Reverse FOIA

The Court of Appeals for the District of Columbia Circuit has defined a reverse FOIA action as one in which the "submitter of information -- usually a corporation or other business entity" that has supplied an agency with "data on its policies, operations or products -- seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request."[1] Such reverse FOIA challenges generally arise from situations involving pending FOIA requests, but on occasion they are brought by parties challenging other types of prospective agency disclosures as well.[2]

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

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[1] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987); accord Mallinckrodt Inc. v. West, 140 F. Supp. 2d 1, 4 (D.D.C. 2000) (declaring that "[i]n a 'reverse FOIA' case, the court has jurisdiction when a party disputes an agency's decision to release information under FOIA"), appeal dismissed voluntarily, No. 00-5330 (D.C. Cir. Dec. 12, 2000); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 11 (D.D.C. 1996) (holding that in reverse FOIA actions "courts have jurisdiction to hear complaints brought by parties claiming that an agency decision to release information adversely affects them"), appeal dismissed voluntarily, No. 96-5163 (D.C. Cir. July 3, 1996).

[2] See, e.g., AFL-CIO v. FEC, 333 F.3d 168, 172 (D.C. Cir. 2003) (submitter organization challenged, albeit with questionable standing, agency decision to place investigatory file, which included information on individuals, in agency's public reading room); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C. Cir. 1997) (submitter challenged agency order requiring it to publicly disclose information, which was issued in context of federal licensing requirements); McDonnell Douglas Corp. v. Widnall, No. 94-0091, slip op. at 13 (D.D.C. Apr. 11, 1994) (submitter challenged agency release decision that was based upon disclosure obligation imposed by Federal Acquisition Regulation (FAR)), and McDonnell Douglas Corp. v. Widnall, No. 92-2211, slip op. at 8 (D.D.C. Apr. 11, 1994) (same), cases consolidated on appeal & remanded for further development of the record, 57 F.3d 1162, 1167 (D.C. Cir. 1995); cf. Tripp v. DOD, 193 F. Supp. 2d 229, 233 (D.D.C. 2002) (plaintiff challenged disclosure of federal job-related information pertaining to herself, but did so after disclosure already had been made to media).

[3] CNA, 830 F.2d at 1134 n.1; see Alexander & Alexander Servs. v. SEC, No. 92-1112, 1993 WL 439799, at *9, *11-12 (D.D.C. Oct. 19, 1993) (agency determined that Exemptions 4, 7(B),

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Typically, the submitter contends that the requested information falls within Exemption 4 of the FOIA,[4] but submitters have also challenged, with mixed results, the contemplated disclosure of information that they contended was exempt under other FOIA exemptions as well.[5] (For a further discussion of other such reverse FOIA cases, see Exemption 6, Privacy

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[3](...continued)
and 7(C) did not apply to certain requested information and "chose not to invoke" Exemption 5 for certain other requested information), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996).

[4] 5 U.S.C. § 552(b)(4) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[5] See, e.g., Doe v. Veneman, 380 F.3d 807, 816-18 & n.39 (5th Cir. 2004) (agreeing with plaintiffs that requested information was protected under Exemption 3, but finding it unnecessary to decide applicability of Exemption 6 or Privacy Act, 5 U.S.C. § 552a (2006), because "the result would be the same"); Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1182 (8th Cir. 2000) (agreeing with submitter that Exemption 6 should have been invoked, and ordering permanent injunction requiring agency to withhold requested information); Bartholdi, 114 F.3d at 282 (denying submitter's request for injunction based on claim that agency's balancing of interests under Exemption 6 was "arbitrary or capricious," and holding that "even were [the submitter] correct that its submissions fall within Exemption 6, the [agency] is not required to withhold the information from public disclosure," because "FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information"); Tripp, 193 F. Supp. 2d at 238-39 (dismissing plaintiff's claim that agency's prior disclosure of information about her somehow "violated" Exemptions 5, 6, 7(A), and 7(C); concluding that with exception of information covered by Exemption 7(C) -- which was found inapplicable to information at issue -- plaintiff could "not rely on a claim that a FOIA exemption requires the withholding" of information, inasmuch as FOIA merely permits withholding but does not "require" it); AFL-CIO v. FEC, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001) (agreeing with plaintiffs that identities of third parties mentioned in agency's investigative files should have been afforded protection under Exemption 7(C); rejecting agency's argument that "the public interest in disclosure outweighs the privacy interest" of named individuals," because D.C. Circuit "has established a categorical rule" for protection of such information; and finding agency's "refusal to apply Exemption 7(C) to bar release" to be "arbitrary, capricious and contrary to law" (citing SafeCard Servs. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991)), aff'd on other grounds, 333 F.3d 168 (D.C. Cir. 2003); Na Iwi O Na Kupuna v. Dalton, 894 F. Supp. 1397, 1411-13 (D. Haw. 1995) (denying plaintiff's request to enjoin release of information that plaintiff contended was exempt pursuant to Exemptions 3 and 6); Church Universal & Triumphant, Inc. v. United States, No. 95-0163, slip op. at 2, 3 & n.3 (D.D.C. Feb. 8, 1995) (rejecting submitter's argument "that the documents in question are 'return information' that is protected from disclosure under" Exemption 3, but sua sponte asking agency "to consider whether any of the materials proposed for disclosure are protected by" Exemption 6); Alexander, 1993 WL 439799, at *10-12 (agreeing with submitter that Exemption 7(C) should have been invoked, and ordering agency to withhold additional information; finding that submitter failed to "timely provide additional substantiation" to justify its claim that Exemption 7(B) applied; and finding that deliberative process privilege of Exemption 5 "belongs to the governmental agency to invoke or not," and noting that "absence of any record support" suggesting that agency, "as a
(continued...)

Interest, above.)

Seven years ago the District Court for the District of Columbia issued opinions in two reverse FOIA cases involving claims that disclosure would be in violation of the Privacy Act of 1974.[6] In one, the court held that the plaintiffs had "properly asserted a cause of action" because the information at issue was protected by Exemption 7(C) of the FOIA and therefore could not be disclosed under the Privacy Act -- inasmuch as that statute generally prohibits public disclosure of Privacy Act-covered information that falls within a FOIA exemption.[7] In the second case -- which was brought after the disclosure had been made -- the court held that the plaintiff could not rely on an alleged violation of the Privacy Act to bring an independent reverse FOIA claim against the agency.[8] (See the further discussion of this issue under Exemption 6, Privacy Interest, above.)

In a reverse FOIA suit, the party seeking to prevent the disclosure of information the government intends to release assumes the burden of justifying the nondisclosure of the information.[9] A submitter's challenge to an agency's disclosure decision is reviewed in light of the "basic policy" of the FOIA to "'open agency action to the light of public scrutiny'" and in

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[5](...continued)
general matter, arbitrarily declined to invoke that privilege").

[6] 5 U.S.C. § 552a (2006).

[7] Recticel Foam Corp. v. U.S. Dep't of Justice, No. 98-2523, slip op. at 9-10 (D.D.C. Jan. 31, 2002) (enjoining disclosure of FBI's criminal investigative files pertaining to plaintiffs), appeal dismissed, No. 02-5118 (D.C. Cir. Apr. 25, 2002); see also Doe v. Veneman, 230 F. Supp. 2d 739, 751-53 (W.D. Tex. 2002) (recognizing claim that disclosure of identities of ranchers utilizing livestock-protection collars would be "violation of" Privacy Act, after concluding that "FOIA does not require release of the information"), aff'd in part & rev'd in part on other grounds, 380 F.3d 807, 816-18 & n.39 (5th Cir. 2004) (declining to consider applicability of either Exemption 6 or Privacy Act after concluding that Exemption 3 protects requested information).

[8] Tripp, 193 F. Supp. 2d at 238-40 (rejecting plaintiff's argument that her reverse FOIA claim was properly predicated on her "'reverse FOIA' request" that she previously sent to the President and the Attorney General requesting "DOD's compliance with its obligations" under the FOIA and the Privacy Act).

[9] See Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997); accord Frazee v. U.S. Forest Serv., 97 F.3d 367, 371 (9th Cir. 1996) (declaring that the "party seeking to withhold information under Exemption 4 has the burden of proving that the information is protected from disclosure"); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (explaining that the "statutory policy favoring disclosure requires that the opponent of disclosure" bear the burden of persuasion); TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1097 (E.D. Mo. 1998) (same); see also McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1195 (D.C. Cir. 2004) (Garland, J., dissenting), reh'g en banc denied, No. 02-5342 (D.C. Cir. Dec. 16, 2004); cf. Kan. Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 4 (D.D.C. July 2, 1993) (holding that submitter's "unsuccessful earlier attempt" to suppress disclosure in state court "effectively restrains it" from raising same arguments again in reverse FOIA action).

accordance with the "narrow construction" afforded to the FOIA's exemptions.[10] If the underlying FOIA request is subsequently withdrawn, the basis for the court's jurisdiction will dissipate and the case will be dismissed as moot.[11] By the same token, a court lacks jurisdiction if an agency has not made a final determination to release requested information.[12]

The landmark case in the reverse FOIA area is Chrysler Corp. v. Brown, in which the Supreme Court held that jurisdiction for a reverse FOIA action cannot be based on the FOIA itself because "Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a submitter "any right to enjoin agency disclosure."[13] Moreover, the Supreme Court held that jurisdiction cannot be based on the

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[10] Martin Marietta, 974 F. Supp. at 40 (quoting U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976)); see, e.g., TRIFID, 10 F. Supp. 2d at 1097 (reviewing submitter's claims in light of FOIA principle that "[i]nformation in the government's possession is presumptively disclosable unless it is clearly exempt"); Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, 1997 WL 578960, at *1 (W.D. Ark. Feb. 5, 1997) (examining submitter's claims in light of "the policy of the United States government to release records to the public except in the narrowest of exceptions," and observing that "[o]penness is a cherished aspect of our system of government"), aff'd, 133 F.3d 1081 (8th Cir. 1998).

[11] See McDonnell Douglas Corp. v. NASA, No. 95-5288, slip op. at 1 (D.C. Cir. Apr. 1, 1996) (ordering a reverse FOIA case "dismissed as moot in light of the withdrawal of the [FOIA] request at issue"); Gen. Dynamics Corp. v. Dep't of the Air Force, No. 92-5186, slip op. at 1 (D.C. Cir. Sept. 23, 1993) (same); Gulf Oil Corp. v. Brock, 778 F.2d 834, 838 (D.C. Cir. 1985) (same); McDonnell Douglas Corp. v. NASA, 102 F. Supp. 2d 21, 24 (D.D.C.) (dismissing case after underlying FOIA request was withdrawn, which in turn occurred after case already had been decided by D.C. Circuit and was before district court on motion for entry of judgment), reconsideration denied, 109 F. Supp. 2d 27 (D.D.C. 2000); cf. Sterling v. United States, 798 F. Supp. 47, 48 (D.D.C. 1992) (declaring that once a record has been released, "there are no plausible factual grounds for a 'reverse FOIA' claim"), aff'd, No. 93-5264 (D.C. Cir. Mar. 11, 1994).

[12] See, e.g., Doe, 380 F.3d at 814-15 (reversing injunction after finding that district court had "exceeded its jurisdiction" by enjoining release of information that agency had in fact decided "not to release"); United States v. N.Y. City Bd. of Educ., No. 96-0374, 2005 WL 1949477, at *1 (E.D.N.Y. Aug. 15, 2005) (holding that court "did not have jurisdiction to enjoin disclosure of" requested documents until "a final determination to disclose the documents" had been made by the agency, and consequently denying a motion for injunctive relief) (non-FOIA case); cf. Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1234, 1238 (5th Cir. 1979) (finding that agencies' asserted failure to "assure" plaintiff that requested information was exempt from disclosure was not "reviewable by statute" or "final" -- which court described as "exhaustion of administrative remedies requirement" of Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000), and not "jurisdictional requirement" -- and dismissing count of complaint seeking declaratory judgment that agencies abused their discretion).

[13] 441 U.S. 281, 293-94 (1979); accord Campaign for Family Farms, 200 F.3d at 1185 (concluding that an "agency has discretion to disclose information within a FOIA exemption, unless something independent of FOIA prohibits disclosure"); Freeman v. Bureau of Land

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Trade Secrets Act[14] (a broadly worded criminal statute prohibiting the unauthorized disclosure of "practically any commercial or financial data collected by any federal employee from any source"[15]), because it is a criminal statute that does not afford a "private right of action."[16] Instead, the Court found that review of an agency's "decision to disclose" requested records[17] can be brought under the Administrative Procedure Act (APA).[18] Accordingly, reverse FOIA plaintiffs ordinarily argue that an agency's contemplated release would violate the Trade Secrets Act and thus would "not be in accordance with law" or would be "arbitrary and

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[13](...continued)
Mgmt., 526 F. Supp. 2d 1178, 1186 (D. Or. 2007) (noting that submitter "must do more than simply show that FOIA does not require disclosure" and must instead "also point to some other law prohibiting disclosure of the information at issue"); Bartholdi, 114 F.3d at 281 (declaring that the "mere fact that information falls within a FOIA exemption does not of itself bar an agency from disclosing the information"); RSR Corp. v. Browner, 924 F. Supp. 504, 509 (S.D.N.Y. 1996) (holding that the "FOIA itself does not provide a cause of action to a party seeking to enjoin an agency's disclosure of information, even if the information requested falls within one of FOIA's exemptions"), aff'd, No. 96-6186, 1997 WL 134413 (2d Cir. Mar. 26, 1997), affirmance vacated without explanation, No. 96-6186 (2d Cir. Apr. 17, 1997); Kan. Gas, No. 87-2748, slip op. at 3 (D.D.C. July 2, 1993) (finding that any "party seeking to prevent disclosure . . . must rely on other sources of law, independent of FOIA, to justify enjoining disclosure"). But see AFL-CIO, 177 F. Supp. 2d at 61-63 (concluding that due to "categorical" nature of Exemption 7(C), a reverse FOIA plaintiff can state claim that agency's decision not to invoke that exemption is unlawful or arbitrary and capricious); accord Tripp, 193 F. Supp. 2d at 239 (observing that district court's decision in AFL-CIO "goes only so far as to say that FOIA prohibits the release of the limited category of 7(C) information").

[14] 18 U.S.C. § 1905 (2006).

[15] CNA, 830 F.2d at 1140.

[16] Chrysler, 441 U.S. at 316-17; accord McDonnell Douglas v. Air Force, 375 F.3d at 1186 n.1 (citing Chrysler).

[17] Chrysler, 441 U.S. at 318.

[18] 5 U.S.C. §§ 701-706; see, e.g., ERG Transit Systems (USA), Inc. v. Wash. Metro. Area Transit Auth., 593 F. Supp. 2d 249, 252 (D.D.C. 2009) (stating that "[r]everse FOIA cases are deemed informal agency adjudications, and thus are reviewable under Section 706 of the [APA]"); CC Distribs. v. Kinzinger, No. 94-1330, 1995 WL 405445, at *2 (D.D.C. June 28, 1995) (holding that "neither [the] FOIA nor the Trade Secrets Act provides a cause of action to a party who challenges an agency decision to release information . . . [but] a party may challenge the agency's decision" under the APA); Comdisco, Inc. v. GSA, 864 F. Supp. 510, 513 (E.D. Va. 1994) (finding that the "sole recourse" of a "party seeking to prevent an agency's disclosure of records under FOIA" is review under the APA); Atlantis Submarines Haw., Inc. v. U.S. Coast Guard, No. 93-00986, slip op. at 5 (D. Haw. Jan. 28, 1994) (concluding that in a reverse FOIA suit, "an agency's decision to disclose documents over the objection of the submitter is reviewable only under" the APA) (denying motion for preliminary injunction), dismissed per stipulation (D. Haw. Apr. 11, 1994); Envtl. Tech., Inc. v. EPA, 822 F. Supp. 1226, 1228 (E.D. Va. 1993) (same).

capricious" within the meaning of the APA.[19]

In Chrysler, the Supreme Court specifically did not address the "relative ambits" of Exemption 4 and the Trade Secrets Act, nor did it determine whether the Trade Secrets Act qualified as an Exemption 3[20] statute.[21] Almost a decade later, the D.C. Circuit addressed these issues, holding that the Trade Secrets Act does not qualify as an Exemption 3 statute under either of that exemption's subparts, particularly as it acts only as a prohibition against "unauthorized" disclosures.[22] (For a further discussion of this point, see Exemption 3, Statutes Found Not to Qualify Under Exemption 3, above.)

In addition, the D.C. Circuit ruled that the scope of the Trade Secrets Act is not narrowly limited to that of its three predecessor statutes and that, instead, its scope is "at least co-extensive with that of Exemption 4."[23] Thus, information falling within the ambit of

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[19] See, e.g., Canadian Commercial Corp. v. Dep't of the Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (explaining that the "underlying Decision Letter issued by the Air Force must be set aside if and only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'" (citing 5 U.S.C. § 706(2)(A))); McDonnell Douglas v. Air Force, 375 F.3d at 1186 n.1 (noting that a submitter "may seek review of an agency action that violates the Trade Secrets Act on the ground that it is 'contrary to law'" under the APA); McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1164 (D.C. Cir. 1995) (same); Acumenics Research & Tech. v. DOJ, 843 F.2d 800, 804 (4th Cir. 1988) (same); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1398 (7th Cir. 1984) (same); Mallinckrodt, 140 F. Supp. 2d at 4 (declaring that "[a]lthough FOIA exemptions are normally permissive rather than mandatory," the Trade Secrets Act "independently prohibits the disclosure of confidential information"); Cortez, 921 F. Supp. at 11; Gen. Dynamics Corp. v. U.S. Dep't of the Air Force, 822 F. Supp. 804, 806 (D.D.C. 1992), vacated as moot, No. 92-5186 (D.C. Cir. Sept. 23, 1993); Raytheon Co. v. Dep't of the Navy, No. 89-2481, 1989 WL 550581, at *1 (D.D.C. Dec. 22, 1989).

[20] 5 U.S.C. § 552(b)(3).

[21] 441 U.S. at 319 n.49.

[22] CNA, 830 F.2d at 1141.

[23] Id. at 1151; accord Canadian Commercial, 514 F.3d at 39 (quoting CNA); McDonnell Douglas v. Air Force, 375 F.3d at 1185-86 (same); Bartholdi, 114 F.3d at 281 (citing CNA and declaring: "[W]e have held that information falling within Exemption 4 of FOIA also comes within the Trade Secrets Act."); Boeing Co. v. U.S. Dep't of the Air Force, No. 05-365, 2009 WL 1373813, at *4 (D.D.C. May 18, 2009) (noting that D.C. Circuit has "'long held'" that Trade Secrets Act "is at least co-extensive with Exemption 4"); Alexander, 1993 WL 439799, at *9; Gen. Dynamics, 822 F. Supp. at 806. But see Chrysler, 441 U.S. 281, 318-19 & n.49 (stating in dicta that "there is a theoretical possibility that material might be outside Exemption 4 yet within the [Trade Secrets Act]," but noting that "that possibility is at most of limited practical significance"); McDonnell Douglas v. Air Force, 375 F.3d at 1204 & n.17 (Garland, J., dissenting) (suggesting that an "agency's agreement to expend a specified amount of public funds . . . may represent a case in which [Exemption 4] and the Trade Secrets Act should not be regarded as coextensive"); McDonnell Douglas, 57 F.3d at 1165 n.2 (noting in dicta that "we

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Exemption 4 would also fall within the scope of the Trade Secrets Act.[24] Accordingly, in the absence of a statute or properly promulgated regulation giving an agency authority to release the information -- which would remove the Trade Secrets Act's disclosure prohibition[25] -- a determination that requested material falls within Exemption 4 is tantamount to a determination that the material cannot be released, because the Trade Secrets Act "prohibits"

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[23](...continued)
suppose it is possible that this statement [from CNA] is no longer accurate in light of [the court's] recently more expansive interpretation of the scope of Exemption 4" in Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc)).

[24] See, e.g., Canadian Commercial, 514 F.3d at 39 (noting that "unless another statute or a regulation authorizes disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4"); McDonnell Douglas v. Air Force, 375 F.3d at 1185-86 (finding that Trade Secrets Act "effectively prohibits an agency from releasing information [that is] subject to [Exemption 4]"); Bartholdi, 114 F.3d at 281 (concluding that when information is shown to be protected by Exemption 4, government is generally "precluded from releasing" it by Trade Secrets Act); Mallinckrodt, 140 F. Supp. 2d at 4 (declaring that "the Trade Secrets Act affirmatively prohibits the disclosure of information covered by Exemption 4"); McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 322 n.4 (D.D.C. 1995) (finding that because two provisions are "co-extensive," it is "unnecessary to perform a redundant analysis"), vacated as moot, No. 95-5288 (D.C. Cir. Apr. 1, 1996); Chem. Waste Mgmt., Inc. v. O'Leary, No. 94-2230, 1995 WL 115894, at *6 n.1 (D.D.C. Feb. 28, 1995) (noting that "analysis under either regime is identical"); Raytheon, 1989 WL 550581, at *1.

[25] See, e.g., St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 410 (5th Cir. 1979) (finding that a disclosure made pursuant to an SSA regulation "was authorized by law within the meaning of the Trade Secrets Act"); RSR, 924 F. Supp. at 512 (finding that Clean Water Act, 33 U.S.C. § 1318(b) (2000), and "regulations promulgated under it permit disclosure" of submitter's "effluent data" and that agency's contemplated disclosure of such data is authorized by law); Jackson v. First Fed. Sav., 709 F. Supp. 887, 890-94 (E.D. Ark. 1989) (concluding that Federal Home Loan Bank Board regulation was "sufficient [under the Trade Secrets Act] to authorize" release of certain bank-examination documents); see also Qwest Commc'ns Int'l v. FCC, 229 F.3d 1172, 1173 (D.C. Cir. 2000) (finding that provision of Communications Act of 1934, 47 U.S.C. § 220(f) (2002), "provides sufficient authorization for disclosure of trade secrets," but nevertheless remanding for further proceedings because agency "failed to explain how its [disclosure order was] consistent with its policy regarding the treatment of confidential [audit] information"); cf. Canadian Commercial,514 F.3d at 42-43 (finding that FAR provisions "cited by the Air Force do not independently remove any information from coverage under Exemption 4"); McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 306 (D.C. Cir. 1999) (repeatedly noting absence of agency reliance on "any independent legal authority to release" requested information as basis for concluding that it was subject to Trade Secrets Act's disclosure prohibition). See generally Bartholdi, 114 F.3d at 281-82 (rejecting challenge to validity of disclosure regulation for failure to first exhaust issue before agency); S. Hills Health Sys. v. Bowen, 864 F.2d 1084, 1093 (3d Cir. 1988) (rejecting challenge to validity of disclosure regulation as unripe).

disclosure.[26] To the extent that information falls outside the scope of Exemption 4, the D.C. Circuit found that there was no need to determine whether it nonetheless still fits within the outer boundaries of the Trade Secrets Act.[27] Such a ruling was unnecessary, the court found, because the FOIA itself would provide the necessary authorization to release any information not falling within one of its exemptions.[28]

Standard of Review

In Chrysler Corp. v. Brown, the Supreme Court held that the Administrative Procedure Act's predominant scope and standard of judicial review -- review on the administrative record according to an arbitrary and capricious standard -- should "ordinarily" apply to reverse FOIA actions.[29] Indeed, the Court of Appeals for the District of Columbia Circuit has strongly emphasized that judicial review in reverse FOIA cases should be based on the administrative record, with de novo review reserved for only those cases in which an agency's administrative procedures were "severely defective."[30]

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[26] CNA, 830 F.2d at 1151-52; see, e.g., Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (holding that when release of requested information is barred by Trade Secrets Act, agency "does not have discretion to release it"); Envtl. Tech., 822 F. Supp. at 1228 (concluding that Trade Secrets Act "bars disclosure of information that falls within Exemption 4"); Gen. Dynamics, 822 F. Supp. at 806 (declaring that Trade Secrets Act "is an independent prohibition on the disclosure of information within its scope"); see also FOIA Update, Vol. VI, No. 3, at 3 (discussing Trade Secrets Act bar to discretionary disclosure under Exemption 4).

[27] CNA, 830 F.2d at 1152 n.139.

[28] Id.; see Frazee, 97 F.3d at 373 (emphasizing that submitters gave "no reason as to why the Trade Secrets Act should, in their case, provide protection from disclosure broader than the protection provided by Exemption 4 of FOIA," and finding that because requested document was "not protected from disclosure under Exemption 4," it also was "not exempt from disclosure under the Trade Secrets Act"); Alexander, 1993 WL 439799, at *9 (declaring that "if the documents are not deemed confidential pursuant to Exemption 4, they will not be protected under the Trade Secrets Act").

[29] 441 U.S. 281, 318 (1979); accord Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1184 (8th Cir. 2000); Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991); Gen. Dynamics Corp. v. U.S. Dep't of the Air Force, 822 F. Supp. 804, 806 (D.D.C. 1992), vacated as moot, No. 92-5186 (D.C. Cir. Sept. 23, 1993); Davis Corp. v. United States, No. 87-3365, 1988 U.S. Dist. LEXIS 17611, at *5-6 (D.D.C. Jan. 19, 1988); see also McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 6 (D.D.C. Jan. 24, 1992) (bench order) (recognizing that court has "very limited scope of review"), remanded, No. 92-5342 (D.C. Cir. Feb. 14, 1994).

[30] Nat'l Org. for Women v. SSA, 736 F.2d 727, 745 (D.C. Cir. 1984) (per curiam) (McGowan & Mikva, JJ., concurring in result); accord Campaign for Family Farms v. Glickman, 200 F.3d at 1186 n.6; Acumenics Research & Tech. v. DOJ, 843 F.2d 800, 804-05 (4th Cir. 1988); RSR Corp. v. Browner, 924 F. Supp. 504, 509 (S.D.N.Y. 1996), aff'd, No. 96-6186, 1997 WL 134413 (2d

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The D.C. Circuit subsequently reaffirmed its position on the appropriate scope of judicial review in reverse FOIA cases, holding that the district court "behaved entirely correctly" when it rejected the argument advanced by the submitter -- that it was entitled to de novo review because the agency's factfinding procedures were inadequate -- and instead confined its review to an examination of the administrative record.[31] The Court of Appeals for the Ninth Circuit, similarly rejecting a submitter's challenge to an agency's factfinding procedures, also has held that judicial review in a reverse FOIA suit is properly based on the administrative record.[32]

Review on the administrative record is a "deferential standard of review [that] only requires that a court examine whether the agency's decision was 'based on a consideration

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[30](...continued)
Cir. Mar. 26, 1997), affirmance vacated without explanation, No. 96-6186 (2d Cir. Apr. 17, 1997); Comdisco, Inc. v. GSA, 864 F. Supp. 510, 513 (E.D. Va. 1994); Burnside-Ott Aviation Training Ctr. v. United States, 617 F. Supp. 279, 282-84 (S.D. Fla. 1985); cf. Alcolac, Inc. v. Wagoner, 610 F. Supp. 745, 749 (W.D. Mo. 1985) (upholding agency's decision to deny claim of confidentiality as "rational"). But see McDonnell Douglas v. Air Force, 375 F.3d 1182, 1197, 1201-02 (D.C. Cir. 2004) (Garland, J., dissenting) (criticizing the panel majority for substituting its own facts and rationales for those contained in the case's administrative record, including its reliance upon an economic theory "of the court's own invention"); Carolina Biological Supply Co. v. USDA, No. 93CV00113, slip op. at 4 & n.2 (M.D.N.C. Aug. 2, 1993) (applying de novo review after observing that standard of review issue presented close "judgment call"); Artesian Indus. v. HHS, 646 F. Supp. 1004, 1005-06 (D.D.C. 1986) (flatly rejecting position advanced by both parties that it should base its decision on agency record according to arbitrary and capricious standard).

[31] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987); see, e.g., TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1092-96 (E.D. Mo. 1998) (finding agency's factfinding procedures to be adequate when submitter "received notice of the FOIA request and was given the opportunity to object," and holding that challenges to brevity of agency's disclosure decision, lack of administrative appeal right, as well as "procedural irregularities" concerning time period allotted for providing objections, as well as a dispute over appropriate decisionmaker, did not justify de novo review); RSR, 924 F. Supp. at 509 (finding agency's factfinding procedures to be adequate when submitter was "promptly notified" of the FOIA request and "given an opportunity to object to disclosure" and "to substantiate [those] objections" before agency decision was made); Comdisco, 864 F. Supp. at 514 (finding agency's factfinding procedures to be adequate when submitter was "accorded a full and fair opportunity to state and support its position on disclosure"); see also CC Distribs. v. Kinzinger, No. 94-1330, 1995 WL 405445, at *3 (D.D.C. June 28, 1995) (confining its review to record when submitter did "not actually challenge the agency's factfinding procedures," but instead challenged how agency "applied" those procedures); Chem. Waste Mgmt., Inc. v. O'Leary, No. 94-2230, 1995 WL 115894, at *6 n.4 (D.D.C. Feb. 28, 1995) (confining its review to record even when agency's factfinding itself was found to be "inadequate," because agency's "factfinding procedures" were not challenged).

[32] See Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1348 (9th Cir. 1990).

of the relevant factors and whether there has been a clear error of judgment.'"[33] Under this standard "[a] reviewing court does not substitute its judgment for the judgment of the agency" and instead "simply determines whether the agency action constitutes a clear error of judgment."[34] Significantly, "[a]n agency is not required to prove that its predictions of the effect of disclosure are superior"; rather, it "is enough that the agency's position is as plausible as the contesting party's position."[35] Indeed, as one court has held, "[t]he harm from disclosure is a matter of speculation, and when a reviewing court finds that an agency has supplied an equally reasonable and thorough prognosis, it is for the agency to choose between the contesting party's prognosis and its own."[36]

Because judicial review is based on the agency's administrative record, it is important that agencies take care to develop a comprehensive one. The D.C. Circuit has remanded several reverse FOIA cases back to the agency for development of a more complete administrative record. In one, the D.C. Circuit ordered a remand so that it would have the benefit of "one considered and complete statement" of the agency's position on disclosure.[37] In another, the D.C. Circuit reversed the decision of the district court, which had permitted an inadequate record to be supplemented in court by an agency affidavit, holding that because the agency had failed at the administrative level to give a reason for its refusal to withhold certain price information, it was precluded from offering a "post-hoc rationalization" for the first

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[33] McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 14 (D.D.C. 1997) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)), rev'd on other grounds, 180 F.3d 303 (D.C. Cir. 1999); accord Campaign for Family Farms, 200 F.3d at 1187 (likewise quoting Citizens to Preserve Overton Park); Clearbrook, L.L.C. v. Ovall, No. 06-0629, 2006 U.S. Dist. LEXIS 81244, at *7 (S.D. Ala. Nov. 3, 2006) (same); McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 215 F. Supp. 2d 200, 204 (D.D.C. 2002) (same), aff'd in part & rev'd in part, 375 F.3d 1182 (D.C. Cir. 2004), reh'g en banc denied, No. 02-5342 (D.C. Cir. Dec. 16, 2004); Mallinckrodt Inc. v. West, 140 F. Supp. 2d 1, 4 (D.D.C. 2000) (same), appeal dismissed voluntarily, No. 00-5330 (D.C. Cir. Dec. 12, 2000).

[34] McDonnell Douglas v. Air Force, 215 F. Supp. 2d at 204; accord Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C. Cir. 1997); see Boeing Co. v. U.S. Dep't of the Air Force, No. 05-365, 2009 WL 1373813, at *3 (D.D.C. May 18, 2009) (noting that agency decision "is arbitrary when it provides no 'empirical support' for its assertions," or "when it suffers from 'shortfalls in logic and evidence,'" or "when it 'fail[s] to explain how [agency's] knowledge or experience supports'" the decision); GS New Mkts. Fund, L.L.C. v. U.S. Dep't of the Treasury, 407 F. Supp. 2d 21, 24 (D.D.C. 2005).

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

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

[37] McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1167 (D.C. Cir. 1995) (deeming case to have come to court in "unusual posture" with "confusing administrative record" stemming from "intersection" of FOIA actions and contract award announcements).

time in court.[38]

Likewise, the court ordered a remand after holding that an "agency's administrative decision must stand or fall upon the reasoning advanced by the agency therein" and that an "agency cannot gain the benefit of hindsight in defending its decision" by advancing a new argument once the matter gets to litigation.[39] Thus, the D.C. Circuit has emphasized that judicial review in reverse FOIA cases must be conducted on the basis of the "administrative record compiled by the agency in advance of litigation."[40] Agency affidavits that do "no more than summarize the administrative record" have been found to be permissible.[41]

In another case remanded to the agency for further proceedings due to an inadequate record, the D.C. Circuit rejected the argument proffered by the agency that a reverse FOIA plaintiff bears the burden of proving the "non-public availability" of information, finding that it is "far more efficient, and obviously fairer" for that burden to be placed on the party who claims that the information is public.[42] The D.C. Circuit also upheld the district court's requirement that the agency prepare a document-by-document explanation for its denial of

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[38] AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987).

[39] Data-Prompt, Inc. v. Cisneros, No. 94-5133, slip op. at 3 (D.C. Cir. Apr. 5, 1995); cf. McDonnell Douglas v. Air Force, 375 F.3d at 1188 & n.2 (declaring that it did not rely upon agency's "post hoc rationale" for upholding its decision, and explaining that court would remand matter to agency "where the agency's initial explanation of its decision was inadequate," but that it would "not typically remand to permit the agency an opportunity to adopt an entirely new explanation first suggested on appeal").

[40] AT&T, 810 F.2d at 1236; see also TRIFID, 10 F. Supp. 2d at 1097 (refusing to consider affidavits proffered by submitter as they "were not submitted to [the agency] during the administrative process"); CC Distribs., 1995 WL 405445, at *3 (same); Chem. Waste, 1995 WL 115894, at *6 n.4 (same); Alexander & Alexander Servs. v. SEC, No. 92-1112, 1993 WL 439799, at *13 n.9 (D.D.C. Oct. 19, 1993) (same), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996); Gen. Dynamics, 822 F. Supp. at 805 n.1 (same); accord Clearbrook, 2006 U.S. Dist. LEXIS 81244, at *10 (same). But cf. Canadian Commercial Corp. v. Dep't of the Air Force, 442 F. Supp. 2d 15, 27-29 (D.D.C. 2006) (accepting the agency's second decision letter, which was issued after litigation commenced, because plaintiff "acquiesced in the reconsideration of the earlier decision"), aff'd on other grounds, 514 F.3d 37 (D.C. Cir. 2008).

[41] Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988); accord McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 238 n.2 (E.D. Mo. 1996) (permitting submission of agency affidavit that "helps explain the administrative record"), appeal dismissed, No. 96-2662 (8th Cir. Aug. 29, 1996); Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 16 (D.D.C. Sept. 2, 1993) (permitting submission of agency affidavit that "merely elaborates" upon basis for agency decision and "provides a background for understanding the redactions"); see also, e.g., Int'l Computaprint v. U.S. Dep't of Commerce, No. 87-1848, slip op. at 12 n.36 (D.D.C. Aug. 16, 1988) ("The record in this case has been supplemented with explanatory affidavits that do not alter the focus on the administrative record.").

[42] Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989).

confidential treatment.[43] Specifically, the D.C. Circuit found that the agency's burden of justifying its decision "cannot be shirked or shifted to others simply because the decision was taken in a reverse-FOIA rather than a direct FOIA context."[44] Moreover, the court observed, in cases in which the public availability of information is the basis for an agency's decision to disclose, the justification of that position is "inevitably document-specific."[45] Similarly, the District Court for the District of Columbia remanded a case in which the agency "never did acknowledge," let alone "respond to," the submitter's competitive harm argument.[46]

Rather than order a remand, however, that same district court, in an earlier case, simply ruled against the agency -- even going so far as to permanently enjoin it from releasing the requested information -- on the basis of a record that it found insufficient under the standards of the APA.[47] Specifically, the court noted that the agency "did not rebut any of the evidence produced" by the submitter, "did not seek or place in the record any contrary evidence, and simply ha[d] determined" that the evidence offered by the submitter was "insufficient or not credible."[48] This, the court found, "is classic arbitrary and capricious action by a government agency."[49] When the agency subsequently sought an opportunity to "remedy" those "inadequacies in the record" by seeking a remand, the court declined to permit one, reasoning that the agency was "not entitled to a second bite of the apple just because it made a poor decision [for,] if that were the case, administrative law would be a never ending loop from which aggrieved parties would never receive justice."[50]

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[43] Id. at 343-44.

[44] Id. at 344.

[45] Id.

[46] Chem. Waste, 1995 WL 115894, at *5.

[47] McDonnell Douglas v. NASA, No. 91-3134, transcript at 5-6, 10 (D.D.C. Jan. 24, 1992).

[48] Id. at 6.

[49] Id.; see, e.g., McDonnell Douglas v. EEOC, 922 F. Supp. at 241-42 (declaring agency to be "arbitrary and capricious" because its "finding that the documents [at issue] were required [to be submitted was] not supported by substantial evidence in the agency record," and elaborating that it was "not at all clear" that agency "even made a factual finding on [that] issue" and "to the extent" that it "did consider the facts of [the] case, it viewed only the facts favorable to its predetermined position"); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 13 (D.D.C. 1996) (declaring agency decision to be "not in accordance with law" when "[n]either the administrative decision nor the sworn affidavits submitted by the [agency] support the conclusion that [the submitter] was required to provide" requested information), appeal dismissed voluntarily, No. 96-5163 (D.C. Cir. July 3, 1996). See generally Envtl. Tech., Inc. v. EPA, 822 F. Supp. 1226, 1230 (E.D. Va. 1993) (granting submitter's motion for permanent injunction perfunctorily, without even addressing adequacy of agency record).

[50] McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316, 319 (D.D.C. 1995) (permanent injunction ordered to "remain[] in place"), aff'd for agency failure to timely raise argument, No. 95-5290 (D.C. Cir. Sept. 17, 1996).

This same court -- when later presented with an administrative record that "differ[ed] substantially" from that earlier case and which "rebutted [the submitter's] arguments with detailed analysis" and indicated that the agency had "consulted" experienced individuals who were "intimately familiar with [the submitter's] arguments and evidence" -- upheld the agency's disclosure decision.[51] When the submitter sought reconsideration of the court's ruling, contending that the court improperly sustained the agency's decision on the basis of "'secret testimony from anonymous witnesses,'" the court dismissed those contentions as "inapposite and inaccurate," reasoning that "none of the issues before the court concerned the relative prestige of the experts on each party's side."[52] Rather, the court held, the "more appropriate concern [was] whether [the agency's] factual decisions [were] supported by substantial evidence" in the administrative record.[53] This decision was, nevertheless, overturned on appeal for what the court of appeals characterized as the agency's "illogical application of the competitive harm test," with no mention made of the extensive evidence in the agency's administrative record.[54]

Another agency's disclosure determination was upheld when it was based on an administrative record that the court found plainly demonstrated that the agency "specifically considered" and "understood" the arguments of the submitter and "provided reasons for rejecting them."[55] In so ruling, the court took note of the "lengthy and thorough" administrative process, during which the agency "repeatedly solicited and welcomed" the submitter's views on whether a FOIA exemption applied.[56] This record demonstrated that the agency's action was not arbitrary or capricious.[57]

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[51] McDonnell Douglas v. NASA, 981 F. Supp. at 16.

[52] McDonnell Douglas Corp. v. NASA, No. 96-2611, slip op. at 3 (D.D.C. May 1, 1998) (quoting submitter's brief), rev'd on other grounds, 180 F.3d 303 (D.C. Cir. 1999).

[53] Id. at 4.

[54] McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 307 (D.C. Cir. 1999) (dismissing agency's disclosure determination); see also FOIA Update, Vol. XX, No. 1, at 2.

[55] Gen. Dynamics, 822 F. Supp. at 807.

[56] Id. at 806.

[57] Id. at 807; see, e.g., GS New Mkts. Fund, 407 F. Supp. 2d at 25 (concluding that agency "carefully considered the nature of the FOIA requests and the basis for the [submitter's] objections before rationally concluding that it should release portions of" requested records); McDonnell Douglas v. Air Force, 215 F. Supp. 2d at 202-03 (noting that agency "requested comments from" submitter three times, that submitter actually "provided comments eleven times," and that after considering those comments agency "presented reasoned accounts" of its position and so, its "decision to disclose was not arbitrary or capricious"); Atlantis Submarines Haw., Inc. v. U.S. Coast Guard, No. 93-00986, slip op. at 10-11 (D. Haw. Jan. 28, 1994) (finding that agency "appears to have fully examined the evidence and carefully followed its own procedures," that its decision to disclose "was conscientiously undertaken," and that it thus was not "arbitrary or capricious") (denying motion for preliminary injunction), dismissed per stipulation (D. Haw. Apr. 11, 1994); Source One Mgmt., Inc. v. U.S. Dep't of the Interior, No.

(continued...)

Similarly, when an agency provided a submitter with "numerous opportunities to substantiate its confidentiality claim," afforded it "vastly more than the amount of time authorized" by its regulations, and "explain[ed] its reasons for [initially] denying the confidentiality request," the court found that the agency had "acted appropriately by issuing its final decision denying much of the confidentiality request on the basis that it had not received further substantiation."[58] In so holding, the court specifically rejected the submitter's contention that "it should have received even more assistance" from the agency and held that the agency was "under no obligation to segregate the documents into categories or otherwise organize the documents for review."[59] The court also specifically noted that the agency's acceptance of some of the submitter's claims for confidentiality in this matter "buttresses" the conclusion that its decision was "rational."[60]

In its most recent reverse FOIA case, the District Court for the District of Columbia again upheld an agency's disclosure determination, finding that the submitter had "not offered evidence sufficient to carry its burden to show that the Air Force acted arbitrarily and capriciously."[61]

Executive Order 12,600

Administrative practice in potential reverse FOIA situations is generally governed by an executive order issued more than two decades ago. Executive Order 12,600 requires federal agencies to establish certain predisclosure notification procedures which will assist

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[57](...continued)
92-Z-2101, transcript at 4 (D. Colo. Nov. 10, 1993) (bench order) (declaring that "Government has certainly been open in listening to" submitter's arguments "and has made a decision which . . . is rational and is not an abuse of discretion and is not arbitrary and capricious"); Lykes Bros., No. 92-2780, slip op. at 15 (D.D.C. Sept. 2, 1993) (noting that agency "provided considerable opportunity" for submitters to "contest the proposed disclosures, and provided sufficient reasons on the record for rejecting" submitters' arguments).

[58] Alexander, 1993 WL 439799, at *5-6; see CC Distribs., 1995 WL 405445, at *6 n.2 (ruling that agency's procedures were adequate when agency gave submitter "adequate notice" of existence of FOIA request, afforded it "numerous opportunities to explain its position," repeatedly advised it to state its objections "with particularity," and "at least, provided [the submitter] with occasion to make the best case it could").

[59] Alexander, 1993 WL 439799, at *5 & 13 n.5.

[60] Id. at *13 n.6; accord Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, 1997 WL 578960, at *3 (W.D. Ark. Feb. 5, 1997) (finding it significant that record revealed that agency had been "careful in its selection of records for release, and in fact [had] denied the release of some records"), aff'd, 133 F.3d 1081 (8th Cir. 1998); Source One, No. 92-Z-2101, transcript at 4 (D. Colo. Nov. 10, 1993) (noting with approval that "there were certain things that [the agency had] excised").

[61] Boeing, 2009 WL 1373813, at *8.

agencies in developing adequate administrative records.[62] The executive order recognizes that submitters of proprietary information have certain procedural rights and it therefore requires, with certain limited exceptions,[63] that notice be given to submitters of confidential commercial information when they mark it as such,[64] or more significantly, whenever the agency "determines that it may be required to disclose" the requested data.[65]

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[62] 3 C.F.R. 235 (1988) (applicable to all executive branch departments and agencies), reprinted in 5 U.S.C. § 552 note (2006), and in FOIA Update, Vol. VIII, No. 2, at 2-3; see, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.8(a)(2) (2008) (defining "submitter" as "any person or entity from whom the Department obtains business information, directly or indirectly").

[63] Exec. Order No. 12,600, § 8 (listing six circumstances in which notice is not necessary -- for example, when agency determines that requested information should be withheld, or conversely, when it already is public or its release is required by law).

[64] Exec. Order No. 12,600, § 3 (establishing procedures for submitter marking of confidential commercial information).

[65] Exec. Order No. 12,600, § 1; see Judicial Watch v. Dep't of the Army, 466 F. Supp. 2d 112, 122-24 & n. 7 (D.D.C. 2006) (permitting intervenor to raise Exemption 4 after court had ordered release of documents, because agency had neglected to follow its submitter notice regulation); Delta Ltd. v. U.S. Customs & Border Prot. Bureau, 393 F. Supp. 2d 15, 18 (D.D.C. 2005) (stating that agency was "putting third parties at risk" by failing to follow its regulations that require it to contact submitters); MCI Worldcom, Inc. v. GSA, 163 F. Supp. 2d 28, 37 (D.D.C. 2001) (finding that agency acted arbitrarily and capriciously when it "failed to follow" its submitter-notice regulations and did not afford submitter "the opportunity to submit any comments as to how disclosure of the [requested information] would cause [it] substantial competitive harm"); see also *FOIA Post*, "Treatment of Unit Prices After McDonnell Douglas v. Air Force" (posted 9/8/05) (supplementing *FOIA Post*, "New McDonnell Douglas Opinion Aids Unit Price Decisionmaking" (posted 10/4/02)); *FOIA Post*, "Treatment of Unit Prices Under Exemption 4" (posted 5/29/02) (setting forth guidance on handling requests for unit prices, directing agencies to conduct full submitter notice each time unit prices are requested, and advising agencies to carefully evaluate any claims of competitive harm on a case-by-case basis) (superseding FOIA Update, Vol. XVIII, No. 4, at 1, and FOIA Update, Vol. V, No. 4, at 4); FOIA Update, Vol. VIII, No. 2, at 1; FOIA Update, Vol. IV, No. 4, at 10; FOIA Update, Vol. III, No. 3, at 3; cf. Forest Guardians v. U.S. Forest Serv., No. 99-615, slip op. at 57 (D.N.M. Jan. 29, 2001) (finding that although agency "failed to undertake procedures required by its own regulations, to engage in sufficient fact finding[,] or to utilize a rational and consistent decisionmaking process," court could not "agree" that these facts rendered agency's conduct "contrary to law" or arbitrary and capricious, because there were "insufficient concrete and uncontested facts" to make determination on applicability of any FOIA exemption) (case ultimately settled by parties and agency agreed to provide notice to affected submitters). But cf. McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 323 (D.D.C. 1995) (finding that agency "simply does not have the authority to require [the submitter] to justify again and again why information, the disclosure of which has been enjoined by a federal court, should continue to be enjoined," and holding that agency must instead take steps to "have the existing injunction modified or dissolved"), vacated as moot, No. 95-5288 (D.C. Cir. Apr. 1, 1996). See generally OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 168 (3d Cir. 2000) (concluding that (continued...)

When submitters are given notice under this procedure, they must be given a "reasonable period of time" within which to object to disclosure of any of the requested material.[66] As one court has emphasized, however, this consultation is "appropriate as one step in the evaluation process, [but] is not sufficient to satisfy [an agency's] FOIA obligations."[67] Consequently, an agency is "required to determine for itself whether the information in question should be disclosed."[68]

If the submitter's objection is not, in fact, sustained by the agency, the submitter must be notified in writing and given a brief explanation of the agency's decision.[69] Such a notification must be provided a "reasonable number of days prior to a specified disclosure date," which gives the submitter an opportunity to seek judicial relief.[70]

This executive order predates the decision of the Court of Appeals for the District of Columbia Circuit in Critical Mass Energy Project v. NRC,[71] and thus does not contain any procedures for notifying submitters of voluntarily provided information in order to determine if that information is "of a kind that would customarily not be released to the public by the person from whom it was obtained."[72] (For a further discussion of this "customary treatment" standard, see Exemption 4, Applying Critical Mass, above.) As a matter of sound administrative practice, however, agencies should employ procedures analogous to those set forth in Executive Order 12,600 when making determinations under this "customary treatment"

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[65](...continued)
estimated $1.7 million cost of notifying more than 80,000 submitters was properly charged to requester seeking documents for commercial use).

[66] Exec. Order No. 12,600, § 4; see McDonnell Douglas, 895 F. Supp. at 328 (holding that submitter is "not denied due process of law just because [agency] regulations do not allow cumulative opportunities to submit justifications and to refute agency decisions").

[67] Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996).

[68] Id.; accord Exec. Order No. 12,600, § 5 (specifically contemplating that after affording notice to submitter agency makes ultimate determination concerning release); see also Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974) (concluding that in justifying nondisclosure, submitter's treatment of information is not "the only relevant inquiry," and finding that agency must be satisfied that harms underlying exemption are likely to occur).

[69] Exec. Order No. 12,600, § 5; see TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1093 (E.D. Mo. 1998) ("An agency's explanation of its decision may be 'curt,'" provided that it "indicate[s] the determinative reason for the action taken.").

[70] Exec. Order No. 12,600, § 5.

[71] 975 F.2d 871 (D.C. Cir. 1992) (en banc).

[72] Id. at 879.

standard.[73]

Accordingly, if an agency is uncertain of the submitter's customary treatment of information, the submitter should be notified and given an opportunity to provide the agency with a description of its treatment -- including any disclosures that are customarily made and the conditions under which such disclosures occur.[74] The agency should then make an objective determination as to whether or not the "customary treatment" standard is satisfied.[75] In the event a submitter challenges an agency's threshold determination under Critical Mass concerning whether the submission is "required" or "voluntary," the agency should be careful to include in the administrative record a full justification for its position on that issue as well.[76]

The procedures set forth in Executive Order 12,600 do not provide a submitter with a formal evidentiary hearing.[77] This is entirely consistent with what has now become well-established law -- i.e., that an agency's procedures for resolving a submitter's claim of confidentiality are not inadequate simply because they do not afford the submitter a right to

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[73] See FOIA Update, Vol. Vol. XIV, No. 2, at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking"); see also id. at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4").

[74] See id. at 7; accord Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 153 (D.C. Cir. 2001) (directing district court, on remand, to review submitters' declarations "and any other relevant responses" that they might provide to establish their customary treatment of requested information); Hull v. U.S. Dep't of Labor, No. 1:04-CV-01264, slip op. at 9-11 (D. Colo. Dec. 2, 2005) (finding that agency had "met its burden" to show that information was not "customarily released" by submitter where agency provided statements from submitters "specifically addressing" its customary treatment of such information; conversely, finding that agency had "failed to meet its burden" on customary treatment issue where submitter failed to address it and agency's affiant lacked requisite "personal knowledge" about submitter's practices); cf. Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 171 (D.D.C. 2004) ("While affidavits from the information providers themselves or evidence of confidentiality agreements would carry more weight on the custom issue, it is sufficient for an agency to proceed solely on its sworn affidavits.").

[75] See FOIA Update, Vol. XIV, No. 2, at 7.

[76] See McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 241-42 (E.D. Mo. 1996) (concluding that agency's finding that submission was required was "not supported by substantial evidence," and consequently finding agency decision to be "arbitrary, capricious, [an] abuse of discretion and contrary to the law"), appeal dismissed, No. 96-2662 (8th Cir. Aug. 29, 1996); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 13 (D.D.C. 1996) (explaining that agency's failure to provide "support" for its conclusion that submission was required rendered its decision "not in accordance with law"), appeal dismissed voluntarily, No. 96-5163 (D.C. Cir. July 3, 1996).

[77] See FOIA Update, Vol. VIII, No. 2, at 1 (describing basic procedural protections afforded to submitters under Executive Order 12,600, none of which includes evidentiary hearing).

an evidentiary hearing.[78]

Similarly, procedures in the executive order do not provide for an administrative appeal of an adverse decision on a submitter's claim for confidentiality. The lack of such an appeal right has not been considered by the D.C. Circuit, but it has been addressed by the District Court for the District of Columbia, which has rejected a submitter's contention that an agency's decision to disclose information "must" be subject to an administrative appeal.[79]

The Court of Appeals for the Fourth Circuit had an opportunity to confront this issue in Acumenics Research & Technology v. Department of Justice.[80] There, in analyzing Department of Justice regulations which do not provide for an administrative appeal, the Fourth Circuit found that the procedures provided for in the regulations -- namely, notice of the request, an opportunity to submit objections to disclosure, careful consideration of those objections by the agency, and issuance of a written statement describing the reasons why any objections were not sustained -- in combination with a "face-to-face meeting that, in essence, amounted to an opportunity to appeal [the agency's] tentative decision in favor of disclosure," were adequate.[81] The Fourth Circuit, however, expressly declined to render an opinion as to whether the procedures implemented by the regulations alone would have been adequate.[82]

Likewise, the Court of Appeals for the Ninth Circuit has upheld the adequacy of an agency's factfinding procedures that did not provide for an administrative appeal per se.[83] In that case, the agency's procedures provided for notice and an opportunity to object to disclosure, for consideration of the objection by the agency, for a written explanation as to why the objection was not sustained, and then for another opportunity for the submitter to provide information in support of its objection.[84] After independently reviewing the record, the Ninth Circuit found that such procedures were adequate, and it accordingly held that the agency's decision to disclose the information did not require review in a trial de novo.[85]

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[78] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1159 (D.C. Cir. 1987); Nat'l Org. for Women v. SSA, 736 F.2d 727, 746 (D.C. Cir. 1984) (per curiam) (McGowan & Mikva, JJ., concurring in result); McDonnell Douglas Corp. v. NASA, No. 96-2611, slip op. at 4 (D.D.C. May 1, 1998), rev'd on other grounds, 180 F.3d 303 (D.C. Cir. 1999).

[79] Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 6 (D.D.C. Sept. 2, 1993); see also TRIFID, 10 F. Supp. 2d at 1093-94 (noting lack of appeal provision in executive order, and concluding that "absence of an appeal mechanism and a formal mechanism to provide additional information [did] not render [the agency's] procedures defective").

[80] 843 F.2d 800, 805 (4th Cir. 1988).

[81] Id.

[82] Id. at 805 n.4.

[83] See Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1348 (9th Cir. 1990).

[84] Id.

[85] Id.