



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

¹ [5 U.S.C. § 552\(b\)\(3\) \(2018\)](#).

² Id.

³ 123 Stat. at 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 Oct. 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).

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 to qualify under Exemption 3 and statutes on which agencies reported having relied as Exemption 3 statutes in prior fiscal years).

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

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 At times, however, the D.C. Circuit as

⁶ Reps. Comm. for Freedom of the Press v. DOJ, 816 F.2d 730, 734 (D.C. Cir. 1987), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n, 533 F.3d 810, 813-14 (D.C. Cir. 2008) (finding that, when analyzing statute under Exemption 3, "a court . . . must first determine whether the statute is a withholding statute at all by deciding whether it satisfies 'the threshold requirement that it specifically exempt matters from disclosure'" (quoting Reps. Comm., 816 F.2d at 734)).

⁷ 816 F.2d 730.

⁸ Id. at 735; see also 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 plain language of statute in question, and noting that federal regulations, constituting agency's interpretation of statute, are not entitled to deference in determining whether statute qualifies under Exemption 3).

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").

well as other courts have not strictly adhered to this requirement that the "congressional purpose to exempt matters from disclosure" be found "in the actual words of the statute"¹¹ and have looked to the legislative history of the claimed withholding statute in determining whether that statute qualified under Exemption 3.¹²

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.¹³ 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."¹⁴

¹¹ Reps. Comm., 816 F.2d at 735; accord Jones v. IRS, No. 06-322, 2008 WL 1901208, at *3-4 (W.D. Mich. Apr. 25, 2008) (concluding that "IRS appropriately denied [plaintiff's] request for Pocket Commission information" pertaining to third-party employee, where IRS determined that reproduction of requested materials would violate 18 U.S.C. § 701, which criminalizes unauthorized reproduction of official badges, identification cards, and other insignia, but which does not refer to nondisclosure of information).

¹² See Wis. Project on Nuclear Arms Control v. U.S. Dep't of Com., 317 F.3d 275, 284-85 (D.C. Cir. 2003) (looking to legislative history of section 12(c) of Export Administration Act of 1979, 50 U.S.C. app. § 2411(c), and section 203(a)(1) of International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1), and finding that both section 12(c) and section 203(a)(1) qualified under Exemption 3; with regard to section 12(c), where Congress made plain its intent to prevent disclosure of export-application information, and, with regard to section 203(a)(1), where Congress made plain its intent to authorize President to maintain confidentiality provision of Export Administration Act in times of lapse); Meyerhoff v. EPA, 958 F.2d 1498, 1501-02 (9th Cir. 1992) (looking to legislative history of withholding statute to determine that statutory amendment did not create new prohibition on disclosure, but rather clarified existing nondisclosure provision); cf. Essential Info., Inc. v. USIA, 134 F.3d 1165, 1165-67 (D.C. Cir. 1998) (surveying legislative history of Smith-Mundt Act, 22 U.S.C. § 1461-1a, to bolster ruling that statute qualifies under Exemption 3).

¹³ See Wis. Project, 317 F.3d at 281-82 (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) as the applicable statute in this Order.").

¹⁴ Wis. Project, 317 F.3d at 283.

Elsewhere, courts have looked to legislative history for guidance in how to interpret statutory terms or phrases subject to multiple interpretations.¹⁵ 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 they have found Exemption 3 statutes to apply retroactively to the requested records.¹⁶ For any statute enacted after October 28, 2009, the text of Exemption 3 itself requires that the statute "specifically cite" to Exemption 3 in order to qualify as a withholding statute.¹⁷

¹⁵ See Doe v. Veneman, 380 F.3d 807, 817-18 (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 FTC Act, 15 U.S.C. § 57b-2(f)).

¹⁶ 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. app. § 2411(c)] in November 2000"); Sw. Ctr. for Biological Diversity v. USDA, 314 F.3d 1060, 1062 (9th Cir. 2002) (determining that agency may rely on National Parks Omnibus Management Act, 16 U.S.C. § 5937, 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. app. § 2411(c)(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, 1183-1184 (9th Cir. 1984) (permitting retroactive application where court determined "[t]hat Congress intended the [Economic Tax Recovery Act, Pub. L. No. 97-34, 95 Stat. 172,] amendment to apply to this litigation is beyond all question"); Chamberlain v. Kurtz, 589 F.2d 827, 835 (5th Cir. 1979) (applying amended version of Internal Revenue Code to pending case where court determined that no injustice would result); Nat'l Educ. Ass'n v. FTC, No. 79-959, 1983 WL 1883, at *2 (D. Mass. Sept. 26, 1983) (looking to legislative history of FTC Improvements Act of 1980, 15 U.S.C. § 57b-2(f) (2006), and concluding that "[t]he legislative history of the bill supports retroactive application of its provisions"). 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 as "misplaced").

¹⁷ 5 U.S.C. § 552(b)(3) ("(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 does not specifically cite to Exemption 3).

In Founding Church of Scientology, Inc. v. Bell,¹⁸ the D.C. Circuit noted that, by its very terms, "Exemption 3 is explicitly confined to material exempted from disclosure 'by statute.'"¹⁹ As such, Exemption 3 is generally triggered only by federal statutes,²⁰ although the D.C. Circuit and the Court of Appeals for the Eleventh Circuit have held that executive orders may trigger Exemption 3 protection when they are issued pursuant to a grant of authority contained in a federal statute.²¹ Federal rules of procedure, which are promulgated by the Supreme Court, ordinarily do not qualify under Exemption 3.²² When a rule of procedure is subsequently modified and thereby specifically enacted into law by Congress, however, it may qualify under the exemption.²³ At least two courts have held

¹⁸ 603 F.2d 945 (D.C. Cir. 1979).

¹⁹ Id. at 952.

²⁰ See id. (finding that the "Federal Rules of Civil Procedure simply do not satisfy this description"); Wash. Post Co. v. HHS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,047, at 81,127 n.2 (D.D.C. Dec. 4, 1980) (declaring that "an Executive Order . . . is clearly inadequate to support reliance on Exemption 3"), rev'd & remanded on other grounds, 690 F.2d 252 (D.C. Cir. 1982).

²¹ 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, 50 U.S.C. app. § 2411(c)(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").

²² 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).

²³ 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 specially amended by Congress); Durham v. U.S. Att'y. Gen., No. 06-843, 2008 WL 620744,

that evidence obtained by way of a self-executing Mutual Legal Assistance Treaty ("MLAT") with a confidentiality clause between the United States and a foreign country qualifies for protection under Exemption 3.²⁴

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.²⁵ This, in turn, often will require courts to interpret the scope of the nondisclosure statute.²⁶ Courts have been somewhat divided over whether to construe the withholding criteria of the nondisclosure statute narrowly, consistent with the strong disclosure policies specifically

at *2 (E.D. Tex. Mar. 3, 2008) (noting that, "[w]hile courts have held that most of the rules contained in the Federal Rules of Civil and Criminal Procedure do not qualify as a statute for the purposes of [Exemption 3], Rule 6 of the Rules of Criminal Procedure qualifies because it was enacted by Congress"); Berry v. DOJ, 612 F. Supp. 45, 49 (D. Ariz. 1985) (determining prior to its amendment, that Rule 32 of Federal Rules of Criminal Procedure, governing disclosure of presentence reports, is properly considered statute for Exemption 3 purposes because it was enacted into law by Congress in 1975); see also Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 776 (E.D. Pa. 2008) (stating that "Rule 6(e)[of the Federal Rules of Criminal Procedure] is a statutory mandate that automatically invokes Exemption 3"); cf. DOJ v. Julian, 486 U.S. 1, 9 (1988) (assuming without deciding that Rule 32(C) of the Rules of Criminal Procedure, prior to its amendment, prevented the disclosure of presentence reports).

²⁴ See Grynberg v. DOJ, 758 F. App'x 162, 164 (2d Cir. 2019) (affirming the district court's determination that the self-executing Mutual Legal Assistance Treaty ("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, 26 (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").

²⁵ 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., 18 F.3d at 143 (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); Fund for Const. Gov't, 656 F.2d at 868 (same); Pub. Citizen Health Rsch. Grp., 704 F.2d at 1284 (same).

²⁶ See, e.g., A. Michael's Piano, Inc., 18 F.3d at 143-45 (interpreting section 21(f) of FTC Act, 15 U.S.C. § 57b-2(f)); Aronson, 973 F.2d at 965-66 (interpreting 26 U.S.C. § 6103); Anderson, 907 F.2d at 950-51 (interpreting section 520j(c) of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360j(c), and section 301(j) of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(j)); Grasso v. IRS, 785 F.2d 70, 74-75 (3rd 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)).

embodied in the FOIA,²⁷ or broadly, pursuant to deferential standards of general administrative law.²⁸ As the Court of Appeals for the Second Circuit observed in A. Michael's Piano, Inc. v. FTC,²⁹ "the Supreme Court has never applied a rule of [either] narrow or deferential construction to withholding statutes."³⁰ 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."³¹

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

²⁷ 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 "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-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 the statute in question lay outside the agency's area of expertise), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996).

²⁸ See Broward Bulldog, Inc. v. U.S. DOJ, 939 F.3d 1164, 1182 (11th Cir. 2019) (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"); 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").

²⁹ 18 F.3d 138 (2d Cir. 1994).

³⁰ Id. at 144.

³¹ Id.

statute and whether the records fall within the statute's scope.³² 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.³³

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 engaged in a specific discussion of the legal basis for Exemption 3's use in that exceptional case.³⁴

³² 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 statute"); see also Cozen O'Connor, 570 F. Supp. 2d at 775 (noting that, "[u]nlike other FOIA exemptions, Exemption 3's applicability does not depend upon the contents of the documents," and stating that, because "[i]t is the nature of the document, not its contents, that makes it exempt[,]. . . the agency need only show that the documents are within the category of documents specifically exempt from disclosure by the statute").

³³ See Aronson, 973 F.2d at 967 (noting that after a court has found Exemption 3 to apply "[a]ny further review must take place under more deferential, administrative law standards"); 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").

³⁴ 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 (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").

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. Courts often place emphasis on specifying whether a statute qualifies as an Exemption 3 statute under what is now subpart (A)(i),³⁵ which encompasses statutes that require information to be withheld and leave the agency no discretion on the issue, or to what is now subpart (A)(ii),³⁶ which encompasses statutes that either provide criteria for withholding information or refer to particular matters to be withheld.³⁷ 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.³⁸

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

³⁶ *Id.* at § 552(b)(3)(A)(ii) (2018) (previously referred to as subpart B of Exemption 3).

³⁷ See, e.g., *Lessner v. U.S. Dep't of Com.*, 827 F.2d 1333, 1336-37 (9th Cir. 1987) (finding that section 12(c)(1) of Export Administration Act of 1979, 50 U.S.C. § 4614, qualified as Exemption 3 statute, and specifying that statute qualified under subpart (A)(ii) (subsequently, section 12(c)(1) was repealed and replaced by Export Control Reform Act of 2018, 50 U.S.C. § 4820(h)(1)(A) (2018) which maintained analogous confidentially provision governing disclosure of information obtained from export licenses); *Piper & Marbury, L.L.P. v. USPS*, No. 99-2383, 2001 WL 214217, at *3-5 (D.D.C. Mar. 6, 2001) (magistrate's recommendation) (same), *adopted*, No. 99-2383 (D.D.C. Mar. 29, 2001); *McGivra v. NTSB*, 840 F. Supp. 100, 102 (D. Colo. 1993) (finding that Transportation Safety Act of 1974, 49 U.S.C. § 1114(c), qualified as Exemption 3 statute, and specifying that statute qualified under subpart (A)(i)); *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) (finding that International Investment Survey Act of 1976, 22 U.S.C. § 3104(c), qualified as Exemption 3 statute, and specifying that statute qualified under subpart (A)(i)); *Motion Picture Ass'n of Am. v. DOJ*, No. 80-6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981) (finding that provision of Antitrust Civil Process Act, 15 U.S.C. § 1314(g), qualified as Exemption 3 statute, and specifying that statute qualified under subpart (A)(i)); *Nat'l W. Life Ins. Co. v. United States*, 512 F. Supp. 454, 459 (N.D. Tex. 1980) (finding that provision of Postal Reorganization Act, 39 U.S.C. § 410(c)(2), qualified as Exemption 3 statute, and specifying that statute qualified under subpart (A)(ii)).

³⁸ See, e.g., *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 part), *aff'd on other grounds*, 288 F. App'x 829 (3d Cir. 2008); *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), *aff'd on other grounds*, 512 F.3d 677 (D.C. Cir. 2008); *ACLU v. DOD*, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same).

For example, one district court has held that section 7332 of the Veterans Health Administration Patient Rights Statute,³⁹ 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 3.⁴⁰ Similarly, one district court found that 38 U.S.C. § 5705(a),⁴¹ 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).⁴² Likewise, "[m]edical quality assurance records created by or for the Department of Defense"⁴³ have also been found to qualify under Exemption 3, generally.⁴⁴

The Court of Appeals for the Fifth Circuit has held that a provision of the Federal Insecticide, Fungicide, and Rodenticide Act⁴⁵ qualifies as an Exemption 3 statute, but it did not state whether that provision qualified under subpart (A)(i) or (A)(ii) of Exemption 3.⁴⁶ Similarly, a district court held that the confidentiality provision in the Federal Election Campaign Act⁴⁷ qualifies as an Exemption 3 statute but did not designate that

³⁹ 38 U.S.C. § 7332 (2018).

⁴⁰ See Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992).

⁴¹ (2018).

⁴² 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).

⁴³ 10 U.S.C. § 1102(a) (2018).

⁴⁴ 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))).

⁴⁵ 7 U.S.C. § 136i-1 (2018).

⁴⁶ See Doe v. Veneman, 380 F.3d 807, 817-18 (5th Cir. 2004).

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

statute as qualifying pursuant to subpart (A)(i) or (A)(ii) of Exemption 3.⁴⁸ 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.⁴⁹ (For a further discussion of the use and origin of the "Glomar" response under Exemption 1, see Exemption 1, Glomar Response and Mosaic Approach.)

Courts have held that 10 U.S.C. § 130c,⁵⁰ a statute that protects from disclosure certain "sensitive information of foreign governments,"⁵¹ qualifies as an Exemption 3 statute but have not identified the statute as qualifying under subpart (A)(i) or (A)(ii) of Exemption 3.⁵² Likewise, one district court has determined that the Archaeological Resources Protection Act of 1979,⁵³ a statute which prohibits disclosure of certain information concerning archaeological resources,⁵⁴ qualifies under Exemption 3, without specifying under which subpart the Act qualifies.⁵⁵ Also, a number of courts have determined that 18 U.S.C. § 798,⁵⁶ which criminalizes the disclosure of certain classified

⁴⁸ See Citizens for Resp. & Ethics in Wash. v. FEC, No. 04-1672, 2005 U.S. Dist. LEXIS 50761, at *6 (D.D.C. May 16, 2005).

⁴⁹ Skurrow v. DHS, 892 F. Supp. 2d 312, 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 authority").

⁵⁰ (2018).

⁵¹ Id. § 130c(a).

⁵² 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), aff'd on other grounds, 512 F.3d 677 (D.C. Cir. 2008); ACLU v. DOD, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same).

⁵³ 16 U.S.C. §§ 470aa-470mm (2018).

⁵⁴ 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").

⁵⁵ 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 (quoting unidentified source)), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004).

⁵⁶ (2018).

information "concerning the nature, preparation, or use of any code, cipher or cryptographic system of the United States or any foreign government,"⁵⁷ qualifies as an Exemption 3 statute without identifying under which subpart it qualifies.⁵⁸

A court has held that a provision of the Fair Housing Act⁵⁹ that protects information concerning ongoing discrimination investigations qualifies as a "disclosure-prohibiting statute," but it did not specify either subpart of Exemption 3.⁶⁰ Similarly, the Supreme Court has held that the Census Act,⁶¹ which requires that certain data be withheld, is an Exemption 3 statute without specifying under which subpart the statute qualifies.⁶² One district court held that the confidentiality provisions of the Gramm Leach Bliley Act of 1999⁶³ qualify as Exemption 3 statutes inasmuch as the provisions protect

⁵⁷ 18 U.S.C. § 798(a)(1).

⁵⁸ See Larson v. U.S. Dep't of State, 565 F.3d 857, 868-69 (D.C. Cir. 2009) (finding that the agency properly protected "classified information 'concerning the communication intelligence activities of the United States' or 'obtained by the process of communication intelligence from the communications of any foreign government'" pursuant to Exemption 3 and 18 U.S.C. § 798(a)(3)-(4) (quoting 18 U.S.C. § 798(a)(3)-(4))); ACLU v. ODNI, No. 10-4419, 2012 WL 1117114, at *4 (S.D.N.Y. Mar. 30, 2012) (finding that agency properly protected records concerning "'communications intelligence activities' of the 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, 512-13 (S.D.N.Y. 2007) (finding 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) (finding information on cryptography currently used by NSA to be "integrally related" to intelligence gathering and thus protectable); Winter v. NSA, 569 F. Supp. 545, 546-48 (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").

⁵⁹ 42 U.S.C. § 3610(d) (2018).

⁶⁰ West v. Jackson, 448 F. Supp. 2d 207, 212-13 (D.D.C. 2006), summary affirmance granted & motion to remand denied, No. 06-5281, 2007 WL 1723362 (D.C. Cir. 2007) (unpublished disposition).

⁶¹ 13 U.S.C. §§ 8(b), 9(a) (2018).

⁶² Baldrige v. Shapiro, 455 U.S. 345, 359 (1982).

⁶³ 15 U.S.C. § 6801 (2018).

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 3.⁶⁴

A district court has held that 18 U.S.C. § 701,⁶⁵ 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.⁶⁶ Similarly, a district court has held that 42 U.S.C. § 14132(b)(3),⁶⁷ a statutory provision that prohibits disclosure of National DNA Index System records except under four circumstances, qualifies as an Exemption 3 statute without specifying the subpart under which the provision qualifies.⁶⁸ In another case, the same district court determined that section 306(i) of the Convention on Cultural Property Implementation Act,⁶⁹ 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.⁷⁰

A district court has found that 42 U.S.C. § 300aa-12(d)(4)(A),⁷¹ 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

⁶⁴ 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").

⁶⁵ (2018).

⁶⁶ 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).

⁶⁷ (2012) (current version at 34 U.S.C. § 12592(b)(3) (2018)).

⁶⁸ 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 categories, "the FOIA forbids disclosing to [requester] the records he seeks").

⁶⁹ 19 U.S.C. § 2605(i) (2018).

⁷⁰ See Ancient Coin Collectors Guild v. U.S. 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 was "appropriately withheld under Exemption 3(b)," but quoting subparts (A)(i) and (A)(ii) of Exemption 3).

⁷¹ (2018).

statute.⁷² 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 withholding (specifically, failure to provide written consent of the individual who submitted the information).⁷³

A district court has held that 7 U.S.C. § 2018(c),⁷⁴ 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,"⁷⁵ qualifies "as a withholding statute under [E]xemption 3" without identifying the Exemption 3 subpart under which the statute qualifies.⁷⁶ 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.⁷⁷

One district court has determined that the Protected National Security Documents Act of 2009 ("PNSDA"),⁷⁸ 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.⁷⁹ The PNSDA requires that for the Government to withhold

⁷² Long v. DOJ, 778 F. Supp. 2d 222, 234 (N.D.N.Y. 2011).

⁷³ See id.

⁷⁴ (2018).

⁷⁵ 7 U.S.C. § 2018(c).

⁷⁶ 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).

⁷⁷ 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)).

⁷⁸ Protected National Security Documents Act of 2009, Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 565, 123 Stat. 2142 (2009).

⁷⁹ ACLU v. DOD, 229 F. Supp. 3d 193, 204-06 (S.D.N.Y. 2017), rev'd on other grounds, 901 F.3d 125 (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

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."⁸⁰

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."⁸¹ A primary example is Rule 6(e) of the Federal Rules of Criminal Procedure, which regulates disclosure of matters occurring before a grand jury⁸² and has been found to qualify as a subpart (A)(i) statute.⁸³ Courts have found that this rule satisfies the basic "statute" requirement of Exemption 3 because Rule 6(e) was amended by Congress in 1977.⁸⁴ 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."⁸⁵

rejecting district court's holding that declaration submitted by CIA in support of its certification that releasing photographs would endanger the United States, lacked sufficient information to be "logical and plausible").

⁸⁰ § 565, 123 Stat. at 2184-85.

⁸¹ 5 U.S.C. § 552(b)(3)(A)(i) (2018) (previously referred to as subpart A).

⁸² Fed. R. Crim. P. 6(e), enacted by Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319.

⁸³ 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").

⁸⁴ 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 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)); 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"); 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").

⁸⁵ 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 law firm to federal prosecutors, accompanying the production of documents requested by

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,⁸⁶ the Court of Appeals for the District of Columbia Circuit stated that the scope of the secrecy that must be afforded grand jury material "is necessarily broad" and that, consequently, "it encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal 'the identities of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like.'"⁸⁷ 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 3.⁸⁸

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"); 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 ground 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).

⁸⁶ 656 F.2d 856 (D.C. Cir. 1981).

⁸⁷ 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 U.S. App. LEXIS 2379 (D.C. Cir. 2016) (affirming district court's action finding that agency properly withheld grand jury material that would reveal identities of jurors and witnesses, scope of the grand jury investigation, source of evidence, and evidence presented to grand jury).

⁸⁸ 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 the disclosure of the Plaintiff's cross-examination as it occurred before a grand jury); Murphy v. EOUSA, 789 F.3d 204, 211 (D.C. Cir. 2015) (affirming district court's action and finding that agency properly protected the dates and times of day that the grand jury met, and the grand jury foreperson's name and signature pursuant to Exemption 3); Sanders v. DOJ, No. 10-

In its scrutiny of the scope of Rule 6(e) in Senate of Puerto Rico v. DOJ,⁸⁹ 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).⁹⁰ Rather, an agency must establish a nexus between the release

5273, 2011 WL 1769099, at *1 (D.C. Cir. Apr. 21, 2011) (per curiam) (holding that "the district court correctly held that the government properly withheld the grand jury transcript [that] . . . would reveal 'such matters as the identities . . . of witnesses . . . , the substance of testimony, [and] the . . . questions of jurors'" (quoting Stolt-Nielsen Transp. Grp. Ltd. v. United States, 534 F.3d 728, 732 (D.C. Cir. 2008))); 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. Kears, 30 F. App'x 85, 86 (4th Cir. 2002) (per curiam) (holding that Rule 6(e) prohibits FOIA disclosure of grand jury transcripts); Rugiero v. DOJ, 257 F.3d 534, 549 (6th Cir. 2001) (protecting grand jury transcripts, exhibits, and identities of witnesses); Church of Scientology Int'l v. DOJ, 30 F.3d 224, 235 (1st Cir. 1994) (noting that "documents identified as grand jury exhibits, and whose contents are testimonial in nature or otherwise directly associated with the grand jury process, such as affidavits and deposition transcripts, ordinarily may be withheld simply on the basis of their status as exhibits"); McDonnell v. United States, 4 F.3d 1227, 1246-47 (3d Cir. 1993) (protecting "[i]nformation and records presented to a federal grand jury[,] . . . names of individuals subpoenaed[,] . . . [and] federal grand jury transcripts of testimony," and recognizing "general rule of secrecy" with regard to grand jury records); Silets v. DOJ, 945 F.2d 227, 230 (7th Cir. 1991) (concluding that "identity of witness before a grand jury and discussion of that witness[s] testimony" are exempt from disclosure, as they "fall[] squarely within" Rule 6(e)'s prohibition); Gatson v. FBI, No. 08-6348, 2012 WL 1033345, at *6 (D.N.J. Mar. 27, 2012) (finding that agency properly asserted Exemption 3 and Rule 6(e) to withhold "identifying information of individuals on the grand jury, such as company names and employees served with a federal grand jury subpoena [sic]"); Kortlander v. BLM, 816 F. Supp. 2d 1001, 1015-17 (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 email documents obtained through grand jury subpoenas," and finding such materials properly withheld under Exemption 3); Bretti, 639 F. Supp. 2d at 265 (finding "grand jury records" properly protected pursuant to Exemption 3 and Rule 6(e)).

⁸⁹ 823 F.2d 574 (D.C. Cir. 1987).

⁹⁰ 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

of that information and "revelation of a protected aspect of the grand jury's investigation."⁹¹ As the D.C. Circuit explained in Stolt-Nielsen Transportation Group Ltd. v. United States,⁹² "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."⁹³ Further, as the D.C. Circuit emphasized in Washington Post Co. v. DOJ,⁹⁴ the required nexus must be apparent from the information itself, and "the government cannot immunize [it] by publicizing the link."⁹⁵

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); accord John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) (declaring that "[a] document that is otherwise available to the public does not become confidential simply because it is before a grand jury"), rev'd on other grounds, 493 U.S. 146 (1989); Cozen O'Connor, 570 F. Supp. 2d at 776 (remarking that "[j]ust because information was either obtained by a grand jury subpoena or was submitted to a grand jury does not make it exempt"; rather, "[t]o be exempt, the information must reveal some aspect of the grand jury's investigation," and "the connection to the investigation must be apparent, especially for documents created independent of and extrinsic to the grand jury investigation").

⁹¹ Senate of P.R., 823 F.2d at 584; see also Bartko v. DOJ, 898 F.3d 51, 73 (D.C. Cir 2017) (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, 529 (D.C. Cir. 2016))); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1113 (D.C. Cir. 2007) (vacating district court's finding that U.S. Marshals Service properly withheld category of records where agency "has failed to demonstrate disclosure would 'tend to reveal some secret aspect of the grand jury's investigation'" (quoting Senate of P.R., 823 F.2d at 582)); Lopez v. DOJ, 393 F.3d 1345, 1349-51 (D.C. Cir. 2005) (holding that agency "failed to meet its burden of demonstrating some 'nexus between disclosure [of date of prosecutor's preliminary witness interview] and revelation of a protected aspect of the grand jury's investigation'" (quoting Senate of P.R., 823 F.2d at 584)); 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").

⁹² 534 F.3d 728 (D.C. Cir. 2008).

⁹³ 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").

⁹⁴ 863 F.2d 96 (D.C. Cir. 1988).

⁹⁵ Id. at 100.

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.⁹⁶ 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.⁹⁷

The Court of Appeals for the First Circuit, in Church of Scientology International v. DOJ,⁹⁸ took a different approach from the D.C. Circuit and established different standards for certain categories of grand jury records.⁹⁹ 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."¹⁰⁰ The First Circuit "distinguish[ed] such materials from

⁹⁶ 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 the 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)); 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"); 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, 16 F. Supp. 2d 1260, 1276 (D. Or. 1998) (requiring agency to resubmit Vaughn Index and explain how disclosure of subpoenas would "compromise the integrity of the grand jury process"), aff'd, 7 F. App'x 591 (9th Cir. 2001).

⁹⁷ See Canning v. DOJ, No. 92-0463, 1995 WL 1073434, at *2 (D.D.C. Feb. 26, 1995) (finding that FOIA officers are "among those with approved access to grand jury material" and that agency's FOIA officer therefore properly reviewed withheld documents in case at hand); see also DOJ, Federal Grand Jury Practice 70 (Oct. 2008) (recognizing that grand jury information may be disclosed to "administrative personnel who need to determine the applicability of Rule 6(e)'s disclosure prohibition for purposes of responding to requests for records under . . . FOIA"); FOIA Update, Vol. XIX, No. 3, at 2 (advising agencies that "[t]his restriction [on disclosure of certain grand jury materials] does not prohibit necessary access to grand jury information by FOIA personnel").

⁹⁸ 30 F.3d 224 (1st Cir. 1994).

⁹⁹ Id. at 235-36.

¹⁰⁰ Id. at 235; accord Rugiero, 257 F.3d at 549 (holding that "documents identified as grand jury exhibits or containing testimony or other material directly associated with grand jury

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)."¹⁰¹ 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.¹⁰²

The Court of Appeals for the Ninth Circuit has held that a provision of the Ethics in Government Act of 1978,¹⁰³ protecting the financial disclosure reports of certain government employees, meets the requirements of subpart (A)(i).¹⁰⁴ Another provision

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").

¹⁰¹ 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)").

¹⁰² Church of Scientology Int'l, 30 F.3d at 236; cf. Foster v. DOJ, 933 F. Supp. 687, 691 (E.D. Mich. 1996) (protecting twenty-seven page prosecution report that "identifies grand jury witnesses, reveals the direction, scope and strategy of the investigation, and sets forth the substance of grand jury testimony" where "[e]ach page containe[d] a 'grand jury' secrecy label").

¹⁰³ 5 U.S.C. app. 4 § 107 (2018).

¹⁰⁴ Meyerhoff v. EPA, 958 F.2d 1498, 1500-02 (9th Cir. 1992) (finding that agency properly withheld "conflict of interest records under Exemption 3," and specifying that statute "qualifies as a withholding statute under Exemption 3(A)(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 properly applied Exemption 3 and section 107(a) of Ethics in Government Act 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 section 107(a) qualifies under that subpart of Exemption 3); Concepcion v. FBI, 606 F. Supp. 2d 14, 33 (D.D.C. 2009) (finding that "EOUSA properly withheld the two Conflict of Interest Certification reports under Exemption 3 [and section 107(a) of the Ethics in Government Act]," and holding that "[t]he Ethics in Government Act requires that these reports remain confidential and leaves the EOUSA no discretion on the issue," thereby tracking language of subpart (A)(i) of Exemption 3 without expressly stating that statute qualifies as subpart (A)(i) statute specifically), renewed motion for summary judgment granted in part on other grounds, 699 F. Supp. 2d 106 (D.D.C. 2010); Glascow v. DOJ, No. 04-0486, 2005 WL 1139269, at *1 (D.D.C. May 15, 2005) (protecting AUSA's

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,¹⁰⁵ was also found to qualify as an Exemption 3 statute under subpart (A)(i) by one district court.¹⁰⁶ 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]."¹⁰⁷

Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964¹⁰⁸ 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.¹⁰⁹ Similarly, a provision of the Bank Secrecy Act,¹¹⁰ the statute governing records pertaining to Currency Transaction Reports and monetary instruments transactions, has been found to meet the

"confidential conflict of interest certification" based on nondisclosure requirement of section 107(a) of Ethics in Government Act, but failing to identify under which subpart section 107(a) qualifies).

¹⁰⁵ Ethics in Government Act § 205 (as of Jan. 1, 1991, repealed and replaced by the Ethics Reform Act of 1989 § 105, which applies to a broader group of officials).

¹⁰⁶ 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 Gov't Act § 205(a))), appeal dismissed per stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993).

¹⁰⁷ Church of Scientology, 816 F. Supp. at 1152.

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

¹⁰⁹ See Frito-Lay v. EEOC, 964 F. Supp. 236, 240-43 (W.D. Ky. 1997) (recognizing 42 U.S.C. § 2000e-8(e) as withholding statute under FOIA, and finding that agency properly applied 42 U.S.C. § 2000e-8(e) and FOIA Exemption 3 to withhold requester's charge file); Am. Centennial Ins. Co. v. EEOC, 722 F. Supp. 180, 184 (D.N.J. 1989) (determining that "[sections] 706(b) and 709(e) [of the Civil Rights Act, 42 U.S.C. §§ 2000e-5(b), 2000e-8(e),] fall within Exemption 3 of the FOIA and prohibit the EEOC from disclosing the requested information to the plaintiff," and expressly rejecting argument that statute did not qualify under subpart (A)(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 materials at issue in this non-FOIA dispute "will be denied access," because Exemption 3 incorporates confidentiality provisions of sections 706(b) and 709(e)).

¹¹⁰ 31 U.S.C. § 5319 (2018).

requirements of subpart (A)(i),¹¹¹ although in some cases courts have not specified which subpart of Exemption 3 they were applying.¹¹² Additionally, the District Court for the District of Columbia 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.'"¹¹³

The International Investment Survey Act of 1976¹¹⁴ has been held to be what is now denominated as a subpart (A)(i) statute,¹¹⁵ as have two Consumer Product Safety Act

¹¹¹ 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), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008))); 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 mandates withholding in such a manner as to leave no discretion on the issue to the agency"), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008).

¹¹² See, e.g., Stein v. SEC, 266 F. Supp. 3d 326, 350 (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)).

¹¹³ 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 (quoting Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979))).

¹¹⁴ 22 U.S.C. § 3104(c) (2018).

¹¹⁵ 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).

provisions¹¹⁶ 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.'"¹¹⁷ Similarly, the District Court for the District of Columbia determined that a provision of the Confidential Information Protection and Statistical Efficiency Act¹¹⁸ "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.'"¹¹⁹

A provision of the Antitrust Civil Process Act,¹²⁰ which exempts from disclosure under the FOIA transcripts of oral testimony taken in the course of investigations under that Act, has been held to qualify as a subpart (A)(i) statute.¹²¹ Also, a section of the Transportation Safety Act of 1974,¹²² which states that the NTSB shall withhold from public disclosure cockpit voice recordings associated with accident investigations, has been found to fall within subpart (A)(i) of Exemption 3.¹²³ Similarly, information contained in the SSA's "Numident system," which was obtained from death certificates provided by state agencies, has been held exempt from disclosure on the basis of subpart (A)(i) on the grounds that the language of the statute¹²⁴ "leaves no room for agency discretion."¹²⁵ Additionally, section 1619 of the Food, Conservation, and Energy Act of

¹¹⁶ § 6(a)(2), (b)(5) (codified at 15 U.S.C. § 2055(a)(2), (b)(5) (2018)).

¹¹⁷ Mulloy v. Consumer Prods. Safety Comm'n, 798 F.2d 1415 (6th Cir. 1986) (per curiam) (unpublished table decision) (quoting 5 U.S.C. § 552b(3)(A)(i)).

¹¹⁸ 7 U.S.C. § 2276(a)(2) (2018).

¹¹⁹ 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)).

¹²⁰ 15 U.S.C. § 1314(g) (2018).

¹²¹ See Motion Picture Ass'n of Am. v. DOJ, No. 80-6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981) (protecting transcripts of oral testimony under Exemption 3).

¹²² 49 U.S.C. § 1114(c) (2018).

¹²³ See Wolk L. Firm v. NTSB, 371 F. Supp. 3d 203, 211 (E.D. Pa. 2019) (finding that "[b]y its plain terms, § 1114(c)(1) prohibits the NTSB from disclosing the video, and leaves the NTSB with no discretion on the issue"); McGilvra v. NTSB, 840 F. Supp. 100, 102 (D. Colo. 1993) (citing prior codification of § 1114(c), 49 U.S.C. app § 1905).

¹²⁴ 42 U.S.C. § 405(r) (2018).

¹²⁵ Int'l Diatomite Producers Ass'n v. SSA, No. 92-1634, 1993 WL 137286, at *3 (N.D. Cal. Apr. 28, 1993), appeal dismissed per stipulation, No. 93-16204 (9th Cir. Oct. 27, 1993).

2008,¹²⁶ 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 disclosure of this type of information."¹²⁷

In a decision construing the application of the identical Exemption 3 language of the Government in the Sunshine Act¹²⁸ to the Defense Nuclear Facilities Safety Board Act, the D.C. Circuit held that sections 315(a) and (315)(g) of the Defense Nuclear Facilities Safety Board Act ¹²⁹ allow no discretion with regard to the release of the Board's proposed recommendations, thereby meeting the requirement of subpart (A)(i).¹³⁰

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."¹³¹ In other words, where "[sub]part 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."¹³²

¹²⁶ 7 U.S.C. § 8791 (2018).

¹²⁷ 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 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, 1185-88 (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).

¹²⁸ 5 U.S.C. § 552b(c)(3) (2018).

¹²⁹ 42 U.S.C. § 2286d(b), (h)(3) (2018) (formerly at 42 U.S.C. § 2286d(a), (g)(3)).

¹³⁰ Nat. Res. Def. Council v. Def. Nuclear Facilities Safety Bd., 969 F.2d 1248, 1249 (D.C. Cir. 1992).

¹³¹ [5 U.S.C. § 552\(b\)\(3\)\(A\)\(ii\) \(2018\)](#) (previously referred to as subpart B).

¹³² Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984).

For example, a provision of the Consumer Product Safety Act¹³³ which protects certain consumer product information obtained by the Consumer Product Safety Commission, has been held to set forth sufficiently definite withholding criteria for it to fall within the scope of what is now subpart (A)(ii) of Exemption 3.¹³⁴ 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 Act¹³⁵ has been held to meet the requirements of subpart (A)(ii) by referring to particular types of matters to be withheld.¹³⁶

Section 777 of the Tariff Act of 1930, which governs the withholding of certain "proprietary information,"¹³⁷ has been held to refer to particular types of information to be withheld and thus to be a subpart (A)(ii) statute.¹³⁸ Section 12(d) of the Railroad Unemployment Insurance Act¹³⁹ 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).¹⁴⁰ Similarly, 39 U.S.C. § 410(c)(2),¹⁴¹ a provision of the Postal Reorganization Act which governs the withholding of "information of a commercial nature . . . which under good business practice would not be publicly disclosed,"¹⁴² has been held to refer to "particular types of matters to be withheld" and thus to be a subpart

¹³³ 15 U.S.C. § 2055(b)(1) (2018).

¹³⁴ See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 122-23 (1980).

¹³⁵ 15 U.S.C. § 2055(b)(5).

¹³⁶ See Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, No. 87-1478, slip op. at 16-17 (D.D.C. Sept. 19, 1989).

¹³⁷ 19 U.S.C. § 1677f (2018).

¹³⁸ See Labow v. DOJ, 831 F.3d 523, 528 (D.C. Cir. 2016) (citing to Mudge Rose Guthrie Alexander & Ferdon v. U.S. Int'l Trade Comm'n, 846 F.2d 1527, 1530 (D.C. Cir. 1988)).

¹³⁹ 45 U.S.C. § 362(d) (2018).

¹⁴⁰ 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 *5 (N.D. Ohio Feb. 20, 1991).

¹⁴¹ (2018).

¹⁴² 39 U.S.C. § 410(c)(2).

(A)(ii) statute.¹⁴³ Likewise, 18 U.S.C. § 3509(d),¹⁴⁴ a provision of the Federal Victims' Protection and Rights Act governing the disclosure of information that would identify children who were victims of certain crimes or witnesses to crimes against others, has been held to qualify as an Exemption 3 statute because it "establishes particular criteria for withholding."¹⁴⁵

Section 12(c)(1) of the Export Administration Act of 1979,¹⁴⁶ 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

¹⁴³ 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 statements properly protected); Airline Pilots Ass'n, Int'l v. USPS, No. 03-2384, 2004 WL 5050900, at *5-7 (D.D.C. June 24, 2004) (holding that agency properly withheld pricing and rate information, methods of operation, performance requirements, and terms and conditions from transportation agreement with FedEx); Robinett v. USPS, No. 02-1094, 2002 WL 1728582, at *5 (E.D. La. July 24, 2002) (finding that agency properly withheld job-applicant information because it falls within agency's regulatory definition of "information of a commercial nature"); see also 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 (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); 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 § 410(c)(2) qualifies).

¹⁴⁴ (2018).

¹⁴⁵ Tampico v. EOUSA, No. 04-2285, 2005 U.S. Dist. LEXIS 49206, at *10 (D.D.C. Apr. 29, 2005).

¹⁴⁶ 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 confidentially provision governing disclosure of information obtained from export licenses).

subpart (A)(ii) and thus has been found to qualify as an Exemption 3 statute.¹⁴⁷ Similarly, the D.C. Circuit has found that section 203(a)(1) of the International Emergency Economic Powers Act,¹⁴⁸ 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 3.¹⁴⁹ Similarly, courts have held that DOD's "technical data" statute,¹⁵⁰ 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.¹⁵¹ Likewise, the Collection and Publication of Foreign Commerce Act,¹⁵² which explicitly provides for nondisclosure of shippers' export declarations, has been held to qualify as an Exemption 3 statute under subpart (A)(ii).¹⁵³

¹⁴⁷ 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 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).

¹⁴⁸ 50 U.S.C. § 1702(a)(1) (2018).

¹⁴⁹ Wis. Project, 317 F.3d at 282-84.

¹⁵⁰ 10 U.S.C. § 130 (2018).

¹⁵¹ 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).

¹⁵² 13 U.S.C. § 301(g) (2018).

¹⁵³ See Afr. Fund, 1993 WL 183736, at *5; 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).

One district court has determined that a provision of the Procurement Integrity Act,¹⁵⁴ which prohibits the disclosure of certain source selection information, is a statute qualifying under subpart (A)(ii) of Exemption 3.¹⁵⁵ That Procurement Integrity Act provision at issue provides protection for pre-award contractor bids, proposal information, and source selection information under certain circumstances.¹⁵⁶

The Court of Appeals for the District of Columbia Circuit has ruled that Title III of the Omnibus Crime Control and Safe Streets Act of 1968,¹⁵⁷ protecting court-ordered wiretaps, was a statute qualifying under subpart (A)(ii) of Exemption 3.¹⁵⁸ In Lam Lek

¹⁵⁴ 41 U.S.C. § 2102 (2018) (formerly at 41 U.S.C. § 423).

¹⁵⁵ See Legal & Safety Emp. Rsch, Inc. v. U.S. Dep't of the Army, No. Civ. 0001748, 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 "court is satisfied 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)).

¹⁵⁶ 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, 1027-28 (N.D. Cal. 2019) (assuming without deciding that the Procurement Integrity Act (PIA) qualifies as an Exemption 3 statute, and denying the 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").

¹⁵⁷ See 18 U.S.C. §§ 2510-2520 (2018).

¹⁵⁸ See Lam Lek Chong v. DEA, 929 F.2d 729, 733 (D.C. Cir. 1991); see also Labow, 831 F.3d at 527-28 (holding that Pen Register Act, 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.'"); 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 (D.C. Cir. 1999) (noting that "wiretapped recordings obtained pursuant to Title III . . . are ordinarily exempt from disclosure under Exemption 3" with no mention made of Exemption 3 subpart under which statute qualified, 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);

Chong v. DEA, the D.C. Circuit, finding that the statute "clearly identifies intercepted communications as the subject of its disclosure limitations," held that "Title III falls squarely within the scope of subsection (B)'s second prong, as a statute referring to 'particular types of matters to be withheld.'"¹⁵⁹ Following the D.C. Circuit's Lam Lek Chong decision, a number of other courts have recognized Title III as an Exemption 3 statute.¹⁶⁰

The D.C. Circuit has held the Pen Register Act, 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."¹⁶¹ The D.C. Circuit 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."¹⁶² 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."¹⁶³ On remand the

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).

¹⁵⁹ 929 F.2d at 733 (quoting 5 U.S.C. § 552(b)(3)).

¹⁶⁰ See Payne v. DOJ, No. 96-30840, 1997 U.S. App. LEXIS 42543, at *6 (5th Cir. July 11, 1997) (protecting tape recordings "obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act," and holding that "Title III communications 'fall squarely within the scope of Exemption 3' of the FOIA" (quoting Davis v. DOJ, 968 F.2d 1276, 1280-81 (D.C. Cir. 1992))); 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), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995); Manchester v. DEA, 823 F. Supp. 1259, 1267 (E.D. Pa. 1993) (ruling that wiretap applications and derivative information fall within broad purview of Title III), aff'd, 40 F.3d 1240 (3d Cir. 1994) (unpublished table decision); Docal v. Benninger, 543 F. Supp. 38, 43-44 (M.D. Pa. 1981) (relying upon entire statutory scheme of 18 U.S.C. §§ 2510-2520 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).

¹⁶¹ Labow, 831 F.3d at 527-28 (quoting 5 U.S.C. § 552(b)(3)(A)(ii) and 18 U.S.C. § 3123(d)).

¹⁶² Id. at 528.

¹⁶³ Id. (explaining that this is an issue for district court on remand because "[it does] not know whether this case involves withholding of any records beyond a pen register order").

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 3.¹⁶⁴

The Supreme Court has held that section 102(d)(3) of the National Security Act of 1947,¹⁶⁵ which required the Director of the CIA to protect "sources and methods,"¹⁶⁶ clearly refers to particular types of matters to be withheld and thus comes within the ambit of subpart (A)(ii).¹⁶⁷ Many courts have upheld the protection of information

¹⁶⁴ 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"); 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"); 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 whether statute qualified under subpart (A)(i) or (A)(ii) of Exemption 3), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995).

¹⁶⁵ 50 U.S.C. § 403(d)(3) (2002) (amended by Pub. L. No. 108-458, 118 Stat. 3643 (2004), currently codified 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).

¹⁶⁶ Id.

¹⁶⁷ 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 1947.¹⁶⁸ 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.¹⁶⁹ (For a further

¹⁶⁸ See 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 . . . 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, 868 (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, 1145 (9th Cir. 2007) (holding that CIA properly withheld two "President's Daily Brief[s]" prepared during President Johnson's term of office.); Assassination Archives & Rsch Ctr. v. CIA, 334 F.3d 55, 60-61 (D.C. Cir. 2003) (affirming that release of CIA's five-volume compendium of biographical information on "Cuban Personalities" in its entirety would reveal intelligence sources and methods, despite plaintiff's allegation that CIA previously released some of same information, and recognizing that "the National Security Act of 1947 . . . meets the two criteria of Exemption 3,"); 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 subpart [(A)(ii)] of the Exemption"); Nat'l Sec. Couns. v. CIA, 320 F. Supp. 3d 200, 215 (D.D.C. 2018) (accepting CIA's explanation that disclosure of screenshots and classification markings "would 'expose Agency information systems to outside threats by providing [access instructions]," and disclosing 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).

¹⁶⁹ See, e.g., 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"); Arabian Shield Dev. Co. v. CIA, No. 99-10327, 2000 WL 180923, at *1 (5th Cir. Jan. 28, 2000) (per curiam) (unpublished disposition), affg No. 3-98-0624, 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 v. CIA, 872 F.2d 660, 664 (5th Cir. 1989))); Frugone v. CIA, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (finding that CIA properly refused to confirm or deny existence of records concerning plaintiff's alleged employment relationship with CIA despite allegation that another government agency seemed to confirm plaintiff's status as former CIA employee); Earth Pledge Found. v. CIA, 128 F.3d 788, 788 (2d Cir. 1997), affg 988 F.

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

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 2004,¹⁷⁰ and thereby established the Director of National Intelligence as the authority charged with

Supp. 623, 627 (S.D.N.Y. 1996) (finding agency's "Glomar" response proper because acknowledgment of records would present "danger of revealing sources"); Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996) (finding that agency properly refused to confirm or deny existence of records concerning deceased person's alleged employment relationship with CIA); Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992) (upholding agency's "Glomar" response to request on foreign national because acknowledgment of existence of any responsive record would reveal sources and methods); Knight v. CIA, 872 F.2d 660, 663 (5th Cir. 1989) (same); Smith v. CIA, 393 F. Supp. 3d 72, 81-84 (D.D.C. 2019) (finding that CIA properly invoked Exemption 3 Glomar response to withhold certain line-item intelligence budget information which is "included in the expansive ambit of information that can reasonably lead to an unauthorized disclosure of sources and methods"); Leopold v. CIA, 380 F. Supp. 3d 14, 28 (D.D.C. 2019) (holding that National Security Act is exemption statute that bars disclosure of "intelligence sources and methods" and "[t]he fact of whether or not the CIA is, or has, exercised covert action authorities constitutes a protected "intelligence source or method""); N.Y Times Co. v. CIA, 314 F. Supp. 3d 519, 533-34 (S.D.N.Y. 2018) (finding that the CIA's declaration provided a 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"); Schwartz v. DOD, No. 15-7077, 2017 WL 78482 (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); Amnesty Int'l v. CIA, No. 07-5435, 2010 WL 5421928, at *2 (S.D.N.Y. Dec. 21, 2010) (finding that "[t]he CIA's Glomar responses with respect to both categories . . . are appropriate under exemption 3 'because it would reveal intelligence sources and methods protected by the [National Security Act]'" (quoting agency declaration)); ACLU v. DOD, 389 F. Supp. 2d 547, 564, 568 (S.D.N.Y. 2005) (upholding CIA's "Glomar" response to requests for DOJ memorandum specifying interrogation methods that CIA may use against top Al-Qaeda members and "directive signed by President Bush granting the CIA the authority to set up detention facilities outside the United States and/or outlining interrogation methods that may be used against detainees"); Pipko v. CIA, 312 F. Supp. 2d 669, 678-79 (D.N.J. 2003) (holding that CIA properly refused to confirm or deny existence of records responsive to first-party request).

¹⁷⁰ Pub. L. No. 108-458, § 1011, 118 Stat. 3638, 3644-55 (codified at 50 U.S.C. § 3024(i)(1) (2018)).

protecting intelligence sources and methods.¹⁷¹ 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.¹⁷² 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.¹⁷³ Additionally, the FBI has used section 102A(i)(1) of the National Security Act of 1947 to protect intelligence sources and methods from unauthorized disclosure.¹⁷⁴ Furthermore, courts addressing the issue have determined that the new Director of National Intelligence is charged with the same duties and responsibilities to protect sources and methods as the Director of Central Intelligence.¹⁷⁵

¹⁷¹ Id.

¹⁷² Id. § 1071.

¹⁷³ See, e.g., Berman, 501 F.3d at 1137-38, 1140 (finding that CIA properly withheld Presidential Daily Briefing reports where disclosure would have revealed protected intelligence sources and methods); Wolf, 473 F.3d at 378, 380 (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"); Ullah v. CIA, No. 18-2785, 2020 WL 248937, at *22 (D.D.C. Jan. 16, 2020) (upholding the 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"); Lahr v. NTSB, 453 F. Supp. 2d 1153, 1172 (C.D. Cal. 2006) (protecting CIA's intelligence sources and methods under 50 U.S.C. § 403-1(i)); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 222 (D.D.C. 2005) (protecting CIA's intelligence sources and methods documented in 2004 National Intelligence Estimate on Iraq).

¹⁷⁴ See Associated Press v. FBI, 265 F. Supp. 3d 82, 94-95 (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).

¹⁷⁵ 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)).

Likewise, many 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,¹⁷⁶ satisfies the requirements of subpart (A)(ii),¹⁷⁷ and one district court has found that

¹⁷⁶ 50 U.S.C. § 3507 (2018).

¹⁷⁷ Minier, 88 F.3d at 801 (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 concerning intelligence sources and methods); Bothwell v. CIA, No. 13-05439, 2014 U.S. Dist. LEXIS 144151, at *31 (N.D. Cal. Oct. 9, 2014) (holding that [the CIA Act] "clearly identif[ies] the types of material to be withheld"); Subh v. CIA, 760 F. Supp. 2d 66, 70 (D.D.C. 2011) (noting agency's assertion that "[t]he CIA Act . . . 'establishes particular criteria for withholding or refers to particular types of matters to be withheld' and thus absolutely protects information regarding the CIA's organization, functions, names, official titles, salaries, and numbers of personnel employed" (quoting Exemption 3)); cf. DiBacco v. Dep't of Army, 926 F.3d 827, 835-36 (D.C. Cir. 2018) (not specifying under which subpart the CIA Act qualifies, and 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.' Rather, it protects from disclosure certain information relating to personnel, wherever that information may be found"); ACLU, 681 F.3d at 72-75 (finding records concerning waterboarding to be properly protected pursuant to FOIA Exemption 3 and the CIA Act, but 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" without specifying under which Exemption 3 subpart section 6 qualifies, and finding 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 [CIA Act] withholdings under [E]xemption 3," without specifying under which Exemption 3 subpart the statute qualifies due to the requester's concession that the statute qualifies under Exemption 3); Blazy v. Tenet, 979 F. Supp. 10, 23-24 (D.D.C. 1997) (finding that CIA properly "withheld . . . facts about the organization, its functions and personnel" pursuant to Exemption 3, and noting that "what has been deleted includes intelligence sources or methods, polygraph information, names and identifying information with respect to confidential sources, employees' names, component names, building locations and organization data"); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 627-28 (S.D.N.Y. 1996), aff'd, 128 F.3d 788 (2d Cir. 1997) (recognizing that the CIA Act qualifies as an "exemption statute[] for the purpose of [Exemption 3]," and finding that the CIA properly applied the CIA Act and Exemption 3, where "CIA . . . demonstrated that being

section 6 meets the requirements of subsection (A)(i).¹⁷⁸ In some instances this statute has also been found to provide a basis for an agency to refuse to confirm or deny the existence of records.¹⁷⁹ Also, the identities of Defense Intelligence Agency (DIA) employees have been held to be protected from disclosure pursuant to 10 U.S.C. § 424.¹⁸⁰

forced to disclose the information the plaintiffs request would compromise its intelligence gathering methods" and "could cause a confrontation with the Dominican Republic or the disruption of foreign relations" and "would destroy the future usefulness of this [unconfirmed CIA field] station, should it in fact exist," and where "CIA . . . demonstrated that even denying the existence of this station could jeopardize national security"), aff'd per curiam, 128 F.3d 788 (2d Cir. 1997). But see Nat'l Sec. Couns. v. CIA, No. 12-284, 2016 WL 6684182, at *24 (D.D.C. Nov. 14, 2016) (finding CIA's withholding under CIA Act of reference code that "merely relates to or concerns" CIA personnel's function was not proper).

¹⁷⁸ 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))).

¹⁷⁹ 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, 441-42 (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 627-28 (finding that agency's refusal to "confirm[] or deny[] the existence of contacts with dissidents" was proper, in light of "danger of revealing sources, detailed in the CIA's public papers," and "additional information, [submitted] in camera, that convinces this Court that disclosure of the information requested by the plaintiffs would jeopardize intelligence sources").

¹⁸⁰ (2018); see, e.g., Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *15 (D.D.C. Aug. 10, 2005) (finding that agency properly protected identity of Defense Intelligence Agency personnel pursuant to Exemption 3 and 10 U.S.C. § 424, and specifying that 10 U.S.C. § 424 qualifies as 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, 865, 870 (D.C. Cir. 2009); see also Physicians for Hum. Rts. v. DOD, 778 F. Supp. 2d 28, 36 (D.D.C. 2011) (recognizing 10 U.S.C. § 424 as

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.¹⁸¹

Additionally, 10 U.S.C. § 130b,¹⁸² 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.¹⁸³ Similarly, section 6 of the National Security Agency Act of 1959,¹⁸⁴ pertaining to the organization, functions, activities, and personnel of NSA, has been held to qualify as a subpart (A)(ii) statute.¹⁸⁵ Some courts have held that section 6 can provide a basis for an agency's refusal

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, titles, and office affiliations of Defense Intelligence Agency personnel pursuant to Exemption 3 and 10 U.S.C. § 424, but not identifying under which Exemption 3 subpart § 424 qualifies); 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 subpart (A)(i) of Exemption 3).

¹⁸¹ Hamdan v. DOJ, 797 F.3d 759, 776-77 (9th Cir. 2015).

¹⁸² (2018).

¹⁸³ See, e.g., Hall, 881 F. Supp. 2d at 66 (recognizing "10 U.S.C. § 130b is an exemption 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) (finding that "non-disclosure of the names and personally identifying information of military personnel pursuant to 10 U.S.C. [§] 130b is valid under Exemption 3"); 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]").

¹⁸⁴ 50 U.S.C. § 3605 (2018) (formerly at 50 U.S.C. § 402 note).

¹⁸⁵ See 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 the 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

to confirm or deny the existence of responsive records.¹⁸⁶ (For a further discussion of the use and origin of the "Glomar" response under Exemption 1, see Exemption 1, In Camera Submissions and Adequate Public Record)

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,"¹⁸⁷ 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.¹⁸⁸ Similarly, section 207 of the

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, 565 F.3d at 868-69 (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 subsection under which statute qualifies); Founding Church of Scientology, 610 F.2d at 827-28 (finding that "examination of [s]ection 6 and its legislative history confirms the view that it . . . satisfies the strictures of Subsection [(A)(ii)]"); see also ACLU, 681 F.3d at 72-75 (noting that plaintiffs did not contest that section 6 qualified as an Exemption 3 statute and finding records related to the CIA's use of waterboarding and the photograph [of high-value detainee] properly protected pursuant to Exemption 3 and section 6); Hayden v. NSA, 608 F.2d 1381, 1389 (D.C. Cir. 1979) (recognizing statute as qualifying under Exemption 3 and protecting documents obtained through monitoring foreign electromagnetic signals, but not identifying subsection under which statute qualifies); ACLU v. ODNI, 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 signal intelligence report because disclosure would reveal certain functions of NSA).

¹⁸⁶ See Elec. Priv. Info. Ctr., 678 F.3d at 934-35 (affirming district court's determination that NSA's refusal to confirm or deny the 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, *5-6 (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 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").

¹⁸⁷ 42 U.S.C. § 2162(a) (2018).

¹⁸⁸ Id. § 2014(y) (2018) (defining "restricted data"); see Meeropol v. Smith, No. 75-1121, slip op. at 53-55 (D.D.C. Feb. 29, 1984) (finding that agency properly protected "certain

National Park Omnibus Management Act of 1998,¹⁸⁹ 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,"¹⁹⁰ has been found to be within the scope of subpart (A)(ii).¹⁹¹

The Court of Appeals for the District of Columbia Circuit has held that a portion of the Patent Act¹⁹² satisfies subpart (A)(ii) because it identifies the types of matters – specifically, patent applications and information concerning them – intended to be withheld.¹⁹³ Likewise, the Court of Appeals for the Third Circuit has suggested that the Juvenile Delinquency Records Statute,¹⁹⁴ which generally prohibits disclosure of the

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).

¹⁸⁹ 54 U.S.C. § 100707 (2018) (formerly at 16 U.S.C. § 5937).

¹⁹⁰ Id.

¹⁹¹ See Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 944-45 (D. Ariz. 2000) (approving withholding of information concerning specific nesting locations of northern goshawks pursuant to subpart (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).

¹⁹² 35 U.S.C. § 122 (2018).

¹⁹³ 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).

¹⁹⁴ 18 U.S.C. § 5038 (2018).

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.¹⁹⁵

In addition, a provision of the Civil Service Reform Act concerning the confidentiality of certain labor relations training and guidance materials,¹⁹⁶ has been held to qualify as a subpart (A)(ii) withholding statute,¹⁹⁷ as has 5 U.S.C. § 7132,¹⁹⁸ a Civil Service Reform Act provision which limits the issuance of certain subpoenas.¹⁹⁹ Similarly, the U.S. Information and Educational Exchange Act of 1948 (the "Smith-Mundt Act")²⁰⁰ 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.²⁰¹ While the Smith-Mundt Act originally applied only to records prepared by the former USIA, the Foreign Affairs Reform and Restructuring Act of 1998²⁰² applied the relevant provisions of that statute to those programs within the Department of State that absorbed USIA's functions.²⁰³

¹⁹⁵ See McDonnell v. United States, 4 F.3d 1227, 1251 (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 statute).

¹⁹⁶ 5 U.S.C. § 7114(b)(4) (2018).

¹⁹⁷ See NTEU v. OPM, No. 76-695, slip op. at 3-4 (D.D.C. July 9, 1979); see also Dubin v. Dep't of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981) (finding that "5 U.S.C. § 7114(b)(4) is a statute within the meaning of [s]ection (b)(3) of the FOIA, and the Labor Relations Report are [sic], therefore, exempt from disclosure pursuant to 5 U.S.C. § 552(b)(3)," but failing to identify 5 U.S.C. § 7114(b)(4) as qualifying pursuant to subpart (A)(i) or subpart (A)(ii) of Exemption 3), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision).

¹⁹⁸ (2018).

¹⁹⁹ See NTEU, slip op. at 3-4.

²⁰⁰ 22 U.S.C. § 1461-1a (2018).

²⁰¹ 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").

²⁰² Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended at 22 U.S.C. §§ 6501-6617 (2018)).

²⁰³ 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)).

Section 8 of the Commodity Exchange Act,²⁰⁴ 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 3.²⁰⁵ 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,²⁰⁶ similarly shields that particular data from disclosure under the FOIA.²⁰⁷ The D.C. Circuit also held that section 306(h) of the Convention on Cultural Property Act²⁰⁸ 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."²⁰⁹

Further, the Federal Technology Transfer Act²¹⁰ contains two provisions that have been found to qualify under Exemption 3.²¹¹ Specifically, 15 U.S.C. § 3710a(c)(7)(A), which prohibits federal agencies from disclosing "trade secrets or commercial or financial information that is privileged or confidential" obtained from "non-Federal part[ies] participating in . . . cooperative research and development agreement[s],"²¹² has been found to qualify under Exemption 3.²¹³ Additionally, another provision of that statute, 15

²⁰⁴ 7 U.S.C. § 12 (2018).

²⁰⁵ See Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 49 (D.D.C. 1979).

²⁰⁶ FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186 (2018) (formerly at 49 U.S.C. § 40119).

²⁰⁷ See Pub. Citizen, Inc. v. FAA, 988 F.2d 186, 194 (D.C. Cir. 1993).

²⁰⁸ 19 U.S.C. § 2605(h) (2018).

²⁰⁹ Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 510-11 (D.C. Cir. 2011) (quoting Exemption 3).

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

²¹¹ See id.

²¹² Id. § 3710a(c)(7)(A) (2018).

²¹³ 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

U.S.C. § 3710a(c)(7)(B), which allows federal agencies the discretion to protect for five years any commercial and confidential information that results from Cooperative Research And Development Agreements with nonfederal parties,²¹⁴ has also been held to qualify as an Exemption 3 statute.²¹⁵

Additionally, a provision of the Witness Security Act of 1984,²¹⁶ which authorizes the Attorney General to "disclose or refuse to disclose" certain information regarding individuals involved with the Witness Security Program,²¹⁷ has been found to qualify under subpart (A)(ii) of Exemption 3.²¹⁸ Likewise, a National Construction Safety Team Act provision,²¹⁹ 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).²²⁰

did not fall within scope of 15 U.S.C. § 3710a(c)(7)(A)), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996).

²¹⁴ 15 U.S.C. § 3710a(c)(7)(B) (2018).

²¹⁵ See DeLorme Publ'g Co., 917 F. Supp. at 874, 877 (finding agency properly protected "raster files for up to 5 years from the date of their development" pursuant to 15 U.S.C. § 3710a(c)(7)(B) and Exemption 3).

²¹⁶ 18 U.S.C. § 3521(b)(1)(g) (2018).

²¹⁷ Id.

²¹⁸ 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).

²¹⁹ 15 U.S.C. § 7306(d) (2018).

²²⁰ 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, which relates to certain information "submitted in confidence . . . in connection with trade negotiations"²²¹ 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 3.²²²

The Bioterrorism Preparedness and Response Act (BPRA),²²³ 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 3.²²⁴

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."²²⁵ For example, the Court of Appeals for the Third Circuit and other district courts have held that section 222(f) of the Immigration and Nationality Act²²⁶ 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 (A)(ii),²²⁷ and other district courts have held that section 222(f) qualifies under subpart (A)(i),²²⁸ while the

²²¹ 19 U.S.C. § 2155(g) (2018).

²²² *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' (citing 5 U.S.C. § 552(b)(3)(A)(ii) before going on to hold that the statute qualifies as an Exemption 3 statute)).

²²³ 42 U.S.C. § 262a(h)(1) (2018).

²²⁴ *Civ. Beat L. Ctr. for the Pub. Int., Inc. v. Ctrs. for Disease Control & Prevention*, 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]").

²²⁵ [5 U.S.C. § 552\(b\)\(3\)\(A\)\(i\), \(A\)\(ii\) \(2018\)](#).

²²⁶ 8 U.S.C. § 1202(f) (2018).

²²⁷ See, e.g., *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).

²²⁸ See *Jud. Watch v. U.S. Dep't of State*, 650 F. Supp. 2d 28, 32-33 (D.D.C. 2009) (finding that agency properly protected visa database documents pursuant to 8 U.S.C. § 1202(f) and

Court of Appeals for the District of Columbia Circuit has held that the section satisfies both Exemption 3 subparts.²²⁹ In addition, many courts, including some in the aforementioned circuits, 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 3.²³⁰ In some instances, this statute has been

FOIA Exemption 3, and quoting language of 5 U.S.C. § 552(b)(3)(A)(i) specifically); Holy Spirit Ass'n for the Unification of World Christianity, Inc. v. U.S. Dep't of State, 526 F. Supp. 1022, 1031 (S.D.N.Y. 1981) (finding that section 222(f) qualifies as exempting statute under FOIA Exemption 3(A)(i)).

²²⁹ See 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 a withholding statute under subparts (A)(i) and (A)(ii) and finding that agency properly protected record concerning the issuance or refusal of a visa to enter the 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) (finding that "[s]ection 222(f) of the [Immigration and Nationality Act, 8 U.S.C. § 1202(f),] qualifies as a disclosure-prohibiting statute under both subsection (A)[(i)] and [(A)(ii)] of Exemption [3]" and concluding that records pertaining to denial of plaintiff's visa application located at American Embassy were properly protected pursuant to Exemption 3); see also Soto v. Dep't of State, No. 14-604, 2016 WL 3390667, at *4 (D.D.C. June 17, 2016) (citing Medina-Hincapie in previous opinion in case and now finding § 1202(f) protects records that pertain to the 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); Airaj v. Dep't of State, No. 15-983, 2016 WL 1698260, at *9 (D.D.C. Apr. 27, 2016) (citing to Medina-Hincapie and finding documents concerning Special Immigrant Visa approval covered by Immigration and National Security Act); Assadi v. Dep't of State, No. 12-1111, 2014 WL 4704840, at *6 (S.D.N.Y. Sept. 22, 2014) (citing to previous line of cases, including Medina-Hincapie, and finding that records concerning application and litigation of visa adjudications properly withheld under National Security Act).

²³⁰ See Nikaj v. 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); Schoenman v. FBI, 573 F. Supp. 2d 119, 144 (D.D.C. 2008) (holding that agency properly withheld telegram pertaining to third-party's visa application pursuant to Exemption 3, but not specifying under which Exemption 3 subpart section 222(f) of Immigration and Nationality Act, 8 U.S.C. § 1202(f), qualified); Perry-Torres v. U.S. Dep't of State, No. 04-1046, 2006 WL 2844357, at *5 (D.D.C. Sept. 29, 2006) (same); Badalamenti v. U.S. Dep't of State, 899 F. Supp. 542, 547 (D. Kan. 1995) (finding that "Defendant has adequately established the applicability of this statutory exemption to the marginal notes at issue," but not specifying under which Exemption 3

recognized as an Exemption 3 statute, but the particular records at issue were found not to fall within its scope.²³¹ Of note, courts have reached differing conclusions as to whether section 222(f) encompasses visa revocations.²³²

subpart); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 711-12 (W.D.N.Y. 1991) (protecting various records pertaining to plaintiff's visa application, including "notes of a consular officer relating to plaintiff's visa eligibility," pursuant to Exemption 3 but not distinguishing between Exemption 3 subparts); Times Newspapers of Gr. Brit., Inc. v. CIA, 539 F. Supp. 678, 685-86 n. 3 (S.D.N.Y. 1982) (acknowledging that "[8 U.S.C. §] 1202(f) has been recognized as being within the scope of [E]xemption [3]" and finding "[d]ocuments pertaining to the issuance or denial of visas" properly protected without distinguishing between subparts).

²³¹ 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 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"); El Badrawi v. DHS, 596 F. Supp. 2d 389, 393-94 (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).

²³² Compare 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[.]" and that "[s]ection 222(f) of the INA encompasses more than just the information found on a visa application; it also includes any 'information revealing the thought-processes of those who rule on the application.'"), and Soto, 2016 WL 3390667, at *4 (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").

Similarly, the Court of Appeals for the Tenth Circuit has held that section 301(j) of the Federal Food, Drug, and Cosmetic Act²³³ qualifies under both subparts of Exemption 3.²³⁴ 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."²³⁵ 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."²³⁶ By contrast, the D.C. Circuit found that another portion of the Federal Food, Drug, and Cosmetic Act²³⁷ does not qualify under either subpart of Exemption 3 because it does not specifically prohibit the disclosure of records.²³⁸

Tax Return Information

The United States 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, which affords confidentiality to tax returns and tax return information,²³⁹ satisfies what is now known as subpart (A)(ii) of Exemption 3 because it refers to particular matters to be withheld.²⁴⁰ The Courts of Appeals for the District of

²³³ 21 U.S.C. § 331(j) (2018).

²³⁴ Anderson v. HHS, 907 F.2d 936, 950-51 (10th Cir. 1990).

²³⁵ Id. at 950.

²³⁶ Id.

²³⁷ § 520, 21 U.S.C. § 360j(h) (2018).

²³⁸ Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1285-86 (D.C. Cir. 1983).

²³⁹ 26 U.S.C. § 6103 (2018).

²⁴⁰ See, e.g., Church of Scientology v. IRS, 484 U.S. 9, 11-12 (1987) (noting that parties agreed that § 6103 of the Internal Revenue Code "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' and 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); Aronson v. IRS, 973 F.2d 962, 964-65 (1st Cir. 1992) (finding that "[t]he relevant exception [to the tax statute], read together with the rest of the statute, both 'refers to particular types of matters to be withheld' (namely, 'taxpayer identity information') and 'establishes particular criteria for withholding' (namely, that the IRS may consider release only where it would help notify taxpayers of refunds due, and, even then, only to the media)" and thus qualifies under subpart (A)(ii) of Exemption 3, and concluding that IRS lawfully exercised discretion to withhold street addresses pursuant to 26 U.S.C. § 6103(m)(1) (quoting 5 U.S.C. § 552(b)(3)(A)(ii)); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986) (finding return information properly protected pursuant to 26 U.S.C. § 6103 and subpart (A)(ii) of Exemption 3); Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984) (acknowledging that 26 U.S.C. § 6103 qualifies as proper withholding statute pursuant to

Columbia and the Sixth Circuits have reasoned that section 6103 qualifies under what is now subpart (A)(i) to the extent that a person generally is not entitled to access to tax returns or return information of other taxpayers.²⁴¹ The Courts of Appeals for the Fifth and Tenth Circuits have found that section 6103 qualifies under both subpart (A)(i) and (A)(ii).²⁴² Finally, several courts have determined that section 6103 qualifies as an exempting statute under Exemption 3 without identifying which subpart of Exemption 3 it satisfies.²⁴³

subpart (A)(ii) of Exemption 3); 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 information); Willamette Indus. 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 subpart).

²⁴¹ 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).

²⁴² 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 particular types of matters to be withheld, it satisfies the requirements of [Exemption 3]" and also noting that "section 6103(a)'s general prohibition on disclosure may also be viewed as an exempting statute under FOIA section 552(b)(3)(A)[(i)]"); Linsteadt v. IRS, 729 F.2d 998, 1000 (5th Cir. 1984) (finding that "[t]hese nondisclosure provisions of § 6103 meet the requirement of [subsection (A)(i)] to Exemption 3 . . . so that a person . . . is not entitled to access to the tax return or return information of other taxpayers"); Chamberlain v. Kurtz, 589 F.2d 827, 839 (5th Cir. 1979) (holding that 26 U.S.C. § 6103 qualifies as proper withholding statute pursuant to subpart (A)(ii) of Exemption 3).

²⁴³ 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).

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.²⁴⁴ Courts have determined that a wide array of information may be properly withheld pursuant to Exemption 3 and section 6103.²⁴⁵

²⁴⁴ 26 U.S.C. § 6103(a) (2018).

²⁴⁵ See Church of Scientology, 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); 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 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, 1150-51 (9th Cir. 2012) (addressing records underlying certain tax assessments involved in criminal tax investigation and electronic database); Hull v. IRS, 656 F.3d 1174, 1195-96 (10th Cir. 2011) (concerning "all documents associated with the IRS's handling of US West's 1996 submission to the V[oluntary] C[ompliance] R[esolution] Program"); Adamowicz, 402 F. App'x at 652 (involving 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) (discussing "closing agreement" reached between IRS and organization); 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) (concerning third-party information submitted in support of application for tax-exempt status); Leonard v. U.S. Dep't of Treasury, No. 10-6625, 2013 WL 4517912, at *2 (D.N.J. Aug. 26, 2013) (withholding Taxpayer Identification Numbers of third-parties); Berger v. IRS, 487 F. Supp. 2d 482, 494-95 (D.N.J. 2007) (restricting release of third-party tax return information), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008); George v. IRS, No. 05-0955, 2007 WL 1450309, at *5 (N.D. Cal. May 14, 2007) (protecting third-party tax information contained in file pertaining to plaintiff); Morley v. CIA, 453 F. Supp. 2d 137, 150-51 (D.D.C. 2006) (involving deceased person's W-4 tax withholding information); Jud. Watch, Inc. v. DOJ, 306 F. Supp. 2d 58, 67 (D.D.C. 2004) (addressing records related to bankruptcy of Enron Corporation); Mays v. IRS, No. 02-1191, 2003 WL 21518343, at *2 (D. Minn. May 21, 2003) (protecting former bank's tax return information from disclosure, absent evidence of bank's corporate dissolution); McGinley v. U.S. Dep't of Treasury, No. 01-09493, 2002 WL 1058115, at *3-4 (C.D. Cal. Apr. 15, 2002) (withholding record regarding contract between IRS and third-party concerning corporate taxpayer's alleged audit); Choure v. IRS, 203 F. Supp. 2d 1196, 1200-02 (W.D. Wash. 2002) (discussing copy of certified mail log pertaining to plaintiff, where mail log also pertained to "other taxpayers who received Statutory Notices of Deficiency from the IRS"); Leveto v. IRS, No. 98-285E, 2001 U.S. Dist. LEXIS

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,"²⁴⁶ 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.²⁴⁷ One district court has found protection appropriate when the information was collected by another agency pursuant to an

5791, at *21-22 (W.D. Pa. Apr. 10, 2001) (protecting information identifying third-party taxpayers); Helmon v. IRS, No. 00-0809, 2000 WL 1909786, at *2-4 (N.D. Tex. Nov. 6, 2000) (magistrate's recommendation) (withholding third-party "return information" despite requester's claim that they were administrator of estate of third-party and was legally entitled to requested information, where proof of requester's relationship to deceased did not satisfy standard established by IRS regulations), adopted in pertinent part, No. 00-0809, 2000 WL 33157844 (N.D. Tex. Nov. 30, 2000); Wewee v. IRS, No. 99-475, 2000 U.S. Dist. LEXIS 20285, at *14-15 (D. Ariz. Oct. 13, 2000) (magistrate's recommendation) (withholding third-party tax return information, including individual and business taxpayer names, income amounts, and deductions), adopted in pertinent part, No. 99-475, 2001 U.S. Dist. LEXIS 3230 (D. Ariz. Feb. 13, 2001); Allnut v. DOJ, No. Y98-1722, 2000 U.S. Dist. LEXIS 4060, at *37-38 (D. Md. Mar. 6, 2000) (magistrate's recommendation) (withholding third-party taxpayer information, even though IRS collected information as part of investigation of requester), adopted in pertinent part, 99 F. Supp. 2d 673 (D. Md. 2000), and renewed motion for summary judgment granted, No. 98-1722, 2000 WL 852455 (D. Md. Oct. 23, 2000), aff'd per curiam sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001); Murphy v. IRS, 79 F. Supp. 2d 1180, 1183-84 (D. Haw. 1999) (withholding third-party return information, despite requester's argument that they had "material interest" in information), appeal dismissed, No. 99-17325 (9th Cir. filed Apr. 17, 2000); Barmes v. IRS, 60 F. Supp. 2d 896, 900-01 (S.D. Ind. 1998) (concerning "transcripts containing a variety of tax data concerning third-party taxpayers"). 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.).

²⁴⁶ 26 U.S.C. § 6103(b)(2)(A) (2018); see also 26 U.S.C. § 6103(b)(1)-(3) (2018) (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).

²⁴⁷ See Ryan v. United States, 74 F.3d 1161, 1163 (11th Cir. 1996) (non-FOIA case) (finding that "[s]ection 6103 of Title 26 protects only information filed with and disclosed by the IRS, not all information relating to any tax matter"); Stokwitz v. United States, 831 F.2d 893, 896-97 (9th Cir. 1987) (identifying "the central fact evident from the legislative history, structure, and language of section 6103 (including the definitions of 'return and return information') [is] that the statute is concerned solely with the flow of tax data to, from, or through the IRS").

agreement with the IRS,²⁴⁸ 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."²⁴⁹

Although infrequently addressed in FOIA cases involving section 6103, one district court stressed that "FOIA's 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,'"²⁵⁰ and ordered that the agency "disclos[e] employees' names . . . , along with any other information contained in the . . . documents that can be segregated from the taxpayer data."²⁵¹ Other courts have found that the FOIA's segregation requirement does not apply to cases involving requests for tax information of third-parties.²⁵²

As the D.C. Circuit explained in Tax Analysts v. IRS,²⁵³ "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

²⁴⁸ 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).

²⁴⁹ Rosenfeld v. DOJ, No. 07-3240, 2010 WL 3448517, at *13 (N.D. Cal. Sept. 1, 2010).

²⁵⁰ 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)).

²⁵¹ Id.

²⁵² See Church of Scientology, 792 F.2d at 151 (holding that "[t]he mere deletion of identifying material will not cause the remainder of the return information to lose its protected status, and document-by-document examination to determine the possibility of redaction for that purpose is therefore unnecessary"); see also Hull, 656 F.3d at 1196 (finding that "although FOIA provides an agency must disclose any reasonably segregable non-exempt information, the IRS has demonstrated all of the requested information is exempt" because all of the requested information falls under section 6103; Surgick v. Cirella, No. 09-3807, 2012 WL 1067923, at *9 (D.N.J. Mar. 29, 2012) (holding that documents covered by section 6103 are "entirely exempt from disclosure" because "FOIA's segregation requirement is inapplicable here"), dismissed, No. 09-3807, 2012 WL 1495422 (D.N.J. Apr. 27, 2012).

²⁵³ 350 F.3d 100 (D.C. Cir. 2003).

the IRS to disclos[e] certain information."²⁵⁴ 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.²⁵⁵ As the Court of Appeals for the Eleventh Circuit

²⁵⁴ *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").

²⁵⁵ See *Currie*, 704 F.2d at 531 (concluding that agency properly protected "internal agency memoranda reflecting the direction and scope of the investigation of the appellants' tax liability, memoranda of interviews with witnesses and confidential informants, draft affidavits of confidential informants, correspondence with a state law enforcement agency and other third-parties, information received from third-parties relating to financial transactions with the appellants, federal tax returns of third-parties, and IRS personnel notes and work papers concerning the scope and direction of the 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 the plaintiff where "delegate of the Secretary has determined that disclosure of the documents at issue in this case would seriously impair tax administration" and where "records identify the specific activity that is the focus of their investigation"); *George*, 2007 WL 1450309, at *8 (determining that release of interview notes associated with plaintiff's case "would allow Plaintiff to alter his sources of income, assets, and relationships with other individuals and entities in attempt to circumvent tax liability" and "would seriously impair federal tax administration by releasing documents the IRS is using in its ongoing investigation"); *Cal-Trim, Inc. v. IRS*, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting interview notes, case history notes, and other records associated with plaintiff's case pursuant to Exemption 3 and 26 U.S.C. § 6103(e)(7) where agency showed that "release of this information would constitute a serious impairment to federal tax administration"); *Warren v. United States*, No. 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).

explained in Currie v. IRS,²⁵⁶ "[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."²⁵⁷ Information that would provide insights into how the IRS selects returns for audits has regularly been found to impair the IRS's enforcement of tax laws.²⁵⁸ 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.²⁵⁹

²⁵⁶ 704 F.2d at 523.

²⁵⁷ Id. at 531; 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").

²⁵⁸ 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, 891 F.2d at 224 (finding that computer tapes used to develop discriminant function formulas protected); Sutton v. IRS, 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); 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); Wishart v. Comm'r, No. 97-20614, 1998 WL 667638, at *6 (N.D. Cal. Aug. 6, 1998) (holding discriminant function scores protectable), aff'd, 199 F.3d 1334 (9th Cir. 1999) (unpublished table decision); 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").

²⁵⁹ 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").

Section 6105 of the Internal Revenue Code²⁶⁰ 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 assistance in tax matters."²⁶¹ The Ninth Circuit and the District Court for the District of Columbia have held that section 6105 qualifies as an Exemption 3 statute.²⁶²

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.²⁶³

FOIA-Specific Nondisclosure Statutes

With the passage of the Open FOIA Act,²⁶⁴ 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.²⁶⁵ Prior to this statutory mandate there were examples of nondisclosure statutes that stated that they prohibited disclosure under the FOIA and,

²⁶⁰ 26 U.S.C. § 6105 (2018).

²⁶¹ Id.

²⁶² See Pac. Fisheries, Inc. v. IRS, No. 09-35618, 2010 WL 3611645, at *2 (9th Cir. Sept. 15, 2010) (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) (unpublished disposition); 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, 2010 WL 1375279, at *4 (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).

²⁶³ See Church of Scientology of Cal. 792 F.2d at 148-50; 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").

²⁶⁴ 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).

²⁶⁵ See [5 U.S.C. § 552\(b\)\(3\) \(2018\)](#).

when such statutes were challenged, courts found that they qualified as Exemption 3 statutes.²⁶⁶

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.²⁶⁷ For instance, section 21(f) of the FTC Act²⁶⁸ provides that certain investigative materials received by the FTC and "provided pursuant to any compulsory process under this subchapter or which is provided voluntarily in place of such compulsory process shall not be required to be disclosed under section 552 of Title 5."²⁶⁹ This statute has been

²⁶⁶ 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"), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008); Sciba v. Bd. of Governors of the Fed. Rsv. 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 northern goshawks 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).

²⁶⁷ 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 (2012) (providing that "a report [filed under Bank Secrecy Act] and records of reports are exempt from disclosure under section 552 of title 5"); see also 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").

²⁶⁸ 15 U.S.C. § 57b-2 (2018).

²⁶⁹ Id.

determined to qualify as an Exemption 3 statute.²⁷⁰ Similarly, a provision of the Antitrust Civil Process Act states that "[a]ny documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this chapter shall be exempt from disclosure under section 552 of title 5."²⁷¹ One district court has determined that the statute qualifies as a proper withholding statute pursuant to Exemption 3.²⁷² Likewise, 31 U.S.C. § 5319,²⁷³ a provision of the Bank Secrecy Act, 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."²⁷⁴ Courts addressing the question of whether 31 U.S.C. § 5319 qualifies under Exemption 3 have concluded that it does.²⁷⁵

²⁷⁰ See A. Michael's Piano, Inc., v. FTC, 18 F.3d 138, 143-44 (2d Cir. 1994) (recognizing section 21(f) of FTC Act, 15 U.S.C. § 57b-2(f), as Exemption 3 statute, but remanding case for determination of whether responsive records fell within scope of statute); Carter, Fullerton & Hayes, LLC v. FTC, 637 F. Supp. 2d 1, 10 (D.D.C. 2009) (concluding that agency met its burden of proof, thereby establishing 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 FTC Act[, 15 U.S.C. § 57b-2(f)]").

²⁷¹ 15 U.S.C. § 1314(g) (2018).

²⁷² Motion Picture Ass'n of Am. v. DOJ, No. 80-6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981).

²⁷³ (2018).

²⁷⁴ 31 U.S.C. § 5319.

²⁷⁵ 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"), rev'd on other grounds, 671 F.3d 690 (8th Cir. 2012); Council on Am.-Islamic Rels., Cal., 749 F. Supp. 2d at 1117 (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, 487 F. Supp. 2d at 496-97; Sciba, 2005 WL 3201206, at *6; Linn, 1995 WL 631847, at *30; Vosburgh, 1994 WL 564699, at *4; Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992) (finding information from Treasury Enforcement Communications System and Currency and Banking Retrieval System properly protected pursuant to Exemption 3 and 31 U.S.C. § 5319); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988) (protecting currency transaction reports and records pertaining to currency transaction reports

Additionally, two district courts have recognized that a provision in the Federal Property and Administrative Services Act of 1949,²⁷⁶ 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,"²⁷⁷ as a statute qualifying under Exemption 3.²⁷⁸ Similarly, two district courts have held that a nearly identical disclosure provision, 10 U.S.C. § 2305(g),²⁷⁹ which provides that, "[e]xcept as provided in paragraph (2), a proposal in the possession or control of an agency named in section 2303 of this title may not be made available to any person under section 552 of title 5,"²⁸⁰ also qualifies under Exemption 3.²⁸¹

pursuant to Exemption 3 and 31 U.S.C. § 5319), aff'd, 890 F.2d 419 (8th Cir. 1989) (unpublished table decision).

²⁷⁶ 41 U.S.C. § 4702 (2018) (formerly at 41 U.S.C. § 253b(m)).

²⁷⁷ Id.

²⁷⁸ 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 [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)); 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 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 contracts" 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), dismissed, No. 02-5165, 2002 WL 31667856 (D.C. Cir. Nov. 25, 2002).

²⁷⁹ (2018).

²⁸⁰ 10 U.S.C. § 2305(g)(1) (2018).

²⁸¹ 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

A less common form of such FOIA-specific nondisclosure statutes provide that agencies "may withhold from disclosure" information which "would be exempt from disclosure under section 552 of title 5."²⁸² In 2012, one district court found that one such provision, 18 U.S.C. § 208(d)(1),²⁸³ "should be read as permitting an agency to withhold under FOIA Exemption 3 any information that is not required to be disclosed on the Form 450," and 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."²⁸⁴

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, 1989,²⁸⁵ which states that "none of the funds provided in this Act may be expended to release information acquired from any handler under" the Act.²⁸⁶ When section 630 was tested in Cal-Almond, Inc. v. USDA,²⁸⁷ 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."²⁸⁸

Assocs., Inc. v. U.S. Coast Guard, No. 08-4674, 2009 WL 1406994, at *1-2 (E.D.N.Y. May 19, 2009).

²⁸² 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) [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").

²⁸³ Id.

²⁸⁴ Seife v. NIH, 874 F. Supp. 2d 248, 256 (S.D.N.Y. 2012).

²⁸⁵ Pub. L. No. 100-460, 102 Stat. 2229, 2229 (1988).

²⁸⁶ Id.

²⁸⁷ 960 F.2d 105 (9th Cir. 1992).

²⁸⁸ Id. at 108 (dictum) (opining on whether section 630 is "explicit" enough to qualify as Exemption 3 statute).

The Court of Appeals for the Seventh Circuit has held that 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,"²⁸⁹ "exempts from disclosure [firearms] data previously available to the public" and qualifies as an Exemption 3 statute.²⁹⁰

Other courts continue to recognize the Consolidated Appropriations Act, 2005, as an Exemption 3 statute.²⁹¹ One district court found that ATF properly protected Firearms Trace System database information pursuant to the Consolidated Appropriations Act, 2005 even though a new appropriations statute had been enacted, because the subsequent year's appropriations statute, the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, largely adopted the language of the 2005 Act.²⁹² The District Court for the District of Columbia has held that ATF properly

²⁸⁹ Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2859-60 (2004).

²⁹⁰ City of Chicago v. U.S. Dep't of the Treasury, 423 F.3d 777, 781-82 (7th Cir. 2005).

²⁹¹ 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 entirety 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).

²⁹² Muhammad, 2007 WL 433552, at *2 n.1 (noting that "[a] 2006 rider was passed which adds that the information 'shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data, in any civil action pending on or filed after the effective date of this Act (including the District of Columbia) or Federal court,'" but ultimately applying 2005 version of statute because Court determined that "[t]he language of the 2005 Act was not altered in any other respects and the additional language [in 2006 rider] does not appear to be applicable to the circumstances here" (quoting 119 Stat. at 2295-96)).

withheld Firearms Trace Database materials pursuant to Exemption 3 and the Consolidated Appropriations Act, 2005.²⁹³

Some courts 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 it did not expressly reference Exemption 3 as required for all statutes enacted after the OPEN FOIA Act of 2009.²⁹⁴ At least two district courts have rejected this reasoning, finding instead that the 2005 and 2008 appropriations acts served as permanent prohibitions on disclosure, and therefore the only question remaining was whether subsequent appropriations acts repealed the language of the 2005 and 2008 acts, ultimately finding trace information properly protected pursuant to Exemption 3.²⁹⁵

"Operational Files" Provisions

The CIA Information Act of 1984, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004, 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."²⁹⁶ To the extent that the issue has been

²⁹³ See 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).

²⁹⁴ See Everytown for Gun Safety Support Fund v. ATF, 403 F. Supp. 3d 343, 349, 351 (S.D.N.Y. 2019) (finding 2012 Tiahrt Rider does not qualify as Exemption 3 statute because provision passed in 2012 did not specifically cite to Exemption 3 as required under the OPEN FOIA Act of 2009); Fowlkes v. ATF, No. 13-0122, 2014 WL 4536909, at *7 (D.D.C. Sept. 15, 2014) (finding that Consolidated Appropriations Act, 2012, failed to meet subpart (A)(ii) of FOIA Exemption 3).

²⁹⁵ See P. W. Arms v. ATF, No. 15-1990, 2017 WL 319250, at *4 (W.D. Wash. Jan. 23, 2017) (finding that although Consolidated Appropriations Act, 2018, enacted after 2009 does not cite to § 552(b)(3), the "disclosure prohibitions set forth by Congress in the 2005 and 2008 appropriations bills are still effective prospectively and beyond those fiscal years as a permanent prohibition, until such time as Congress expresses the intent to repeal or modify them") (quoting Abdeljabbar v. ATF, 74 F. Supp. 3d 158, 175 (D.D.C. 2014); see also Abdeljabbar, 74 F. Supp. 3d at 173-76 (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).

²⁹⁶ 50 U.S.C. § 3141(a) (2018) (formerly at 50 U.S.C. § 431).

addressed in litigation, courts have recognized the CIA Information Act as a qualifying statute under Exemption 3 of the FOIA.²⁹⁷

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,²⁹⁸ the National Reconnaissance Office,²⁹⁹ and the National Geospatial-Intelligence Agency.³⁰⁰ These special statutory protections are modeled after, and quite similar to, the CIA Information Act.³⁰¹ 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."³⁰²

²⁹⁷ 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").

²⁹⁸ See 50 U.S.C. § 3144 (2018).

²⁹⁹ See 50 U.S.C. § 3143 (2018); *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").

³⁰⁰ 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).

³⁰¹ See § 3141; *Aftergood*, 441 F. Supp. 2d at 44 n.8 (noting that "[50 U.S.C.] § 432a was modeled on [50 U.S.C.] § 431, and much of § 432a's language is substantially identical to corresponding provisions of § 431").

³⁰² 50 U.S.C. § 3143 (2018) (formerly cited as 50 U.S.C. § 432a).

Statutes Found Not to Qualify Under Exemption 3

Certain statutes have been found to fail to meet the requisites of Exemption 3.³⁰³ For instance, in Reporters Committee for Freedom of the Press v. DOJ,³⁰⁴ 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,"³⁰⁵ does not qualify under Exemption 3 because the statute does not expressly prohibit the records disclosure, nor did it satisfy either prong.³⁰⁶

Likewise, the Copyright Act of 1976³⁰⁷ has been held to satisfy neither Exemption 3 subpart because, rather than prohibiting disclosure, it specifically permits public inspection of copyrighted documents.³⁰⁸ The D.C. Circuit has also held that section 520 of the Federal Food, Drug, and Cosmetic Act³⁰⁹ is not an Exemption 3 statute because it does not specifically prohibit the disclosure of records.³¹⁰ Similarly, a provision of the Postal Reorganization Act, 39 U.S.C. § 410(c)(6),³¹¹ has been found not to qualify because the broad discretion afforded the Postal Service to release or withhold records is not

³⁰³ See [5 U.S.C. § 552\(b\)\(3\) \(2018\)](#).

³⁰⁴ 816 F.2d 730 (D.C. Cir. 1987), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989).

³⁰⁵ 28 U.S.C. § 534 (2018).

³⁰⁶ Reps. Comm., 816 F.2d at 736 n.9.

³⁰⁷ 17 U.S.C. § 705(b) (2018).

³⁰⁸ See St. Paul's Benevolent Educ. & Missionary Inst. v. United States, 506 F. Supp. 822, 830 (N.D. Ga. 1980); see also FOIA Update, Vol. IV, No. 4, at 3-5 ("OIP Guidance: Copyrighted Materials and the FOIA") (emphasizing that Copyright Act should not be treated as Exemption 3 statute, and advising that copyrighted records should be processed in accordance with standards of Exemption 4); accord Gilmore v. DOE, 4 F. Supp. 2d 912, 922-23 (N.D. Cal. 1998) (alternate holding) (protecting copyrighted computer software pursuant to Exemption 4).

³⁰⁹ 21 U.S.C. § 360j(h) (2018).

³¹⁰ 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).

³¹¹ (2018).

sufficiently specific.³¹² Similarly, section 1106 of the Social Security Act³¹³ 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.³¹⁴

Likewise, the District Court for the District of Columbia rejected the argument that section 210(b) of the Investment Advisers Act of 1940³¹⁵ 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."³¹⁶ That same district court determined that section 10(d) of the Federal Insecticide, Fungicide, and Rodenticide Act³¹⁷ does not qualify as an Exemption 3 statute where withholding of the information in question is entirely discretionary under that Act.³¹⁸ Additionally, the Court of Appeals for the District of Columbia Circuit has held that the early warning disclosure provision in the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act³¹⁹ does not qualify as an Exemption 3 statute because it does not specifically exempt data from disclosure.³²⁰

³¹² 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").

³¹³ 42 U.S.C. § 1306 (2018).

³¹⁴ 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) (finding that "[a]s a direct result of the 1976 amendment to Exemption 3 of the FOIA, therefore, a general, discretionary nondisclosure statute like 42 U.S.C. s 1306 no longer qualifies as the kind of authority to withhold information by virtue of Exemption 3") (non-FOIA case).

³¹⁵ 15 U.S.C. § 80b-10(b) (2018).

³¹⁶ Aguirre v. SEC, 551 F. Supp. 2d 33, 50-51 (D.D.C. 2008).

³¹⁷ 7 U.S.C. § 136h(d) (2018).

³¹⁸ Compare Nw. Coal. for Alts. to Pesticides v. Browner, 941 F. Supp. 197, 201 (D.D.C. 1996), with Doe v. Veneman, 380 F.3d 807, 818-19 (5th Cir. 2004) (holding that section 1491 of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136i-1, is Exemption 3 statute because it prohibits disclosure of covered information) (reverse FOIA suit).

³¹⁹ 49 U.S.C. § 30166(m) (2018).

³²⁰ Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n, 533 F.3d 810, 815 (D.C. Cir. 2008).

Although the Supreme Court has declined to decide whether the Trade Secrets Act³²¹ is an Exemption 3 statute,³²² most courts confronted with the issue have held that the statute does not meet the requirements of Exemption 3.³²³ 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.³²⁴ 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."³²⁵ Because duly promulgated agency regulations can provide the necessary authorization for release, the agency "possesses discretion to control the applicability" of the Act.³²⁶ The D.C. Circuit found that the existence of this discretion precludes the Trade Secrets Act from satisfying subpart (A)(i) of Exemption 3.³²⁷ Moreover, the court held that the Trade Secrets Act fails to satisfy the first prong of subpart (A)(ii) because it "in no way channels the discretion of agency decisionmakers."³²⁸ Indeed, as the court concluded, this lack of statutory guidance renders the Trade Secrets Act susceptible to invocation at the "whim of an administrator."³²⁹ 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.³³⁰ Given all these elements, the court held that the Trade Secrets Act does not qualify as an Exemption 3 statute.³³¹

³²¹ 18 U.S.C. § 1905 (2018).

³²² See Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979).

³²³ See, e.g., Anderson, 907 F.2d at 949 (finding that "broad and ill-defined wording of [18 U.S.C.] § 1905 fails to meet either of the requirements of Exemption 3"); Acumenics 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) (same).

³²⁴ CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137-43 (D.C. Cir. 1987).

³²⁵ Id. at 1138.

³²⁶ Id. at 1139.

³²⁷ Id. at 1138.

³²⁸ Id. at 1139.

³²⁹ Id.

³³⁰ Id. at 1140-41.

³³¹ Id. at 1141.

Likewise, the District Court for the District of Columbia held that the Federal Information Security Modernization Act of 2014³³² failed to qualify as an Exemption 3 statute for two reasons.³³³ 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].'"³³⁴ The court found that "[i]t does not do so."³³⁵ "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."³³⁶ 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.'"³³⁷

Lastly, at one time there was uncertainty as to whether the Privacy Act of 1974³³⁸ could serve as an Exemption 3 statute. Congress, upon enacting the CIA Information Act in 1984, explicitly provided that the Privacy Act is not an Exemption 3 statute.³³⁹

³³² 44 U.S.C. § 3551 (2014).

³³³ See Long v. ICE, 149 F. Supp. 3d 39, 54 (D.D.C. 2015).

³³⁴ Id.

³³⁵ Id.

³³⁶ Id.

³³⁷ Id.

³³⁸ 5 U.S.C. § 552a (2018).

³³⁹ Pub. L. No. 98-477, § 2(c), 98 Stat. 2209, 2212 (1984) (amending what is now subsection (t) of Privacy Act).