# 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]

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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); cf. Am. Farm Bureau Fed'n v. EPA, 836 F.3d 963, 969 (8th Cir. 2016) (holding that allegation that EPA's disclosure of personal information was based on misapplication of FOIA exemption designed to protect personal privacy together with undisputed evidence of nonconsensual disclosures or impending disclosures "suffice to establish an injury in fact that was caused by the agency and is redressable by the court"); Entergy Gulf States La., L.L.C. v. EPA, 817 F.3d 198, 206 (5th Cir. 2016) (holding that requester entitled to intervene of right in reverse FOIA case because adversity of interest exists due to dispute between requester and agency over stay of case and therefore, despite ultimate goal of disclosure, "any same-ultimate-objective presumption of adequate representation is overcome, and the requirement that [the requester's] interests be inadequately represented by EPA is satisfied").

[2] See, e.g., AFL-CIO v. FEC, 333 F.3d 168, 172 (D.C. Cir. 2003) (submitter organization challenged 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-

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]

Typically, the submitter contends that the requested information falls within Exemption 4 of the FOIA.[4] On June 24, 2019, the Supreme Court issued a decision in Food Marketing. Institute v. Argus Leader Media,[5] which overturned the definition of "confidential" for purposes of Exemption 4 established over forty years ago in National Parks & Conservation Association v. Morton,[6] and which had included a "substantial competitive harm" standard.[7] The cases discussed in this chapter all predate the Supreme Court's ruling on the meaning of the word "confidential" under Exemption 4.

Reverse FOIA actions have also been brought by plaintiffs challenging a contemplated agency disclosure of information that the plaintiffs contended was exempt

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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), 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) (2012 & Supp. V 2017).

[5] 139 S. Ct. 915 (2019).

[6] 498 F.2d 765 (D.C. Cir. 1974).

[7] Id. (holding that "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4").

under other FOIA exemptions.[8] Plaintiffs have also used the Privacy Act of 1974[9] as a basis to bring a reverse FOIA claim.[10] (See the further discussion of this issue under Exemption 6, Privacy Interest, above.)

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[8] See, e.g., Am. Farm Bureau Fed'n v. EPA, 836 F.3d 963, 972 (8th Cir. 2016) (finding that agency abused its discretion in deciding that information at issue was not exempt from mandatory disclosure under Exemption 6 because, even though some information about individuals might be obtained through publically available sources, "[t]here is an important distinction 'between the mere *ability* to access information and the likelihood of actual public *focus* on that information'"); 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 Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (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 v. DOD, 193 F. Supp. 2d 229, 238-39 (D.D.C. 2002) (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 O Mokapu 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 "absence of any record support" suggesting that agency, "as a general matter, arbitrarily declined to invoke that privilege").

[9] 5 U.S.C. § 552a (2012 & Supp. V 2017).

Courts have held that 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.[11] 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 accordance with the "narrow construction" afforded to the FOIA's exemptions.[12] When the underlying FOIA request was subsequently withdrawn, the D.C. Circuit has found that the basis for the court's

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[10] See, e.g., Recticel Foam Corp. v. DOJ, 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 because Privacy Act generally prohibits public disclosure of covered information that falls within FOIA exemption), appeal dismissed, No. 02-5118 (D.C. Cir. Apr. 25, 2002); Tripp, 193 F. Supp. 2d at 238-40 (rejecting plaintiff's argument brought after disclosure occurred 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); 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).

[11] 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. Stevens v. DHS, No. 14-3305, 2017 WL 1397549, at *4 (N.D. Ill. Apr. 19, 2017) (rejecting intervenor's argument that agency "show how disclosure would not cause competitive harm to [intervenor]," and rejecting intervenor's responsiveness argument and holding that "[i]t is up to ICE and the requester to decide whether the information sought is relevant to what was requested").

[12] 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).

jurisdiction dissipates and dismissed the case as moot.[13] Courts have also found that they lack jurisdiction if an agency has not made a final determination to release requested information.[14]

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."[15] Moreover, the Supreme Court held that jurisdiction cannot be based

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[13] 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).

[14] 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).

[15] 441 U.S. 281, 293-94 (1979); accord Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1185 (8th Cir. 2000) (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 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 Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) (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,

on the Trade Secrets Act[16] (a broadly worded criminal statute prohibiting the unauthorized disclosure of "practically any commercial or financial data collected by any federal employee from any source"[17]) because it is a criminal statute that does not afford a "private right of action."[18] Instead, the Court found that review of an agency's "decision to disclose" requested records[19] can be brought under the Administrative Procedure Act (APA).[20] 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 capricious" within the meaning of the APA.[21]

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1997). But see AFL-CIO v. FEC, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001) (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").

[16] 18 U.S.C. § 1905 (2012 & Supp. V 2017).

[17] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987).

[18] Chrysler, 441 U.S. at 316-17, 319 n.49 (declining to address "relative ambits" of Exemption 4 and Trade Secrets Act); accord McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1186 n.1 (D.C. Cir. 2004) (citing Chrysler).

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

[20] 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).

[21] 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 &

## 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.[22] 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."[23]

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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); Northrop Grumman Sys. Corp. v. NASA, 346 F. Supp. 3d 109, 116 (D.D.C. 2018) (noting that submitter "may bring an action under the APA to enjoin an agency from releasing proprietary information under FOIA in violation of the Trade Secrets Act"): Mallinckrodt Inc. v. West, 140 F. Supp. 2d 1, 4 (D.D.C. 2000) (declaring that "[a]lthough FOIA exemptions are normally permissive rather than mandatory," the Trade Secrets Act "independently prohibits the disclosure of confidential information"); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 11 (D.D.C. 1996); 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).

[22] 441 U.S. 281, 318 (1979); accord Jurewicz v. USDA, 741 F.3d 1326, 279 (D.C. Cir. 2014) (holding that "[t]o prevail, appellants must demonstrate that conclusion is arbitrary and capricious or contrary to law); 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, 822 F. Supp. at 806, 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).

[23] 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, 200 F.3d at 1186 n.6; Acumenics Research & Tech., 843 F.2d at 804-05; RSR Corp. v. Browner, 924 F. Supp. 504, 509 (S.D.N.Y. 1996), 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); Comdisco, 864 F. Supp. at 513; 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 at 1201-02 (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"); Artesian Indus. v. HHS, 646 F. Supp. 1004, 1005-06 (D.D.C. 1986) (rejecting position advanced by both parties that it should base its decision on agency record according to arbitrary and capricious standard).

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.[24] 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.[25]

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 of the relevant factors and whether there has been a clear error of judgment.'"[26] 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

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[24] 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., 1995 WL 405445, at *3 (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).

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

[26] McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 14 (D.D.C. 1997) (quoting Citizens to Pres. 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 Pres. 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., 140 F. Supp. 2d at 4 (same), appeal dismissed voluntarily, No. 00-5330 (D.C. Cir. Dec. 12, 2000).

error of judgment."[27] 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."[28] 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."[29]

The D.C. Circuit has remanded several reverse FOIA cases back to the agency for development of a more complete administrative record. In one case, 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.[30] 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 time in court.[31]

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

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[27] 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).

[28] 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").

[29] 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).

[30] 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).

[31] AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987); see also AAR Airlift Grp. v. U.S. Transp. Command, 161 F. Supp. 3d 37, 45 (D.D.C. 2015) (holding that court could not support disclosure determination where current agency "explanation of its rationale is in tension with the contemporaneous record of its decision" because "[a]ny 'new materials' requested by the Court at this stage would more likely constitute 'new rationalizations' for the agency's decision that the Court may not consider on the present record, as opposed to being 'merely explanatory of the original record'").

of litigation."[32] Agency affidavits that do "no more than summarize the administrative record" have been found to be permissible.[33]

In a 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.[34] The D.C. Circuit also upheld the district court's requirement that the agency prepare a document-by-document explanation for its denial of confidential treatment.[35] Specifically, the D.C. Circuit found that the agency's burden of justifying its decision "cannot be shirked or shifted to others simply because

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[32] AT&T, 810 F.2d at 1236; see also McDonnell Douglas Corp. v. NASA, 109 F. Supp. 2d 27, 29 (D.D.C. 2000) (holding that "the only relevant evidence in a reverse-FOIA proceeding is the administrative record"); TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1097 (E.D. Mo. 1998) (refusing to consider affidavits proffered by submitter as they "were not submitted to [the agency] during the administrative process"); CC Distribs. v. Kinzinger, No. 94-1330, 1995 WL 405445, at *3 (D.D.C. June 28, 1995) (same); Chem. Waste Mgmt., Inc. v. O'Leary, No. 94-2230, 1995 WL 115894, at *6 n.4 (D.D.C. Feb. 28, 1995) (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 Corp. v. U.S. Dep't of the Air Force, 822 F. Supp. 804, 805 n.1 (D.D.C. 1992) (same); accord Clearbrook, L.L.C. v. Ovall, No. 06-0629, 2006 U.S. Dist. LEXIS 81244, at *10 (S.D. Ala. Nov. 3, 2006) (same); cf. Chiquita Brands Int'l Inc. v. SEC, 805 F.3d 289, 299 (D.C. Cir. 2015) (holding that "'[a]lthough it is axiomatic that [the court] may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review . . . the contested decision need not be a model of clarity'") (citing Casino Airlines, Inc. v. NTSB, 439 F.3d 715, 717 (D.C.Cir.2006). 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).

[33] 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.").

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

[35] Id. at 343-44.

the decision was taken in a reverse-FOIA rather than a direct FOIA context."[36] 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."[37] 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.[38]

Rather than order a remand, however, that same district court, in an earlier case, ruled against the agency and permanently enjoined it from releasing the requested information on the basis of a record that it found insufficient under the standards of the APA.[39] 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."[40] This, the court found, "is classic arbitrary and capricious action by a government agency."[41] 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

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[36] Id. at 344.

[37] Id.

[38] Chem. Waste Mgmt., Inc. v. O'Leary, No. 94-2230, 1995 WL 115894, at *5 (D.D.C. Feb. 28, 1995).

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

[40] Id. at 6.

[41] Id.; see, e.g., McDonnell Douglas Corp. 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 without addressing adequacy of agency record).

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."[42]

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.[43] This decision was, nevertheless, overturned on appeal, with the D.C. Circuit setting aside the agency's disclosure decision and ruling that the reasons the submitter "advanced for claiming its line item prices were confidential commercial or financial information are indisputable."[44]

Conversely, an 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."[45] 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.[46] The court found that the record demonstrated that the agency's action was not arbitrary or capricious.[47]

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

[43] McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 16 (D.D.C. 1997).

[44] McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 307 (D.C. Cir. 1999) (considering and rejecting each rationale provided by agency in support of its disclosure decision); see also Northrop Grumman Sys. Corp. v. NASA, 346 F. Supp. 3d 109, 120 (D.D.C. 2018) (conducting review of each rationale provided by agency in support of disclosure determination, and holding that "reasons [agency] gave for concluding that release of the information [at issue] was not likely to cause [submitter] substantial competitive harm do not withstand scrutiny" and so "decision must be set aside as arbitrary, capricious and not in accordance with the law").

[45] Gen. Dynamics Corp. v. U.S. Dep't of the Air Force, 822 F. Supp. 804, 807 (D.D.C. 1992).

[46] Id. at 806.

[47] Id. at 807; see, e.g., GS New Mkts. Fund, L.L.C. v. U.S. Dep't of the Treasury, 407 F. Supp. 2d 21, 25 (D.D.C. 2005) (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 Corp. v. U.S. Dep't of the Air Force, 215 F. Supp. 2d 200, 202-03 (D.D.C. 2002) (noting that agency "requested comments from" submitter three times, that submitter actually "provided comments eleven times," and that after considering those comments, agency "presented

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."[48] 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."[49] 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."[50]

## **Executive Order 12,600**

Executive Order 12,600 requires federal agencies to "establish procedures to notify submitters of records containing confidential commercial information [as described in

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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. 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).

[48] Alexander & Alexander Servs. v. SEC, No. 92-1112, 1993 WL 439799, at *5-6 (D.D.C. Oct. 19, 1993); see CC Distribs. v. Kinzinger, No. 94-1330, 1995 WL 405445, at *6 n.2 (D.D.C. June 28, 1995) (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").

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

[50] 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").

the order]. . . when those records are requested under the [FOIA], if [after review] the agency determines that it may be required to disclose the records.[51] The executive order requires, with certain limited exceptions,[52] that notice be given to submitters of confidential commercial information when they mark it as such,[53] or more significantly, whenever the agency "determines that it may be required to disclose" the requested data.[54] Under the executive order, "confidential commercial information" is defined as "records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm."[55] Agency implementing regulations may define the term "confidential commercial information" without reference to competitive harm and may instead refer more generically to material that may be protected under Exemption 4.[56]

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.[57] Agencies must then give "careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue." [58]

If the agency decides to disclose the requested records the agency must notify the submitter in writing and give a brief explanation of "why the submitter's objections are not sustained."[59] Such a notification must be provided a "reasonable number of days prior

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[51] 3 C.F.R. 235 (1988) (applicable to all executive branch departments and agencies), reprinted in 5 U.S.C. § 552 note (2012 & supp. V 2017).

[52] Id. § 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).

[53] Id. § 3 (establishing procedures for submitter marking of confidential commercial information).

[54] Id. § 1.

[55] Id. § 2; see Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 915 (2019) (overturning definition of "confidential" which had included "substantial competitive harm" standard).

[56] See, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.7(a)(1) (2018) (defining "confidential commercial information" as "commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under Exemption 4 of the FOIA").

[57] Exec. Order No. 12,600, § 4.

[58] Id. § 5.

[59] Id. § 5.

to a specified disclosure date," which gives the submitter an opportunity to seek judicial relief.[60]

*This executive order predates the decision of the Supreme Court in Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 915 (2019), which examines the definition of the term confidential under Exemption 4. The Court's decision overturns the definition established over forty years ago in Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), which had created the "substantial competitive harm" standard. The Department of Justice is currently in the process of formulating guidance on the Supreme Court's decision and its impact on the submitter notification procedures established by Executive Order 12,600. We will update this section once that guidance has been issued. In the meantime, agencies are always welcome to seek advice through OIP's FOIA Counselor Service if they have questions about the impact of the Court's decision.*

[60] Id.