Exemption 3

Exemption 3 of the Freedom of Information Act incorporates into the FOIA certain nondisclosure provisions that are contained in other federal statutes. 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." 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.

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. 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."

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).
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] \text{ 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" and have looked to the legislative history of the claimed withholding statute in determining whether that statute qualified under Exemption 3.

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


12 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. 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. 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.


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., 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").

In Founding Church of Scientology, Inc. v. Bell, the D.C. Circuit noted that, by its very terms, "Exemption 3 is explicitly confined to material exempted from disclosure by statute." As such, Exemption 3 is generally triggered only by federal statutes, 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. Federal rules of procedure, which are promulgated by the Supreme Court, ordinarily do not qualify under Exemption 3. When a rule of procedure is subsequently modified and thereby specifically enacted into law by Congress, however, it may qualify under the exemption. 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 ",the 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

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).

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

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. 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 witholding statute has been found to be governed not by the FOIA, but by the withholding statute itself.

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.

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. FBL, 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").
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), 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), which encompasses statutes that either provide criteria for withholding information or refer to particular matters to be withheld. 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.

36 Id. at § 552(b)(3)(A)(ii) (2018) (previously referred to as subpart B of Exemption 3).
For example, one district court has held that section 7332 of the Veterans Health Administration Patient Rights Statute, 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. Similarly, one district court found that 38 U.S.C. § 5705(a), 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). Likewise, "[m]edical quality assurance records created by or for the Department of Defense" have also been found to qualify under Exemption 3, generally.

The Court of Appeals for the Fifth Circuit has held that a provision of the Federal Insecticide, Fungicide, and Rodenticide Act 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. Similarly, a district court held that the confidentiality provision in the Federal Election Campaign Act qualifies as an Exemption 3 statute but did not designate that

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


49 Skurow 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).


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").


56 (2018).

A court has held that a provision of the Fair Housing Act\footnote{42 U.S.C. § 3610(d) (2018).} that protects information concerning ongoing discrimination investigations qualifies as a "disclosure-prohibiting statute," but it did not specify either subpart of Exemption 3.\footnote{West v. Jackson, 448 F. Supp. 2d 207, 212-13 (D.D.C. 2006), summary affirmand motion to remand denied, No. 06-5281, 2007 WL 1723362 (D.C. Cir. 2007) (unpublished disposition).} Similarly, the Supreme Court has held that the Census Act,\footnote{13 U.S.C. §§ 8(b), 9(a) (2018).} which requires that certain data be withheld, is an Exemption 3 statute without specifying under which subpart the statute qualifies.\footnote{Baldrige v. Shapiro, 455 U.S. 345, 359 (1982).} One district court held that the confidentiality provisions of the Gramm Leach Bliley Act of 1999\footnote{15 U.S.C. § 6801 (2018).} qualify as Exemption 3 statutes inasmuch as the provisions protect
from disclosure customers' nonpublic personal information, but the court did not specify whether the provisions qualified pursuant to subpart (A)(i) or (A)(ii) of Exemption 3.64

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).


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").


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).

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).

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

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

---

73 See id.
74 (2018).
75 7 U.S.C. § 2018(c).
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)).
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.


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").


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 "(i) 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, 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." 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.

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 materials 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

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."\textsuperscript{91} As the D.C. Circuit explained in\textsuperscript{92} Stolt-Nielsen Transportation Group Ltd. v. United States,\textsuperscript{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."\textsuperscript{93} Further, as the D.C. Circuit emphasized in\textsuperscript{94} Washington Post Co. v. DOJ,\textsuperscript{94} the required nexus must be apparent from the information itself, and "the government cannot immunize [it] by publicizing the link."\textsuperscript{95}

---

\textsuperscript{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").

\textsuperscript{92} 534 F.3d 728 (D.C. Cir. 2008).

\textsuperscript{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").

\textsuperscript{94} 863 F.2d 96 (D.C. Cir. 1988).

\textsuperscript{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. 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.

The Court of Appeals for the First Circuit, in Church of Scientology International v. DOJ, took a different approach from the D.C. Circuit and established different standards for certain categories of grand jury records. 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." 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"); Mavdak 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)."\(^\text{101}\) 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.\(^\text{102}\)

The Court of Appeals for the Ninth Circuit has held that a provision of the Ethics in Government Act of 1978,\(^\text{103}\) protecting the financial disclosure reports of certain government employees, meets the requirements of subpart (A)(i).\(^\text{104}\) 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 contain[d] a ‘grand jury' secrecy label").


\(^{104}\) 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 witheld 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); Glascoe 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, was also found to qualify as an Exemption 3 statute under subpart (A)(i) by one district court. 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]."

Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964 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. Similarly, a provision of the Bank Secrecy Act, 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.


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)).

requirements of subpart (A)(i), although in some cases courts have not specified which subpart of Exemption 3 they were applying. 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.'"

The International Investment Survey Act of 1976 has been held to be what is now denominated as a subpart (A)(i) statute, as have two Consumer Product Safety Act


provisions\textsuperscript{116} 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.'"\textsuperscript{117} Similarly, the District Court for the District of Columbia determined that a provision of the Confidential Information Protection and Statistical Efficiency Act\textsuperscript{118} "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.'"\textsuperscript{119}

A provision of the Antitrust Civil Process Act,\textsuperscript{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.\textsuperscript{121} Also, a section of the Transportation Safety Act of 1974,\textsuperscript{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.\textsuperscript{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 statute\textsuperscript{124} "leaves no room for agency discretion."\textsuperscript{125} Additionally, section 1619 of the Food, Conservation, and Energy Act of

\begin{footnotesize}
\textsuperscript{116} § 6(a)(2), (b)(5) (codified at 15 U.S.C. § 2055(a)(2), (b)(5) (2018)).


\textsuperscript{120} 15 U.S.C. § 1314(g) (2018).

\textsuperscript{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).

\textsuperscript{122} 49 U.S.C. § 1114(c) (2018).


\textsuperscript{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).
\end{footnotesize}
2008, 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 Act 128 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 "[subp]art A[(i)] [of Exemption 3] embraces only those statutes leaving no room for administrative discretion to disclose," federal statutes allowing for administrative discretion may qualify under subpart (A)(ii) of Exemption 3, provided that the statute "either limit[s] discretion to a particular item or to a particular class of items that Congress has deemed appropriate for exemption, or . . . limit[s] it by prescribing guidelines for its exercise." 132

---


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).


132 Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984).
For example, a provision of the Consumer Product Safety Act\textsuperscript{133} 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.\textsuperscript{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 Act\textsuperscript{135} has been held to meet the requirements of subpart (A)(ii) by referring to particular types of matters to be withheld.\textsuperscript{136}

Section 777 of the Tariff Act of 1930, which governs the withholding of certain "proprietary information,"\textsuperscript{137} has been held to refer to particular types of information to be withheld and thus to be a subpart (A)(ii) statute.\textsuperscript{138} Section 12(d) of the Railroad Unemployment Insurance Act\textsuperscript{139} 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).\textsuperscript{140} Similarly, 39 U.S.C. § 410(c)(2),\textsuperscript{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,"\textsuperscript{142} has been held to refer to "particular types of matters to be withheld" and thus to be a subpart


\textsuperscript{135} 15 U.S.C. § 2055(b)(5).


\textsuperscript{141} (2018).

\textsuperscript{142} 39 U.S.C. § 410(c)(2).
Likewise, 18 U.S.C. § 3509(d), 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."\footnote{Tampico v. EOUSA, No. 04-2285, 2005 U.S. Dist. LEXIS 49206, at *10 (D.D.C. Apr. 29, 2005).}

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

---

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 ", exemption 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).


149 Wis. Project, 317 F.3d at 282-84.


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.\(^{158}\)


\(^{155}\) See Legal & Safety Emp. Rsch, Inc. v. U.S. Dep’t of the Army, No. Civ. S001748, 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").


\(^{158}\) 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 "wiredtapped 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.'" Following the D.C. Circuit's Lam Lek Chong decision, a number of other courts have recognized Title III as an Exemption 3 statute.

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.' 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." 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." 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. Bennsinger, 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).


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").
The district court found that the targets of pen registers and reports generated as a result of pen registers are protected pursuant to 18 U.S.C. § 3123(d) and Exemption 3.\(^\text{164}\)

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


\(^{166}\)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.\textsuperscript{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.\textsuperscript{169} (For a further

\textsuperscript{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.

\textsuperscript{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), aff’d 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), aff’d 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, 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 102A(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).

protecting intelligence sources and methods. 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. 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. 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. 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.

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).


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


177 Minier, 88 F.3d at 801 (protecting names of CIA agents after finding that statute identifies types of matters to be withheld); Golan 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 identifies 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). 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. Also, the identities of Defense Intelligence Agency (DIA) employees have been held to be protected from disclosure pursuant to 10 U.S.C. § 424.

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).

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))).

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").

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).


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)(ii)); 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]").


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.\textsuperscript{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,"\textsuperscript{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.\textsuperscript{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).

\textsuperscript{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").


\textsuperscript{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, which sets forth criteria for the Secretary of the Interior to apply when exercising discretion about release of "[i]nformation concerning the nature and specific location of [certain] National Park System resource[s]," including resources which are "endangered, threatened, rare, or commercially valuable," has been found to be within the scope of subpart (A)(ii).

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

190 Id.
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

---


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.


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").


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, 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. 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, similarly shields that particular data from disclosure under the FOIA. The D.C. Circuit also held that section 306(h) of the Convention on Cultural Property Act qualifies under Exemption 3 because 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."

Further, the Federal Technology Transfer Act contains two provisions that have been found to qualify under Exemption 3. 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]," has been found to qualify under Exemption 3. Additionally, another provision of that statute, 15 U.S.C. § 3710a(c)(7)(B), has been held to qualify under Exemption 3.
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).\(^{220}\)


\(^{215}\) 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).


\(^{217}\) 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).


\(^{220}\) 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" 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


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)).


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 identifies the types of material to be withheld under their scope as required [under Exemption 3]"").


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.\textsuperscript{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.\textsuperscript{230} In some instances, this statute has been

\\n
\textsuperscript{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 [B]" 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).

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

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
pertain[ing] 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.
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).

(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 Act\textsuperscript{233} qualifies under both subparts of Exemption 3.\textsuperscript{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."\textsuperscript{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."\textsuperscript{236} By contrast, the D.C. Circuit found that another portion of the Federal Food, Drug, and Cosmetic Act\textsuperscript{237} does not qualify under either subpart of Exemption 3 because it does not specifically prohibit the disclosure of records.\textsuperscript{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,\textsuperscript{239} satisfies what is now known as subpart (A)(ii) of Exemption 3 because it refers to particular matters to be withheld.\textsuperscript{240} The Courts of Appeals for the District of


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

\textsuperscript{235} Id. at 950.

\textsuperscript{236} Id.


\textsuperscript{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.\footnote{See Tax Analysts v. IRS, 117 F.3d 607, 611 (D.C. Cir. 1997) (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).}

The Courts of Appeals for the Fifth and Tenth Circuits have found that section 6103 qualifies under both subpart (A)(i) and (A)(ii).\footnote{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).} 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.\footnote{DeSalvo v. IRS, 861 F.2d 1217, 1221, 1221 n.4 (10th Cir. 1988) (determining that "because 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)’}); Linnead v. IRS, 729 F.2d 998, 1000 (5th Cir. 1984) (finding that "these 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).}
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. Courts have determined that a wide array of information may be properly withheld pursuant to Exemption 3 and section 6103.

244 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); 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); Chourre 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

---


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, 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).


\(^{251}\) *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 disclose certain information." 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. 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. 704 F.2d at 523. 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 Code\textsuperscript{260} 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."\textsuperscript{261} The Ninth Circuit and the District Court for the District of Columbia have held that section 6105 qualifies as an Exemption 3 statute.\textsuperscript{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.\textsuperscript{263}

**FOIA-Specific Nondisclosure Statutes**

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

\begin{footnotes}

\textsuperscript{261} Id.

\textsuperscript{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).

\textsuperscript{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").

\textsuperscript{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).

\end{footnotes}
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

---


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").


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


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


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 Relns., Cal., 749 F. Supp. 2d at 1117 (finding that agency's "reliance] 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; Seiba, 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, 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," as a statute qualifying under Exemption 3. Similarly, two district courts have held that a nearly identical disclosure provision, 10 U.S.C. § 2305(g), 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," also qualifies under Exemption 3.

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


277 Id.


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." In 2012, one district court found that one such provision, 18 U.S.C. § 208(d)(1), "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 an employee's spouse or dependent child."

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

---


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


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).


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).

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[] premise[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 "authorize[s] 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").


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").


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").

Statutes Found Not to Qualify Under Exemption 3

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

Likewise, the Copyright Act of 1976 has been held to satisfy neither Exemption 3 subpart because, rather than prohibiting disclosure, it specifically permits public inspection of copyrighted documents. The D.C. Circuit has also held that section 520 of the Federal Food, Drug, and Cosmetic Act is not an Exemption 3 statute because it does not specifically prohibit the disclosure of records. Similarly, a provision of the Postal Reorganization Act, 39 U.S.C. § 410(c)(6), has been found not to qualify because the broad discretion afforded the Postal Service to release or withhold records is not

---

306 Reps. Comm., 816 F.2d at 736 n.9.
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).
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").


Although the Supreme Court has declined to decide whether the Trade Secrets Act\footnote{18 U.S.C. § 1905 (2018).} is an Exemption 3 statute,\footnote{See Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979).} most courts confronted with the issue have held that the statute does not meet the requirements of Exemption 3.\footnote{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).} 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.\footnote{CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137-43 (D.C. Cir. 1987).} 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."\footnote{Id. at 1138.} Because duly promulgated agency regulations can provide the necessary authorization for release, the agency "possesses discretion to control the applicability" of the Act.\footnote{Id. at 1139.} The D.C. Circuit found that the existence of this discretion precludes the Trade Secrets Act from satisfying subpart (A)(i) of Exemption 3.\footnote{Id. at 1138.} 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."\footnote{Id. at 1139.} Indeed, as the court concluded, this lack of statutory guidance renders the Trade Secrets Act susceptible to invocation at the "whim of an administrator."\footnote{Id.} 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.\footnote{Id. at 1140-41.} Given all these elements, the court held that the Trade Secrets Act does not qualify as an Exemption 3 statute.\footnote{Id. at 1141.}
Likewise, the District Court for the District of Columbia held that the Federal Information Security Modernization Act of 2014 failed to qualify as an Exemption 3 statute for two reasons. 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].'" The court found that "[i]t does not do so." 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. 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.'"

Lastly, at one time there was uncertainty as to whether the Privacy Act of 1974 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.

334 Id.
335 Id.
336 Id.
337 Id.