holding that "[b]y withdrawing its request" plaintiff "mooted the live dispute"); McDonnell Douglas Corp. v. NASA, 102 F. Supp. 2d 21, 24 (D.D.C. 2000) (dismissing case after underlying FOIA request was withdrawn, which occurred after case already had been decided by D.C. Circuit and was before district court on motion for judgment pursuant to appellate mandate); cf. Sterling v. United States, 798 F. Supp. 47, 48 (D.D.C. 1992) (declaring that once a record has been released, "there are no plausible factual grounds for a 'reverse FOIA' claim") (internal citation omitted), aff'd, No. 93-5264, 1994 WL 88894 (D.C. Cir. Mar. 11, 1994).

[17] Synopsys, Inc. v. U.S. Dep't of Lab., Nos. 20-16414, 20-16416, 2022 WL 1501094, at *3-4 (9th Cir. May 12, 2022) (per curiam) (holding that lower court's "conclusion in the FOIA Action that [appellant's report containing employment data] fell outside the scope of Exemption 4 necessarily precludes [appellant] from winning relief on its reverse-FOIA claim - which is premised on a Trade Secrets Act theory - absent re-litigation of the same issues decided in the FOIA Action").

[18] 441 U.S. 281 (1979).

agency disclosure."[19] Moreover, the Supreme Court held that jurisdiction cannot be based on the Trade Secrets Act[20] (a broadly worded criminal statute prohibiting the unauthorized disclosure of "practically any commercial or financial data collected by any federal employee from any source"[21]) because it is a criminal statute that does not afford a "private right of action."[22] Instead, the Court held that review of an agency's "decision to disclose" requested records can be brought under the Administrative Procedure Act (APA).[23]

Standard of Review

[19] Id. at 293-94; accord Campaign for Fam. Farms v. Glickman, 200 F.3d 1180, 1185 (8th Cir. 2000) (concluding that an "agency has discretion to disclose information within a FOIA exemption, unless something independent of FOIA prohibits disclosure"); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) (declaring that the "mere fact that information falls within a FOIA exemption does not of itself bar an agency from disclosing the information"); Freeman v. Bureau of Land Mgmt., 526 F. Supp. 2d 1178, 1186 (D. Or. 2007) (noting that submitter "must do more than simply show that FOIA does not require disclosure" and must instead "also point to some other law prohibiting disclosure of the information at issue"); RSR Corp. v. Browner, 924 F. Supp. 504, 509 (S.D.N.Y. 1996) (holding that the "FOIA itself does not provide a cause of action to a party seeking to enjoin an agency's disclosure of information, even if the information requested falls within one of FOIA's exemptions"), aff'd, No. 96-6186, 1997 WL 134413 (2d Cir. Mar. 26, 1997), affirmance vacated without explanation, No. 96-6186 (2d Cir. Apr. 17, 1997). But see AFL-CIO v. FEC, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001) (concluding, as alternative basis for its holding, that "categorical" nature of Exemption 7(C) renders any agency decision to discretionarily release information covered by Exemption 7(C) unlawful or arbitrary and capricious).

[20] 18 U.S.C. § 1905 (2018).

[21] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987).

[22] Chrysler, 441 U.S. at 316-17, 319 n.49 (declining to address "relative ambits" of Exemption 4 and Trade Secrets Act); accord McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1186 n.1 (D.C. Cir. 2004) (citing Chrysler, 411 U.S. at 317).

[23] Chrysler, 441 U.S. at 317-18; see, e.g., ERG Transit Sys. (USA), Inc. v. Wash. Metro. Area Transit Auth., 593 F. Supp. 2d 249, 252 (D.D.C. 2009) (stating that "[r]everse FOIA cases are deemed informal agency adjudications, and thus are reviewable under Section 706 of the [APA]"); CC Distribs. v. Kinzinger, No. 94-1330, 1995 WL 405445, at *2 (D.D.C. June 28, 1995) (holding that "neither [the] FOIA nor the Trade Secrets Act provides a cause of action to a party who challenges an agency decision to release information . . . [but] a party may challenge the agency's decision" under the APA); Comdisco, Inc. v. GSA, 864 F. Supp. 510, 513 (E.D. Va. 1994) (holding that the "sole recourse" of a "party seeking to prevent an agency's disclosure of records under FOIA" is review under the APA).

In Chrysler Corporation v. Brown,[24] the Supreme Court held that the Administrative Procedure Act (APA)'s predominant scope and standard of judicial review – review on the administrative record according to an arbitrary and capricious standard – should "ordinarily" apply to reverse FOIA actions.[25] Accordingly, reverse FOIA plaintiffs ordinarily argue that an agency's contemplated release would violate the Trade Secrets Act and thus would "not be in accordance with law" or would be "arbitrary and capricious" within the meaning of the APA.[26]

Indeed, the Court of Appeals for the District of Columbia Circuit has emphasized that judicial review in reverse FOIA cases should be based on the "administrative record

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[24] 441 U.S. 281 (1979).

[25] Id. at 318; accord Ryan, L.L.C. v. U.S. Dep't of Interior, No. 22-10373, 2022 WL 17250186, at *1 (5th Cir. Nov. 28, 2022) (per curiam) (stating that an agency's decision to release information is reviewed under a "deferential" standard that will "'set aside that decision [only] if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"'" (quoting Doe v. Veneman, 380 F.3d 807, 813-14 (5th Cir. 2004))); Jurewicz v. USDA, 741 F.3d 1326, 1334 (D.C. Cir. 2014) (holding that "[t]o prevail, appellants must demonstrate that conclusion is arbitrary and capricious or contrary to law"); Campaign for Fam. Farms v. Glickman, 200 F.3d 1180, 1184 (8th Cir. 2000) (quoting 5 U.S.C. § 706(2)(A)); Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991) (holding that agency decisions related to FOIA requests are informal adjudications and are reviewed under the arbitrary and capricious standard of the APA); Alcolac, Inc. v. Wagoner, 610 F. Supp. 745, 748-49 (W.D. Mo. 1985) (upholding agency's decision to deny claim of confidentiality as "rational").

[26] See, e.g., Canadian Com. Corp. v. Dep't of the Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (explaining that the "underlying Decision Letter issued by the Air Force must be set aside if and only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'" (quoting 5 U.S.C. § 706(2)(A))); McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1186 n.1 (D.C. Cir. 2004) (noting that submitter "may seek review of an agency action that violates the Trade Secrets Act on the ground that it is 'contrary to law'" under the APA) (internal citation omitted); Acumenics Rsch. & Tech. v. DOJ, 843 F.2d 800, 804 (4th Cir. 1988) (noting that a submitter "has no private right of action under either the Trade Secrets Act or the FOIA itself", but rather is "entitled to review of the agency's disclosure decision under the Administrative Procedures Act"); Gen. Elec. Co. v. Nuclear Regul. Comm'n, 750 F.2d 1394, 1398, 1401-02 (7th Cir. 1984) (holding that claim of violation of APA is redressable and also analyzing Exemption 4 claim under Trade Secrets Act); Northrop Grumman Sys. Corp. v. NASA, 346 F. Supp. 3d 109, 116 (D.D.C. 2018) (noting that submitter "may bring an action under the APA to enjoin an agency from releasing proprietary information under FOIA in violation of the Trade Secrets Act"); Mallinckrodt Inc. v. West, 140 F. Supp. 2d 1, 4 (D.D.C. 2000) (declaring that "[a]lthough FOIA exemptions are normally permissive rather than mandatory," the Trade Secrets Act "independently prohibits the disclosure of confidential information").

compiled by the agency in advance of litigation,"[27] with de novo review reserved for only those cases in which an agency's administrative procedures were inadequate.[28] The Court

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[27] AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987); accord Clearbrook, L.L.C. v. Ovall, No. 06-0629, 2006 U.S. Dist. LEXIS 81244, at *10 (S.D. Ala. Nov. 3, 2006); see also McDonnell Douglas Corp. v. NASA, 109 F. Supp. 2d 27, 29 (D.D.C. 2000) (holding that "the only relevant evidence in a reverse-FOIA proceeding is the administrative record"); TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1097 (E.D. Mo. 1998) (refusing to consider affidavits proffered by submitter as they "were not submitted to [the agency] during the administrative process"); CC Distribs. v. Kinzinger, No. 94-1330, 1995 WL 405445, at *3 (D.D.C. June 28, 1995) (noting that "this Court's review shall be confined to the administrative record" and "[t]he affidavits submitted in support of plaintiff's motions are not properly before the court in this APA proceeding"); Chem. Waste Mgmt., Inc. v. O'Leary, No. 94-2230, 1995 WL 115894, at *3 n.4 (D.D.C. Feb. 28, 1995) (noting that "[t]he affidavits submitted in support of plaintiff's motions are, thus, not properly before the Court"); Alexander & Alexander Servs., Inc. v. SEC, No. 92-1112, 1993 WL 439799, at *13 n.9 (D.D.C. Oct. 19, 1993) (ruling "[t]hat affidavit shall be stricken from the record" because it is a "post-hoc rationalization" of plaintiff's claim, "not submitted with" plaintiff's "administrative support and documentation"); Gen. Dynamics Corp. v. U.S. Dep't of the Air Force, 822 F. Supp. 804, 805 n.1 (D.D.C. 1992) (denying plaintiff's attempt to supplement administrative record made apparently "in order to encompass arguments it apparently failed to make" at the administrative stage but noting supplementation is permitted when the record is "so inadequate" it "frustrate[s] judicial review"); cf. Chiquita Brands Int'l Inc. v. SEC, 805 F.3d 289, 299 (D.C. Cir. 2015) (holding that "'[a]lthough it is axiomatic that [the court] may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review . . . the contested decision need not be a model of clarity'" (quoting Casino Airlines, Inc. v. NTSB, 439 F.3d 715, 717 (D.C. Cir. 2006))). But cf. Canadian Com. Corp. v. Dep't of the Air Force, 442 F. Supp. 2d 15, 27-29 (D.D.C. 2006) (accepting agency's second decision letter, which was issued after litigation commenced, because plaintiff "acquiesced in the reconsideration of the earlier decision"), aff'd on other grounds, 514 F.3d 37 (D.C. Cir. 2008).

[28] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987) (affirming lower court's position that review was confined to administrative record and de novo review was not warranted); Nat'l Org. for Women, D.C. Chapter v. SSA, 736 F.2d 727, 745 (D.C. Cir. 1984) (per curiam) (McGowan & Mikva, JJ., concurring) (noting that review of agency record may be substituted for de novo review by court only when administrative process is "severely defective"); accord Campaign for Fam. Farms, 200 F.3d at 1186 n.6 (noting "[j]udicial review under the APA of informal agency adjudications is normally confined to the administrative record" unless agency procedures are inadequate); Acumenics Rsch. & Tech., 843 F.2d at 804-05 (holding that combination of complying with agency regulations and "the opportunity for a face-to-face meeting" were not inadequate); TRIFID Corp., 10 F. Supp. 2d at 1092-96 (concluding agency's factfinding procedures were adequate when submitter "received notice of the FOIA request and was given the opportunity to object," and holding that challenges to brevity of agency's disclosure decision, lack of administrative appeal right, as well as "procedural irregularities" concerning time period allotted for providing objections, as well as dispute over appropriate decisionmaker, did not justify de novo review); RSR Corp. v. Browner, 924 F. Supp. 504, 509 (S.D.N.Y. 1996) (holding

of Appeals for the Ninth Circuit, similarly rejecting a submitter's challenge to an agency's factfinding procedures, also has held that judicial review in a reverse FOIA suit is properly based on the administrative record.[29] Agency affidavits that do "no more than summarize the administrative record" have been found to be permissible.[30]

Review on the administrative record is a "deferential standard of review [that] only requires that a court examine whether the agency's decision was 'based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[31] Under this standard "[a] reviewing court does not substitute its judgment for the judgment of the agency" and instead, "simply determines whether the agency action constitutes a clear

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agency's factfinding procedures were adequate when submitter was "promptly notified" of FOIA request and "given an opportunity to object to disclosure" and "to substantiate [those] objections" before agency decision was made), aff'd, No. 96-6186, 1997 WL 134413 (2d Cir. Mar. 26, 1997), vacated without explanation, No. 96-6186, 1997 WL 134413 (2d Cir. Apr. 17, 1997); Burnside-Ott Aviation Training Ctr., Inc. v. United States, 617 F. Supp. 279, 282-84 (S.D. Fla. 1985); see also McDonnell Douglas Corp., 375 F.3d at 1201-02 (Garland, J., dissenting) (criticizing the panel majority for substituting its own facts and rationales for those contained in the case's administrative record, including its reliance upon an economic theory "of the court's own invention"); CC Distribs., 1995 WL 405445, at *3 (confining its review to record when submitter did "not actually challenge the agency's factfinding *procedures*," but instead challenged how agency "*applied*" those procedures); Chem. Waste Mgmt., Inc., 1995 WL 115894, at *3 n.4 (confining its review to record even when agency's factfinding itself was found to be "inadequate," because agency's "factfinding *procedures*" were not challenged).

[29] See Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1348 (9th Cir. 1990) (rejecting plaintiff's request for a trial de novo and concluding agency's factfinding procedures were accurate).

[30] Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988); accord McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 238 n.2 (E.D. Mo. 1996) (permitting submission of agency affidavit "to the extent that it helps explain the administrative record"); Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 16 (D.D.C. Sept. 2, 1993) (permitting submission of agency affidavit that "merely elaborates" upon basis for agency decision and "provides a background for understanding the redactions"); see also, e.g., Int'l Computaprint Corp. v. U.S. Dep't of Com., No. 87-1848, slip op. at 12 n.36 (D.D.C. Aug. 16, 1988) ("The record in this case has been supplemented with explanatory affidavits that do not alter the focus on the administrative record.").

[31] McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 14 (D.D.C. 1997) (quoting Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971)); accord Ryan, L.L.C. v. U.S. Dep't of the Interior, No. 22-10373, 2022 WL 17250186, at *1 (5th Cir. Nov. 28, 2022) (per curiam) (noting APA's deferential standard of review); Campaign for Fam. Farms, 200 F.3d at 1187 (quoting Citizens to Pres. Overton Park); Clearbrook, L.L.C., 2006 U.S. Dist. LEXIS 81244, at *7 (same); McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 215 F. Supp. 2d 200, 204 (D.D.C. 2002) (same), aff'd in part & rev'd in part, 375 F.3d 1182 (D.C. Cir. 2004); Mallinckrodt Inc., 140 F. Supp. 2d at 4 (same).

error of judgment."[32] Significantly, "[a]n agency is not required to prove that its predictions of the effect of disclosure are superior;" rather, "[i]t is enough that the agency's position is as plausible as the contesting party's position."[33] Indeed, as one court has held, "[t]he harm from disclosure is a matter of speculation, and when a reviewing court finds that an agency has supplied an equally reasonable and thorough prognosis, it is for the agency to choose between the contesting party's prognosis and its own."[34]

The D.C. Circuit has observed that, in cases in which the public availability of information is the basis for an agency's decision to disclose, the burden is on the party who claims that the information is public, and the justification of that position is "inevitably document-specific."[35]

The D.C. Circuit has remanded several reverse FOIA cases back to the agency to develop a more complete administrative record.[36] However, courts have denied agency

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[32] McDonnell Douglas Corp., 215 F. Supp. 2d at 204; accord Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C. Cir. 1997) (non-FOIA case); see Boeing Co. v. U.S. Dep't of the Air Force, 616 F. Supp. 2d 40, 44 (D.D.C. 2009) (noting that agency decision "is arbitrary when it provides no 'empirical support' for its assertions," or "when it suffers from 'shortfalls in logic and evidence,'" or "when it 'fail[s] to explain how [agency's] knowledge or experience supports'" the decision) (internal citations omitted); GS New Mkts. Fund, L.L.C. v. U.S. Dep't of the Treasury, 407 F. Supp. 2d 21, 24 (D.D.C. 2005) (stating that "agency record must at least contain a 'rational connection between the facts found and the choice made'" (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))).

[33] McDonnell Douglas Corp., 215 F. Supp. 2d at 205; accord CNA Fin. Corp., 830 F.2d at 1155 (deferring to agency when presented with "no more than two contradictory views of what likely would ensue upon release of [the] information").

[34] McDonnell Douglas Corp., 215 F. Supp. 2d at 205; accord CNA Fin. Corp., 830 F.2d at 1155 (upholding agency's release decision and finding that agency's "explanations of anticipated effects were certainly no less plausible than those advanced by" submitter).

[35] Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342-44 (D.C. Cir. 1989) (rejecting agency's argument that reverse FOIA plaintiff bears burden of proving "*non*-public availability" of information, holding that it is "far more efficient, and obviously fairer" for that burden to be placed on party who claims the information is public).

[36] See McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1167 (D.C. Cir. 1995) (remanding for district court to have benefit of "one considered and complete statement" of agency's position on disclosure); see also AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (reversing "with direction to remand" to agency to develop its rationale for not withholding); accord Ryan, L.L.C. v. U.S. Dep't of Interior, No. 22-10373, 2022 WL 17250186, at *2 (5th Cir. Nov. 28, 2022) (per curiam) (vacating and remanding lower court's decision because agency "didn't fully explore the record or the Supreme Court's decision in Food Marketing Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019)"); AAR Airlift Grp. v. U.S. Transp. Command, 161 F. Supp. 3d 37, 45 (D.D.C. 2015) (holding that

attempts to "remedy" "inadequacies in the record" by seeking a remand,[37] and have permanently enjoined agencies from releasing requested information when the agency "did not rebut any of the evidence produced" by the submitter, "did not seek or place in the record any contrary evidence, and simply ha[d] determined" that the evidence offered by the submitter was "insufficient or not credible."[38]

Conversely, an agency's disclosure determination was upheld when it was based on an administrative record that demonstrated that the agency "carefully considered the nature of the FOIA requests and the basis for the [submitter's] objections before rationally concluding that it should release portions of" requested records.[39] Similarly, when an agency provided a submitter with "numerous opportunities to substantiate its confidentiality claim," afforded it "vastly more than the amount of time authorized" by its regulations, and "explain[ed] its reasons for [initially] denying the confidentiality

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court could not support disclosure determination where current agency "explanation of its rationale is in tension with the contemporaneous record of its decision" because "[a]ny 'new materials' requested by the Court at this stage would more likely constitute 'new rationalizations' for the agency's decision that the Court may not consider on the present record, as opposed to being 'merely explanatory of the original record'" (quoting Env't Def. Fund, Inc. v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981))); Chem. Waste Mgmt., Inc. v. O'Leary, No. 94-2230, 1995 WL 115894, at *5 (D.D.C. Feb. 28, 1995) (returning case to agency where it "never did acknowledge," let alone "respond to," submitter's competitive harm argument).

[37] McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316, 319 (D.D.C. 1995) (ordering permanent injunction to "remain[] in place", because agency was "not entitled to a second bite of the apple just because it made a poor decision [for,] if that were the case, administrative law would be a never ending loop from which aggrieved parties would never receive justice").

[38] McDonnell Douglas Corp. v. NASA, No. 91-3134, slip op. 5-6 (D.D.C. Jan. 24, 1992) ("The Court finds that is classic arbitrary and capricious action by a government agency." (quoting transcript)); see, e.g., McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 241-42 (E.D. Mo. 1996) (declaring agency action to be "arbitrary and capricious" because its "finding that the documents [at issue] were required [to be submitted was] not supported by substantial evidence in the agency record," and elaborating that it was "not at all clear" that agency "even made a factual finding on [that] issue" and "to the extent" that it "did consider the facts of [the] case, it viewed only the facts favorable to its predetermined position"); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 13 (D.D.C. 1996) (declaring agency decision to be "not in accordance with law" when "[n]either the administrative decision nor the sworn affidavits submitted by the [agency] support the conclusion that [the submitter] was required to provide" requested information). See generally Env't Tech., Inc. v. EPA, 822 F. Supp. 1226, 1230 (E.D. Va. 1993) (granting submitter's motion for permanent injunction to stop release of information without addressing adequacy of agency record).

[39] GS New Mkts. Fund, L.L.C. v. U.S. Dep't of the Treasury, 407 F. Supp. 2d 21, 25 (D.D.C. 2005).

request," the court held that the agency had "acted appropriately by issuing its final decision denying much of the confidentiality request on the basis that it had not received further substantiation."[40] In fact, the court noted that the agency's acceptance of some of the submitter's claim for confidentiality "buttresse[d]" the conclusion that the agency made a rational decision.[41]

Executive Order 12,600

Executive Order 12,600 required federal agencies to "establish procedures to notify submitters of records containing confidential commercial information [as described in the order] . . . when those records are requested under the [FOIA]."[42] The executive order required, with certain limited exceptions,[43] that notice be given to submitters of confidential commercial information when they mark it as such,[44] or more significantly, whenever the agency "determines that it may be required to disclose" the requested information.[45] Under the executive order, "confidential commercial information" is defined as "records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), because disclosure could reasonably be expected to cause substantial

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[40] Alexander & Alexander Servs. Inc. v. SEC, No. 92-1112, 1993 WL 439799, at *5-6 & 13 n.5 (D.D.C. Oct. 19, 1993) (specifically rejecting submitter's contention that "it should have received even more assistance" from agency and holding that agency was "under no obligation to segregate the documents into categories or otherwise organize the documents for review" or "to compile additional indices for [submitter's] benefit"); see also CC Distribs. v. Kinzinger, No. 94-1330, 1995 WL 405445, at *3 n.2 (D.D.C. June 28, 1995) (ruling that agency's procedures were adequate when agency gave submitter "adequate notice" of existence of FOIA request, afforded it "numerous opportunities to explain its position," repeatedly advised it to state its objections "with particularity," and "at least, provided [submitter] with occasion to make the best case it could").

[41] Alexander & Alexander Servs., 1993 WL 439799, at *13 n.6.

[42] Exec. Order No. 12,600, 3 C.F.R. 235 (1988) (applicable to all Executive Branch departments and agencies), reprinted in 5 U.S.C. § 552 note (2018).

[43] Id. § 8, 3 C.F.R. 237 (listing six circumstances when notice is not necessary – for example, when agency determines that requested information should be withheld, or conversely, when it already is public or its release is required by law).

[44] Id. § 3, 3 C.F.R. 236 (establishing procedures for submitter marking of confidential commercial information).

[45] Id. § 1, 3 C.F.R. 235.

competitive harm."[46] Agency implementing regulations may define the term "confidential commercial information" without reference to competitive harm and may instead refer more generically to material that may be protected under Exemption 4.[47]

This executive order predated the decision of the Supreme Court in Food Marketing Institute v. Argus Leader Media,[48] which examined the definition of the term "confidential" under Exemption 4.[49] The Court's decision overturned the definition established in National Parks & Conservation Association v. Morton,[50] which had created the "substantial competitive harm" standard.[51] The Department of Justice has issued guidance on the Supreme Court's decision and its impact on the submitter notification procedures established by Executive Order 12,600.[52] In the wake of Argus Leader Media, agencies should use predisclosure notification procedures when necessary to seek the submitter's views on whether the two conditions that agencies should consider in determining whether information is "confidential" for the purposes of Exemption 4 are met.[53] (For further discussion of these conditions and of Exemption 4 following the Argus Leader Media decision, see Exemption 4.) Agencies are always welcome to seek advice through OIP's FOIA Counselor Service[54] if they have questions about the impact of the Court's decision.

When submitters are given notice under this procedure, they must be given a "reasonable period of time" to object to disclosure of any of the requested material.[55]

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[46] Id. § 2, 3 C.F.R. 236; see generally Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427 (2019) (overturning definition of "confidential" which had included "substantial competitive harm" standard).

[47] See, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.7(a)(1) (2023) (defining "confidential commercial information" as "commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under Exemption 4 of the FOIA").

[48] 588 U.S. 427 (2019).

[49] See Exec. Order No. 12,600, 3 C.F.R. 235 (1988).

[50] 498 F.2d 765 (D.C. Cir. 1974).

[51] See Argus Leader Media, 588 U.S. at 438-39.

[52] See OIP Guidance: Exemption 4 after the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media (posted 10/3/2019).

[53] See id.

[54] See OIP, FOIA Resources.

[55] Exec. Order No. 12,600 § 4, 3 C.F.R. 236-37 (1988).

Agencies must then give "careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue."[56]

If the agency decides to disclose the requested records, the agency must notify the submitter in writing and provide an explanation of "why the submitter's objections are not sustained."[57] Such a notification must be provided a "reasonable number of days prior to a specified disclosure date," which affords the submitter an opportunity to seek judicial relief.[58]

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[56] Id. § 5, 3 C.F.R. 237.

[57] Id.

[58] Id.