Exemption 3*

Exemption 3 of the Freedom of Information Act incorporates into the FOIA certain nondisclosure provisions that are contained in other federal statutes.[1] Exemption 3 allows for the withholding of information prohibited from disclosure by another federal statute provided that one of two disjunctive requirements are met: the statute either "(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, *or* (A)(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[2] The OPEN FOIA Act of 2009 established an additional requirement that any statute "enacted after the date of enactment of the OPEN FOIA Act of 2009, [must] specifically cite[] to this paragraph" to qualify under Exemption 3.[3]

Agencies are required each year to list all Exemption 3 statutes that they relied upon during the course of the year in their Annual FOIA Reports.[4] 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

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* This section primarily includes case law, guidance and statutes up until September 30, 2022. 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] 5 U.S.C. § 552(b)(3) (2018).

[2] Id.

[3] OPEN FOIA Act of 2009, Pub. L. No. 111-83, 123 Stat. 2184; see also OIP Guidance, Congress Passes Amendment to Exemption 3 of the FOIA (posted 3/10/2010) (noting that requirement to cite to Exemption 3 applies to statutes enacted after October 28, 2009).

[4] 5 U.S.C. § 552(e)(1)(B)(ii); see also OIP Guidance, 2008 Guidelines for Agency Preparation of Annual FOIA Reports (posted 05/22/2008).

decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld."[5]

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."[6] In Reporters Committee for Freedom of the Press v. DOJ,[7] 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.[8]

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[5] 5 U.S.C. § 552(e)(1)(B)(ii); see also OIP, FOIA Resources (linking to Exemption 3 resource materials, including chart of statutes litigated and found by federal courts to qualify under Exemption 3 and statutes upon which agencies reported having relied as Exemption 3 statutes in prior fiscal years).

[6] Reps. Comm. for Freedom of the Press v. DOJ, 816 F.2d 730, 734 (D.C. Cir. 1987); 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 Reps. Comm., 816 F.2d at 734)).

[7] 816 F.2d 730 (D.C. Cir. 1987).

[8] Id. at 735; see also, e.g., Pub. Citizen, 533 F.3d at 813-14; Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 37 (D.C. Cir. 2002) (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 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 statute in question's plain language, and noting that federal regulations, constituting agency's interpretation of statute, are not entitled to deference in determining whether statute qualifies under Exemption 3).

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,[9] but the statute must at least "explicitly deal with public disclosure."[10]

The D.C. Circuit 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 had lapsed.[11] In that situation, the D.C. Circuit stated that, although "FOIA undoubtedly demands a liberal presumption of disclosure, . . . [an] unduly strict reading of Exemption 3 strangles Congress's intent."[12]

Elsewhere, courts have looked to legislative history for guidance on how to interpret statutory terms or phrases subject to multiple interpretations.[13] 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 for litigation already commenced at the time the statute was enacted and have found

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[9] Reps. 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").

[10] 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").

[11] See Wis. Project on Nuclear Arms Control v. U.S. Dep't of Com., 317 F.3d 275, 281-82 (D.C. Cir. 2003) (rejecting as "formalistic logic" an argument that agency improperly withheld records pursuant to Exemption 3 statute that had lapsed at time that request was received, 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))); see also Sinkfield v. HUD, No. 10-885, 2012 WL 893876, at *3 n.3 (S.D. Ohio Mar. 15, 2012) ("Because plaintiff submitted his request when [41 U.S.C.] § 253b(m) was in effect and both parties treat that provision as the applicable statutory provision, the Court will likewise refer to § 253b(m) [currently codified as amended at 41 U.S.C. § 4702] as the applicable statute in this Order.").

[12] Wis. Project, 317 F.3d at 283.

[13] See Doe v. Veneman, 380 F.3d 807, 817 (5th Cir. 2004) (looking to legislative history of section 1491 of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136i-1) (reverse FOIA suit); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 145 (2d Cir. 1994) (looking to legislative history of section 21(f) of Federal Trade Commission Act, 15 U.S.C. § 57b-2(f)).

Exemption 3 statutes to apply retroactively to the requested records.[14] For any statute enacted after October 28, 2009, the text of Exemption 3 itself requires that the statute "specifically cite" to Exemption 3 to qualify as a withholding statute.[15]

In Founding Church of Scientology, Inc. v. Bell,[16] the D.C. Circuit noted that, by its very terms, "Exemption 3 is explicitly confined to material exempted from disclosure 'by statute.'"[17] As such, Exemption 3 is generally triggered only by federal statutes,[18] although

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[14] See City of Chicago v. U.S. Dep't of the Treasury, 423 F.3d 777, 779-82 (7th Cir. 2005) (holding that newly enacted appropriations legislation applies retroactively); Wis. Project, 317 F.3d at 280, 282-85 (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. § 4820(h)(1)] 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, 54 U.S.C. § 100707, to withhold information, even though statute was enacted after FOIA litigation commenced); Times Publ'g Co. v. U.S. Dep't of Com., 236 F.3d 1286, 1292 (11th Cir. 2001) (finding that agency properly relied upon section 12(c)(1) of Export Administration Act of 1979, 50 U.S.C. § 4820(h)(1), to withhold information, even though statute had lapsed at time of request, where Congress re-enacted statute during course of litigation); Long v. IRS, 742 F.2d 1173, 1183 (9th Cir. 1984) (permitting retroactive application where court determined "[t]hat Congress intended the [Economic Tax Recovery Act of 1981, 26 U.S.C. § 6103(b)(2)] 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); Nat'l Educ. Ass'n v. FTC, No. 79-959, 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), and concluding that "[t]he legislative history of the bill supports retroactive application of its provisions"). But see Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 49 n.1 (D.D.C. 1979) (finding that in order for information to be exempt from disclosure pursuant to Exemption 3, there must be an Exemption 3-qualifying statute in effect at the time that the FOIA request in question is filed, and characterizing agency's reliance on amended version of section 8 of Commodity Exchange Act, 7 U.S.C. § 12(a)(1), as "misplaced").

[15] 5 U.S.C. § 552(b)(3) (2018) ("(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph"); see Long v. ICE, 149 F. Supp. 3d 39, 54 (D.D.C. 2015) (finding that Federal Information Security Modernization Act of 2014, 44 U.S.C. § 3551 *et seq*. "does not enable Defendants to invoke Exemption 3" because it "was enacted after the OPEN FOIA Act of 2009" and does not specifically cite to Exemption 3).

[16] 603 F.2d 945 (D.C. Cir. 1979).

[17] Id. at 952.

[18] 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

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 contained in a federal statute.[19] Federal rules of procedure, which are promulgated by the Supreme Court, ordinarily do not qualify under Exemption 3.[20] When a rule of procedure is subsequently modified and thereby specifically enacted into law by Congress, however, it may qualify under the exemption.[21] At least two courts have held that evidence obtained by way of a self-executing Mutual Legal Assistance Treaty

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(D.D.C. Dec. 4, 1980) (declaring that "an Executive Order . . . is clearly inadequate to support reliance on Exemption 3").

[19] 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 of Civil Procedure 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 of 1979, 50 U.S.C. § 4820(h)(1)], was maintained by virtue of Executive Order 12,924" 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").

[20] 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 a statute under Exemption 3).

[21] See, e.g., Fund for Const. Gov't v. NARA, 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 "enacted [in] a modified version" by Congress); Durham v. U.S. Att'y. 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"); 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").

("MLAT") with a confidentiality clause between the United States and a foreign country qualifies for protection under Exemption 3.[22]

Once it is established that a statute is a nondisclosure statute and that it meets the standards for qualifying under Exemption 3, courts next examine whether the records in question fall within the withholding provision of the nondisclosure statute.[23] This, in turn, often will require courts to interpret the scope of the nondisclosure statute.[24] 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,[25] or broadly, pursuant to deferential standards of general

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[22] See Grynberg v. DOJ, 758 F. App'x 162, 164 (2d Cir. 2019) (affirming district court's determination that self-executing MLAT between the United States and Switzerland constitutes a withholding statute "within the meaning of Exemption 3" and covers "all evidence and information provided by either country"); Dongkuk Int'l, Inc. v. DOJ, 204 F. Supp. 3d 18, 21 (D.D.C. 2016) (concluding that "the MLAT between the United States and the Republic of Korea qualifies as a 'statute' for purposes of Exemption 3 and that the RFA [Request for Assistance Letter] is a 'particular type[ ] of matter[ ] to be withheld' under the MLAT").

[23] 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 and records in question must fall within statute's scope); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143 (2d Cir. 1994) (same); Aronson v. IRS, 973 F.2d 962, 964 (1st Cir. 1992) (same); Cal-Almond, Inc. v. USDA, 960 F.2d 105, 108 (9th Cir. 1992) (same); Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1284 (D.C. Cir. 1983) (same); Fund for Const. Gov't, 656 F.2d at 868 (same).

[24] See, e.g., A. Michael's Piano, Inc., 18 F.3d at 143-45 (interpreting section 21(f) of Federal Trade Commission Act, 15 U.S.C. § 57b-2(f)); Aronson, 973 F.2d at 965-66 (interpreting 26 U.S.C. § 6103); Anderson v. HHS, 907 F.2d 936, 950-51 (10th Cir. 1990) (interpreting 21 U.S.C. §§ 360j(c), 331(j), provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399i); Grasso v. IRS, 785 F.2d 70, 74-75 (3d Cir. 1986) (interpreting section 6103 of Internal Revenue Code, 26 U.S.C. § 6103); Medina-Hincapie v. Dep't of State, 700 F.2d 737, 742-44 (D.C. Cir. 1983) (interpreting section 222(f) of Immigration and Nationality Act, 8 U.S.C. § 1202(f)); Citizens for Resp. & Ethics in Wash. v. USPS, 557 F. Supp. 3d 145, 152-55 (D.D.C. 2021) (interpreting subsection 410(c)(2) of Postal Reorganization Act, 39 U.S.C. §§ 401-416).

[25] 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] was not designed to displace FOIA, which itself contains an adequate exception from disclosure for materials protected under other federal statutes," and noting "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] is a self-

administrative law.[26] Conversely, as the Court of Appeals for the Second Circuit observed in A. Michael's Piano, Inc. v. FTC,[27] "the Supreme Court has never applied a rule of [either] narrow or deferential construction to withholding statutes."[28] 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."[29] The D.C. Circuit has followed a similar approach by stating that its interpretation of a statute begins with "the plain meaning of the text."[30]

Judicial review of agency assertions of Exemption 3 under the FOIA is generally limited to determinations of whether the withholding statute qualifies as an Exemption 3 statute and whether the records fall within the statute's scope.[31] Courts occasionally

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contained scheme governing disclosure" and noting that "FOIA was designed to encourage open disclosure of public information"); cf. 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 applying more deferential standards of general administrative law when statute in question lay outside agency's area of expertise).

[26] 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 (6th Cir. 1983) (holding that agency determination that documents in dispute fell within withholding provision of Internal Revenue Code was "neither arbitrary nor capricious").

[27] 18 F.3d 138 (2d Cir. 1994).

[28] Id. at 144.

[29] Id.

[30] Elec. Priv. Info. Ctr. v. IRS, 910 F.3d 1232, 1241 (D.C. Cir. 2018) (quoting Blackman v. District of Columbia, 456 F.3d 167, 176 (D.C. Cir. 2006)); see also DiBacco v. U.S. Dep't of the Army, 926 F.3d 827, 836 (D.C. Cir. 2019) (concluding that the court must "interpret [the statute] to 'give reasonable effect to the congressional intent' expressed in the text of the statute" (quoting Halperin v. CIA, 629 F.2d 144, 151 (D.C. Cir. 1980))).

[31] See Aronson, 973 F.2d at 967 (noting 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"); Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd., 830 F.2d 331, 335 (D.C. Cir. 1987) (noting that "[d]e novo review ends with the finding that the particular matter sought . . . is covered by the

discuss the relationship between Exemption 3 and the FOIA's foreseeable harm provision but generally only to note that "[t]he FOIA harm provision does not apply,"[32] as there is no independent foreseeable harm requirement[33] when "'disclosure is prohibited by law.'"[34] With respect to subpart (A)(ii) 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 by the withholding statute itself.[35]

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; in one case it stated that "national security would be compromised and threats to the safety of individuals would arise if the court

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statute"); see also Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 775 (E.D. Pa. 2008) (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").

[32] Black Hills Clean Water All. v. U.S. Forest Serv., No. 20-5034, 2022 WL 2340440, at *9 (D.S.D. June 29, 2022).

[33] See, e.g., id.; Wash. Post Co. v. Special Inspector Gen. for Afg. Reconstruction, No. 18-2622, 2021 WL 4502106, at *22 (D.D.C. Sept. 30, 2021) ("[The] foreseeable harm requirement, 5 U.S.C. § 552(a)(8)(B), does not require 'disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under [FOIA] subsection (b)(3).'"); Ctr. for Investigative Reporting v. Dep't of Treasury, No. 19-8181, 2021 WL 229309, at *7 (N.D. Cal. Jan. 22, 2021) (explaining that "[5 U.S.C. §] 552(a)(8) explicitly does not require 'disclosure of information that is . . . otherwise exempted from disclosure under subsection (b)(3),'" and therefore, agency "need not show foreseeable harm to withhold documents under Exemption 3").

[34] Black Hills Clean Water All., 2022 WL 2340440, at *2 (quoting 5 U.S.C. § 552(a)(8)(A)(i)(II)).

[35] See Aronson, 973 F.2d at 966 (noting that "how an Exemption 3 statute applies to data that arguably fall within its reach, and whether specific circumstances counsel disclosure to further the statute's aim, are legal questions normally governed by that Exemption 3 statute, not by the FOIA itself"); Ass'n of Retired R.R. Workers, 830 F.2d at 336 (noting that "[t]he required scope of review is further narrowed in the case of statutes falling within [(A)(ii)] because the congressional intent to withhold is made manifest in the withholding statute itself[,]. . . . Hence the policing role assigned to the courts in a [(A)(ii)] case is reduced").

engaged in a specific discussion of the legal basis for Exemption 3's use in that exceptional case.[36]

Statutes Not Delineated as Subpart (A)(i) (Requiring Withholding) or Subpart (A)(ii) (Establishing Criteria or Designating Matters to Be Withheld)

A wide range of federal laws qualify as Exemption 3 statutes.[37] Courts often place emphasis on specifying whether a statute qualifies as an Exemption 3 statute under subpart (A)(i),[38] which encompasses statutes that require information to be withheld and leave the agency no discretion on the issue,[39] or to subpart (A)(ii),[40] which encompasses statutes that either provide criteria for withholding information or refer to particular

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[36] 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"); accord Haddam v. FBI, No. 01-434, 2004 U.S. Dist. LEXIS 32911, at *36-37 (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").

[37] See OIP, FOIA Resources (linking to Exemption 3 resource materials, including chart of statutes litigated and found by federal courts to qualify under Exemption 3 and chart of statutes which agencies report having relied upon as Exemption 3 statutes in prior fiscal years).

[38] 5 U.S.C. § 552(b)(3)(A)(i) (2018) (previously referred to as subpart A of Exemption 3).

[39] See, e.g., Corley v. DOJ, 998 F.3d 981, 985 (D.C. Cir 2021) (holding that 18 U.S.C. § 3509 qualifies as Exemption 3 statute, and specifying that statute qualifies under subpart (A)(i) because it "clearly 'requires that . . . matters be withheld from the public in such a manner as to leave no discretion on the issue'" (quoting 5 U.S.C. § 552(b)(3)(A)(i))); McGilvra v. NTSB, 840 F. Supp. 100, 102 (D. Colo. 1993) (holding that Transportation Safety Act of 1974, 49 U.S.C. § 1114(c), qualifies as Exemption 3 statute because statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue"); Young Conservative Found. v. U.S. Dep't of Com., No. 85-3982, 1987 WL 9244, at *3-4 (D.D.C. Mar. 25, 1987) (holding that International Investment Survey Act of 1976, 22 U.S.C. § 3104(c), qualifies as Exemption 3 statute because statute "leaves no discretion as to the release of the information").

[40] 5 U.S.C. § 552(b)(3)(A)(ii) (previously referred to as subpart B of Exemption 3).

matters to be withheld.[41] However, courts do not 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.[42]

For example, one district court has held that section 7332 of the Veterans Health Administration Patient Rights Statute,[43] 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 may be released, satisfies the requirements of Exemption 3, yet the court did not specify whether the statute qualifies under subpart (A)(i) or subpart (A)(ii) of Exemption 3.[44] Similarly, one district court found that 38 U.S.C. § 5705(a),[45] governing records created by the Department of Veterans Affairs as part of a medical quality-assurance program, qualifies as an Exemption 3 statute, without specifying whether the Exemption 3 protection was pursuant to subpart (A)(i) or (A)(ii).[46] Likewise, "[m]edical quality assurance records created by or for the Department of Defense"[47] have also been

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[41] See, e.g., Civ. Beat L. Ctr. for the Pub. Int. v. CDC, 929 F.3d 1079, 1084-85 (9th Cir. 2019) (holding that Public Health Security and Bioterrorism Preparedness and Response Act, 42 U.S.C. § 262a(h)(1), qualifies as Exemption 3 statute, and specifying that statute qualifies under subpart (A)(ii) because it exempts disclosure of certain "types of material to be withheld," namely, information relating to biological agents and toxins); Wash. Post Co. v. Special Inspector Gen. for Afg. Reconstruction, 486 F. Supp. 3d 141, 166 (D.D.C. 2020) (holding that 10 U.S.C. § 130b is Exemption 3 statute qualifying under subpart (A)(ii)); 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) (holding that Postal Reorganization Act, 39 U.S.C. § 410(c)(2), qualifies as Exemption 3 statute, and focusing analysis on particular criteria and particular types of matters to be withheld under statute), adopted, No. 99-2383 (D.D.C. Mar. 29, 2001).

[42] See, e.g., Black Hills Clean Water All. v. U.S. Forest Serv., No. 20-5034, 2022 WL 2340440, at *9 (D.S.D. June 29, 2022) (finding that Federal Cave Resources Protection Act, 16 U.S.C. § 4304, qualifies as Exemption 3 statute without specifying under which subpart it qualifies); Berger v. IRS, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (finding that "[31 U.S.C.] § 5319 qualifies as an exempting statute under Exemption 3," but failing to specify under which subpart); Nat'l Inst. of Mil. Just. 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); ACLU v. DOD, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same).

[43] 38 U.S.C. § 7332 (2018).

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

[45] (2018).

[46] 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).

[47] 10 U.S.C. § 1102(a) (2018).

found to qualify under Exemption 3, generally,[48] as have "[m]edical quality assurance records created by or for any Indian health program."[49]

The Court of Appeals for the Fifth Circuit has held that a provision of the Federal Insecticide, Fungicide, and Rodenticide Act[50] qualifies as an Exemption 3 statute, but it did not state whether that provision qualified under subpart (A)(i) or (A)(ii) of Exemption 3.[51] Similarly, a district court held that the confidentiality provision in the Federal Election Campaign Act[52] qualifies as an Exemption 3 statute, but did not designate that statute as qualifying pursuant to subpart (A)(i) or (A)(ii) of Exemption 3.[53] Another district court has held that 49 U.S.C. § 114(r) may serve as the basis under Exemption 3 for an agency refusing to confirm or deny whether an individual's name was on a Federal Watch List, as "Federal Watch Lists constitute 'Sensitive Security Information' that is exempted from disclosure," without specifying which subpart applied.[54] (For further

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[48] 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)(i) or (A)(ii)); 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 (quoting 10 U.S.C. § 1102(a))).

[49] N.Y. Times Co. v. HHS, 15 F.4th 216, 219-21 (2d Cir. 2021) (per curiam) (holding that because 25 U.S.C. § 1675 "'refers to particular types of [records] to be withheld,' 'medical quality assurance records' are 'specifically exempted from disclosure by statute' under FOIA's Exemption 3," but ultimately deciding that third-party prepared report evaluating HHS's management and administration did not fall within scope of Exemption 3 (quoting 25 U.S.C. § 1675 (2018))).

[50] 7 U.S.C. § 136i-1 (2018).

[51] Doe v. Veneman, 380 F.3d 807, 817-18 (5th Cir. 2004) (reverse FOIA suit).

[52] 52 U.S.C. § 30109(a)(12)(A) (2018) (formerly at 2 U.S.C. § 437g(a)(12)(A)).

[53] See Citizens for Resp. & Ethics in Wash. v. FEC, No. 04-1672, 2005 U.S. Dist. LEXIS 50761, at *6-7 (D.D.C. May 16, 2005).

[54] Skurow v. DHS, 892 F. Supp. 2d 319, 332 (D.D.C. 2012) (finding that "the TSA's *Glomar* response to plaintiff's FOIA request was entirely proper and squarely within the realm of its authority"); see also Magassa v. TSA, No. 19-01953, 2022 WL 971207, at *8 (D.D.C Mar. 31, 2022) (finding that "TSA properly responded to [plaintiff's] request for information about whether his name appeared on a watch list by refusing to confirm or deny that information pursuant to FOIA Exemption 3").

discussion of the use and origin of the "Glomar" response under Exemption 1, see Exemption 1, Glomar Response.)

Courts have held that 10 U.S.C. § 130c,[55] a statute that protects from disclosure certain "sensitive information of foreign governments,"[56] qualifies as an Exemption 3 statute but have not identified the statute as qualifying under subpart (A)(i) or (A)(ii) of Exemption 3.[57] Likewise, one district court has determined that the Archaeological Resources Protection Act of 1979,[58] a statute which prohibits disclosure of certain information concerning archaeological resources,[59] qualifies under Exemption 3, without specifying under which subpart the Act qualifies.[60] Also, a number of courts have determined that 18 U.S.C. § 798,[61] a provision of the Espionage Act which criminalizes the disclosure 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,"[62] qualifies as an Exemption 3 statute without identifying under which subpart it qualifies.[63]

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[55] (2018).

[56] 10 U.S.C. § 130c(a).

[57] See Nat'l Inst. of Mil. Just. 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); ACLU v. DOD, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same).

[58] 16 U.S.C. §§ 470aa-470mm (2018).

[59] Id. § 470hh(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").

[60] 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 the Archaeological Resources Protection Act of 1979" to protect document pertaining to Shenandoah National Park), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004).

[61] (2018).

[62] 18 U.S.C. § 798(a)(1).

[63] See Larson v. Dep't of State, 565 F.3d 857, 868-69 (D.C. Cir. 2009) (holding that 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))); ACLU v. Off. of the Dir. of Nat'l Intel., No. 10-4419, 2012 WL 1117114, at *4 (S.D.N.Y. Mar. 30, 2012) (holding that agency properly protected records concerning "'communications intelligence activities' of the

A court has held that a provision of the Fair Housing Act[64] that protects information concerning ongoing discrimination investigations qualifies as a "disclosure-prohibiting statute,"[65] but it did not specify either subpart of Exemption 3.[66] Similarly, the Supreme Court has held that the Census Act,[67] which requires that certain data be withheld, is an Exemption 3 statute without clearly specifying under which subpart the statute qualifies.[68] One district court held that the confidentiality provisions of the Gramm Leach Bliley Act of 1999[69] 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)(i) or (A)(ii) of Exemption 3.[70]

United States government" pursuant to 18 U.S.C. § 798 and Exemption 3 (quoting 18 U.S.C. § 798)); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 513 (S.D.N.Y. 2007) (holding that agency properly applied Exemption 3 and 18 U.S.C. § 798 to withhold classified documents containing "information disclosure of which would reveal . . . 'the intelligence activities of the United States'" (quoting 18 U.S.C. § 798)); Gilmore v. NSA, No. 92-3646, 1993 U.S. Dist. LEXIS 7694, at *26-27 (N.D. Cal. May 3, 1993) (determining that information on cryptography currently used by NSA is "integrally related" to intelligence gathering and thus protectable); Winter v. NSA, 569 F. Supp. 545, 546, 548 (S.D. Cal. 1983) (recognizing 18 U.S.C. § 798 as statute qualifying 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 . . . would expose the NSA's intelligence functions and activities").

[64] 42 U.S.C. § 3610(d) (2018).

[65] West v. Jackson, 448 F. Supp. 2d 207, 212 (D.D.C. 2006), summary affirmance granted, No. 06-5281, 2007 WL 1723362 (D.C. Cir. Mar. 6, 2007) (unpublished disposition).

[66] See id. at 212-13.

[67] 13 U.S.C. §§ 8(b), 9(a) (2018).

[68] Baldrige v. Shapiro, 455 U.S. 345, 359 (1982); see also Fair Lines Am. Found. Inc. v. U.S. Dep't of Com., No. 21-1361, 2022 WL 3042188, at *4-7 (D.D.C. Aug. 2, 2022) (deferring to the Supreme Court's determination in Baldrige, 455 U.S. at 355, that "portions of the Census Act defendants cite are an appropriate basis for the denial of a FOIA request under Exemption 3" without specifying under which subpart the statute qualifies).

[69] 15 U.S.C. § 6801 (2018).

[70] 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").

A district court has held that 18 U.S.C. § 701,[71] 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 qualifies.[72] Similarly, a district court has held that a statutory provision that prohibits disclosure of National DNA Index System records, except under four circumstances,[73] qualifies as an Exemption 3 statute without specifying the subpart under which the provision qualifies.[74] In another case, the same district court determined that section 306(i) of the Convention on Cultural Property Implementation Act,[75] which pertains to certain records submitted to the Cultural Property Advisory Committee or to the United States and certain other individuals, also qualifies under Exemption 3 without clearly identifying the subpart or subparts under which the section qualifies.[76]

A district court has found that 42 U.S.C. § 300aa-12(d)(4)(A),[77] a provision of the National Childhood Vaccine Injury Act of 1986 prohibiting the disclosure of information provided to a special master of the court in a proceeding on a petition without written consent of the person who submitted the information, qualified as an Exemption 3 statute.[78] The court did not specify whether it considered 42 U.S.C. § 300aa-12(d)(4)(A) to qualify under subpart (A)(i) of Exemption 3, based on the provision's prohibition on disclosure of the information, or subpart (A)(ii) of Exemption 3, based on the criteria for

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[71] (2018).

[72] See Jones v. IRS, No. 06-322, 2008 WL 1901208, at *3 (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).

[73] 42 U.S.C. § 14132(b)(3) (2012) (transferred to 34 U.S.C. § 12592(b)(3) (2018)).

[74] See Moore v. Nat'l DNA Index Sys., 662 F. Supp. 2d 136, 140 (D.D.C. 2009) (finding that, because requester did not fall within statutorily enumerated situations, "the FOIA forbids disclosing to [requester] the records he seeks").

[75] 19 U.S.C. § 2605(i) (2018).

[76] See Ancient Coin Collectors Guild v. Dep't of State, 866 F. Supp. 2d 28, 32 (D.D.C. 2012) (finding portions of emails between agency employee and member of private sector qualified under 19 U.S.C. § 2605(i)(1) and were "appropriately withheld under Exemption 3(b)," but quoting subparts (A)(i) and (A)(ii) of Exemption 3).

[77] (2018).

[78] Long v. DOJ, 778 F. Supp. 2d 222, 234 (N.D.N.Y. 2011).

withholding (specifically, failure to provide written consent of the individual who submitted the information).[79]

A district court has held that 7 U.S.C. § 2018(c),[80] which calls for regulations to limit the disclosure of certain information provided by certain applicants to the Supplemental Nutrition Assistance Program and provides that "[a]ny person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law . . . any information obtained under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both,"[81] qualifies "as a withholding statute under [E]xemption 3" without identifying the Exemption 3 subpart under which the statute qualifies.[82] On appeal, the Court of Appeals for the Eighth Circuit left undisturbed the district court's finding that 7 U.S.C. § 2018(c) qualifies as an Exemption 3 statute, but it found that the district court erred in its determination that the records sought by plaintiff qualified for withholding under that statute.[83]

One district court has determined that the Protected National Security Documents Act of 2009 ("PNSDA"),[84] which prohibits from disclosure certain photographs related to the treatment of individuals engaged, captured, or detained after September 11, 2001, is a statute qualifying under Exemption 3 without explicitly specifying under which subpart of Exemption 3 it qualifies.[85] The PNSDA requires that for the Government to withhold

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[79] See id. (finding that plaintiffs did not have written consent from individuals who submitted vaccine information and, therefore, the information was exempt under Exemption 3).

[80] (2018).

[81] 7 U.S.C. § 2018(c).

[82] Argus Leader Media v. USDA, 900 F. Supp. 2d 997, 1006 (D.S.D. 2012), rev'd on other grounds, 740 F.3d 1172 (8th Cir. 2014).

[83] Argus Leader Media v. USDA, 740 F.3d 1172, 1175-76 (8th Cir. 2014) (holding that dollar amounts collected by retailers participating in Supplemental Nutrition Assistance Program ("SNAP") did not qualify for withholding because such information was not submitted by retailers to allow USDA to determine whether retailers should qualify for participation in SNAP program, as required by withholding provision of 7 U.S.C. § 2018(c)).

[84] Protected National Security Documents Act of 2009, Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 565, 123 Stat. 2142 (2009).

[85] ACLU v. DOD, 229 F. Supp. 3d 193, 204-06 (S.D.N.Y. 2017), rev'd on other grounds, 901 F.3d 125, 133 (2d Cir. 2018) (reversing district court's decision requiring CIA to produce certain photographs and remanding with directions to enter judgment for CIA, assuming, without finding, that the de novo standard of review for qualifying Exemption 3 statute applied, and rejecting district court's holding that declaration submitted by CIA in support

a photograph under that statute, the Secretary of Defense must certify that "disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."[86]

Subpart (A)(i): Statutes Requiring Withholding

Many statutes have been held to qualify as Exemption 3 statutes under the exemption's first subpart, (A)(i), which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue."[87] A primary example is Rule 6(e) of the Federal Rules of Criminal Procedure, which regulates disclosure of matters occurring before a grand jury[88] and has been found to qualify as a subpart (A)(i) statute.[89] Courts have found that this rule satisfies the basic "statute" requirement of Exemption 3 because Rule 6(e) was amended by Congress in 1977.[90] 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."[91]

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of its certification that releasing photographs would endanger the United States lacked sufficient information to be "logical and plausible").

[86] § 565, 123 Stat. at 2184-85.

[87] 5 U.S.C. § 552(b)(3)(A)(i) (2018) (previously referred to as subpart A of Exemption 3).

[88] Fed. R. Crim. P. 6(e), enacted by Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319.

[89] See, e.g., Fund for Const. Gov't v. NARA, 656 F.2d 856, 867 (D.C. Cir. 1981) (holding that Rule 6(e)'s "ban on disclosure is for FOIA purposes absolute and falls within subpart (A)[(i)] of Exemption 3").

[90] See, e.g., id. (concluding that Rule 6(e) of Federal Rules of Criminal Procedure satisfies Exemption 3's statute requirement because Rule 6(e) was amended and enacted by Congress); Bretti v. DOJ, 639 F. Supp. 2d 257, 265 (N.D.N.Y. 2009) (stating that "[a]lthough Federal Rules of Criminal Procedure do not generally fall under the scope of the statutory exemption, Rule 6(e) does because Congress 'positively enacted' it so that it falls within the exemption provided by 5 U.S.C. § 552(b)(3)" (quoting Fund for Const. Gov't, 656 F.2d at 867)); 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" (citing McDonnell v. United States, 4 F.3d 1227, 1247 (3d Cir. 1993))); Durham v. U.S. Att'y. 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").

[91] Iglesias v. CIA, 525 F. Supp. 547, 556 (D.D.C. 1981); cf. Sorin v. DOJ, 758 F. App'x 28, 31-32 (2d Cir. 2018) (protecting under Rule 6(e) and Exemption 3 "(1) communications from a

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. NARA,[92] 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, "[i]t 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.'"[93] 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.[94]

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law firm to federal prosecutors, accompanying the production of documents requested by grand jury subpoena and discussing the contents of specific subpoenas; and (2) communications from those federal prosecutors to that law firm referencing specific grand jury subpoenas" (citing agency declaration)); Kuzma v. DOJ, 692 F. App'x 30, 33, 34 (2d Cir. 2017) (per curiam) (rejecting plaintiff's argument, first raised on appeal, that courts' authority to release grand jury information "under exceptional circumstances" given their supervisory authority over grand juries they have empaneled meant that the district court should have ordered the grand jury materials released, holding instead that such authority "to release grand jury material does not mean these materials do not fall within Rule 6(e)'s protection and so are not properly withheld pursuant to Exemption 3"); 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 grounds for disclosure of Grand Jury materials under Rule 6(e)(3)"); 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"); McQueen v. United States, 179 F.R.D. 522, 528-30 (S.D. Tex. May 6, 1998) (holding that all matters occurring before grand jury are protected even if records predate grand jury investigation), aff'd per curiam, 176 F.3d 478 (5th Cir. 1999) (unpublished table decision).

[92] 656 F.2d 856 (D.C. Cir. 1981).

[93] Id. at 869 (quoting SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1382 (D.C. Cir. 1980)); see also Dorsey v. EOUSA, No. 15-5104, 2016 WL 1272941, at *1 (D.C. Cir. Feb. 10, 2016) (affirming district court's action finding that agency properly withheld grand jury material that would reveal identities of jurors and witnesses, scope of grand jury investigation, source of evidence, and evidence presented to grand jury).

[94] See, e.g., Liounis v. Krebs, No. 18-5351, 2019 WL 7176453, at *1-2 (D.C. Cir. Dec. 19, 2019) (per curiam) (finding that district court properly held that Rule 6(e) prohibited disclosure of grand jury transcript and grand jury exhibits); Murphy v. EOUSA, 789 F.3d 204, 211-12 (D.C. Cir. 2015) (affirming district court's action and finding that agency properly protected

dates and times of day that grand jury met, which could reveal complexity and scope of grand jury's investigation, and grand jury foreperson's name and signature, which would reveal identity of a juror, pursuant to Exemption 3); Covington v. McLeod, No. 09-5336, 2010 WL 2930022, at *1 (D.C. Cir. July 16, 2010) (per curiam) (affirming district court's action and finding that agency properly protected grand jury minutes and third party's proffer statement pursuant to Exemption 3); Leon, 250 F. App'x at 509 (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) (identifying grand jury exhibits, documents containing testimony, and other material "directly associated with grand jury proceedings" as appropriate for Exemption 3 withholding pursuant to Rule 6(e)); 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 a witness before a grand jury and a discussion of that witness'[s] testimony" are exempt from disclosure, as they "fall[] squarely within" Rule 6(e)'s prohibition); Rivera-Rodriguez v. DOJ, No. 19-02510, 2022 WL 136793, at *1-2 (D.D.C. Jan. 14, 2022) (determining, after reviewing agency's updated Vaughn Index, that agency properly applied Rule 6(e) to withhold "Grand Jury Minutes," "Grand Jury Voting Records," "Record of Concurring Grand Jurors," and "Grand Jury Instructions Charges" because such records could reveal secret aspects of grand jury's investigation); Elec. Priv. Info. Ctr. v. DOJ, 490 F. Supp. 3d 246, 259 (D.D.C. 2020) (affirming agency's use of Rule 6(e) to withhold grand jury materials even where identity of "a grand jury witness may have been previously disclosed," because "'[c]itations to grand jury testimony would necessarily divulge the substance of the testimony,' . . . and the disclosure of any additional information would reveal more than what is publicly available" (quoting Wolf v. CIA , 473 F.3d 370, 378 (D.C. Cir. 2007))), aff'd in part, rev'd in part & remanded on other grounds, 18 F.4th 712 (D.C. Cir. 2021); Kortlander v. Bureau of Land Mgmt., 816 F. Supp. 2d 1001, 1015-16 (D. Mont. 2011) (holding that "grand jury documents or information obtained from grand jury subpoenas will reveal the nature of the information before a federal grand jury, including interviews of witnesses disclosing information in confidence about documents obtained through grand jury subpoenas, grand jury exhibit lists, and e-mail documents obtained through grand jury subpoenas," and finding such materials properly withheld under Exemption 3).

In its scrutiny of the scope of Rule 6(e) in Senate of Puerto Rico v. DOJ,[95] 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).[96] 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."[97] As the D.C. Circuit explained in Stolt-Nielsen Transportation Group Ltd. v. United States,[98] "the government may not bring information into the protection of Rule 6(e) and thereby into the protection afforded by Exemption 3, simply by submitting it as a grand jury exhibit."[99] Further, as the D.C. Circuit emphasized in Washington Post Co.

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[95] 823 F.2d 574 (D.C. Cir. 1987).

[96] Id. at 583-84; see also Wash. Post Co. v. DOJ, 863 F.2d 96, 100 (D.C. Cir. 1988) (finding that record created before grand jury was impaneled 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"); 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 investigation" and "the connection to the investigation must be apparent, especially for documents created independent of and extrinsic to the grand jury investigation").

[97] Senate of P.R. v. DOJ, 823 F.2d 574, 584 (D.C. Cir. 1987); see also Bartko v. DOJ, 898 F.3d 51, 73 (D.C. Cir 2018) (remanding to district court to "answer whether the documents on the thumb drive themselves 'would have revealed something about the workings of the grand jury had they been released with other requested documents'" (quoting Labow v. DOJ, 831 F.3d 523, 530 (D.C. Cir. 2016))); Sussman v. USMS, 494 F.3d 1106, 1113 (D.C. Cir. 2007) (vacating district court's finding that USMS 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, 1350 (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)); Abakporo v. EOUSA, No. 18-846, 2019 WL 1046661, at *2 (D.D.C. Mar. 5, 2019) (finding that defendant "has not demonstrated that the dates the grand jury's term was extended, or any court orders authorizing those extensions, 'tend to reveal some secret aspect of the grand jury's investigation' so that they are covered by Exemption 3" (quoting Lopez, 393 F.3d at 1349)).

[98] 534 F.3d 728 (D.C. Cir. 2008).

[99] 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").

v. DOJ,[100] the required nexus must be apparent from the information itself, and "the government cannot immunize [it] by publicizing the link."[101]

Courts have required agencies to adequately document and support their determinations that disclosure of the records in question would reveal a secret aspect of the grand jury proceedings.[102] Additionally, in order to document and support agencies' determinations, the District Court for the District of Columbia has held that agency FOIA personnel necessarily should be afforded unrestricted access to grand jury-protected information.[103]

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[100] 863 F.2d 96 (D.C. Cir. 1988).

[101] Id. at 100; see also Bagwell v. DOJ, No. 15-531, 2022 WL 602448, at *4-5 (D.D.C. Mar. 1, 2022) (denying blanket withholding of over 11,000 pages of grand jury materials because Rule 6(e) "does not 'draw[] "a veil of secrecy . . . over *all* matters occurring in the world that happen to be investigated by a grand jury"'" (quoting Lopez, 393 F.3d at 1349) (emphasis added) and outlining requirement that "material must be - without the government saying so - 'identifiable as materials sought by the grand jury'" to qualify for Rule 6(e) withholding (quoting Bartko, 898 F.3d at 73)).

[102] See, e.g., Sussman, 494 F.3d at 1113 (finding that agency failed to adequately meet its burden of demonstrating that certain withheld records would "'tend to reveal some secret aspect of the grand jury's investigation'" (quoting Senate of P.R., 823 F.2d at 582)); Lopez, 393 F.3d at 1349-51 (refusing to endorse categorical withholding of dates of preliminary witness interviews under Rule 6(e) and finding that agency failed to demonstrate a "'nexus between disclosure and revelation of a protected aspect of the grand jury's investigation'" (quoting Senate of P.R., 823 F.2d at 584)); Rivera Rodriguez v. DOJ, No. 19-02510, 2020 WL 2079442, at *2 (D.D.C. Apr. 30, 2020) (finding that agency may take "categorical approach" within Vaughn index listing of grand jury materials, but overly broad category descriptions can prevent court's "meaningful inquiry" as to applicability of Exemption 3 to responsive records); Abakporo, 2019 WL 1046661, at *2 (finding that agency failed to adequately meet its burden when it had "not demonstrated that the dates the grand jury's term was extended, or any court orders authorizing those extensions, 'tend to reveal some secret aspect of the grand jury's investigation' so that they are covered by Exemption 3" (quoting Lopez, 393 F.3d at 1349)); 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); Hronek v. DEA, 15 F. Supp. 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).

[103] 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 FOIA Update, Vol. XIX, No. 3 (advising agencies 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 the [FOIA]").

The Court of Appeals for the First Circuit, in Church of Scientology International v. DOJ,[104] took a different approach from the D.C. Circuit and established different standards for certain categories of grand jury records.[105] Specifically, 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."[106] 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)."[107] 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.[108]

The Court of Appeals for the Ninth Circuit has held that a provision of the Ethics in Government Act of 1978,[109] protecting the financial disclosure reports of certain government employees, meets the requirements of subpart (A)(i).[110] Another provision

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[104] 30 F.3d 224 (1st Cir. 1994).

[105] See id. at 235-36.

[106] Id. at 235; accord Rugiero v. DOJ, 257 F.3d 534, 549 (6th Cir. 2001) (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").

[107] Church of Scientology Int'l, 30 F.3d at 235 (quoting in part United States v. Dynavac, Inc., 6 F.3d 1407, 1412 (9th Cir. 1993)); accord Widi v. McNeil, No. 12-00188, 2016 WL 4394724, at *23 (D. Me. Aug. 16, 2016) (finding "that exhibits, by virtue of their status as exhibits, are not ipso facto entitled to protection" and "'the government needs to provide some basis for a claim that releasing them will implicate the secrecy concerns protected by Rule (6)(e)'" (quoting Dynavac, 6 F.3d at 1412)).

[108] Church of Scientology Int'l, 30 F.3d at 236.

[109] 5 U.S.C. app. 4 § 107 (2018).

[110] Meyerhoff v. EPA, 958 F.2d 1498, 1500,1502 (9th Cir. 1992) (finding that agency properly withheld "conflict of interest records under Exemption 3," and specifying that 5 U.S.C. app. 4 § 107 "qualifies as a withholding statute under Exemption 3(A)[(i)] because it leaves no discretion to the agencies on whether the confidential reports can be disclosed to the public"); accord Seife v. NIH, 874 F. Supp. 2d 248, 254 (S.D.N.Y. 2012) (finding that agency

of the Ethics in Government Act, providing for the disclosure of financial disclosure reports of certain other government employees only when particular requirements were met,[111] was also found to qualify as an Exemption 3 statute under subpart (A)(i) by one district court.[112] Where it was uncontested that the requester did not comply with the requirements of the Ethics in Government Act, the district court held that "the [agency] properly withheld the record pursuant to Exemption 3," noting that "[t]he requester cannot use the FOIA to circumvent the express requirements of the [Ethics in Government Act]."[113]

Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964[114] have also been held to meet the subpart (A)(i) requirement because they allow the EEOC no discretion to publicly disclose matters pending before the agency.[115] Similarly, a provision

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properly applied Exemption 3 pursuant to 5 U.S.C. app. 4 § 107(a) to withhold "Form 450s," noting that "[section] 107(a)(2) . . . leaves no discretion to agencies as to whether they may reveal the contents of the Form 450s," thus referencing language of subpart (A)(i) without specifically stating that § 107(a) qualifies under that subpart of Exemption 3); Concepcion v. FBI, 606 F. Supp. 2d 14, 33-34 (D.D.C. 2009) (finding that "EOUSA properly withheld the two Conflict of Interest Certification reports under Exemption 3 [and 5 U.S.C. app. 4 § 107(a)]," 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)(i) of Exemption 3 without expressly stating that statute qualifies as subpart (A)(i) 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 § 107(a), but failing to identify under which subpart § 107(a) qualifies).

[111] Ethics in Government Act § 205 (as of Jan. 1, 1991, repealed and replaced by the Ethics Reform Act of 1989, Pub. L. 101-194, § 105, 103 Stat. 1716, 1737-39, codified as amended at 5 U.S.C. app. § 105, which applies to a broader group of officials).

[112] See Church of Scientology v. IRS, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993) (noting statute's requirement that in order to obtain access, requester must provide "a written application stating 'the person's name, occupation and address; the name and address of any other person or organization on whose behalf the inspection or copy is requested; and that such person is aware of the prohibitions in obtaining or use of the report'" (quoting Ethics in Government Act § 205(a))).

[113] Id. at 1152.

[114] 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (2018).

[115] 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

of the Bank Secrecy Act,[116] the statute governing records pertaining to Currency Transaction Reports and monetary instruments transactions, has been found to meet the requirements of subpart (A)(i),[117] although in some cases courts have not specified which subpart of Exemption 3 they were applying.[118] Additionally, the D.C. District Court upheld an agency's determination that 28 U.S.C. § 652(d) qualifies as an Exemption 3 statute because it requires a district court to "prohibit disclosure of confidential dispute resolution communications," noting that "the ban on disclosure of these communications evidences a congressional determination that they 'ought to be kept in confidence.'"[119]

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information to the plaintiff," and expressly rejecting argument that statute did not qualify under subpart (A)(i) of Exemption 3); 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 EEOC investigation materials will be denied access," because Exemption 3 incorporates confidentiality provisions of Civil Rights Act sections 706(b) and 709(e)).

[116] 31 U.S.C. § 5319 (2018).

[117] See Sciba v. Bd. of Governors of the Fed. Rsrv. Sys., No. 04-1011, 2005 WL 3201206, at *5 (D.D.C. Nov. 4, 2005) (finding that "[agency] correctly asserts Exemption 3(A)[(i)] 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"); see also Bloomer v. DHS, 870 F. Supp. 2d 358, 365 (D. Vt. 2012) (finding that "[t]he Bank Secrecy Act is properly within the bounds of Exemption 3 because it 'mandates withholding in such a manner as to leave no discretion on the issue'" and concluding that agency properly protected information concerning "current transaction reports" pursuant to Exemption 3 and 31 U.S.C. § 5319 (quoting Berger v. IRS, 487 F. Supp. 2d 482, 496 (D.N.J. 2007))); Berger v. IRS, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (finding information concerning cash transactions properly protected under Bank Secrecy Act where "[p]laintiffs agree that [31 U.S.C.] § 5319 meets the criteria of Exemption 3 because it mandates withholding in such a manner as to leave no discretion on the issue to the agency").

[118] See, e.g., Stein v. SEC, 266 F. Supp. 3d 326, 351 (D.D.C. 2017) (holding that suspicious activity reports are protected from disclosure under 31 U.S.C. § 5319 pursuant to Exemption 3 but without specifying which subpart); Linn v. DOJ, No. 92-1406, 1995 WL 631847, at *30 (D.D.C. Aug. 22, 1995) (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. 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)(i) or (A)(ii)), 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)(i) or subpart (A)(ii)).

[119] Yelder v. DOD, 577 F. Supp. 2d 342, 346 (D.D.C. 2008) (finding agency properly applied Exemption 3 and 28 U.S.C. § 652(d) to withhold confidential letter to mediator).

The International Investment Survey Act of 1976[120] has been held to be what is now designated as a subpart (A)(i) statute,[121] as have two Consumer Product Safety Act provisions[122] that the Court of Appeals for the Sixth Circuit found to satisfy subpart (A)(i)'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.'"[123] Similarly, the D.C. District Court determined that a provision of the Confidential Information Protection and Statistical Efficiency Act[124] "requires the withholding [of] unaggregated data pertaining to individual farmers, ranchers, and other providers of data . . . 'in such a manner as to leave no discretion on the issue.'"[125]

A section of the Transportation Safety Act of 1974,[126] which states that the NTSB shall withhold from public disclosure cockpit voice recordings associated with accident investigations, has been found to fall within Exemption 3's first subpart.[127] Similarly, information that was obtained from death certificates provided by state agencies and contained in the SSA's Numident system has been held exempt from disclosure on the basis of subpart (A)(i) on the grounds that the language of the statute[128] "leaves no room

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[120] 22 U.S.C. § 3104(c) (2018).

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

[122] § 6(a)(2), (b)(5) (currently codified as amended at 15 U.S.C. § 2055(a)(2), (b)(5) (2018)).

[123] Mulloy v. Consumer Prods. Safety Comm'n, No. 85-3720, 1986 WL 17283, at *1 (6th Cir. Jul. 22, 1986) (per curiam) (unpublished table decision) (quoting 5 U.S.C. § 552b(3)(A)(i)).

[124] 7 U.S.C. § 2276(a)(2) (2018).

[125] Strunk v. U.S. Dep't of the Interior, 752 F. Supp. 2d 39, 44-45 (D.D.C. 2010) (quoting 5 U.S.C. § 552b(3)(A)(i)).

[126] 49 U.S.C. § 1114(c) (2018).

[127] See Wolk L. Firm v. NTSB, 392 F. Supp. 3d 514, 522 (E.D. Pa. 2019) (finding that § 1114(c)(1) is an Exemption 3 statute because "[b]y its plain terms, [it] prohibits the NTSB from disclosing ['publicly any part of a cockpit voice or video recording or transcript of oral communications by and between flight crew members and ground stations related to an accident or incident investigated by the [NTSB]'], and leaves the NTSB with no discretion on the issue" (quoting § 1114(c)(1))); see also McGilvra v. NTSB, 840 F. Supp. 100, 102 (D. Colo. 1993) (finding statute falls under Exemption 3's first subpart and citing prior codification of § 1114(c), formerly at 49 U.S.C. app § 1905).

[128] 42 U.S.C. § 405(r) (2018).

for agency discretion."[129] Additionally, section 1619 of the Food, Conservation, and Energy Act of 2008,[130] which pertains to agricultural and geospatial information, has been found to qualify as a subpart (A)(i) statute inasmuch as "[section 1619] leaves no discretion to the agency as to the disclosure of this type of information."[131]

In a decision construing the application of the identical Exemption 3 language of the Government in the Sunshine Act[132] to the Defense Nuclear Facilities Safety Board Act,[133] the D.C. Circuit held that sections 315(a) and 315(g) of the Defense Nuclear Facilities Safety Board Act allow no discretion regarding the release of the Board's proposed recommendations, thereby meeting the requirement of Exemption 3 subpart (A)(i)[134]

Subpart (A)(ii): Statutes Establishing Criteria for Withholding or Referring to Types of Matters to Be Withheld

Exemption 3 also 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."[135] In other words,

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[129] Int'l Diatomite Producers Ass'n v. SSA, No. 92-1634, 1993 WL 137286, at *3 (N.D. Cal. Apr. 28, 1993).

[130] 7 U.S.C. § 8791 (2018).

[131] Zanoni v. USDA, 605 F. Supp. 2d 230, 237-38 (D.D.C. 2009) (determining that agency properly applied Exemption 3 to protect National Premises Information Repository information); see also Telematch, Inc. v. USDA, 45 F.4th 343, 349 (D.C. Cir. 2022) (finding that "[f]arm and tract numbers [that] identify a specific area of farmland in a specific location . . . serve as a shorthand reference to individual plots of land . . . [which] are analogous to a street address or latitude and longitude coordinates . . . [and] are therefore 'geospatial information' properly withheld under section 8791(b)(2)(B)"); Ctr. for Biological Diversity v. USDA, 626 F.3d 1113, 1118 (9th Cir. 2010) (finding that "GPS coordinates are exempt from disclosure under FOIA because [§] 8791 meets the requirements of Exemption 3, [and] applies to the GPS coordinates at issue," without specifying under which Exemption 3 subpart statute qualifies); Audubon Soc'y v. U.S. Nat. Res. Conservation Serv., 841 F. Supp. 2d 1182, 1185-86, 1188 (D. Or. 2012) (assuming without deciding that section 8791 qualifies under Exemption 3 without identifying under which subpart, and ultimately concluding that agency improperly withheld information under section 8791).

[132] 5 U.S.C. § 552(b)(3) (2018).

[133] 42 U.S.C. § 2286d(b), (h)(3) (2018).

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

[135] 5 U.S.C. § 552(b)(3)(A)(ii) (2018) (previously referred to as subpart B of Exemption 3).

where "[subp]art A[(i)] [of Exemption 3] embraces only those statutes leaving no room for administrative discretion to disclose," federal statutes allowing for administrative discretion may qualify under subpart (A)(ii) 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."[136]

For example, a provision of the Consumer Product Safety Act[137] which protects certain consumer product information obtained by the Consumer Product Safety Commission, has been held by the Supreme Court to set forth sufficiently definite withholding criteria for it to fall within the scope of what is now subpart (A)(ii) of Exemption 3.[138] 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[139] has been held to meet the requirements of subpart (A)(ii) by referring to particular types of matters to be withheld.[140]

Section 777 of the Tariff Act of 1930, which governs the withholding of certain "proprietary information,"[141] has been held to refer to particular types of information to be withheld and thus to be a subpart (A)(ii) statute.[142] Section 12(d) of the Railroad Unemployment Insurance Act[143] refers to particular types of matters to be withheld – specifically, information which would reveal employees' identities – and thus has been held to satisfy subpart (A)(ii).[144] Similarly, 39 U.S.C. § 410(c)(2),[145] a provision of the Postal Reorganization Act which governs the withholding of "information of a commercial

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[136] Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984).

[137] 15 U.S.C. § 2055(b)(1) (2018).

[138] See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 122-23 (1980).

[139] 15 U.S.C. § 2055(b)(5).

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

[141] 19 U.S.C. § 1677f (2018).

[142] See Labow v. DOJ, 831 F.3d 523, 528 (D.C. Cir. 2016) (citing Mudge Rose Guthrie Alexander & Ferdon v. U.S. Int'l Trade Comm'n, 846 F.2d 1527, 1530 (D.C. Cir. 1988)).

[143] 45 U.S.C. § 362(d) (2018).

[144] 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. Emps. v. R.R. Ret. Bd., No. 87-117, 1991 U.S. Dist. LEXIS 21923, at *6-8 (N.D. Ohio Feb. 20, 1991).

[145] (2018).

nature . . . which under good business practice would not be publicly disclosed,"[146] has been held to refer to particular types of matters to be withheld and thus to be a subpart (A)(ii) statute.[147]

Section 12(c)(1) of the Export Administration Act of 1979,[148] 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

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[146] 39 U.S.C. § 410(c)(2).

[147] See Wickwire Gavin, P.C. v. USPS, 356 F.3d 588, 589 (4th Cir. 2004) (holding that agency properly withheld "quantity and pricing" information related to contract for which requester was unsuccessful bidder); Reid v. USPS, No. 05-294, 2006 WL 1876682, at *7-9 (S.D. Ill. July 5, 2006) (finding customer's postage statements and agency's daily financial information 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 because it falls within agency's regulatory definition of "information of a commercial nature"); 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 (A)(ii) of Exemption 3 but finding that contract 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)[(A)(ii)]," but concluding that list of names and duty stations of postal employees did not qualify as "commercial information"); cf. Carlson v. USPS, 504 F.3d 1123, 1127, 1130 (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); Am. Oversight v. USPS, No. 20-2580, 2021 WL 4355401, at *4-7 (D.D.C. Sept. 23, 2021) (finding that USPS's analysis of whether redacted calendar entries constitute "commercial information" under the Postal Reorganization Act was flawed); Dorsey & Whitney, LLP v. USPS, 402 F. Supp. 3d 598, 602 (D. Minn. 2019) (noting that "[m]ultiple courts have recognized that the good business exception is an applicable statute under Exemption 3 to FOIA"); Am. Postal Workers Union, AFL-CIO v. USPS, 742 F. Supp. 2d 76, 80-83 (D.D.C. 2010) (finding Pay for Performance program information properly protected without identifying under which Exemption 3 subpart 39 U.S.C. § 410(c)(2) qualifies).

[148] 50 U.S.C. § 4614, repealed by the Export Control Reform Act of 2018, Pub. L. 115-232, Div. A, Title XVII, § 1766(a), 132 Stat. 2232 (Aug. 13, 2018); see Export Control Reform Act of 2018, 50 U.S.C. § 4820(h)(1)(A) (2018) (replacing Export Administration Act of 1979 and maintaining analogous confidentiality provision governing disclosure of information obtained from export licenses).

subpart (A)(ii) and thus has been found to qualify as an Exemption 3 statute.[149] Similarly, the Court of Appeals for the District of Columbia Circuit has found that section 203(a)(1) of the International Emergency Economic Powers Act,[150] 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 any periods of time where the provisions of the Act are allowed to lapse, also qualifies under Exemption 3.[151] Similarly, courts have held that DOD's "technical data" statute,[152] which protects technical information with "military or space application" for which an export license is required, satisfies subpart (A)(ii) because it refers to sufficiently particular types of matters.[153] Likewise, the Collection and Publication of Foreign Commerce Act,[154] which explicitly provides for

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[149] See Wis. Project on Nuclear Arms Control v. U.S. Dep't of Com., 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)); Times Publ'g Co. v. U.S. Dep't of Com., 236 F.3d 1286, 1289-92 (11th Cir. 2001) (same); see also Lessner v. U.S. Dep't of Com., 827 F.2d 1333, 1336-37 (9th Cir. 1987) (construing statute as effective in 1987 and determining that statute qualified under what is now subpart (A)(ii) of Exemption 3); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at *6 (S.D.N.Y. 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); 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) (quoting 50 U.S.C. app. § 2411(c))).

[150] 50 U.S.C. § 1702(a)(1) (2018).

[151] Wis. Project, 317 F.3d at 282-84.

[152] 10 U.S.C. § 130 (2018).

[153] See Newport Aeronautical Sales v. Dep't of the Air Force, 684 F.3d 160, 165 (D.C. Cir. 2012); Chenkin v. Dep't of the Army, No. 93-494, 1994 U.S. Dist. LEXIS 20907, at *8 (M.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).

[154] 13 U.S.C. § 301(g) (2018).

nondisclosure of shippers' export declarations, has been held to qualify as an Exemption 3 statute under subpart (A)(ii).[155]

One district court has determined that a provision of the Procurement Integrity Act,[156] which prohibits the disclosure of certain source selection information, is a statute qualifying under subpart (A)(ii) of Exemption 3.[157] That Procurement Integrity Act provision at issue provides protection for pre-award contractor bids, proposal information, and source selection information under certain circumstances.[158]

The D.C. Circuit has ruled that Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[159] protecting court-ordered wiretaps, is a statute qualifying under subpart (A)(ii) of Exemption 3.[160] In Lam Lek Chong v. DEA, the D.C. Circuit held that

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[155] See Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at *5 (S.D.N.Y. May 26, 1993); Young Conservative Found. v. U.S. Dep't of Com., No. 85-3982, 1987 WL 9244, at *2-3 (D.D.C. Mar. 25, 1987).

[156] 41 U.S.C. § 2102 (2018) (formerly at 41 U.S.C. § 423).

[157] See Legal & Safety Emp. Rsch, Inc. v. U.S. Dep't of the Army, No. 00-01748, 2001 WL 34098652, at *4 (E.D. Cal. May 4, 2001) (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 "[41 U.S.C. §] 423 is a nondisclosure statute under Exemption 3, subsection [(A)(ii)]," but ultimately rejecting Exemption 3 applicability where records at issue did not fall within scope of nondisclosure provision (quoting 41 U.S.C. § 423(a)(1))); see also Raher v. BOP, No. 09-526, 2011 WL 2014875, at *4, *6-7 (D. Or. May 24, 2011) (assuming without deciding that 41 U.S.C. § 423 is an Exemption 3 statute and acknowledging that "Exemption 3 does not protect bid or proposal information from disclosure post award based on § 423 and its implementing regulations unless it 'pertains to another procurement' or 'is prohibited by law'" (internal quotation unattributed)).

[158] 41 U.S.C. § 2107(7) (2018) (formerly at 41 U.S.C. § 423(h)); see also Am. Small Bus. League v. DOD, 372 F. Supp. 3d 1018, 1025-27 (N.D. Cal. 2019) (assuming without deciding that the Procurement Integrity Act (PIA) qualifies as an Exemption 3 statute, but denying government's motion for summary judgment because "[b]oth sides agree that the PIA's non-disclosure provision applies to information created '*before the award* of a Federal agency procurement contract to which the information relates . . . [but that h]ere, the details of [the] actual subcontracting performance and compliance relate to contracts *already* awarded," and such post-award information fell "outside the scope of the PIA").

[159] See 18 U.S.C. §§ 2510-2520 (2018).

[160] See Lam Lek Chong v. DEA, 929 F.2d 729, 733 (D.C. Cir. 1991); see also 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, 554-55 (D.C. Cir. 1999) (noting that "wiretapped recordings

"Title III falls squarely within the scope of [what is now subpart (A)(ii)], as a statute referring to '*particular types of matters to be withheld*.'"[161] Following the D.C. Circuit's Lam Lek Chong decision, a number of other courts have recognized Title III as an Exemption 3 statute.[162]

The D.C. Circuit has held that the Pen Register Act, codified at 18 U.S.C. § 3123(d), "identifies 'particular types of matters to be withheld,' . . . in that it requires the sealing of '[a]n order authorizing or approving the installation and use of a pen register or a trap and trace device.'"[163] The D.C. Circuit further held that the Act "primarily authorizes the government to withhold a responsive pen register order itself, not all information that may be contained in or associated with a pen register order."[164] However, the D.C. Circuit also found that "[t]o the extent the statute arguably authorizes withholding documents other than a pen register order, [the court has had] no occasion to address the issue."[165]

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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, but ultimately 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); accord Ewell v. DOJ, 153 F. Supp. 3d 294, 305 (D.D.C. 2016) (protecting both the "recordings and the application (including all supporting materials) that gave rise to" the Title III application).

[161] 929 F.2d at 733 (quoting 5 U.S.C. § 552(b)(3) and further finding that the statute "clearly identifies intercepted communications as the subject of its disclosure limitations").

[162] See Payne v. DOJ, No. 96-30840, 1997 U.S. App. LEXIS 42543, 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 falls squarely within the scope of Exemption 3 of FOIA"); 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); Manna v. DOJ, 815 F. Supp. 798, 810-12 (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); Docal v. Bennsinger, 543 F. Supp. 38, 43-44 (M.D. Pa. 1981) (relying upon entire statutory scheme of 18 U.S.C. §§ 2510 *et seq.* in protecting "written accounts of phone calls monitored pursuant to several wire intercepts," but not distinguishing between Exemption 3 subparts); 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).

[163] Labow v. DOJ, 831 F.3d 523, 527-28 (D.C. Cir. 2016) (quoting 5 U.S.C. § 552(b)(3)(A)(ii) and 18 U.S.C. § 3123(d)).

[164] Id. at 528.

[165] Id. (explaining that this is an issue for the district court to consider on remand because "[it does] not know whether this case involves withholding of any records beyond a pen register order").

On remand, the district court found that the targets of pen registers and reports generated as a result of pen registers are protected pursuant to 18 U.S.C. § 3123(d) and Exemption 3.[166]

The Supreme Court has held that section 102(d)(3) of the National Security Act of 1947,[167] which requires the Director of the CIA to protect "sources and methods,"[168] clearly refers to particular types of matters to be withheld and thus comes within the ambit of subpart (A)(ii).[169] Many courts have upheld the protection of information

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[166] See Labow v. DOJ, 278 F. Supp. 3d 431, 441 (D.D.C. 2017) (finding that "[i]nformation at the crux of a pen register order that, as here, happens to appear in a document outside of the order itself and would necessarily compromise the order, is therefore information that falls within the scope of Exemption 3's protection as triggered by the Pen Register Act[; t]his Court and other courts in this district have accordingly and consistently held that 'information regarding the target of pen registers, and reports generated as a result of the pen registers' is information that 'falls squarely under' the Pen Register Act") (quoting Brown v. FBI, 873 F. Supp. 2d 388, 401 (D.D.C. 2012))); see also Brown v. FBI, 873 F. Supp. 2d 388, 401 (D.D.C. 2012) (finding that "'applications and subsequent court orders for pen registers, information regarding the target of pen registers, and reports generated as the result of pen registers'" "falls squarely under [18 U.S.C.] § 3123(d)(1)" and "was properly held under exemption 3") (quoting agency declaration)); Jennings v. FBI, No. 03-1651, 2004 U.S. Dist. LEXIS 31951, at *17-18 (D.D.C. May 6, 2004) (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 *7 (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); accord Manna, 815 F. Supp. at 812 (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 which Exemption 3 subpart under which it qualified).

[167] 50 U. S. C. § 403(d)(3) (2002) (amended by Pub. L. No. 108-458, 118 Stat. 3638 (2004)), and currently codified as amended at 50 U.S.C. § 3024(i)(1) (2018)), which, among other things, established the Director of National Intelligence and replaced the Director of the CIA as the authority charged with protecting intelligence sources and methods.

[168] Id.

[169] 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)(A)(ii))).

pursuant to the National Security Act of 1947.[170] In some instances, section 102(d)(3) has been found to provide a basis for an agency to refuse to confirm or deny the existence of records because to do so would reveal intelligence sources or methods.[171] (For further

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[170] See Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1182 (11th Cir. 2019) (affirming the withholding of certain national security information pursuant to Exemption 3 and the National Security Act of 1947 and holding that "the district court owed substantial deference to the Bureau's invocation of Exemption 3 even though the Bureau still bore the burden of proving the applicability of that exemption"); ACLU v. DOJ, 681 F.3d 61, 72-75 (2d Cir. 2012) (finding records related to CIA's use of waterboarding and photographs of "high-value detainee" were properly protected pursuant to Exemption 3 and the National Security Act of 1947); ACLU v. DOD, 628 F.3d 612, 619, 626 (D.C. Cir. 2011) (recognizing "the National Security Act . . . qualifies as an exemption statute under exemption 3" and finding that agency properly asserted Exemption 3 and the National Security Act to withhold transcripts of Combat Status Review Tribunals and documents detainees submitted in connection with those hearings); Larson v. Dep't of State, 565 F.3d 857, 865, 869 (D.C. Cir. 2009) (finding that agencies properly protected "information relating to 'intelligence sources and methods'"); 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, but ultimately reversing grant of summary judgment on other grounds); Berman v. CIA, 501 F.3d 1136, 1144 (9th Cir. 2007) (holding that CIA properly withheld two "President's Daily Brief[s]" prepared during President Johnson's term of office, and that "the passage of time has not vitiated the CIA's interest in maintaining the secrecy of the requested" documents); Assassination Archives & Rsch Ctr. v. CIA, 334 F.3d 55, 58, 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"); Maynard v. CIA, 986 F.2d 547, 554 (1st Cir. 1993) (recognizing statute as qualifying as "an Exemption 3 statute because it specifies the types of material to be withheld under [what is now subpart (A)(ii)] of the Exemption"); Knight v. CIA, 872 F.2d 660, 663-65 (5th Cir. 1989) (holding that "the names of institutions and individuals who performed research on a project financed by the CIA were exempt" under the National Security Act of 1947 because "disclosing the names might reveal intelligence sources and methods"); Citizens United v. Dep't of State, No. 18-1862, 2021 WL 3268385, at *6 (D.D.C. July 29, 2021) (finding that where "the specific redactions in question contain information about a particular intelligence source" and disclosure would "publicly identify[] that intelligence source" it was "enough, although just enough, to satisfy the requirements of Exemption 3" and section 102(d)(3) of the National Security Act of 1947); Nat'l Sec. Couns. v. CIA, 320 F. Supp. 3d 200, 216 (D.D.C. 2018) (accepting CIA's explanation that disclosure of database screenshots "would 'expose Agency information systems to outside threats by providing [access instructions],'" and disclosure of classification markings would reveal areas of intelligence interest, sources, and other intelligence methods under Section 102(A)(i)(1) of the National Security Act of 1947 (quoting agency declaration)).

[171] See, e.g., Leopold v. CIA, 987 F.3d 163, 169-72 (D.C. Cir. 2021) (holding "that President Trump's tweet [regarding alleged payments to Syrian rebels] was not an official acknowledgment of the existence (or not) of [a]gency records," and that "the records'

existence (or not) is a properly classified fact and one that would reveal intelligence sources and methods"); N.Y. Times Co. v. CIA, 965 F.3d 109, 113 (2d Cir. 2020) (finding that CIA's declaration provided sufficient basis to conclude that "revealing whether or not responsive records exist in connection with an alleged program to arm and train Syrian rebels would lead to an unauthorized disclosure of intelligence sources and methods"); Wolf v. CIA, 473 F.3d 370, 380 (D.C. Cir. 2007) ("affirm[ing] the district court's holding that the existence or nonexistence of records about [Columbian presidential candidate assassinated in 1948] is itself classified information and protected from disclosure by Exemptions 1 and 3 of the FOIA," but "revers[ing] the district court . . . to the extent that it held that the existence of Agency records about [the candidate] was not officially acknowledged by the CIA in testimony before the Congress"); Frugone v. CIA, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (finding that CIA properly refused to confirm or deny existence of records concerning plaintiff's alleged employment relationship with CIA despite allegation that another government agency seemed to confirm plaintiff's status as former CIA employee); Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996) (finding that agency properly refused to confirm or deny existence of records concerning deceased person's alleged employment relationship with CIA); Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992) (upholding agency's "Glomar" response to request on foreign national because acknowledgment of existence of any responsive record would reveal sources and methods); Smith v. CIA, 393 F. Supp. 3d 72, 81-84 (D.D.C. 2019) (concluding that because "the CIA does not retain the intelligence budgets of other agencies, . . . President Obama's remark [regarding aid to Israel] does not undermine or contradict the CIA's proffered reasons for issuing the *Glomar* response, such as a concern that confirmation would reveal not only that the CIA is the specific agency administering aid to Israel, but also the specific type of aid being given and intelligence source information"); Leopold v. CIA, 380 F. Supp. 3d 14, 28 (D.D.C. 2019) (holding that National Security Act is Exemption 3 statute and "'[t]he fact of whether or not the CIA is, or has, exercised covert action authorities constitutes a protected "intelligence source or method"'" (quoting agency declaration)); Schwartz v. DOD, No. 15-7077, 2017 WL 78482, at *22 (E.D.N.Y. Jan. 6, 2017) (finding that CIA properly invoked Exemption 3 Glomar because to "disclose the existence or non-existence of records relating to the means by which any original classifying authority can monitor or interrupt the Guantanamo audio feed, such confirmation could indicate that the CIA has previously interrupted the feed or that the CIA lacks the capacity to do so"); Klayman v. CIA, 170 F. Supp. 3d 114, 122 (D.D.C. 2016) (finding CIA's Glomar response concerning whether it communicated with local officials proper under Section 102(A)(i)(1) of National Security Act of 1947 and Section 6 of the Central Intelligence Act of 1949 because confirming or denying communication might identify agency contractor or employee); Arabian Shield Dev. Co. v. CIA, No. 98-0624, 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, 872 F.2d at 664)), aff'd per curiam, No. 99-10327, 2000 WL 180923 (5th Cir. Jan. 28, 2000) (unpublished disposition); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 627 (S.D.N.Y. 1996) (finding agency's Glomar response proper because acknowledgment of records would present "danger of revealing sources"), aff'd per curiam, 128 F.3d 788 (2d Cir. 1997).

discussion of the use and origin of the "Glomar" response under Exemption 1, see Exemption 1, Glomar Response.).

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,[172] and thereby established the Director of National Intelligence as the authority charged with protecting intelligence sources and methods.[173] 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.[174] 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.[175] Additionally, the FBI has used section 102A(i)(1) of the National Security

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[172] Pub. L. No. 108-458, § 1011, 118 Stat. 3638, 3644-55 (currently codified as amended at 50 U.S.C. § 3024(i)(1) (2018)).

[173] Id.

[174] Id. § 1071.

[175] See, e.g., N.Y. Times Co., 965 F.3d at 115 (finding FOIA Exemption 1 and Exemption 3, in conjunction with Section 102(A)(i)(1) of National Security Act of 1947, as amended by 50 U.S.C. § 3024(i)(1), applicable where "any substantive response could reveal . . . 'whether or not the United States exercised extraordinary legal authorities to covertly influence the political, economic, and/or military conditions in Syria' or 'the CIA's connection to such a program, if one existed,'" and where "a substantive response to whether the CIA had any documents would reveal that the agency had an interest – or lack thereof – that could expose agency priorities, strategies, and areas of operational interest" (quoting agency declaration)); 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 377-78, 380 (noting change in National Security Act, and agreeing with agency 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 in testimony before the Congress"); N.Y. Times Co. v. DOJ, 550 F. Supp. 3d 26, 34, 36 (S.D.N.Y. 2021) (holding that National Security Act of 1947, as amended by 50 U.S.C. § 3024(i)(1), "vests the intelligence community with 'very broad authority to protect all sources of intelligence information from disclosure'" (quoting ACLU, 681 F.3d at 73)); Elec. Priv. Info. Ctr. v. DOJ, 490 F. Supp. 3d 246, 261 (D.D.C. 2020) (concluding that DOJ "appropriately redacted information from the Mueller Report that relates to intelligence sources and methods and therefore is protected from disclosure by Exemption 3 and the National Security Act"), aff'd in part, rev'd & remanded in part on other grounds, 18 F.4th 712 (D.C. Cir. 2021); Ullah v. CIA, 435 F. Supp. 3d 177, 188 (D.D.C. 2020) (upholding CIA's reliance on National Security Act of 1947 to withhold "labels, names of files, classified markings, and categories of restrictions on the handling of the material" even though the material "did not encompass *any* substantive information").

Act of 1947 to protect intelligence sources and methods from unauthorized disclosure.[176] Furthermore, courts addressing the issue have determined that the Director of National Intelligence is charged with the same duties and responsibilities to protect sources and methods as the Director of Central Intelligence.[177]

Likewise, courts have found that section 6 of the CIA Act of 1949, which protects from disclosure intelligence sources and methods and "the organization, functions, names, official titles, salaries or numbers of personnel employed by" the CIA,[178] satisfies the requirements of subpart (A)(ii),[179] while one district court has found that section 6 meets the requirements of subsection (A)(i).[180] Other courts have not specified under which subpart the CIA Act qualifies but have held that records may be withheld pursuant to Exemption 3 under the statute.[181] In some instances, this statute has also been found

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[176] See Associated Press v. FBI, 265 F. Supp. 3d 82, 97-98 (D.D.C. 2017) (upholding FBI's use of section 102A(i)(1) of National Security Act of 1947 to withhold identity of technology vendor who assisted FBI in unlocking smartphone of suspected terrorist and purchase price of tool).

[177] 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 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)).

[178] 50 U.S.C. § 3507 (2018).

[179] See Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996) (protecting names of CIA agents after finding that statute identifies types of matters to be withheld); Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978) (holding that the CIA Act "'refer[s] to particular types of matters to be withheld' namely, information respecting intelligence sources and methods").

[180] See Roman v. NSA, Nos. 09-2947, 09-4281, 09-3344, 09-2504, 09-5633, 2012 WL 569747, at *11 (E.D.N.Y. Feb. 22, 2012) (finding that "section 6 of the CIA Act of 1949, which requires the CIA to protect from disclosure 'the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency,'" is "properly within the bounds of Exemption 3 because it leaves no discretion on the issue of whether the information should be withheld from the public" (quoting 50 U.S.C. § 403(g))).

[181] See DiBacco v. Dep't of Army, 926 F.3d 827, 835-36 (D.C. Cir. 2019) (finding that "the CIA Act's text does not expressly restrict its scope to personnel currently employed by the agency" nor "does [the CIA Act] cover only 'personnel records[;]' [r]ather, it protects from disclosure certain information relating to personnel, wherever that information may be found"); ACLU v. DOJ, 681 F.3d 61, 72-75 (2d Cir. 2012) (finding records concerning waterboarding to be properly protected pursuant to FOIA Exemption 3 and the CIA Act, but

to provide a basis for an agency to refuse to confirm or deny the existence of records.[182] Also, the identities of Defense Intelligence Agency (DIA) employees have been held to be

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failing to identify pursuant to which Exemption 3 subpart the CIA Act qualifies); N.Y. Times Co. v. DOJ, 915 F. Supp. 2d 508, 539, 541 (S.D.N.Y. 2013) (recognizing the CIA Act as "an exempting statute within the meaning of Exemption 3" and finding that "[t]o the extent that [the requester] seeks information regarding the CIA's participation, if any, in the Government's targeted killing program, that information is properly withheld under Exemption 3 and the CIA Act," but noting that "the CIA Act's prohibition on the disclosure of intelligence sources or methods would apply to the targeted killing program itself, but not to the withheld legal analysis"); ACLU v. CIA, 892 F. Supp. 2d 234, 242, 245 (D.D.C. 2012) (observing that "[section 6 of the CIA Act] . . . has been recognized in this Circuit as a legitimate source for exemption under FOIA Exemption 3" and holding that agency properly withheld "information pertain[ing] to methods that the agency used to collect foreign intelligence" pursuant to Exemption 3); Hall v. CIA, 881 F. Supp. 2d 38, 66 (D.D.C. 2012) (finding that "deceased former employees still fall within the plain language of [the CIA Act] as having been 'employed' by the CIA" and "hold[ing] that the CIA has properly supported its withholdings under [E]xemption 3,"); Blazy v. Tenet, 979 F. Supp. 10, 23-24 (D.D.C. 1997) (holding 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 the CIA Act "clearly" qualifies as an "exemption statute[] for the purpose of [Exemption 3]," and holding that the CIA properly applied the CIA Act 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"), aff'd per curiam, 128 F.3d 788 (2d Cir. 1997).

[182] See ACLU v. DOJ, No. 12-794, 2015 WL 4470192, at *49 (S.D.N.Y. July 16, 2015) (finding that the "CIA's Glomar response is 'tethered' to Exemption 3, in that disclosure is barred by the CIA Act"), aff'd in part and rev'd in part on other grounds, 844 F.3d 126 (2d Cir. 2016); Moore v. FBI, 883 F. Supp. 2d 155, 165 (D.D.C. 2012) (finding that "CIA properly relied upon the Central Intelligence Agency Act of 1949 [in conjunction with FOIA Exemptions 1 and 3] . . . to support its Glomar response"); Makky v. Chertoff, 489 F. Supp. 2d 421, 442 (D.N.J. 2007) (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. Dailey, No. 97-1164, 1998 U.S. Dist. LEXIS 6708, 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"); Earth Pledge Found., 988 F. Supp. at 627 (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

protected from disclosure pursuant to 10 U.S.C. § 424.[183] The Court of Appeals for the Ninth Circuit has interpreted the word "function" under the first prong of § 424(a) to also protect records relating to the DIA's mission, including the names of countries or agencies with which the DIA shares intelligence.[184]

Additionally, 10 U.S.C. § 130b,[185] which protects personally identifying information regarding certain members of the armed forces and certain DOD and U.S. Coast Guard employees, has been held to qualify as a subpart (A)(ii) statute.[186] Similarly, a number of courts have found that section 6 of the National Security Agency Act of 1959,[187] pertaining to the organization, functions, activities, and personnel of NSA, is a

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disclosure of the information requested by the plaintiffs would jeopardize intelligence sources").

[183] (2018); see, e.g., Physicians for Hum. Rts. v. DOD, 778 F. Supp. 2d 28, 36 (D.D.C. 2011) (recognizing 10 U.S.C. § 424 as statute meeting requirements of Exemption 3 without specifically referring to subpart (A)(ii), and finding that agency properly withheld unit's name, location, and responsibilities pursuant to Exemption 3 and 10 U.S.C. § 424); Miller v. DOJ, 562 F. Supp. 2d 82, 112 (D.D.C. 2008) (protecting "names, office affiliations and titles of DIA personnel" pursuant to Exemption 3 and 10 U.S.C. § 424, but not identifying under which Exemption 3 subpart § 424 qualifies); 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 specifying that 10 U.S.C. § 424 qualifies as what is now a subpart (A)(ii) statute by noting that "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, 565 F.3d 857 (D.C. Cir. 2009); Wickwire Gavin, P.C. v. Def. Intel. 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 what is now subpart (A)(i) of Exemption 3).

[184] Hamdan v. DOJ, 797 F.3d 759, 776-77 (9th Cir. 2015).

[185] (2018).

[186] See, e.g., Hall, 881 F. Supp. 2d at 66 (recognizing "10 U.S.C. § 130b is an [E]xemption 3 statute, because it '. . . establishes particular criteria for withholding or refers to particular types of matters to be withheld,'" and finding names of individuals assigned to routinely deployable units properly protected pursuant to Exemption 3 (quoting 5 U.S.C. § 552(b)(3)(A)(ii))); Hiken v. DOD, 521 F. Supp. 2d 1047, 1062 (N.D. Cal. 2007) (concluding 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"); see also Rosenberg v. DOD, 342 F. Supp. 3d 62, 90 (D.D.C. 2018) (identifying § 130b as falling under 5 U.S.C. 552(b)(3)(A)(i)); cf. O'Keefe v. DOD, 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006) (holding as improper DOD's blanket withholding of employees' names under 10 U.S.C. § 130b in absence of any showing that those employees were "stationed with a 'routinely deployable unit' or any other unit within the ambit of [that statute]").

[187] 50 U.S.C. § 3605 (2018) (formerly at 50 U.S.C. § 402 note).

valid Exemption 3 statute, although most of those courts have not specified whether the provision qualifies as a subpart (A)(ii) statute.[188] Some courts have held that section 6 can provide a basis for an agency's refusal to confirm or deny the existence of responsive records.[189] (For further discussion of the use and origin of the "Glomar" response under Exemption 1, see Exemption 1, In Camera Submissions and Adequate Public Record).

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[188] See ACLU v. DOJ, 681 F.3d 61, 72-75 (2d Cir. 2012) (noting that plaintiffs did not contest that section 6 qualified as an Exemption 3 statute and finding records related to CIA's use of waterboarding and photograph of "high-value detainee" properly protected pursuant to Exemption 3 and section 6); Elec. Priv. Info. Ctr. v. NSA, 678 F.3d 926, 931-32 (D.C. Cir. 2012) (recognizing that "[s]ection 6 . . . 'is a statute qualifying under Exemption 3'" and finding that agency's Glomar response to request for records concerning NSA activities was proper, but not specifying under which Exemption 3 subpart section 6 qualifies (quoting Founding Church of Scientology v. NSA, 610 F.2d 824, 828 (D.C. Cir. 1979))); Houghton v. NSA, 378 F. App'x 235, 238-39 (3d Cir. 2010) (per curiam) (acknowledging section 6 as statute qualifying under Exemption 3 and finding that agency's Glomar response to request for records concerning requester was proper, but not identifying under which Exemption 3 subpart section 6 qualifies); Lahr v. NTSB, 569 F.3d 964, 985 (9th Cir. 2009) (finding that agency properly protected computer simulation program and data inputted therein pursuant to section 6 and Exemption 3, without specifying under which Exemption 3 subpart section qualifies); Larson v. Dep't of State, 565 F.3d 857, 868-69 (D.C. Cir. 2009) (recognizing "[s]ection 6 . . . as an Exemption 3 statute . . . provid[ing] absolute protection" for materials concerning violence in Guatemala determined to constitute records concerning NSA activities, but not identifying Exemption 3 subpart under which section 6 qualifies); 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 [(A)(ii)]"); Hayden v. NSA, 608 F.2d 1381, 1389-91 (D.C. Cir. 1979) (recognizing statute as qualifying under Exemption 3 and protecting documents obtained through monitoring foreign electromagnetic signals, but not identifying Exemption 3 subpart under which section 6 qualifies); ACLU v. Off. of the Dir. of Nat'l Intel., No. 10-4419, 2012 WL 1117114, at *4 (S.D.N.Y. Mar. 30, 2012) (determining that agency properly withheld "materials [that] reveal 'intelligence sources or methods,' the activities of the NSA[,] and 'communications intelligence activities' of the United States Government" pursuant to NSA Act and Exemption 3); Roman v. NSA, No. 07-4502, 2009 WL 303686, at *1, *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 "that [agency] appropriately invoked the Glomar response" for "request . . . seeking [certain] satellite time logs"), summary affirmance granted, 354 F. App'x 591 (2d Cir. 2009); Fla. Immigrant Advoc. Ctr. v. NSA, 380 F. Supp. 2d 1332, 1340 (S.D. Fla. 2005) (finding, upon in camera inspection, that NSA properly withheld signals intelligence report because disclosure would reveal certain functions of NSA).

[189] See Elec. Priv. Info. Ctr., 678 F.3d at 934-35 (affirming district court's determination that NSA's refusal to confirm or deny existence of cybersecurity-related communications between NSA and Google, Inc. was proper); Houghton, 378 F. App'x at 238-39 (finding that agency's Glomar response to request for records concerning requester was proper); Roman, 2009 WL 303686, at *1, *6 (noting that "it is clear by the plain language of both FOIA Exemption 3 and [s]ection 6 . . . that [the agency] appropriately invoked the Glomar

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,"[190] refers to particular types of matters – specifically, information pertaining to atomic weapons and special nuclear material – and thus has been held to qualify as an Exemption 3 statute as well.[191] Similarly, section 207 of the National Park Omnibus Management Act of 1998,[192] which sets forth criteria for the Secretary of the Interior to apply when exercising discretion about release of "[i]nformation concerning the nature and specific location of [certain National Park] System resource[s]," including resources which are "endangered, threatened, rare, or commercially valuable,"[193] has been found to be within the scope of subpart (A)(ii).[194]

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response" for a "request . . . seeking the satellite time logs focused on New York and New Jersey from January 1985 through January 1991 and the total amount of hours a satellite was focused on those states").

[190] 42 U.S.C. § 2162(a) (2018).

[191] Id. § 2014(y) (defining "Restricted Data"); see Meeropol v. Smith, No. 75-1121, slip op. at 54-55 (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).

[192] 54 U.S.C. § 100707 (2018) (formerly at 16 U.S.C. § 5937).

[193] Id.

[194] 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 type of rare bird pursuant to subpart (A)(ii) 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. 99-113, 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 (A)(ii), 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 § 5937 qualified), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); OIP Guidance: Agencies Rely on Wide Range of Exemption 3 Statutes (posted 12/16/2003) (discussing National Park Omnibus Management Act of 1998).

The D.C. Circuit has held that a portion of the Patent Act[195] satisfies subpart (A)(ii) because it identifies the types of matters – specifically, patent applications and information concerning them – intended to be withheld.[196] Likewise, the Court of Appeals for the Third Circuit has suggested that the Juvenile Delinquency Records Statute,[197] 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 (A)(ii) statute[198]

In addition, a provision of the Civil Service Reform Act concerning the confidentiality of certain labor relations training and guidance materials[199] has been held to qualify as a subpart (A)(ii) withholding statute,[200] as has 5 U.S.C. § 7132,[201] a Civil Service Reform Act provision which limits the issuance of certain subpoenas.[202] Similarly, the U.S. Information and Educational Exchange Act of 1948 (the "Smith-Mundt Act")[203] has been found to qualify as a subpart (A)(ii) statute insofar as it prohibits the disclosure of certain overseas programming materials within the United States.[204] While

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[195] 35 U.S.C. § 122 (2018).

[196] 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).

[197] 18 U.S.C. § 5038(a) (2018).

[198] See McDonnell v. United States, 4 F.3d 1227, 1249-51 (3d Cir. 1993) (dictum) (suggesting that 18 U.S.C. § 5038 qualifies under Exemption 3, but ultimately finding that state juvenile delinquency records fall outside scope of federal statute); see also Lavado v. DEA, No. 90-5262, 1991 WL 119586, at *1 (D.C. Cir. June 28, 1991) (finding that 18 U.S.C. § 5038 qualifies under Exemption 3).

[199] 5 U.S.C. § 7114(b)(4) (2018).

[200] See NTEU v. OPM, No. 79-695, slip op. at 3-4 (D.D.C. July 9, 1979); see also Dubin v. Dep't of 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)(i) or subpart (A)(ii) of Exemption 3), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision).

[201] (2018).

[202] See NTEU, slip op. at 3-4.

[203] 22 U.S.C. § 1461-1a (2018).

[204] 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*").

the Smith-Mundt Act originally applied only to records prepared by the former USIA, the Foreign Affairs Reform and Restructuring Act of 1998[205] applied the relevant provisions of that statute to those programs within the Department of State that absorbed USIA's functions.[206]

Section 8 of the Commodity Exchange Act,[207] which prohibits the disclosure of business transactions, market positions, trade secrets, or customer names of persons under investigation under the Act, has been held to refer to particular types of matters and thus to satisfy subpart (A)(ii) of Exemption 3.[208] Likewise, 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,[209] similarly shields that particular data from disclosure under the FOIA.[210] The D.C. Circuit also held that section 306(h) of the Convention on Cultural Property Act[211] qualifies under Exemption 3 "[b]ecause it authorizes the President or his designee to close [Cultural Property Advisory Committee] meetings otherwise required to be open" and "provides 'particular criteria' for deciding on such closures."[212]

Similarly, the Federal Technology Transfer Act,[213] which prohibits federal agencies from disclosing "trade secrets or commercial or financial information that is privileged or confidential" and obtained from "non-Federal part[ies] participating in cooperative research and development agreement[s],"[214] and allows federal agencies the discretion to

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[205] Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended at 22 U.S.C. §§ 6501-6617 (2018)).

[206] Id. (abolishing "[USIA] (other than the Broadcasting Board of Governors and the International Broadcasting Bureau)," 22 U.S.C. § 6531 (2018); transferring USIA functions to Department of State, 22 U.S.C. § 6532 (2018); and applying Smith-Mundt Act to USIA functions that were transferred to Department of State (22 U.S.C. § 6552(b)) (2018)).

[207] 7 U.S.C. § 12 (2018).

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

[209] FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186 (2018) (formerly at 49 U.S.C. § 40119).

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

[211] 19 U.S.C. § 2605(h) (2018).

[212] Ancient Coin Collectors Guild v. Dep't of State, 641 F.3d 504, 510-11 (D.C. Cir. 2011).

[213] 15 U.S.C. § 3710a(c)(7)(A), (B) (2018).

[214] Id. § 3710a(c)(7)(A).

protect for five years any commercial and confidential information that results from Cooperative Research and Development Agreements with non-federal parties,[215] has been found to qualify as an Exemption 3 statute.[216]

Additionally, a provision of the Witness Security Act of 1984,[217] which authorizes the Attorney General to "disclose or refuse to disclose" certain information regarding individuals involved with the Witness Security Program,[218] has been found to qualify under subpart (A)(ii) of Exemption 3.[219] Likewise, a National Construction Safety Team Act provision,[220] which precludes the National Institute for Standards and Technology from releasing information received during the course of an investigation if the Institute Director determines that disclosure might jeopardize public safety, has also been found to qualify under subpart (A)(ii).[221]

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[215] Id. § 3710a(c)(7)(B).

[216] See Pub. Citizen Health Rsch. Grp. 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, 874 (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)).

[217] 18 U.S.C. § 3521(b)(1)(g) (2018).

[218] Id.

[219] See, e.g., Bonadonna v. DOJ, 791 F. Supp. 2d 269, 270 (D. Mass. 2010) (finding witness security program information to be "exempt from FOIA disclosure requirements" inasmuch as "FOIA 'does not apply to matters that are . . . specifically exempted from disclosure by statute . . . provided that such statute . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld'" (quoting Exemption 3)), aff'd, No. 10–1595, 2011 WL 4770189 (1st Cir. Jan. 7, 2011); cf. Librach v. FBI, 587 F.2d 372, 373 (8th Cir. 1978) (per curiam) (upholding district court's application of Exemptions 3, 7(C), and 7(F) to "records [that] pertain to the relocation of a witness under the Department of Justice Witness Security Program" where court "agreed . . . that to release these materials would jeopardize the effectiveness of the Witness Security Program and would invade the personal privacy of the witness," without identifying statute justifying Exemption 3 assertion or subpart under which statute qualified).

[220] 15 U.S.C. § 7306(d) (2018).

[221] See Quick v. Dep't of Com., 775 F. Supp. 2d 174, 180-81 (D.D.C. 2011) (finding 68,500 data files agency received in course of investigation properly withheld pursuant to Exemption 3 and 15 U.S.C. § 7306(d)).

A district court has determined that the Trade Act of 1974,[222] which relates to certain information "submitted in confidence . . . in connection with trade negotiations"[223] to the United States, the Advisory Committee for Trade Policy and Negotiation, or any Industry Trade Advisory Committee, qualifies as an (A)(ii) withholding statute under Exemption 3.[224]

The Bioterrorism Preparedness and Response Act (BPRA),[225] which exempts certain federal agencies, including the CDC, from disclosing certain categories of information relating to biological agents and toxins, was found to be a qualifying (A)(ii) statute under Exemption 3.[226]

Statutes Both Requiring Withholding and Establishing Criteria or Delineating Particular Matters to Be Withheld

Some statutes have been found to satisfy both Exemption 3 subparts by "requir[ing] that the matters be withheld from the public in such a manner as to leave no discretion on the issue" and "establish[ing] particular criteria for withholding or refer[ring] to particular types of matters to be withheld."[227] For example, the Court of Appeals for the Second and Third Circuits and other district courts have held that section 222(f) of the Immigration and Nationality Act[228] 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

[222] 19 U.S.C. § 2155(g) (2018).

[223] Id.

[224] Intell. Prop. Watch v. U.S. Trade Representative, 134 F. Supp. 3d 726, 739-43 (S.D.N.Y. 2015) (noting that "[b]ecause the statute no longer prohibits disclosure on its face, it can only qualify as a withholding statute if it either 'establishes particular criteria for withholding' or 'refers to particular types of matters to be withheld'" (quoting 5 U.S.C. § 552(b)(3)(A)(ii) before going on to hold that the statute qualifies as an Exemption 3 statute)).

[225] 42 U.S.C. § 262a(h)(1) (2018).

[226] Civ. Beat L. Ctr. for the Pub. Int., Inc. v. CDC, 929 F.3d 1079, 1084-85 (9th Cir. 2019) (finding that 42 U.S.C. § 262a(h)(1) "'clearly identif[ies] the types of material to be withheld under their scope as required [under Exemption 3], and therefore qualif[ies] as' an Exemption 3 statute" (quoting Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996))).

[227] 5 U.S.C. § 552(b)(3)(A)(i), (A)(ii) (2018) (emphasis added).

[228] 8 U.S.C. § 1202(f) (2018).

(A)(ii),[229]while the Court of Appeals for the District of Columbia Circuit has held that the section satisfies both Exemption 3 subparts.[230] In addition, some courts have acknowledged that section 222(f) qualifies as an Exemption 3 statute while declining to identify the statute as qualifying under subpart (A)(i) or subpart (A)(ii) of Exemption 3.[231] In some instances, this statute has been recognized as an Exemption 3 statute, but the particular records at issue were found not to fall within its scope.[232] Of note, courts have

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[229] See, e.g., Spadaro v. CBP, 978 F.3d 34, 43 (2d Cir. 2020) (concluding that Immigration and Nationality Act § 222(f) "is a qualifying [Exemption 3] statute because it clearly 'refers to particular types of matters to be withheld'" in accordance with 5 U.S.C. § 552(b)(3)(A)(ii), but declining to address alternative argument that it also qualifies under 5 U.S.C. § 552(b)(3)(A)(i)); DeLaurentiis v. Haig, 686 F.2d 192, 194 (3d Cir. 1982); Smith v. DOJ, No. 81-813, 1983 U.S. Dist. LEXIS 10878, at *13-14 (N.D.N.Y. Dec. 13, 1983).

[230] Medina-Hincapie v. Dep't of State, 700 F.2d 737, 741-42 (D.C. Cir. 1983); accord Beltranena v. U.S. Dep't of State, 821 F. Supp. 2d 167, 177-78 (D.D.C. 2011) (quoting Medina-Hincapie for proposition that statute qualifies as withholding statute under subparts (A)(i) and (A)(ii), and finding that agency properly protected records concerning issuance or refusal of visa to enter United States pursuant to FOIA Exemption 3); 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)[(i)] and [subsection (A)(ii)] of Exemption (b)(3) of 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) (recognizing that 8 U.S.C. § 1202(f) had previously been held to qualify "as a disclosure-prohibiting statute under both subsection (A)[(i)] and [(A)(ii)] of Exemption []3" and concluding that records pertaining to denial of plaintiff's visa application were properly protected pursuant to Exemption 3).

[231] See Stevens v. U.S. Dep't of State, 20 F.4th 337, 344 (7th Cir. 2021) (finding that materials "pertaining to the issuance or refusal of visas" fall under section 222(f) of Immigration and Nationality Act, 8 U.S.C. § 1202(f), but not specifying under which Exemption 3 subpart); Nikaj v. U.S. Dep't of State, No. 18-0496, 2019 WL 2602520, at *2 (W.D. Wash. June 25, 2019) (finding non-immigrant visa refusals withholdable under Immigration and Nationality Act, but not specifying subpart); Badalamenti v. U.S. Dep't of State, 899 F. Supp. 542, 547 (D. Kan. 1995) (finding that 8 U.S.C. § 1202(f) was properly applied "to withhold from disclosure marginal notes pertaining to the consideration of granting or refusing a visa," but not specifying under which Exemption 3 subpart).

[232] See Immigr. Just. Clinic of the Benjamin N. Cardozo Sch. of L. v. U.S. Dep't of State, No. 12-1874, 2012 WL 5177410, at *1-2 (S.D.N.Y. Oct. 18, 2012) (finding that "[§] 1202(f) qualifies as a withholding statute under Exemption 3 because it refers to particular types of confidential matter to be withheld," therefore paraphrasing language of subpart (A)(ii) of Exemption 3, but ultimately determining that record withheld did not "fall under the category of documents that the statute withholds" inasmuch as "[i]t is not a document that pertains to the issuance or refusal of a visa because there is no past or pending visa

reached differing conclusions as to whether section 222(f) encompasses visa revocations.[233]

Similarly, the Court of Appeals for the Tenth Circuit has held that section 301(j) of the Federal Food, Drug, and Cosmetic Act[234] qualifies under both subparts of Exemption 3.[235] First, the Tenth Circuit held that section 301(j) qualified under subpart (A)(i) in that its "prohibition against disclosure is absolute and applies to *any* information within its scope."[236] In addition, the Tenth Circuit determined that section 301(j) met the requirements of subpart (A)(ii) because it "is specific as to the particular matters to be withheld."[237] By contrast, the D.C. Circuit found that another portion of the Federal Food,

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application"); Guerra v. United States, No. 09-1027, 2010 WL 5211613, at *2 (W.D. Wash. Dec. 15, 2010) (stating that "section [222(f)] is an exemption from [FOIA] . . . requests under Exemption (b)(3)," but finding that "[w]ithout some legal authority to broaden the reach of this statutory language, the Court cannot find or assume that waiver applications fit within the 'narrow compass' of the § 1202(f) exemption," which protects "records pertaining to the issuance or refusal of visas or permits to enter the United States") (quoting DOJ v. Tax Analysts, 492 U.S. 136, 151 (1989))); El Badrawi v. DHS, 596 F. Supp. 2d 389, 395 (D. Conn. 2009) (acknowledging 8 U.S.C. § 1202(f) as Exemption 3 statute protecting documents "pertain[ing] to the issuance or refusal of a visa," without specifying subpart, but determining that "reliance on Exemption 3 to withhold documents relating to visa revocation was improper" and ordering release of that withheld information).

[233] Compare Spadaro v. CBP, 978 F.3d 34, 45-46 (2d Cir. 2020) (finding that "[a]lthough the statutory language refers only to issuances or refusals on its face, the use of the word 'pertaining' makes clear that the reach of the statute is not so limited," and thus concluding that "the plain language of INA § 222(f) encompasses visa revocations"), Calderon v. DHS, No. 18-764, 2020 WL 805212, at *2-3 (D.D.C. Feb. 18, 2020) (finding the "text of section 222(f) is sufficiently broad to encompass revocations, even though 'issuance of a visa is undoubtedly a distinct act from the revocation of that same visa,' because 'the relevant question is not one of equivalence but of pertinence[,]'" (quoting Soto v. U.S. Dep't of State, No. 14-604, 2016 WL 3390667, at *4 (D.D.C. June 17, 2016))), and Soto v. U.S. Dep't of State, No. 14-604, 2016 WL 3390667, at *4 (D.D.C. June 17, 2016) (finding that § 1202(f) also protects records pertaining to revocation of visas because "as a textual matter, a decision to revoke a visa relates to, has a bearing on, or concerns the issuance of the visa . . . [in that] it nullifies that action"), with Mantilla v. U.S. Dep't of State, No. 12-21109, 2012 WL 4372239, at *4 (S.D. Fla. Sept. 24, 2012) (finding that "[section] 222(f) of the [Immigration and Nationality Act], 8 U.S.C. § 1202(f), explicitly precludes from disclosure documents related to the issuance or refusal of visas, but does not apply to visa revocations").

[234] 21 U.S.C. § 331(j) (2018).

[235] Anderson v. HHS, 907 F.2d 936, 950-51 (10th Cir. 1990).

[236] Id. at 950.

[237] Id.

Drug, and Cosmetic Act[238] does not qualify under either subpart of Exemption 3 because it does not specifically prohibit the disclosure of records.[239]

Likewise, 18 U.S.C. § 3509(d),[240] a provision of the Child Victims' and Child Witnesses' Rights Act ("Child Victims' Act") governing the disclosure of information that would identify children who were victims of certain crimes or witnesses to crimes against others, has been held by courts to meet the requirements of Exemption 3 subpart (A)(i)[241] and subpart (A)(ii).[242]

Tax Return Information

The Supreme Court and multiple appellate courts that have considered the matter have held either explicitly or implicitly that section 6103 of the Internal Revenue Code,[243] which affords confidentiality to tax returns and tax return information,[244] satisfies what is now known as subpart (A)(ii) of Exemption 3 because it refers to particular matters to be withheld.[245] The Courts of Appeals for the District of Columbia and the Sixth Circuits

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[238] § 520, 21 U.S.C. § 360j(h) (2018).

[239] Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1285-86 (D.C. Cir. 1983).

[240] (2018).

[241] See Corley v. DOJ, 998 F.3d 981, 985 (D.C. Cir. 2021) (agreeing with agency that 18 U.S.C. § 3509(d) "unambiguously qualifies as an Exemption 3 statute" because it "clearly 'requires that matters be withheld from the public in such a manner as to leave no discretion on the issue'" (quoting 5 U.S.C. § 552(b)(3)(A)(i))); Muhammad v. EOUSA, 453 F. Supp. 3d 160, 166-67 (D.D.C. 2020) (determining that Child Victims' Act gives no discretion to agency to release name of child victim and rejecting plaintiff's argument that Child Victims' Act "does not bar disclosure to him because the Act has an exception for 'the defendant' who is entitled to 'the name of or other information concerning a child'" as "[plaintiff] is no longer a defendant in a criminal proceeding" and "seeks the records as a FOIA plaintiff" (quoting 18 U.S.C. § 3509(d)(1)(A)(1))).

[242] See Tampico v. EOUSA, No. 04-2285, 2005 U.S. Dist. LEXIS 49206, at *10 (D.D.C. Apr. 29, 2005) (determining that 18 U.S.C. § 3509(d) is an Exemption 3 statute because it "'establishes particular criteria for withholding'" private child victim and child witness information (quoting 5 U.S.C. § 552(b)(3)(A)(ii))).

[243] Internal Revenue Code of 1986, Pub. L. No. 99-514, 100 Stat. 2095 (currently codified as amended at 26 U.S.C. §§ 1-9834 (2018)).

[244] 26 U.S.C. § 6103 (2018).

[245] See, e.g., Church of Scientology of Cal. v. IRS, 484 U.S. 9, 11-12 (1987) (noting that parties agreed that 26 U.S.C. § 6103 "is the sort of statute referred to by the FOIA in 5 U.S.C. § 552(b)(3) relating to matters that are 'specifically exempted from disclosure by statute,'"

have reasoned that section 6103 qualifies under what is now Exemption 3 subpart (A)(i) to the extent that a person generally is not entitled to access to tax returns or return information of other taxpayers.[246] The Courts of Appeals for the Fifth and Tenth Circuits have found that section 6103 qualifies under both subpart (A)(i) and (A)(ii).[247] Finally,

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and finding that so-called "Haskell Amendment," which provides that the term "'return information . . . does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer,'" did not remove FOIA protection for § 6103's "extensive definition" of "return information" that is not identifiable to individual taxpayers (quoting 26 U.S.C. § 6103(b)(2))); Aronson v. IRS, 973 F.2d 962, 964-65 (1st Cir. 1992) (finding that 26 U.S.C. § 6103 qualifies as Exemption 3 statute, and concluding that IRS lawfully exercised discretion to withhold street addresses pursuant to § 6103(m)(1) because "[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)" (quoting 5 U.S.C. § 552(b)(3))); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986) (finding return information properly protected pursuant to 26 U.S.C. § 6103 because it "establishes particular criteria for withholding information" (quoting 5 U.S.C. § 552(b)(3))); Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984) (acknowledging that 26 U.S.C. § 6103 qualifies as proper Exemption 3 withholding statute because it allows agency some discretion on the matter, but "contains guidelines to inform the exercise" of agency's discretion by limiting withholding to when disclosure would "seriously impair the assessment, collection or enforcement" of tax laws); King v. IRS, 688 F.2d 488, 496 (7th Cir. 1982) (finding that § 6103 establishes particular criteria for withholding information and refers to particular types of matters to be withheld); cf. 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 not specifying subpart, and noting that deletion of taxpayers' identification does not alter confidentiality of 26 U.S.C. § 6103 tax return information); Willamette Indus., Inc. v. United States, 689 F.2d 865, 867 (9th Cir. 1982) (recognizing 26 U.S.C. § 6103 as proper Exemption 3 statute, but not specifying under which subpart).

[246] See Tax Analysts v. IRS, 117 F.3d 607, 611 (D.C. Cir. 1997) (finding that § 6103 is a nondisclosure statute "specifically exempting certain matters from disclosure to the general public and leaving the IRS with no discretion to reveal those matters publicly" (citing Church of Scientology of Cal. v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986))); 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)[(i)] criterion"); cf. 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 not identifying under which Exemption 3 subpart); Ryan v. ATF, 715 F.2d 644, 645-47 (D.C. Cir. 1983) (recognizing 26 U.S.C. § 6103 as proper Exemption 3 statute but not specifying subpart).

[247] See DeSalvo v. IRS, 861 F.2d 1217, 1221, 1221 n.4 (10th Cir. 1988) (determining that "[b]ecause section 6103 both establishes criteria for withholding information and refers to

several courts have determined that section 6103 qualifies as an exempting statute under Exemption 3 without identifying which subpart of Exemption 3 it satisfies.[248]

Specifically, section 6103 of the Internal Revenue Code provides that "[r]eturns and return information shall be confidential," subject to a number of enumerated exceptions.[249] Courts have determined that a wide array of information may be properly withheld pursuant to Exemption 3 and section 6103.[250] Moreover, the District Court for

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particular types of matters to be withheld, it satisfies the requirements" of what is now 5 U.S.C. § 552(b)(3)(A)(ii) and further noting that "section 6103(a)'s general prohibition on disclosure may also be viewed as an exempting statute" under what is now § 552(b)(3)(A)(i)); Linsteadt v. IRS, 729 F.2d 998, 1000 (5th Cir. 1984) (concluding that general nondisclosure provision of 26 U.S.C. § 6103(a) qualifies as proper Exemption 3 withholding statute pursuant to now subpart (A)(i) because it prohibits release of tax information concerning one taxpayer to another taxpayer who has no material interest in information); Chamberlain v. Kurtz, 589 F.2d 827, 839, 841 (5th Cir. 1979) (holding that subsections (c) and (e)([7]) of 26 U.S.C. § 6103 qualify as proper Exemption 3 withholding provisions pursuant to now subpart (A)(ii) because these provisions, which concern disclosure of returns and return information to designee of taxpayer or to persons with material interest, establish particular criteria for withholding and refer to particular types of matters to be withheld).

[248] See Adamowicz v. IRS, 402 F. App'x 648, 652 (2d Cir. 2010) (finding tax return information properly protected pursuant to Exemption 3 and 26 U.S.C. § 6103 without specifying under which Exemption 3 subpart statute qualifies); Currie v. IRS, 704 F.2d 523, 527-28 (11th Cir. 1983) (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 not specifying subpart).

[249] 26 U.S.C. § 6103(a) (2018).

[250] See Church of Scientology of Cal., 484 U.S. at 12-15 (finding that so-called "Haskell Amendment" did not remove FOIA protection for § 6103's "extensive definition" of "return information" that is not identifiable to individual taxpayers); Elec. Priv. Info. Ctr. v. IRS, 910 F.3d 1232, 1241 (D.C. Cir. 2018) (holding that "request for 'any other indications of financial relations' with Russian entities" was framed "in such a way that acknowledging the existence of any responsive documents would itself violate section 6103 by disclosing whether the President has filed income tax returns for the years in question," and, therefore, agency could not comply with request (quoting plaintiff's request)); Solers, Inc. v. IRS, 827 F.3d 323, 331 (4th Cir. 2016) (upholding agency's decision to withhold identities of third-party individuals and the return information of certain entities); Jud. Watch, Inc. v. SSA, 701 F.3d 379, 380 (D.C. Cir. 2012) (upholding protection of list of employers receiving high numbers of "no match" letters, which advise of mismatches between social security numbers in SSA's records and those appearing on employees' W-2 forms); Shannahan v. IRS, 672 F.3d 1142, 1149-51 (9th Cir. 2012) (holding that release of certain tax assessments involved in criminal tax investigation and electronic database would "'seriously impair Federal tax administration'" (quoting 26 U.S.C. § 6103(e)(7))); Hull v. IRS, 656 F.3d 1174, 1192-94 (10th Cir. 2011) (holding that because Plaintiff's FOIA request for "all documents associated with

the IRS's handing of [the company's] 1996 submissions to the" Voluntary Compliance Review Program was seeking return information and Plaintiff did not provide the company's consent to release the records, "the IRS has fulfilled its obligations under FOIA and IRS regulations and properly withheld the requested information"); Adamowicz, 402 F. App'x at 652 (protecting third-party tax return information; specifically, "return information concerning entities in which the estate possesses a material interest"); Tax Analysts v. IRS, 410 F.3d 715, 717-22 (D.C. Cir. 2005) (granting agency "great deference" of its interpretation of its own regulation pertaining to a "closing agreement" reached between IRS and organization, and exempting documents from disclosure); Landmark Legal Found. v. IRS, 267 F.3d 1132, 1135-37 (D.C. Cir. 2001) (withholding identities of tax-exempt organizations and information pertaining to third-party requests for audits or investigations of tax-exempt organizations); Stanbury L. Firm v. IRS, 221 F.3d 1059, 1062 (8th Cir. 2000) (withholding names of contributors to public charity); Lehrfeld v. Richardson, 132 F.3d 1463, 1467 (D.C. Cir. 1998) (agreeing with IRS "that documents it either receives or creates during the initial investigation of an organization seeking tax-exempt status constitute 'return information' within the meaning of § 6103 and are therefore not subject to disclosure" (quoting 26 U.S.C. § 6103)); Argyle Sys. Inc. v. IRS, No. 21-16, 2022 WL 4464854, at *1, *5 (D.D.C. Sept. 25, 2022) (concluding that Reporting Agent Lists (RALs), which identify "taxpayers for whom an RA will perform authorized services . . . [are] 'return information' because they [were] provided to the IRS 'with respect to the determination of the existence, or possible existence, of liability'") (quoting 26 U.S.C. § 6103(b)(2)(A))); S. Poverty L. Ctr. v. IRS, 589 F. Supp. 3d 79, 85 (D.D.C. 2022) (holding that "interview memoranda, law enforcement documents, communications between law enforcement agencies, and investigation photographs and videos – were records 'prepared,' 'furnished,' or 'collected' in connection with the IRS's criminal investigation . . . qualify as 'return information' under [26 U.S.C. § 6103]"); Leonard v. U.S. Dep't of the Treasury, No. 10-6625, 2013 WL 4517912, at *2 (D.N.J. Aug. 26, 2013) (withholding Taxpayer Identification Numbers of third parties); Morley v. CIA, 453 F. Supp. 2d 137, 150-51 (D.D.C. 2006) (protecting deceased person's W-4 tax withholding information because it "is precisely the type of information prohibited from disclosure" by § 6103(a)), aff'd in part, rev'd & remanded on other grounds, 508 F.3d 1108 (D.D.C 2007); Jud. Watch, Inc. v. DOJ, 306 F. Supp. 2d 58, 66-67 (D.D.C. 2004) (holding that documents which DOJ referred to IRS relating to bankruptcy of Enron Corporation and its former chairman constituted "return information" which is exempt from disclosure under 26 U.S.C. § 6103); McGinley v. U.S. Dep't of Treasury, No. 01-09493, 2002 WL 1058115, at *3-4 (C.D. Cal. Apr. 15, 2002) (withholding record regarding contract between IRS and third-party concerning corporate taxpayer's alleged audit); Chourre v. IRS, 203 F. Supp. 2d 1196, 1200-02 (W.D. Wash. 2002) (affirming agency's use of Exemption 3 in conjunction with other exemptions to withhold "a one page copy of a certified mail log . . . which listed plaintiff, as well as other taxpayers who received Statutory Notices of Deficiency from the IRS"); cf. Smart-Tek Serv. Sols. Corp. v. IRS, Nos. 15-0452, 15-0453, 2018 WL 6181472, at *5-7 (S.D. Cal. Nov. 26, 2018) (rejecting plaintiff's argument that "because the IRS has determined for tax liability purposes that Plaintiff and other taxpayers are alter egos, and therefore one entity, the IRS cannot withhold documents on the basis that they belong to other taxpayers," and holding that "[t]he Internal Revenue Code treats taxpayers as separate entities for tax assessment purposes irrespective of whether they are designated alter egos for collection purposes") aff'd per curiam, 829 F. App'x 224 (9th Cir. 2020) (mem.).

the District of Columbia has approved the use of Exemption 3 and section 6103 to refuse to confirm or deny the existence of records relating to tax return whistleblower claims.[251] (For further discussion on the use of the "Glomar" response, see Exemption 1, Glomar Response; Exemption 6, "Glomar" Responses; Exemption 7(C), The "Glomar" Response.)

Inasmuch as the statute defines tax return information as "[certain information] or any other data, received by, prepared by, furnished to, or collected by the Secretary,"[252] the Courts of Appeals for the Ninth and Eleventh Circuits have held that section 6103 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.[253] One district court has found protection appropriate when the information was collected by another agency pursuant to an agreement with the IRS,[254] and another district court has suggested that another agency's assertion of section 6103 may be appropriate if the agency could "supply a declaration with sufficient detail to determine whether the IRS has appropriately directed the [agency] to withhold [certain] information."[255]

Although infrequently addressed in FOIA cases involving section 6103, one district court stressed that if non-tax return data is contained in responsive records, "FOIA's

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[251] Nosal v. IRS, 523 F. Supp. 3d 72, 79 (2021) (concluding that agency "appropriately issued a Glomar response in conjunction with Exemption 3" by determining that "the broad definition of 'return information' encompasses not only the contents of whistleblower records[] but also the existence or non-existence of such records").

[252] 26 U.S.C. § 6103(b)(2)(A); 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).

[253] See Ryan v. United States, 74 F.3d 1161, 1163 (11th Cir. 1996) (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") (non-FOIA case); 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").

[254] See Davis, Cowell & Bowie, LLP v. SSA, No. 01-4021, 2002 WL 1034058, at *1, *4-5, *7 (N.D. Cal. May 16, 2002) (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" 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).

[255] Rosenfeld v. DOJ, No. 07-3240, 2010 WL 3448517, at *13 (N.D. Cal. Sept. 1, 2010).

segregability rule requires an agency [to] disclose non-exempt portions of a document so long as the information is not 'inextricably intertwined with exempt portions,'"[256] and thus ordered that the agency disclose the names of employees who sent or received emails pursuant to an ongoing IRS investigation as well as "any other information contained in the . . . documents that [could] be segregated from the taxpayer data."[257] The Supreme Court has held that the Haskell Amendment to section 6103, which provides that "'return information' . . . 'does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer," does not require an agency to segregate and redact "identification from return information" in order to make "otherwise protected return information disclosable."[258]

As the D.C. Circuit explained in Tax Analysts v. IRS,[259] "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 disclos[e] certain information."[260] Additionally, courts have held that 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.[261] As the Eleventh Circuit explained in Currie v.

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[256] Vento v. IRS, No. 08-159, 2010 WL 1375279, at *4 (D.V.I. Mar. 31, 2010) (quoting Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 260-61 (D.C. Cir. 1977))).

[257] Id.

[258] Church of Scientology of Cal. vs. IRS, 484 U.S. 9, 16, 18 (1987) (holding that "removal of identification from return information would not deprive it of protection under § 6103(b)" and that "such deletion would not make otherwise protected return information disclosable"); see also Hull v. IRS, 656 F.3d 1174, 1196 (10th Cir. 2011) ("'[T]he mere deletion of identifying material will not cause the remainder of the return information to lose its protected status[.]'" (quoting Church of Scientology of Cal. v. IRS, 792 F.2d 146, 151 (D.C Cir. 1986))); Surgick v. Cirella, No. 09-3807, 2012 WL 1067923, at *9 (D.N.J. Mar. 29, 2012) (holding that "FOIA's segregation requirement is inapplicable here because . . . even if the IRS were to redact identifiers from the documents at issue, such redaction is insufficient to deprive the requested documents of their protected status under [§] 6103").

[259] 350 F.3d 100 (D.C. Cir. 2003).

[260] Id. at 104 (noting that IRS is required "to disclose all tax exemption determinations – whether [it] grant[s], den[ies], or revoke[s] the exemption").

[261] See Currie v. IRS, 704 F.2d 523, 531 (11th Cir. 1983) (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 . . . notes and work papers concerning the scope and direction of the

IRS,[262] "[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."[263] Information that would

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investigation" pursuant to Exemption 3); Radcliffe v. IRS, 536 F. Supp. 2d 423, 436 (S.D.N.Y. 2008) (protecting 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 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 v. IRS, No. 05-0955, 2007 WL 1450309, at *8 (N.D. Cal. May 14, 2007) (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. 99-1317, 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. 99-9253, 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, hence seriously impair tax administration).

[262] 704 F.2d 523 (11th Cir. 1983).

[263] Id. at 531; see, e.g., Highland Cap. Mgmt., LP v. IRS, 408 F. Supp. 3d 789, 809 (N.D. Tex. 2019) (finding that although IRS had explained "the nature and types of documents withheld," IRS did not fully "explain to the court just exactly *how* disclosing [certain portions of a confidential report prepared for the IRS] would seriously impair federal tax administration").

provide insights into how the IRS selects returns for audits has regularly been found to impair the IRS's enforcement of tax laws.[264] One district court concluded that section 6103(e)(7) did not authorize an agency to refuse to confirm or deny the existence of tax records about an individual where confirming the existence of records would not reveal whether that individual was investigated by the IRS.[265]

Section 6105 of the Internal Revenue Code[266] governs the withholding of tax convention information such as bilateral agreements providing, for example, for the exchange of foreign "tax relevant information" with the United States and "mutual

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[264] See Gillin v. IRS, 980 F.2d 819, 822 (1st Cir. 1992) (per curiam) (holding that differential function scores, used to identify returns most in need of examination or audit, are exempt from disclosure); Long v. IRS, 891 F.2d 222, 224 (9th Cir. 1989) (protecting computer tapes used to develop discriminant function formulas); Sutton v. IRS, No. 05-7177, 2007 WL 30547, at *3-4 (N.D. Ill. Jan. 4, 2007) (holding discriminant function scores properly exempt from disclosure); Coolman v. IRS, No. 98-6149, 1999 WL 675319, at *5 (W.D. Mo. July 12, 1999) (holding that 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); Wishart v. Comm'r, No. 97-20614, 1998 WL 667638, at *6 (N.D. Cal. Aug. 6, 1998) (protecting discriminant function scores), aff'd, 199 F.3d 1334 (9th Cir. 1999) (unpublished table decision); Buckner v. IRS, 25 F. Supp. 2d 893, 898-99 (N.D. Ind. 1998) (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); Cujas v. IRS, No. 97-00741, 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").

[265] See Leonard v. U.S. Dep't of Treasury, No. 10-6625, 2012 WL 813837, at *5 (D.N.J. Mar. 9, 2012) (noting that "[t]he Glomar response has . . . been invoked . . . where information speaking to the existence of an investigation would compromise the investigation," and explaining that "the Court does not find that Defendant has shown that the mere existence of whistleblower forms filed about Plaintiff would lead to the necessary conclusion that an IRS investigation had been undertaken against him").

[266] 26 U.S.C. § 6105 (2018).

assistance in tax matters."[267] The Ninth Circuit and the District Court for the District of Columbia have held that section 6105 qualifies as an Exemption 3 statute.[268]

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.[269]

FOIA-Specific Nondisclosure Statutes

With the passage of the Open FOIA Act of 2009,[270] all statutes enacted after 2009 that are intended by Congress to operate as Exemption 3 statutes must specifically cite to Exemption 3 of the FOIA.[271] Prior to this statutory mandate, there were examples of nondisclosure statutes that specifically stated that they prohibited disclosure under the

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[267] Id.

[268] See Pac. Fisheries, Inc. v. IRS, No. 09-35618, 2010 WL 3611645, at *2 (9th Cir. Sept. 15, 2010) (unpublished disposition) (finding that information exchanged between United States and Russia qualified as tax convention information and was therefore properly protected pursuant to Exemption 3 and 26 U.S.C. § 6105); 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, 12-14 (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); see also Vento v. IRS, No. 08-159, 2010 WL 1375279, at *4 (D.V.I. Mar. 31, 2010) (stating that "26 U.S.C. § 6105 . . . requires non-disclosure of information exchanged pursuant to tax conventions," but failing to make determination about propriety of agency's assertion where plaintiffs conceded that documents may be withheld pursuant to 26 U.S.C. § 6105).

[269] 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").

[270] Pub. L. No. 111-83, 123 Stat. 2184; see also OIP Guidance: Congress Passes Amendment to Exemption 3 of the FOIA (posted 3/10/2010).

[271] See 5 U.S.C. § 552(b)(3) (2018). But see Everytown for Gun Safety Support Fund v. ATF, 984 F.3d 30, 42 (2d Cir. 2020) (holding that "the plain import of the 2012 Tiahrt Rider exempts [Firearms Trace System] data from FOIA disclosure, and that statute must be given effect regardless of the specific-citation requirement of the OPEN FOIA Act, an earlier [enacted] statute").

FOIA and, when such statutes were challenged, courts found that they qualified as Exemption 3 statutes.[272]

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.[273] For example, section 21(f) of the Federal Trade Commission Act[274] provides that certain investigative material 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."[275]

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[272] 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" and finding that "[currency and banking retrieval system] reports qualify as reports under the Bank Secrecy Act that are exempt from disclosure under FOIA"); Sciba v. Bd. of Governors of the Fed. Rsrv. Sys., No. 04-1011, 2005 WL 3201206, at *5-6 (D.D.C. Nov. 4, 2005) (finding that "the Board correctly asserts Exemption 3(A)[(i)] 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"); Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 944-45 (D. Ariz. 2000) (holding that 16 U.S.C. § 5937 is an Exemption 3 statute, and finding information pertaining to rare birds and 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 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), aff'd, 106 F.3d 411 (9th Cir. 1997) (unpublished table decision); see also Council on Am.-Islamic Rels., Cal. v. FBI, 749 F. Supp. 2d 1104, 1117 (S.D. Cal. 2010) (finding information obtained from Financial Crimes Financial Network properly withheld pursuant to Exemption 3, where requester had no objection to non-disclosure of this information and other courts had found Bank Secrecy Act to qualify under Exemption 3).

[273] See, e.g., 15 U.S.C. § 1314(g) (2018) (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 (2018) (providing that "a report [filed under the Bank Secrecy Act] and records of reports are exempt from disclosure under section 552 of title 5"); see also OIP Guidance: Agencies Rely on Wide Range of Exemption 3 Statutes (posted 12/16/2003) (discussing "disclosure prohibitions that are not general in nature but rather are specifically directed toward disclosure under the FOIA in particular").

[274] 15 U.S.C. § 57b-2 (2018).

[275] Id.

This statute has been determined by federal courts to qualify as an Exemption 3 statute.[276] Similarly, a provision of the Antitrust Civil Process Act[277] 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 under section 552 of title 5."[278] A provision of the Bank Secrecy Act,[279] 31 U.S.C. § 5319, 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."[280] Courts addressing the question of whether 31 U.S.C. § 5319 qualifies under Exemption 3 have concluded that it does.[281]

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[276] See A. Michael's Piano, Inc., v. FTC, 18 F.3d 138, 143-44 (2d Cir. 1994) (recognizing section 21(f) of Federal Trade Commission 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); Carter, Fullerton & Hayes, LLC v. FTC, 637 F. Supp. 2d 1, 10 (D.D.C. 2009) (concluding that agency properly invoked FOIA Exemption 3 and 15 U.S.C. § 57b-2(f) to protect three documents pertaining to investigation of state liquor regulations); Nat'l Educ. Ass'n v. FTC, No. 79-959, 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"); Novo Lab'ys, 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 [submitter] 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 Federal Trade Commission Act[, 15 U.S.C. § 57b-2(f)]").

[277] 15 U.S.C. §§ 1311-1314 (2018).

[278] Id. § 1314(g).

[279] 31 U.S.C. §§ 5311-5336 (2018).

[280] Id. § 5319.

[281] See Hulstein v. DEA, No. 10-4112, 2011 WL 13195929, at *3 (N.D. Iowa Mar. 11, 2011) (granting agency's motion for summary judgment "with regard to the information . . . that has been redacted on the basis that the information was received from the Secretary of the Treasury under the Bank Secrecy Act, 31 U.S.C. § 5311"); Council on Am.-Islamic Rels., Cal. v. FBI, 749 F. Supp. 2d 1104, 1117 (S.D. Cal. 2010) (finding that agency's "reli[ance] on the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, to withhold information obtained from the Financial Crimes Enforcement Network" was proper); Berger v. IRS, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (same); Sciba v. Bd. of Governors of the Fed. Rsrv. Sys., No. 04-1011, 2005 WL 3201206, at *6 (D.D.C. Nov. 4, 2005) (same); Linn v. DOJ, No. 92-1406, 1995 WL 631847, at *30 (D.D.C. Aug. 22, 1995) (same); Vosburgh v. IRS, No. 93-1493, 1994 WL 564699, at *4 (D. Or. July 5, 1994) (same); 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.

Additionally, two district courts have recognized that a provision in the Federal Property and Administrative Services Act of 1949,[282] 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,"[283] as a statute qualifying under Exemption 3.[284] Similarly, two district courts have held that a nearly identical disclosure provision, 10 U.S.C. § 2305(g),[285] 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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§ 5319); Vennes v. IRS, No. 88-00036, 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).

[282] 41 U.S.C. § 4702 (2018) (formerly at 41 U.S.C. § 253b(m)).

[283] Id. § 4702(b).

[284] See Sinkfield v. HUD, No. 10-885, 2012 WL 893876, at *5, *7 (S.D. Ohio Mar. 15, 2012) (stating that "there is no question that [the Federal Property and Administrative Services Act] . . . fall[s] within the purview of Exemption 3," and finding "Technical and Price Documents" properly protected pursuant to Exemption 3 and 41 U.S.C. § 253b(m) [currently at 41 U.S.C. § 4702]); Margolin v. NASA, No. 09-00421, 2011 WL 1303221, at *6 (D. Nev. Mar. 31, 2011) (finding two copies of contract proposal properly protected pursuant to Exemption 3 and Federal Property and Administrative Services Act); 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 [executive] agency'" (quoting Federal Property and Administrative Services Act)), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); see also Raher v. BOP, No. 09-526, 2011 WL 2014875, at *4, *7 (D. Or. May 24, 2011) (assuming without deciding that Federal Property and Administrative Services Act is statute qualifying under Exemption 3, but finding that agency could not rely on statute as basis for withholding information concerning successful proposals, which court determined were beyond scope of statute); cf. Pohlman, Inc. v. SBA, No. 03-01241, slip op. at 26 (E.D. Mo. Sept. 30, 2005) (holding that Federal Property and Administrative Services Act "applies only to government procurement contracts, not to sales contract[]" at issue); Ctr. for Pub. Integrity v. DOE, 191 F. Supp. 2d 187, 190-94 (D.D.C. 2002) (rejecting applicability of Federal Property and Administrative Services Act to records relating to bids for sale of government property on grounds that statute applies only to government procurement contracts).

[285] (2018).

section 2303 of this title may not be made available to any person under section 552 of title 5,"[286] also qualifies under Exemption 3.[287]

A less common form of FOIA-specific nondisclosure statutes use language stating that agencies "may withhold from disclosure" information which "would be exempt from disclosure under section 552 of title 5."[288] One district court found that one such provision, 18 U.S.C. § 208(d)(1),[289] "should be read as permitting an agency to withhold under FOIA Exemption 3 any information that is not required to be disclosed on the [Office of Government Ethics] Form 450."[290] The court concluded that the agency properly applied Exemption 3 and 18 U.S.C. § 208(d)(1) to protect "letter designations reflecting whether a financial interest on a waiver determination is that of a[n employee's] spouse or dependent child."[291]

Nondisclosure Results Under Appropriations Acts

Congress has at times 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,[292] which states that "none of the funds provided in this Act may be expended to release information acquired from any handler under" the Act.[293] When section 630 was tested in Cal-Almond, Inc. v.

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[286] 10 U.S.C. § 2305(g)(1).

[287] See Roman v. NSA, Nos. 09-2947, 09-4281, 09-3344, 09-2504, 09-5633, 2012 WL 569747, at *7 (E.D.N.Y. Feb. 22, 2012); Margolin, 2011 WL 1303221, at *6; Chesterfield Assocs., Inc. v. U.S. Coast Guard, No. 08-4674, 2009 WL 1406994, at *1-2 (E.D.N.Y. May 19, 2009).

[288] See, e.g., 18 U.S.C. § 208(d)(1) (2018) (providing that "a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) [of 18 U.S.C. § 208] [from application of penalties for acts affecting personal financial interests determined to constitute bribery, graft, or conflicts of interest] shall be made available to the public," but exempting from this disclosure requirement "any information contained in the determination that would be exempt from disclosure under section 552 of title 5").

[289] Id.

[290] Seife v. NIH, 874 F. Supp. 2d 248, 256 (S.D.N.Y. 2012).

[291] Id.

[292] Pub. L. No. 100-460, 102 Stat. 2229, 2229 (1988).

[293] Id.

USDA,[294] 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."[295]

Another statute, the Consolidated Appropriations Act, 2005, which prohibits the use of appropriated funds to disclose certain firearms database information and provides that such data "shall be immune from judicial process,"[296] and also "exempts from disclosure [firearms] data previously available to the public," was held by the Court of Appeals for the Seventh Circuit to qualify as an Exemption 3 statute.[297] Other courts continue to recognize the Consolidated Appropriations Act, 2005, as an Exemption 3 statute.[298] One district court found that ATF properly protected Firearms Trace System ("FTS") database information pursuant to the Consolidated Appropriations Act, 2005, even though a new appropriations statute[299] had been enacted because the subsequent

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[294] 960 F.2d 105 (9th Cir. 1992).

[295] Id. at 108 (dictum) (opining on whether section 630 is "explicit" enough to qualify as Exemption 3 statute).

[296] Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2859-60 (2004).

[297] City of Chicago v. U.S. Dep't of the Treasury, 423 F.3d 777, 781-82 (7th Cir. 2005).

[298] See, e.g., McRae v. DOJ, 869 F. Supp. 2d 151, 163 (D.D.C. 2012) (noting that "[t]he Consolidated Appropriations Act of 2005 is a statute on which an agency may rely for purposes of Exemption 3" and finding that agency properly withheld in full "information derived from the Firearms Trace System Database" pursuant to Exemption 3) (internal citation omitted); Skinner v. DOJ, 744 F. Supp. 2d 185, 204 (D.D.C. 2010) (noting that "[t]hrough the Consolidated Appropriations Act, [2005,] Congress expressly prohibits disclosure of information in the Firearms Trace System Database and information maintained pursuant to 18 U.S.C. § 923(g)," and finding that "[agency] . . . properly withheld the Firearms Trace Reports under Exemption 3"); Singh v. FBI, 574 F. Supp. 2d 32, 46 (D.D.C. 2008) (finding firearms trace records properly protected, 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 entireties pursuant to Consolidated Appropriations Act, 2005); 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); see also Caruso v. ATF, 495 F. App'x 776, 778 (9th Cir. 2012) (per curiam) (holding "the ATF correctly relied on the Appropriations Act of 2010 as a withholding statute explicitly barring disclosure under" Exemption 3).

[299] Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. 108-109, 119 Stat. 2290, 2295-96 (2006).

year's appropriations statute largely adopted the language of the 2005 Act.[300] The District Court for the District of Columbia has held that ATF properly withheld FTS database materials pursuant to Exemption 3 and the Consolidated Appropriations Act, 2005.[301]

Some courts, including the Ninth Circuit, have found that the Consolidated Appropriations Act, 2012, and the 2012 Tiahrt Rider did not meet the requirements of Exemption 3, as amended, inasmuch as they did not expressly reference Exemption 3 as required for all statutes enacted after the OPEN FOIA Act of 2009.[302] The Court of Appeals for the Second Circuit has come to a different conclusion.[303]

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[300] Muhammad, 2007 WL 433552, at *2 n.1 (noting that "[a] 2006 rider was passed . . ." but ultimately applying 2005 version of statute because Court determined that "[t]he language of the 2005 Act was not altered in any [pertinent] respects and the additional language [in 2006 rider] does not appear to be applicable to the circumstances here").

[301] See Cooper v. DOJ, No. 99-2513, 2022 WL 602532, at *27 (D.D.C. Mar. 1, 2022) ("[U]nder the plain language of the Consolidated Appropriations Act of 2005, the ATF is prohibited from disclosing this information because it represents both 'part . . . of the contents of the Firearms Trace Systems database' and 'information required to be kept by licensees pursuant to [§] 923(g).'" (quoting Pub. L. No. 108–447, 18 Stat. 2809, 2859)); Michael v. DOJ, No. 17-0197, 2018 WL 4637358, at *8 (D.D.C. Sept. 27, 2018) (finding disclosure prohibitions in 2005 and 2008 appropriations bills still effective prospectively and beyond those fiscal years as permanent prohibition); McRae, 869 F. Supp. 2d at 163 (finding that agency "properly withheld all information derived from the Firearms Trace System Database" pursuant to Exemption 3 and Consolidated Appropriations Act, 2005; Skinner, 744 F. Supp. 2d at 204 (finding "Firearm Trace Reports" properly protected pursuant to Exemption 3 and Consolidated Appropriations Act, 2005).

[302] See Ctr. for Investigative Reporting v. DOJ, 14 F.4th 916, 927, 932 (9th Cir. 2021) ("[T]he 2012 Rider . . . impliedly repealed [preceding Riders] in full [and] . . . simply reenacted the 2010 Rider. Given that the government has advanced no argument suggesting that the 2010 or 2012 Riders satisfy the OPEN FOIA Act or that they do not need to satisfy the OPEN FOIA Act, . . . the data requested by [Plaintiff] is not exempted from disclosure under FOIA, 5 U.S.C § 552(b)(3)."); Fowlkes v. ATF, No. 13-0122, 2014 WL 4536909, at *7 (D.D.C. Sept. 15, 2014) (holding that Consolidated Appropriations Act, 2012, failed to meet subpart (A)(ii) of FOIA Exemption 3). But see Ctr. for Investigative Reporting v. DOJ, 982 F.3d 668, 693-700 (9th Cir. 2020) (Bumatay, J., dissenting) (arguing that OPEN FOIA Act's requirement that future Exemption 3 statutes must cite specifically to the FOIA is a legislative entrenchment that unconstitutionally binds future Congresses).

[303] Everytown for Gun Safety Support Fund v. ATF, 984 F.3d 30, 42 (2d Cir. 2020) (holding that "the plain import of the 2012 Tiahrt Rider exempts [Firearms Trace System] data from FOIA disclosure, and that statute must be given effect regardless of the specific-citation requirement of the OPEN FOIA Act, an earlier statute"); accord Abdeljabbar v. ATF, 74 F. Supp. 3d 158, 173-76 (D.D.C. 2014) (determining that more recent appropriations acts need not meet requirements of Exemption 3, as amended, where appropriations acts enacted prior to OPEN FOIA Act's enactment remain in effect as permanent laws).

"Operational Files" Provisions

The CIA Information Act of 1984, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004,[304] 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."[305] Several courts have recognized the CIA Information Act as a qualifying statute under Exemption 3 of the FOIA.[306]

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,[307] the National Reconnaissance Office,[308] and the National Geospatial-Intelligence Agency.[309] These special statutory protections are

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[304] 50 U.S.C. § 3141(a) (2018) (formerly at 50 U.S.C. § 431).

[305] Id. § 3141(a).

[306] 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 the "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 Off., 441 F. Supp. 2d 37, 44 (D.D.C. 2006) (recognizing 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, 271-72 (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 procedure for exempting operational files").

[307] See 50 U.S.C. § 3144 (2018).

[308] See 50 U.S.C. § 3143 (2018); see also Aftergood, 441 F. Supp. 2d at 46 (finding that "[t]he [National Reconnaissance Office] Director and the [Director of National Intelligence] are empowered . . . 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").

[309] See 50 U.S.C. § 3142 (2018) (formerly at 50 U.S.C. § 432) (authorizing special "operational files" treatment for National Geospatial-Intelligence Agency); see also OIP Guidance: Agencies Rely on Wide Range of Exemption 3 Statutes (posted 12/16/2003).

modeled after, and quite similar to, the CIA Information Act.[310] For example, 50 U.S.C. § 3143 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 in connection therewith."[311]

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,[312] 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,"[313] does not qualify under Exemption 3 because the statute does not expressly prohibit the records disclosure, nor did it satisfy either prong of Exemption 3's two subparts.[314]

Likewise, the Copyright Act of 1976[315] has been held to satisfy neither Exemption 3 subpart because, rather than prohibiting disclosure, it specifically permits public inspection of copyrighted documents.[316] The D.C. Circuit has also held that section 520 of the Federal Food, Drug, and Cosmetic Act[317] is not an Exemption 3 statute because it does not specifically prohibit the disclosure of records.[318] Similarly, a provision of the

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[310] See 50 U.S.C. § 3141; see also Aftergood, 441 F. Supp. 2d at 44 n.8 (noting that "[50 U.S.C.] § 432a [currently at 50 U.S.C. § 3142] was modeled on [50 U.S.C.] § 431, and much of § 432a's language is substantially identical to corresponding provisions of § 431").

[311] 50 U.S.C. § 3143 (2018) (formerly at 50 U.S.C. § 432a).

[312] 816 F.2d 730 (D.C. Cir. 1987).

[313] 28 U.S.C. § 534 (2018).

[314] Reps. Comm., 816 F.2d at 736 n.9.

[315] 17 U.S.C. § 705(b) (2018).

[316] 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, 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).

[317] 21 U.S.C. § 360j(h) (2018).

[318] See Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1286 (D.C. Cir. 1983). But cf. 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), qualifies as Exemption 3 statute).

Postal Reorganization Act, currently codified at 39 U.S.C. § 410(c)(6),[319] has been found not to qualify because the broad discretion afforded the Postal Service to release or withhold records is not sufficiently specific.[320] Similarly, section 1106 of the Social Security Act[321] 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.[322]

Likewise, the District Court for the District of Columbia rejected the argument that section 210(b)[323] of the Investment Advisers Act of 1940 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 information obtained by a subpoena."[324] That same district court determined that section 10(d)[325] of the Federal Insecticide, Fungicide, and Rodenticide Act does not qualify as an Exemption 3 statute because it "does not prohibit the disclosure of [pesticide] inert ingredients in the absence of the [EPA] Administrator's judgment."[326] Additionally, the D.C. Circuit has held that the early warning disclosure provision in the Transportation

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[319] (2018).

[320] 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").

[321] 42 U.S.C. § 1306 (2018).

[322] See Robbins v. HHS, No. 95-3258, 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. Med. Ass'n, Inc. v. Dep't of Health, Ed. & Welfare, 479 F. Supp. 1291, 1302 (M.D. Fla. 1979) ("As a direct result of the 1976 amendment to Exemption 3 of the FOIA, therefore, a general, discretionary nondisclosure statute like 42 U.S.C. [§] 1306 no longer qualifies as the kind of authority to withhold information by virtue of Exemption 3 . . . .") (non-FOIA case).

[323] 15 U.S.C. § 80b-10(b) (2018).

[324] Aguirre v. SEC, 551 F. Supp. 2d 33, 50-51 (D.D.C. 2008).

[325] 7 U.S.C. § 136h(d) (2018).

[326] Nw. Coal. for Alts. to Pesticides v. Browner, 941 F. Supp. 197, 201 (D.D.C. 1996). Compare id. ("The plain language of [7 U.S.C. § 136h(d)] does not satisfy the narrow requirements of Exemption 3."), with Doe v. Veneman, 380 F.3d 807, 817-18 (5th Cir. 2004) (holding that section 1491 of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136i-1, is Exemption 3 statute because it prohibits disclosure of covered information) (reverse FOIA suit).

Recall Enhancement, Accountability, and Documentation (TREAD) Act[327] does not qualify as an Exemption 3 statute because it does not "'specifically exempt[]'" data "'from disclosure.'"[328]

Although the Supreme Court has declined to decide whether the Trade Secrets Act[329] is an Exemption 3 statute,[330] most courts confronted with the issue have held that the statute does not meet the requirements of Exemption 3.[331] Significantly, in 1987, the D.C. Circuit issued a decision 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.[332] 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."[333] Because duly promulgated agency regulations can provide the necessary authorization for release, the agency "possesses discretion to control the applicability" of the Act.[334] The D.C. Circuit found that the existence of this discretion precludes the Trade Secrets Act from satisfying what is now subpart (A)(i) of Exemption 3.[335] Moreover, the court held that the Trade Secrets Act fails to satisfy the first prong of what is now subpart

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[327] 49 U.S.C. § 30166(m) (2018).

[328] Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n, 533 F.3d 810, 815 (D.C. Cir. 2008) (quoting 5 U.S.C. § 552(b)(3)).

[329] 18 U.S.C. § 1905 (2018).

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

[331] See, e.g., Anderson v. HHS, 907 F.2d 936, 949 (10th Cir. 1990) (finding that "broad and ill-defined wording of [18 U.S.C.] § 1905 fails to meet either of the requirements of Exemption 3"); Acumenics Rsch. & 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) (discussing difficulty of integrating Trade Secrets Act, which is "almost certainly designed to protect that narrower category of trade secrets" and "forbids disclosure of trade secrets 'to any extent not authorized by law [18 U.S.C. § 1905],'" with FOIA Exemption 3's requirements for qualifying statutes, and suggesting that if trade secrets and formulas are "not protected by [E]xemption 4, even more clearly [they are] not protected by [Exemption 3, pursuant to §] 1905 either").

[332] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137-42 (D.C. Cir. 1987).

[333] Id. at 1138 (quoting § 1905).

[334] Id. at 1139.

[335] Id. at 1138.

(A)(ii) because it "in no way channels the discretion of agency decisionmakers."[336] Indeed, as the court concluded, this lack of statutory guidance renders the Trade Secrets Act susceptible to invocation at the "whim of an administrator."[337] Finally, the D.C. Circuit held that the Act also fails to satisfy the second prong of subpart (A)(ii) 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.[338] Given all these elements, the court held that the Trade Secrets Act does not qualify as an Exemption 3 statute.[339]

Likewise, the D.C. District Court held that the Federal Information Security Modernization Act of 2014[340] failed to qualify as an Exemption 3 statute for two reasons.[341] The court explained: "First, because the Modernization Act was enacted after the OPEN FOIA Act of 2009, for it to protect records from disclosure under Exemption 3 it must 'specifically cite[ ] to [Exemption 3].'"[342] The court found that "[i]t does not do so."[343] Second, the court found that "to the extent that the Modernization Act does cite to [the] FOIA, it does not alter agencies' obligations under the FOIA statute."[344] As the court explained, "[t]he Modernization Act expressly states that '[n]othing in this subchapter . . . may be construed as affecting the authority of . . . the head of any agency, with respect to the authorized use or disclosure of information, including . . . the disclosure of information under section 552 of title 5.'"[345]

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[336] Id. at 1139.

[337] Id.

[338] Id. at 1140-41.

[339] Id. at 1141.

[340] 44 U.S.C. § 3551 (2018).

[341] See Long v. ICE, 149 F. Supp. 3d 39, 54 (D.D.C. 2015).

[342] Id. (quoting 5 U.S.C. § 552(b)(3)).

[343] Id.

[344] Id.

[345] Id. (quoting 44 U.S.C. § 3558).

Lastly, at one time there was uncertainty as to whether the Privacy Act of 1974[346] could serve as an Exemption 3 statute.[347] Congress, upon enacting the CIA Information Act[348] in 1984, explicitly provided that the Privacy Act is not an Exemption 3 statute.[349]

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[346] 5 U.S.C. § 552a (2018).

[347] See Greentree v. U.S. Customs Serv., 674 F.2d 74, 76-89 (D.C. Cir. 1982) (concluding that Privacy Act is not Exemption 3 statute while acknowledging that "[t]he question presented is a difficult one," and that two other circuit courts previously reached the opposite conclusion).

[348] Pub. L. No. 98-477, § 2(c), 98 Stat. 2209, 2212 (1984).

[349] Id. § 2(c) ("No agency shall rely on any [Privacy Act] exemption . . . to withhold from an individual any record which is otherwise accessible to such individual under the provisions of [the FOIA]." (amending what is now subsection (t)(2) of Privacy Act, 5 U.S.C. § 552a(t)(2))).