Michael Mabee
[redacted]
(516) 808-0883
CivilDefenseBook@gmail.com

September 13, 2019

James Danly, General Counsel
Federal Energy Regulatory Commission
888 First Street, NE,
Washington, D.C. 20426
Via Email: james.danly@ferc.gov

Subject: Appeal of Constructive Denial of FOIA 2019-0030

Dear Mr. Danly:

I hereby appeal the Commission's constructive denial of my Freedom of Information Act (FOIA) request in FOIA 2019-0030, filed on January 12, 2019.[1] This request, after significant reduction in scope upon good-faith negotiation with the Commission's staff,[2] amounts to the production of the names of the "Unidentified Registered Entity"[3] (and corresponding docket numbers) of 190 Notices of Penalty (NOPs) submitted to the Commission from July 6, 2010 through December 31, 2013. In these NOPs, the identities of the violators were withheld from the public.

As of this date, the Commission has processed only 6 out of the 190 dockets (releasing the names in 6 dockets). Simple math reveals that at this rate, it will take the Commission decades to process these FOIA requests.

On August 3, 2019 I sent the Commission a request for an estimated completion date of FOIA #2019-0030 (attached hereto as Exhibit A). To date, I have received no reply.

The Commission claims that it is processing my FOIA requests "on a rolling basis." As such, the Commission has sent "Submitter's Rights Letters" to NERC requesting their views on only a few dockets at a time. The Commission sent such a "Submitter's Rights Letter" on February 8, 2019 addressing 10 dockets (FOIA 2019-0030). As far as I am aware, the Commission has sent no other "Submitter's Rights Letters" and has only adjudicated 6 out of the 10 referenced dockets in over 8 months since the submission of FOIA 2019-0030. This means that there are 180 dockets under my FOIA request that have

[1] In this FOIA, I requested: "the 'NERC Full Notice of Penalty' version which includes the name of the registered entity (and which has been previously withheld from the public). In the instances where there was a 'Spreadsheet NOP' I request a copy of the spreadsheet that lists the name(s) of the entity subject to the regulatory action." After negotiation with the FERC staff, and in order to reduce the staff's burden, I agreed to accept the first page of the public version of the NOP with the name of the entity and the docket number entered onto the page.

[2] See email dated March 21, 2019 from FERC staff attorney Jonathan O'Connell to Michael Mabee

[3] The industry euphemisms for the entities whose names are withheld from the public are "Unidentified Registered Entity" or "URE."

not yet even been subject of a "Submitter's Rights Letter" over half a year since my FOIA request was submitted.

This extreme delay and inaction on the part of the Commission to respond to my FOIA requests constitutes a constructive denial of my requests. Specifically, the Commission has failed to conduct an adequate search and has failed to release records responsive to my FOIA request.

For the reasons set forth in my appeal letter April 17, 2019 in FOIA 2019-0019, (attached hereto as Exhibit B and incorporated here), I request that the names of the remaining "Unidentified Registered Entities" be immediately released. I look forward to your response within the 20-day statutory timeframe.

Sincerely,

Michael Mabee

CC: Charles A. Beamon, Associate General Counsel
Via Email: charles.beamon@ferc.gov

Michael Mabee
[redacted]
(516) 808-0883
CivilDefenseBook@gmail.com

August 3, 2019

Leonard Tao,
Director and Chief FOIA Officer
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Subject: Request for an estimated completion date of FOIA #2019-0019 and #2019-0030

Dear Mr. Tao:

Pursuant to Section (a)(7)(B)(ii) of the Freedom of Information Act[1], I request an estimated completion date of:

1. FOIA #2019-0019 filed on December 18, 2018
2. FOIA #2019-0030 filed on January 12, 2019

I would note that I have worked in good faith with the Commission's staff to reduce the scope of this request. At the suggestion of the staff I agreed that for each of the 243 dockets covered under these two FOIA requests, I am only seeking page 1 of the Notice of Penalty (NOP) with the name of the company(s) and docket number disclosed. (For spreadsheet NOPs and FFT spreadsheets, a copy of the spreadsheet with the name of the company(s) and docket number disclosed.)

This estimated completion date may be provided to me electronically at this email address: CivilDefenseBook@gmail.com.

Sincerely,

Michael Mabee

[1] 5 U.S.C. § 552(a)(7)(B)(ii)

Michael Mabee
[redacted]
(516) 808-0883
CivilDefenseBook@gmail.com

April 17, 2019

James Danly, General Counsel
Federal Energy Regulatory Commission
888 First Street, NE,
Washington, D.C. 20426
Via Email: james.danly@ferc.gov

Subject: Appeal of April 2, 2019 Determination in FOIA 2019-0019

Dear Mr. Danly:

I hereby appeal the determination letter dated April 2, 2019, denying part of my Freedom of Information Act (FOIA) request in FOIA 2019-0019.[1] I also note that your determination on this appeal will have an impact on the rest of the processing of both FOIA 2019-0019 and FOIA 2019-0030—both of which I filed requesting that the identities of Critical Infrastructure Protection (CIP) violators be released to the public.[2] For the reasons more fully set forth below, the Federal Energy Regulatory Commission (FERC) should release the requested information because:

1. There is no valid FOIA exemption that would prevent the release of this information.
2. To the extent that the Commission believes there is an applicable exemption, the Commission should exercise its discretion to release the information because it is in the public interest to do so. And,
3. It would enhance the security of the critical infrastructures to release this information to the public.

[1] Specifically, FERC denied my request to supply the names of the entities that were subject to regulatory actions in FERC Docket Numbers NP14-30, NP14-37, and NP14-39. Note, my FOIA request was for specific documents. I requested: "the 'NERC Full Notice of Penalty' version which includes the name of the registered entity (and which has been previously withheld from the public). In the instances where there was a 'Spreadsheet NOP' I request a copy of the spreadsheet that lists the name(s) of the entity subject to the regulatory action." After negotiation with the FERC staff, and in order to reduce the staff's burden, I agreed to accept the first page of the public version of the NOP with the name of the entity and the docket number entered onto the page.

[2] The industry euphemism for the entities whose names are withheld from the public is "Unidentified Regulated Entity" or "URE."

I. Introduction.

This appeal could be the "poster child" for why the Freedom of Information Act exists; to allow the public to understand how their government operates and call for change when a regulatory system fails us. According to the federal government's reference website on FOIA, www.foia.gov, the operation of this important law has a presumption of openness:

> The FOIA provides that when processing requests, *agencies should withhold information only if they reasonably foresee that disclosure would harm an interest protected by an exemption, or if disclosure is prohibited by law*. Agencies should also consider whether partial disclosure of information is possible whenever they determine that full disclosure is not possible, and they should take reasonable steps to segregate and release nonexempt information.[3] [Emphasis added.]

The names of violators in a regulatory regime overseen and approved by the United States government must be made available to the public. Legitimately sensitive and harmful information can be protected by exemptions to the FOIA, but disclosing the name of a company that is subject to a regulatory action does not harm national security. In fact, the opposite is true. When the names of violators are withheld from public scrutiny, the incentive for bad behavior is increased. Indeed, if national security is the true rationale for the FERC/NERC regulatory regime, then Congress and the public should have the right to know how this regime (or concealment scheme) is working.

II. Procedural history.

On December 18, 2018 I submitted a FOIA request to the Federal Energy Regulatory Commission (FERC), Request FOIA-2019-19. I subsequently filed an amended FOIA request on January 4, 2019. The original and amended requests are attached hereto as Exhibit A.[4]

On January 18, 2019 FERC sent a letter to the North American Electric Reliability Corporation (NERC) requesting their views on the release of the information I seek. This FERC letter is attached hereto as

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[3] https://www.foia.gov/about.html (accessed April 12, 2019).

[4] While the determination letter dated April 2, 2019 makes no reference to my fee waiver request, I assume it was granted. If the issue must be revisited for any reason, I hereby incorporate my fee waiver request of December 18, 2018 by reference.

Exhibit B. Apparently, NERC, the industry Trade Associations[5] and some individual companies responded, but their responses have not yet been provided to me and are presently the subject of a separate FOIA request (FOIA 2019-0056).

On February 28, 2019 FERC issued a "Notice of Intent to Release" letter to the parties, which is attached as Exhibit E. On March 18, 2019 FERC issued an "Initial Release Letter" to the parties which is attached as Exhibit F. FERC subsequently released the identity of the UREs in two of the 53 FERC dockets covered by my FOIA request.[6]

On March 28, 2019 the Trade Associations disclosed their objections to this FOIA as well as a related FOIA request: FOIA 2019-0030 as exhibits to a Motion to Intervene on FERC Docket NP19-4-000. I have attached those responses as Exhibits C and D.

On April 2, 2019 FERC issued a second determination letter in FOIA 2019-0019 denying my request for FERC to disclose the identities of the "UREs" who violated CIP regulations in FERC Docket Numbers NP14-30, NP14-37, and NP14-39." FERC's April 2, 2019 letter (entitled "FOIA FY19-19 (Rolling) Denial (NP14-30, NP14-37, and NP14-39)—Second Response Letter") is attached as Exhibit G.

There is no apparent difference in law between the February 28 decision of FERC to release the identities of UREs and the April 2 decision of FERC to deny release of URE identities. In fact, the only apparent rationale is the intervening entreaties to FERC by the industry Trade Associations on March 28, 2019 in Docket NP19-4-000 to withhold the names of their misbehaving members from public scrutiny. In fact, the Trade Associations used their filing under Docket NP19-4-000[7] as an opposition to my FOIA requests.[8]

Pressure on FERC by the Trade Associations is not an allowed FOIA exemption.

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[5] The American Public Power Association (APPA), the Edison Electric Institute (EEI), and the National Rural Electric Cooperative Association (NRECA).

[6] I filed a separate, but related FOIA request on January 12, 2019 for Notices of Penalty on an additional 190 docket numbers. FOIA 2019-0030.

[7] Accession Number: 20190328-5292. Document Date: 3/28/2019

[8] FERC Docket 19-4-000. "Motion to Intervene and Protest of The American Public Power Association, The Edison Electric Institute, and The National Rural Electric Cooperative Association." March 28, 2019. Page 11.

III. Withholding the names of CIP violators from the public has not made the electric grid more reliable and America more secure. In fact, *the opposite is true*.

NERC and the Trade Associations argue that the names of the CIP violators must be kept from the public in order to protect us. The record on this matter demonstrates that this clearly is not true. In fact, the evidence infers that the continued withholding of this information is placing the critical infrastructures, and the public, *in more danger*.

The practice of withholding the names of the CIP violators from the public began in July of 2010. If we take NERC at their word that the reason the names of CIP violators are being withheld from public scrutiny is to protect Americans, we should see some improvement in the security of our electric grid between 2010 and the present.

In an official assessment to the U.S. Congress released on January 29, 2019, the U.S. Intelligence Community confirmed that the U.S. electric grid is not secure against foreign incursions:[9]

> Russia has the ability to execute cyber attacks in the United States that generate localized, temporary disruptive effects on critical infrastructure, such as disrupting an electrical distribution network for at least a few hours, similar to those demonstrated in Ukraine in 2015 and 2016. Moscow is mapping our critical infrastructure with the long-term goal of being able to cause substantial damage.

Vulnerability of the U.S. electric grid to foreign attack has been longstanding. In an April 8, 2009 article, "Electricity Grid in U.S. Penetrated By Spies," the Wall Street Journal disclosed:[10]

> Cyberspies have penetrated the U.S. electrical grid and left behind software programs that could be used to disrupt the system, according to current and former national-security officials.
>
> The spies came from China, Russia and other countries, these officials said, and were believed to be on a mission to navigate the U.S. electrical system and its controls. The intruders haven't

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[9] Coats, Daniel R. "Worldwide Threat Assessment of the U.S. Intelligence Community" Senate Select Committee on Intelligence. January 29, 2019. https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf (accessed February 5, 2019).

[10] Gorman, Siobhan. "Electricity Grid in U.S. Penetrated By Spies." *Wall Street Journal*. April 8, 2009. https://www.wsj.com/articles/SB123914805204099085 (accessed April 12, 2019). Also, see a decade later: Smith, Rebecca. "America's Electric Grid Has a Vulnerable Back Door—and Russia Walked Through It." Wall Street Journal. January 10, 2019. https://www.wsj.com/articles/americas-electric-grid-has-a-vulnerable-back-doorand-russia-walked-through-it-11547137112 (accessed April 12, 2019).

> sought to damage the power grid or other key infrastructure, but officials warned they could try during a crisis or war.
>
> "The Chinese have attempted to map our infrastructure, such as the electrical grid," said a senior intelligence official. "So have the Russians."

So, we know for a fact the at the Russians and the Chinese have infiltrated our electric grid for over a decade. In January of 2011, about six months after NERC began withholding the identities of CIP violators, the U.S. Department of Energy, Office of Inspector General, issued a report which provides an interesting baseline at the time the entity names began to be withheld.[11] The OIG noted:

> In addition, as noted in a recent survey conducted by industry and the Center for Strategic and International Studies, more than half of the operators of power plants and other "critical infrastructure" components reported that their computer networks had been infiltrated by sophisticated adversaries. Furthermore, during recent testimony to Congress, the Director of National Intelligence stated that the cyber security threat was growing at an unprecedented rate and stressed the need for increased cooperation between government and industry to help alleviate the threats. The importance of implementing effective cyber security measures over the power grid was recently highlighted by the discovery of sophisticated malware within various industrial control systems. An industry expert also noted that there have been more than 125 industrial control system incidents resulting in impacts ranging from environmental and equipment damage to death.

When examining the Director of National Intelligence's January 29, 2019 report quoted above, one thing is apparent: For eight years the Director of National Intelligence and other federal officials have warned that our grid has been penetrated by adversaries.

Nothing positive has occurred as a result of withholding the names of the CIP violators. In fact, the industry has *vehemently opposed* more stringent cybersecurity standards, claiming that they are "unduly burdensome."[12] (Meanwhile, the Russians and Chinese apparently don't find it "unduly burdensome" to penetrate our electric grid.)

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[11] U.S. Department of Energy Office of Inspector General. "Federal Energy Regulatory Commission's Monitoring of Power Grid Cyber Security." January 2011. https://www.ferc.gov/industries/electric/indus-act/reliability/cybersecurity/doe-ig-report.pdf?csrt=4870345339811568870 (accessed April 12, 2019).

[12] See for example, the summary of the industry's opposition to increased cybersecurity measures in my filing under Docket No. RM17-13-000 (Supply Chain Risk Management Reliability Standards) FERC Accession Number 20180326-5018. March 25, 2018.

If keeping the names of the CIP violators from the public was going to make the grid more reliable and the nation more secure, it should have worked by now. Why is the public being kept in the dark? How does hiding the names of CIP violators protect America? In order to answer these questions, FERC must honor the spirit of the FOIA and release this information so the public can evaluate this regulatory scheme.

Specifically, the public needs to analyze whether the decade-long failure to secure the U.S. electric grid is a direct result of NERC's enforcement regime that shields the identities of standard violators from public scrutiny.

The NERC coverup started in July 2010. (Previous to July 10, 2010, identities of standards violators were disclosed by both NERC and FERC.) The public must examine the incentives under this enforcement regime for electric utilities to implement meaningful cybersecurity protections. Will the industry devote only moderate attention to grid security while knowing any gaps will be kept hidden from ratepayers, investors, the U.S. Congress, and the public at large? In its consideration of this appeal, FERC now has the opportunity to end these practices injurious to national security and the public interest.

In sum, withholding of names of CIP violators has not worked to thwart our adversaries—the Russians and Chinese infiltrated the electric the grid for a decade. In fact, *withholding violators' names has made the grid less reliable and America less secure* because the industry has little incentive to improve their Critical Infrastructure Protection (CIP) performance. This is exactly why the Russians and the Chinese are still in the grid, because information is being withheld from the public. If the truth was known, Congress could reasonably conclude that NERC's enforcement of the CIP regulatory system has failed, and the system must be reformed.

FERC can make the country safer simply by releasing this regulatory information to the public. Public scrutiny through transparency and disclosure is the time-tested oversight for regulatory systems in a free society. Even if FOIA exemptions might be applicable, it is within FERC's discretion to release the identity of standards violators. FERC is charged with serving the public interest; the public interest demands disclosure.

IV. The test that FERC devised for this FOIA request is too restrictive and violates FOIA.

In its February 28, 2019 "Notice of Intent to Release" letter, FERC described a test it intended to use to determine whether to release the names of the CIP violators under my FOIA request:

> A case-by-case assessment of each requested document must consider the following: the nature of the CIP violation; whether mitigation is complete; the content of the public and non-public versions of the Notice of Penalty; the extent to which the disclosure of the pertinent URE identity would be useful to someone seeking to cause harm; whether an audit has occurred since the violation(s); whether the violation(s) was administrative or technical in nature; and the length of time that has elapsed since the filing of the public Notice of Penalty. An application of these factors will dictate whether a particular FOIA exemption, including 7(F) and/or Exemption 3, is appropriate. *See Garcia v. US. DOJ,* 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002) ("In evaluating the validity of an agency's invocation of Exemption 7(F), the court should within limits, defer to the agency's assessment of danger.") (citation and internal quotations omitted).

This test devised by FERC is too restrictive and does not comport with FOIA's presumption of openness. This "test" appears to have been concocted as an attempt to bolster FERC's improper uses of FOIA exemptions 3 and 7(F), neither of which apply in this case as is more fully set forth later.

At issue here is the disclosure of the names of regulatory violators. I would note that NERC already publishes a great deal of information on its website, including the identities of its regulated entities and their functions; for example, the "NERC Active Compliance Registry Matrix"[13] and other files. But it somehow becomes a problem to use the name of the entity when they are associated with a CIP violation. Because there is no legitimate security argument to withhold all names of all CIP violators in perpetuity, as is the current practice, public scrutiny should be mandatory. It appears that the real reason for concealing the names of CIP standard violators *is to avoid public scrutiny* of electric utilities.

I would further note that industry embarrassment does not equal national security concern and does not equal FOIA exemption either. On April 10, 2019, the Wall Street Journal quoted a FERC official explaining why the identities of the CIP violators are not disclosed to the public:[14]

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[13] Available at: https://www.nerc.com/pa/comp/Pages/Registration.aspx (accessed April 12, 2019).

[14] Smith, Rebecca. "PG&E Among Utilities Cited for Failing to Protect Against Cyber and Physical Attacks." Wall Street Journal. April 9, 2019. https://www.wsj.com/articles/pg-e-among-utilities-cited-for-failing-to-protect-against-cyber-and-physical-attacks-11554821337 (accessed April 12, 2019).

> FERC's Mr. Ortiz[15] said identities are protected to honor confidentiality requests from the North American Electric Reliability Corp., called NERC, the federally appointed organization that crafts utility standards and audits compliance. It refers penalty cases to FERC for enforcement.

NERC's "confidentiality requests" do not fall under an exemption under FOIA. If the potential "harm" of disclosure is the embarrassment of the entity subjected to a regulatory action, this is not a "harm" recognized by any exemption of the FOIA.

Finally, the burden of proof should not be on the public to prove that there is not a risk in the release of violators' names; the burden should be on the business submitter (NERC) or government (FERC) to credibly demonstrate that release of the information would reasonably constitute a risk to the public.

I observe there is not a scintilla of public evidence over the last decade that there would be a security risk in releasing the names of CIP violators. There is ample evidence that the real danger here has been in the lack of disclosure in this failed regulatory scheme.

V. Exemption 7(F) does not apply to the names of CIP violators.

It is puzzling that FERC cites Exemption 7(F) as a basis for withholding the names of regulatory violators. This exemption generally allows an agency to protect the identities of law enforcement agents. This exemption is also valid in protecting the names and identifying information of non-law enforcement federal employees, local law enforcement personnel, and other third persons in connection with particular law enforcement matters.[16]

The identities of companies who violate CIP standards and are subject to regulatory actions by the government simply don't fit in any arguable way under Exemption 7(F).

VI. Exemption 3 does not apply to the names of CIP violators.

According to the Department of Justice FOIA Manual[17]:

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[15] David Ortiz, Deputy Director, FERC Office of Electric Reliability.

[16] Exhibit H is the U.S. Department of Justice Guide to the Freedom of Information Act, Exemption 7(F), page 653, et seq.

[17] Exhibit I is the U.S. Department of Justice Guide to the Freedom of Information Act, Exemption 3, page 207, et seq.

> Exemption 3 allows the withholding of information prohibited from disclosure by another federal statute provided that one of two disjunctive requirements are met: the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

Neither of these requirements are met here. There is no law that NERC or FERC has cited that even arguably requires the withholding of the names of entities subject to regulatory actions under either prong of the exemption.

I further note that FERC failed to properly disclose to the U.S. Attorney General and Congress its use of Exemption 3 in 2018 for another of my FOIA requests—more evidence of FERC's non-compliance with the most basic aspects of FOIA law. Agencies are required in their annual FOIA reports each year to list all Exemption 3 statutes that they relied upon during that year. Disturbingly, FERC's annual FOIA reports from 1998 to 2018[18] reveals that for the past 21 years, all the years reports are available, FERC claims to have never used Exemption 3 in such a manner as it has here.

- From 1998-1999 FERC only used Exemption 3 under 41 U.S.C. § 253b(m)—Proposals submitted by unsuccessful contract bidders.
- From 2000-2001 FERC only used Exemption 3 under 16 U.S.C. 470hh(a)—Information pertaining to the nature and location of certain archaeological resource.
- In 2002 FERC did not use Exemption 3.
- From 2003-2018 FERC only used Exemption 3 under 16 U.S.C. 470hh(a)—Information pertaining to the nature and location of certain archaelogical [sic] resource.

However, FERC *did use* Exemption 3 in 2018 for my FOIA No. FY18-75 and failed to disclose the relevant statute, 16 U.S.C. 824o-1(d)(1), in its 2018 Annual Freedom of Information Act Report.

Exhibit J is page 10 of FERC's 2018 FOIA report which is required by 5 U.S.C. § 552(e)(1)(B)(ii). It lists only one Exemption 3 statute: 16 U.S.C. 470hh(a)— "Information pertaining to the nature and location of certain archaelogical [sic] resource."

[18] Located at: https://www.ferc.gov/legal/ceii-foia/foia/ann-rep.asp (accessed April 12, 2019).

Exhibit K is a FOIA response letter from FERC dated May 25, 2018 denying FOIA No. FY18-75 under exemptions 3 and 7(F). Exhibit L is a letter from FERC dated August 7, 2018 (after an appeal of the May 25, 2018 denial) upholding the denial to disclose documents under exemptions 3 and 7(F). Specifically, the letter states:

> FOIA Exemption 3 protects information "specifically exempted from disclosure by statute." Here, CEII is specifically exempted from disclosure under the Fixing America's Surface Transportation Act, Pub. L. No. 118-94, § 61003 (2015).

This use of an Exemption 3 statute is not disclosed in FERC's annual FOIA report.

Apparently, the undisclosed argument is that the names of the entities subject to regulatory actions constitute "Critical Electric Infrastructure Information" (CEII) exempt from disclosure,[19] This argument fails under FOIA and under FERC's own interpretive regulations and orders.

Neither the "FAST Act"[20], apparently cited by FERC as the Exemption 3 law in their April 2, 2019 denial letter, nor the Commission's implementing regulations prohibit the disclosure of the names of regulatory violators. Therefore, the argument that withholding this information under Exemption 3 is required fails on both prongs of the exemption, which would allow withholding where a federal law:

> (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
>
> (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Since neither prong is met, Exemption 3 does not apply. However, to the extent that anybody still wants to argue prong "B", let's dig deeper into the "criteria" for withholding information determined to be CEII.

Only NERC is asserting that the names of violators are CEII or "privileged" or "nonpublic" The Commission has not made such a determination. 18 CFR § 388.112(c)(1)(i) provides that:

> The documents for which privileged treatment is claimed will be maintained in the Commission's document repositories as non-public until such time as the Commission may

[19] 16 U.S.C. 824o-1(d)(1) Protection of critical electric infrastructure information

[20] The Fixing America's Surface Transportation Act, Pub. L. No. 118-94, § 61003 (2015)

> determine that the document is not entitled to the treatment sought and is subject to disclosure consistent with § 388.108. *By treating the documents as nonpublic, the Commission is not making a determination on any claim of privilege status. The Commission retains the right to make determinations with regard to any claim of privilege status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.* [Emphasis added.]

NERC has for years been classifying the names of the violators and the settlement agreements as "nonpublic" and tries to argue that FERC also deems these documents as "nonpublic"—but this presumption is not in compliance with the clear requirements of the CFR.

Even the Commission's own interpretation of the Critical Energy Infrastructure Information rules support disclosure. I note that FERC Order No. 833 holds that[21]:

> 24. In response to the Trade Associations' comments seeking clarification if a name or location of a facility should be protected as CEII, the Commission's current practice is that information that "simply give[s] the general location of the critical infrastructure" or simply provides the name of the facility is not CEII. [FN 40] However, under certain circumstances, information regarding the location of infrastructure or its name that is not already publicly known could be CEII. [FN 41] Therefore, we clarify that, while as a general matter the location or name of infrastructure is not CEII, a submitter of information to the Commission may ask that non-public information about the location, or the name, of critical infrastructure be treated as CEII. The submitter would have to provide a justification for the request and explain why the information is not already publicly known.
>
> **FN 40** 18 CFR 388.113(c)(1)(iv).
>
> **FN 41** For example, the location of an operating transformer is likely publicly known. However, the location of a spare transformer housed in a central location may not be publicly known and, therefore, may qualify as CEII.

Particularly instructive is the footnote 41 example of what may qualify as CEII.

Notably, NERC has not provided legally valid justification for keeping the names of violators secret. And the reason "the information is not already publicly known" is FERC's noncompliance with its own regulations.

[21] 157 FERC ¶ 61,123. Pg. 17.

FERC is ignoring another relevant holding of its Order No. 833[22]:

> 36. The Commission does not agree that the scope of CEII should be modified, as suggested by the Trade Associations, to encompass information "related to compliance with the Reliability Standards." The Trade Associations' proposal is unduly broad and inconsistent with the FAST Act because it could lead to all infrastructure information, whether critical or not, being treated as CEII. For the same reason, we do not agree that the blanket presumption that information relating to compliance with Reliability Standards is CEII, proposed by the Trade Associations, is appropriate. Like other forms of CEII, however, information on compliance with Reliability Standards may be treated as CEII if the submitter justifies its treatment as CEII under the Commission's regulations.

It is clear and unambiguous that the industry wanted the names of violating entities to be always considered CEII but the Commission specifically denied this in rulemaking. Where did NERC justify treatment as CEIII of the names of standard violators for each NOP submitted? Nowhere. In retrospect, it is clear that the NERC did the industry's bidding, and FERC allowed this behavior on a wholesale basis.

VII. FERC regulations require disclosure.

18 CFR § 39.7 (b)(4) provides that:

> Each violation or alleged violation shall be treated as nonpublic *until the matter is filed with the Commission as a notice of penalty* or resolved by an admission that the user, owner or operator of the Bulk Power System violated a Reliability Standard or by a settlement or other negotiated disposition. The *disposition of each violation or alleged violation that relates to a Cybersecurity Incident* or that would jeopardize the security of the Bulk-Power System if publicly disclosed shall be nonpublic unless the Commission directs otherwise. [Emphasis added.]

It must be noted that in the three NOPs which are the subject of this appeal, the "cybersecurity incident" exception clearly does not apply. It is critical to point out that nothing in these three NOPs refers to a "cybersecurity incident." 18 CFR § 39.1 defines "cybersecurity incident" as:

> Cybersecurity Incident means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communications networks including hardware, software and data that are essential to the Reliable Operation of the Bulk-Power System.

[22] 157 FERC ¶ 61,123. Pg. 24.

There is no allegation in these NOPs of a malicious act or suspicious event that disrupted or attempted to disrupt the Reliable Operation of the Bulk-Power System. These were simply regulatory actions after instances of noncompliance of CIP standards were discovered, either through self-reports or regulatory audits. Nor has NERC provided an explanation of how the security of the Bulk Power System would be jeopardized if the names of CIP standard violators were to be publicly disclosed.

Further, 18 CFR § 39.7(d)(1) provides that a notice of penalty by the Electric Reliability Organization shall consist of, *inter alia*: "The name of the entity on whom the penalty is imposed."

So, 18 CFR § 39.7 (b)(4) and 18 CFR § 39.7(d)(1) are clear that at the point when "the matter is filed with the Commission as a notice of penalty or resolved by an admission that the user, owner or operator of the Bulk Power System violated a Reliability Standard or by a settlement or other negotiated disposition" then the name of the penalized entity as well as the supporting documentation, including the settlement agreement, must be publicly disclosed. Importantly, the "notice of penalty" is afforded different treatment in 18 CFR § 39.7 (b)(4) than the "disposition of each violation. There is no provision in regulation to make the "notice of penalty" nonpublic. Moreover, 18 CFR § 39.7(d)(1) makes it absolutely clear that "the name of the entity on whom the penalty is imposed" is part of the "notice of penalty."

18 CFR § 39.7 (b)(4) allows the "disposition of each violation" (or alleged violation) to be made nonpublic, but only if disclosure of the "disposition" would jeopardize security of the Bulk Power System. Again, the "name of the entity" is not part of "disposition" of the violation, so there is never an exemption of the violator's name from public disclosure. Nor has NERC made a credible case that disclosure of the "disposition" of these NOPs would jeopardize the security of the Bulk-Power System, especially when the violations do not involve *bona fide* Cybersecurity Incidents as defined in 18 CFR § 39.1.

FERC has made no public order (or change in regulation) to allow NERC to withhold the "notice of penalty" for these NOPs. If FERC has made a private directive to NERC to withhold the "disposition" of the violations in Duke NOP, and other NOPs, then the public interest demands that the text of this hidden FERC directive and its underlying legal rationale be promptly released by the Commission.

VIII. NERC's standard argument about "information in the aggregate."

In the NOP for Docket NP19-4-000, which was subsequently outed by the press to be against Duke Energy Corp.,[23] and which the Trade Associations are now using as a forum to fight my FOIA requests[24] NERC essentially argues that they are redacting the names of "the Companies" and any identifying information because:

> Malicious individuals already target the Companies' operational personnel, seeking bits and pieces of data to map the Companies' systems and identify possible attack vectors. The public disclosure of a single piece of redacted information may not, on its own, provide everything needed to exploit an entity and attack the electric grid. But, successive public disclosures of additional pieces of redacted information will increase the likelihood of a cyber-intrusion with a corresponding adverse effect on energy infrastructure. Each successive disclosure could fill in some knowledge gaps of those planning to do harm, helping to complete the maps of entity systems. Therefore, it is important to examine and evaluate the redacted information in the aggregate.[25]

This is a generic argument that any information of any kind identifying "the Companies" would assist hackers. Therefore, according to NERC, hiding the names of the companies will somehow thwart the Chinese and Russians (who already dwell comfortably in the grid). The Trade Associations mirror this argument in their direct opposition to these FOIAs (see Exhibits C & D):

> Even information that some may deem innocuous—such as revealing the names of UREs involved in a remediated NOP—can result in unintended consequences. For example, in some instances, a URE may have remediated a particular instance of regulatory noncompliance. However, that URE may have experienced a pattern of similar noncompliance—not because of a lack of will to fix, but because there are significant other factors at play. In addition, UREs face challenges in integrating modern information technology systems with older operational technology systems that were never designed with modern cybersecurity needs in mind. Sophisticated bad actors, like the ones discussed above, may be able to discern points of attack and vulnerabilities in publicly disclosed UREs based on their patterns of NOPs. The Trade Associations recognize that public access to information is important, and appreciate the goal of

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[23] Sobczak, Blake and Behr, Peter. "Duke agreed to pay record fine for lax security — sources" E&E News, February 1, 2019. https://www.eenews.net/energywire/2019/02/01/stories/1060119265?fbclid (accessed April 15, 2019).

[24] See Exhibits C and D which the Trade Associations filed as exhibits to their Motion to Intervene in FERC Docket NP19-4-000.

[25] Docket NP19-4-000 NOP pg. 56

> FOIA, but believe the line must be drawn where a requested disclosure might risk the security of the Bulk-Power System.

Another very reasonable inference to draw here is that the line was already "drawn" on the wrong side. For example:

- Might disclosing the names of the violators lead the public and Congress to assess how well the regulatory system is working?
- Might this information inform the public and Congress as to whether the current regulatory system has adequately thwarted threats to the grid?
- Also, might this information lead the public and Congress to conclude that better investment in the critical infrastructures is necessary?

These are public policy questions, not CEII.

Interestingly, NERC, the Trade Associations and the companies themselves put a lot of information about the companies and the industry as a whole on their websites. By their defective rationale, all information "in the aggregate" should be CEII. In fact, any information whatsoever about any of the 1,500 regulated entities by this bogus argument should be considered CEII. All websites should be shut down, and even our electric bills should not list the name of the company we are paying, lest these small pieces of "information in the aggregate" leads hackers to realize which utility is operating in that area, and thus helps to narrow the hacker's target list.

Obviously, the forgoing illustration of the industry argument is ridiculous as is ultimately the industry argument itself. Why? Because there is *only one piece of information* that the industry is fighting vehemently to keep from the public: The names of regulatory violators.

Why is this one piece of information so sensitive to the industry? Because the name of a standard violator is the most essential piece of information to hold that utility accountable.

Public disclosure of the identity of law-breakers is a purpose of FOIA. The public has the right and Congress the obligation to examine this failed enforcement regime.

IX. The CEII Designation has expired in 195 of the 243 dockets in FOIAs 2019-0019 and 2019-0030.

To the extent that FERC may continue to argue that the names of the "UREs" constitute CEII, this argument fails on 195 of the requested dockets, including two of the three denied by FERC's April 2, 2019 denial letter. In these two cases, the purported CEII designation made by NERC has expired. 18 CFR § 388.113(e)(1) provides that the designation of Critical Energy/Electric Infrastructure Information (CEII) "may last for up to a five-year period, unless re-designated." One hundred ninety-five of the Commission dockets subject to these two FOIAs (See Exhibit M) were filed by NERC between July 6, 2010 and the date of this appeal. Each of these actions was filed over five years from the date of this appeal and, thus, the CEII assertion by the North American Electric Reliability Corporation (NERC) has expired in each docket. There is no public evidence that the CEII assertion has been re-designated. In fact, as I noted previously, there is no public evidence that NERC appropriately designated its NOP as CEII in the first place, as these NOPs were filed as "privileged," not "CEII."

I note that the regulation requires that: "In making a determination as to whether the designation should be extended, the CEII Coordinator will take into account information provided in response to paragraph (d)(1)(i) of this section, and any other information, as appropriate."

18 CFR § 388.113(d)(1)(i) provides that, should NERC seek a re-designation of CEII for these dockets, NERC must *for each of these dockets* demonstrate "how the information, or any portion of the information, qualifies as CEII, as the terms are defined in paragraphs (c)(1) and (2) of this section." [26]

[26] 18 CFR § 388.113(c)(1) defines Critical Electric Infrastructure Information as "information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to the Commission or other Federal agency other than classified national security information, that is designated as critical electric infrastructure information by the Commission or the Secretary of the Department of Energy pursuant to section 215A(d) of the Federal Power Act. Such term includes information that qualifies as critical energy infrastructure information under the Commission's regulations. Critical Electric Infrastructure Information is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(3) and shall not be made available by any Federal, State, political subdivision or tribal authority pursuant to any Federal, State, political subdivision or tribal law requiring public disclosure of information or records pursuant to section 215A(d)(1)(A) and (B) of the Federal Power Act."

18 CFR § 388.113(c)(2) defines Critical Energy Infrastructure Information as "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

> (i) Relates details about the production, generation, transportation, transmission, or distribution of energy;
> (ii) Could be useful to a person in planning an attack on critical infrastructure;
> (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and
> (iv) Does not simply give the general location of the critical infrastructure."

18 CFR § 388.113(d)(1)(i) also provides that: "Failure to provide the justification or other required information could result in denial of the designation and release of the information to the public." Because NERC has failed to seek re-designation for CEII on a timely basis for these 194 dockets, FERC should rule, as a matter of both current and future policy, that NERC has waived any purported interest in CEII re-designation.

Finally, the Commission has never ruled that the information withheld by the public in these 195 dockets is actually CEII—this is just the assertion of NERC. 18 CFR § 388.113(d)(iv) provides that:

> The information for which CEII treatment is claimed will be maintained in the Commission's files as non-public until such time as the Commission may determine that the information is not entitled to the treatment sought. By treating the information as CEII, the Commission is not making a determination on any claim of CEII status. The Commission retains the right to make determinations with regard to any claim of CEII status at any time, and the discretion to release information as necessary to carry out its jurisdictional responsibilities. [Emphasis added.]

Specifically, related to FERC's April 2, 2019 FOIA denial letter, I note:

- NP14-30-000 was filed on 1/30/2014 (the purported CEII designation is expired)
- NP14-37-000 was filed on 3/31/2014 (the purported CEII designation is expired)
- NP14-39-000 was filed 4/30/2014 (the purported CEII designation expires on 4/29/2019)

X. The violations have long been mitigated; the names of the violators should be disclosed.

Once CIP standard violations have been mitigated, there can be no legitimate rationale for withholding names of the violators. If compliance with CIP standards truly protects electric grid systems, then the identities of utilities that have mitigated violations is evidence of security, not vulnerability.

Specifically, related to FERC's April 2, 2019 FOIA denial letter, Exhibit N is the information on the violations relevant to this FOIA denial from NERC's public website.[27] Each of the CIP violations for NP14-30-000, NP14-37-000 and NP14-39-000 have long been mitigated (see the highlighted "Mitigation Completion Date" column), and FERC has issued a final order (see "Notice of No Further Review Issued" column).

[27] "Searchable NOP Spreadsheet" available at: https://www.nerc.com/pa/comp/CE/Pages/Enforcement-and-Mitigation.aspx (accessed April 15, 2019).

These cases are long ago closed and mitigated. There is no plausible argument that releasing the name of the violator would now be a threat to security.

XI. The specifics of the three denied NOPs do not support CEII designation of violators' names.

The three NOPs covered in the April 2, 2019 FOIA denial letter from FERC—NP14-30-000, NP14-37-000 and NP14-39-000—disclose no information that could credibly aid attackers, even if the identities of the violations were to be disclosed. Specifically:

1. The locations and capacities of equipment are not disclosed.
2. The vendors used by the utilities are not disclosed.
3. Network configurations and IP addresses are not disclosed.
4. The description of the violations is idiosyncratic to the violating utilities and cannot be reasonably extended to other utilities.
5. All violations have long ago been mitigated (see Section X above and Exhibit N).

In summary, the apparent purpose of the NOPs is to support the assessment of NERC fines, and therefore technical details that could aid attackers, have not been included.

XII. All settlements are required to be disclosed including the names of violators.

The three NOPs covered in the April 2, 2019 FOIA denial letter from FERC, NP14-30-000, NP14-37-000 and NP14-39-000, were all regulatory actions that resulted in settlement agreements. I hereby incorporate the argument made by the Foundation for Resilient Societies in FERC Docket NP19-4-000 (attached hereto as Exhibit O) that *all settlement agreements are required to be public*, including the names of the CIP violators. In sum, the Foundation for Resilient Societies argues:

> FERC made a public commitment in Order 672 that "settlement agreements will be public"; this is inconsistent with NERC's claim that settlement agreements are "privileged" or "CEII." For Docket No. NP19-4-000 specifically, a redacted settlement agreement that would perpetually omit the identity of the standard violators will never be "public" in any meaningful way and therefore is in apparent violation of FERC Order 672.
>
> CEII is defined by FERC as "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure (physical or virtual) that…could be useful to a person planning an attack on critical infrastructure." FERC has not given the public an explanation why the disposition of corrected standards violations should be classified as "CEII." Standard violations that have been corrected by means of a settlement agreement do not fall

within a commonsense interpretation of the CEII definition, because a corrected standard violation should be of minimal usefulness in planning an attack, or not useful at all.

This further rebuts the argument by the industry that 1) FERC has "told them" to omit the names of the CIP violators, and 2) that the names of standards violators are CEII. The CEII exemption simply does not apply and time after time, FERC orders have correctly concluded that the public is entitled to information on standards violators, and time after time, the industry has ignored the Commission's orders. Unfortunately, up to now, the Commission has allowed this misbehavior.

XIII. Conclusion.

The Commission must now make a choice. Either:

1. Follow the clear mandates of the Freedom of Information Act and the Commission's own orders and regulations.

Or:

2. Be a captive regulator of an industry that has put America's security at grave risk.

I await the Commission's decision.

Sincerely,

Michael Mabee

Attachments: Exhibits A-O

CC: Charles A. Beamon, Associate General Counsel
Via Email: charles.beamon@ferc.gov

Exhibit A
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

FOIA-2019-19
REQUEST AMENDED - January 4, 2019
Track 3
NEW DUE DATE: February 4, 2019

Michael Mabee
[redacted]
(516) 808-0883
CivilDefenseBook@gmail.com

December 18, 2018

Leonard Tao,
Director and Chief FOIA Officer
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Subject: Request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

Dear Mr. Tao:

I request records under the Freedom of Information Act, which are described below. Further, as more fully set forth below, I also request a fee waiver as I have no commercial interest in the described records and it is in the public interest for the Federal Energy Regulatory Commission (FERC) to disclose these records to the public.

Description of records sought:
I seek the "NERC Full Notice of Penalty" version which includes the name of the registered entity (and which has been previously withheld from the public) for the following docket numbers:

Date	FERC Docket Number	Region	Registered Entity	Entities
1/30/2014	NP14-29-000	WECC	Unidentified Registered Entity	1
1/30/2014	NP14-30-000	RFC	Unidentified Registered Entity	1
2/27/2014	NP14-32-000	SPP RE	Unidentified Registered Entity	1
3/31/2014	NP14-37-000	WECC	Unidentified Registered Entity	1
4/30/2014	NP14-39-000	WECC	Unidentified Registered Entity	1
5/29/2014	NP14-41-000	WECC	Unidentified Registered Entity	1
5/29/2014	NP14-42-000	SERC	Unidentified Registered Entity	1
7/31/2014	NP14-45-000	WECC	Unidentified Registered Entity	1
7/31/2014	NP14-46-000	RFC	Unidentified Registered Entities	7
8/27/2014	NP14-48-000	RFC/NPCC	Unidentified Registered Entities	3
10/30/2014	NP15-5-000	SPP	Unidentified Registered Entity	1
10/30/2014	NP15-6-000	TRE	Unidentified Registered Entity	1
11/25/2014	NP15-10-000	WECC	Unidentified Registered Entity	1
11/25/2014	NP15-11-000	RFC	Unidentified Registered Entity	1
11/25/2014	NP15-9-000	MRO	Unidentified Registered Entity	1
12/30/2014	NP15-13-000	RFC	Unidentified Registered Entity	1
12/30/2014	NP15-15-000	SERC	Unidentified Registered Entity	1
12/30/2014	NP15-17-000	WECC	Unidentified Registered Entity	1

Date	FERC Docket Number	Region	Registered Entity	Entities
2/26/2015	NP15-20-000	SERC	Unidentified Registered Entity	1
3/31/2015	NP15-23-000	WECC	Unidentified Registered Entities	3
4/30/2015	NP15-24-000	RFC	Unidentified Registered Entity	1
4/30/2015	NP15-26-000	RFC	Unidentified Registered Entity	1
8/31/2015	NP15-33-000	RFC	Unidentified Registered Entity	1
10/29/2015	NP16-2-000	WECC	Unidentified Registered Entity	1
12/1/2015	NP16-4-000	WECC	Unidentified Registered Entity	1
12/1/2015	NP16-5-000	WECC	Unidentified Registered Entity	1
12/30/2015	NP16-7-000	SPP	Unidentified Registered Entity	1
1/28/2016	NP16-10-000	RF	Unidentified Registered Entity	1
1/28/2016	NP16-9-000	WECC	Unidentified Registered Entity	1
2/29/2016	NP16-12-000	RF	Unidentified Registered Entity	1
4/28/2016	NP16-18-000	RF / SERC	Unidentified Registered Entities	5
5/31/2016	NP16-20-000	FRCC	Unidentified Registered Entity	1
7/28/2016	NP16-23-000	SERC	Unidentified Registered Entity	1
7/28/2016	NP16-24-000	SERC	Unidentified Registered Entity	1
10/31/2016	NP17-2-000	WECC	Unidentified Registered Entity	1
10/31/2016	NP17-3-000	WECC	Unidentified Registered Entity	1
11/30/2016	NP17-8-000	MRO	Unidentified Registered Entity	1
12/29/2016	NP17-10-000	WECC	Unidentified Registered Entity	1
12/29/2016	NP17-11-000	WECC	Unidentified Registered Entity	1
12/29/2016	NP17-12-000	WECC /SERC	Unidentified Registered Entities	4
12/29/2016	NP17-13-000	WECC	Unidentified Registered Entity	1
4/27/2017	NP17-21-000	WECC	Unidentified Registered Entity	1
7/31/2017	NP17-25-000	WECC	Unidentified Registered Entity	1
7/31/2017	NP17-26-000	SPP RE	Unidentified Registered Entity	1
9/28/2017	NP17-31-000	SERC	Unidentified Registered Entity	1
10/31/2017	NP18-2-000	WECC	Unidentified Registered Entities	2
2/28/2018	NP18-7-000	WECC	Unidentified Registered Entity	1
5/31/2018	NP18-14-000	RF	Unidentified Registered Entity	1
5/31/2018	NP18-15-000	WECC	Unidentified Registered Entity	1
7/31/2018	NP18-21-000	WECC	Unidentified Registered Entity	1
8/30/2018	NP18-22-000	WECC	Unidentified Registered Entity	1
9/27/2018	NP18-26-000	NPCC	Unidentified Registered Entity	1

In the instances where there was a "Spreadsheet NOP" I request a copy of the spreadsheet that lists the name(s) of the entity subject to the regulatory action. There is a total of 52 docket numbers covered under this request, with a total of 70 "Unidentified Registered Entities."

The records sought are not Critical Energy Infrastructure Information (CEII) or otherwise classified to protect national security:

I note that FERC Order No. 833 holds that the Commission's practice is that information that "simply give[s] the general location of the critical infrastructure" or simply provides the name of the facility is not Critical Energy

Infrastructure Information (CEII).[1] I am not seeking any CEII. I simply ask for disclosure of the identities of the "Unidentified Registered Entities" in the above dockets.

There is no national security reason or FOIA exemption that should prevent disclosure of the identity of this violator of reliability standards to the public, because the NERC Notice of Penalty claims that the cybersecurity vulnerabilities have been remedied.

Mere disclosure of the identity of the violating entity, without disclosure of the details of any remedied cybersecurity violations, will not provide adversaries information of any value but instead will likely reduce future violations. Disclosure of the identity of violators will prompt other utilities to be more diligent in order to avoid adverse publicity. The possibility of public shaming is a key component of the mandatory system of electric reliability standards established by Congress under Section 215 of the Federal Power Act and further codified in the Code of Federal Regulations. For example, when a utility has caused a blackout, FERC has had no issue in identifying the offending utilities and the amount of the fines. Would it not be better to identify reliability standard violators and therefore avoid blackouts?

I lastly note that the public has already been forced to wait years for this information in some instances, allowing electric utilities to hide behavior that causes profound risk to the public interest.

Under FERC's regulations, the names of the entities must be disclosed:

18 CFR § 39.7 (b)(4) provides that: "Each violation or alleged violation shall be treated as nonpublic until the matter is filed with the Commission as a notice of penalty or resolved by an admission that the user, owner or operator of the Bulk-Power System violated a Reliability Standard or by a settlement or other negotiated disposition." [Emphasis added.]

Further, 18 CFR § 39.7(d)(1) provides that a notice of penalty by the Electric Reliability Organization shall consist of, *inter alia*: "The name of the entity on whom the penalty is imposed."

The regulations are very clear that the name of the entity on whom the penalty is imposed is to be disclosed. Yet, somehow this is not the practice at NERC and the records I am requesting have had the names of the registered entities hidden from the public.

The records sought would not reveal trade secrets and commercial or financial information obtained from a person and privileged or confidential:

I note that it has been practice for FERC and NERC to disclose the identities of some entities who have been subject to regulatory fines by NERC. Therefore, those entities violating reliability standards have not been considered privileged or confidential information, solely on the basis of being a violator.

I also note that it is inconsistent with a well-functioning democracy for monetary penalties to be assessed against regulated entities whose identities are then held as secrets. I urge the Commission to reconsider the implications of allowing NERC, the FERC-designated Electric Reliability Organization (ERO), to have delegated authority to assess fines for wrongdoing and then to keep the identities of wrongdoers from public view. I know of no other federal regulator that allows this odious practice.

[1] Order No. 833 at pg. 17. Also see 18 C.F.R. §388.113(c)(1)(iv).

Request for Waiver of Fees:

I am a private citizen with expertise in emergency preparedness and critical infrastructure protection. I maintain a blog where I intend to disseminate this information[2]. I accept no advertising on my blog and derive no revenue from writing or posting my blog articles.

As set forth fully below, I am entitled to a waiver of fees as I meet all the requirements of 18 C.F.R. §388.109(c).

Requirement: In accordance with 18 C.F.R. §388.109(c)(1), "(1) Any fee described in this section may be reduced or waived if the requester demonstrates that disclosure of the information sought is: (i) In the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (ii) Not primarily in the commercial interest of the requester."

Answer: Disclosure of this information will inform the public as to the actions the government and the designated ERO have taken to insure the security of the bulk power system. There has been a great deal of media attention and government notices regarding recent cyberattacks and cybersecurity breaches to the electric grid.[3] Disclosure of the requested information is critical to the public's understanding of how FERC and the ERO holds regulated entities accountable to compliance with regulatory standards for cybersecurity.

I have no commercial interest in these records and will use these records in research and information dissemination to the public.

Requirement: In accordance with 18 C.F.R. §388.109(c)(2) "The Commission will consider the following criteria to determine the public interest standard:"

Answer: I will answer each criterion in turn.

Criterion: (i) "Whether the subject of the requested records concerns the operations or activities of the government"

Answer: The protection of the critical infrastructure, including the bulk power system, is a clear function of the federal government.[4] The regulation of the critical infrastructures by the federal government and the transparency of the process – including the identities of entities that violate reliability standards– concerns the operations or activities of the government.

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[2] https://michaelmabee.info/category/mikes-blog/ (accessed April 13, 2018).

[3] See for example: US-CERT Alert (TA18-074A) https://www.us-cert.gov/ncas/alerts/TA18-074A (accessed March 15, 2018); Gizmodo: "FBI and DHS Warn That Russia Has Been Poking at Our Energy Grid." https://apple.news/AHv5RwYqbSf-EI-yIa355Jw (accessed March 15, 2018); Washington Free Beacon: "Russia Implicated in Ongoing Hack on U.S. Grid." https://apple.news/AGs6ieh6wSP-1tQkUFttREA (accessed March 15, 2018); Slate: "What Does It Mean to Hack an Electrical Grid?" https://apple.news/Au5gy7bTlTDSovpvzg5j79w

[4] Executive Order 13800 "Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure." May 11, 2017. https://www.gpo.gov/fdsys/pkg/FR-2017-05-16/pdf/2017-10004.pdf (accessed March 24, 2018); Presidential Policy Directive 21 (PPD-21) – Critical Infrastructure Security and Resilience. February 12, 2013. https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil (accessed March 24, 2018).

Criterion: (ii) “Whether the disclosure is likely to contribute to an understanding of government operations or activities”

Answer: According to NERC, ““These violations posed a serious or substantial risk to the reliability of the bulk power system (BPS).” The entity in question risked the reliable operation of the bulk power system and therefore the public has a right to examine this incident and the behavior and actions of the violating entity.

Criterion: (iii) “Whether disclosure of the requested information will contribute to public understanding”

Answer: As previously noted, there has been a great deal of public attention, press articles and increased awareness to the threat of cyberattacks against the bulk power system. The identity of entities that place the public at risk by violating cybersecurity standards is critical to the public understanding of the effectiveness of existing standards.

Criterion: (iv) “Whether the disclosure is likely to contribute significantly to public understanding of government operations or facilities.”

Answer: Under Section 215 of the Federal Power Act, regulation of the bulk power system is clearly a government operation. The public needs to understand how reliability standards are being enforced.

Requirement: In accordance with 18 C.F.R. §388.109(c)(3) “The Commission will consider the following criteria to determine the commercial interest of the requester:”

Answer: I will answer each criterion in turn.

Criterion: (i) Whether the requester has a commercial interest that would be furthered by the requested disclosure.

Answer: No. The requester a private citizen and has no commercial interest in the information.

And, if so: criterion: (ii) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

Answer: Not applicable since the requester has no commercial interest in the information.

The records may be provided to me electronically at this email address: CivilDefenseBook@gmail.com.

Sincerely,

Michael Mabee

Michael Mabee
[redacted]
(516) 808-0883
CivilDefenseBook@gmail.com

January 4, 2019

Leonard Tao,
Director and Chief FOIA Officer
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Subject: Amendment to Freedom of Information Act (FOIA) Request #FOIA-2019-0019

Dear Mr. Tao:

Regarding my FOIA request dated December 18, 2018 (#FOIA-2019-0019 – copy attached for reference), I request records from one additional docket which I inadvertently omitted from my original request:

Date	FERC Docket Number	Region	Registered Entity	Entities
12/30/2014	NP15-18-000	Multiple	Unidentified Registered Entities	10

Updated description of records sought:
I seek the "NERC Full Notice of Penalty" version which includes the name of the registered entity (and which has been previously withheld from the public). In the instances where there was a "Spreadsheet NOP" I request a copy of the spreadsheet that lists the name(s) of the entity subject to the regulatory action. Between my original December 18, 2018 request and this amendment, there are a total of 53 docket numbers covered under this request, with a total of 81 "Unidentified Registered Entities."

Sincerely,

Michael Mabee

Exhibit B
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

JAN 18 2019

Re: Submitter's Rights Letter,
FOIA No. FY19-019

VIA E-MAIL AND REGULAR MAIL

Edwin G. Kichline
Senior Counsel and Director of Enforcement Oversight
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, D.C. 20005
edwin.kichline@nerc.net

Sonia Mendonca
Vice President, Deputy General Counsel, and Director of Enforcement
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, D.C. 20005
Sonia.mendonca@nerc.net

Dear Sirs and Madam:

Pursuant to the Freedom of Information Act (FOIA)[1] and the Federal Energy Regulatory Commission's (Commission) regulations, 18 C.F.R. § 388.112(d) (2018), you are hereby notified that an individual has filed a request for material that the North American Electric Reliability Corporation (NERC) has submitted as privileged or confidential. The requester is seeking to obtain the "NERC Full Notice of Penalty" version, which includes the name of the registered entity for various dockets, including: NP14-29-000; NP14-30-000; NP14-32-000; NP14-37-000; NP14-39-000; and NP14-41-000.[2] The requester also seeks any "Spreadsheet NOP [Notice of Penalty]" that lists the name(s) of the entity subject to the regulatory action.

Because NERC has asserted a privileged and/or confidential interest in the information requested, we are soliciting your comments on whether release of the information is required under the FOIA. Your written comments are due within five (5)

[1] 5 U.S.C. § 552, *as amended* by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

[2] The requestor is seeking information regarding numerous docket numbers. However, given the volume of information requested, this request will be processed on a rolling basis, with these initial docket numbers addressed first.

business days from the date of this letter, and should clearly explain whether you oppose the release of this document, or portions thereof, and the rationale for your position. The Commission will not be persuaded by conclusory statements as to why the information deserves protection. The Commission may construe a non-response as evidence that you do not object to releasing the document.

Your comments, if any, may be mailed to the undersigned at the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Your comments may also be mailed electronically to the email address provided below or sent via facsimile to (202) 208-2106. If you have any questions regarding this matter, please contact Ms. Toyia Johnson of my staff by phone at (202) 502-6088 or e-mail to foia-ceii@ferc.gov.

Sincerely,

Leonard M. Tao
Director
Office of External Affairs

Bcc

Exhibit C
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

VIA E-MAIL

Mr. Leonard M. Tao
Director, External Affairs
888 First Street, NE
Washington, D.C. 20426
Leonard.tao@ferc.gov

Re: Submitter's Rights Letter, FOIA-2019-19

Dear Mr. Tao,

On behalf of our members, the American Public Power Association ("APPA"), the Edison Electric Institute ("EEI") and the National Rural Electric Cooperative Association ("NRECA"), (collectively, the "Trade Associations") respectfully submit the following comments in response to your January 18, 2019 Submitter's Rights Letter to Mr. Kichline and Ms. Mendonca, regarding a Freedom of Information Act ("FOIA") request made by Mr. Michael Mabee to obtain the NERC Full Notice of Penalty ("Full NOP") in various dockets ("the FOIA Request").[1]

APPA is the national service organization representing the interests of the nation's 2,000 not-for-profit, community-owned electric utilities. Public power utilities account for 15% of all sales of electric energy (kilowatt-hours) to ultimate customers and collectively serve over 49 million people in every state except Hawaii. Approximately 261 public power utilities are registered entities subject to compliance with NERC mandatory reliability standards.

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 65 international electric companies as International Members, and hundreds of industry suppliers and related organizations as Associate Members. EEI's U.S. members include Generator Owners and Operators, Transmission Owners and Operators, Load-Serving Entities, and other entities that are subject to the mandatory Reliability Standards developed by the North American Electric Reliability Corporation ("NERC") and enforced by NERC and the Federal Energy Regulatory Commission ("FERC" or "the Commission"). EEI's members are committed to the reliability and security of the Bulk-Power System.

NRECA is the national service organization for the nation's member-owned, not-for-profit electric cooperatives. More than 900 rural electric cooperatives are responsible for keeping the lights on for more than 42 million people across 47 states. Because of their critical role in

[1] FOIA No. FY19-019 (January 18, 2019).

providing affordable, reliable, and universally accessible electric service, electric cooperatives are vital to the economic health of the communities they serve. Cooperatives serve 56% of the nation's land area, 88% of all counties, and 12% of the nation's electric customers, while accounting for approximately 11% of all electric energy sold in the United States. NRECA's member cooperatives include entities that are subject to the mandatory reliability and cybersecurity standards. Accordingly, NRECA members are directly affected by this FOIA request.

The explanation in the FOIA Request appears to request only the names of the Unidentified Registered Entities ("UREs") for six dockets,[2] but the actual request seeks public disclosure of the Full NOPs and "Spreadsheet NOP." In addition, the requester has also submitted requests for the same information for not only these six dockets, but from 236 additional dockets covering Critical Infrastructure Protection ("CIP") Reliability Standards violations over the past ten years.[3]

The Trade Associations object to the release of the information requested by Mr. Mabee because its disclosure is not required by FOIA and—more importantly—because disclosing this information broadly would unnecessarily jeopardize national security by providing sensitive information about the Bulk-Power System. For these reasons, the Commission should not release the documents requested. Also, this information has previously been protected by the Commission from public disclosure.[4] As discussed below, this is not a new policy, but one carefully crafted by the Commission over nine years ago in its 2011-2012 Find, Fix, and Track and Report ("FFT") proceeding—an open and transparent proceeding in which stakeholders and the public were able to weigh in on policy concerns, ultimately striking a careful balance between information disclosure and national security throughout the six months of that proceeding.[5] Disclosing the requested information in response to the underlying FOIA Request before the Commission would represent a significant change to the Commission's policy on the protection of such information related to the security of the Bulk-Power System. Due to the risks posed to national security, the Commission should not abrogate the process established in these previous proceedings in response to this or any other FOIA request. Instead, before contemplating such a change in policy, the Commission should provide all stakeholders an opportunity for notice and comment in a full rulemaking similar to the FFT proceeding.

The Trade Associations oppose the release of the requested documents because risks to the Bulk-Power System from disclosure far outweigh any benefit to the public from disclosure.

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[2] FERC Docket Nos.: NP14-29-000, NP14-30-000, NP14-32-000, NP14-37-000, NP14-39-000, and NP14-41-000.

[3] Request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (Dec. 18, 2018), *available at* https://michaelmabee.info/wp-content/uploads/2018/12/FERC-FOIA-Request-2018-12-18-R.pdf; Request under the Freedom of Information Act (FOIA), 5 U.S.C § 552 (Jan. 12, 2018), *available at* https://michaelmabee.info/wp-content/uploads/2019/01/FERC-FOIA-Request-Mabee-2019-01-12-R.pdf.

[4] Significant information on penalties and specific violations (e.g., specific standard and requirements) is made publicly available in the NOPs posted on NERC's website, but the more sensitive information (e.g., registered entity names and mitigation measures) has been protected from disclosure as privileged and confidential to protect public safety and security.

[5] *See* FFT Order, 138 FERC ¶ 61,193 (Mar. 15, 2012).

Security threats to utility systems and the Bulk-Power System continues to grow. For example, in the last year, the following has occurred:

1. The FBI and United States Department of Homeland Security publicly revealed that a foreign nation-state engaged in a prolonged, "multi-stage intrusion campaign" against US utilities.[6]

2. The United States Department of Justice indicted foreign hackers who successfully penetrated hundreds of US institutions. In releasing the indictment, the Department of Justice specifically called out the grave risk posed by malicious actors targeting the US electric sector, including the Commission itself, for sensitive information.[7]

In other words, the array and capabilities of hostile forces seeking to attack the U.S. electric grid and destabilize the nation has increased in size and sophistication. The FOIA request to publicize sensitive information about the U.S. electric grid could—as FERC noted earlier—assist these terrorists and nation-states in attacking the U.S. grid. Even information that some may deem innocuous—such as revealing the names of UREs involved in a remediated NOP—can result in unintended consequences. For example, in some instances, a URE may have remediated a particular instance of regulatory noncompliance. However, that URE may have experienced a pattern of similar noncompliance—not because of a lack of will to fix, but because there are significant other factors at play. In addition, UREs face challenges in integrating modern information technology systems with older operational technology systems that were never designed with modern cybersecurity needs in mind. Sophisticated bad actors, like the ones discussed above, may be able to discern points of attack and vulnerabilities in publicly disclosed UREs based on their patterns of NOPs. The Trade Associations recognize that public access to information is important, and appreciate the goal of FOIA, but believe the line must be drawn where a requested disclosure might risk the security of the Bulk-Power System.

The release of the information by the Commission is not required by FOIA.

The release of the information requested in the December 18, 2018 FOIA request, as amended January 4, 2019, is not required by FOIA or under the Commission's FOIA regulations. The requested information is exempt from disclosure pursuant to 5 U.S.C. 552(b)(3) ("Exemption 3") and 5 U.S.C. 552(b)(7)(F) ("Exemption 7(F)"). Exemption 3 precludes disclosure of information that is prohibited from disclosure by another federal law and Exemption 7(F) precludes the disclosure of "records or information compiled for law enforcement purposes" if the release of

[6] United States Computer Emergency Readiness Team (US-CERT), Alert TA18-074A, Russian Government Cyber Activity Targeting Energy and Other Critical Infrastructure Sectors (March 16, 2018), *available at* https://www.us-cert.gov/ncas/alerts/TA18-074A.

[7] Daniel Voltz, *U.S. charges, sanctions Iranians for global cyber attacks on behalf of Tehran,* Reuters (Mar. 23, 2018), https://www.reuters.com/article/us-usa-cyber-iran/u-s-charges-sanctions-iranians-for-global-cyber-attacks-on-behalf-of-tehran-idUSKBN1GZ22K

such information "could reasonably be expected to endanger the life or physical safety of any individual."[8]

In addition, Section 39.7(b)(4) of the Commission's enforcement of Reliability Standards regulations provides the exception that "[t]he disposition of each violation or alleged violation that relates to a Cybersecurity Incident or that would jeopardize the security of the Bulk-Power System if publicly disclosed shall be non-public unless the Commission directs otherwise."[9] The information found within the requested Full NOPs contains details, including the identities of the URE, URE mitigation plans, and other specific security measures taken by particular UREs to address actual security risks identified either in audit or by self-reports, which the Commission has consistently protected from public disclosure to prevent jeopardizing the security of the Bulk-Power System. This information provides details and strategic security information on the generation and transmission system that would be useful to a person planning an attack on critical infrastructure. Because this information is protected by FOIA Exemption 3 and "it is reasonably foreseeable that disclosure would harm" the interests protected by that exemption, this information should not be disclosed by the Commission under Exemption 3.[10]

The Fixing America's Surface Transportation Act, Pub. L. No. 118-94, §61003 (2015); 16 U.S.C. 824o-1(d)(1) ("FAST Act"), specifically exempts Critical Electric Infrastructure Information ("CEII") from disclosure. The FOIA request seeks copies of documents providing information concerning the critical cyber assets and the NERC CIP violations of the UREs treated in the dockets he has identified, which is CEII. The Commission has a longstanding recognition of the need to protect information associated with critical electric infrastructure as CEII from public disclosure.[11] In addition, FERC has previously responded to a similar request, determining that identification of an Unidentified Registered Entity ("URE") is protected from disclosure by 5 U.S.C. §§ 552(b)(3) and 7(f).[12] FERC's response letter noted that:

> with respect to the name of the Unidentified Registered entity, disclosing such name could provide potential bad actor with information that would make a cyber intrusion less difficult. In this regard, public release of the requested documents would provide information which could help breach its network, and allow possible access to non-public, sensitive, and/or confidential information that could be used to plan an attack on energy infrastructure, endangering the lives and safety of citizens.[13]

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[8] 15 U.SC. §§ 552(b)(3) and 7(F).

[9] Enforcement of Reliability Standards, 18 C.F.R. § 39.7 (b)(4).

[10] 18 C.F.R. § 388.109(c)(5).

[11] *See, e.g.*, *Mandatory Reliability Standards for Critical Infrastructure Protection*, Order 706, 122 FERC ¶ 61,040 at P 330 (2008).

[12] FERC Response, FOIA No. FY18-75 (May 25, 2018) *available at* https://michaelmabee.info/wp-content/uploads/2018/06/DETERMINATION-LETTER-FOIA-2018-75-R.pdf.

[13] *Id.* at 2. The Trade Associations are aware that the Commission has previously released the name of a URE in response to a similar FOIA request. However, the Commission has not made its decision or reasoning behind it public. As a result, we cannot comment on the applicability of that decision. However, the circumstance is distinguishable based solely on the fact that this request seeks the wholesale release of Full NOPs contained in up to

Accordingly, the release of the information requested is not required by FOIA because Exemptions 3 and 7(F) apply as well as the Commission's regulations on enforcement of the Reliability Standards. Not only is this information not required to be disclosed pursuant to FOIA Exemptions 3 and 7(F), but it is reasonably foreseeable that disclosure would harm the security interests that the exemptions and the FAST Act explicitly protect.[14]

If the Commission decides to change its disclosure policy regarding the CIP Reliability Standards, then the Commission should first provide public notice and opportunity to comment.

The Trade Associations appreciate the delicate task before the Commission—to balance the need for public transparency with the need to protect national security and public safety. As described above, granting the FOIA request poses significant risks to public safety and national security and as discussed below, granting Mr. Mabee's FOIA request would constitute a sweeping policy change with respect to the Commission's protection of information related to the Bulk-Power System. Releasing the information requested in the current FOIA request would set precedent for future requests such as those made for the other 236 dockets without allowing the other affected entities adequate notice and time to comment on the consequences of such a change in policy and its potential detrimental impact to the security of the Bulk-Power System. If the Commission believes that disclosure may be warranted, then such a departure from longstanding Commission precedent should be considered in a public notice and comment proceeding, not in the context of a FOIA request that provides little notice to limited interested parties and an unrealistically short comment period.

In addition, the Commission has previously addressed many of the policy issues raised in the FOIA request. Specifically, in 2011, NERC submitted to this Commission for approval its FFT process "to more efficiently process and track lesser risk violations in order to focus their resources on issues that pose the greatest risk to reliability."[15] On March 15, 2012, the Commission issued the FFT Order approving this process.[16] The issue of publicly identifying registered entities was squarely addressed in the FFT Order.[17] The Commission held that while the identity of the entity generally would be provided, the exception enshrined in 18 C.F.R. § 39.7(b)(4) for violations that relate to "a Cybersecurity Incident or that would jeopardize the security of the Bulk-Power System if publicly disclosed. . . . [would] continue to apply in the

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242 separate dockets. In addition, that one release appears to have been an outlier, and thus has limited (if any) decisional value. For example, the Commission initially denied that request using the same reasoning listed above, and then without explanation reversed that decision. Since the Commission did not explain its reasoning for releasing the information, that decision has limited bearing here. In addition, the Trade Associations understand that two different parties filed FOIA requests for the URE name that was eventually released. We also understand that the Commission released the URE name in response to one FOIA request and withheld it in response to the other. We do not understand why the Commission faced two FOIA requests seeking what we believe to be the same information at approximately the same time, and yet reached two different results, especially since the Commission has not been transparent in its decision-making process.

[14] 18 18 C.F.R. § 388.109(c)(5).

[15] FFT Order, 138 FERC ¶ 61,193 at P 2.

[16] *Id*.

[17] *Id*. at P 16, 67-69.

FFT context."[18] Moreover, at that time the Commission stated that as it "gain[ed] further experience with the FFT program and review[ed] the data provided by NERC in its compliance and informational filings, [it] will consider and evaluate ways to improve the program" by "soliciting input from NERC, the Regional Entities, and industry when addressing such issues."[19] The Trade Associations encourage the Commission not to use a FOIA request to depart substantially from this policy. To the extent that the Commission is now considering a different approach, we ask that the Commission adhere to its prior commitment to invite these stakeholders to discuss the matter and avoid straying from the original approach in a response to the underlying FOIA request.

In a June 2013 FFT Order on Compliance related to implementation of the FFT and enhancements thereto, the Commission reiterated the general rule that "FFT informational filings must publicly identify the registered entity with a possible violation,"[20] but stated "[f]or FFTs involving the **CIP Reliability Standards, the Regional Entities would continue to redact the identity of the registered entities** involved in the issue and provide access to the non-public versions of these FFTs to NERC and FERC."[21] The Commission approved this compliance filing without modifying this aspect, designating information associated with CIP Reliability Standard violations as non-public information not subject to disclosure.[22] Importantly, the Commission emphasized the importance of protecting the identity of entities with CIP Standards violations:

> The Commission emphasizes that Regional Entities must continue to take precautions to protect non-public, confidential information and **redact any details** that could be used with publicly available information with respect to violations of the CIP Reliability Standards, such as the Regional Entities' audit schedule, **to identify the registered entity**. This is especially relevant in cases where the FFT is posted with ongoing mitigation activities because the registered entity may not have fully addressed any vulnerabilities resulting from the possible violation at the time of filing or posting.[23]

This approach to confidentiality with respect to the CIP Standards is settled, and a change to this policy requires a new proceeding with a broad opportunity for notice and comment to consider the implications of changing the existing Commission policy relied upon by NERC, Regional Entities, and registered entities.

The Trade Associations do not support a change in policy, especially in a response to a FOIA request. As noted above, publicizing the name of the registered entity with ongoing or repeated CIP or cybersecurity violations, even minor ones, may exacerbate cybersecurity risks and harm

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[18] *Id.* at P 69.

[19] *Id.* at P 3 and n.2.

[20] *North American Electric Reliability Corporation*, 143 FERC ¶ 61,253, P 4 (2013) ("FFT Order on Compliance").

[21] *Id.* at P 19 (emphasis added).

[22] *Id.*

[23] *Id.* at P. 37 n.50 (emphasis added).

the public. For example, the Commission, while redacting certain information could, in theory, mitigate some risks, but such case-by-case consideration of confidentiality will vitiate any efficiency gains created through the FFT process. Moreover, subjecting utilities to subsequent disclosure under FOIA for violations could chill incentives for submitting nonpublic self-reports and undermine the existing enforcement and mitigation regime enshrined in the FFT process.[24] The broad request for disclosure of NOPs, which runs counter to existing FERC policy, is more appropriately considered in a public notice and comment proceeding, with the benefit of full stakeholder input and careful vetting of the ramifications.

Finally, it is worth noting that the registered entities have relied on NERC's and the Commission's existing approach to confidentiality, when engaging in good faith settlement negotiations and submitting self-reports. If FERC believes that it may now be appropriate to consider broad disclosure of sensitive information under FOIA that has historically been treated as confidential, any departure from the past practice should be applied on a prospective basis only, after public notice and an opportunity to comment on the proposed changes.

If the Commission decides to disclose any nonpublic information in responding to the FOIA Request, then the Commission must only provide information that will not risk jeopardizing the security of the Bulk-Power System.

To determine whether the information will jeopardize security, the Commission should provide the implicated UREs and NERC the opportunity to review the relevant records to determine the specific information that should be redacted to protect cybersecurity and the reliability of the Bulk-Power System. The Commission's FOIA process only provides parties five business days to respond, which is insufficient time to replicate the thoughtful decision-making processes provided by a rulemaking. For example, if FERC is considering disclosing a list identifying the registered entities that received an NOP, the Commission should work with NERC and the UREs to ensure that there are no ongoing security issues related to the violations that might jeopardize security. This may be even more important if the Commission anticipates disclosing a particular NOP and its disclosure also plans to tie the NOP to the identification of a specific registered entity.

In conclusion, the Trade Associations recognize the delicate task before the Commission in balancing the public's need for information against the nation's need to protect itself from some of the gravest cyber threats in the world. We respectfully ask the Commission to deny Mr. Mabee's request completely in order to protect public safety and national security as described above.

Alternatively, if the Commission believes that it should change its disclosure policy, then the Commission should do so in a full and open proceeding where all parties and interested actors

[24] Courts have recognized this concern about the government's ability to acquire information. The D.C. Circuit's test for the application of FOIA Exemption 4 asks whether disclosure of confidential information would "1) [. . .] impair the Government's ability to obtain necessary information in the future; or (2) [. . .] cause substantial harm to the competitive position of the person from whom the information was obtained. The test for confidentiality set forth in *National Parks* was subsequently adopted by nearly all of the other circuits, including the Ninth Circuit." *Dow Jones Co. v. F.E.R.C.*, 219 F.R.D. 167, 176–77 (C.D. Cal. 2003) (citing *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 at 770 (D.C. Cir. 1974) ("*National Parks*")).

may participate and comment on the policy risks involved. Where the public and the nation is at risk from a proposed change in Commission policy, the public can only benefit if the Commission weighs and adjudicates on these issues in an open rulemaking proceeding. If the Commission decides to disclose any nonpublic information, then it must ensure that the disclosure of any of that information will not risk jeopardizing the security of the Bulk-Power System.

Respectfully submitted,

AMERICAN PUBLIC POWER ASSOCIATION

/s/ Delia D. Patterson
SVP Advocacy & Communications and General Counsel
2451 Crystal Dr., Suite 1000
Arlington, VA 22202
(202) 467-2900

EDISON ELECTRIC INSTITUTE

/s/ Emily Sanford Fisher
General Counsel and Corporate Secretary
701 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 508-5000

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

/s/ Randolph Elliott
Randolph Elliott
Senior Director, Regulatory Counsel
4301 Wilson Boulevard
Arlington, VA 22203
(703) 907-6818

Cc: Toyia.Johnson@ferc.gov, foiaceii@ferc.gov, edwin.kichline@nerc.net, Sonia.mendonca@nerc.net, james.danly@ferc.gov, david.morenoff@ferc.gov, joseph.mclelland@ferc.gov, dpatterson@publicpower.org, Randolph.Elliott@nreca.coop

Exhibit D
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

February 20, 2019

VIA E-MAIL

Mr. Leonard M. Tao
Director, External Affairs
888 First Street, NE
Washington, D.C. 20426
Leonard.tao@ferc.gov

Re: Submitter's Rights Letter, FOIA No. FY19-030

Dear Mr. Tao,

On behalf of our members, the American Public Power Association ("APPA"), the Edison Electric Institute ("EEI") and the National Rural Electric Cooperative Association ("NRECA"), (collectively, the "Trade Associations") respectfully submit the following comments in response to your February 8, 2019 Submitter's Rights Letter to Mr. Kichline, Mr. Berardesco, and Ms. Mendonca, regarding a Freedom of Information Act ("FOIA") request made by Mr. Michael Mabee to obtain the NERC Full Notice of Penalty ("Full NOP") in various dockets ("the FOIA Request").[1]

APPA is the national service organization representing the interests of the nation's 2,000 not-for-profit, community-owned electric utilities. Public power utilities account for 15% of all sales of electric energy (kilowatt-hours) to ultimate customers and collectively serve over 49 million people in every state except Hawaii. Approximately 261 public power utilities are registered entities subject to compliance with North American Electric Reliability Corporation ("NERC") mandatory reliability standards.

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 65 international electric companies as International Members, and hundreds of industry suppliers and related organizations as Associate Members. EEI's U.S. members include Generator Owners and Operators, Transmission Owners and Operators, Load-Serving Entities, and other entities that are subject to the mandatory Reliability Standards developed by the NERC and enforced by NERC and the Federal Energy Regulatory Commission ("FERC" or "the Commission"). EEI's members are committed to the reliability and security of the bulk-power system.

[1] FOIA No. FY19-030 (Feb. 8, 2019).

NRECA is the national service organization for the nation's member-owned, not-for-profit electric cooperatives. More than 900 rural electric cooperatives are responsible for keeping the lights on for more than 42 million people across 47 states. Because of their critical role in providing affordable, reliable, and universally accessible electric service, electric cooperatives are vital to the economic health of the communities they serve. Cooperatives serve 56% of the nation's land area, 88% of all counties, and 12% of the nation's electric customers, while accounting for approximately 11% of all electric energy sold in the United States. NRECA's member cooperatives include entities that are subject to the NERC mandatory reliability and cybersecurity standards. Accordingly, NRECA members are directly affected by this FOIA request.

The explanation in the FOIA Request appears to request only the names of the Unidentified Registered Entities ("UREs") for the ten dockets, [2] but the actual request seeks public disclosure of the Full NOPs, which are the versions that include the registered entity names. In addition, the requester has also submitted requests for the same information for not only these ten dockets, but from 232 additional dockets covering Critical Infrastructure Protection ("CIP") reliability standards violations over the past ten years.[3]

The Trade Associations object to the release of the information requested by Mr. Mabee because its disclosure is not required by FOIA and—more importantly—because disclosing this information broadly would unnecessarily jeopardize national security by providing sensitive information about the bulk-power system. For these reasons, the Commission should not release the documents requested.

Even with perfect compliance, cyber vulnerabilities would exist, given the constantly evolving threats to cybersecurity. Each requested NOP, when coupled with the name of the URE and other, already-public information, could provide sufficient information to materially assist those entities that are driven to find and exploit such vulnerabilities. While the Trade Associations object to the release of this information generally because of concerns about the safety and reliability of the bulk-power system, should the Commission determine that it is necessary to provide any element of an NOP in response to the FOIA Request, the Commission should provide both NERC and the URE ample time to review this information and provide a detailed assessment of the potential harm that could result from disclosure. This would be appropriate given the very few days that the UREs and NERC have to analyze and respond to the Submitter's Rights Letter and the FOIA request in general, which seeks the disclosure of thousands, if not tens of thousands, of pages of information. In addition, FERC itself should consider carefully how any piece of information, no matter how seemingly innocuous on its own, could be coupled with other information and used by those seeking to attack the reliability of U.S. energy infrastructure.

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[2] FERC Docket Nos.: NP10-140-000, NP10-139-000, NP10-138-000, NP10-137-000, NP10-136-000, NP10-135-000, NP10-134-000, NP10-131-000, NP10-130-000, and NP10-150-000.

[3] Request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (Dec. 18, 2018), https://michaelmabee.info/wp-content/uploads/2018/12/FERC-FOIA-Request-2018-12-18-R.pdf; Request under the Freedom of Information Act (FOIA), 5 U.S.C § 552 (Jan. 12, 2018), https://michaelmabee.info/wp-content/uploads/2019/01/FERC-FOIA-Request-Mabee-2019-01-12-R.pdf.

Release of the requested information by the Commission is not required by FOIA.

The release of the information requested in the December 18, 2018 FOIA request, as amended January 4, 2019, is not required by FOIA or under the Commission's FOIA regulations. The requested information is exempt from disclosure pursuant to 5 U.S.C. 552(b)(3) ("Exemption 3") and 5 U.S.C. 552(b)(7)(F) ("Exemption 7(F)"). Exemption 3 precludes disclosure of information that is prohibited from disclosure by another federal law and Exemption 7(F) precludes the disclosure of "records or information compiled for law enforcement purposes" if the release of such information "could reasonably be expected to endanger the life or physical safety of any individual."[4]

In addition, Section 39.7(b)(4) of the Commission's enforcement of reliability standards regulations provides the exception that "[t]he disposition of each violation or alleged violation that relates to a Cybersecurity Incident or that would jeopardize the security of the Bulk-Power System if publicly disclosed shall be non-public unless the Commission directs otherwise."[5] The information found within the requested Full NOPs contains details, including the identities of the URE, URE mitigation plans, and other specific security measures taken by particular UREs to address actual security risks identified either in audit or by self-reports. The Commission has consistently protected this information from public disclosure to prevent jeopardizing the security of the bulk-power system. The requested information provides details and strategic security information pertaining to the generation and transmission system that would be useful to a person planning an attack on critical infrastructure. Because this information is protected by FOIA Exemption 3 and it is reasonably foreseeable that disclosure would harm the interests protected by that exemption, this information should not be disclosed by the Commission under Exemption 3.[6]

The Fixing America's Surface Transportation Act, Pub. L. No. 118-94, §61003 (2015); 16 U.S.C. 824o-1(d)(1) ("FAST Act"), specifically exempts Critical Electric Infrastructure Information ("CEII") from disclosure. The FOIA Request seeks copies of documents providing information concerning critical cyber assets and the NERC CIP violations of the UREs treated in the dockets he has identified. This information includes details regarding the physical and cyber safeguards, protections, and vulnerabilities associated with the reliable operation of the bulk-power system, which is CEII. The Commission has a longstanding recognition of the need to protect information associated with critical electric infrastructure as CEII from public disclosure.[7] In addition, FERC has previously responded to a similar request, determining that identification of a URE is protected from disclosure by 5 U.S.C. §§ 552(b)(3) and 7(f).[8] FERC's response letter noted that:

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[4] 15 U.S.C. §§ 552(b)(3) and 7(F).

[5] Enforcement of Reliability Standards, 18 C.F.R. § 39.7 (b)(4).

[6] 5 U.S.C. § 552(a)(8)(A)(i)(I).

[7] *See, e.g.*, FERC Order 706 (Jan. 18, 2008), at ¶ 330.

[8] FERC Response, FOIA No. FY18-75 (May 25, 2018), https://michaelmabee.info/wp-content/uploads/2018/06/DETERMINATION-LETTER-FOIA-2018-75-R.pdf.

> with respect to the name of the Unidentified Registered entity, disclosing such name could provide a potential bad actor with information that would make a cyber intrusion less difficult. In this regard, public release of the requested documents would provide information which could help breach its network, and allow possible access to non-public, sensitive, and/or confidential information that could be used to plan an attack on energy infrastructure, endangering the lives and safety of citizens.[9]

Accordingly, the release of the information requested is not required by FOIA because Exemption 3 and 7(F) apply, as well as the Commission's regulations on enforcement of the reliability standards. Not only is this information not required to be disclosed pursuant to FOIA Exemption 3, but it is reasonably foreseeable that disclosure would harm the security interests that exemption and the FAST Act explicitly protect.[10]

The Trade Associations oppose the release of the requested documents because the information would be useful to a person planning an attack on the bulk-power system.

The array and capabilities of hostile forces seeking to attack the U.S. electric grid and destabilize the nation has increased in size and sophistication. In the past year, the FBI and United States Department of Homeland Security publicly revealed that a foreign nation-state engaged in a prolonged, "multi-stage intrusion campaign" against U.S. utilities.[11] Also, the United States Department of Justice indicted foreign hackers who successfully penetrated hundreds of U.S. institutions. In releasing the indictment, the Department of Justice specifically called out the grave risk posed by malicious actors targeting the US electric sector, including the Commission itself, for sensitive information.[12]

The FOIA Request to publicize sensitive information about the U.S. electric grid could assist people seeking to attack U.S. electric infrastructure. Even information that some may deem

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[9] *Id.* at 2. The Trade Associations are aware that the Commission has previously released the name of a URE in response to a similar FOIA request. However, the Commission has not made its decision or reasoning behind it public. As a result, we cannot comment on the applicability of that decision. However, the circumstance is distinguishable based solely on the fact that this request seeks the wholesale release of Full NOPs contained in up to 242 separate dockets. In addition, that one release appears to have been an outlier, and thus has limited (if any) decisional value. For example, the Commission initially denied that request using the same reasoning listed above, and then without explanation reversed that decision. Since the Commission did not explain its reasoning for releasing the information, that decision has limited bearing here. In addition, the Trade Associations understand that two different parties filed FOIA requests for the URE name that was eventually released. We also understand that the Commission released the URE name in response to one FOIA request and withheld it in response to the other. We do not understand why the Commission faced two FOIA requests seeking what we believe to be the same information at approximately the same time, and yet reached two different results, especially since the Commission has not been transparent in its decision-making process.

[10] 5 U.S.C. § 552(a)(8)(A)(i)(I).

[11] United States Computer Emergency Readiness Team (US-CERT), Alert TA18-074A, Russian Government Cyber Activity Targeting Energy and Other Critical Infrastructure Sectors (Mar. 16, 2018), https://www.us-cert.gov/ncas/alerts/TA18-074A.

[12] Daniel Voltz, *U.S. charges, sanctions Iranians for global cyber attacks on behalf of Tehran,* Reuters (Mar. 23, 2018), www.reuters.com/article/us-usa-cyber-iran/u-s-charges-sanctions-iranians-for-global-cyber-attacks-on-behalf-of-tehran-idUSKBN1GZ22K.

innocuous—such as revealing the names of UREs involved in a remediated NOP—can result in unintended consequences. In some instances, a URE may have remediated a particular instance of regulatory noncompliance. However, that URE may have experienced similar noncompliance—which occurred not because they are not committed to security, but because there are significant other factors at play (e.g., legacy systems, equipment compatibility). More importantly, however, while a particular URE has addressed a particular compliance issue or vulnerability, other entities may have not yet discovered or fixed a similar issue or vulnerability.

UREs face challenges in integrating modern information technology systems with older operational technology systems that were never designed with modern cybersecurity needs in mind. Sophisticated bad actors, like the ones discussed above, may be able to discern points of attack and vulnerabilities in publicly disclosed UREs based on information discerned from NOPs—especially when such information is coupled with other publicly available information. The Trade Associations recognize that public access to information is important, and appreciate the goal of FOIA, but believe the line must be drawn where a requested disclosure could have a negative impact on reliability and security of the bulk-power system.

Commission staff must determine that any new information—which staff is considering releasing—cannot be useful to a person planning an attack on the bulk-power system.

The Commission is responsible for protecting "the reliability of the high voltage interstate transmission system through mandatory reliability standards." As a part of this role, the Commission seeks to "promote the development of safe, reliable, and secure infrastructure that serves the public interest."[13] In its strategic plan, the Commission acknowledges that jurisdictional infrastructure is at "increased risk from new and evolving threats, including physical and cyber security threats, by sophisticated perpetrators that often have access to significant resources."[14] To protect reliability, the Commission and its staff must determine whether the information it gathers from registered entities and produces in carrying out its enforcement of the reliability standards could be useful to a person planning an attack if the information was made public. Commission staff should consider and give deference to the data and information classifications provided by registered entities or, in this case, the UREs—who are required to give their sensitive information regarding security vulnerabilities and measures to NERC and FERC—to provide details on why the Commission should not release this information. Additionally, the Commission can consult with NERC staff regarding their proposed data and information classifications, which should also be given consideration and deference. Finally, it is significant that the Commission has its own subject matter experts (e.g., within the Office of Energy Infrastructure Security) who should be able to determine whether disclosure of information in response to FOIA requests would be useful to a person planning an attack on electric infrastructure. Further, Commission staff has at least 20 business days to conduct its own analysis through which it can consider and incorporate inputs from all of the above-referenced stakeholders.

[13] Federal Energy Regulatory Commission, Strategic Plan: FY 2018-2022 (Sep. 2018), https://www.ferc.gov/about/strat-docs/FY-2018-FY-2022-strat-plan.pdf?csrt=2040418639181005609, at 9.

[14] *Id.* at 14.

When performing its analysis of requested information, the Commission must consider not only the information requested (e.g., entity names) but information that is already in the public domain. For example, NERC has already published public versions of the NOPs on its websites for each of the dockets subject to the FOIA Request, which contain significant information that could become actionable with the addition of information that, alone, would be considered innocuous. In addition, Commission staff should evaluate other sources of information made public (e.g., by the entity's city and state), giving due consideration to the effect of that information if it was combined with the public NOP and the entity name to provide new information that would be useful to a person seeking to disrupt electric infrastructure.

In addition, Commission staff must consider whether other entities may not have yet discovered or fixed similar issues. The Commission should work with NERC and the UREs to ensure that there are no ongoing security issues related to the violations that might jeopardize security. This may be even more important if the Commission anticipates disclosing a particular NOP and its disclosure also plans to tie the NOP to the identification of a specific registered entity.

Commission staff should give due weight to NERC's technical expertise in deciding whether information related to the reliability standards should be protected as CEII.

In addition, Congress entrusted the Electric Reliability Organization ("ERO") or NERC with the technical expertise related to the reliability of the bulk-power system and therefore Commission staff should give due weight to NERC—the submitter in the FOIA Request—in determining whether disclosure of information regarding the violations of the CIP Standards might risk the security of the bulk-power system. In 2005, Congress delegated authority to the Electric Reliability Organization ("ERO") "to establish and enforce reliability standards for the bulk-power system," including requirements for cybersecurity protection.[15] In 2006, the Commission certified NERC as the ERO. Congress gave the Commission the authority to approve or disapprove such standards, but not to create them, recognizing that the ERO has the technical expertise necessary to develop reliability standards:

> The Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard or modification to a reliability standard and to the technical expertise of a regional entity organized on an Interconnection-wide basis with respect to a reliability standard to be applicable within that Interconnection. . .[16]

Congress also recognized the technical expertise of the ERO by giving the ERO the authority to conduct assessments of bulk-power system reliability and adequacy.[17] Furthermore, the purpose of the reliability standards, developed by NERC is "to provide for reliable operation of the bulk-power system." As a result, in determining whether specific information regarding the violations of the CIP Standards could jeopardize the security of the bulk-power system, Commission staff

[15] 16 U.S.C. § 824o (a)(2) – (3).

[16] *Id.* at (d)(2).

[17] *Id.* at (g).

should defer to NERC. If NERC objects to the release of the information requested in a FOIA request that is related to the reliability standards because it could be useful to a person in planning an attack on the bulk-power system, then Commission staff should continue to exempt this information under FOIA Exemption 3, unless staff sufficiently demonstrates that that the information cannot be useful to a person in planning an attack. Such a determination must be made by not only evaluating the information being considered for release, but also other information that has already in the public domain such as the public versions of the NOPs.

In conclusion, the Trade Associations recognize the delicate task before the Commission in balancing the public's need for information against the nation's need to protect itself from some of the gravest cyber threats in the world. We respectfully ask the Commission to deny Mr. Mabee's request. If the Commission decides to disclose any nonpublic information, then it must ensure that the disclosure of any of that information will not risk jeopardizing the security of the bulk-power system.

Respectfully submitted,

AMERICAN PUBLIC POWER ASSOCIATION
/s/ *Delia D. Patterson*
SVP Advocacy & Communications and General Counsel
2451 Crystal Dr., Suite 1000
Arlington, VA 22202
(202) 467-2900

EDISON ELECTRIC INSTITUTE
/s/ Emily Sanford Fisher
General Counsel and Corporate Secretary
701 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 508-5000

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
/s/ Randolph Elliott
Randolph Elliott
Senior Director, Regulatory Counsel
4301 Wilson Boulevard
Arlington, VA 22203
(703) 907-6818

Exhibit E
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

Federal Energy Regulatory Commission
Washington, DC 20426

FEB 28 2019

Re: FOIA FY19-19
Notice of Intent to Release

VIA E-MAIL AND REGULAR MAIL

Edwin G. Kichline
Senior Counsel and Director of Enforcement Oversight
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, D.C. 20005
edwin.kichline@nerc.net

Sonia Mendonca
Vice President, Deputy General Counsel, and Director of Enforcement
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, D.C. 20005
Sonia.mendonca@nerc.net

Dear Mr. Kichline and Ms. Mendonca:

Pursuant to the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 C.F.R. § 388.112(e) (2018), you are hereby notified that the Commission intends to release, in part, material requested by Mr. Michael Mabee (Mr. Mabee) pursuant to the Freedom of Information Act (FOIA).[1] On December 19, 2018, Mr. Mabee requested the following:

> the "NERC Full Notice of Penalty" version which includes the name of the registered entity for various dockets, including: NP14-29-000; NP14-30-000; NP14-32-000; NP14-37-000; NP14-39-000; and NP14-41-000.[2] The requester also seeks any "Spreadsheet NOP [Notice of Penalty]" that lists the name(s) of the entity subject to the regulatory action.

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[1] 5 U.S.C. § 552, *as amended by* the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

[2] The request references numerous docket numbers. However, given the volume of information requested, Mr. Mabee's request will be processed on a rolling basis, with these initial docket numbers addressed first.

In reviewing the request in its entirety and based on staff discussions with Mr. Mabee via telephone, his request is primarily for the name of the UREs associated with various dockets.

On January 18, 2019, Commission staff notified you, as well as the relevant UREs, of the request and provided an opportunity to comment pursuant to 18 C.F.R. § 388.112. NERC submitted comments on January 28, 2019, objecting to the release of any Non-public NERC Full Notice of Penalty ("Non-public NOP"), as well as the identity of the UREs generally. Additionally, a number of trade groups submitted comments also objecting to disclosure of the Non-public NOPs and the URE identities. Finally, Commission staff has and is continuing to receive verbal comments from relevant UREs.

Identities of UREs

A case-by-case assessment of each requested document must consider the following: the nature of the CIP violation; whether mitigation is complete; the content of the public and non-public versions of the Notice of Penalty; the extent to which the disclosure of the pertinent URE identity would be useful to someone seeking to cause harm; whether an audit has occurred since the violation(s); whether the violation(s) was administrative or technical in nature; and the length of time that has elapsed since the filing of the public Notice of Penalty. An application of these factors will dictate whether a particular FOIA exemption, including 7(F) and/or Exemption 3, is appropriate. *See Garcia v. U.S. DOJ*, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002) ("In evaluating the validity of an agency's invocation of Exemption 7(F), the court should within limits, defer to the agency's assessment of danger.") (citation and internal quotations omitted).

NP14-32

The public version of the Notice of Penalty in NP14-32 was filed on February 27, 2014. Based on my application of the various factors discussed above, I determine that the disclosure of the name of the URE is appropriate. In this regard, the violations have been mitigated, a significant amount of time has elapsed since the violations, and a follow-up audit has occurred since the filing of the Notice. I also considered relevant input from the URE and consulted with FERC technical staff in reaching my decision. A copy of the public version of the Notice of Penalty with the name of the URE inserted on the first page will be disclosed to the requestor no sooner than five calendar days from the date of this letter. *See* 18 C.F.R. § 388.112(e).

NP14-41

The public version of the Notice of Penalty in NP14-41 was filed on May 29, 2014. Based on application of the various factors discussed above, I determine that the disclosure of the name of the URE is appropriate. In this regard, the violations were administrative in nature and have been mitigated, an audit has occurred since the Notice of Penalty, and a significant period of time has elapsed since the violations. Furthermore, in finding that disclosure is appropriate, I also considered relevant input from the URE, as well as FERC technical staff. A copy of the public version of the NOP with the name of the URE inserted on the first page will be disclosed to the requestor no sooner than five calendar days from the date of this letter. *See* 18 C.F.R. § 388.112(e).

Staff is continuing to assess dockets NP14-29; NP14-30; NP14-37; and NP14-39- addressed in my January 18, 2019 letter, and will issue an additional Notice of Intent to Release, if appropriate. We will also issue additional Submitters' Rights Letters to interested UREs to cover the balance of the information sought in the FOIA request.

Sincerely,

Leonard Tao

Leonard Tao
Director
Office of External Affairs

Cc Michael Mabee

Bcc

Exhibit F
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

MAR 1 0 2019

Re: Initial Release Letter
FOIA No. FY19-19

VIA EMAIL AND REGULAR MAIL
Michael Mabee
[redacted]
CivilDefenseBook@gmail.com

Dear Mr. Mabee:

This is a response to your correspondence received on December 19, 2018, and amended on January 4, 2019, in which you requested information pursuant to the Freedom of Information Act (FOIA),[1] and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2018).

By letter dated February 28, 2019, I advised the submitter and the concerned Unidentified Registered Entities (URE) that a copy of the public version of the Notice of Penalty associated with Docket Nos. NP14-32 and NP14-41, along with the name of the URE inserted on the first page, would be disclosed to you no sooner than five calendar days from the date of my letter. *See* 18 C.F.R. § 388.112(e). The five-day notice period has elapsed and I am now releasing the first page of these public NOPs with the associated URE names to you.

Ordinarily, any appeal from a FOIA determination must be filed within 90 days of the date of issuance as provided by the Freedom of Information Act and 18 C.F.R. § 388.110(a)(1) of the Commission's regulations. However, because your request is being processed on a rolling basis, the Commission will hold your appeal rights in abeyance pending a final determination. This will allow you to file a single appeal at the conclusion of our processing of your request.

If you decide to appeal, this appeal must be in writing, addressed to James P. Danly, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, and clearly marked "Freedom of Information Act Appeal."

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[1] 5 U.S.C. § 552, *as amended* by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

Please include a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

You also have the right to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue your appeal. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,

Leonard M. Tao
Director
Office of External Affairs

Cc
Edwin G. Kichline
Associate Director, Enforcement
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, DC 20005
edwin.kichline@nerc.net

Charles Berardesco
Senior Vice President and Gene
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, DC 20005
Charles.berardesco@nerc.net

Sonia Mendonca
Attorney
North American Electric Reliability Corporation
1101 New York Avenue NW
Washington, D.C. 20005
Sonia.mendonca@nerc.net

(Enclosures (2))

URE: Pacific Gas and Electric Company

May 29, 2014

VIA ELECTRONIC FILING

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: NERC Full Notice of Penalty regarding Unidentified Registered Entity (URE), FERC Docket No. NP14-_-000

Dear Ms. Bose:

The North American Electric Reliability Corporation (NERC) hereby provides this Notice of Penalty[1] regarding Unidentified Registered Entity (URE), NERC Registry ID# NCRXXXXX, in accordance with the Federal Energy Regulatory Commission's (Commission or FERC) rules, regulations and orders, as well as NERC's Rules of Procedure including Appendix 4C (NERC Compliance Monitoring and Enforcement Program (CMEP)).[2]

This Notice of Penalty is being filed with the Commission because, based on information from Western Electricity Coordinating Council (WECC), URE does not dispute the violations[3] of CIP-007-1 R5 and R6 and the proposed ninety-eight thousand five-hundred dollar ($98,500) penalty to be assessed to URE. Accordingly, the violations identified as NERC Violation Tracking Identification Numbers

[1] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards* (Order No. 672), III FERC Stats. & Regs. ¶ 31,204 (2006); *Notice of New Docket Prefix "NP" for Notices of Penalty Filed by the North American Electric Reliability Corporation*, Docket No. RM05-30-000 (February 7, 2008). *See also* 18 C.F.R. Part 39 (2013). *Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242 (2007) (Order No. 693), *reh'g denied*, 120 FERC ¶ 61,053 (2007) (Order No. 693-A). *See* 18 C.F.R § 39.7(c)(2).

[2] *See* 18 C.F.R § 39.7(c)(2).

[3] For purposes of this document, each violation at issue is described as a "violation," regardless of its procedural posture and whether it was a possible, alleged or confirmed violation.

NERC
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION

PRIVILEGED AND CONFIDENTIAL INFORMATION HAS BEEN REMOVED FROM THIS PUBLIC VERSION

URE: City Utilities of Springfield, MO

February 27, 2014

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: NERC Full Notice of Penalty regarding Unidentified Registered Entity, FERC Docket No. NP14-_-000

Dear Ms. Bose:

The North American Electric Reliability Corporation (NERC) hereby provides this Notice of Penalty[1] regarding Unidentified Registered Entity (URE), NERC Registry ID# NCRXXXXX in accordance with the Federal Energy Regulatory Commission's (Commission or FERC) rules, regulations and orders, as well as NERC's Rules of Procedure including Appendix 4C (NERC Compliance Monitoring and Enforcement Program (CMEP)).[2]

This Notice of Penalty is being filed with the Commission because Southwest Power Pool Regional Entity (SPP RE) and URE have entered into a Settlement Agreement to resolve all outstanding issues arising from SPP RE's determination and findings of the violation[3] of CIP-002-1. According to the Settlement Agreement, URE stipulates and agrees to the facts of the violation and has agreed to the assessed penalty of zero dollars ($0), in addition to other remedies and actions to mitigate the instant violation and facilitate future compliance under the terms and conditions of the Settlement Agreement. Accordingly, the violation identified as NERC Violation Tracking Identification Number SPP201000414 is being filed in accordance with the NERC Rules of Procedure and the CMEP.

---

[1] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards* (Order No. 672), III FERC Stats. & Regs. ¶ 31,204 (2006); *Notice of New Docket Prefix "NP" for Notices of Penalty Filed by the North American Electric Reliability Corporation*, Docket No. RM05-30-000 (February 7, 2008). *See also* 18 C.F.R. Part 39 (2013). *Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242 (2007) (Order No. 693), *reh'g denied*, 120 FERC ¶ 61,053 (2007) (Order No. 693-A). *See* 18 C.F.R § 39.7(c)(2).

[2] *See* 18 C.F.R § 39.7(c)(2).

[3] For purposes of this document, each violation at issue is described as a "violation," regardless of its procedural posture and whether it was a possible, alleged or confirmed violation.

Exhibit G
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

Federal Energy Regulatory Commission
Washington, D.C. 20426

APR 0 2 2019

Re: FOIA FY19-19 (Rolling)
Denial (NP14-30, NP14-37, and
NP14-39) – Second Response
Letter

VIA E-MAIL AND U.S MAIL

Michael Mabee
[redacted]
CivilDefenseBook@gmail.com

Dear Mr. Mabee:

This is a second response to your correspondence received on December 19, 2018, and amended on January 4, 2019, in which you requested information pursuant to the Freedom of Information Act (FOIA), and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2018). In reviewing the request in its entirety and based on staff discussions with you via telephone, your request is primarily for the name of the UREs associated with various dockets, including: NP14-29-000; NP14-30-000; NP14-32-000; NP14-37-000; NP14-39-000; and NP14-41-000.[1]

On January 18, 2019, Commission staff notified you, as well as the relevant UREs, of the request and provided an opportunity to comment pursuant to 18 C.F.R. § 388.112. NERC submitted comments on January 28, 2019, objecting to the release of the identity of the UREs generally. Additionally, a number of trade groups submitted comments also objecting to disclosure of the URE identities. Finally, Commission staff received feedback from some of the relevant UREs.

On February 28, 2019, I issued a Notice of Intent to Release as to the identities of the UREs in NP14-32 and NP14-41, which were subsequently provided to you. This letter addresses NP14-30, NP14-37, and NP14-39.

Identities of UREs

A case-by-case assessment of the requested information must consider the following: the nature of the Critical Infrastructure Protection violation; whether

[1] As you are aware, given the volume of dockets in your request, this FOIA response will be processed on a rolling basis.

mitigation is complete; the content of the public and non-public versions of the Notice of Penalty; the extent to which the disclosure of the pertinent URE identity would be useful to someone seeking to cause harm; whether an audit has occurred since the violation(s); whether the violation(s) was administrative or technical in nature; and the length of time that has elapsed since the filing of the public Notice of Penalty. An application of these factors will dictate whether a particular FOIA exemption, including 7(F) and/or Exemption 3, is appropriate. *See Garcia v. U.S. DOJ*, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002) ("In evaluating the validity of an agency's invocation of Exemption 7(F), the court should within limits, defer to the agency's assessment of danger.") (citation and internal quotations omitted).

Based on application of the various factors discussed above, I conclude that disclosing the identity of the UREs in NP14-30, NP14-37, and NP14-39, in combination with the information contained in the public versions of the Notices of Penalty, would create a risk of harm or detriment to life, physical safety, or security because the specified UREs could become the target of a potentially bad actor. *See* 5 U.S.C. § 552(b)(7)(F) (protecting law enforcement information where release "could reasonably be expected to endanger the life or physical safety of any individual."); *see also* the Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 61003 (2015) (specifically exempting the disclosure of CEII and establishing applicability of FOIA Exemption 3, 5 U.S.C. § 552(b)(3)). Accordingly, the names of the UREs associated with NP14-30, NP14-37, and NP14-39 will not be disclosed.

We are continuing to process your request, and staff will issue another Submitters' Rights letter to NERC addressing additional dockets covered by your request, with a blind courtesy copy to the relevant UREs.

Sincerely,

Leonard Tao
Director
Office of External Affairs

cc
Edwin G. Kichline
Senior Counsel and Director of Enforcement Oversight
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, D.C. 20005

edwin.kichline@nerc.net

Sonia Mendonca
Vice President, Deputy General Counsel, and Director of Enforcement
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, D.C. 20005
Sonia.mendonca@nerc.net

bcc

Exhibit H
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

Exemption 7(F)

Exemption 7(F) of the Freedom of Information Act protects law enforcement information that "could reasonably be expected to endanger the life or physical safety of any individual."[1]

Courts have routinely upheld the use of Exemption 7(F) to protect the identities of law enforcement agents.[2] However, given that this Exemption protects the safety of "any

[1] 5 U.S.C. § 552(b)(7)(F) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[2] See, e.g., Rugiero v. DOJ, 257 F.3d 534, 552 (6th Cir. 2001) (protecting names of DEA special agents); Johnston v. DOJ, No. 97-2173, 1998 WL 518529, *1 (8th Cir. Aug. 10, 1998) (protecting names of DEA special agents); McCoy v. United States, No. 04-101, 2006 WL 2459075, at *6 (N.D. W. Va. Aug. 23, 2006) (finding that DEA properly withheld names of DEA special agents, deputy U.S. Marshals, and state and local law enforcement officers); Blanton v. DOJ, 182 F. Supp. 2d 81, 87 (D.D.C. 2002) (acknowledging that disclosure of identities of FBI special agents could endanger their safety), aff'd, 64 F. App'x 787 (D.C. Cir. 2003); Garcia v. DOJ, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002) (protecting names of FBI special agents and other government agents); Amro v. U.S. Customs Serv., 128 F. Supp. 2d 776, 788 (E.D. Pa. 2001) (protecting names of DEA supervisory special agents and other law enforcement officers); Hronek v. DEA, 16 F. Supp. 2d 1260, 1275 (D. Or. 1998) (protecting names and identities of DEA special agents, supervisory special agents, and other law enforcement officers), aff'd, 7 F. App'x 591 (9th Cir. 2001); Crompton v. DEA, No. 95-8771, slip op. at 16 (C.D. Cal. Mar. 26, 1997) (finding agency properly withheld agents' names, signatures, and identifying information); Jimenez v. FBI, 938 F. Supp. 21, 30-31 (D.D.C. 1996) (holding that disclosure of names of DEA special agents, supervisors, and local law enforcement officers could result in "physical attacks, threats, or harassment"). But see Pub. Employees for Envtl. Responsibility v. EPA, 978 F. Supp. 955, 964 (D. Colo. 1997) (finding no risk to agency investigators in disclosing EPA Inspector General guidelines).

individual,"[3] courts have held that Exemption 7(F) can protect the names and identifying information of non-law enforcement federal employees, local law enforcement personnel, and other third persons in connection with particular law enforcement matters.[4] Exemption 7(F) protection has also been extended to protect, for example, names of and identifying information about inmates,[5] private security contractor companies,[6] undercover agents,[7] and medical personnel.[8] Courts have also upheld the use of Exemption 7(F) to protect the

[3] 5 U.S.C. § 552(b)(7)(F); see, e.g., Amuso v. DOJ, No. 07-1935, 2009 WL 535965, at *17 (D.D.C. Mar. 4, 2009) (explaining that "'[w]hile courts generally have applied Exemption 7(F) to protect law enforcement personnel or other specified third parties, by its terms, the exemption is not so limited; it may be invoked to protect 'any individual' reasonably at risk of harm'" (quoting Long v. DOJ, 450 F. Supp. 2d 42, 79 (D.D.C. 2006)), amended, 457 F. Supp. 2d 30 (D.D.C. 2006), amended further on reconsideration, 479 F. Supp. 2d 23 (D.D.C. 2007) (appeal pending)).

[4] See, e.g., Johnston, 1998 WL 518529, at *1 (protecting names of not only special agents, but also "DEA personnel, local law enforcement personnel, and other third parties"); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2006 WL 1826185, at *9 (D.D.C. June 30, 2006) (finding that disclosure of U.S. Customs officials' identities and information regarding seized contraband could endanger life or physical safety of both Customs officials and innocent bystanders); Garcia, 181 F. Supp. 2d at 378 (protecting "names and/or identifying information concerning private citizens and third parties who provided information" to FBI); Pfeffer v. Dir., BOP, No. 89-899, 1990 U.S. Dist. LEXIS 4627, at *4 (D.D.C. Apr. 18, 1990) (holding that information about smuggling weapons into prisons could reasonably be expected to endanger physical safety of "some individual" and therefore is properly withheld).

[5] Lee v. DOJ., No. 04-1013, 2007 WL 2852538, at *7 (W.D. Pa. Sept. 27, 2007) (finding agency properly withheld "names and personal information" about inmates involved in investigations of wrong-doing at correctional facilities because disclosure could subject them to "retaliatory physical harm"); Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002) (finding that release of list of inmates' names would endanger life and physical safety "given inmates' gang ties, interest in escape, and motives for violence"); Anderson v. U.S. Marshals Serv., 943 F. Supp. 37, 40 (D.D.C. 1996) (protecting identity of inmate who required separation from incarcerated requester when disclosure could endanger his safety).

[6] L.A. Times Commcn's, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 898-900 (C.D. Cal. 2006) (applying Exemption 7(F) where disclosure of private security contractor company names could endanger life or physical safety of many individuals).

[7] McQueen v. United States, 264 F. Supp. 2d 502, 521 (S.D. Tex. 2003) (protecting identities of undercover agents participating in plaintiff's criminal investigation), aff'd, 100 F. App'x 964 (5th Cir. 2004).

[8] Sanders v. DOJ, No. 91-2263, 1992 WL 97785, at *4 (D. Kan. Apr. 21, 1992) (finding that disclosing identities of medical personnel who prepared requester's mental health records would endanger their safety, in view of requester's mental difficulties).

identities of informants and sources.[9] Finally, in keeping with the statutory language, courts have applied Exemption 7(F) in order to protect persons from possible harm from a requester who has threatened them in the past, or one who has a violent past or who has a connection to violent organizations.[10]

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[9] See, e.g., Amuso, 2009 WL 535965, at *18 (concluding that agency properly withheld information pertaining to "source symbol number informants and the names and identifying information concerning cooperating witnesses" because "disclosure of this information could threaten the lives of or otherwise endanger their safety"); Cozen O'Connor v. Dep't of Treasury, 570 F. Supp. 2d 749, 786 (E.D. Pa. 2008) (finding agency properly redacted names and personal identifiers of sources to protect them from retribution in connection with their "involve[ment] in ongoing criminal investigations of terrorist activities"); Miller v. DOJ, 562 F. Supp. 2d 82, 124-25 (D.D.C. 2008) (finding agency properly withheld information pertaining to symbol-numbered informant and cooperating witnesses); Diaz v. DEA, 555 F. Supp. 2d 124, 126 (D.D.C. 2008) (finding agency properly withheld documents that "relate to the identity and history of cooperation of an individual who has assisted DEA agents in several drug investigations"); Butler v. DOJ, 368 F. Supp. 2d 776, 786 (E.D. Mich. 2005) (protecting information that could endanger lives of individuals who provided information to DEA); McQueen, 264 F. Supp. 2d at 521 (protecting identities of informants participating in plaintiff's criminal investigation); Bartolotta v. FBI, No. 99-1145, slip op. at 5-6 (D.D.C. July 13, 2000) (protecting name of, and identifying information about, confidential inmate-source); Pray v. FBI, No. 95-0380, 1998 WL 440843, at *3 (S.D.N.Y. Aug. 3, 1998) (protecting names of sources); Jimenez, 938 F. Supp. at 30-31 (protecting names and identifying information furnished by confidential sources); Bruscino v. BOP, No. 94-1955, 1995 WL 444406, at *11 (D.D.C. May 12, 1995) (protecting investigatory information obtained from sources whose lives would be endangered by disclosure, especially in view of "rough justice" to be rendered upon informants should identities be disclosed), summary affirmance granted in pertinent part, vacated & remanded in part, No. 95-5213, 1996 WL 393101, at *1 (D.C. Cir. June 24, 1996); Crooker v. IRS, No. 94-0755, 1995 WL 430605, at *5 (D.D.C. Apr. 27, 1995) (protecting confidential informants when requester has history of harassing, intimidating, and abusing witnesses). But see Hidalgo v. FBI, 541 F. Supp. 2d 250, 256 (D.D.C. 2008) (ordering "disclosure of information related to the FBI's misconduct in handling [the confidential informant]" where agency has not explained how disclosure "would further endanger [the confidential informant's] life . . . when his identity as an informant is manifest and could not be any clearer"); Homick v. DOJ, No. 98-557, slip op. at 33-34 (N.D. Cal. Sept. 16, 2004) (finding that agency did not satisfy standard for invoking Exemption 7(F), and ordering disclosure, "except insofar as other exemptions apply," of information that would identify informants despite evidence of requester's violent nature), reconsideration denied, (N.D. Cal. Oct. 27, 2004), appeal dismissed, No. 04-17568 (9th Cir. July 5, 2005).

[10] See, e.g., Brunetti v. FBI, 357 F. Supp. 2d 97, 109 (D.D.C. 2004) (approving withholding of identities of individuals who cooperated with agency, given "violent nature of the La Cosa Nostra organization"); Ortloff v. DOJ, No. 98-2819, slip op. at 10 (D.D.C. Mar. 22, 2002) (finding withholding of "name of one witness who was identified as being potentially subject to future harm" proper, given plaintiff's conviction for violent acts); Shores v. FBI, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (approving nondisclosure of names of, and identifying information about, cooperating witnesses when information obtained from one of those witnesses led to plaintiff's murder conviction and prompted plaintiff to attempt to murder a witness's family

(continued...)

Significantly, Exemption 7(F) protection has been held to remain applicable even after a law enforcement officer subsequently retired.[11] Moreover, it has been held that Exemption 7(F) can be employed to protect even the identities of individuals who testified at the requester's criminal trial.[12] And one court approved a rather novel application of this exemption to a description in an FBI laboratory report of a homemade machine gun because its disclosure would create the real possibility that law enforcement officers would have to face "individuals armed with homemade devices constructed from the expertise of other law enforcement people."[13]

Exemption 7(F) has been used to protect information regarding seized contraband and information concerning U.S. Customs' employees involved in the seizure, storage, and evaluation of the contraband.[14] Applying Exemption 7(F), the court reasoned that the release of this information could place at risk innocent third parties located in the vicinity of U.S.

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[10](...continued)
member); Blanton, 182 F. Supp. 2d at 87 (protecting identities of FBI special agents and non-law enforcement personnel assisting in investigation, because "[e]ven though [requester] is incarcerated, his threats against persons responsible for his arrest and now his conviction make it possible that these individuals could be targets of physical harm"); Burke v. DOJ, No. 96-1739, 1999 WL 1032814, at *9 (D.D.C. Sept. 30, 1999) (finding that disclosing identities of "agents, other agencies' personnel and sources could expose [them] to violent retaliation," given requester's violent history); Anderson v. DOJ, No. 95-1888, 1999 U.S. Dist. LEXIS 4731, at *10-11 (D.D.C. Mar. 31, 1999) (finding that releasing witnesses' names could subject them to harassment and threats, given requester's history of carrying firearms); Crooker, 1995 WL 430605, at *5 (protecting confidential informants when requester has history of harassing, intimidating, and abusing witnesses); Manna v. DOJ, 815 F. Supp. 798, 810 (D.N.J. 1993) (finding that releasing agency reports would endanger life or physical safety of associates of requester in organized crime case), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995); Author Servs. v. IRS, No. 90-2187, slip op. at 7 (C.D. Cal. Nov. 14, 1991) (withholding identities of third parties and handwriting and identities of agency employees in view of previous conflict and hostility between parties).

[11] See Moody v. DEA, 592 F. Supp. 556, 559 (D.D.C. 1984).

[12] See Linn v. DOJ, No. 92-1406, 1997 U.S. Dist. LEXIS 9321, at *17 (D.D.C. May 29, 1997) (protecting witnesses who testified) (Exemptions 7(C) and 7(F)), appeal dismissed voluntarily, No. 97-5122 (D.C. Cir. July 14, 1997); Beck v. DOJ, No. 88-3433, 1991 U.S. Dist. LEXIS 1179, at *10-11 (D.D.C. July 24, 1991) (finding that exemption was not necessarily waived when information revealed at public trial); Prows v. DOJ, No. 87-1657, 1989 WL 39288, at *2 (D.D.C. Apr. 13, 1989) (finding DEA special agents' identities protectible even though they testified at trial), aff'd, No. 89-5185, 1990 WL 45519, at *1 (D.C. Cir. Feb. 26, 1990). But see Myers v. DOJ, No. 85-1746, 1986 U.S. Dist. LEXIS 20058, at *6 (D.D.C. Sept. 22, 1986) (declining to protect law enforcement personnel who testified) (Exemptions 7(C) and 7(F)).

[13] LaRouche v. Webster, No. 75-6010, 1984 WL 1061, at *8 (S.D.N.Y. Oct. 23, 1984); see also Pfeffer, No. 89-899, 1990 U.S. Dist. LEXIS 4627, at *4 (D.D.C. Apr. 14, 1990) (approving withholding of information on smuggling of weapons into prison).

[14] Herrick's Newsletter, 2006 WL 1826185, at *8-9.

Customs' officials, activities, or the seized contraband.[15] Similarly, Exemption 7(F) was used to protect the company names of private security contractors (PSC) operating in concert with U.S. military forces in Iraq.[16] In that case, the court accepted the government's specific "assessment that disclosure of the PSC company names might very well be expected to endanger the life or safety of miliary personnel, PSC employees, and civilians of Iraq."[17]

By contrast, protection was denied by the Court of Appeals for the Second Circuit in ACLU v. DOD, where the court held that "in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual."[18] The Second Circuit declined to "shape the precise contours of the exemption," but found that it did not apply to "some unspecified member of a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan."[19]

Although Exemption 7(F)'s coverage is in large part duplicative of that afforded by Exemption 7(C), some courts have found that it is potentially broader in that no balancing is required for withholding information under Exemption 7(F).[20]

Finally, while courts generally defer to an agency's assessment of harm,[21] courts

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[15] See id. at *9 (citing Garcia, 181 F. Supp. 2d at 378).

[16] L.A. Times, 442 F. Supp. 2d at 898-900.

[17] Id. at 900.

[18] 543 F.3d 59, 71 (2d Cir. 2008), application to extend time to file petition for cert. granted, No. 08A1068 (J. Ginsburg, May 29, 2009).

[19] Id.

[20] See Raulerson v. Ashcroft, 271 F. Supp. 2d 17, 29 (D.D.C. 2002) ("Unlike Exemption 7(C), which involves a balancing of societal and individual privacy interests, 7(F) is an absolute ban against certain information and, arguably, an even broader protection than 7(C)."); Shores, 185 F. Supp. 2d at 85 (stating that Exemption 7(F), while covering material that also may be subject to Exemption 7(C), "does not require any balancing test"); LaRouche, 1984 WL 1061, at *8 (stating Exemption 7(F) was properly asserted after danger to law enforcement personnel was identified); see also FOIA Update, Vol. V, No. 2, at 5 ("FOIA Counselor: Questions & Answers"). But see ACLU, 389 F. Supp. 2d at 578 (dicta) (rejecting principle that once threat to life or safety is discerned, no balancing is required in Exemption 7(F) analysis).

[21] See, e.g., El Badrawi v. DHS, 583 F. Supp. 2d 285, 319 (D. Conn. 2008) (noting that agencies are entitled to deference, but that "court's review is not vacuous"); Levy v. USPS, 567 F. Supp. 2d 162, 169 (D.D.C. 2008) (concluding agency properly withheld "information given by victims of a hoax involving the deadly anthrax toxin [which] could result in bodily harm or death for those individuals" and defering to "agency's assessment of danger"); Miller, 562 F. Supp. 2d at 124 (noting that "[w]ithin limits, the Court defers to the agency's assessment of danger"); Garcia, 181 F. Supp. 2d at 378 ("In evaluating the validity of an agency's invocation of Exemption 7(F), the court should 'within limits, defer to the agency's assessment of danger.'"

(continued...)

nevertheless require agency declarations to provide an adequate justification for the withholding.[22] In cases where agency declarations are lacking sufficient explanation for the withholding, courts will sometimes undertake an in camera review to determine whether application of Exemption 7(F) is appropriate.[23]

[21](...continued)
(quoting Linn v. DOJ, No. 92-1406, 1995 WL 631847, at *9 (D.D.C. Aug. 22, 1995)).

[22] See, e.g., Lawyers' Comm. for Civil Rights v. Dep't. of the Treasury, No. C 07-2590, 2009 WL 1299821, at *5-6 (N.D. Cal. May 11, 2009) (finding that "[u]nlike the prior" declaration with its "conclusory, unsupported speculation" that failed to provide "court with sufficient information to understand the basis" for withholdings, that current declaration "provides sufficient non-conclusory reasons" and detailed information; thus, agency is "entitled to categorically redact under Exemption 7(F) the identities and other identifying information" from delisting petitions); Antonelli v. BOP, No. 07-2016, 2008 WL 5339738, at *9 (D.D.C. Dec. 22, 2008) (explaining that agency did not link withheld information to "a specific exemption" and thus provided no basis for ruling on withholdings); Long v.DOJ, 450 F. Supp. 2d 42, 80 (D.D.C. 2006) (explaining that agency "offers little more than conclusory assertions" and finding that "[s]uch unsupported speculations cannot serves as a justification for withholding information under Exemption7(F)"), amended, 457 F. Supp. 2d 30 (D.D.C. 2006), amended further on reconsideration, 479 F. Supp. 2d 23 (D.D.C. 2007) (appeal pending); Trupei v. Huff, No. 96-2850, 1998 WL 8986, at *5 (D.D.C. Jan. 7, 1998) (finding agency's assertion "conclusory and not supported with sufficient detail for the Court to determine whether Exemption 7(F) was properly invoked"); Linn v. DOJ, No. 92-1406,1995 WL 631847, at *9 (D.D.C. Aug. 22, 1995) (finding that agency "has not established even a minimal nexus" between the withheld information and harm to persons discussed in file).

[23] El Badrawi, 583 F. Supp. 2d at 319 (ordering in camera review because agency's "string of cryptic and indefinite possibilities whereby terrorists could piece together . . . abstract information" does not sustain "its burden of demonstrating that the material withheld under Exemptions 7(D), 7(E), and 7(F) is exempt"; explaining that "[e]ven where nations security implications are involved, the court must have sufficient information to review the agency's withholdings de novo" (quoting Halpern v. FBI, 181 F.3d 279, 295 (2d. Cir. 1999))).

Exhibit I
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

Exemption 3

Exemption 3 of the Freedom of Information Act incorporates into the FOIA certain nondisclosure provisions that are contained in other federal statutes. Specifically, Exemption 3 allows the withholding of information prohibited from disclosure by another federal statute provided that one of two disjunctive requirements are met: the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[1] Courts have held that a statute falls within the exemption's coverage if it satisfies either of its disjunctive requirements,[2] although courts do not always specify under which subpart of Exemption 3 a statute qualifies.[3]

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

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

[2] See Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984); Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979); Am. Jewish Cong. v. Kreps, 574 F.2d 624, 628 (D.C. Cir. 1978).

[3] See, e.g., Berger v. IRS, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (finding that "[31 U.S.C.] § 5319 [(2006)] qualifies as an exempting statute under Exemption 3," but failing to specify whether statute qualifies under subpart (A) or (B)), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008), cert. denied, No. 08-884, 2009 WL 1650205 (U.S. June 15, 2009); Nat'l Inst. of Military Justice v. DOD, 404 F. Supp. 2d 325, 335-37 (D.D.C. 2005) (holding that 10 U.S.C. § 130c (2006) is Exemption 3 statute without specifying under which subpart it qualifies), aff'd on other grounds, 512 F.3d 677 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 775 (2008); ACLU v. DOD, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same); Vosburgh v. IRS, No. No. 93-1493, 1994 WL 564699, at *4 (D. Or. July 5, 1994) (recognizing 31 U.S.C. § 5319 (2006) as statute qualifying under Exemption 3, but failing to identify Exemption 3 subpart under which statute qualified), aff'd, 106 F.3d 411 (9th Cir. 1997) (unpublished table decision); Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992) (same); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988) (same), aff'd, 890 F.2d 419 (8th Cir. 1989) (unpublished table decision).

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

Initial Considerations

The Court of Appeals for the District of Columbia Circuit has held that records may be withheld under the authority of another statute pursuant to Exemption 3 "if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure."[6] In Reporters Committee for Freedom of the Press v. DOJ,[7] the D.C. Circuit emphasized that:

> [A] statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. [The court] must find a congressional purpose to exempt matters from disclosure in the actual words of the statute (or at least in the legislative history of FOIA) – not in the legislative history of the claimed withholding statute, nor in an agency's interpretation of the statute.[8]

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

[5] 5 U.S.C. § 552(e)(1)(B)(ii).

[6] Reporters Comm. for Freedom of the Press v. DOJ, 816 F.2d 730, 734 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n, 533 F.3d 810, 813-14 (D.C. Cir. 2008) (finding that, when analyzing statute under Exemption 3, "a court . . . must first determine whether the statute is a withholding statute at all by deciding whether it satisfies 'the threshold requirement that it specifically exempt matters from disclosure'" (quoting Reporters Comm., 816 F.2d at 734 (emphasis added))); Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 37 (D.C. Cir. 2002) (finding that, "for purposes of qualifying as a withholding statute under Exemption 3, a statute 'must on its face exempt matters from disclosure,'" and concluding that statute in question failed to qualify as withholding statute under Exemption 3 because it did not refer to "nondisclosure of information" (quoting Reporters Comm., 816 F.2d at 735)); Zanoni v. USDA, 605 F. Supp. 2d 230, 236 (D.D.C. 2009) (noting that "[w]hen determining whether FOIA Exemption (3) applies, the court 'must first determine whether the statute is a withholding statute . . . that . . . specifically exempt[s] matters from disclosure'" by "look[ing] at the language of the statute on its face" (quoting Pub. Citizen, 533 F.3d at 813)).

[7] 816 F.2d 730.

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

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

(...continued)
Ass'n of Retired R. R. Workers, Inc. v. U.S. R.R. Ret. Bd., 830 F.2d 331, 334 (D.C. Cir. 1987)); Anderson v. HHS, 907 F.2d 936, 950, 951 n.19 (10th Cir. 1990) (holding that statute qualified under FOIA Exemption 3 based on plain language of statute in question, and noting that federal regulations, constituting agency's interpretation of statute, are not entitled to deference in determining whether statute qualifies under Exemption 3); Zanoni, 605 F. Supp. 2d at 236 (holding that, "[w]hen determining whether FOIA Exemption (3) applies, the court 'must first determine whether the statute is a withholding statute . . . that . . . specifically exempt[s] matters from disclosure'" by "look[ing] at the language of the statute on its face" (quoting Pub. Citizen, 533 F.3d at 813)). But see Wis. Project on Nuclear Arms Control v. U.S. Dep't of Commerce, 317 F.3d 275, 284 (D.C. Cir. 2003) (looking to legislative history of section 203(a)(1) of International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1) (2006), and determining that statute satisfies Exemption 3's requirements); Meyerhoff v. EPA, 958 F.2d 1498, 1501-02 (9th Cir. 1992) (looking to legislative history of withholding statute to determine that statutory amendment did not create new prohibition on disclosure, but rather clarified existing nondisclosure provision); cf. Essential Info., Inc. v. USIA, 134 F.3d 1165, 1168 (D.C. Cir. 1998) (surveying legislative history of Smith-Mundt Act, 22 U.S.C. § 1461-1a (2006), to bolster ruling that statute qualifies under Exemption 3).

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

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

[11] § 4, 16 U.S.C. § 1533 (2006).

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

[13] Reporters Comm., 816 F.2d at 735.

[14] See Wis. Project, 317 F.3d at 282-85 (looking to legislative history of section 12(c) of Export Administration Act of 1979, 50 U.S.C. app. § 2411(c) (2006), and section 203(a)(1) of
(continued...)

The D.C. Circuit also has looked beyond statutory text and considered congressional intent when determining whether a statute that qualified under Exemption 3 at one time should continue to be recognized as an Exemption 3 statute after that statute has lapsed.[15] In such situations, the D.C. Circuit has stated that, although "FOIA undoubtedly demands a liberal presumption of disclosure, . . . [an] unduly strict reading of Exemption 3 strangles Congress's intent."[16] Similarly, courts have looked to legislative history for guidance in how to interpret statutory terms or phrases subject to multiple interpretations.[17] Additionally, courts sometimes consider the legislative history of a newly enacted Exemption 3 statute in determining whether the statute is applicable to FOIA requests already pending, or litigation

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

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

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

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

already commenced, at the time the statute was enacted,[18] and have found Exemption 3 statutes to apply retroactively to the requested records.[19]

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

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[18] See City of Chicago v. U.S. Dep't of the Treasury, 423 F.3d 777, 779-82 (7th Cir. 2005) (considering congressional intent behind appropriations legislation that prohibited expenditure of appropriated funds for processing requests for firearms database information); Long v. IRS, 742 F.2d 1173, 1183 (9th Cir. 1984) (looking to congressional intent with regard to retroactive application of Economic Tax Recovery Act of 1981, Pub. L. No. 97-34, § 701(a), 95 Stat. 172, and noting that, "[w]hen Congress unequivocally intends retroactive application, the only limitations upon the effectuation of that intent must be rooted in the Constitution"); National Educ. Ass'n v. FTC, No. 79-959-S, 1983 WL 1883, at *1 (D. Mass. Sept. 26, 1983) (looking to legislative history of FTC Improvements Act of 1980, 15 U.S.C. § 57b-2(f) (2006), and concluding that "[t]he legislative history of the bill supports retroactive application of its provisions").

[19] See City of Chicago, 423 F.3d at 783 (holding that newly enacted appropriations legislation applies retroactively); Wis. Project, 317 F.3d at 280, 284-85 (finding that agency properly relied upon statute to withhold information retroactively, where Congress re-enacted statute during litigation and where court noted that "legislative history indicates that Congress intended to preserve these confidentiality protections when it renewed the [Export Administration Act of 1979, 50 U.S.C. app. § 2411(c) (2006)] in November 2000"); Sw. Ctr. for Biological Diversity v. USDA, 314 F.3d 1060, 1062 (9th Cir. 2002) (determining that agency may rely on National Parks Omnibus Management Act, 16 U.S.C. § 5937 (2006), to withhold information, even though statute was enacted after FOIA litigation commenced); Times Publ'g Co., 236 F.3d at 1292 (finding that agency properly relied upon section 12(c)(1) of Export Administration Act of 1979, 50 U.S.C. app. § 2411(c)(1) (2006), to withhold information, even though statute had lapsed at time of request, where Congress re-enacted statute during course of litigation); Long, 742 F.2d at 1183-84 (permitting retroactive application where court determined "[t]hat Congress intended the [Economic Tax Recovery Act, Pub. L. No. 97-34, § 701(a), 95 Stat. 172,] amendment to apply to this litigation is beyond all question"); Chamberlain v. Kurtz, 589 F.2d 827, 835 (5th Cir. 1979) (applying amended version of Internal Revenue Code to pending case where court determined that no injustice would result); Lee Pharm. v. Kreps, 577 F.2d 610, 614 (9th Cir. 1978) (same); see also Am. Jewish Cong. v. Kreps, 574 F.2d 624, 627 (D.C. Cir. 1978) (applying amended version of Exemption 3 to pending case).

[20] 603 F.2d 945 (D.C. Cir. 1979).

[21] Id. at 952.

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

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

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

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

[25] See, e.g., Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981) (concluding that Rule 6(e) of Federal Rules of Criminal Procedure, regulating disclosure of matters occurring before grand jury, satisfies Exemption 3's statute requirement because it was specially amended by Congress); Durham v. U.S. Atty. Gen., No. 06-843, 2008 WL 620744, at *2 (E.D. Tex. Mar. 3, 2008) (noting that, "[w]hile courts have held that most of the rules contained in the Federal Rules of Civil and Criminal Procedure do not qualify as a statute for the purposes of [Exemption 3], Rule 6 of the Rules of Criminal Procedure qualifies because it was enacted by Congress"); Berry v. DOJ, 612 F. Supp. 45, 49 (D. Ariz. 1985) (determining that Rule 32 of Federal Rules of Criminal Procedure, governing disclosure of presentence reports, is properly considered statute for Exemption 3 purposes because it was enacted into law by Congress in 1975); see also Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 776 (E.D. Pa. 2008) (stating that "Rule 6(e)[of the Federal Rules of Criminal Procedure] is a statutory mandate that automatically invokes Exemption 3"); cf. Lykins v. DOJ, 725 F.2d 1455, 1462 n.7 (D.C. Cir. 1984) (holding that standing order of district court has no nondisclosure effect under FOIA where "[t]here is no indication that the . . . [d]istrict [c]ourt's order had anything to do with any concrete case or controversy before it").

can qualify as a statute under Exemption 3 in a FOIA case.[26]

Once it is established that a statute is a nondisclosure statute and that it meets at least one of the two subparts of Exemption 3, an agency next must establish that the records in question fall within the withholding provision of the nondisclosure statute.[27] This, in turn, often will require an interpretation of the scope of the nondisclosure statute.[28] Courts have been somewhat divided over whether to construe the withholding criteria of the nondisclosure statute narrowly, consistent with the strong disclosure policies specifically embodied in the FOIA,[29] or broadly, pursuant to deferential standards of general administrative law.[30] As the

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

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

[28] See, e.g., A. Michael's Piano, Inc., 18 F.3d at 143-45 (interpreting section 21(f) of FTC Act, 15 U.S.C. § 57b-2(f) (2006)); Aronson, 973 F.2d at 965-66 (interpreting 26 U.S.C. § 6103 (2006)); Anderson v. HHS, 907 F.2d 936, 950-51 (10th Cir. 1990) (interpreting section 520j(c) of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360j(c) (2006), and section 301(j) of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(j) (2006)); Grasso v. IRS, 785 F.2d 70, 74-75 (5th Cir. 1984) (interpreting section 6103 of Internal Revenue Code, 26 U.S.C. § 6103 (2006)); Medina-Hincapie v. Dep't of State, 700 F.2d 737, 743-44 (D.C. Cir. 1983) (interpreting section 222(f) of Immigration and Nationality Act, 8 U.S.C. § 1202(f) (2006)).

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

Court of Appeals for the Second Circuit observed in A. Michael's Piano, Inc. v. FTC,[31] "the Supreme Court has never applied a rule of [either] narrow or deferential construction to withholding statutes."[32] 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."[33] In interpreting the statutory provision in question, the Second Circuit began its analysis by looking at the plain language of the statute and, when it discovered that "[the statute's] plain language sheds no light on how courts should construe this withholding statute," it then looked to the statute's legislative history to discern the "legislative purpose" behind the provision.[34]

Under Exemption 3, judicial review under the FOIA of agency action is generally limited to determinations that the withholding statute qualifies as an Exemption 3 statute and that the records fall within the statute's scope.[35] With respect to subpart (B) statutes – which permit agencies some discretion to withhold or disclose records – the agency's exercise of its discretion under the withholding statute has been found to be governed not by the FOIA, but

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

[30] See Church of Scientology Int'l v. DOJ, 30 F.3d 224, 235 (1st Cir. 1994) (finding that, "unlike actions under other FOIA exemptions, agency decisions to withhold materials under Exemption 3 are entitled to some deference"); Aronson, 973 F.2d at 967 (determining that, "once a court determines that the statute in question is an Exemption 3 statute, and that the information requested at least arguably falls within the statute, FOIA de novo review normally ends" and "[a]ny further review must take place under more deferential, administrative law standards"); cf. White v. IRS, 707 F.2d 897, 900-01 (6th Cir. 1983) (holding that agency determination that documents in dispute fell within withholding provision of Internal Revenue Code was "neither arbitrary nor capricious").

[31] 18 F.3d 138 (2d Cir. 1994).

[32] Id. at 144.

[33] Id.

[34] Id.

[35] See Aronson, 973 F.2d at 967; Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd., 830 F.2d 331, 335 (D.C. Cir. 1987); see also Cozen O'Connor, 570 F. Supp. 2d at 775 (noting that, "[u]nlike other FOIA exemptions, Exemption 3's applicability does not depend upon the contents of the documents," and stating that, because "[i]t is the nature of the document, not its contents, that makes it exempt[,] . . . . the agency need only show that the documents are within the category of documents specifically exempt from disclosure by the statute").

by the withholding statute itself.[36]

Agencies and courts ordinarily specify the nondisclosure statutes upon which Exemption 3 withholdings are based, but the District Court for the District of Columbia has on occasion concealed the nondisclosure statute that formed the basis for its ruling that the agency properly invoked Exemption 3, stating that "national security would be compromised and threats to the safety of individuals would arise" if the court engaged in a specific discussion of the legal basis for Exemption 3's use in those exceptional cases.[37]

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

A wide range of federal laws qualify as Exemption 3 statutes. In the past, courts usually placed emphasis on specifying whether a statute qualifies as an Exemption 3 statute under subpart (A), which encompasses statutes that require information to be withheld and leave the agency no discretion on the issue, or subpart (B), which encompasses statutes that either provide criteria for withholding information or refer to particular matters to be withheld, either explicitly or implicitly.[38] Although this practice is by no means obsolete, courts do not

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[36] See Aronson, 973 F.2d at 966; Ass'n of Retired R.R. Workers, 830 F.2d at 336.

[37] Simpson v. Dep't of State, No. 79-0674, 2 Gov't Disclosure Serv. (P-H) ¶ 81,280, at 81,798 (D.D.C. Apr. 30, 1981) (concluding that Exemption 3 authorized withholding of State Department's "Biographic Register" of federal employees, but declining to "discuss the [in camera] submission [of the Exemption 3 claim]" or identify Exemption 3 statute serving as basis for withholding, where "national security would be compromised and threats to the safety of individuals would arise upon specific discussion of the in camera submission"); see also Haddam v. FBI, No. 01-434, slip op. at 28 (D.D.C. Sept. 8, 2004) (protecting twenty-three pages of documents described in agency's in camera affidavit pursuant to Exemption 3, but declining to name nondisclosure statute upon which agency relied where court determined that "no further information as to this exemption should be disclosed on the public record").

[38] See, e.g., Lessner v. U.S. Dep't of Commerce, 827 F.2d 1333, 1336-37 (9th Cir. 1987) (finding that section 12(c)(1) of Export Administration Act of 1979, 50 U.S.C. app. § 2411(c)(1) (2006) (statutory authority most recently expired on August 20, 2001, as required by 50 U.S.C. app. § 2419 (2006), but has been re-extended several times in past, in substantially identical form), qualified as Exemption 3 statute and specifying that statute qualified under subpart (B)); Piper & Marbury, L.L.P. v. USPS, No. 99-2383, 2001 WL 214217, at *3-5 (D.D.C. Mar. 6, 2001) (magistrate's recommendation) (same), adopted, No. 99-2383 (D.D.C. Mar. 29, 2001); McGilvra v. NTSB, 840 F. Supp. 100, 102 (D. Colo. 1993) (finding that Transportation Safety Act of 1974, 49 U.S.C. § 1114(c) (2006), qualified as Exemption 3 statute and specifying that statute qualified under subpart (A)); Young Conservative Found. v. U.S. Dep't of Commerce, No. 85-3982, 1987 WL 9244, at *3-4 (D.D.C. Mar. 25, 1987) (finding that International Investment Survey Act of 1976, 22 U.S.C. § 3104(c) (2006), qualified as Exemption 3 statute and specifying that statute qualified under subpart (A)); Motion Picture Ass'n of Am. v. DOJ, No. 80 Civ. 6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981) (finding that provision of Antitrust Civil Process Act, 15 U.S.C. § 1314(g) (2006), qualified as Exemption 3 statute and specifying that statute qualified under subpart (A)); Nat'l W. Life Ins. Co. v. United States, 512 F. Supp. 454, 459, 462 (N.D. Tex. 1980) (finding that provision of Postal Reorganization Act, 39 U.S.C. § 410(c)(2) (2006), qualified

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

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

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[38](...continued)
as Exemption 3 statute and specifying that statute qualified under subpart (B)).

[39] See, e.g., Berger v. IRS, 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007) (finding that "[31 U.S.C.] § 5319 [2006] qualifies as an exempting statute under Exemption 3," but failing to specify whether court considered statute to qualify under subpart (A) or (B)), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008), cert. denied, No. 08-884, 2009 WL 1650205 (U.S. June 15, 2009); Nat'l Inst. of Military Justice v. DOD, 404 F. Supp. 2d 325, 335-37 (D.D.C. 2005) (holding that 10 U.S.C. § 130c (2006) is Exemption 3 statute without specifying under which subpart it qualifies), aff'd on other grounds, 512 F.3d 677 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 775 (2008); ACLU v. DOD, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same); Vosburgh v. IRS, No. No. 93-1493, 1994 WL 564699, at *4 (D. Or. July 5, 1994) (recognizing 31 U.S.C. § 5319 (2006) as statute qualifying under Exemption 3, but failing to identify Exemption 3 subpart by which statute qualified), aff'd, 106 F.3d 411 (9th Cir. 1997) (unpublished table decision); Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992) (same); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988) (same), aff'd, 890 F.2d 419 (8th Cir. 1989) (unpublished table decision).

[40] 7 U.S.C. § 136i-1 (2006).

[41] See Doe v. Veneman, 380 F.3d 807, 818 (5th Cir. 2004).

[42] 2 U.S.C. § 437g(a)(12)(A) (2006).

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

[44] (2006).

[45] (2006).

[46] See Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 110 n.10 (D.D.C. 2005) (finding that both 49 U.S.C. § 114(s) and 49 U.S.C. § 40119(b) qualify as Exemption 3 statutes (continued...)

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

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generally), supplemental motion for summary judgment granted sub nom. Elec. Privacy Info. Ctr. v. TSA, No. 03-1846, 2006 WL 626925 (D.D.C. Mar. 12, 2006); Gordon v. FBI, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004) (holding that "there is no dispute that these statutes fall within Exemption 3"); see also Tooley v. Bush, No. 06-306, 2006 WL 3783142, at *19 (D.D.C. Dec. 21, 2006) (holding that 49 U.S.C. § 114(s) qualifies as Exemption 3 statute), rev'd & remanded in part on other grounds sub nom. Tooley v. Napolitano, 556 F.3d 836 (D.C. Cir. 2009).

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

[48] (2006).

[49] Jennings v. FBI, No. 03-1651, slip op. at 11 (D.D.C. May 6, 2004).

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

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

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

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

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

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[52] 18 U.S.C. §§ 2510-2520 (2006).

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

[54] 42 U.S.C. § 3610(d) (2006).

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

[56] 13 U.S.C. §§ 8(b), 9(a) (2006).

[57] Baldrige v. Shapiro, 455 U.S. 345, 355, 359 (1982).

[58] § 501, 15 U.S.C. § 6801 (2006).

[59] 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").

[60] (2006).

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

[62] 38 U.S.C. § 7332 (2006).

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

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

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

[64] See 38 U.S.C. § 5705(a) (2006).

[65] See Schulte & Sun-Sentinel Co. v. VA, No. 86-6251, slip op. at 3-4 (S.D. Fla. Feb. 2, 1996) (allowing agency to withhold mortality statistics).

[66] 10 U.S.C. § 1102(a) (2006).

[67] See Goodrich v. Dep't of the Air Force, 404 F. Supp. 2d 48, 50, 51 (D.D.C. 2005) (holding that DOD's medical quality-assurance statute, qualifies as Exemption 3 statute protecting "minutes of Credentials Functions meetings and [Medical Practice Review Boards]," but failing to identify statute as qualifying under subpart (A) or (B)); Dayton Newspapers, Inc. v. Dep't of the Air Force, 107 F. Supp. 2d 912, 917 (S.D. Ohio 1999) (finding that 10 U.S.C. § 1102 qualifies as Exemption 3 statute protecting "all 'medical quality assurance records,' regardless of whether the contents of such records originated within or outside of a medical quality assurance program," but failing to specify Exemption 3 subpart under which statute qualifies).

[68] (2006).

[69] Id. § 130c(a).

[70] See Nat'l Inst. of Military Justice v. DOD, 404 F. Supp. 2d 325, 335-37 (D.D.C. 2005) (holding that 10 U.S.C. § 130c is Exemption 3 statute without specifying under which subpart it qualifies), aff'd on other grounds, 512 F.3d 677 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 775 (U.S. 2008); ACLU v. DOD, 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (same).

[71] §§ 1-14, 16 U.S.C. §§ 470aa-470mm (2006).

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

without specifying under which subpart the Act qualifies.[73]

Subpart (A) Statutes

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

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

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

[75] Fed. R. Crim. P. 6(e).

[76] See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981) (concluding that Rule 6(e) of Federal Rules of Criminal Procedure, regulating disclosure of matters occurring before grand jury, satisfies Exemption 3's statute requirement because Rule 6(e) was amended by Congress); Durham v. U.S. Atty. Gen., No. 06-843, 2008 WL 620744, at *2 (E.D. Tex. Mar. 3, 2008) (noting that, "[w]hile courts have held that most of the rules contained in the Federal Rules of Civil and Criminal Procedure do not qualify as a statute for the purposes of [5 U.S.C. §] 552(b)(3), Rule 6 of the Rules of Criminal Procedure qualifies because it was enacted by Congress"); see also Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 776 (E.D. Pa. 2008) (stating that "Rule 6(e)[of the Federal Rules of Criminal Procedure] is a statutory mandate that automatically invokes Exemption 3").

[77] Iglesias v. CIA, 525 F. Supp. 547, 556 (D.D.C. 1981); see also Cozen O'Connor, 570 F. Supp. 2d at 776 (declaring that "[Rule 6(e)] is not discretionary"; rather, Rule 6(e) "covers not just grand jury transcripts, but all matters that could tend to reveal what occurred or was occurring in the grand jury, including identities of witnesses, questions asked by prosecutors or grand jurors, testimony of witnesses, or anything that could reveal the course of the investigation"); Tel. Publ'g Co. v. DOJ, No. 95-521-M, slip op. at 16-18, 26-27 (D.N.H. Aug. 31, 1998) (citing Exemption 3 together with Rule 6(e) as partial basis for protecting information related to grand jury, including correspondence between U.S. Attorney's Office and nongovernment attorneys pertaining to grand jury, even where correspondence was not shown to grand jury and evidence notebooks were created by local police at direction of AUSA, because disclosure would "probably . . . reveal too much about evidence presented to the grand jury"); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 27-28 (D.D.C. 1998) (permitting agency to withhold transcripts of conversations that were taped during course of FBI investigation and were subsequently subpoenaed by grand jury); McQueen v. United

(continued...)

Defining the parameters of Rule 6(e) protection, however, is not always a simple task and has been the subject of much litigation. In Fund for Constitutional Government v. National Archives & Records Service,[78] 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.'"[79] 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.[80]

(...continued)
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).

[78] 656 F.2d 856 (D.C. Cir. 1981).

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

[80] See Leon v. United States, 250 F. App'x 507, 509 (3d Cir. 2007) (per curiam) (holding that "Rule 6 establishes a presumption of nondisclosure of Grand Jury materials" and concluding that district court properly dismissed complaint where "[requester's] complaint does not allege any ground for disclosure of Grand Jury materials under Rule 6(e)(3)"); Peltier v. FBI, 218 F. App'x 30, 31 (2d Cir. 2007) (finding "grand jury subpoenas, information identifying grand jury witnesses, information identifying records subpoenaed by the grand jury, and the dates of grand jury testimony" properly protected pursuant to Exemption 3); United States v. Kearse, 30 F. App'x 85, 86 (4th Cir. 2002) (per curiam) (holding that Rule 6(e) prohibits FOIA disclosure of grand jury transcripts); Rugiero v. DOJ, 257 F.3d 534, 549 (6th Cir. 2001) (protecting grand jury transcripts, exhibits, and identities of witnesses); Church of Scientology Int'l v. DOJ, 30 F.3d 224, 235 (1st Cir. 1994) (noting that "documents identified as grand jury exhibits, and whose contents are testimonial in nature or otherwise directly associated with the grand jury process, such as affidavits and deposition transcripts, ordinarily may be withheld simply on the basis of their status as exhibits"); McDonnell v. United States, 4 F.3d 1227, 1246-47 (3d Cir. 1993) (protecting "[i]nformation and records presented to a federal grand jury[,] . . . names of individuals subpoenaed[,] . . . [and] federal grand jury transcripts of testimony," and recognizing "general rule of secrecy" with regard to grand jury records); Silets v. DOJ, 945 F.2d 227, 230 (7th Cir. 1991) (concluding that "identity of witness before a grand jury and discussion of that witness'[s] testimony" are exempt from disclosure, as they "fall[] squarely within" Rule 6(e)'s prohibition); Thompson v. EOUSA, 587 F. Supp. 2d 202, 208 (D.D.C. 2008) (finding grand jury transcript and grand jury exhibit properly protected pursuant to Exemption 3 and Rule 6(e)); Kishore v. DOJ, 575 F. Supp. 2d 243, 255 (D.D.C. 2008) (protecting grand jury subpoenas, names and other identifying information pertaining to individuals subpoenaed to testify before grand jury, and information identifying records subpoenaed by grand jury); Singh v. FBI, 574 F. Supp. 2d 32, 45 (D.D.C. 2008) (protecting "identities of witnesses and the records subpoenaed by a grand jury" pursuant to Exemption 3); Antonelli v. ATF, 555 F. Supp. 2d 16, 25 (D.D.C. 2008) (holding that form pertaining to securing third party's testimony before grand (continued...)

In its scrutiny of the scope of Rule 6(e) in Senate of Puerto Rico v. DOJ,[81] 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).[82]

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[80](...continued)
jury was properly protected pursuant to Exemptions 3 and 5); Durham, 2008 WL 620744, at *2-3 (protecting grand jury balloting where "[plaintiff] . . . failed to demonstrate a particularized need for disclosure of the grand jury materials"); Peay v. DOJ, No. 04-1859, 2007 WL 788871, at *3-4 (D.D.C. Mar. 14, 2007) (finding "names and other identifying information of individuals subpoenaed to testify before the grand jury, [and] information identifying specific records subpoenaed by the grand jury" properly protected); Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 WL 259941, at *6 (D.D.C. Jan. 30, 2007) (protecting grand jury subpoenas); Boyd v. ATF, No. 05-1096, 2006 WL 2844912, at *6 (D.D.C. Sept. 29, 2006) (protecting grand jury transcripts); Meserve v. DOJ, No. 04-1844, 2006 WL 2366427, at *3 n.5 (D.D.C. Aug. 14, 2006) (protecting grand jury "correspondence, witness subpoenas, transcripts, and evidence"); Peay v. DOJ, No. 04-1859, 2006 WL 1805616, at *2 (D.D.C. June 29, 2006) (holding that agency properly protected grand jury investigation request and referral, prosecutor's recommendation based on grand jury's investigation, and unsigned grand jury indictment; however, agency failed to show whether segregability requirements were met); Boyd v. Criminal Div., DOJ, No. 04-1100, 2005 WL 555412, at *6 (D.D.C. Mar. 9, 2005) (protecting identities of grand jury witnesses), aff'd on other grounds, 475 F.3d 381 (D.C. Cir. 2007), cert. denied sub nom. Boyd v. U.S. Marshals Service, 128 S. Ct. 511 (2007); Brunetti v. FBI, 357 F. Supp. 2d 97, 105 (D.D.C. 2004) (protecting "grand jury subpoenas, names and identifying information of the individuals named in the subpoenas, records subpoenaed by the grand jury, and the dates of grand jury meetings"); Twist v. Reno, No. 95-258, 1997 U.S. Dist. LEXIS 8981, at *5 n.1 (D.D.C. May 12, 1997) (holding that agency properly withheld information that would reveal strategy or direction of grand jury investigation, even though requester was previously on investigation team and had seen some of withheld information), summary affirmance granted, No. 97-5192, 1997 WL 811736 (D.C. Cir. Dec. 9, 1997); Jimenez v. FBI, 938 F. Supp. 21, 28 (D.D.C. 1996) (protecting notes written by AUSA in preparation for grand jury proceeding, records of third parties provided in course of proceeding, and notes concerning witnesses who testified); Canning v. DOJ, No. 92-0463, slip op. at 6 (D.D.C. June 26, 1995) (protecting "material that, while not directly mentioning the grand jury," nevertheless mentions witness names and describes witness testimony).

[81] 823 F.2d 574 (D.C. Cir. 1987).

[82] See id. at 584; see also Wash. Post Co. v. DOJ, 863 F.2d 96, 100 (D.C. Cir. 1988) (finding that record created before grand jury was impanelled did not independently reveal anything about grand jury and thus was not covered by Rule 6(e) -- even though record was subpoenaed by grand jury, was available to jurors, and was used by prosecutors to question grand jury witnesses); John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) (declaring that "[a] document that is otherwise available to the public does not become confidential simply because it is before a grand jury"), rev'd on other grounds, 493 U.S. 146 (1989); Cozen O'Connor, 570 F. Supp. 2d at 776 (remarking that "[j]ust because information was either obtained by a grand jury subpoena or was submitted to a grand jury does not make it exempt"; rather, "[t]o be exempt, the information must reveal some aspect of the grand jury's
(continued...)

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

[82](...continued)
investigation" and "the connection to the investigation must be apparent, especially for documents created independent of and extrinsic to the grand jury investigation"); Tel. Publ'g, No. 95-521-M, slip op. at 11 (D.N.H. Aug. 31, 1998) (noting that "Exemption 3 . . . does not protect all information that is found in grand jury files since mere exposure to a grand jury does not, by itself, immunize information from disclosure").

[83] Senate of P.R., 823 F.2d at 584; see also Sussman v. U.S. Marshals Service, 494 F.3d 1106, 1113 (D.C. Cir. 2007) (vacating district court's finding that U.S. Marshals Service properly withheld category of records where agency "has failed to demonstrate disclosure would 'tend to reveal some secret aspect of the grand jury's investigation'" (quoting Senate of P.R., 823 F.2d at 582)); Lopez v. DOJ, 393 F.3d 1345, 1349-51 (D.C. Cir. 2005) (holding that agency "failed to meet its burden of demonstrating some 'nexus between disclosure [of date of prosecutor's preliminary witness interview] and revelation of a protected aspect of the grand jury's investigation'" (quoting Senate of P.R., 823 F.2d at 584)); Peay, 2007 WL 788871, at *3-4 (finding "names and other identifying information of individuals subpoenaed to testify before the grand jury, [and] information identifying specific records subpoenaed by the grand jury" properly protected, but also holding that agency "has not . . . explained how the disclosure of the dates the grand jury convened would tend to reveal a 'secret aspect' of the grand jury investigation and therefore is not entitled to summary judgment on the redacted dates"); Homick v. DOJ, No. 98-00557, slip op. at 16-17 (N.D. Cal. Sept. 16, 2004) (protecting "names and identifying information of grand jury witnesses," but ordering disclosure of information that agency described only as "type of records subpoenaed by the grand jury," because agency failed to meet its burden of showing how such information "is exempt from disclosure"); LaRouche v. U.S. Dep't of the Treasury, No. 91-1655, 2000 WL 805214, at *8 (D.D.C. Mar. 31, 2000) (observing that, "[a]lthough the IRS has alleged with sufficient specificity in many instances how Exemption 3 and Rule 6(e) are applicable, there are several documents for which the required nexus between the information withheld and a protected interest has not been demonstrated," and ordering release of information (e.g., location of grand jury proceedings, case number) for which agency failed to demonstrate sufficient nexus); Tel. Publ'g, No. 95-521-M, slip op. at 11 (D.N.H. Aug. 31, 1998) (requiring that agencies show nexus between disclosure of withheld information and impermissible revelation of grand jury matters to invoke protection of Exemption 3); Greenberg, 10 F. Supp. 2d at 27-28 (finding that nexus was established because releasing transcripts of taped conversations would show "direction or path the Grand Jury was taking"); LaRouche v. DOJ, No. 90-2753, 1993 WL 388601, at *5 (D.D.C. June 25, 1993) (holding that "[agency] has not met its burden of showing that it is entitled to withhold [letter prepared by government attorney discussing upcoming grand jury proceedings]" where agency "presented no specific factual basis to support the conclusion that disclosure of this document would reveal confidential aspects of grand jury proceedings where the grand jury had not even started its work").

[84] 534 F.3d 728 (D.C. Cir. 2008).

by Exemption 3, simply by submitting it as a grand jury exhibit."[85]

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

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[85] 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").

[86] Senate of P.R., 823 F.2d at 584.

[87] 863 F.2d 96 (D.C. Cir. 1988).

[88] Id. at 100.

[89] See, e.g., Sussman, 494 F.3d at 1113; Lopez, 393 F.3d at 1349-51; Peay, 2007 WL 788871, at *3-4; Maydak v. DOJ, 254 F. Supp. 2d 23, 42 (D.D.C. 2003) (stating that court could not determine whether agency properly invoked Exemption 3 where neither Vaughn Index nor agency's declaration described specific records withheld); LaRouche, 2000 WL 805214, at *7-8 (holding that agency affidavit demonstrated nexus between disclosure and revelation of secret aspects of grand jury for most records withheld under 6(e), but ordering release where agency failed to demonstrate nexus); Hronek v. DEA, 16 F. Supp. 2d 1260, 1276 (D. Or. 1998) (requiring agency to resubmit Vaughn Index and explain how disclosure of subpoenas would "compromise the integrity of the grand jury process"), aff'd, 7 F. App'x 591 (9th Cir. 2001); Sousa v. DOJ, No. 95-375, 1997 U.S. Dist. LEXIS 9010, at *10-11 (D.D.C. June 19, 1997) (holding that supplemental Vaughn Index adequately demonstrated that disclosure of grand jury witness subpoenas, AUSA's handwritten notes discussing content of witness testimony, evidence used, and strategies would reveal protected aspects of grand jury investigation); Kronberg v. DOJ, 875 F. Supp. 861, 867-68 (D.D.C. 1995) (ordering grand jury material released where prior disclosure was made to defense counsel and where government had not met burden of demonstrating that disclosure would reveal inner workings of grand jury).

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

The Court of Appeals for the First Circuit, in Church of Scientology International v. DOJ,[91] took a different approach from the D.C. Circuit and established different standards for certain categories of grand jury records.[92] In Church of Scientology International, the First Circuit found that "documents identified as grand jury exhibits, and whose contents are testimonial in nature or otherwise directly associated with the grand jury process, such as affidavits and deposition transcripts, ordinarily may be withheld simply on the basis of their status as exhibits."[93] The First Circuit "distinguish[ed] such materials from business records or similar documents 'created for purposes independent of grand jury investigations, which have legitimate uses unrelated to the substance of the grand jury proceedings,'" noting that "[a]lthough these documents, too, may be subject to nondisclosure under Exemption 3 if they are grand jury exhibits, the government needs to provide some basis for a claim that releasing them will implicate the secrecy concerns protected by Rule 6(e)."[94] 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.[95]

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

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

[91] 30 F.3d 224 (1st Cir. 1994).

[92] Id. at 235-36.

[93] Id. at 235; see also Rugiero, 257 F.3d at 549 (holding that "documents identified as grand jury exhibits or containing testimony or other material directly associated with grand jury proceedings fall within [Exemption 3] without regard to whether one of the Rule 6(e)(3) exceptions allows disclosure" but that "[d]ocuments created for reasons independent of a grand jury investigation do not," without acknowledging that many grand jury exhibits are created for "reasons independent" of grand jury investigation); Church of Scientology International, 30 F.3d at 235 n.15 (dictum) (finding that it is "reasonable for an agency to withhold any document containing a grand jury exhibit sticker or that is otherwise explicitly identified on its face as a grand jury exhibit, as release of such documents reasonably could be viewed as revealing the focus of the grand jury investigation").

[94] Church of Scientology International, 30 F.3d at 235.

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

[96] § 107, 5 U.S.C. app. § 4 (2006).

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

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

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

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

[98] Ethics in Government Act § 205 (repealed as of Jan. 1, 1991).

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

[100] 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (2006).

[101] See Frito-Lay v. EEOC, 964 F. Supp. 236, 240-43 (W.D. Ky. 1997) (recognizing 42 U.S.C. § 2000e-8(e) as withholding statute under FOIA, and finding that agency properly applied 42 U.S.C. § 2000e-8(e) and FOIA Exemption 3 to withhold requester's charge file); Am. Centennial Ins. Co. v. EEOC, 722 F. Supp. 180, 184 (D.N.J. 1989) (determining that "[sections] 706(b) and 709(e) [of the Civil Rights Act, 42 U.S.C. §§ 2000e-5(b), 2000e-8(e),] fall within Exemption 3 of the FOIA and prohibit the EEOC from disclosing the requested information to the plaintiff," and expressly rejecting argument that statute did not qualify under subpart (A) of Exemption 3); see also Crump v. EEOC, No. 3:97-0275, slip op. at 5-6 (M.D. Tenn. June 18, 1997) (finding that agency met its burden of demonstrating records were properly withheld pursuant to Exemption 3, through 42 U.S.C. § 2000e-5(b), but failing to identify under which Exemption 3 subpart § 2000e-5(b) qualifies); cf. EEOC v. City of Milwaukee, 54 F. Supp. 2d 885, 893 (E.D. Wis. 1999) (noting that "any member of the public making a FOIA request" for materials at issue in this non-FOIA dispute "will be denied access, because Exemption 3 incorporates confidentiality provisions of sections 706(b) and 709(e)").

[102] 31 U.S.C. § 5319 (2006).

[103] See Sciba v. Bd. of Governors of the Fed. Reserve Sys., No. 04-1011, 2005 WL 3201206, (continued...)

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

Similarly, a provision of the Antitrust Civil Process Act,[109] which exempts from the FOIA

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

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

[105] 22 U.S.C. § 3104(c) (2006).

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

[107] § 6(a)(2), (b)(5), 15 U.S.C. § 2055(a)(2), (b)(5) (2006).

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

[109] 15 U.S.C. § 1314(g) (2006).

transcripts of oral testimony taken in the course of investigations under that Act,[110] has been held to qualify as a subpart (A) statute.[111] Also, a section of the Transportation Safety Act of 1974,[112] which states that the NTSB shall withhold from public disclosure cockpit voice recordings associated with accident investigations, was found to fall within subpart (A) of Exemption 3.[113] Similarly, information contained in the SSA's "Numident system," which was obtained from death certificates provided by state agencies, has been held exempt on the basis of subpart (A) on the grounds that the language of the statute[114] "leaves no room for agency discretion."[115]

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

Subpart (B) Statutes

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

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[110] See id.

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

[112] 49 U.S.C. § 1114(c) (2006).

[113] McGilvra v. NTSB, 840 F. Supp. 100, 102 (D. Colo. 1993).

[114] 42 U.S.C. § 405(r) (2006).

[115] 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).

[116] 5 U.S.C. § 552b(c)(3) (2006).

[117] § 315(a), (g), 42 U.S.C. § 2286d(a), (g)(3) (2006).

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

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

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

For example, a provision of the Consumer Product Safety Act[121] has been held to set forth sufficiently definite withholding criteria for it to fall within the scope of subpart (B) of Exemption 3.[122] 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[123] has been held to meet the requirements of subpart (B) by referring to particular types of matters to be withheld.[124]

Section 777 of the Tariff Act of 1930, which governs the withholding of certain "proprietary information,"[125] has been held to refer to particular types of information to be withheld and thus to be a subpart (B) statute.[126] Section 12(d) of the Railroad Unemployment Insurance Act[127] refers to particular types of matters to be withheld – specifically, information which would reveal employees' identities -- and thus has been held to satisfy subpart (B).[128] Similarly, 39 U.S.C. § 410(c)(2),[129] 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,"[130] has been held to refer to "particular types of matters to be withheld" and thus to be a subpart (B) statute.[131] Likewise, 18 U.S.C. § 3509(d),

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

[121] 15 U.S.C. § 2055(b)(1) (2006).

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

[123] 15 U.S.C. § 2055(b)(5).

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

[125] 19 U.S.C. § 1677f (2006).

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

[127] 45 U.S.C. § 362(d) (2006).

[128] See Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd., 830 F.2d 331, 334 (D.C. Cir. 1987); Nat'l Ass'n of Retired & Veteran Ry. Employees v. R.R. Ret. Bd., No. 87-117, slip op. at 5 (N.D. Ohio Feb. 20, 1991).

[129] (2006).

[130] Id.

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

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

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

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[131](...continued)
properly withheld "quantity and pricing" information related to contract for which requester was unsuccessful bidder); Reid v. USPS, No. 05-294, 2006 WL 1876682, at *5-9 (S.D. Ill. July 5, 2006) (finding customer's postage statements and agency's daily financial statements properly protected); Airline Pilots Ass'n, Int'l v. USPS, No. 03-2384, 2004 WL 5050900, at *5-7 (D.D.C. June 24, 2004) (holding that agency properly withheld pricing and rate information, methods of operation, performance requirements, and terms and conditions from transportation agreement with FedEx); Robinett v. USPS, No. 02-1094, 2002 WL 1728582, at *5 (E.D. La. July 24, 2002) (finding that agency properly withheld job-applicant information under 39 U.S.C. § 410(c)(2) because it falls within agency's regulatory definition of "information of a commercial nature"); cf. Carlson v. USPS, 504 F.3d 1123, 1127 (9th Cir. 2007) (assuming "without deciding that 39 U.S.C. § 410(c)(2) qualifies as an Exemption 3 statute," but ultimately determining that requested records fell outside statute's scope); Piper & Marbury, L.L.P. v. USPS, No. 99-2383, 2001 WL 214217, at *3-5 (D.D.C. Mar. 6, 2001) (magistrate's recommendation) (acknowledging statute as qualifying under subpart (B) of Exemption 3 but finding that contract in question did not constitute "commercial information" within scope of 39 U.S.C. § 410(c)(2)), adopted, No. 99-2383 (D.D.C. Mar. 29, 2001); Nat'l W. Life Ins. Co. v. United States, 512 F. Supp. 454, 459, 462 (N.D. Tex. 1980) (finding that "[39 U.S.C. §] 410(c)(2) qualifies as an exemption statute under 5 U.S.C. § 552(b)(3)(B)," but concluding that list of names and duty stations of postal employees did not qualify as "commercial information").

[132] (2006).

[133] Tampico v. EOUSA, No. 04-2285, slip op. at 8 (D.D.C. Apr. 29, 2005).

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

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

203(a)(1) of the International Emergency Economic Powers Act,[136] a statute "enacted . . . out of concern that export controls remain in place without interruption" and intended "to authorize the President to preserve the operation of the export regulations promulgated under the [Export Administration Act]" during repeated periods of lapse, also qualifies under Exemption 3.[137] Similarly, courts have held that DOD's "technical data" statute,[138] which protects technical information with "military or space application" for which an export license is required, satisfies subpart (B) because it refers to sufficiently particular types of matters.[139] Likewise, the Collection and Publication of Foreign Commerce Act,[140] which explicitly provides for nondisclosure of shippers' export declarations, qualifies as an Exemption 3 statute under subpart (B).[141]

One district court has determined that a provision of the Procurement Integrity Act,[142]

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[135](...continued)
May 26, 1993) (holding that protection under Export Administration Act, 50 U.S.C. app. § 2411(c)(1), was properly applied to agency denial made after Act expired in 1990 and before its subsequent re-extension in 1993); Lessner v. U.S. Dep't of Commerce, 827 F.2d 1333, 1336-37 (9th Cir. 1987) (construing statute as effective in 1987 and determining that statute qualified under subpart (B) of Exemption 3); cf. Durrani v. DOJ, 607 F. Supp. 2d 77, 86 (D.D.C. 2009) (finding that "[22 U.S.C. §] 2778(e) [2006] . . . , by incorporation of the Export Administration Act [, 50 U.S.C. app. § 2411(c)(1),] . . . exempts from FOIA disclosure 'information obtained for the purpose of consideration of, or concerning, license applications under [the Export Administration Act] . . . unless the release of such information is determined by the [Commerce] Secretary to be in the national interest,'" without acknowledging that Export Administration Act had lapsed); Council for a Livable World v. U.S. Dep't of State, No. 96-1807, slip op. at 11 (D.D.C. Jan. 21, 1998) (finding that section 12(c)(1) of Export Administration Act, 50 U.S.C. app. § 2411(c)(1), as specifically incorporated by reference into Arms Export Control Act, 22 U.S.C. § 2778(e) (2006), is Exemption 3 statute that protects information concerning export license applications -- without acknowledging that Export Administration Act, 50 U.S.C. app. § 2411(c)(1), had lapsed), amended (D.D.C. Nov. 23, 1998).

[136] 50 U.S.C. § 1702(a)(1) (2006).

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

[138] 10 U.S.C. § 130 (2006).

[139] See Chenkin v. Dep't of the Army, No. 93-494, 1994 U.S. Dist. LEXIS 20907, at *8 (E.D. Pa. Jan. 14, 1994), aff'd, 61 F.3d 894 (3d Cir. 1995) (unpublished table decision); Colonial Trading Corp. v. Dep't of the Navy, 735 F. Supp. 429, 431 (D.D.C. 1990).

[140] 13 U.S.C. § 301(g) (2006).

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

[142] 41 U.S.C. § 423 (2006).

which prohibits the disclosure of certain source selection information,[143] is a statute qualifying under subpart (B) of Exemption 3.[144] That Procurement Integrity Act provision -- encompassing pre-award contractor bids, proposal information, and source selection information -- prohibits disclosures only "other than as provided by law," and it also provides that it "does not . . . limit the applicability of any . . . remedies established under any other law or regulation."[145] Another court in a non-FOIA case, however, has found that these exceptions clearly evince congressional intent that the prohibition on disclosure is limited to those disclosures not contemplated by law, such as "leaks."[146]

Exemption 3 protection for information obtained by law enforcement agencies pursuant to the statute governing court-ordered wiretaps, Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[147] has also been recognized as a statute qualifying under subpart (B) of Exemption 3.[148] In Lam Lek Chong v. DEA,[149] the D.C. Circuit, finding that it "clearly identifies intercepted communications as the subject of its disclosure limitations," held that "'Title III falls squarely within the scope of subsection (B)'s second prong, as a statute referring to 'particular matters to be withheld.'"[150] Following the D.C. Circuit's Lam Lek Chong decision, a number of courts have recognized Title III as an Exemption 3 statute, although most did not

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[143] See Legal & Safety Employer Research, Inc. v. U.S. Dep't of the Army, No. Civ. S001748, 2001 WL 34098652, at *4 (E.D. Cal. May 4, 2001) (dictum) (explaining that "Congress limited agency discretion to withhold information to[] 'source selection information,' then carefully identified documents that make up source selection information," and concluding that "court is satisfied that [41 U.S.C. §] 423 is a nondisclosure statute under Exemption 3, subsection B" (quoting 41 U.S.C. § 423(a)(1))). But see Pikes Peak Family Hous., LLC v. United States, 40 Fed. Cl. 673, 680-81 (Cl. Ct. 1998) (rejecting argument that Procurement Integrity Act, 41 U.S.C. § 423, prohibited release of the information in question, construing phrase "other than as provided by law" as necessarily allowing disclosures in civil discovery) (non-FOIA case); cf. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 n.139 (D.C. Cir. 1987) (noting that comparable language in Trade Secrets Act, 18 U.S.C. § 1905 (2006), interrelates with FOIA so as to render any statutory prohibition inapplicable because, under it, "FOIA would provide legal authorization for" disclosure).

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

[145] 41 U.S.C. § 423(h).

[146] Pikes Peak Family Hous., LLC, 40 Fed. Cl. at 680-81 (noting that statute does not apply to legal disclosures but rather "is obviously directed at a situation in which a present or former government procurement officer secretly leaks information concerning a pending solicitation to an offeror participating therein").

[147] See 18 U.S.C. §§ 2510-2520 (2006).

[148] See Lam Lek Chong v. DEA, 929 F.2d 729, 733 (D.C. Cir. 1991).

[149] 929 F.2d 729.

[150] Id. at 733 (quoting 5 U.S.C. § 552(b)(3)).

specify whether Title III qualifies under subpart (A) or (B) of Exemption 3.[151]

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

[151] See Mendoza v. DEA, No. 07-5006, 2007 U.S. App. LEXIS 22175, at *2 (D.C. Cir. Sept. 14, 2007) (per curiam) (finding "information obtained by a wiretap" properly protected pursuant to "FOIA Exemption 3" without specifying under which Exemption 3 subpart statute qualified); Cottone v. Reno, 193 F.3d 550, 553-54 (D.C. Cir. 1999) (noting that "wiretapped recordings obtained pursuant to Title III . . . are ordinarily exempt from disclosure under Exemption 3" with no mention made of Exemption 3 subpart under which statute qualified); Willis v. FBI, No. 98-5071, 1999 WL 236891, at *1 (D.C. Cir. Mar. 19, 1999) (unpublished disposition) (citing Lam Lek Chong for proposition that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, is qualifying statute under FOIA Exemption 3, and ultimately finding that FBI properly withheld two electronic surveillance tapes under Title III and Exemption 3); Payne v. DOJ, No. 96-30840, slip op. at 5-6 (5th Cir. July 11, 1997) (protecting tape recordings "obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act," and holding that "Title III communications 'fall squarely within the scope of Exemption 3' of the FOIA" (quoting Davis v. DOJ, 968 F.2d 1276, 1280-81 (D.C. Cir. 1992)); Miller v. DOJ, 562 F. Supp. 2d 82, 111 (D.D.C. 2008) (recognizing that "information pertaining to wiretaps may be withheld under Exemption 3," but failing to identify which subpart of Exemption 3 applied); Peay v. DOJ, No. 04-1859, 2007 WL 788871, at *3-4 (D.D.C. Mar. 14, 2007) (protecting "wiretap information obtained pursuant to Title III" but failing to identify which subpart of Exemption 3 applied); Jennings v. FBI, No. 03-1651, slip op. at 11 (D.D.C. May 6, 2004) (protecting 346 pages of transcripts of wiretapped communications pursuant to Exemption 3 and "[t]he wiretap statute, 18 U.S.C. § 2510 et seq., [which] explicitly prohibits anyone from disclosing to any other person the contents of any wire, oral or electronic communication intercepted through a wiretap," but failing to identify which subpart of Exemption 3 applied); Sinito v. DOJ, No. 87-0814, slip op. at 12-14 (D.D.C. July 11, 2000) (citing Lam Lek Chong v. DEA, 929 F.2d 729 (D.C. Cir. 1991), for proposition that Title III qualifies under subpart (B) of Exemption 3, and finding Title III applications and orders under court seal properly protected pursuant to FOIA Exemption 3 and 18 U.S.C. § 2518(8)(b)), aff'd per curiam, 22 F. App'x 1 (D.C. Cir. 2001); Manna v. DOJ, 815 F. Supp. 798, 811-12 (D.N.J. 1993) (determining that analysis of audiotapes and identities of individuals conversing on tapes obtained pursuant to Title III are protected under Exemption 3), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995); Manchester v. DEA, 823 F. Supp. 1259, 1267 (E.D. Pa. 1993) (ruling that wiretap applications and derivative information fall within broad purview of Title III), aff'd, 40 F.3d 1240 (3d Cir. 1994) (unpublished table decision); Gonzalez v. DOJ, No. 88-913, 1988 WL 120841, at *2 (D.D.C. Oct. 25, 1988) (holding that 18 U.S.C. § 2511(2)(a)(ii), which regulates disclosure of existence of wiretap intercepts, meets requirements of Exemption 3, without specifying under which subpart statute qualifies); Docal v. Bennsinger, 543 F. Supp. 38, 43-44 (M.D. Pa. 1981) (relying upon entire statutory scheme of 18 U.S.C. §§ 2510-2520, but not distinguishing between Exemption 3 subparts in protecting "written accounts of phone calls monitored pursuant to several wire intercepts"); cf. Smith v. DOJ, 251 F.3d 1047, 1049 (D.C. Cir. 2001) (finding that audiotapes of telephone calls made by inmate on monitored prison telephone were not "interceptions" within scope of Title III and thus were withheld improperly); Cottone, 193 F.3d at 554-56 (noting that wiretapped recordings obtained pursuant to Title III ordinarily are exempt from disclosure under Exemption 3, but holding that Exemption 3 protection was waived when FOIA requester identified specific tapes that had been played in open court by prosecution as evidence during criminal trial).

1947,[152] which required the Director of the CIA to protect "sources and methods," clearly refers to particular types of matters to be withheld and thus comes within the ambit of subpart (B),[153]

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

[153] See CIA v. Sims, 471 U.S. 159, 167 (1985) (finding that "[s]ection 102(d)(3) of the National Security Act of 1947, which calls for the Director of Central Intelligence to protect 'intelligence sources and methods,' clearly 'refers to particular types of matters,' and thus qualifies as a withholding statute under Exemption 3" (quoting 5 U.S.C. § 552(b)(3)(B))); Maynard v. CIA, 986 F.2d 547, 554 (1st Cir. 1993) (acknowledging statute as "an Exemption 3 statute because it specifies the types of material to be withheld under subpart (B) of the Exemption"); Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990) (recognizing that courts have determined that "[50 U.S.C. §] 403(d)(3) is an exemption statute" under 5 U.S.C. § 552(b)(3)(B), and noting that "[t]his conclusion is supported by the plain meaning of the statute, by the legislative history of FOIA, and by every federal court of appeals that has considered the matter" and, as such, "[t]here is thus no doubt that [50 U.S.C. §] 403(d)(3) is a proper exemption statute under exemption 3"); see also Larson v. Dep't of State, 565 F.3d 857, 865, 868 (D.C. Cir. 2009) (finding that agencies properly protected "information relating to 'intelligence sources and methods,'" but failing to specify Exemption 3 subpart under which statute qualifies (quoting 50 U.S.C. § 403-1(i)); Morley v. CIA, 508 F.3d 1108, 1125 (D.C. Cir. 2007) (finding that agency properly protected "intelligence sources and methods along with other internal information" pursuant to Exemption 3, without identifying Exemption 3 subpart pursuant to which statute qualifies, but ultimately reversing grant of summary judgment on other grounds); Berman v. CIA, 501 F.3d 1136, 1145 (9th Cir. 2007) (holding that CIA properly withheld two "President's Daily Briefs" prepared during President Johnson's term of office, but failing to identify Exemption 3 subpart under which statute qualifies); Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 60-61 (D.C. Cir. 2003) (affirming that release of CIA's five-volume compendium of biographical information on "Cuban Personalities" in its entirety would reveal intelligence sources and methods, despite plaintiff's allegation that CIA previously released some of same information, and recognizing that "the National Security Act of 1947 . . . meets the two criteria of Exemption 3," but failing to clarify whether "two criteria" referred to Exemption 3's two subparts or to criteria that statute meet Exemption 3 threshold requirement as well as meeting requirements of one of Exemption 3's two subparts); Students Against Genocide v. Dep't of State, 257 F.3d 828, 835-36 (D.C. Cir. 2001) (finding that CIA properly withheld photographs purportedly taken by U.S. spy planes and satellites, including photographs that were shown to members of United Nations Security Council, pursuant to Exemption 3, without identifying Exemption 3 subpart under which National Security Act, 50 U.S.C.A. § 403-3(c)(6), qualifies); Earth Pledge Found. v. CIA, 128 F.3d 788, 788 (2d Cir. 1997) (per curiam), aff'g 988 F. Supp. 623, 627 (S.D.N.Y. 1996) (recognizing statute as "exemption statute[] for the purpose of [5 U.S.C. §] 552(b)(3)," but failing to specify Exemption 3 subpart under which statute qualifies); Krikorian v. Dep't of State, 984 F.2d 461, 465 (D.C. Cir. 1993) (stating that "[i]t is well settled that [50 U.S.C. §] 403(d)(3) falls within exemption 3," but failing to identify statute as qualifying under subpart (A) or (B) of Exemption 3); Aftergood v. CIA, 355 F. Supp. 2d 557, 562-

(continued...)

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

[153](...continued)
64 (D.D.C. 2005) (finding that Exemption 3 statute protected CIA's historical budget information from 1947 to 1970, but noting that such protection did not extend to "1963 budget information" that CIA officially acknowledged in declassified "Cost Reduction Program Report," and failing to state whether statute qualifies under subpart (A) or (B) of Exemption 3), amended, No. 01-2524, slip op. at 1 (D.D.C. Apr. 4, 2005) (ordering CIA to disclose officially acknowledged 1963 budget figure to plaintiff); Schrecker v. DOJ, 74 F. Supp. 2d 26, 32-33 (D.D.C. 1999) (ruling that CIA properly refused to disclose identity of deceased intelligence sources, allegedly of historical significance, and noting that privacy concerns are not relevant, but failing to identify statute as qualifying under subpart (A) or (B) of Exemption 3), aff'd in relevant part, rev'd & remanded in part on other grounds, 254 F.3d 162 (D.C. Cir. 2001).

[154] See, e.g., Wolf v. CIA, 473 F.3d 370, 378, 380 (D.C. Cir. 2007) (affirming district court's determination that CIA properly invoked Exemption 3 in refusing to confirm or deny existence of records pertaining to Jorge Elicier Gaitan, Columbian presidential candidate assassinated in 1948, where agency established that "disclosure of information regarding whether or not CIA records of a foreign national exist would be unauthorized under Exemption 3 because it would be reasonably harmful to intelligence sources and methods," but reversing and remanding "to the extent that [the district court] held that the existence of Agency records about Gaitan was not officially acknowledged by the CIA in testimony before the Congress"); Arabian Shield Dev. Co. v. CIA, No. 99-10327, 2000 WL 180923, at *1 (5th Cir. Jan. 28, 2000) (per curiam) (unpublished disposition), aff'g No. 3-98-CV-0624, 1999 WL 118796, at *4 (N.D. Tex. Feb. 26, 1999) (deferring to CIA Director's determination that to confirm or deny existence of any agency record pertaining to contract negotiations between U.S. oil company and foreign government would compromise intelligence sources and methods, while noting that "Director [of Central Intelligence]'s determination in this regard is almost unassailable" and that "[a]bsent evidence of bad faith, the [CIA]'s determination 'is beyond the purview of the courts'" (quoting Knight v. CIA, 872 F.2d 660, 664 (5th Cir. 1989))); Frugone v. CIA, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (finding that CIA properly refused to confirm or deny existence of records concerning plaintiff's alleged employment relationship with CIA despite allegation that another government agency seemed to confirm plaintiff's status as former CIA employee); Earth Pledge Found., 128 F.3d at 788, aff'g 988 F. Supp. 623, 627 (S.D.N.Y. 1996) (finding agency's "Glomar" response proper because acknowledgment of records would present "danger of revealing sources"); Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996) (finding that agency properly refused to confirm or deny existence of records concerning deceased person's alleged employment relationship with CIA); Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992) (upholding agency's "Glomar" response to request on foreign national because acknowledgment of existence of any responsive record would reveal sources and methods); Knight v. CIA, 872 F.2d 660, 663 (5th Cir. 1989) (same); Tooley v. Bush, No. 06-306, 2006 WL 3783142, at *20-21 (D.D.C. Dec. 21, 2006) (upholding TSA's reliance on Exemption 3 in agency's "Glomar" response to first-party request for "TSA watch-list records"), rev'd & remanded in part on other grounds sub nom. Tooley v. Napolitano, 556 F.3d 836 (D.C. Cir. 2009); ACLU v. DOD, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005) (upholding CIA's "Glomar" response to requests for DOJ memorandum specifying interrogation methods that CIA may use against top Al-Qaeda members and "directive signed by President Bush granting the CIA the authority to set up
(continued...)

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

In December 2004, Congress enacted section 102A(i) of the National Security Act of 1947, as part of the Intelligence Reform and Terrorism Prevention Act of 2004,[155] and thereby established the Director of National Intelligence as the authority charged with protecting intelligence sources and methods.[156] 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.[157] 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.[158] Furthermore, courts addressing the issue have determined that the new Director of National Intelligence is charged with the same duties and responsibilities as the Director of Central Intelligence.[159]

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[154](...continued)
detention facilities outside the United States and/or outlining interrogation methods that may be used against detainees"); Pipko v. CIA, 312 F. Supp. 2d 669, 678-79 (D.N.J. 2004) (holding that CIA properly refused to confirm or deny existence of records responsive to first-party request). But cf. ACLU, 389 F. Supp. 2d at 566 (declining to uphold CIA's "Glomar" denial of request for DOJ memorandum interpreting Convention Against Torture, because acknowledgment of its existence does not implicate intelligence sources or methods).

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

[156] Id.

[157] Id. § 1071.

[158] See, e.g., Berman, 501 F.3d at 1137-38, 1140 (finding that CIA properly withheld Presidential Daily Briefing reports where disclosure would have revealed protected intelligence sources and methods); Wolf, 473 F.3d at 378, 380 (affirming district court's determination that CIA properly invoked Exemption 3 in refusing to confirm or deny existence of records pertaining to Columbian presidential candidate assassinated in 1948, where agency established that "disclosure of information regarding whether or not CIA records of a foreign national exist would be unauthorized under Exemption 3 because it would be reasonably harmful to intelligence sources and methods," but reversing and remanding "to the extent that [the district court] held that the existence of Agency records about [candidate] was not officially acknowledged by the CIA"); Lahr v. NTSB, 453 F. Supp. 2d 1153, 1172 (C.D. Cal. 2006) (protecting CIA's intelligence sources and methods under 50 U.S.C. § 403-1(i)); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 222 (D.D.C. 2005) (protecting CIA's intelligence sources and methods documented in 2004 National Intelligence Estimate on Iraq).

[159] 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
(continued...)

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

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[159](...continued)
sources and methods from unauthorized disclosure'" (quoting 50 U.S.C. § 403-1(i)(1))); see also Berman, 501 F.3d at 1140 n.1 (stating that "[t]he change in titles and responsibilities has no impact on this case" (citing Wolf, 473 F.3d at 377 n.6)).

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

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

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

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

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

[163] (2006); see, e.g., Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *15 (D.D.C. Aug. 10, 2005) (finding that agency properly protected identity of Defense Intelligence Agency personnel pursuant to Exemption 3 and 10 U.S.C. § 424, and indicating that 10 U.S.C. § 424 qualifies as a subpart (B) statute specifically by noting that "[§] 424 qualifies as a withholding statute because it refers to particular types of matters to be withheld, specifically the name, official title, occupational series, grade, or salary of DIA personnel"), aff'd on other grounds, 565 F.3d 857 (D.C. Cir. 2009); Wickwire Gavin, P.C. v. Def. Intelligence Agency, 330 F. Supp. 2d 592, 601-02 (E.D. Va. 2004) (holding that agency properly withheld names of Defense Intelligence Agency employees pursuant to 10 U.S.C. § 424 and subpart (B) of Exemption 3); see also Miller v. DOJ, 562 F. Supp. 2d 82, 112 (D.D.C. 2008) (protecting names, titles, and office affiliations of Defense Intelligence Agency personnel pursuant to Exemption 3 and 10 U.S.C. § 424, but failing to identify under which Exemption 3 subpart § 424 qualifies).

[164] (2006) (authorizing withholding of personally identifying information regarding any member of armed forces, DOD employee, or U.S. Coast Guard employee assigned to unit that is overseas, "sensitive," or "routinely deployable"); see, e.g., Hiken v. DOD, 521 F. Supp. 2d 1047, 1062 (N.D. Cal. 2007) (finding that "non-disclosure of the names and personally identifying information of military personnel pursuant to 10 U.S.C. [§] 130b is valid under Exemption 3"); O'Keefe v. DOD, 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006) (holding as improper DOD's blanket withholding of employees' names under 10 U.S.C. § 130b in absence of any showing that those employees were "stationed with a 'routinely deployable unit' or any other unit within the ambit of [that statute]").

[165] 50 U.S.C. § 402 note (2006).

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

of certain classified information "concerning the nature, preparation, or use of any code, cipher or cryptographic system of the United States or any foreign government," has been found to qualify.[168] 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,"[169] refers to particular types of matters -- specifically, information pertaining to atomic weapons and special nuclear material[170] -- and thus has been held to qualify as an

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[166](...continued)
failing to identify subsection under which statute qualifies); Roman v. NSA, No. 07-CV-4502, 2009 WL 303686, at *5-6 (E.D.N.Y. Feb. 9, 2009) (noting that "it is well-established that FOIA Exemption 3 properly encompasses [s]ection 6" and "it is clear by the plain language of both FOIA Exemption 3 and [s]ection 6 of the [NSA Act] that defendant appropriately invoked the Glomar response"); Wilner v. NSA, No. 07-3883, 2008 WL 2567765, at *4 (S.D.N.Y. June 25, 2008) (looking to statutory language and determining that "language of [s]ection 6 makes quite clear that it falls within the scope of Exemption 3"); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 512-13 (S.D.N.Y. 2007) (treating statute as providing "absolute" protection); People for the Am. Way Found. v. NSA, 462 F. Supp. 2d 21, 28 (D.D.C. 2006) (same); Lahr, 453 F. Supp. 2d at 1191-93 (holding, upon in camera inspection, that NSA properly protected computer simulation program that "related to [its] core functions and activities"); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1340 (S.D. Fla. 2005) (finding, upon in camera inspection, that NSA properly withheld signal intelligence report because disclosure would reveal certain functions of NSA).

[167] (2006).

[168] See Larson, 565 F.3d at 868-69 (finding that the agency properly protected "classified information 'concerning the communication intelligence activities of the United States' or 'obtained by the process of communication intelligence from the communications of any foreign government'" pursuant to Exemption 3 and 18 U.S.C. § 798(a)(3)-(4) (quoting 18 U.S.C. § 798(a)(3)-(4))); N.Y. Times Co., 499 F. Supp. 2d at 512-13 (finding that 18 U.S.C. § 798 qualifies as "withholding statute" and holding that agency properly applied Exemption 3 to withhold classified documents containing "information disclosure of which would reveal . . . 'the intelligence activities of the United States'" (quoting 18 U.S.C. § 798)); Winter v. NSA, 569 F. Supp. 545, 546-48 (S.D. Cal. 1983) (recognizing 18 U.S.C. § 798 as qualifying statute under Exemption 3, and concluding that agency properly protected "a document originated by . . . NSA[] which consisted of information derived exclusively from the interception of foreign electromagnetic signals" where "release of the requested information would expose the NSA's intelligence functions and activities"); see also Adejumobi v. NSA, No. 07-1237, 2007 WL 4247878, at *3 (M.D. Fla. Dec. 3, 2007) (finding that NSA properly applied Exemption 3 and 18 U.S.C. § 798 in refusing to confirm or deny whether individual has been target of surveillance), aff'd per curiam, 287 F. App'x 770 (11th Cir. 2008); Gilmore v. NSA, No. C 92-3646, 1993 U.S. Dist. LEXIS 7694, at *26-27 (N.D. Cal. May 3, 1993) (finding information on cryptography currently used by NSA to be "integrally related" to intelligence gathering and thus protectible).

[169] 42 U.S.C. § 2162(a) (2006).

[170] Id. § 2014(y) (defining "restricted data").

Exemption 3 statute as well.[171]

Likewise, the Court of Appeals for the Third Circuit has suggested that the Juvenile Delinquency Records Statute,[172] which generally prohibits disclosure of the existence of records compiled pursuant to that section, but which does provide specific criteria for releasing the information, qualifies as a subpart (B) statute.[173] Similarly, section 207 of the National Park Omnibus Management Act of 1998,[174] 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],"[175] including resources which are "endangered, threatened, rare, or commercially valuable,"[176] has been found to be within the scope of subpart (B).[177]

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

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

[172] 18 U.S.C. § 5038 (2006).

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

[174] 16 U.S.C. § 5937 (2006).

[175] Id.

[176] Id.

[177] See Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 944-45 (D. Ariz. 2000) (approving withholding of information concerning specific nesting locations of northern goshawks pursuant to subpart (B) of Exemption 3 and section 207 of National Park Omnibus Management Act, 16 U.S.C. § 5937), aff'd, 314 F.3d 1060 (9th Cir. 2002); Pease v. U.S. Dep't of Interior, No. 1:99CV113, slip op. at 2, 4 (D. Vt. Sept. 17, 1999) (finding that agency properly withheld "certain information pertaining to the location, tracking and/or radio frequencies of grizzly bears" in Yellowstone National Park ecosystem pursuant to Exemption 3, subpart (B) and 16 U.S.C. § 5937); see also Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 30 (D.D.C. 2003) (concluding that agency properly withheld information regarding "rare or commercially valuable" resources located within "public land" boundaries pursuant to FOIA Exemption 3 and 16 U.S.C. § 5937, but failing to identify Exemption 3 subpart under which 16 U.S.C. § 5937 qualified), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03) (discussing National Park Omnibus Management Act of 1998).

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

The Commodity Exchange Act,[188] which prohibits the disclosure of business transactions, market positions, trade secrets, or customer names of persons under

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[178] 35 U.S.C. § 122 (2006).

[179] See Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979); accord Leeds v. Quigg, 720 F. Supp. 193, 194 (D.D.C. 1989), summary affirmance granted, No. 89-5062, 1989 WL 386474 (D.C. Cir. Oct. 24, 1989).

[180] 5 U.S.C. § 7114(b)(4) (2006).

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

[182] 5 U.S.C. § 7132 (2006).

[183] See NTEU, No. 76-695, slip op. at 3-4 (D.D.C. July 9, 1979).

[184] 22 U.S.C. § 1461-1a (2006).

[185] 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").

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

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

[188] 7 U.S.C. § 12 (2006).

investigation under the Act, has been held to refer to particular types of matters and thus to satisfy subpart (B) of Exemption 3.[189] 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,[190] similarly shields that particular data from disclosure under the FOIA.[191]

Further, the Federal Technology Transfer Act[192] contains two provisions that have been found to qualify under Exemption 3.[193] 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],"[194] has been found to qualify under Exemption 3.[195] Additionally, another provision of that statute, 15 U.S.C. § 3710a(c)(7)(B), which allows federal agencies the discretion to protect for five years any commercial and confidential information that results from Cooperative Research And Development Agreements (CRADAs) with nonfederal parties,[196] has also been held to qualify as an Exemption 3 statute.[197]

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

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

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

[190] 49 U.S.C. § 40119 (2006).

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

[192] 15 U.S.C. § 3710a(c)(7)(A), (B) (2006).

[193] See id.

[194] Id. § 3710a(c)(7)(A).

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

[196] 15 U.S.C. § 3710a(c)(7)(B).

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

of matters to be withheld."[198] For example, the Court of Appeals for the Third Circuit and one district court in another circuit have held that section 222(f) of the Immigration and Nationality Act[199] sufficiently limits the category of information it covers -- records pertaining to the issuance or refusal of visas and permits to enter the United States -- to qualify as an Exemption 3 statute under subpart (B),[200] and another district court has held that section 222(f) qualifies under subpart (A),[201] while the Court of Appeals for the District of Columbia Circuit and the District Court for the District of Columbia have held that the section satisfies both Exemption 3 subparts.[202] In addition, many courts have acknowledged that section 222(f) qualifies as an Exemption 3 statute while declining to identify the statute as qualifying under subpart (A) or subpart (B) of Exemption 3.[203]

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

[199] 8 U.S.C. § 1202(f) (2006).

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

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

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

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

(continued...)

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

Tax Return Information

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

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

[204] 21 U.S.C. § 331(j) (2006).

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

[206] Anderson, 907 F.2d at 950.

[207] Id.

[208] § 520, 21 U.S.C. § 360j(h).

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

theories. The United States Supreme Court and most appellate courts that have considered the matter have held either explicitly or implicitly that section 6103 of the Internal Revenue Code,[210] which affords confidentiality to tax returns and tax return information,[211] satisfies subpart (B) of Exemption 3.[212] Several appellate courts have determined that section 6103 qualifies as an exempting statute under Exemption 3 without identifying section 6103 as qualifying under subpart (A) or (B) of Exemption 3.[213] The Courts of Appeals for the District of Columbia, Fifth, Sixth, and Tenth Circuits have further reasoned that section 6103 is a subpart (A) statute to the extent that a person generally is not entitled to access to tax returns

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[210] (2006).

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

[212] See, e.g., Church of Scientology v. IRS, 484 U.S. 9, 15 (1987); Aronson v. IRS, 973 F.2d 962, 964-65 (1st Cir. 1992) (finding that "[t]he relevant exception [to the tax statute], read together with the rest of the statute, both 'refers to particular types of matters to be withheld' (namely, 'taxpayer identity information') and 'establishes particular criteria for withholding' (namely, that the IRS may consider release only where it would help notify taxpayers of refunds due, and, even then, only to the media)" and thus qualifies under subpart (B) of Exemption 3, and concluding that IRS lawfully exercised discretion to withhold street addresses pursuant to 26 U.S.C. § 6103(m)(1) (quoting 5 U.S.C. § 552(b)(3)(B) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524)); DeSalvo v. IRS, 861 F.2d 1217, 1221 (10th Cir. 1988) (determining that "[b]ecause section 6103 both establishes criteria for withholding information and refers to particular types of matters to be withheld, it satisfies the requirements of [Exemption 3]"); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986) (finding return information properly protected pursuant to 26 U.S.C. § 6103 and subpart (B) of Exemption 3); Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984) (acknowledging that 26 U.S.C. § 6103 qualifies as proper withholding statute pursuant to subpart (B) of Exemption 3); Chamberlain v. Kurtz, 589 F.2d 827, 839 (5th Cir. 1979) (same).

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

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

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

[215] 26 U.S.C. § 6103(a).

[216] See Tax Analysts v. IRS, 410 F.3d 715, 717-22 (D.C. Cir. 2005) (finding that the "closing agreement" reached between IRS and organization qualifies as protected "return information"); Landmark Legal Found. v. IRS, 267 F.3d 1132, 1135-37 (D.C. Cir. 2001) (determining that "return information" includes identities of tax-exempt organizations as well as information pertaining to third-party requests for audits or investigations of tax-exempt organizations); Stanbury Law Firm v. IRS, 221 F.3d 1059, 1062 (8th Cir. 2000) (ruling that names of contributors to public charity constitute tax return information and may not be disclosed); Lehrfeld v. Richardson, 132 F.3d 1463, 1467 (D.C. Cir. 1998) (protecting third-party "return information" submitted in support of application for tax-exempt status); Berger v. IRS, 487 F. Supp. 2d 482, 494-95 (D.N.J. 2007) (protecting third-party tax return information pursuant to Exemption 3), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008), cert. denied, No. 08-884, 2009 WL 1650205 (U.S. June 15, 2009); George v. IRS, No. C05-0955, 2007 WL 1450309, at *5 (N.D. Cal. May 14, 2007) (protecting third-party tax information contained in IRS file pertaining to plaintiff); Morley v. CIA, 453 F. Supp. 2d 137, 150-51 (D.D.C. 2006) (protecting deceased person's W-4 tax withholding information); Judicial Watch, Inc. v. DOJ, 306 F. Supp. 2d 58, 67 (D.D.C. 2004) (ruling that records related to bankruptcy of Enron Corporation constitute "return information"); Hodge v. IRS, No. 03-0269, 2003 WL 22327940, at *1 (D.D.C. Aug. 28, 2003) (ruling that agency withholding of third-party tax return information was proper despite claim that third party used plaintiff's social security number on third party's tax return); Mays v. IRS, No. 02-1191, 2003 WL 21518343, at *2 (D. Minn. May 21, 2003) (prohibiting disclosure of former bank's tax return information absent evidence of bank's corporate dissolution); McGinley v. U.S. Dep't of Treasury, No. 01-09493, 2002 WL 1058115, at *3-4 (C.D. Cal. Apr. 15, 2002) (refusing to allow IRS employee access to record regarding contract between IRS and third party concerning corporate taxpayer's alleged audit, because such record constituted tax return information); Chourre v. IRS, 203 F. Supp. 2d 1196, 1200-02 (W.D. Wash. 2002) (finding that IRS properly redacted portions of one-page copy of certified mail log pertaining to plaintiff, where mail log also pertained to "other taxpayers who received Statutory Notices of Deficiency from the IRS"); Leveto v. IRS, No. 98-285E, 2001 U.S. Dist. LEXIS 5791, at *21-22 (W.D. Pa. Apr. 10, 2001) (protecting information identifying third-party taxpayers); Helmon v. IRS, No. 3-00-CV-0809-M, 2000 WL 1909786, at *2-4 (N.D. Tex. Nov. 6, 2000) (magistrate's recommendation) (protecting third-party "return information" despite requester's claim that she was administrator of estate of third party and was legally entitled to requested

(continued...)

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

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[216](...continued)
information, where proof of her relationship to deceased did not satisfy standard established by IRS regulations), adopted in pertinent part, No. 3:00-CV-0809-M, 2000 WL 33157844 (N.D. Tex. Nov. 30, 2000); Wewee v. IRS, No. 99-475, 2000 U.S. Dist. LEXIS 20285, at *14-15 (D. Ariz. Oct. 13, 2000) (magistrate's recommendation) (concluding that agency properly withheld third-party tax return information, including individual and business taxpayer names, income amounts, and deductions), adopted in pertinent part, No. 99-475, 2001 U.S. Dist. LEXIS 3230 (D. Ariz. Feb. 13, 2001); Allnutt v. DOJ, No. Y98-1722, 2000 U.S. Dist. LEXIS 4060, at *37-38 (D. Md. Mar. 6, 2000) (magistrate's recommendation) (protecting third-party taxpayer information even though IRS collected information as part of investigation of requester), adopted in pertinent part, 99 F. Supp. 2d 673 (D. Md. 2000), and renewed motion for summary judgment granted, No. Y98-1722, 2000 WL 852455 (D. Md. Oct. 23, 2000), aff'd per curiam sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001); Murphy v. IRS, 79 F. Supp. 2d 1180, 1183-84 (D. Haw. 1999) (upholding agency decision to withhold third-party return information despite requester's argument that he had "material interest" in information), appeal dismissed, No. 99-17325 (9th Cir. Apr. 17, 2000); Barmes v. IRS, 60 F. Supp. 2d 896, 900-01 (S.D. Ind. 1998) (protecting "transcripts containing a variety of tax data concerning third party taxpayers"). But see Kamman v. IRS, 56 F.3d 46, 49 (9th Cir. 1995) (holding appraisal of jewelry seized from third-party taxpayer and auctioned to satisfy tax liability was not "return information"); Long v. IRS, No. C74-724, 2008 WL 2474591, at *2 (W.D. Wash. June 13, 2008) (ordering full disclosure of table which "may contain 'raw tax data'" where "IRS effectively reformulate[d] that data by extracting it from taxpayers' files and compil[ed] it in a statistical tabulation," inasmuch as "very act of compiling and tabulating large quantities of data converts the return information to a 'form' not associated with an individual taxpayer").

[217] 350 F.3d 100 (D.C. Cir. 2003).

[218] Id. at 104.

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

Court of Appeals for the Eleventh Circuit explained in Currie v. IRS,[220] "[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."[221] 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.[222] The Courts of Appeals for the Ninth and Eleventh Circuits have held that section 6103

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[219](...continued)
documents "generated or compiled during the identification and examination of plaintiff's tax returns for possible fraudulent offshore credit card activity" and rejecting argument that because "the records consist mainly of credit card account information gathered by Credomatic, not the IRS," they should not be considered "return information," noting that "it does not matter that the information was gathered by Credomatic, since it was received by the IRS"); Arizechi v. IRS, No. 06-5292, 2008 WL 539058, at *8 (D.N.J. Feb. 25, 2008) (finding that defendants properly applied Exemption 3 to protect tax records pertaining to the plaintiff where "delegate of the Secretary has determined that disclosure of the documents at issue in this case would seriously impair tax administration" and where "records identify the specific activity that is the focus of their investigation"); George, 2007 WL 1450309, at *8 (determining that release of interview notes associated with plaintiff's case "would allow Plaintiff to alter his sources of income, assets, and relationships with other individuals and entities in attempt to circumvent tax liability" and "would seriously impair federal tax administration by releasing documents the IRS is using in its ongoing investigation"); Cal-Trim, Inc. v. IRS, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting interview notes, case history notes, and other records associated with plaintiff's case pursuant to Exemption 3 and 26 U.S.C. § 6103(e)(7) where agency showed that "release of this information would constitute a serious impairment to federal tax administration"); Warren v. United States, No. 1:99CV1317, 2000 WL 1868950, at *6 (N.D. Ohio Oct. 31, 2000) (concluding that release of return information to taxpayer would inhibit investigation of taxpayer and impair tax administration); Youngblood v. Comm'r, No. 2:99-CV-9253, 2000 WL 852449, at *9-10 (C.D. Cal. Mar. 6, 2000) (declaring that special agent report was properly withheld where "disclosure of the [special agent report] would seriously impair Federal tax administration"); Anderson v. U.S. Dep't of Treasury, No. 98-1112, 1999 WL 282784, at *2-3 (W.D. Tenn. Mar. 24, 1999) (finding that disclosure to taxpayer of IRS-prepared "checkspread" charting all checks written by taxpayer over two-year period would seriously impair tax administration, notwithstanding IRS agent's disclosure of "checkspread" to taxpayer during interview); Brooks v. IRS, No. 96-6284, 1997 WL 718473, at *9 (E.D. Cal. Aug. 28, 1997) (upholding protection of revenue agent's notes because release "would permit Plaintiff to ascertain the extent of [IRS's] knowledge and predict the direction of [its] examination"); Holbrook v. IRS, 914 F. Supp. 314, 316-17 (S.D. Iowa 1996) (protecting IRS agent's handwritten notes regarding interview with plaintiff where disclosure would interfere with enforcement proceedings and hence seriously impair tax administration).

[220] 704 F.2d 523.

[221] Id. at 531.

[222] 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 (continued...)

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.[223]

Section 6105 of the Internal Revenue Code[224] governs the withholding of tax convention information such as bilateral agreements providing, for example, for the exchange of foreign

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[222](...continued)
disclosure); Long v. IRS, 891 F.2d at 224 (finding that computer tapes used to develop discriminant function formulas protected); Sutton, 2007 WL 30547, at *3-4 (holding discriminant function scores properly exempt from disclosure); Coolman v. IRS, No. 98-6149, 1999 WL 675319, at *5 (W.D. Mo. July 12, 1999) (holding that 26 U.S.C. § 6103(b)(2) permits IRS to withhold discriminant function scores), summary affirmance granted, No. 99-3963, 1999 WL 1419039 (8th Cir. Dec. 6, 1999); Buckner, 25 F. Supp. 2d at 898-99 (concluding that discriminant function scores were properly withheld under 26 U.S.C. § 6103(b)(2), even where scores were seventeen years old, because IRS continued to use scores in determining whether to audit certain tax files); Wishart v. Comm'r, No. 97-20614, 1998 WL 667638, at *6 (N.D. Cal. Aug. 6, 1998) (holding discriminant function scores protectible), aff'd, 199 F.3d 1334 (9th Cir. 1999) (unpublished table decision); Cujas v. IRS, No. 1:97CV00741, 1998 WL 419999, at *5 (M.D.N.C. Apr. 15, 1998) (recognizing that requester was likely to disseminate information about his discriminant function score, "thus making it easier for taxpayers to avoid an audit of their return[s]"), aff'd per curiam sub nom. Cujas v. Internal Revenue, 162 F.3d 1154 (4th Cir. 1998) (unpublished table decision); Inman v. Comm'r, 871 F. Supp. 1275, 1278 (E.D. Cal. 1994) (holding discriminant function scores properly exempt); Lamb v. IRS, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (same); see also 26 U.S.C. § 6103(b)(2)(D) (providing that no law "shall be construed to require the disclosure of standards used . . . for the selection of returns for examination . . . if the Secretary [of the Treasury] determines that such disclosure will seriously impair . . . enforcement under the internal revenue laws").

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

[224] 26 U.S.C. § 6105 (2006).

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

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.[227] Yet the D.C. Circuit has held that the procedures of the Presidential Recordings and Materials Preservation Act[228] exclusively govern the disclosure of transcripts of the tape recordings of President Nixon's White House conversations, based upon that Act's comprehensive, carefully tailored procedure for releasing Presidential materials to the public.[229]

FOIA-Specific Nondisclosure Statutes

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

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[225] Id.

[226] See Tax Analysts v. IRS, 217 F. Supp. 2d 23, 27-29 (D.D.C. 2002) (finding that IRS properly withheld under Exemption 3 international tax convention records considered confidential under such conventions); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 12 (D.D.C. 2001) (protecting record created by IRS to respond to foreign tax treaty partner's request for legal advice, because record consisted of tax convention information that treaty requires be kept confidential), aff'd in part, rev'd & remanded in part on other grounds, 294 F.3d 71 (D.C. Cir. 2002).

[227] See Church of Scientology of Cal. v. IRS, 792 F.2d 146, 148-50 (D.C. Cir. 1986); see also Maxwell v. Snow, 409 F.3d 354, 358 (D.C. Cir. 2005) (holding that "FOIA still applies to [26 U.S.C.] § 6103 claims").

[228] 44 U.S.C. § 2111 (2006).

[229] Ricchio v. Kline, 773 F.2d 1389, 1395 (D.C. Cir. 1985).

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

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

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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.[232] For instance, section 21(f) of the FTC Act[233] 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."[234] This statute has been determined to qualify as an Exemption 3 statute.[235] Similarly, a provision of the Antitrust Civil Process Act states that "[a]ny documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this chapter shall be exempt from disclosure

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

[232] See, e.g., 15 U.S.C. § 1314(g) (2006) (providing that "[a]ny documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this chapter shall be exempt from disclosure under section 552 of Title 5"); 31 U.S.C. § 5319 (2006) (providing that "a report [filed under Bank Secrecy Act] and records of reports are exempt from disclosure under section 552 of title 5"); see also *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03) (discussing "disclosure prohibitions that are not general in nature but rather are specifically directed toward disclosure under the FOIA in particular").

[233] 15 U.S.C. § 57b-2 (2006).

[234] Id.

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

under section 552 of title 5."[236] One district court has determined that the statute qualifies as a proper withholding statute pursuant to Exemption 3.[237] Likewise, 31 U.S.C. § 5319, a provision of the Bank Secrecy Act,[238] 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."[239] Courts addressing the question of whether 31 U.S.C. § 5319 qualifies under Exemption 3 have concluded that it does.[240]

Additionally, section 303B(m) of the Federal Property and Administrative Services Act of 1949,[241] 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,"[242] has been recognized by the District Court for the District of Columbia as a statute qualifying under Exemption 3.[243] Similarly, one district court has held that a nearly identical disclosure provision, 10 U.S.C. § 2305(g),[244] which provides that, "[e]xcept as provided in paragraph (2), a proposal in the possession or control of an agency named in

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[236] 15 U.S.C. § 1314(g).

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

[238] (2006).

[239] Id.

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

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

[242] Id. § 253b(m).

[243] Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 30 (D.D.C. 2003) (finding proposals to be properly withheld from disclosure pursuant to Exemption 3, because statute "specifically prohibits the disclosure of 'a proposal in the possession or control of an agency'" (quoting 41 U.S.C. § 253b (m)(1))), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); cf. Pohlman, Inc. v. SBA, No. 03-01241, slip op. at 26 (E.D. Mo. Sept. 30, 2005) (holding that 41 U.S.C. § 253b(m) "applies only to government procurement contracts, not to sales contracts" at issue in case); Ctr. for Pub. Integrity v. DOE, 191 F. Supp. 2d 187, 190-94 (D.D.C. 2002) (rejecting applicability of 41 U.S.C. § 253b(m) to records relating to bids for sale of government property, on grounds that statute applies only to government procurement contracts, not to contracts for sale of government property).

[244] (2006).

section 2303 of this title may not be made available to any person under section 552 of title 5,"[245] also qualifies under Exemption 3.[246]

Nondisclosure Results Under Appropriations Acts

Congress also has enacted legislation that achieves an Exemption 3 effect in an indirect fashion -- i.e., by limiting the funds that an agency may expend in responding to a FOIA request. The first such statute enacted was section 630 of the Agricultural, Rural Development, and Related Agencies Development Act, 1989,[247] which states that "none of the funds provided in this Act may be expended to release information acquired from any handler under" the Act.[248] When section 630 was tested in Cal-Almond, Inc. v. USDA,[249] 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."[250]

More recently, during the course of litigation in City of Chicago v. U.S. Department of the Treasury,[251] Congress enacted three appropriations bills that specifically prohibited ATF from using appropriated funds to comply with any FOIA request seeking records relating to the contested firearms sales databases that are maintained by ATF.[252] The first of these laws was enacted shortly before the scheduled oral argument before the Supreme Court, whereupon the Supreme Court vacated the Seventh Circuit disclosure order that was on appeal and remanded the case for the lower court to consider the effect of this newly enacted provision.[253] By the time the case reached the circuit court for consideration on remand,

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[245] Id. § 2305(g)(1).

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

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

[248] Id.

[249] 960 F.2d 105 (9th Cir. 1992).

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

[251] 384 F.3d 429 (2004), vacated, 423 F.3d 777 (7th Cir. 2005).

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

[253] DOJ v. City of Chicago, 537 U.S. 1229, 1229 (2003); see also *FOIA Post*, "Supreme Court Vacates and Remands in ATF Database Case" (posted 3/25/03).

Congress had enacted the Consolidated Appropriations Act, 2004,[254] that likewise prohibited ATF's use of appropriated funds to disclose the same type of firearms database information, and as a result, both appropriations laws were taken into consideration by the Seventh Circuit.[255]

On remand, the appeals court determined that although both appropriations bills prohibited ATF from expending federal funds on retrieval of the information, there was no "irreconcilable conflict" between prohibiting such expenditure and granting plaintiff access to the databases.[256] While ATF's petition for rehearing en banc was pending, Congress passed the Consolidated Appropriations Act, 2005,[257] which likewise prohibited the use of appropriated funds to disclose the same type of firearms database information, but added an appropriations rider providing that such data "shall be immune from judicial process."[258] The Seventh Circuit granted ATF's petition for rehearing en banc and ordered the parties to submit briefs on the impact of this new legislation.[259] On rehearing, the Seventh Circuit held that this new language "exempts from disclosure [firearms] data previously available to the public" and that, as such, the new law qualified as an Exemption 3 statute.[260]

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

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

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

[256] Id. at 435-36 (ordering ATF to provide plaintiff access to databases through use of court-appointed special master).

[257] 118 Stat. at 2859-60.

[258] Id.

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

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

[261] See, e.g., Singh v. FBI, 574 F. Supp. 2d 32, 46 (D.D.C. 2008) (finding firearms trace records properly protected pursuant to Exemption 3 and declaring that, "[b]ecause Congress prohibits the expenditure of funds for release of Firearms Transaction Records, [ATF] properly withholds them in full under Exemption 3"); Miller v. DOJ, 562 F. Supp. 2d 82, 111 (D.D.C. 2008) (protecting "Firearms Trace Reports" in their entireties pursuant to Consolidated Appropriations Act, 2005, 118 Stat. at 2859-60); Muhammad v. DOJ, No. 06-0220, 2007 WL 433552, at *1-2 (S.D. Ala. Feb. 6, 2007) (finding that "Firearms Trace System database information" properly withheld pursuant to Exemption 3 and Consolidated Appropriations Act, 2005, 118 Stat. at 2859-60). But cf. City of N.Y. v. Beretta U.S.A. Corp., 429 F. Supp. 2d 517, 528-29 (E.D.N.Y 2006) (distinguishing City of Chicago litigation and holding that firearms database appropriations legislation for 2005 and 2006 does not prevent disclosure of firearms

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

"Operational Files" Provisions

A closely related but somewhat different form of statutory protection is found in special FOIA provisions that Congress has enacted to cover the "operational files" of individual intelligence agencies. For example, the CIA Information Act of 1984[264] 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."[265] The CIA Information Act established the CIA as the first intelligence agency to obtain such exceptional FOIA treatment for its "operational files."[266] To the extent that the issue has been addressed in litigation,

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

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

[263] 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)).

[264] 50 U.S.C. § 431 (2006).

[265] Id. § 431(a).

[266] See id. § 431; see also FOIA Update, Vol. V, No. 4, at 1-2 (noting that underlying principle of CIA Information Act of 1984 is to free "CIA of the burden of processing FOIA requests for" records that "would be almost entirely withholdable anyway, upon application of the FOIA's national security exemption, Exemption 1, together with the CIA's other statutory (continued...)

courts have recognized the CIA Information Act as a qualifying statute under Exemption 3 of the FOIA.[267]

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,[268] the National Reconnaissance Office,[269] and the National Geospatial-Intelligence Agency.[270] This special statutory protection is modeled after, and quite similar to, the CIA Information Act.[271] For example, 50 U.S.C. § 432a provides that "[t]he Director of the National Reconnaissance Office, with the coordination of the Director of National Intelligence, may exempt operational files of the National Reconnaissance Office from the provisions of section 552 of title 5 which require publication, disclosure, search, or review

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

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

[268] See 50 U.S.C. § 432b (2006) (authorizing special "operational files" treatment for National Security Agency).

[269] See id. § 432a (authorizing special "operational files" treatment for National Reconnaissance Office).

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

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

in connection therewith."[272]

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

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,[275] 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,"[276] does not qualify under Exemption 3 because the statute does not expressly prohibit the records' disclosure.[277] Specifically, the Reporters Committee court found that the statute fails to fulfill subpart (A)'s requirement of absolute withholding because the statute, which "gives the Department discretion, apparently unbounded, to withhold records from authorized government officials who disseminate the records to the public," implies that "it might also give the Department discretionary authority to withhold such records directly from the general public" and, in fact, the FBI had exercised such discretion by its inconsistent manner of releasing rap sheets to the public.[278] Furthermore, the D.C. Circuit noted that "[e]ven if [28 U.S.C. §] 534 met Exemption 3's threshold requirement ('specifically exempted from disclosure') it would not appear to satisfy either prong[, subpart (A) or subpart (B),] of the exemption's proviso."[279]

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[272] (2006).

[273] See Aftergood, 441 F. Supp. 2d at 46.

[274] Id.

[275] 816 F.2d 730 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989).

[276] 28 U.S.C. § 534 (2006).

[277] Reporters Comm., 816 F.2d at 736 n.9.

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

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

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

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

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[280] 17 U.S.C. § 705(b) (2006).

[281] 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).

[282] 21 U.S.C. § 360j(h) (2006).

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

[284] 39 U.S.C. § 410(c)(6) (2006).

[285] 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").

[286] 42 U.S.C. § 1306 (2006).

[287] See Robbins v. HHS, No. 95-cv-3258, slip op. at 3-4 (N.D. Ga. Aug. 13, 1996), aff'd per curiam, 120 F.3d 275 (11th Cir. 1997) (unpublished table decision); Fla. Medical Ass'n, Inc. v. Dep't of Health, Ed. & Welfare, 479 F. Supp. 1291, 1302 (M.D. Fla. 1979).

[288] 15 U.S.C. § 80b-10(b) (2006).

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

A particularly difficult Exemption 3 issue was addressed by the Supreme Court in 1988. In analyzing the applicability of Exemption 3 to the Parole Commission and Reorganization Act[294] and Rule 32 of the Federal Rules of Criminal Procedure, each of which governs the disclosure of presentence reports, the Supreme Court held that they are Exemption 3 statutes only in part.[295] The Court found that they do not permit the withholding of an entire presentence report, but rather only those portions of a presentence report pertaining to a probation officer's sentencing recommendations, certain diagnostic opinions, information obtained upon a promise of confidentiality, and information which, if disclosed, might result in harm to any person, and that "the remaining parts of the reports are not covered by this exemption, and thus must be disclosed unless there is some other exemption which applies to them."[296]

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

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

[290] 7 U.S.C. § 136h(d) (2006).

[291] Nw. Coal. for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 201 (D.D.C. 1996). But see Doe v. Veneman, 380 F.3d 807, 818-19 (5th Cir. 2004) (holding that section 1491 of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136i-1, is Exemption 3 statute) (reverse FOIA suit).

[292] 49 U.S.C. § 30166(m) (2006).

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

[294] 18 U.S.C. § 4208 (2006) (repealed as to offenses committed after November 1, 1987).

[295] DOJ v. Julian, 486 U.S. 1, 9 (1988).

[296] Id. at 11; see also FOIA Update, Vol. IX, No. 2, at 1-2.

[297] 18 U.S.C. § 1905 (2006).

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

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

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issued a decision that definitively resolved the issue by holding that the Trade Secrets Act does not satisfy either of Exemption 3's requirements and thus does not qualify as a separate withholding statute.[300] 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."[301] Because duly promulgated agency regulations can provide the necessary authorization for release, the agency "possesses discretion to control the applicability" of the Act.[302] The existence of this discretion precludes the Trade Secrets Act from satisfying subpart (A) of Exemption 3.[303] Moreover, the court held that the Trade Secrets Act fails to satisfy the first prong of subpart (B) because it "in no way channels the discretion of agency decisionmakers."[304] Indeed, as the court concluded, this utter lack of statutory guidance renders the Trade Secrets Act susceptible to invocation at the "whim of an administrator."[305] Finally, the D.C. Circuit held that the Act also fails to satisfy the second prong of subpart (B) because of the "encyclopedic character" of the material within its scope and the absence of any limitation on the agencies covered or the sources of data included.[306] Given all these elements, the court held that the Trade Secrets Act does not qualify as an Exemption 3 statute.[307] This followed the Department of Justice's stated policy position on the issue.[308] The D.C. Circuit's decision on this issue is consistent with the legislative history of the 1976 amendment to Exemption 3, which reveals that the Trade Secrets Act was not intended to qualify as a nondisclosure statute under the exemption and that any analysis of trade secrets and commercial or financial information should focus instead on the applicability of Exemption 4.[309]

(...continued)
& Tech. v. DOJ, 843 F.2d 800, 805 n.6, 806 (4th Cir. 1988) (finding "no basis" for business submitter's argument that Exemption 3 and 18 U.S.C. § 1905 prevent disclosure of information that is outside scope of Exemption 4) (reverse FOIA suit); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1401-02 (7th Cir. 1984) (same); accord FOIA Update, Vol. VI, No. 3, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

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

[301] Id. at 1138.

[302] Id. at 1139.

[303] Id. at 1138.

[304] Id. at 1139.

[305] Id.

[306] Id. at 1140-41.

[307] Id. at 1141.

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

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

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

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

[310] 5 U.S.C. § 552a (2006).

[311] See Provenzano v. DOJ, 717 F.2d 799 (3d Cir. 1983), cert. granted, 466 U.S. 926 (1984); Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983), cert. granted, 466 U.S. 926 (1984).

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

[313] DOJ v. Provenzano, 469 U.S. 14, 15-16 (1984) (per curiam); see also Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. DOJ, 503 F. Supp. 2d 373, 380 (D.D.C. 2007) (finding that "[Privacy] Act[, 5 U.S.C. § 552a,] is not a FOIA exemption upon which DOJ can rely" to withhold records pertaining to third parties, and noting that "[i]nvoking the Privacy Act to refuse a FOIA request does not complete the analysis that DOJ must conduct"). But see Hill v. Blevins, No. 92-0859, 1993 U.S. Dist. LEXIS 21455, at *10 (M.D. Pa. Apr. 12, 1993) (holding that subsection (f)(3) of Privacy Act, 5 U.S.C. § 552a(f)(3), which authorizes agency to establish procedures for disclosure of medical and psychological records, is "exempting statute" under FOIA), aff'd, 19 F.3d 643 (3d Cir. 1994) (unpublished table decision).

Exhibit J
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

IV. EXEMPTION 3 STATUTES

Statute	Type of Information Withheld	Case Citation	Agency / Component	Number of Times Relied upon by Agency / Component	Total Number of Times Relied upon by Agency Overall
16 U.S.C. 470hh	Information pertaining to the nature and location of certain archaeological resources	Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 30 (D.D.C. 2003), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); Starkey v. U.S. Dep't of the Interior, 238 F. Supp. 2d 1188, 1193-94 (S.D. Cal. 2002).	FERC	10	10

Exhibit K
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

Federal Energy Regulatory Commission
Washington, DC 20426

MAY 25 2018

Re: FOIA No. FY18-75
Response

VIA E-MAIL AND REGULAR MAIL

Michael Mabee
[redacted]
CivilDefenseBook@gmail.com

Dear Mr. Mabee:

This is a response to your correspondence received on April 13, 2018, in which you requested information pursuant to the Freedom of Information Act (FOIA)[1], and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108. Specifically, you requested a copy of the following:

1. I seek correspondence between FERC and the North American Electric Reliability Corporation (NERC) identifying the 'Unidentified Registered Entity' described in the document: 'NERC Full Notice of Penalty regarding Unidentified Registered Entity' filed with FERC on February 28, 2018.

2. I also seek any correspondence between FERC and NERC laying out any purported rationale for withholding the entity of the 'Unidentified Registered Entity' from public view.

On April 23, 2018, Commission staff notified NERC of your request and provided an opportunity to comment pursuant to 18 C.F.R. § 388.112. NERC submitted comments on April 30, 2018, objecting to "the FOIA Request because [FERC] has instructed NERC not to divulge the identity of entities that have violated NERC Critical Infrastructure Protection ('CIP') Reliability Standards." In support of the foregoing, NERC cites various Commission orders.

[1] 5 U.S.C. § 552, *as amended* by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

A search of the Commission's non-public records has identified approximately seven (7) responsive documents[2] that are responsive to your request(s), consisting of various email correspondence between FERC and NERC regarding questions concerning details relative to the incident resulting in the Notice of Penalty. Such questions include detailed discussions of mitigation efforts and risk analysis, as well as the Unidentified Registered Entity's Cyber Security Incident Response Plan(s). As explained below, the documents are protected from disclosure pursuant to FOIA Exemptions 3 and 7, and therefore will not be released.

Exemption 3

The documents are designated as CEII and thus, exempt from mandatory disclosure pursuant to FOIA Exemption 3.[3]

Exemption 7(F)

The requested documents, including the identity of the Unidentified Registered Entity, are also exempt from mandatory disclosure under FOIA Exemption 7(F), which exempts "records or information compiled for law enforcement purposes" to the extent that release of such information "could reasonably be expected to endanger the life or physical safety of any individual." *See* 5 U.S.C. § 552(b)(7)(F). The requested material contains information regarding cyber security and risks to the Unidentified Registered Entity, as well the techniques used to resolve the incident and associated possible vulnerabilities. I also note that with respect to the name of the Unidentified Registered Entity, disclosing such name could provide a potential bad actor with information that would make a cyber intrusion less difficult. In this regard, public release of the requested documents would provide information which could help breach its network, and allow possible access to non-public, sensitive, and/or confidential information that could be used to plan an attack on energy infrastructure, endangering the lives and safety of citizens. Accordingly, the requested material is being withheld under FOIA Exemption 7(F).

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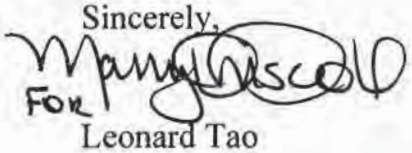
[2] Please note that Commission staff searched for responsive documents available through the date in which your FOIA request was accepted by the Commission, April 13, 2018.

[3] CEII is specifically exempted from disclosure under the Fixing America's Surface Transportation Act, Pub. L. No. 118-94, § 61003 (2015) (establishing applicability of FOIA Exemption 3, 5 U.S.C. 552(b)(3) (protecting material specifically exempted by statute).

As provided by FOIA, any appeal from this determination must be filed within 90 days of the date of this letter. The appeal must be in writing, addressed to James Danly, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, and clearly marked "Freedom of Information Act Appeal." Please include a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

You also have the right to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue your appeal. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,



For

Leonard Tao
Director
Office of External Affairs

Exhibit L
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

AUG - 2 2018

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY18-75

VIA E-MAIL AND CERTIFIED MAIL

Michael Mabee (without enclosures)

[redacted]

CivilDefenseBook@gmail.com

Dear Mr. Mabee:

This letter responds to your correspondence received on June 16, 2018, in which you appealed the May 25, 2018 denial of your request filed pursuant to the Freedom of Information Act (FOIA) and the Federal Energy Regulatory Commission's (Commission) FOIA regulations. 5 U.S.C. § 552, *as amended* by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016); 18 C.F.R. § 388.108 (2018).

On April 13, 2018, you requested the following:

1. correspondence between FERC and the North American Electric Reliability Corporation (NERC) identifying the 'Unidentified Registered Entity' described in the document: 'NERC Full Notice of Penalty regarding Unidentified Registered Entity' filed with FERC on February 28, 2018.[1]

2. correspondence between FERC and NERC laying out any purported rationale for withholding the identity of the 'Unidentified Registered Entity' from public view.

On April 23, 2018, Commission staff notified NERC of your request and provided an opportunity to comment pursuant to 18 C.F.R. § 388.112. NERC submitted comments on April 30, 2018, objecting to "the FOIA Request because [FERC] has instructed NERC not to divulge the identity of entities that have violated NERC Critical Infrastructure Protection ('CIP') Reliability Standards." In support of the foregoing, NERC cited certain Commission orders.

[1] Your request was not construed to seek the February 28, 2018 NERC Full Notice of Penalty itself.

On May 25, 2018, Leonard M. Tao, Director of the Office of External Affairs (Director), determined that the seven (7) responsive documents[2] were protected from disclosure in their entirety pursuant to FOIA Exemptions 3 and 7(F), and therefore, denied your request. By letter dated June 16, 2018, you appealed that determination. Specifically, you argue that you are not seeking Critical Energy/Electric Infrastructure Information (CEII) and that you "simply ask for disclosure of the identity of the 'Unidentified Registered Entity' [URE] and why this information has been withheld."

FOIA Exemption 3 protects information "specifically exempted from disclosure by statute." Here, CEII is specifically exempted from disclosure under the Fixing America's Surface Transportation Act, Pub. L. No. 118-94, § 61003 (2015). I conclude that the responsive documents contain sensitive cyber security-related information that qualifies for protection as CEII, and thus, was appropriately withheld. *See* 18 C.F.R. § 388.113(c). FOIA Exemption 7(F), exempts "records or information compiled for law enforcement purposes" to the extent that release of such information "could reasonably be expected to endanger the life or physical safety of any individual." *See* 5 U.S.C. § 552(b)(7)(F).[3] In this regard, the requested documents contain information regarding cyber security and risks to the URE, as well the techniques used to resolve the incident and associated possible vulnerabilities, the disclosure of which could provide a potential bad actor with information that may assist it in targeting the entity for cyber intrusion attacks. *See Public Employees for Environmental Responsibility, U.S. Section, Int'l Boundary and Water Comm.*, 740 F.3d 195, 206 (D.C. Cir. 2014) (Exemption 7(F) protects "the many potential threats posed by the release of sensitive agency information."). Therefore, the Director also correctly invoked FOIA Exemption 7(F) to withhold the relevant documents.

While it is possible that the name of a URE may constitute CEII under 18 C.F.R. 388.113 and qualify for protection under Exemption 7(F), under the circumstances and facts presented in this particular case, I conclude that the name of the URE can be disclosed. However, other information contained in the documents which I conclude should remain protected under Exemptions 3 and 7 has been redacted. Additionally, the names of lower-level employees have been redacted pursuant to FOIA Exemption 6. *See*

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[2] These documents consist of various email correspondence between FERC and NERC regarding questions concerning details relative to the incident resulting in the Notice of Penalty.

[3] I note that Exemption 7(F) applies to civil, as well as criminal law enforcement matters. *See Vento v. IRS*, 714 F. Supp. 2d 137, 148 (D.D.C. 2010) (holding that distinguishing between civil and criminal enforcement is incorrect because there "is no warrant in the law for that distinction and the federal courts have rejected it.")

Judicial Watch, Inc. v. Bd. of Governors of Fed. Reserve System, 773 F. Supp. 2d 57, 62 (D.D.C. 2011); *see also Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.,* 384 F. Supp. 2d 100 (D.D.C. 2005) and *Cofield v. City of LaGrange, Ga.,* 913 F. Supp. 608, 616 (D.D.C. 1996).

Accordingly, your appeal is granted in part and denied in part. This letter also constitutes notice to NERC that this information will be made available to you no sooner than five (5) calendar days from the date of this letter. *See* 18 C.F.R. § 388.112(e).

Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,

James P. Danly
General Counsel

Via Email
Edwin G. Kichline (with enclosures)
Senior Counsel and Director of
Enforcement Oversight
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, D.C. 20005
edwin.kichline@nerc.net

Exhibit M
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

Date	FERC Docket Number	Region	Registered Entity	Entities	Total Penalty ($)	Years	FOIA
7/6/2010	NP10-130-000	SERC	Unidentified Registered Entity	1	$0	8.8	2019-0030
7/6/2010	NP10-131-000	SERC	Unidentified Registered Entity	1	$5,000	8.8	2019-0030
7/6/2010	NP10-134-000	SPP	Unidentified Registered Entity	1	$0	8.8	2019-0030
7/6/2010	NP10-135-000	WECC	Unidentified Registered Entity	1	$8,000	8.8	2019-0030
7/6/2010	NP10-136-000	WECC	Unidentified Registered Entity	1	$7,000	8.8	2019-0030
7/6/2010	NP10-137-000	WECC	Unidentified Registered Entity	1	$39,000	8.8	2019-0030
7/6/2010	NP10-138-000	RFC	Unidentified Registered Entity	1	$5,000	8.8	2019-0030
7/6/2010	NP10-139-000	WECC	Unidentified Registered Entity	1	$3,000	8.8	2019-0030
7/6/2010	NP10-140-000	RFC	Unidentified Registered Entity	1	$5,600	8.8	2019-0030
7/30/2010	NP10-159-000	WECC	Unidentified Registered Entity	1	$109,000	8.7	2019-0030
9/13/2010	NP10-160-000	WECC	Unidentified Registered Entity	1	$0	8.6	2019-0030
10/7/2010	NP11-1-000	WECC	Unidentified Registered Entity	1	$106,000	8.5	2019-0030
10/7/2010	NP11-2-000	WECC	Unidentified Registered Entity	1	$9,000	8.5	2019-0030
10/7/2010	NP11-3-000	SERC	Unidentified Registered Entity	1	$6,000	8.5	2019-0030
10/7/2010	NP11-4-000	FRCC	Unidentified Registered Entity	1	$250,000	8.5	2019-0030
10/7/2010	NP11-5-000	SERC	Unidentified Registered Entity	1	$16,000	8.5	2019-0030
11/5/2010	NP11-21-000	RFC	Unidentified Registered Entity	1	$8,000	8.4	2019-0030
11/5/2010	NP11-22-000	SERC	Unidentified Registered Entity	1	$5,000	8.4	2019-0030
11/30/2010	NP11-47-000	SERC	Unidentified Registered Entity	1	$0	8.4	2019-0030
11/30/2010	NP11-56-000	SERC	Unidentified Registered Entity	1	$0	8.4	2019-0030
12/22/2010	NP11-59-000	RFC	Unidentified Registered Entity	1	$7,000	8.3	2019-0030
12/22/2010	NP11-63-000	WECC	Unidentified Registered Entity	1	$80,000	8.3	2019-0030
12/22/2010	NP11-64-000	WECC	Unidentified Registered Entity	1	$38,500	8.3	2019-0030
12/22/2010	NP11-70-000	WECC	Unidentified Registered Entity	1	$55,000	8.3	2019-0030
12/22/2010	NP11-72-000	SERC	Unidentified Registered Entity	1	$2,000	8.3	2019-0030
12/22/2010	NP11-76-000	SERC	Unidentified Registered Entity	1	$0	8.3	2019-0030
12/22/2010	NP11-79-000	FRCC	Unidentified Registered Entity	1	$100,000	8.3	2019-0030
12/22/2010	NP11-81-000	MRO, SPP	Unidentified Registered Entities	2	$50,000	8.3	2019-0030
1/31/2011	NP11-102-000	WECC	Unidentified Registered Entity	1	$6,500	8.2	2019-0030
1/31/2011	NP11-98-000	WECC	Unidentified Registered Entity	1	$5,000	8.2	2019-0030
2/1/2011	NP11-104-000	Various	Unidentified Registered Entities	6	$9,300	8.2	2019-0030
2/23/2011	NP11-106-000	RFC	Unidentified Registered Entity	1	$15,000	8.1	2019-0030
2/23/2011	NP11-111-000	MRO	Unidentified Registered Entity	1	$120,000	8.1	2019-0030
2/23/2011	NP11-116-000	FRCC	Unidentified Registered Entity	1	$75,000	8.1	2019-0030
2/23/2011	NP11-124-000	RFC	Unidentified Registered Entity	1	$100,000	8.1	2019-0030
2/23/2011	NP11-125-000	SPP, RFC	Unidentified Registered Entity	1	$77,000	8.1	2019-0030
2/23/2011	NP11-127-000	FRCC	Unidentified Registered Entity	1	$55,000	8.1	2019-0030
2/23/2011	NP11-128-000	WECC	Unidentified Registered Entity	1	$450,000	8.1	2019-0030
2/28/2011	NP11-133-000	Various	Unidentified Registered Entities	5	$11,500	8.1	2019-0030
3/30/2011	NP11-136-000	WECC	Unidentified Registered Entity	1	$14,500	8.0	2019-0030
3/30/2011	NP11-137-000	WECC	Unidentified Registered Entity	1	$106,000	8.0	2019-0030
3/30/2011	NP11-140-000	WECC	Unidentified Registered Entity	1	$27,000	8.0	2019-0030
3/30/2011	NP11-143-000	SERC	Unidentified Registered Entity	1	$5,000	8.0	2019-0030
3/30/2011	NP11-145-000	WECC	Unidentified Registered Entity	1	$13,000	8.0	2019-0030
3/30/2011	NP11-146-000	RFC	Unidentified Registered Entities	3	$52,500	8.0	2019-0030
3/30/2011	NP11-149-000	RFC	Unidentified Registered Entity	1	$20,000	8.0	2019-0030
3/30/2011	NP11-150-000	MRO	Unidentified Registered Entity	1	$0	8.0	2019-0030
3/30/2011	NP11-155-000	WECC	Unidentified Registered Entity	1	$2,000	8.0	2019-0030
3/30/2011	NP11-156-000	SERC	Unidentified Registered Entity	1	$12,500	8.0	2019-0030
3/30/2011	NP11-157-000	SERC	Unidentified Registered Entity	1	$7,000	8.0	2019-0030
3/30/2011	NP11-161-000	WECC	Unidentified Registered Entity	1	$35,000	8.0	2019-0030
3/31/2011	NP11-162-000	TRE, NPCC	Unidentified Registered Entities	2	$10,500	8.0	2019-0030
4/29/2011	NP11-166-000	SPP, TRE	Unidentified Registered Entity	1	$50,000	8.0	2019-0030

Date	FERC Docket Number	Region	Registered Entity	Entities	Total Penalty ($)	Years	FOIA
4/29/2011	NP11-167-000	WECC	Unidentified Registered Entity	1	$89,000	8.0	2019-0030
4/29/2011	NP11-174-000	RFC	Unidentified Registered Entity	1	$15,000	8.0	2019-0030
4/29/2011	NP11-175-000	WECC	Unidentified Registered Entity	1	$32,000	8.0	2019-0030
4/29/2011	NP11-176-000	WECC	Unidentified Registered Entity	1	$80,000	8.0	2019-0030
4/29/2011	NP11-178-000	WECC	Unidentified Registered Entity	1	$35,000	8.0	2019-0030
4/29/2011	NP11-179-000	MRO	Unidentified Registered Entity	1	$10,000	8.0	2019-0030
4/29/2011	NP11-180-000	WECC	Unidentified Registered Entity	1	$71,500	8.0	2019-0030
4/29/2011	NP11-181-000	FRCC, NPCC	Unidentified Registered Entities	6	$39,500	8.0	2019-0030
5/26/2011	NP11-182-000	WECC	Unidentified Registered Entity	1	$59,000	7.9	2019-0030
5/26/2011	NP11-184-000	RFC	Unidentified Registered Entity	1	$70,000	7.9	2019-0030
5/26/2011	NP11-188-000	SPP	Unidentified Registered Entity	1	$16,860	7.9	2019-0030
5/26/2011	NP11-189-000	FRCC	Unidentified Registered Entity	1	$17,000	7.9	2019-0030
5/26/2011	NP11-192-000	WECC	Unidentified Registered Entity	1	$12,200	7.9	2019-0030
5/26/2011	NP11-193-000	WECC	Unidentified Registered Entity	1	$60,000	7.9	2019-0030
5/26/2011	NP11-198-000	SPP	Unidentified Registered Entity	1	$17,860	7.9	2019-0030
5/26/2011	NP11-199-000	Various	Unidentified Registered Entities	3	$3,500	7.9	2019-0030
6/29/2011	NP11-204-000	WECC	Unidentified Registered Entity	1	$37,500	7.8	2019-0030
6/29/2011	NP11-205-000	WECC	Unidentified Registered Entity	1	$22,000	7.8	2019-0030
6/29/2011	NP11-206-000	NPCC	Unidentified Registered Entity	3	$80,000	7.8	2019-0030
6/29/2011	NP11-211-000	WECC	Unidentified Registered Entity	1	$14,000	7.8	2019-0030
6/29/2011	NP11-212-000	WECC	Unidentified Registered Entity	1	$381,600	7.8	2019-0030
6/29/2011	NP11-213-000	WECC	Unidentified Registered Entity	1	$143,500	7.8	2019-0030
6/29/2011	NP11-218-000	WECC	Unidentified Registered Entity	1	$130,000	7.8	2019-0030
6/29/2011	NP11-223-000	SPP	Unidentified Registered Entity	1	$30,000	7.8	2019-0030
6/29/2011	NP11-225-000	RFC	Unidentified Registered Entity	1	$10,000	7.8	2019-0030
6/29/2011	NP11-226-000	RFC	Unidentified Registered Entity	1	$85,000	7.8	2019-0030
7/28/2011	NP11-229-000	WECC	Unidentified Registered Entity	1	$75,000	7.7	2019-0030
7/28/2011	NP11-230-000	RFC	Unidentified Registered Entity	1	$18,000	7.7	2019-0030
7/28/2011	NP11-233-000	WECC	Unidentified Registered Entity	1	$70,000	7.7	2019-0030
7/28/2011	NP11-234-000	WECC	Unidentified Registered Entity	1	$35,000	7.7	2019-0030
7/28/2011	NP11-237-000	RFC	Unidentified Registered Entity	3	$180,000	7.7	2019-0030
7/28/2011	NP11-243-000	RFC	Unidentified Registered Entity	1	$20,000	7.7	2019-0030
7/28/2011	NP11-247-000	RFC	Unidentified Registered Entity	1	$15,000	7.7	2019-0030
7/28/2011	NP11-248-000	WECC	Unidentified Registered Entity	1	$5,000	7.7	2019-0030
7/28/2011	NP11-249-000	WECC	Unidentified Registered Entity	1	$18,000	7.7	2019-0030
7/28/2011	NP11-250-000	WECC	Unidentified Registered Entity	1	$12,600	7.7	2019-0030
7/28/2011	NP11-251-000	WECC	Unidentified Registered Entity	1	$7,000	7.7	2019-0030
7/29/2011	NP11-253-000	Various	Unidentified Registered Entities	8	$26,500	7.7	2019-0030
8/31/2011	NP11-261-000	RFC	Unidentified Registered Entity	1	$70,000	7.6	2019-0030
8/31/2011	NP11-262-000	SPP	Unidentified Registered Entity	1	$12,000	7.6	2019-0030
8/31/2011	NP11-263-000	TRE	Unidentified Registered Entity	1	$11,000	7.6	2019-0030
8/31/2011	NP11-264-000	SPP	Unidentified Registered Entity	1	$8,000	7.6	2019-0030
8/31/2011	NP11-266-000	Various	Unidentified Registered Entities	5	$63,500	7.6	2019-0030
9/30/2011	NP11-269-000	WECC	Unidentified Registered Entity	1	$225,000	7.5	2019-0030
9/30/2011	NP11-270-000	Various	Unidentified Registered Entities	21	$193,900	7.5	2019-0030
9/30/2011	RC11-6-000	Various	Unidentified Registered Entities	59	$0	7.5	2019-0030
10/31/2011	NP12-1-000	RFC	Unidentified Registered Entities	3	$275,000	7.5	2019-0030
10/31/2011	NP12-2-000	Various	Unidentified Registered Entities	16	$184,200	7.5	2019-0030
10/31/2011	RC12-1-000	Various	Unidentified Registered Entities	33	$0	7.5	2019-0030
11/30/2011	NP12-3-000	WECC	Unidentified Registered Entity	1	$125,000	7.4	2019-0030
11/30/2011	NP12-4-000	WECC	Unidentified Registered Entity	1	$160,000	7.4	2019-0030
11/30/2011	NP12-5-000	RF, WECC	Unidentified Registered Entities	12	$89,000	7.4	2019-0030
11/30/2011	RC12-2-000	Various	Unidentified Registered Entities	30	$0	7.4	2019-0030

Date	FERC Docket Number	Region	Registered Entity	Entities	Total Penalty ($)	Years	FOIA
12/30/2011	NP12-10-000	Various	Unidentified Registered Entities	21	$109,600	7.3	2019-0030
12/30/2011	NP12-9-000	RFC	Unidentified Registered Entity	1	$60,000	7.3	2019-0030
12/30/2011	RC12-6-000	Various	Unidentified Registered Entities	40	$0	7.3	2019-0030
1/31/2012	NP12-11-000	WECC	Unidentified Registered Entity	1	$135,000	7.2	2019-0030
1/31/2012	NP12-12-000	Various	Unidentified Registered Entities	18	$160,500	7.2	2019-0030
1/31/2012	RC12-7-000	Various	Unidentified Registered Entities	30	$0	7.2	2019-0030
2/29/2012	NP12-16-000	WECC	Unidentified Registered Entity	1	$80,000	7.1	2019-0030
2/29/2012	NP12-17-000	SPP RE	Unidentified Registered Entity	1	$40,000	7.1	2019-0030
2/29/2012	NP12-18-000	Various	Unidentified Registered Entities	23	$222,900	7.1	2019-0030
2/29/2012	RC12-8-000	Various	Unidentified Registered Entities	24	$0	7.1	2019-0030
3/30/2012	NP12-20-000	WECC	Unidentified Registered Entity	1	$60,000	7.0	2019-0030
3/30/2012	NP12-22-000	Various	Unidentified Registered Entities	15	$42,000	7.0	2019-0030
3/30/2012	RC12-10-000	Various	Unidentified Registered Entities	12	$0	7.0	2019-0030
4/30/2012	NP12-25-000	RFC	Unidentified Registered Entity	1	$115,000	7.0	2019-0030
4/30/2012	NP12-26-000	Various	Unidentified Registered Entities	18	$95,300	7.0	2019-0030
4/30/2012	RC12-11-000	Various	Unidentified Registered Entities	18	$0	7.0	2019-0030
5/30/2012	NP12-27-000	Various	Unidentified Registered Entities	20	$48,600	6.9	2019-0030
5/30/2012	NP12-29-000	WECC	Unidentified Registered Entity	1	$162,200	6.9	2019-0030
5/30/2012	RC12-12-000	Various	Unidentified Registered Entities	40	$0	6.9	2019-0030
6/29/2012	NP12-36-000	Various	Unidentified Registered Entities	15	$121,900	6.8	2019-0030
6/29/2012	RC12-13-000	Various	Unidentified Registered Entities	40	$0	6.8	2019-0030
7/31/2012	NP12-37-000	WECC	Unidentified Registered Entities	4	$134,350	6.7	2019-0030
7/31/2012	NP12-38-000	WECC	Unidentified Registered Entity	1	$72,000	6.7	2019-0030
7/31/2012	NP12-40-000	Various	Unidentified Registered Entities	15	$101,100	6.7	2019-0030
7/31/2012	RC12-14-000	Various	Unidentified Registered Entities	30	$0	6.7	2019-0030
8/31/2012	NP12-43-000	WECC	Unidentified Registered Entity	1	$70,000	6.6	2019-0030
8/31/2012	NP12-44-000	Various	Unidentified Registered Entities	16	$182,800	6.6	2019-0030
8/31/2012	RC12-15-000	Various	Unidentified Registered Entities	38	$0	6.6	2019-0030
9/28/2012	NP12-45-000	FRCC	Unidentified Registered Entity	1	$150,000	6.5	2019-0030
9/28/2012	NP12-46-000	WECC	Unidentified Registered Entity	1	$200,000	6.5	2019-0030
9/28/2012	NP12-47-000	Various	Unidentified Registered Entities	14	$113,400	6.5	2019-0030
9/28/2012	RC12-16-000	Various	Unidentified Registered Entities	41	$0	6.5	2019-0030
10/31/2012	NP13-1-000	WECC	Unidentified Registered Entity	1	$200,000	6.5	2019-0030
10/31/2012	NP13-4-000	RFC	Unidentified Registered Entities	3	$725,000	6.5	2019-0030
10/31/2012	NP13-5-000	Various	Unidentified Registered Entities	19	$216,000	6.5	2019-0030
10/31/2012	RC13-1-000	Various	Unidentified Registered Entities	44	$0	6.5	2019-0030
11/30/2012	NP13-6-000	WECC	Unidentified Registered Entity	1	$62,500	6.4	2019-0030
11/30/2012	RC13-2-000	Various	Unidentified Registered Entities	25	$0	6.4	2019-0030
12/31/2012	NP13-11-000	SPP	Unidentified Registered Entity	1	$107,000	6.3	2019-0030
12/31/2012	NP13-12-000	Various	Unidentified Registered Entities	21	$214,000	6.3	2019-0030
12/31/2012	NP13-16-000	WECC	Unidentified Registered Entity	1	$207,000	6.3	2019-0030
12/31/2012	NP13-17-000	RFC	Unidentified Registered Entities	3	$80,000	6.3	2019-0030
12/31/2012	NP13-18-000	SPP	Unidentified Registered Entity	1	$153,000	6.3	2019-0030
12/31/2012	NP13-19-000	SERC	Unidentified Registered Entity	1	$950,000	6.3	2019-0030
12/31/2012	RC13-3-000	Various	Unidentified Registered Entities	25	$0	6.3	2019-0030
1/31/2013	NP13-22-000	WECC	Unidentified Registered Entity	1	$115,000	6.2	2019-0030
1/31/2013	NP13-23-000	Various	Unidentified Registered Entities	22	$73,000	6.2	2019-0030
1/31/2013	RC13-5-000	Various	Unidentified Registered Entities	22	$0	6.2	2019-0030
2/28/2013	NP13-24-000	WECC	Unidentified Registered Entity	3	$151,500	6.1	2019-0030
2/28/2013	NP13-27-000	Various	Unidentified Registered Entities	14	$53,000	6.1	2019-0030
2/28/2013	RC13-6-000	Various	Unidentified Registered Entities	27	$0	6.1	2019-0030
3/27/2013	NP13-30-000	RFC	Unidentified Registered Entity	3	$120,000	6.0	2019-0030
3/27/2013	NP13-28-000	Various	Unidentified Registered Entity	1	$90,000	6.0	2019-0030

Date	FERC Docket Number	Region	Registered Entity	Entities	Total Penalty ($)	Years	FOIA
3/27/2013	NP13-29-000	Various	Unidentified Registered Entities	10	$80,000	6.0	2019-0030
4/30/2013	NP13-32-000	NERC	Unidentified Registered Entity	1	$40,000	6.0	2019-0030
4/30/2013	NP13-33-000	Various	Unidentified Registered Entities	18	$315,250	6.0	2019-0030
4/30/2013	RC13-8-000	Various	Unidentified Registered Entities	50	$0	6.0	2019-0030
5/30/2013	NP13-34-000	Texas RE	Unidentified Registered Entity	1	$137,000	5.9	2019-0030
5/30/2013	NP13-38-000	WECC	Unidentified Registered Entity	1	$291,000	5.9	2019-0030
5/30/2013	NP13-39-000	Various	Unidentified Registered Entities	16	$67,500	5.9	2019-0030
5/30/2013	RC13-9-000	Various	Unidentified Registered Entities	53	$0	5.9	2019-0030
6/27/2013	NP13-41-000	Various	Unidentified Registered Entities	20	$198,000	5.8	2019-0030
6/27/2013	RC13-10-000	Various	Unidentified Registered Entities	52	$0	5.8	2019-0030
7/31/2013	NP13-45-000	WECC	Unidentified Registered Entity	1	$198,000	5.7	2019-0030
7/31/2013	NP13-46-000	Various	Unidentified Registered Entities	18	$112,000	5.7	2019-0030
7/31/2013	NP13-47-000	RFC, SERC	Unidentified Registered Entities	2	$350,000	5.7	2019-0030
8/30/2013	NP13-51-000	Various	Unidentified Registered Entities	18	$98,000	5.6	2019-0030
9/30/2013	NP13-55-000	WECC	Unidentified Registered Entity	1	$150,000	5.5	2019-0030
9/30/2013	NP13-57-000	Various	Unidentified Registered Entities	12	$189,000	5.5	2019-0030
10/30/2013	NP14-4-000	RF, SERC	Unidentified Registered Entities	16	$55,000	5.5	2019-0030
10/30/2013	NP14-5-000	RFC	Unidentified Registered Entity	1	$0	5.5	2019-0030
11/27/2013	NP14-6-000	Various	Unidentified Registered Entities	14	$142,000	5.4	2019-0030
12/30/2013	NP14-14-000	Various	Unidentified Registered Entities	18	$276,500	5.3	2019-0030
12/30/2013	NP14-16-000	SERC	Unidentified Registered Entity	1	$50,000	5.3	2019-0030
12/30/2013	NP14-17-000	WECC	Unidentified Registered Entity	1	$144,000	5.3	2019-0030
12/30/2013	NP14-18-000	SERC	Unidentified Registered Entity	1	$110,000	5.3	2019-0030
12/30/2013	NP14-19-000	WECC	Unidentified Registered Entity	1	$185,000	5.3	2019-0030
12/30/2013	NP14-20-000	SERC	Unidentified Registered Entity	1	$198,000	5.3	2019-0030
12/30/2013	NP14-22-000	WECC	Unidentified Registered Entity	1	$150,000	5.3	2019-0030
12/31/2013	NP14-21-000	SERC	Unidentified Registered Entity	1	$175,000	5.3	2019-0030
12/31/2013	NP14-23-000	SPP RE	Unidentified Registered Entity	1	$100,000	5.3	2019-0030
12/31/2013	NP14-24-000	SERC	Unidentified Registered Entity	1	$350,000	5.3	2019-0030
12/31/2013	NP14-25-000	SERC	Unidentified Registered Entity	1	$250,000	5.3	2019-0030
12/31/2013	NP14-26-000	SERC	Unidentified Registered Entity	1	$120,000	5.3	2019-0030
1/30/2014	NP14-29-000	WECC	Unidentified Registered Entity	1	$109,000	5.2	2019-0019
1/30/2014	**NP14-30-000**	**RFC**	**Unidentified Registered Entity**	**1**	**$75,000**	**5.2**	**2019-0019**
2/27/2014	NP14-32-000	SPP RE	City Utilities of Springfield, MO	1	$0	5.1	2019-0019
3/31/2014	**NP14-37-000**	**WECC**	**Unidentified Registered Entity**	**1**	**$465,000**	**5.0**	**2019-0019**
4/30/2014	**NP14-39-000**	**WECC**	**Unidentified Registered Entity**	**1**	**$155,000**	**5.0**	**2019-0019**
5/29/2014	NP14-41-000	WECC	Pacific Gas and Electric Company	1	$98,500	4.9	2019-0019
5/29/2014	NP14-42-000	SERC	Unidentified Registered Entity	1	$250,000	4.9	2019-0019
7/31/2014	NP14-45-000	WECC	Unidentified Registered Entity	1	$180,000	4.7	2019-0019
7/31/2014	NP14-46-000	RFC	Unidentified Registered Entities	7	$50,000	4.7	2019-0019
8/27/2014	NP14-48-000	RFC/NPCC	Unidentified Registered Entities	3	$625,000	4.6	2019-0019
10/30/2014	NP15-5-000	SPP	Unidentified Registered Entity	1	$45,000	4.5	2019-0019
10/30/2014	NP15-6-000	TRE	Unidentified Registered Entity	1	$106,000	4.5	2019-0019
11/25/2014	NP15-10-000	WECC	Unidentified Registered Entity	1	$150,000	4.4	2019-0019
11/25/2014	NP15-11-000	RFC	Unidentified Registered Entity	1	$75,000	4.4	2019-0019
11/25/2014	NP15-9-000	MRO	Unidentified Registered Entity	1	$150,000	4.4	2019-0019
12/30/2014	NP15-13-000	RFC	Unidentified Registered Entity	1	$0	4.3	2019-0019
12/30/2014	NP15-15-000	SERC	Unidentified Registered Entities	2	$120,000	4.3	2019-0019
12/30/2014	NP15-17-000	WECC	Unidentified Registered Entity	1	$120,000	4.3	2019-0019
12/30/2014	NP15-18-000	Multiple	Unidentified Registered Entities	10	$124,000	4.3	2019-0019
2/26/2015	NP15-20-000	SERC	Unidentified Registered Entity	1	$70,000	4.1	2019-0019
3/31/2015	NP15-23-000	WECC	Unidentified Registered Entities	3	$165,000	4.0	2019-0019
4/30/2015	NP15-24-000	RFC	Unidentified Registered Entity	1	$150,000	4.0	2019-0019

Date	FERC Docket Number	Region	Registered Entity	Entities	Total Penalty ($)	Years	FOIA
4/30/2015	NP15-26-000	RFC	Unidentified Registered Entity	1	$0	4.0	2019-0019
8/31/2015	NP15-33-000	RFC	Unidentified Registered Entity	1	$425,000	3.6	2019-0019
10/29/2015	NP16-2-000	WECC	Unidentified Registered Entity	1	$160,000	3.5	2019-0019
12/1/2015	NP16-4-000	WECC	Unidentified Registered Entity	1	$205,000	3.4	2019-0019
12/1/2015	NP16-5-000	WECC	Unidentified Registered Entity	1	$200,000	3.4	2019-0019
12/30/2015	NP16-7-000	SPP	Unidentified Registered Entity	1	$235,000	3.3	2019-0019
1/28/2016	NP16-10-000	RF	Unidentified Registered Entity	1	$150,000	3.2	2019-0019
1/28/2016	NP16-9-000	WECC	Unidentified Registered Entity	1	$0	3.2	2019-0019
2/29/2016	NP16-12-000	RF	Unidentified Registered Entity	1	$1,700,000	3.1	2019-0019
4/28/2016	NP16-18-000	RF / SERC	Unidentified Registered Entities	5	$115,000	3.0	2019-0019
5/31/2016	NP16-20-000	FRCC	Unidentified Registered Entity	1	$35,000	2.9	2019-0019
7/28/2016	NP16-23-000	SERC	Unidentified Registered Entity	1	$225,000	2.7	2019-0019
7/28/2016	NP16-24-000	SERC	Unidentified Registered Entity	1	$180,000	2.7	2019-0019
10/31/2016	NP17-2-000	WECC	Unidentified Registered Entity	1	$1,125,000	2.4	2019-0019
10/31/2016	NP17-3-000	WECC	Unidentified Registered Entity	1	$250,000	2.4	2019-0019
11/30/2016	NP17-8-000	MRO	Unidentified Registered Entity	1	$142,000	2.4	2019-0019
12/29/2016	NP17-10-000	WECC	Unidentified Registered Entity	1	$0	2.3	2019-0019
12/29/2016	NP17-11-000	WECC	Unidentified Registered Entity	1	$0	2.3	2019-0019
12/29/2016	NP17-12-000	WECC /SERC	Unidentified Registered Entities	4	$60,000	2.3	2019-0019
12/29/2016	NP17-13-000	WECC	Unidentified Registered Entity	1	$0	2.3	2019-0019
4/27/2017	NP17-21-000	WECC	Unidentified Registered Entity	1	$201,000	2.0	2019-0019
7/31/2017	NP17-25-000	WECC	Unidentified Registered Entity	1	$0	1.7	2019-0019
7/31/2017	NP17-26-000	SPP RE	Unidentified Registered Entity	1	$250,000	1.7	2019-0019
9/28/2017	NP17-31-000	SERC	Unidentified Registered Entity	1	$500,000	1.5	2019-0019
10/31/2017	NP18-2-000	WECC	Unidentified Registered Entities	2	$0	1.4	2019-0019
2/28/2018	NP18-7-000	WECC	Pacific Gas and Electric Company	1	$2,700,000	1.1	2018-0075
5/31/2018	NP18-14-000	RF	Unidentified Registered Entity	1	$180,000	0.9	2019-0019
5/31/2018	NP18-15-000	WECC	Unidentified Registered Entity	1	$0	0.9	2019-0019
7/31/2018	NP18-21-000	WECC	Unidentified Registered Entity	1	$0	0.7	2019-0019
8/30/2018	NP18-22-000	WECC	Unidentified Registered Entity	1	$0	0.6	2019-0019
9/27/2018	NP18-26-000	NPCC	Unidentified Registered Entity	1	$0	0.5	2019-0019

Exhibit N
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

Date	Regulatory Authority	Regulatory Filing ID	Region	Registered Entity	NCR ID (NERC Compliance Registry Identifier)	Total Penalty ($) (The total penalty amount represents an aggregate amount for the filing; it does	SA, NOCV, ACP, SNOP or OMNI	NERC Violation ID	Reliability Standard	Req.	Violation Risk Factor (Lower, Medium, High)	Risk Assessment (Minimal, Moderate, Serious)	Mitigation Completion Date	Notice of No Further Review Issued
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2013011941	CIP-005-1	R2; R2.2	Medium	Moderate	1/6/2014	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2013012708	CIP-005-3a	R3; R3.2	Medium	Moderate	8/1/2015 (approved completion date)	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2012011452	CIP-005-3	R4	Medium	Moderate	3/28/2013	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2012011455	CIP-007-3	R8	Lower	Moderate	3/28/2013	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2012011568	CIP-006-1	R1	Medium	Minimal	6/26/2013	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2012011569	CIP-006-1	R2; R2.2	Medium	Moderate	6/28/2013	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2013012114	CIP-007-1	R1; R1.1	Medium	Moderate	1/6/2014	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2013011942	CIP-007-1	R2	Medium	Moderate	4/30/2014 (approved completion date)	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2013011943	CIP-007-1	R3	Lower	Moderate	1/22/2014	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2013011945	CIP-007-1	R4; R4.2	Medium	Moderate	12/26/2013	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2012011453	CIP-007-1	R5; R5.2	Lower	Moderate	3/1/2014 (approved completion date)	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2012011454	CIP-007-1	R6; R6.3, R6.4, R6.5	Medium	Moderate	5/23/2013	X
1/30/2014	FERC	NP14-30-000	RF	Unidentified Registered Entity	NCRXXXXX	$75,000	SA	RFC2013013118	CIP-007-1	R6; R6.3, R6.4, R6.5	Medium	Moderate	8/1/2015 (approved completion date)	X
3/31/2014	FERC	NP14-37-000	WECC	Unidentified Registered Entity	NCRXXXXX	$465,000	SA	WECC2012011042	CIP-002-2	R3	High	Moderate	1/14/2014	X

Date	Regulatory Authority	Regulatory Filing ID	Region	Registered Entity	NCR ID (NERC Compliance Registry Identifier)	Total Penalty ($) (The total penalty amount represents an aggregate amount for the filing; it does	SA, NOCV, ACP, SNOP or OMNI	NERC Violation ID	Reliability Standard	Req.	Violation Risk Factor (Lower, Medium, High)	Risk Assessment (Minimal, Moderate, Serious)	Mitigation Completion Date	Notice of No Further Review Issued
3/31/2014	FERC	NP14-37-000	WECC	Unidentified Registered Entity	NCRXXXXX	$465,000	SA	WECC2012011043	CIP-005-3	R1	Medium	Moderate	9/7/2014 (approved completion date)	X
3/31/2014	FERC	NP14-37-000	WECC	Unidentified Registered Entity	NCRXXXXX	$465,000	SA	WECC2012011044	CIP-005-3	R5	Lower	Minimal	11/15/2013	X
3/31/2014	FERC	NP14-37-000	WECC	Unidentified Registered Entity	NCRXXXXX	$465,000	SA	WECC2012011140	CIP-006-1	R1	Medium	Moderate	3/18/2014	X
3/31/2014	FERC	NP14-37-000	WECC	Unidentified Registered Entity	NCRXXXXX	$465,000	SA	WECC2012011053	CIP-006-1	R2	Medium	Minimal	11/29/2013	X
3/31/2014	FERC	NP14-37-000	WECC	Unidentified Registered Entity	NCRXXXXX	$465,000	SA	WECC2012011054	CIP-006-1	R3	Medium	Moderate	1/24/2014	X
3/31/2014	FERC	NP14-37-000	WECC	Unidentified Registered Entity	NCRXXXXX	$465,000	SA	WECC2012011058	CIP-007-1	R1	Medium	Moderate	10/1/2013	X
3/31/2014	FERC	NP14-37-000	WECC	Unidentified Registered Entity	NCRXXXXX	$465,000	SA	WECC2012011059	CIP-007-1	R2	Medium	Moderate	6/13/2013	X
4/30/2014	FERC	NP14-39-000	WECC	Unidentified Registered Entity	NCRXXXXX	$155,000	SA	WECC2012010739	CIP-005-1	R1; R1.1; R1.5; R1.6	Medium	Moderate	7/1/2014 (approved completion date)	X
4/30/2014	FERC	NP14-39-000	WECC	Unidentified Registered Entity	NCRXXXXX	$155,000	SA	WECC2012010740	CIP-005-3	R4	Medium	Minimal	12/1/2011	X
4/30/2014	FERC	NP14-39-000	WECC	Unidentified Registered Entity	NCRXXXXX	$155,000	SA	WECC2012011029	CIP-007-1	R1	Medium	Moderate	12/1/2012	X
4/30/2014	FERC	NP14-39-000	WECC	Unidentified Registered Entity	NCRXXXXX	$155,000	SA	WECC2012010439	CIP-007-3a	R2	Medium	Moderate	9/30/2013 (approved completion date)	X
4/30/2014	FERC	NP14-39-000	WECC	Unidentified Registered Entity	NCRXXXXX	$155,000	SA	WECC2012011031	CIP-007-1	R3	Lower	Moderate	8/6/2013	X
4/30/2014	FERC	NP14-39-000	WECC	Unidentified Registered Entity	NCRXXXXX	$155,000	SA	WECC2012011329	CIP-007-2a	R4	Medium	Minimal	10/29/2012	X
4/30/2014	FERC	NP14-39-000	WECC	Unidentified Registered Entity	NCRXXXXX	$155,000	SA	WECC2012011032	CIP-007-3a	R5; R5.2.3; R5.3.3	Medium	Moderate	8/30/2013	X

Date	Regulatory Authority	Regulatory Filing ID	Region	Registered Entity	NCR ID (NERC Compliance Registry Identifier)	Total Penalty ($) (The total penalty amount represents an aggregate amount for the filing; it does	SA, NOCV, ACP, SNOP or OMNI	NERC Violation ID	Reliability Standard	Req.	Violation Risk Factor (Lower, Medium, High)	Risk Assessment (Minimal, Moderate, Serious)	Mitigation Completion Date	Notice of No Further Review Issued
4/30/2014	FERC	NP14-39-000	WECC	Unidentified Registered Entity	NCRXXXXX	$155,000	SA	WECC2012011034	CIP-007-1	R6	Lower	Moderate	2/11/2013	X
4/30/2014	FERC	NP14-39-000	WECC	Unidentified Registered Entity	NCRXXXXX	$155,000	SA	WECC2012010741	CIP-007-3a	R8	Medium	Minimal	6/28/2012	X

Exhibit O
To Appeal - FOIA 2019-0019
Submitted by Michael Mabee

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

NERC Full Notice of Penalty Regarding	**)**	
Unidentified Registered Entities	**)**	**Docket No. NP19-4-000**
"The Companies"	**)**	

MOTION TO INTERVENE AND REQUEST FOR PUBLIC IDENTIFICATION AND RELEASE OF SETTLEMENT AGREEMENT FOR "THE COMPANIES" IN VIOLATION OF SPECIFIC RELIABILITY STANDARDS

Submitted by the Foundation for Resilient Societies on March 26, 2019

The Foundation for Resilient Societies (hereafter "Resilient Societies") files this Motion to Intervene in the above captioned docket, pursuant to 18 C.F.R. § 39.7(e)(4). The settlement agreement submitted with redactions by the North American Electric Reliability Corporation (NERC) in Docket No. NP19-4-000 omits the identity of the reliability standards violator(s), described as "the Companies." We respectfully request that the Federal Energy Regulatory Commission (FERC) release the unredacted version of this settlement agreement, including the identity of each of the violators. We also request that FERC release the identity of these same standards violators redacted in the NERC Notice of Penalty.

FERC Orders on Settlement Agreements

FERC Order 672, "Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,"[1] clearly states that "settlements will be made public":

> [P]ursuant to section 39.7(b)(4) of the Final Rule, the ERO should file, for informational purposes only, any settlement of an alleged violation regardless of whether the agreement contains an admission by the settling user, owner or operator. *Settlements will be made public.* This is consistent with our own procedures in which enforcement settlements are made public. (Emphasis added.)

[1] Order 672, 71 FR 8736, Feb. 17, 2006 at p. 230, 598, FERC Stats. & Regs. ¶ 31,204, as amended by Order 737, 75 FR 43404, July 26, 2010.

FERC Order 737[2] established a new Notice of Penalty (NP) Docket series but did not amend provisions of FERC Order 672 *requiring public release of settlement agreements*. Instead, FERC Order 737 was titled "Technical Corrections to Commission's Regulations." The pertinent section of FERC Order 737 reads:

> PART 39—RULES CONCERNING CERTIFICATION OF THE ELECTRIC RELIABILITY ORGANIZATION; AND PROCEDURES FOR THE ESTABLISHMENT, APPROVAL, AND ENFORCEMENT OF ELECTRIC RELIABILITY STANDARDS
>
> ■49. The authority citation for Part 39 continues to read as follows: Authority: 16 U.S.C. 824o. § 39.7 [Amended]
>
> ■50. In § 39.7, paragraph (d)(6) is removed and paragraph (d)(7) is redesignated as paragraph (d)(6).

FERC Order 737 further claims it will not significantly affect the rights of the public:

> 14. The provisions of 5 U.S.C. 801 regarding Congressional review of final rules do not apply to this Final Rule, because this Final Rule concerns agency procedure and practice and *will not substantially affect the rights of non-agency parties*.
>
> 15. The Commission is issuing this Final Rule without a period for public comment. Under 5 U.S.C. 553(b), notice and comment procedures are unnecessary where a rulemaking concerns only agency procedure and practice, or where the agency finds that notice and comment is unnecessary. *This rule concerns only matters of agency procedure and will not significantly affect regulated entities or the general public.* (Emphasis added.)

Allowing Intervention by Resilient Societies Is in the Public Interest

Since the year 2012 the Foundation for Resilient Societies has participated in reliability standard proceedings as a non-profit engaged in research and education in support of more resilient critical infrastructures. We have participated in rulemakings for new cybersecurity standards to improve the Critical Infrastructure Protraction (CIP) standards violated by the unidentified "companies." We should be allowed to intervene for the following reasons:

[2] Order 737, 75 FR 43404, July 26, 2010.

- Pursuant to Commission Rules of Practice, Rule 214 (Intervention) the Movant, the Foundation for Resilient Societies, takes position that the identities of registered entities accepting penalties for CIP standard violations should be publicly identified to deter noncompliance, to encourage greater prudence in the future, to assist regulators in other federal and state proceedings, to promote industry awareness of threats and hazards to critical energy infrastructure, to better inform the public of the risks and significance of noncompliance with reliability standards, and ultimately improve the resilience of critical energy infrastructure; and
- The Movant has an interest in the Commission's compliance with its own declared purposes and objectives, including the commitment to transparency and public accountability expressed as reliability standard objectives in FERC Order No. 672[3]; and
- The Movant has a direct interest in the outcome of these proceedings, as an entity that depends upon reliable electric service as a consumer; and as a research organization that depends upon transparency of regulatory oversight for the bulk electric system.

For the above reasons, the Movant asserts that it is in the public interest that the Commission allow the intervention of the Movant in this Docket and its proceedings.

NERC and FERC Practices on Settlement Agreements

The effective date of FERC Order 737 was July 26, 2010. Several weeks before, on July 6, 2010, NERC began its longstanding practice of classifying settlement agreements as "privileged." In this same month, NERC began redacting the identity of standards violators in its Notices of Penalty for CIP violations. The heavily redacted settlement agreement included in Docket No. NP19-4-000 is an exception to nearly all other Notice of Penalty dockets for CIP violations since July 2010; in these other dockets the settlement agreements have been withheld in their

[3] FERC Order No. 672(2006) at ¶ 50 provides: "[O]nce the ERO or a Regional Entity imposes a penalty and files the statutorily-required 'notice of penalty' with the Commission, the Commission will publicly disclose the penalty. The Final Rule includes an exception to this public disclosure with respect to Cybersecurity Incidents and other matters that would jeopardize system security." Section 39.7(e)(7) of the Final Rule in FERC Order 672 "allows the Commission to determine on *a case-by-case basis whether* a particular Commission proceeding to review an enforcement penalty for violation of a Reliability Standard can and should be nonpublic." (Emphasis added.) In this case, we argue that the Commission should decide the proceeding in Docket No. NP19-4-000 should be public.

entirety from public access. Starting in 2017, NERC has placed settlement agreements on FERC dockets as "CEII."

FERC prevents public docket access to the purported "privileged" and "CEII" versions of NERC's settlement agreements. Significantly, FERC denial of public access to NERC's settlement agreements apparently operates automatically and in perpetuity, without any "case-by-case" FERC procedure for review at time of submittal or reconsideration after a period of time.

We know of no "privileged" or "CEII" settlement agreement that has ever been released on the public docket by FERC, regardless of the nature of the violation, the time elapsed since the standards violation, or the status of violation corrections. FERC prevents public access to settlement agreements dated as far back as July 2010.

Notably, dozens of NERC's "privileged" settlement agreements conceal the identities of violators of non-CIP standards, including violations of Standard FAC-003-1 — Transmission Vegetation Management Program. With dozens of recent fire deaths in California due to transmission lines contacting vegetation, immediate and unredacted release of these settlement agreements would clearly be in the public interest. [4]

Conclusions

FERC made a public commitment in Order 672 that "settlement agreements will be public"; this is inconsistent with NERC's claim that settlement agreements are "privileged" or "CEII." For Docket No. NP19-4-000 specifically, a redacted settlement agreement that would perpetually omit the identity of the standard violators will never be "public" in any meaningful way and therefore is in apparent violation of FERC Order 672.

CEII is defined by FERC as "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure (physical or virtual) that…could be useful to a person planning an attack on critical infrastructure." FERC has not given the public an

[4] The concealment of violators of vegetation management standards may be due to associated violations of cybersecurity standards in the same Notice of Penalty.

explanation why the disposition of *corrected standards violations* should be classified as "CEII." Standard violations that have been corrected by means of a settlement agreement do not fall within a commonsense interpretation of the CEII definition, because a corrected standard violation should be of minimal usefulness in planning an attack—or not useful at all.

It is clearly not in the public interest for FERC to unnecessarily conceal the identity of standards violators and their settlement agreements for long periods. When FERC allows information on security-related standards violations to be perpetually withheld from public scrutiny, it reduces motivation for electric utilities to avoid future violations. Alternatively, if FERC were to establish a process whereby information on standards violations would be withheld from public disclosure for an arbitrarily long and/or fixed length of time, such as three years, this could unnecessarily harm transparency and accountability. Instead, we propose that in nearly all cases, the proper time to publicly release information on security-related standards violations is in the immediate aftermath of confirmation that the violations have been corrected.

In cases such as Docket NP19-4-000, serious standards violations have been ongoing for years; the public has a compelling interest in knowing which utilities continue to put electric reliability at risk. In these relatively infrequent instances of systemic violations extending over multiple years, the benefits of transparency and accountability may significantly outweigh the security risks of disclosure in the immediate aftermath of effective corrective actions; such situations should be examined by the Commission on a case-by-case basis. This policy that FERC adopted via Order No. 672 more than a decade ago should be reaffirmed.

On the matter of Docket No. NP19-4-000, the Commission has the opportunity to reduce longstanding noncompliance with reliability standards and to follow its own Order 672. When the standards violations in Docket No. NP19-4-000 have been corrected, FERC should soon thereafter release the identities of the violators and also release the unredacted text of the settlement agreement. If the standards violators in Docket No. NP19-4-000 put reliability at risk by unreasonably delaying correction of ongoing violations, FERC should consider sooner releasing the identities of the standards violators and the settlement agreement, as motivation

for promptness in correcting violations. With these actions, FERC can better serve the public interest.

Respectfully submitted by:

Thomas S. Popik, Chairman and President
thomasp@resilientsocieties.org

William R. Harris, Attorney and Director
williamh@resilientsocieties.org

Foundation for Resilient Societies
24 Front Street, Suite 203
Exeter, NH 03833
www.resilientsocieties.org

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