



## Exemption 7(D)

Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."<sup>1</sup>

### Introduction

It has long been recognized that Exemption 7(D) affords the most comprehensive protection of all of the FOIA's law enforcement exemptions.<sup>2</sup> Indeed, both Congress and the courts have clearly manifested their appreciation that a "robust" Exemption 7(D)<sup>3</sup> is important to ensure that "confidential sources are not lost through retaliation against the sources for past disclosure or because of the sources' fear of future disclosure."<sup>4</sup>

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

<sup>2</sup> Billington v. DOJ, 301 F. Supp. 2d 15, 21 (D.D.C. 2004) (stating that "Exemption 7(D) has long been recognized as affording the most comprehensive protection of all FOIA's law enforcement exemptions" (citing Voinche v. FBI, 940 F. Supp. 323, 331 (D.D.C. 1996)); accord Irons v. FBI, 880 F.2d 1446, 1451 (1st Cir. 1989).

<sup>3</sup> See Brant Constr. Co. v. EPA, 778 F.2d 1258, 1262 (7th Cir. 1985) (noting that Exemption 7(D) is intended to ensure that law enforcement agencies are not unduly hampered in their investigations).

<sup>4</sup> Id.; see, e.g., Ortiz v. HHS, 70 F.3d 729, 732 (2d Cir. 1995) (stating that "Exemption 7(D) is meant to . . . protect confidential sources from retaliation that may result from the disclosure

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Sources' identities are protected wherever they have provided information either under an express promise of confidentiality<sup>5</sup> or "under circumstances from which such an assurance could be reasonably inferred."<sup>6</sup> As the Supreme Court made clear in DOJ v. Landano,<sup>7</sup> not all sources furnishing information in the course of criminal investigations are entitled to a "presumption" of confidentiality.<sup>8</sup> Instead, the Supreme Court ruled that source confidentiality must be determined on a case-by-case basis,<sup>9</sup> particularly noting that such a presumption

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<sup>4</sup>(...continued)

of their participation in law enforcement activities"); McDonnell v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (finding that the "goal of Exemption 7(D) [is] to protect the ability of law enforcement agencies to obtain the cooperation of persons having relevant information and who expect a degree of confidentiality in return for their cooperation"); Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 563 (1st Cir. 1992) (explaining that Exemption 7(D) is intended to avert "drying-up" of sources); Nadler v. DOJ, 955 F.2d 1479, 1486 (11th Cir. 1992) (observing that the "fear of exposure would chill the public's willingness to cooperate with the FBI . . . [and] would deter future cooperation" (citing Irons, 880 F.2d at 1450-51)); Shaw v. FBI, 749 F.2d 58, 61 (D.C. Cir. 1984) (holding that the purpose of Exemption 7(D) is "to prevent the FOIA from causing the 'drying up' of sources of information in criminal investigations"); Miller v. DOJ, 562 F. Supp. 2d 82, 122 (D.D.C. 2008) (recognizing that "[e]xperience has shown the FBI that its sources must be free to provide information 'without fear of reprisal' and 'without the understandable tendency to hedge or withhold information out of fear that their names or their cooperation with the FBI will later be made public'" (quoting agency declaration)); Wilson v. DEA, 414 F. Supp. 2d 5, 7 (D.D.C. 2006) (concluding that release of names of DEA sources could jeopardize DEA criminal investigative operations and deter cooperation of future potential DEA sources); Garcia v. DOJ, 181 F. Supp. 2d 356, 375 (S.D.N.Y. 2002) (holding that "Exemption 7(D) [en]sures that confidential sources are protected from retaliation in order to prevent the loss of valuable sources of information").

<sup>5</sup> See Rosenfeld v. DOJ, 57 F.3d 803, 814 (9th Cir. 1995) (stating that "an express promise of confidentiality is 'virtually unassailable' [and is] easy to prove: 'The FBI need only establish the informant was told his name would be held in confidence'" (quoting Wiener v. FBI, 943 F.2d 972, 986 (9th Cir. 1991))); Jones v. FBI, 41 F.3d 238, 248 (6th Cir. 1994) (stating that "sources who spoke with express assurances of confidentiality are always 'confidential' for FOIA purposes"); McDonnell, 4 F.3d at 1258 (holding that "identity of and information provided by [persons given express assurances of confidentiality] are exempt from disclosure under the express language of Exemption 7(D)").

<sup>6</sup> S. Conf. Rep. No. 93-1200, at 13 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6291; see Farrugia v. EOUSA, No. 04-0298, 2006 WL 335771, at \*8 (D.D.C. Feb. 14, 2006) (reasoning that "[b]ased on the nature of crime for which plaintiff was convicted and circumstances surrounding his arrest . . . it [was] reasonable to infer the existence of an implicit grant of confidentiality").

<sup>7</sup> 508 U.S. 165 (1993).

<sup>8</sup> Id. at 175.

<sup>9</sup> Id. at 179-80.

should not be applied automatically to cooperating law enforcement agencies.<sup>10</sup>

The term "source" is meant to include a wide variety of individuals and institutions. The legislative history of the 1974 amendments to the FOIA indicates that the term "confidential source" was chosen by design to encompass a broader group than would have been included had the word "informer" been used.<sup>11</sup> This was reinforced in the Freedom of Information Reform Act of 1986,<sup>12</sup> which added to the statute specific categories of individuals and institutions to be included in the term "source."<sup>13</sup> Thus, state and local law enforcement agencies<sup>14</sup> and employees;<sup>15</sup> foreign law enforcement agencies;<sup>16</sup> and foreign commercial institutions<sup>17</sup> have been found to qualify as sources. The Court of Appeals for the Second Circuit has held that a "federal government employee, like a local law enforcement agency, can be a confidential source" under Exemption 7(D).<sup>18</sup>

By its own terms, however, this statutory enumeration is not exhaustive. Indeed, courts

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<sup>10</sup> Id. at 176; see also FOIA Update, Vol. XIV, No. 3, at 10 ("Justice Changes Policy on Exemption 7(D) Disclosure").

<sup>11</sup> See S. Conf. Rep. No. 93-1200, at 13.

<sup>12</sup> Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48.

<sup>13</sup> Id.

<sup>14</sup> See, e.g., Halpern v. FBI, 181 F.3d 279, 299 (2nd Cir. 1999); Williams v. FBI, 69 F.3d 1155, 1160 (D.C. Cir. 1995) (local law enforcement agency); Jones, 41 F.3d at 248 (law enforcement agencies); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 & n.27 (10th Cir. 1989) (state law enforcement agencies); Parton v. DOJ, 727 F.2d 774, 775-77 (8th Cir. 1984) (state prison officials interviewed in connection with civil rights investigation); Thomas v. DOJ, 531 F. Supp. 2d 102, 111-12 (D.D.C. 2008) (Washington D.C. Metropolitan Police Department).

<sup>15</sup> See Garcia, 181 F. Supp. 2d at 377 (protecting identity of "state governmental employee" who provided "professional opinions as well as observations" regarding "plaintiff and his criminal activities").

<sup>16</sup> See, e.g., Billington v. DOJ, 233 F.3d 581, 585 n.5 (D.C. Cir. 2000) (foreign agencies); Halpern, 181 F.3d at 299; Shaw, 749 F.2d at 62 (foreign law enforcement agencies); Founding Church of Scientology v. Regan, 670 F.2d 1158, 1161-62 (D.C. Cir. 1981) (foreign INTERPOL national bureaus); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 785 (E.D. PA. 2008) (foreign law enforcement entities); Badalamenti v. Dep't of State, 899 F. Supp. 542, 549 (D. Kan. 1995) (foreign law enforcement officials).

<sup>17</sup> Cozen O'Connor, 570 F. Supp. 2d at 785.

<sup>18</sup> Kuzma v. IRS, 775 F.2d 66, 69 (2d Cir. 1985). But cf. Retail Credit Co. v. FTC, No. 75-0895, 1976 WL 1206, at \*4 n.3 (D.D.C. 1976) (noting that "FTC cited the confidential source exemption as a further justification for withholding" a document consisting of a summary of a meeting between the Federal Housing Administration (FHA) and FTC, and commenting that "[c]ertainly the FHA cannot be a confidential source").

have interpreted the term "source" to include a broad range of individuals and institutions that are not necessarily specified on the face of the statute -- such as crime victims;<sup>19</sup> citizens providing unsolicited allegations of misconduct;<sup>20</sup> citizens responding to inquiries from law enforcement agencies;<sup>21</sup> private employees responding to OSHA investigators about the circumstances of an industrial accident;<sup>22</sup> and employees providing information about their employers and co-workers.<sup>23</sup> Courts have likewise interpreted it to include prisoners;<sup>24</sup> mental healthcare facilities;<sup>25</sup> medical personnel;<sup>26</sup> commercial or financial institutions<sup>27</sup> and employees;<sup>28</sup> and social organizations' officials and employees.<sup>29</sup>

The adjective "confidential" signifies that the "source furnished information with the understanding that the . . . [agency] would not divulge the communication except to the

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<sup>19</sup> See, e.g., Coleman v. FBI, No. 89-2773, slip op. at 21 (D.D.C. Dec. 10, 1991), summary affirmance granted, No. 92-5040, 1992 WL 373976 (D.C. Cir. Dec. 4, 1992); Gula v. Meese, 699 F. Supp. 956, 960 (D.D.C. 1988).

<sup>20</sup> See, e.g., Brant Constr., 778 F.2d at 1263; Pope v. United States, 599 F.2d 1383, 1386-87 (5th Cir. 1979); Almy v. DOJ, No. 90-0362, 1995 WL 476255, at \*12-13 (N.D. Ind. Apr. 13, 1995), aff'd, 114 F.3d 1191 (7th Cir. 1997) (unpublished table decision).

<sup>21</sup> See, e.g., Providence Journal, 981 F.2d at 565; Miller v. Bell, 661 F.2d 623, 627-28 (7th Cir. 1981); Kowalczyk v. O'Brien, No. 94-1333, slip op. at 2 (D.D.C. Jan. 30, 1996); Almy, 1995 WL 476255, at \*21, \*23.

<sup>22</sup> See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 924-25 (11th Cir. 1984). But cf. Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 552 (5th Cir. 2002) (stating that "[f]or us to hold . . . that OSHA's investigative records, as a category, are implicitly confidential would be unwarranted and would plow new ground").

<sup>23</sup> See, e.g., United Techs. Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985) (recognizing fear of employer retaliation as giving rise to "a justified expectation of confidentiality"); Canning v. DOJ, 567 F. Supp. 2d 104, 112 (D.D.C. 2008) (same); Gov't Accountability Project v. NRC, No. 86-1976, No. 86-3201, 1993 WL 13033518, at \*4 (D.D.C. July 2, 1993) (holding that individuals who provided information to investigators about "potentially criminal matters involving co-workers" face risk of reprisal and are entitled to legitimate expectation of confidentiality).

<sup>24</sup> See, e.g., Williams v. FBI, No. 99-0899, slip op. at 1-2 (D.D.C. July 31, 2000); Johnson v. BOP, No. 90-H-645, 1990 U.S. Dist. LEXIS 18358, at \*9 (N.D. Ala. Nov. 1, 1990).

<sup>25</sup> See, e.g., Sanders v. DOJ, No. 91-2263, 1992 WL 97785, at \*4-5 (D. Kan. Apr. 21, 1992).

<sup>26</sup> See, e.g., Putnam v. DOJ, 873 F. Supp. 705, 716 (D.D.C. 1995).

<sup>27</sup> See, e.g., Halpern, 181 F.3d at 300; Davin v. DOJ, No. 98-3343, slip op. at 9 (3d Cir. Jan. 27, 1999); Williams, 69 F.3d at 1158; Jones, 41 F.3d at 248.

<sup>28</sup> See, e.g., Hunsberger v. DOJ, No. 92-2587, slip op. at 6-7 (D.D.C. July 22, 1997) (upholding confidential source protection for employee of financial institution).

<sup>29</sup> See Halpern, 181 F.3d at 300.

extent the . . . [agency] thought necessary for law enforcement purposes."<sup>30</sup> Most significantly, "the question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential."<sup>31</sup> Because the applicability of this exemption hinges on the circumstances under which the information is provided, and not on the harm resulting from disclosure (in contrast to Exemptions 6 and 7(C)), no balancing test is applied under the case law of Exemption 7(D).<sup>32</sup>

### Express Confidentiality

Courts have uniformly recognized that express promises of confidentiality deserve

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<sup>30</sup> Landano, 508 U.S. at 174; see Env'tl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (reiterating that source is deemed confidential if source furnished information with understanding that government agency would not divulge information except to extent necessary for law enforcement purposes).

<sup>31</sup> Landano, 508 U.S. at 172; see Billington, 233 F.3d at 585 (holding that the "confidentiality analysis proceeds from the perspective of an informant, not [that of] the law enforcement agency"); Ortiz, 70 F.3d at 733 (finding that although agency did not solicit letter from letter writer, it was writer's expectation that letter would be kept secret); McDonnell, 4 F.3d at 1258 (holding that a "content based test [is] not appropriate in evaluating a document for Exemption 7(D) status[;] rather the proper focus of the inquiry is on the source of the information"); Providence Journal, 981 F.2d at 563 (explaining that "confidentiality depends not on [document's] contents but on the terms and circumstances under which" agency acquired information); Ferguson v. FBI, 957 F.2d 1059, 1069 (2d Cir. 1992) (observing that "Exemption 7(D) is concerned not with the content of the information, but only with the circumstances in which the information was obtained"); Weisberg v. DOJ, 745 F.2d 1476, 1492 (D.C. Cir. 1984) (stating that availability of Exemption 7(D) depends not upon factual contents of document sought, but upon whether source was confidential); Gordon v. Thornberg, 790 F. Supp. 374, 377 (D.R.I. 1992) (defining "confidential" as "provided in confidence or trust; neither the information nor the source need be 'secret'").

<sup>32</sup> See, e.g., Jones, 41 F.3d at 247 (clarifying that Exemption 7(D) "does not involve a balancing of public and private interests; if the source was confidential, the exemption may be claimed regardless of the public interest in disclosure"); McDonnell, 4 F.3d at 1257 (stating that Exemption "7(D) does not entail a balancing of public and private interests"); Nadler, 955 F.2d at 1487 n.8 (holding that "[o]nce a source has been found to be confidential, Exemption 7(D) does not require the Government to justify its decision to withhold information against the competing claim that the public interest weighs in favor of disclosure"); Parker v. DOJ, 934 F.2d 375, 380 (D.C. Cir. 1991) (stating that "judiciary is not to balance interests under Exemption 7(D)"); Irons v. FBI, 811 F.2d 681, 685 (1st Cir. 1987) (stating that "the judiciary is not permitted to undertake a balancing of conflicting interests, but is required to uphold a claimed 7(D) exemption so long as the statutory criteria are met"); Katz v. FBI, No. 87-3712, slip op. at 9 (5th Cir. Mar. 30, 1988) (noting that "unlike [with] the privacy exemption, no balancing of interests is allowed once material qualifies for the confidential source exemption"); Brant Constr., 778 F.2d at 1262-63 (observing that "[n]o judicial 'balancing' of the competing interests is permitted" under Exemption 7(D)).

protection under Exemption 7(D),<sup>33</sup> and they usually require affidavits specifically demonstrating the existence of such an express promise.<sup>34</sup> Express promises can be supported by notations made on the face of documents indicating that the information in them is to be kept confidential pursuant to an express promise;<sup>35</sup> by statements from the agents or

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<sup>33</sup> See, e.g., Williams v. FBI, 69 F.3d 1155, 1159 (D.C. Cir. 1995) (finding information provided under express assurances of confidentiality to be exempt from disclosure); Jones v. FBI, 41 F.3d 238, 248 (6th Cir. 1994) (express confidentiality justified based on Court's in camera review); KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) (upholding express assurances of confidentiality given interviewees who provided information regarding postal employee who shot and killed fellow workers); Franklin v. DOJ, No. 97-1225, slip op. at 13-15 (S.D. Fla. June 15, 1998) (magistrate's recommendation) (withholding of "identities and information provided by coded and noncoded sources based upon express promises of confidentiality" was proper), adopted, (S.D. Fla. June 26, 1998), aff'd, 189 F.3d 485 (11th Cir. 1999) (unpublished table decision); Fedrick v. DOJ, 984 F. Supp. 659, 665 (W.D.N.Y. 1997) (magistrate's recommendation) (withholding upheld when express promises of confidentiality were given to informants "in accordance with DEA policy and procedure"), adopted, No. 95-558 (W.D.N.Y. Oct. 28, 1997), aff'd sub nom. Fedrick v. Huff, 165 F.3d 13 (2d Cir. 1998) (unpublished table decision); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1566 (M.D. Fla. 1994) (explaining that "application of Landano to a case where a witness [to an internal investigation] gave full cooperation only after receiving an express assurance of confidentiality . . . clearly leads to the conclusion that the witness is a confidential source").

<sup>34</sup> See, e.g., Boyd v. Criminal Div. of DOJ, 475 F. 3d 381, 389 (D.C. Cir. 2007) (finding that ATF's affidavit properly demonstrated that confidential source received an express promise); Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, 467 F. Supp. 2d 40, 54 (D.D.C. 2006) (finding sufficient agency's declaration that indicates "'confidential source . . . has been given an express guarantee that personal and contact information will not be disclosed to the public'" (quoting agency declaration)); DiPietro v. EOUSA, 357 F. Supp. 2d 177, 185 (D.D.C. 2004) (reiterating that when an agency relies on an express assurance of confidentiality to invoke Exemption 7(D), it must offer "probative evidence that the source did in fact receive an express grant of confidentiality"); Guccione v. Nat'l Indian Gaming Comm'n, No. 98-CV-164, 1999 U.S. Dist. LEXIS 15475, at \*8 (S.D. Cal. Aug. 4, 1999) (declaring that express confidentiality can be found to exist when the agency's declaration "provides sufficient context and explanation of the [withheld] documents' contents").

<sup>35</sup> See, e.g., King v. DOJ, 830 F.2d 210, 235 (D.C. Cir. 1987) (finding express confidentiality when the agency showed that the "documents [were] marked 'confidential informant' at the time of their compilation"); Kishore v. DOJ, 575 F. Supp. 2d 243, 258 (D.D.C. 2008) (finding that agency demonstrated express confidentiality where "PROTECT" was written next to informant's name on documents); Miller v. DOJ, 562 F. Supp. 2d 82, 122 (D.D.C. 2008) (finding express grant of confidentiality where FBI personnel expressly promised that source's identity would not be disclosed prior to interview and the "phrase 'protect ID' appears in the records when this individual's name is referenced"); Peltier v. FBI, No. 02-4328, slip op. at 23 (D. Minn. Oct. 24, 2006) (magistrate's recommendation) (finding that FBI established that records themselves "constitute contemporaneous evidence reflecting express grants of confidentiality"), adopted, (D. Minn. Feb. 9, 2007); Peltier v. FBI, No. 03-905S, 2005 WL 735964, at \*18 (W.D.N.Y. Mar. 31, 2005) (finding that evidence of express confidentiality was present

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sources involved in which they attest to their personal knowledge of an express promise;<sup>36</sup> by specific agency practices or procedures regarding the routine treatment of confidential sources,<sup>37</sup> including those for "symbol-numbered" sources,<sup>38</sup> or by some combination of the

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<sup>35</sup>(...continued)

when documents contained designations "PROTECT," "protect identity," and "protect by request"); Martinez v. EEOC, No. 04-0271, 2005 U.S. Dist. LEXIS 3864, at \*11 n.27 (W.D. Tex. Mar. 3, 2005) (recognizing that courts have held that words such as "confidential[ity] requested by witness" on face of document are sufficient to justify nondisclosure); Homick v. DOJ, No. 98-0557, slip op. at 30 (N.D. Cal. Sept. 16, 2004) (determining that "protect" or "protect identity by request," followed by name of interviewee, was indicative of express grant of confidentiality); Barber v. Office of Info. & Privacy, No. 02-1748, slip op. at 7 (D.D.C. Sept. 4, 2003) (determining that documents "stamped 'Confidential Property of F.D.L.E. Released to U.S. Attorney No. Dist. . . . Its Contents Are Not To Be Distributed Outside of Your Agency'" was evidence of express promises of confidentiality), summary affirmance granted, No. 03-5266, 2004 WL 344040 (D.C. Cir. May 7, 2004); see also Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000) (remanding with instructions that if the "district court finds that the [withheld] documents . . . do in fact, as the FBI claims, bear evidence 'on their face' of 'express promises of confidentiality,' . . . then the FBI would most likely be entitled to withhold such documents" (quoting government's brief)).

<sup>36</sup> See, e.g., Bullock v. FBI, 577 F. Supp. 2d 75, 80 (D.D.C. 2008) (holding that signed agreement between confidential source and law enforcement agency was sufficient to prove express promise); Adamowicz v. IRS, 552 F. Supp. 2d 355, 371 (S.D.N.Y. 2008) (stating that government's declaration was sufficient evidence of express grant of confidentiality); Neuhausser v. DOJ, No. 03-531, 2006 WL 1581010, at \*7 (E.D. Ky. June 6, 2006) (finding that DEA's declaration delineated between those informants who received express assurances of confidentiality and those who received implied assurances of confidentiality); Wheeler v. DOJ, 403 F. Supp. 2d 1, 16 (D.D.C. 2005) (finding that FBI's declaration sufficiently demonstrated that agent had personal knowledge of express promise given to confidential source); Billington v. DOJ, 301 F. Supp. 2d 15, 22 (D.D.C. 2004) (finding that an in camera affidavit of the source "confirms that the source . . . was assured [with] an express grant of confidentiality").

<sup>37</sup> See, e.g., Callaway v. U.S. Dep't of Treasury, 577 F. Supp. 2d 1, 3 (D.D.C. 2008) (finding Exemption 7(D) appropriately invoked where "declarant with 'firsthand knowledge' of Customs' policy with respect to the assignment of source symbol codes explain[ed] that codes are assigned only to those expressly granted an assurance of confidentiality"); Neuhausser, 2006 WL 1581010, at \*7 (finding that DEA has longstanding confidential source policy which provides that coded sources receive express assurances of confidentiality); Millhouse v. IRS, No. 03-1418, 2005 U.S. Dist. LEXIS 1290, at \*5 (D.D.C. Jan. 3, 2005) (finding that IRS's Special Agent followed IRS procedures for providing confidential sources with express grants of confidentiality); Pinnavaia v. FBI, No. 03-112, slip op. at 12 (D.D.C. Feb. 25, 2004) (withholding confidential source number identifiers because FBI policy assigns such numbers only pursuant to express grant of confidentiality); Rugiero v. DOJ, 234 F. Supp. 2d 697, 702 (E.D. Mich. 2002) (relying on detailed affidavits by DEA indicating that sources given express confidentiality were assigned codes and recorded as such), appeal dismissed voluntarily, No. 03-2455 (6th Cir. Feb. 8, 2005); Campbell v. DOJ, No. 89-3016, slip op. at 23 (D.D.C. Sept. 28, 2001) (finding express promise of confidentiality to be established in part by "Bureau Bulletins issued by the

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above.<sup>39</sup>

Further, courts have held that the identities of persons providing statements in response to routinely given "unsolicited assurances of confidentiality" are protectible under Exemption 7(D) as well.<sup>40</sup> However, courts have found that vague declarations, unsupported

<sup>37</sup>(...continued)

FBI headquarters" and the FBI's "Manuals of Rules and Regulations that deal with confidential sources [and which] were in effect at the time the information . . . was gathered"); Wayne's Mech. & Maint. Contractor, No. 1:00-45, slip op. at 18-19 (N.D. Ga. May 7, 2001) (stating that "employee-witnesses are covered by Exemption 7(D) because OSHA representatives did ensure . . . that their statements would be confidential, according to standard OSHA practice"). But cf. Homick, No. 98-0557, slip op. at 28 (N.D. Cal. Sept. 16, 2004) (finding that FBI's 1993 policy guidelines for source symbol numbers were not applicable to requested information).

<sup>38</sup> See, e.g., Mays v. DEA, 234 F.3d 1324, 1329 (D.C. Cir. 2000) (holding that an agency affidavit that "plainly refers to 'notations on the face of [the] withheld document[s]' -- specifically, the DEA confidential informant code -- indicat[es] that [the] source received an express assurance of confidentiality" (quoting Campbell v. DOJ, 164 F.3d 20, 34 (D.C. Cir. 1998))); Manna v. DOJ, 51 F.3d 1158, 1167 (3d Cir. 1995) (finding that express confidentiality exists as to sources "assigned numbers" who provided information regarding organized crime); McDonnell v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (reasoning that a "source was considered so sensitive that he or she was assigned a symbol source number and was never referred to by name in the file [leading to the] conclusion that [the information is] exempt from disclosure under the express language of Exemption 7(D)"); Barbosa v. DOJ, No. 06-0867, 2007 WL 1201604 at \*4 (D.D.C. Apr. 23, 2007) (finding coded confidential informants received express assurance of confidentiality); Mendoza v. DEA, 465 F. Supp. 2d 5, 13 (D.D.C. 2006) (explaining DEA's practice that coded sources are expressly assured confidentiality); Ray v. FBI, 441 F. Supp. 2d 27, 36 (D.D.C. 2006) (explaining FBI practice that confidential sources who receive permanent source symbol numbers are provided express assurances of confidentiality); Wheeler, 403 F. Supp. 2d at 16 (agreeing that FBI's declaration showed that informant with source symbol number received express grant of confidentiality); Jones v. DEA, No. 04-1690, 2005 WL 1902880, at \*3 (D.D.C. July 13, 2005) (finding that defendant properly justified withholding document given necessary DEA policy of debriefing coded confidential source); Piper v. DOJ, 374 F. Supp. 2d 73, 81 (D.D.C. 2005) (determining that agency practice regarding assigned source symbol numbers showed express assurance of confidentiality); Butler v. DOJ, 368 F. Supp. 2d 776, 785 (E.D. Mich. 2005) (recognizing that "coded informants" are assured by DEA that their identities and information they provide will remain confidential).

<sup>39</sup> See, e.g., Davin v. DOJ, No. 98-3343, slip op. at 8 (3d Cir. Jan. 27, 1999) (finding express confidentiality to be established when a "source is referred to as a 'confidential informant,' coupled with the FBI Manuals' policy that confidential informants should be given express assurances of confidentiality"); Neuhausser, 2006 WL 1581010, at \*7 (concluding that DEA's policy sufficiently established that coded sources received express assurances of confidentiality).

<sup>40</sup> See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 925 n.8 (11th Cir. 1984)  
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statements asserting the existence of an express promise from third parties who are without direct knowledge, or generalized recitations of harm are generally insufficient to support a showing of express confidentiality for a source.<sup>41</sup>

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<sup>40</sup>(...continued)

(finding that "the identity of a person . . . may be protected if the person provided information under an . . . assurance of confidentiality"); Pope v. United States, 599 F.2d 1383, 1386-87 (5th Cir. 1979) (concluding that sources of information would hardly have made charges unless they were confident that their identities would remain concealed); see also Church of Scientology Int'l v. DOJ, 30 F.3d 224, 239 (1st Cir. 1994) (ruling that "investigator's policy of affording confidentiality in interviews is an adequate basis upon which the government may consider the information provided . . . confidential"); Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 565 (1st Cir. 1992) (finding express promises of confidentiality for twenty-four individuals based upon inspector general regulation); Badalamenti v. Dep't of State, 899 F. Supp. 542, 549 (D. Kan. 1995) (withholding proper when agency attests that expectation of confidentiality for information about criminal activity documented by governing body of INTERPOL by resolutions); Kuffel v. BOP, 882 F. Supp. 1116, 1125 (D.D.C. 1995) (discussing how "ongoing understanding" between local law enforcement agencies and FBI that information shared about criminal investigation conducted by local agency would remain confidential alone could support conclusion that explicit grant of confidentiality existed). But cf. Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 550 (5th Cir. 2002) (refusing to "presume regularity in [OSHA] inspector's actions" despite agency's "established policy explicitly to assure employee-witnesses of confidentiality").

<sup>41</sup> See, e.g., Cooper Cameron, 280 F.3d at 550 (holding that an express promise of confidentiality is not established by "internally inconsistent, self-contradictory" declaration that "vaguely states that according to standard procedure, OSHA assured the [sources] that their statements would remain confidential"); Billington v. DOJ, 233 F.3d 584-85 (D.C. Cir. 2000) (requiring the FBI "at the very least" to "indicate where [express] assurances of confidentiality are memorialized"); Halpern v. FBI, 181 F.3d 279, 299 (2d Cir. 1999) (finding to be insufficient the agency's "bare assertions that express assurances were given to the sources in question, and that the information received was treated in a confidential manner during and subsequent to its receipt"); Campbell v. DOJ, 164 F.3d 20, 34-35 (D.C. Cir. 1998) (remanding the case to the district court because the agency's affidavit "simply asserts that various sources received express assurances of confidentiality without providing any basis for the declarant's knowledge of this alleged fact"); Davin, 60 F.3d at 1062 (stating that "government . . . must produce evidence of its alleged policy and practice of giving all symbol numbered informants or code name sources express assurances of confidentiality, evidence that the policy was in force throughout the [time] spanned by the documents . . . and evidence that the policy was applied to each of the separate investigations and in each case in which a document or portion has been withheld"), aff'd on appeal after remand, 176 F.3d 471 (3d Cir. 1999) (unpublished table decision); Rosenfeld v. DOJ, 57 F.3d 803, 814-15 (9th Cir. 1995) (determining that FBI affidavits did not demonstrate that symbol-numbered sources were given express promises of confidentiality); Fischer v. DOJ, No. 07-2037, 2009 WL 162688, at \*8 (D.D.C. Jan. 26, 2009) (finding bare assertion that foreign authority provided information to FBI under an express assurance of confidentiality insufficient to carry burden of establishing that source received express grant); McCoy v. United States, No. 04-CV-101, 2006 WL 463106, at \*6 (N.D.W.VA 2006) (rejecting adequacy of affidavit that indicated that coded  
(continued...)

### Implied Confidentiality

In addition to express confidentiality, Exemption 7(D) also affords protection to sources who provide information under circumstances in which an expectation of confidentiality can be inferred. Historically, many courts of appeals applied a "categorical" approach to implied confidentiality cases, recognizing a presumption of confidentiality in criminal investigations.<sup>42</sup> However, in its landmark Exemption 7(D) decision in DOJ v. Landano, the Supreme Court effectively reversed all of these cases on this point of evidentiary presumption.<sup>43</sup>

At issue in Landano was "whether the Government is entitled to a presumption that all sources supplying information to the Federal Bureau of Investigation . . . in the course of a criminal investigation are confidential sources."<sup>44</sup> In Landano, the Supreme Court first made it clear that its decision affected only implied assurances of confidentiality<sup>45</sup> and that a source

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<sup>41</sup>(...continued)

sources "generally" receive express assurances of confidentiality because agency failed to show that individuals in question were given express assurances of confidentiality); Hudson v. DOJ, No. 04-4079, 2005 WL 1656909, at \*6 (N.D. Cal. July 11, 2005) (rejecting FBI's "bare assertions" of express confidentiality absent sufficiently detailed declaration demonstrating that such promise of confidentiality was provided); Homick, No. 98-0557, slip op. at 31 (N.D. Cal. Sept. 16, 2004) (finding that agency's vague justification for withholding documents was facially insufficient); Billington v. DOJ, 245 F. Supp. 2d 79, 89 (D.D.C. 2003) (finding that "the mere fact that reports provided by a source have been assigned to a numbered file does not establish that he or she has been provided with assurances that the reports will remain confidential"), on reconsideration, 301 F. Supp. 2d 15 (D.D.C. 2004) (upholding agency application of Exemption 7(D) following in camera inspection); Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at \*13 (D.D.C. July 29, 1999) (magistrate's recommendation) (warning agency "that the generic, 'cookie-cutter,' one size fits all declaration . . . which speaks generally of policies and procedures but does not specifically indicate when, where, and by whom each confidential source was in fact expressly promised confidentiality, will not do"); Voinche v. F.B.I., 46 F. Supp. 2d 26, 34 (D.D.C. 1999) (rejecting an agency's "general arguments for protecting confidential informants as well as [its] unsupported assertion . . . that the FBI made an express promise of confidentiality to the informant"); Hronek v. DEA, 16 F. Supp. 2d 1260, 1275 (D. Or. 1998) (ordering submission of a supplemental declaration because the agency failed to sufficiently "discuss the [express] grant of confidentiality"), aff'd, No. 99-36055, 2001 WL 291035 (9th Cir. Mar. 12, 2001).

<sup>42</sup> See, e.g., Nadler v. DOJ, 955 F.2d 1479, 1486 & n.7 (11th Cir. 1992); Parker v. DOJ, 934 F.2d 375, 378 (D.C. Cir. 1991); KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990); Dow Jones & Co. v. DOJ, 917 F.2d 571, 576 (D.C. Cir. 1990); Donovan v. FBI, 806 F.2d 55, 61 (2d Cir. 1986); Ingle v. DOJ, 698 F.2d 259, 269 (6th Cir. 1983); Kimberlin v. Dep't of the Treasury, 774 F.2d 204, 208 (7th Cir. 1985); Parton v. DOJ, 727 F.2d 774, 776 (8th Cir. 1984).

<sup>43</sup> See 508 U.S. 165, 179-80 (1993).

<sup>44</sup> Id. at 167.

<sup>45</sup> See id. at 172 (acknowledging that "precise question before us . . . is how the Government  
(continued...)

need not have an expectation of "total secrecy" in order to be deemed a confidential source.<sup>46</sup> However, the Court found that it was not Congress's intent to provide for a "universal" presumption or broad categorical withholding under Exemption 7(D);<sup>47</sup> rather, it declared, a "more particularized approach" is required.<sup>48</sup> Under this refined approach, agencies seeking to invoke Exemption 7(D) must prove expectations of confidentiality based upon the

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<sup>45</sup>(...continued)

can meet its burden of showing that a source provided information on an implied assurance of confidentiality"); see also Rosenfeld v. DOJ, 57 F.3d 803, 814 (9th Cir. 1995) (stating that "Landano did not affect the application of Exemption 7(D) to sources and information covered by an express assurance of confidentiality").

<sup>46</sup> Landano, 508 U.S. at 174 (observing that "an exemption so limited that it covered only sources who reasonably could expect total anonymity would be, as a practical matter, no exemption at all"); see Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1566 (M.D. Fla. 1994) (stating that "[t]he Landano Court noted that 'confidential' does not necessarily mean completely secret, but that a statement may still be made in confidence when the speaker knows it will be shared with limited others"); Butler v. DOJ, No. 86-2255, 1994 WL 55621, at \*6 (D.D.C. Feb. 3, 1994) (holding that "source need not be promised total secrecy . . . for material to be covered by [Exemption 7(D)]"), appeal dismissed voluntarily, No. 94-5078 (D.C. Cir. Sept. 8, 1994).

<sup>47</sup> Landano, 508 U.S. at 174-78; see Rosenfeld, 57 F.3d at 814 (reiterating that the "presumption of confidentiality [no longer] attaches from the mere fact of an FBI investigation . . . [Instead,] the confidentiality determination turns on the circumstances under which the subject provided the requested information"); Jones v. FBI, 41 F.3d 238, 247 (6th Cir. 1994) (observing that the "[Supreme] Court unanimously held that the government is not entitled to a presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential within the meaning of Exemption 7(D)"); cf. Rugiero v. DOJ, 257 F.3d 534, 552 (6th Cir. 2001) (finding DEA applied incorrect standard whereby "any informant who ha[d] not received an express assurance of confidentiality [would] be treated as having received an implied assurance of confidentiality").

<sup>48</sup> Landano, 508 U.S. at 179-80; see Quiñon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (restating that the "[Supreme] Court rejected . . . a broad presumption of confidentiality in favor of a 'particularized approach' that looks to 'factors such as the nature of the crime that was investigated and the source's relation to it' in order to determine whether a promise of confidentiality may be inferred" (quoting Landano, 508 U.S. at 179-80)); cf. Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 906 (D.C. Cir. 1996) (holding that "the manner in which an agency 'routinely' handles information is not sufficient to establish an implied assurance of confidentiality"); El Badrawi v. DHS, 583 F. Supp. 2d 285, 319 (D. Conn. 2008) (finding agency's declarations only entitled to deference when "accompanied by reasonably detailed explanations of why material was withheld" (quoting Halpern v. FBI, 181 F.3d 279, 295 (2d Cir. 1999)) and concluding that agency had failed to provide "reasonably detailed explanations of how disclosing the information could compromise the interests protected by Exemption 7").

"circumstances" of each case.<sup>49</sup>

Specific showings of confidentiality can be made on a "generic" basis,<sup>50</sup> when "certain circumstances characteristically support an inference of confidentiality."<sup>51</sup> Throughout

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<sup>49</sup> Landano, 508 U.S. at 180; see Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 552 (5th Cir. 2002) (declaring that "implied confidentiality can arise . . . through the specific circumstances of a particular investigation"); Billington v. DOJ, 233 F.3d 581, 585 (D.C. Cir. 2000) (finding that the "circumstances under which the FBI receives information might support a finding of an implied assurance of confidentiality"); Hale v. DOJ, 226 F.3d 1200, 1204 (10th Cir. 2000) (holding that "[a] source's reluctance to speak directly with the FBI is a clear sign that the source wanted to remain confidential"); Hale v. DOJ, 99 F.3d 1025, 1030 (10th Cir. 1996) (explaining that inferences of confidentiality "should be evaluated on a case-by-case basis"); see also FOIA Update, Vol. XIV, No. 3, at 10 ("Landano Decision Requires Greater Disclosure"). But see Ortiz v. DOJ, No. 97-140-A-3, slip op. at 9 (M.D. La. Aug. 25, 1998) (magistrate's recommendation) (relying on pre-Landano cases for proposition that assurance of confidentiality, either express or implied, can be assumed when individual gives information to criminal law enforcement official unless circumstances indicate otherwise), adopted, (M.D. La. Oct. 1, 1998), aff'd, 194 F.3d 1309 (5th Cir. 1999) (unpublished table decision).

<sup>50</sup> Landano, 508 U.S. at 179.

<sup>51</sup> Id. at 177; see Mays v. DEA, 234 F.3d 1324, 1331 (D.C. Cir. 2000) (observing that there is "no doubt that a source of information about a conspiracy to distribute cocaine typically faces a sufficient threat of retaliation that the information he provides should be treated as implicitly confidential"); Halpern v. FBI, 181 F.3d 279, 299-300 (2d Cir. 1999) (holding that "fear of retaliation" in meat-packing industry during union movement in 1930s and 1940s satisfied Landano standard); Maydak v. DOJ, 362 F. Supp. 2d 316, 323 (D.D.C. 2005) (noting that source who witnessed assault provided information under circumstances from which confidentiality reasonably could be inferred); Homick v. DOJ, No. 98-0557, slip op. at 9 (N.D. Cal. Oct. 27, 2004) (finding that eyewitnesses to narcotics transactions and other criminal conduct were entitled to confidentiality), appeal dismissed voluntarily, No. 04-17568 (9th Cir. July 5, 2005); Prescott v. DOJ, No. 00-0187, slip op. at 4 (D.D.C. Aug. 10, 2001) (finding implied confidentiality where agency attested that sources "had a specific personal or business relationship with plaintiff . . . [who] was investigated for possession and distribution of major quantities of narcotics as well as possession of extremely violent weapons including machine guns and grenades"); Billington v. DOJ, 11 F. Supp. 2d 45, 67 (D.D.C. 1998) (concluding that investigation of violent organization involved "exactly the type of serious offenses which would warrant" an inference of implied confidentiality), aff'd in part, vacated in part & remanded on other grounds, 233 F.3d 581 (D.C. Cir. 2000); Coleman v. FBI, 13 F. Supp. 2d 75, 81-82 (D.D.C. 1998) ("Where there is an ongoing relationship between an informant and the Bureau and their communication occurs via secret rendezvous, it is reasonable to infer confidentiality."); Greenberg v. U.S. Dep't of the Treasury, 10 F. Supp. 2d 3, 19 (D.D.C. 1998) (ruling that implied assurance can be inferred when source advised agency he received threat to life); Steinberg v. DOJ, 179 F.R.D. 357, 365 (D.D.C. Apr. 28, 1998) (finding "generic circumstances" met when source would speak to FBI only through intermediary); Butler v. Dep't of the Treasury, No. 95-1931, 1997 U.S. Dist. LEXIS 802, at \*10 (D.D.C. Jan. 14, 1997)

(continued...)

Landano, the Court stressed two "factors" to be applied in deciding whether implicit confidentiality exists: "the nature of the crime . . . and the source's relation to it."<sup>52</sup> It also pointed to five lower court rulings in which courts highlighted the potential for harm to the witnesses involved, as examples of decisions in which courts have correctly applied these two factors.<sup>53</sup>

The courts that have addressed implied confidentiality since the Landano decision have recognized the nature of the crime and the source's relation to it as the primary factors in determining whether implied confidentiality exists.<sup>54</sup> They have uniformly recognized that a key consideration is the potential for retaliation against the source, whether based on actual

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<sup>51</sup>(...continued)

(emphasizing that the monitoring of conversations in a prison setting between cooperating sources and plaintiff "is precisely the situation contemplated by the 'generic' circumstances of confidentiality" in Landano); see also McNamera v. DOJ, 974 F. Supp. 946, 963 (W.D. Tex. 1997) (ruling that major narcotics conspiracy case involved circumstances that characteristically support inference of confidentiality).

<sup>52</sup> Landano, 508 U.S. at 179.

<sup>53</sup> Id. at 179-80 (citing Keys v. DOJ, 830 F.2d 337, 345-46 (D.C. Cir. 1987) (believing that individuals providing information regarding possible Communist sympathies, criminal activity, and murder by foreign operatives would have worried about retaliation); Donovan, 806 F.2d at 60-61 (ruling that individuals providing information about four American churchwomen murdered in El Salvador will likely face fear of disclosure); Parton, 727 F.2d at 776-77 (reasoning that prison officials providing information regarding alleged attack on inmate faced "high probability of reprisal"); Miller v. Bell, 661 F.2d 623, 628 (7th Cir. 1981) (determining that individuals providing information about self-proclaimed litigious subject seeking to enlist them in "anti-government crusades" faced "strong potential for harassment"); Nix v. United States, 572 F.2d 998, 1003-04 (4th Cir. 1978) (finding implicit confidentiality when guards and prison inmates providing information about guards who allegedly beat another inmate face risk of reprisal).

<sup>54</sup> See Cooper Cameron, 280 F.3d at 551-52; Hale, 226 F.3d at 1203; Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 486-87 (2d Cir. 1999); Quiñon, 86 F.3d at 1231; Ortiz v. HHS, 70 F.3d 729, 733 (2d Cir. 1995); Davin v. DOJ, 60 F.3d 1043, 1063 (3d Cir. 1995); Rosenfeld, 57 F.3d at 814; Jones, 41 F.3d at 247-48; Koch v. USPS, No. 93-1487, 1993 U.S. App. LEXIS 26130, at \*3-4 (8th Cir. Oct. 8, 1993); cf. Mays, 234 F.3d at 1330 (concluding that the Supreme Court in Landano did not find that "the source need have any particular relationship to the crime in order for the information [that] he supplies to be deemed confidential," and further concluding that "whatever his 'relation to the crime,' an informant is at risk to the extent that the criminal enterprise he exposes is of a type inclined toward violent retaliation"); Oliver v. FBI, No. 02-0012, slip op. at 8 (D.D.C. Mar. 8, 2004) (rejecting the FBI's contention that implied confidentiality existed, because the sources "placed themselves in harm's way should the assailant become aware of their cooperation with the FBI"), summary judgment granted (D.D.C. Nov. 15, 2004) (holding, after in camera review, that FBI properly invoked Exemption 7(D) to withhold entire records).

threats of retaliation by defendants or requesters,<sup>55</sup> prior retaliatory acts by perpetrators or against sources,<sup>56</sup> the possibility of reprisals by third parties,<sup>57</sup> the specific dangers faced by prison informants,<sup>58</sup> or the violent or intimidating nature of the crime itself.<sup>59</sup>

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<sup>55</sup> See, e.g., Meserve v. DOJ, No. 04-1844, 2006 U.S. Dist. LEXIS 56732, at \*30 (D.D.C. Aug. 14, 2006) (concluding that agency properly applied Exemption 7(D) to protect eyewitness statements regarding armed robbery due to threats of harm made); Dohse v. Potter, No. 04-355, 2006 WL 379901, at \*7 (D. Neb. Feb. 15, 2006) (concluding that "in light of the nature of the alleged threats . . . the informant could reasonably be assumed to suffer reprisal if his identity were disclosed"); Blanton v. DOJ, 182 F. Supp. 2d 81, 87 (D.D.C. 2002) (recognizing that "[e]ven though plaintiff is incarcerated, his threats against persons responsible for his arrest and . . . his conviction make it possible that these individuals could be targets of physical harm should their identities be revealed"), aff'd, 64 F. App'x 787 (D.C. Cir. 2003); Linn v. DOJ, No. 92-1406, 1995 WL 631847, at \*34 (D.D.C. Aug. 22, 1995) (finding withholding proper when "persons associated with the investigation and prosecution were subject to threats of harm when their cooperation was divulged"); see also Germosen v. Cox, No. 98 CIV 1294, 1999 WL 1021559, at \*17 (S.D.N.Y. Nov. 9, 1999) (observing that requester sought names of confidential informants "for the specific purpose of inflicting the precise harm that Exemption 7(D) seeks to prevent -- harassment of the confidential source"), appeal dismissed for failure to prosecute, No. 00-6041 (2d Cir. Sept. 12, 2000). But see Hidalgo v. FBI, No. 04-0562, slip op. at 5 (D.D.C. Sept. 29, 2005) (finding that government initially failed to make necessary showing that disclosure of source's identity would subject him or her to "harassment and actual danger"), summary judgment granted, No. 04-0562, 2006 WL 2716086 (D.D.C. Sept. 22, 2006).

<sup>56</sup> See, e.g., Garcia v. DOJ, 181 F. Supp. 2d 356, 375 (S.D.N.Y. 2002) (holding that "sources expected their identities to be kept private in order to avoid retaliation by" a plaintiff who had been "convicted of two violent felonies, including conspiring to kill an individual who had testified against him at his robbery trial"); Jimenez v. FBI, 938 F. Supp. 21, 30 (D.D.C. 1996) (finding withholding of name and identifying information of source to be proper when plaintiff had previously harassed and threatened government informants).

<sup>57</sup> See, e.g., Hale, 226 F.3d at 1204-05 (stating that "people who provided detailed information surrounding [a kidnapping and murder], information that would only be known to a few people, would logically be fearful of retribution," in part because "[a]t the time the FBI conducted the[] interviews it was unclear if [plaintiff] had acted alone . . . or whether he may have worked with accomplices who might have violent propensities"); Coleman, 13 F. Supp. 2d at 82 (recognizing potential for "third party retaliation" even when imprisoned murderer, rapist, and kidnapper has "slim likelihood" of freedom).

<sup>58</sup> See, e.g., Maydak, 362 F. Supp. 2d at 324 (concluding that "an individual providing confidential information about inmate-on-inmate sexual assault [would] only [speak with] an express or an implied grant of confidentiality"); Hazel v. DOJ, No. 95-01992, slip op. at 11 (D.D.C. July 2, 1998) (identifying risk of reprisal in "close-quarter context of prison" for sources who provided information about "cold-blooded murder" of inmate); Butler, 1997 U.S. Dist. LEXIS 802, at \*10 (recognizing danger of cooperating with prison or law enforcement officials).

<sup>59</sup> See, e.g., Mays, 234 F.3d at 1331 (emphasizing "[t]hat a conspiracy to distribute cocaine  
(continued...)

Moreover, they have recognized that the "danger of retaliation encompasses more than the

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<sup>59</sup>(...continued)

is typically a violent enterprise, in which a reputation for retaliating against informants is a valuable asset, [and] is enough to establish the inference of implied confidentiality for those who give information about such a conspiracy"); Hale, 99 F.3d at 1031 (recognizing that nature of crime supports inference of confidentiality when "discrete aspects" of it "make it particularly likely" for source to fear reprisal); Williams, 69 F.3d at 1159 (finding withholding justified based on "risk of retaliation, harassment and bodily harm"); Koch, 1993 U.S. App. LEXIS 26130, at \*3-4 (finding withholding proper as to whistleblower who reported another employee's threat to bring grenade in to work because of "nature of alleged threat" and possibility of retaliation); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 785 (E.D. PA. 2008) (observing that "[o]ne cannot seriously argue that anyone providing information in the investigation of terrorist organizations and activities would not expect that his identity as a source would be kept secret"); Canning v. DOJ, 567 F. Supp. 2d 104, 112 (D.D.C. 2008) (finding that "the crime of government corruption, while not inherently violent, gives rise to an implied assurance of confidentiality" (citing Garcia, 181 F. Supp. 2d at 377)); Masters v. ATF, No. 04-2274, slip op. at 17 (D.D.C. Sept. 25, 2006) (explaining that "violations of Federal firearms law . . . and individuals who provide information concerning these crimes face a very real possibility of violent reprisal"); Wilson v. DEA, 414 F. Supp. 2d 5, 7 (D.D.C. 2006) (finding it "reasonable to infer that individuals [who] provided information about [trade of illicit substances] would fear for their safety if their identities or the information they provided was revealed" (citing Quiñon, 86 F.3d at 1222)); Gonzalez v. ATF, No. 04-2281, 2005 WL 3201009, at \*9 (D.D.C. Nov. 9, 2005) (finding FBI's use of Exemption 7(D) proper to withhold sources' names and information because it was reasonable that sources would fear reprisal); Peltier v. FBI, No. 03-905S, 2005 WL 735964, at \*19 (W.D.N.Y. Mar. 31, 2005) (concluding that "sources are precisely the type of individuals who reasonably would fear retaliation in the event of disclosure . . . given the highly charged emotions, ongoing exposure, and public attention in th[is] case"); Carbe v. ATF, No. 03-1658, 2004 U.S. Dist. LEXIS 17339, at \*29 n.7 (D.D.C. Aug. 12, 2004) (acknowledging that confidential source involved in cocaine trafficking faced possible retaliation if documents were released); Jennings v. FBI, No. 03-1651, slip op. at 18 (D.D.C. May 6, 2004) (agreeing that "in the type of prosecution involved here -- armed bank robbery -- it is reasonable to infer that source would fear reprisal"); Gansterer v. DOJ, No. 95-1614, slip op. at 21 (C.D. Cal. July 6, 1998) (magistrate's recommendation) (recognizing that criminals engaged in drug trafficking are often "heavily armed, making violent retaliation a very real fear for those who provide information to the government"), adopted, (C.D. Cal. Aug. 24, 1998); Wickline v. FBI, 923 F. Supp. 1, 3 (D.D.C. 1996) (finding withholding proper based on violent nature of crime when requester had been convicted of multiple dismemberment murders); Perrone v. FBI, 908 F. Supp. 24, 27 (D.D.C. 1995) (withholding proper when those interviewed face fear of retribution or harm based on fact of their cooperation with FBI); Putnam v. DOJ, 873 F. Supp. 705, 716 (D.D.C. 1995) (fearing retribution, FBI properly withheld "names and information provided by relatives and close associates of the victim and the plaintiff" when former FBI Special Agent pled guilty to first degree manslaughter of an informant); Landano v. DOJ, 873 F. Supp. 884, 888 (D.N.J. 1994) (stating on remand from the Supreme Court that "the violent nature of the crime, the potential involvement of the motorcycle gang, and the broad publication of the murder persuade the court that an implied assurance of confidentiality is warranted"). But see Sukup v. EOUSA, No. 02-0355, slip op. at 10 (D.D.C. Jan. 13, 2005) (rejecting agency's "vague" assertions that nature of crimes investigated were such that implied confidentiality was automatic).

source's physical safety."<sup>60</sup>

Indeed, in post-Landano cases, courts have found implied confidentiality in circumstances involving organized crime,<sup>61</sup> murder,<sup>62</sup> drug trafficking,<sup>63</sup> extortion,<sup>64</sup> illegal

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<sup>60</sup> Ortiz, 70 F.3d at 733 (citing Irons v. FBI, 880 F.2d 1446, 1451 (1st Cir. 1989)); see Grand Cent. P'ship, 166 F.3d at 487 (recognizing that retaliation "may constitute work place harassment, demotions, job transfers or loss of employment"); LaRouche v. DOJ, No. 90-2753, slip op. at 11 (D.D.C. Nov. 17, 2000) (observing that "[f]ear of financial retribution is valid in considering whether information was given confidentially"); Schrecker v. DOJ, 74 F. Supp. 2d 26, 35 (D.D.C. 1999) (finding implied confidentiality in case involving passport fraud and contempt of Congress when disclosure of source's identity "would likely subject him to potential reprisal from others"), aff'd in part, rev'd in part & remanded on other grounds, 254 F.3d 162 (D.C. Cir. 2001); see also United Techs. Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985) (concluding that "[a]n employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality"). But cf. LaRouche, No. 90-2753, slip op. at 23 (D.D.C. July 5, 2001) (finding that the agency "failed to meet its burden of proof" for implied confidentiality where the "information furnished by the[] informants did not pertain to dangerous crimes associated with violence" -- i.e., it pertained to "white collar offenses" -- and where the government "made no showing that indicates release of the[] documents would subject the sources to retaliation").

<sup>61</sup> See, e.g., Amuso v. DOJ, 600 F. Supp. 2d 78, 99 (D.D.C. 2009) (finding implied confidentiality where informants reported on activities of organized crime families including murder, extortion and labor racketeering); Peay v. DOJ, No. 04-1859, 2007 WL 788871, at \*6 (D.D.C. Mar. 14, 2007) (finding implied promise of confidentiality because of violent nature of organized crime/drug investigation); Homick, No. 98-0557, slip op. at 29 (N.D. Cal. Sept. 16, 2004) (agreeing with agency's position that confidentiality was "reasonably inferred" because of "violent nature of plaintiff and his associates, and his connections with members of organized crime"); Brunetti v. FBI, 357 F. Supp. 2d 97, 107 (D.D.C. 2004) (inferring confidentiality based on plaintiff's forty-year conviction for Racketeering Influenced and Corrupt Organizations crimes); Pray v. FBI, No. 95-0380, 1998 WL 440843, at \*4-5 (S.D.N.Y. Aug. 3, 1998) (racketeering investigation); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (major racketeering investigation), summary affirmance granted, No. 95-5388 (D.C. Cir. Jan. 24, 1997); Cudzich v. INS, 886 F. Supp. 101, 107 (D.D.C. 1995) (suspected alien smuggling ring); Landano, 873 F. Supp. at 888 (possible motorcycle gang-related violence); Anderson v. DEA, No. 92-0225, slip op. at 11 (W.D. Pa. May 18, 1994) (magistrate's recommendation) (gang-related shootings), adopted, (W.D. Pa. June 27, 1994), appeal dismissed, No. 94-3387 (3d Cir. Sept. 12, 1994); Manna v. DOJ, 832 F. Supp. 866, 876 (D.N.J. 1993) (organized crime activity), aff'd, 51 F.3d 1158 (3d Cir. 1995).

<sup>62</sup> See, e.g., Hale, 226 F.3d at 1204-05; Engelking v. DEA, 119 F.3d 980 (D.C. Cir. 1997); Lewis-Bey v. DOJ, 595 F. Supp. 2d 120, 137 (D.D.C. 2009) (murder of grand jury witness); Kishore v. DOJ, 575 F. Supp. 2d 243, 258 (D.D.C. 2008) (murder for hire); Miller v. DOJ, 562 F. Supp. 2d 82, 123 (D.D.C. 2008) (kidnapping, torture, murder and dismemberment of bodies); Peltier v. FBI, No. 02-4328, slip op. at 24 (D. Minn. Oct. 24, 2006); Peltier, 2005 WL 735964, at \*18-19; Shores v. FBI, 185 F. Supp. 2d 77, 84 (D.D.C. 2002); Burke v. DOJ, No. 96-1739, 1999 WL 1032814, at \*8 (D.D.C. Sept. 30, 1999); Green v. DEA, No. 98-0728, slip op. at 10-11 (D.D.C. Sept.

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possession of firearms,<sup>65</sup> domestic terrorism,<sup>66</sup> international terrorism,<sup>67</sup> national security,<sup>68</sup>

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<sup>62</sup>(...continued)

30, 1999); Russell v. Barr, No. 92-2546, slip op. at 11 (D.D.C. Aug. 28, 1998); Coleman, 13 F. Supp. 2d at 82; Isley v. EOUSA, No. 96-0123, slip op. at 8 (D.D.C. Mar. 27, 1997); Wickline, 923 F. Supp. at 3; Eagle Horse v. FBI, No. 92-2357, slip op. at 1, 5 (D.D.C. July 28, 1995); LeGrand v. FBI, No. 94-0300, slip op. at 12 (S.D.N.Y. July 10, 1995); Linn v. DOJ, No. 92-1406, 1995 WL 417810, at \*11 (D.D.C. June 6, 1995); Putnam, 873 F. Supp. at 716; Landano, 873 F. Supp. at 888.

<sup>63</sup> See, e.g., Ibarra-Cortez v. DEA, 36 F. App'x 598, 598 (9th Cir. 2002); Mays, 234 F.3d at 1324; Bell v. FBI, No. 93-1485, 1993 U.S. App. LEXIS 27235, at \*5 (6th Cir. Oct. 18, 1993); Concepcion v. FBI, 606 F. Supp. 2d 14, 42 (D.D.C. 2009) (stating that "given the drug trafficking activity in which plaintiff and his co-conspirators engaged, it is reasonable to conclude that the cooperating witness and confidential source provided information to the FBI with an expectation that their identities would not be disclosed"); Lewis-Bey, 595 F. Supp. 2d at 137 (violence and risk of retaliation attendant to drug trafficking warrant implied grant of confidentiality); Fischer v. DOJ, 596 F. Supp. 2d 34, 49 (D.D.C. 2009) (promise of confidentiality inferred where foreign authority provided information to FBI in connection with large scale narcotics trafficking investigation); Mendoza v. DEA, 465 F. Supp. 2d 5, 13 (D.D.C. 2006); McCoy v. United States, No. 04-101, 2006 WL 463106, at \*11 (N.D. W. Va. Feb. 24, 2006); Gonzalez, 2005 WL 3201009, at \*9; Jones v. DEA, No. 04-1690, 2005 WL 1902880, at \*4 (D.D.C. July 13, 2005); Butler v. DOJ, 368 F. Supp. 2d 776, 786 (E.D. Mich. 2005); Juste v. DOJ, No. 03-723, slip op. at 12 (D.D.C. Jan. 30, 2004); Barreiro v. EOUSA, No. 03-0720, 2004 WL 2451753, at \*9 (D.D.C. Dec. 31, 2003); Rubis v. DEA, No. 01-1132, slip op. at 6 (D.D.C. Sept. 30, 2002); Rugiero v. DOJ, 234 F. Supp. 2d 697, 702 (E.D. Mich. 2002); Gansterer, No. 95-1614, slip op. at 16, 21 (C.D. Cal. July 6, 1998); McNamara, 974 F. Supp. at 963; Jimenez, 938 F. Supp. at 29; Perrone, 908 F. Supp. at 27; Delviscovo, 903 F. Supp. at 3; Badalamenti v. Dept of State, 899 F. Supp. 542, 549 (D. Kan. 1995); Linn, 1995 WL 417810, at \*11.

<sup>64</sup> See, e.g., Rugiero, 234 F. Supp. 2d at 702; Perrone, 908 F. Supp. at 27; Delviscovo, 903 F. Supp. at 3.

<sup>65</sup> See Mendoza, 465 F. Supp at 13; Rugiero, 234 F. Supp. 2d at 702; Perrone, 908 F. Supp. at 27.

<sup>66</sup> See, e.g., Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at \*9 (D.D.C. Mar. 30, 2001) (finding implied confidentiality to be established for "confidential informant who reported a possible terrorist threat against the INS Miami District Office"); Blanton v. DOJ, 63 F. Supp. 2d 35, 49 (D.D.C. 1999) (finding implied confidentiality for sources who assisted in an investigation of a bombing of an African-American church "during a time of great unrest in the South"), on motion for partial reconsideration, 182 F. Supp. 2d 81, 88 (D.D.C. 2002), aff'd, 64 F. App'x 787 (D.C. Cir. 2003); Ajluni v. FBI, 947 F. Supp. 599, 602, 606 (N.D.N.Y. 1996); Steinberg v. DOJ, No. 93-2409, slip op. at 24 (D.D.C. Oct. 31, 1995).

<sup>67</sup> See Owens v. DOJ, No. 04-1701, 2007 WL 778980, at \*10-11 (D.D.C. Mar. 9, 2007) (finding implied confidentiality arising from risk of violence and retaliation as "[t]errorist bombings that kill large numbers of civilians, even more so than the types of crimes already accorded a

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loan sharking and gambling,<sup>69</sup> armed robbery,<sup>70</sup> bribery,<sup>71</sup> interstate transportation of stolen property,<sup>72</sup> tax evasion,<sup>73</sup> kidnapping,<sup>74</sup> financial crimes,<sup>75</sup> corruption by law enforcement

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<sup>67</sup>(...continued)

categorical presumption by the D.C. Circuit, are violent in nature and implicate a grave risk of retaliation").

<sup>68</sup> See Campbell v. DOJ, No. 89-3016, 1996 WL 554511, at \*9 (D.D.C. Sept. 19, 1996) (finding an implied confidential relationship "given the customary trust" that exists for relaying information between nonfederal and foreign law enforcement agencies and the FBI), rev'd on other grounds, 164 F.3d 20 (D.C. Cir. 1998); Pinnavaia v. FBI, No. 03-112, slip op. at 14 (D.D.C. Feb. 25, 2004).

<sup>69</sup> See Delviscovo, 903 F. Supp. at 3.

<sup>70</sup> See Thomas v. DOJ, 531 F. Supp. 2d 102, 111 (D.D.C. 2008) (finding that agency properly applied Exemption 7(D) to protect identities of eyewitnesses who provided information about violent and intimidating armed robbery); Jennings, No. 03-1651, slip op. at 18 (D.D.C. May 6, 2004) (finding that sources who provided information regarding details of bank robbery are entitled to "implied confidentiality" to protect their identities); Anderson v. DOJ, No. 95-1880, 1999 U.S. Dist. LEXIS 5048, at \*9 n.8 (D.D.C. Apr. 12, 1999) (finding Exemption 7(D) properly applied when witnesses to armed bank robbery provided information during police line-up).

<sup>71</sup> See Melius v. Nat'l Indian Gaming Comm'n, No. 98-2210, 1999 U.S. Dist. LEXIS 17537, at \*17-18 (D.D.C. Nov. 3, 1999) (holding that criminal investigation involving allegations of bribery suggests an implied promise of confidentiality).

<sup>72</sup> See Delviscovo, 903 F. Supp. at 3.

<sup>73</sup> See McQueen v. United States, 264 F. Supp. 2d 502, 523 (S.D. Tex. 2003) (holding that a diesel tax fraud operation inspired "very real" fear in agency's confidential sources, and then reasoning that "[t]his particular kind of tax fraud -- involving big dollars, complex operations, vast numbers of transactions, and many people -- is not qualitatively unlike other crimes on the 'categorical list,' such as organized crime, loan sharking and gambling, and bribery").

<sup>74</sup> See Hale, 226 F.3d at 1204-05; Canning v. DOJ, No. 01-2215, slip op. at 13 (D.D.C. Mar. 9, 2004) (concluding that agency had "adequate justification for nondisclosure" due to nature of kidnapping information contained in responsive documents); Piper v. DOJ, 294 F. Supp. 2d 16, 29 (D.D.C. 2003); cf. Oliver, No. 02-0012, slip op. at 8 (D.D.C. Mar. 8, 2004) (concluding that agency failed to demonstrate confidential source's relation to the kidnapping crime to warrant "implied confidentiality"), summary judgment granted (D.D.C. Nov. 15, 2004) (holding, after in camera review, that FBI properly invoked Exemption 7(D) to withhold entire records).

<sup>75</sup> See LaRouche, No. 90-2753, slip op. at 11-12 (D.D.C. Nov. 17, 2000). But see Billington, 233 F.3d at 586 n.7 (stating in dicta that "[w]e have doubts that [the LaRouche political organization's] members' participation in financial crimes [after the organization publicly disavowed violence], without more, would support an inference that sources received an implied assurance of confidentiality"); Canning, No. 01-2215, slip op. at 11 (D.D.C. Mar. 9, 2004) (reasoning that "the prior convictions of members of the LaRouche organization for financial

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officials of state and local governments,<sup>76</sup> and passport fraud and contempt of Congress.<sup>77</sup> Courts also have found that a possibility of retaliation exists for paid informants,<sup>78</sup> cooperative witnesses,<sup>79</sup> anonymous sources,<sup>80</sup> and for symbol-numbered sources.<sup>81</sup>

Moreover, implied confidentiality has been found where former members of targeted organizations disclosed self-incriminating information,<sup>82</sup> where sources provided information as a result of plea-bargains,<sup>83</sup> where sources provided information in response to a subpoena,<sup>84</sup> where sources were interviewed during an unfair labor practice investigation,<sup>85</sup> and where

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<sup>75</sup>(...continued)

crimes does not rise to the level of creating . . . an implied assurance of confidentiality"); Davis v. DOJ, No. 00-2457, slip op. at 20 (D.D.C. Mar. 21, 2003) (requiring agency to provide more detail regarding circumstances of interviews with sources for nonviolent financial crimes).

<sup>76</sup> See Garcia, 181 F. Supp. 2d at 377 (finding implied confidentiality in a case involving "investigation . . . into serious allegations of corruption within the state police").

<sup>77</sup> See Schrecker, 74 F. Supp. 2d at 35 (holding "passport fraud and contempt of Congress" are "serious enough crimes to warrant . . . implied confidentiality"). But see Singh v. FBI, 574 F. Supp. 2d 32, 51 (D.D.C. 2008) (holding passport fraud does not establish significant risk of violence or retaliation necessary for implied confidentiality).

<sup>78</sup> See, e.g., Jones, 41 F.3d at 248; Anderson, No. 92-0225, slip op. at 11 (W.D. Pa. May 18, 1994); Lesar v. DOJ, No. 92-2219, slip op. at 11 (D.D.C. Oct. 18, 1993).

<sup>79</sup> See Fischer, 596 F. Supp. 2d at 49 (finding "inherent risk of harm" sufficient to infer confidentiality of cooperative witnesses).

<sup>80</sup> See, e.g., Ortiz, 70 F.3d at 733; Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at \*28 (M.D. Fla. Oct. 1, 1997).

<sup>81</sup> See, e.g., Jones, 41 F.3d at 248; Tamayo v. DOJ, 932 F. Supp. 342, 345 (D.D.C. 1996), summary affirmance granted, No. 96-5234, 1997 U.S. App. LEXIS 16367 (D.C. Cir. May 22, 1997); Putnam, 873 F. Supp. at 716.

<sup>82</sup> See Campbell, 1996 WL 554511, at \*9.

<sup>83</sup> See Homick, No. 98-0557, slip op. at 8 (N.D. Cal. Oct. 27, 2004) (finding that "informant and attorney [names] are properly withheld under Exemption 7(D) due to an inference of confidentiality from the proffer discussion"); Engelking v. DEA, No. 91-0165, 1997 U.S. Dist. LEXIS 1881, at \*6 (D.D.C. Feb. 21, 1997) (finding implied confidentiality and observing that plea bargains frequently are only way to obtain information about other suspected criminals).

<sup>84</sup> See LaRouche v. DOJ, No. 90-2753, slip op. at 15 (D.D.C. Aug. 8, 2002) (stating that "the need for a subpoena indicates the desire for confidentiality").

<sup>85</sup> See Means v. Segal, No. 97-1301, slip op. at 14-15 (D.D.C. Mar. 18, 1998) (magistrate's recommendation) (finding withholding consistent with written policy of FLRA), adopted, (D.D.C. Apr. 14, 1998), aff'd per curiam on other grounds, No. 98-5170 (D.C. Cir. Oct. 6, 1998).

an employee provided information about an employer.<sup>86</sup> Additionally, the Court of Appeals for the Second Circuit found implied confidentiality for sources who furnished information in connection with a civil law enforcement investigation of a company that was alleged to have harassed homeless persons.<sup>87</sup>

Some courts, however, have found the agency attestations before them as to the circumstances surrounding a claim of implied confidentiality to be insufficient, holding that a more "specific" showing as to the nature of the crime and the source's relation to it is required under Landano.<sup>88</sup> For example, the Court of Appeals for the First Circuit has held

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<sup>86</sup> See, e.g., Government Accountability Project v. NRC, No. 86-1976, No. 86-3201, 1993 WL 13033518, at \*4 (D.D.C. July 2, 1993).

<sup>87</sup> Grand Cent. P'ship, 166 F.3d at 487-88 (stating that "[t]hrough the HUD investigation was civil in nature, the allegations of misconduct contained in the sources' documents are 'serious and damaging' and led to the imposition of civil sanctions" and reasoning that "[i]f the identities of the sources . . . were disclosed, they would face an objectively real and substantial risk of retaliation, reprisal or harassment").

<sup>88</sup> See, e.g., Billington, 233 F.3d at 585-86 (instructing the FBI on remand to "supply evidence that informants predicated their assistance on an implied assurance of confidentiality" where the organization about which information was provided had "publicly disavowed violence"); Neely v. FBI, 208 F.3d 461, 467 (4th Cir. 2000) (remanding with observation that "district court would be well within its discretion to require the FBI . . . to fully shoulder its responsibility -- which to date it has not done -- to provide specific justifications" for claim of implied confidentiality); Hale, 99 F.3d at 1033 (finding that government's claim of implied confidentiality lacked particularized justification); DiPietro v. EOUSA, 357 F. Supp. 2d 177, 186 (D.D.C. 2004) (rejecting agency's unsupported assertion of expressed and implied assurances of confidentiality); Raulerson v. Ashcroft, 271 F. Supp. 2d 17, 27 (D.D.C. 2002) (ruling that "the dispositive issue must be . . . more than simply whether the crime is violent," and that an agency cannot generalize circumstances from one source to all but rather must demonstrate fear of retaliation for each source); Morales Cozier v. FBI, No. 1:99-0312, slip op. at 19 (N.D. Ga. Sept. 25, 2000) (holding that the FBI's "mere[] state[ment] that the sources were associates or acquaintances of plaintiff with knowledge of her activities" is insufficient to justify an inference of confidentiality); Hall v. DOJ, 26 F. Supp. 2d 78, 81 (D.D.C. 1998) (finding that "FBI's generalized assertion of crimes relating to Communist Party activities is not enough to support . . . 'reasonable assumption'" that sources expected confidentiality); Kern v. FBI, No. 94-0208, slip op. at 11-12 (C.D. Cal. Sept. 14, 1998) (stating that agency's justification for the application of Exemption 7(D) is "vague and fails to sufficiently describe the circumstances from which an inference of implied confidentiality could be made"); see also Computer Prof'ls, 72 F.3d at 906 (holding that agency offered no evidence that fear of retaliation was "sufficiently widespread" to justify inference of confidentiality for sources of information and information they provided); Ajluni v. FBI, No. 94-CV-325, slip op. at 13 (N.D.N.Y. July 13, 1996) (finding agency's statements "unacceptably conclusory" when circumstances surrounding its receipt of information were not described), summary judgment granted, 947 F. Supp. 599, 606 (N.D.N.Y. 1996) (holding, after in camera review, that information was provided under implied assurance of confidentiality). But see Blanton v. DOJ, 64 F. App'x 787, 790 (D.C. Cir. 2003) (relying on FBI affidavits regarding the nature of the crime to find that "Landano does not

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that "[i]t is not enough . . . for the government simply to state blandly that the source's relationship to the crime permits an inference of confidentiality. Rather, the government has an obligation to spell out that relationship . . . [without] compromising the very interests it is seeking to protect."<sup>89</sup>

Moreover, in Landano the Supreme Court specifically stated that when "institutional" sources -- such as local law enforcement agencies and private commercial enterprises -- are involved, greater disclosure should occur, because these sources typically provide a "wide variety of information" under circumstances that do not necessarily warrant confidentiality.<sup>90</sup> Accordingly, courts have required agencies to demonstrate that cooperating law enforcement agencies have provided information under either an express<sup>91</sup> or an implied promise of confidentiality.<sup>92</sup>

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<sup>88</sup>(...continued)

require that both the nature of the crime and the relationship of the source must be investigated in all implied confidentiality situations; instead it only emphasized that the government could not rely on a blanket presumption that all information . . . was covered by an implied confidentiality agreement").

<sup>89</sup> Church of Scientology Int'l v. DOJ, 30 F.3d 224, 224 (1st Cir. 1994).

<sup>90</sup> 508 U.S. at 176; see, e.g., Hale, 99 F.3d at 1033 (finding that agency did not adequately justify withholding information provided by commercial and financial institutions); Linn, 1995 WL 417810, at \*32 (noting that agency disclosed "much of the information it previously withheld . . . in light of Landano," but ordering disclosure of institutional source document, "particularly in light of the fact that this document obviously originated from the Louisiana state authorities, and the application of Exemption 7(D) depends on the source of the information rather than its contents"); see also FOIA Update, Vol. XIV, No. 3, at 10 ("Landano Decision Requires Greater Disclosure") (discussing applicability of Landano standards to "institutional" sources).

<sup>91</sup> Compare Peltier, 2005 WL 735964, at \*16 (finding that "the FBI had an agreement with foreign law enforcement agencies that expressly forbids dissemination of information provided to the FBI"), and LaRouche v. DOJ, No. 90-2753, slip op. at 21 (D.D.C. July 5, 2001) (finding express confidentiality where agency affidavit "sufficiently details the relationships the FBI has with the foreign governments in question . . . specifically refers to written agreements the agency has with these governments . . . explains the differing types of agreements the agency has with governments[,] and details the levels of restriction governments place on the release of information given to the FBI"), with Maydak v. DOJ, 254 F. Supp. 2d 23, 44 (D.D.C. 2003) (finding that subsequent statements by local law enforcement agency source requesting confidentiality were insufficient to establish express confidentiality as of time that information was provided), and Linn, 1995 WL 417810, at \*32 (ruling that agency's conclusory attestation that "policy of confidentiality . . . between [local and federal] law enforcement justifies nondisclosure" . . . [is] insufficient to justify withholding").

<sup>92</sup> Compare Davin v. DOJ, No. 98-3343, slip op. at 9 (3d Cir. Jan. 27, 1999) (upholding a finding of implied assurances of confidentiality for state or local bureaus or agencies and a financial institution "accustomed to maintaining confidential files, and as to which a policy of

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Before Landano, there existed conflict in the case law as to the availability of Exemption 7(D) protection for sources who were advised that they might be called to testify if a trial eventually were to take place.<sup>93</sup> However, in Landano, the Supreme Court resolved this conflict by holding that "[a] source should be deemed confidential if the source furnished information with the understanding that the [agency] would not divulge the communication except to the extent . . . thought necessary for law enforcement purposes."<sup>94</sup> (It should be noted that the effect of a source's actual testimony upon continued Exemption 7(D) protection presents a different issue,<sup>95</sup> which is addressed below together with other issues regarding waiver of this exemption.)

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<sup>92</sup>(...continued)

routinely granting confidentiality was cited"), Savage v. FBI, No. C2-90-797, slip op. at 15 (S.D. Ohio Mar. 8, 1996) (finding implied confidentiality when the agency attested that local law enforcement authorities suggested that they might "revisit the extent of their cooperation with the FBI if confidentiality is not maintained") aff'd, 124 F.3d 199 (6th Cir. 1997) (unpublished table decision), Beard v. DOJ, 917 F. Supp. 61, 63 (D.D.C. 1996) (finding implied confidentiality when the agency attested that "[t]he FBI requested permission from the [local law enforcement agency] to release the information [and t]he request was denied"), Putnam, 873 F. Supp. at 717 (finding implied confidentiality when the agency attested that "documents provided by [state police] are not accessible to the public absent authorization from the state law enforcement agency"), and Cucci v. DEA, 871 F. Supp. 508, 513 (D.D.C. 1994) (finding implied confidentiality when the agency attested that a document was stamped "not to be distributed outside your agency" and a state police representative stated that state police "provide . . . law enforcement records to other agencies based upon an express understanding of confidentiality"), with Levy v. USPS, 567 F. Supp. 2d 162, 169 (D.D.C. 2008) (finding agency's descriptions of documents obtained from outside law enforcement agency "so conclusory that it is impossible for the Court to determine if they were obtained subject to an implied grant of confidentiality").

<sup>93</sup> Compare Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 986 (9th Cir. 1985) (no confidentiality recognized), and Poss v. NLRB, 565 F.2d 654, 658 (10th Cir. 1977) (same), with Irons v. FBI, 811 F.2d 681, 687 (1st Cir. 1987) (confidentiality recognized), Schmerler v. FBI, 900 F.2d 333, 339 (D.C. Cir. 1990) (same), and United Techs., 777 F.2d at 95 (same).

<sup>94</sup> 508 U.S. at 174 (clarifying that "'confidential,' as used in Exemption 7(D), refers to a degree of confidentiality less than total secrecy"); see also Leveto v. IRS, No. 98-285, 2001 U.S. Dist. LEXIS 5791, at \*20 (W.D. Pa. Apr. 10, 2001) (finding confidentiality established for sources who were "assured that their identities would not be disclosed except to the extent necessary to obtain a search warrant, or at a future grand jury proceeding or criminal trial"); Jefferson v. O'Brien, No. 96-1365, slip op. at 2 (D.D.C. July 3, 2000) (rejecting as inconsequential "[p]laintiff's evidence that law enforcement officers recognized the potential need to have confidential informants available to testify at trial when they were interviewed").

<sup>95</sup> See Parker, 934 F.2d at 381 (distinguishing cases in which a source actually testifies from cases "consider[ing] whether a source, knowing he is likely to testify at the time he furnishes information to [an] agency, is, or remains after testimony, a 'confidential source'").

Information Eligible for Protection

The first clause of Exemption 7(D) focuses upon the identity of a confidential source, rather than the information furnished by the source. This clause protects "both the identity of the informer and information which might reasonably be found to lead to disclosure of such identity."<sup>96</sup> Consequently, courts have recognized that the first clause of Exemption 7(D) safeguards not only such obviously identifying information as an informant's name and address,<sup>97</sup> but also all information that would "tend to reveal" the source's identity,<sup>98</sup> including telephone numbers,<sup>99</sup> the time and place of events or meetings,<sup>100</sup> and information provided

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<sup>96</sup> 120 Cong. Rec. 17033 (1974) (statement of Sen. Hart).

<sup>97</sup> See, e.g., Cuccaro v. Sec'y of Labor, 770 F.2d 355, 359-60 (3d Cir. 1985); Piper v. DOJ, 374 F. Supp. 2d 73, 81 (D.D.C. 2005) (protecting name and address); Cleveland & Vicinity Dist. Council v. U.S. Dep't of Labor, No. 1:87-2384, slip op. at 12-14 (N.D. Ohio Apr. 22, 1992) (magistrate's recommendation) (protecting names and addresses), adopted, (N.D. Ohio May 11, 1992).

<sup>98</sup> See, e.g., Pollard v. FBI, 705 F.2d 1151, 1155 (9th Cir. 1983) (holding that entire document properly was withheld where disclosure "would tend to reveal [source's] identity"); Palacio v. DOJ, No. 00-1564, 2002 U.S. Dist. LEXIS 2198, at \*25 n.15 (D.D.C. Feb. 8, 2002) (withholding cooperating witness' "aliases, date of birth, address, identification numbers, . . . physical description, and [information which sets] forth his or her involvement in other investigations"), summary affirmance granted, No. 02-5247, 2003 U.S. App. LEXIS 1804 (D.C. Cir. Jan. 31, 2003); Lodi v. IRS, No. 96-2095, slip op. at 4-5 (E.D. Cal. Apr. 14, 1998) (finding entire pages of material properly withheld because release would disclose identity of confidential source); Spirko v. USPS, No. 96-0458, slip op. at 2 (D.D.C. Apr. 11, 1997) (ruling that agency properly withheld location where certain event took place and specific information imparted by informant because release would allow a "knowledgeable person to deduce informant's identity"), aff'd on other grounds, 147 F.3d 992 (D.C. Cir. 1998); Ajluni v. FBI, 947 F. Supp. 599, 606 (N.D.N.Y. 1996) (finding information properly withheld where disclosure could result in narrowing sources "to a limited group of individuals"); Mavadia v. Caplinger, No. 95-3542, 1996 WL 592742, at \*3 (E.D. La. Oct. 11, 1996) (ordering protection for information that would identify informants); Kitchen v. FBI, No. 93-2382, slip op. at 13 (D.D.C. Mar. 18, 1996) (ruling that "Exemption 7(D) protects more than the names of confidential sources; it protects information . . . that might identify such sources"); Doe v. DOJ, 790 F. Supp. 17, 21 (D.D.C. 1992) (stating that where source is well known to investigated applicant, agency must protect "even the most oblique indications of identity").

<sup>99</sup> See Crooker v. IRS, No. 94-0755, 1995 WL 430605, at \*6 (D.D.C. Apr. 27, 1995) (determining that the agency properly "deleted . . . telephone numbers, recent activities, and other information tending to reveal the identity of confidential informants").

<sup>100</sup> See, e.g., Halpern v. FBI, No. 94-365A(F), slip op. at 25-26 (W.D.N.Y. Aug. 31, 2001) (protecting times and places that information was obtained); Accuracy in Media v. FBI, No. 97-2107, slip op. at 5 (D.D.C. Mar. 31, 1999) (reasoning that "an informant may be identified by . . . dates, times, places, events, or names connected with certain cases").

by the source that could allow the source's identity to be deduced.<sup>101</sup>

Accordingly, courts have found that protection for source-identifying information, such as source symbol numbers,<sup>102</sup> extends beyond information that is merely a substitute for the source's name. For example, to prevent indirect identification of a source, even the name of a third party who is not a confidential source -- but who acted as an intermediary for the source in his dealings with the agency -- has been protected.<sup>103</sup>

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<sup>101</sup> See, e.g., Ibarra-Cortez v. DEA, 36 F. App'x 598, 598 (9th Cir. 2002) (withholding documents where the requester "might be able to deduce the identity of the informants because they deal with specific events and circumstances"); Hale v. DOJ, 226 F.3d 1200, 1204 n.2 (10th Cir. 2000) (finding that "public dissemination of the documents [supplied by sources] would reveal the[ir] identit[ies]" because the "case took place in a small town where most everyone knew everyone else"); Lewis-Bey v. DOJ, 595 F. Supp. 2d 120, 137 (D.D.C. 2009) (withholding dates and accounts of interviews that could be used to identify sources); Bullock v. F.B.I., 577 F. Supp. 2d 75, 80 (D.D.C. 2008) (finding withholding proper where requested information could enable plaintiff to identify confidential source); Billington v. DOJ, 69 F. Supp. 2d 128, 138 (D.D.C. 1999) (finding that the "FBI is well within its rights to withhold [the city of origin of various teletypes] where revealing the city would reveal the identity of the source," and protecting the identities of foreign agencies that requested law enforcement information where disclosure would "reveal that they have also agreed to provide such information in return" and therefore would "betray these foreign entities' status as confidential sources"), aff'd in pertinent part, vacated in part & remanded on other grounds, 233 F.3d 581 (D.C. Cir. 2000); see also Judicial Watch, Inc. v. FBI, No. 00-745, slip op. at 14 (D.D.C. Apr. 20, 2001) (recognizing the "substantial likelihood in many cases that the identity of a source can be determined from an analysis of the information furnished by the source himself, especially where the analysis is made by a person familiar with the facts and circumstances on which the investigation is predicated").

<sup>102</sup> See Amuso v. DOJ, 600 F. Supp.2d 78, 99 (D.D.C. 2009) ("The FBI establishes that the confidential sources to whom the agency has assigned file numbers and permanent source symbol numbers, and the information provided by these symbol numbered sources, properly are withheld under Exemption 7(D)."); Summers v. DOJ, 517 F. Supp. 2d 231, 244 (D.D.C. 2007) (finding source symbol number of confidential informant properly withheld); Brunetti v. FBI, 357 F. Supp. 2d 97, 107 (D.D.C. 2004) (holding "that the FBI's internal numbering system for confidential informants is appropriately withheld . . . especially when release might lead to discovery of confidential informant's identity"); Halpern, No. 94-365A(F), slip op. at 25-26 (W.D.N.Y. Aug. 31, 2001) (accepting FBI's assertion that release of source symbol designations would permit "individuals who were the target of the investigations . . . to determine dates, times and places that information pertaining to them was obtained, resulting in knowledge as to the informant's identity"); Accuracy in Media, No. 97-2107, slip op. at 5 (D.D.C. Mar. 31, 1999) (reasoning that if informant symbol numbers "were routinely released, over time an informant may be identified by revealing the informant's connections with dates, times, places, events, or names connected with certain cases"); Putnam v. DOJ, 873 F. Supp. 705, 716 (D.D.C. 1995) (finding "coded identification numbers, file numbers and information that could be used to identify sources" properly withheld).

<sup>103</sup> See Birch v. USPS, 803 F.2d 1206, 1212 (D.C. Cir. 1986); United Techs. Corp. v. NLRB, 777 (continued...)



When circumstances warrant, a law enforcement agency may employ a "Glomar" response -- refusing to confirm or deny the very existence of records about a particular individual or possible source entity -- if a more specific response to a narrowly targeted request would disclose whether that individual acted as a confidential source.<sup>104</sup> Additionally, information provided by a source may be withheld under this first clause of Exemption 7(D) wherever disclosure of that information would permit the "linking" of a source to specific source-provided material.<sup>105</sup>

The second clause of Exemption 7(D) broadly protects all information furnished to criminal law enforcement authorities by confidential sources<sup>106</sup> in the course of criminal investigations<sup>107</sup> or information furnished to an agency conducting a lawful national security intelligence investigation.<sup>108</sup> Thus, the statutory requirement of an "investigation," while not

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<sup>103</sup>(...continued)

F.2d 90, 95 (2d Cir. 1985) ("The identity of [an NLRB] agent was properly withheld as information in an investigatory record that could lead to the disclosure of a confidential source.").

<sup>104</sup> See, e.g., Benavides v. DEA, 769 F. Supp. 380, 381-82 (D.D.C. 1990), rev'd & remanded on procedural grounds, 968 F.2d 1243 (D.C. Cir.), modified, 976 F.2d 751 (D.C. Cir. 1992).

<sup>105</sup> See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923-25 (11th Cir. 1984); Concepcion v. FBI, 606 F. Supp. 2d 14, 41 (D.D.C. 2009) (finding agency properly withheld identifying information and specific information provided by cooperating witness as "[t]he witness provided 'detailed information that is singular in nature concerning the criminal activities of plaintiff, his associates, and/or other subjects of this investigation,' such that disclosure of the information provided 'could enable others to discern [the witness'] identity'" (quoting agency declaration)); Stone v. Def. Investigative Serv., 816 F. Supp. 782, 788 (D.D.C. 1993) (protecting "information so singular that to release it would likely identify the individual"); Barrett v. OSHA, No. C2-90-147, slip op. at 13 (S.D. Ohio Oct. 18, 1990) (protecting statements obtained from witnesses regarding single incident involving only three or four persons).

<sup>106</sup> See Reiter v. DEA, No. 96-0378, 1997 WL 470108, at \*6-7 (D.D.C. Aug. 13, 1997) (holding all source-supplied information protectible under Exemption 7(D)'s second clause when source is confidential), summary affirmance granted, No. 97-5246, 1998 WL 202247 (D.C. Cir. Mar. 3, 1998).

<sup>107</sup> See Shaw v. FBI, 749 F.2d 58, 63-65 (D.C. Cir. 1984) (articulating the standard for determining if law enforcement undertaking satisfies "criminal investigation" threshold); see also Pray v. DOJ, No. 95-5383, 1996 WL 734142, at \*1 (D.C. Cir. Nov. 20, 1996) (per curiam) (upholding agency's use of Exemption 7(D) for source information); Kuffel v. BOP, 882 F. Supp. 1116, 1125 (D.D.C. 1995) ("qualifying criminal investigation" exists when "FBI gather[s] information on criminals who violated specific state crimes for the purpose of using the information as possible leads in investigations of robberies and burglaries that could be in violation of federal law").

<sup>108</sup> See Ferguson v. FBI, 957 F.2d 1059, 1069 (2d Cir. 1992) (finding that "[o]nce it is shown (continued...)

a component of Exemption 7's threshold language, is "a predicate of exemption under the second clause of paragraph (D)."<sup>109</sup> For the purposes of this clause, criminal law enforcement authorities include federal agencies' inspector generals.<sup>110</sup>

In an important elaboration on the definition of a "criminal investigation," courts have recognized that information originally compiled by local law enforcement authorities in conjunction with a nonfederal criminal investigation fully retains its criminal investigatory character when subsequently obtained by federal authorities,<sup>111</sup> even if received solely for use in a federal civil enforcement proceeding.<sup>112</sup> In addition, protection for source-provided information has been extended to information supplied to federal officials by state or local enforcement authorities seeking assistance in pursuing a nonfederal investigation.<sup>113</sup>

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<sup>108</sup>(...continued)

that information was provided by a confidential source [during a criminal or lawful national security intelligence investigation], the information itself is protected from disclosure, despite the fact that there is no danger that the identity of the source could be divulged"; Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at \*9 (D.D.C. Mar. 30, 2001) (finding agency properly withheld information pertaining to "a confidential informant who reported a possible terrorist threat against the INS Miami District Office"); National Security Archive v. FBI, 759 F. Supp. 872, 885 (D.D.C. 1991) (finding agency properly withheld identities of and information furnished by persons interviewed under express and implied assurances of confidentiality pursuant to lawful national security investigation).

<sup>109</sup> Keys v. DOJ, 830 F.2d 337, 343 (D.C. Cir. 1987).

<sup>110</sup> See Ortiz v. HHS, 70 F.3d 729, 732 (2d Cir. 1995) (ruling that Exemption 7(D) properly applied when "HHS's Office of Inspector General . . . use[d anonymous] letter to launch a criminal investigation"); Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 563 n.13 (1st Cir. 1992) (deeming inspectors general same as criminal law enforcement authorities); Brant Constr. Co. v. EPA, 778 F.2d 1258, 1265 (7th Cir. 1985) (recognizing "substantial similarities between the activities of the FBI and the OIGs").

<sup>111</sup> See Harvey v. DOJ, 747 F. Supp. 29, 38 (D.D.C. 1990).

<sup>112</sup> See Martinez v. EEOC, No. 04-0391, 2004 WL 2359895, at \*2 (W.D. Tex. Oct. 19, 2004) (rejecting plaintiff's argument that Exemption 7(D) should not apply to EEOC civil investigations); Cleveland & Vicinity Dist. Council v. U.S. Dep't of Labor, No. 1:87-2384, slip op. at 12 n.3 (N.D. Ohio Apr. 22, 1992) (magistrate's recommendation) (holding that Exemption 7(D) "clearly applies to information obtained from confidential sources in all investigations, both civil and criminal"), adopted, (N.D. Ohio May 11, 1992); Dayo v. INS, No. C-2-83-1422, slip op. at 5-6 (S.D. Ohio Dec. 31, 1985).

<sup>113</sup> See, e.g., Hopkinson v. Shillinger, 866 F.2d 1185, 1222 (10th Cir. 1989) (protecting state law enforcement agency's request for FBI laboratory evaluation of evidence submitted by state agency and results of FBI's analysis); Gordon v. Thornberg, 790 F. Supp. 374, 377-78 (D.R.I. 1992) (emphasizing that "when a state law enforcement agency sends material to an FBI lab for testing, confidentiality is 'inherently implicit'" and that "all information from another agency must be protected to provide the confidence necessary to law enforcement cooperation");

(continued...)

As mentioned above, the second clause of Exemption 7(D) also protects "records or information compiled for law enforcement purposes . . . by an agency conducting a lawful national security intelligence investigation" that "could reasonably be expected to disclose the identity of a confidential source and . . . information furnished by a confidential source."<sup>114</sup> This broad national security clause applies to any agency and covers all law enforcement information either identifying or provided by the confidential source.<sup>115</sup> Protection for sources under this clause of Exemption 7(D) has been upheld in cases regarding domestic terrorism,<sup>116</sup> foreign intelligence services,<sup>117</sup> agents of foreign governments,<sup>118</sup> and national security investigations.<sup>119</sup>

Confidential source information that falls within the broad coverage of this second

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<sup>113</sup>(...continued)

Rojem v. DOJ, 775 F. Supp. 6, 12 (D.D.C. 1991) (finding that disclosure of criminal files provided to FBI by state authorities "would unduly discourage" states from enlisting FBI's assistance), appeal dismissed for failure to timely file, No. 92-5088 (D.C. Cir. Nov. 4, 1992); Payne v. DOJ, 722 F. Supp. 229, 231 (E.D. Pa. 1989) (stating that "requirement is met . . . [when] the documents sought are FBI laboratory and fingerprint examinations of evidence collected by local law enforcement agencies"), aff'd, 904 F.2d 695 (3d Cir. 1990) (unpublished table decision).

<sup>114</sup> 5 U.S.C. § 552(b)(7)(D).

<sup>115</sup> See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act at 14 (Dec. 1987).

<sup>116</sup> See, e.g., Judicial Watch, Inc. v. Reno, 2001 WL 1902811, at \*9; Blanton v. DOJ, 63 F. Supp. 2d 35, 49 (D.D.C. 1999); Ajluni, 947 F. Supp. at 602; Steinberg v. DOJ, No. 93-2409, slip op. at 24 (D.D.C. Oct. 31, 1995).

<sup>117</sup> See Shaw, 749 F.2d at 62 (finding implied confidentiality for foreign law enforcement agencies); Pinnavaia v. FBI, No. 03-112, slip op. at 14 (D.D.C. Feb. 25, 2004) (finding that "the agreement between New Scotland Yard and the FBI expressly forbids the disclosure of information provided to the FBI"); Campbell v. DOJ, No. 89-3016, 1996 WL 554511, at \*9 (D.D.C. Sept. 19, 1996) (finding implied confidentiality for foreign law enforcement agencies) rev'd on other grounds, 164 F.3d 20 (D.C. Cir. 1998); Meeropol v. Smith, No. 75-1121, slip op. at 76-78 (D.D.C. Feb. 29, 1984) (protecting information obtained during intelligence investigations), aff'd in pertinent part & remanded in part on other grounds sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

<sup>118</sup> See Hogan v. Huff, No. 00 Civ. 6753, 2002 WL 1359722, at \*11 (S.D.N.Y. June 21, 2002) (finding that law enforcement purpose exists where documents were gathered to determine if subject was unregistered agent for Cuban Government).

<sup>119</sup> See Hudson v. DOJ, No. 04-4079, 2005 WL 1656909, at \*5 (N.D. Cal. July 11, 2005) (finding that the FBI "has an agreement with this confidential . . . source under which security and/or criminal law enforcement information is exchanged"); Pinnavaia, No. 03-112, slip op. at 12 (D.D.C. Feb. 25, 2004) (finding information exempt from disclosure as an "agreement between New Scotland Yard and the FBI expressly forbids the disclosure of information provided to the FBI").

clause of Exemption 7(D) need not necessarily be source-identifying to be found protectable.<sup>120</sup> Thus, under the second clause of Exemption 7(D), courts have permitted the withholding of confidential information even after the source's identity has been officially divulged or acknowledged,<sup>121</sup> or when the requester knows the source's identity.<sup>122</sup> Similarly, information provided by an anonymous source has been found eligible for protection.<sup>123</sup> Moreover, even

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<sup>120</sup> See, e.g., Parker v. DOJ, 934 F.2d 375, 375 (D.C. Cir. 1991); Shaw, 749 F.2d at 61-62; Radowich v. U.S. Attorney, Dist. of Md., 658 F.2d 957, 964 (4th Cir. 1981); see also FOIA Update, Vol. XIV, No. 3, at 10 (pointing out breadth of Exemption 7(D) coverage).

<sup>121</sup> See, e.g., Neely v. FBI, 208 F.3d 461, 467 (4th Cir. 2000) (holding that district court erred to extent it denied withholding based on belief that Exemption 7(D) cannot be claimed to protect identities of confidential sources whose identities previously have been disclosed); Ferguson, 957 F.2d at 1068 (holding that the subsequent disclosure of a source's identity or of some of the information provided by the source does not require "full disclosure of information provided by such a source"); Cleary v. FBI, 811 F.2d 421, 423 (8th Cir. 1987) (rejecting plaintiff's argument that "the confidential source exemption is unavailable because the identities of the confidential sources have been disclosed to him by the FBI"); Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 185 (D.N.H. 1993) (ruling that source's identity or information provided need not be "secret" to justify withholding); Church of Scientology v. IRS, 816 F. Supp. 1138, 1161 (W.D. Tex. 1993) (declaring it "irrelevant that the identity of the confidential source is known").

<sup>122</sup> See, e.g., Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (explaining that Exemption 7(D) "focuses on the source's intent, not the world's knowledge"); Radowich, 658 F.2d at 960 (declaring that Exemption 7(D) applies even when "identities of confidential sources . . . [are] known"); see also L&C Marine, 740 F.2d at 923, 925 (noting that fact that employee witnesses "could be matched to their statements" does not diminish Exemption 7(D) protection); Keeney v. FBI, 630 F.2d 114, 119 n.2 (2d Cir. 1980) (ruling that Exemption 7(D) applies to "local law enforcement agencies [that] have now been identified"); Bullock, 577 F. Supp. 2d at 80 (holding "Exemption 7(D) applies even when the source's identity is no longer a secret"); Butler v. DOJ, Crim. Div., No. 02-0412, slip op. at 8 (D.D.C. Mar. 29, 2004) (finding Exemption 7(D) properly invoked to withhold information regardless of fact that confidential sources are known); Ortiz v. DOJ, No. 97-140-A-3, slip op. at 10 (M.D. La. Aug. 25, 1998) (stating that "[i]t is irrelevant that the identity of the confidential source is known"); Crooker, 1995 WL 430605, at \*6 (stating that "an agency may withhold confidential information even if the requester or the public know[s] the source's identity"); Wickline v. FBI, No. 92-1189, 1994 WL 549756, at \*4 n.8 (D.D.C. Sept. 30, 1994) (reiterating that "confidentiality is not waived or revoked when a [requester] already knows the protected names"); Shafmaster Fishing, 814 F. Supp. at 185 (stating that source's identity need not be secret to justify withholding information under Exemption 7(D)).

<sup>123</sup> See Ortiz, 70 F.3d at 735 (reasoning that extending confidentiality to anonymous hotline communications "reflects a common sense judgment" given the importance of encouraging public cooperation in combatting fraud); Providence Journal, 981 F.2d at 565-67 (extending confidentiality to unsolicited anonymous letters regarding investigation of officers in Rhode Island Army National Guard); Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at \*28 (M.D. Fla. Oct. 1, 1997) (finding it "reasonable to assume" that anonymous caller expected confidentiality); Mitchell v. Ralston, No. 81-4478, slip op. at 2 (S.D. Ill. Oct. 14, 1982) (ruling that

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when source-provided information has been revealed and the identities of some of the confidential sources have been independently divulged, Exemption 7(D) can protect against the matching of witnesses' names with the specific information that they supplied.<sup>124</sup>

### Waiver of Confidentiality

Once courts determine the existence of confidentiality under Exemption 7(D), they are reluctant to find a subsequent waiver of the exemption's protections.<sup>125</sup> This restraint stems both from the potentially adverse repercussions that may result from additional disclosures and from a recognition that any "judicial effort[] to create a 'waiver' exception" to exemption 7(D)'s language runs afoul of the statute's intent to provide "workable rules."<sup>126</sup> It therefore has been recognized that a waiver of Exemption 7(D)'s protections should be only found upon "absolutely solid evidence showing that the source . . . has manifested complete disregard for confidentiality."<sup>127</sup>

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<sup>123</sup>(...continued)

anonymity of source does not negate confidentiality).

<sup>124</sup> See Kirk v. DOJ, 704 F. Supp. 288, 293 (D.D.C. 1989) ("The fact that [certain sources' names are mentioned in other documentation] does not destroy confidentiality; plaintiffs do not know who said what to the investigators. . . . it seems likely that plaintiffs seek to try to 'match' names with statements, thus destroying the confidentiality protected by exemption (7)(D)."); see also L&C Marine, 740 F.2d at 925 (ruling that the names of employee-witnesses in OSHA accident investigation were properly withheld "even if use of civil discovery procedures might provide plaintiffs-appellees with information sufficient to match the workers with their statements").

<sup>125</sup> See, e.g., Reiter v. DEA, No. 96-0378, 1997 WL 470108, at \*6 (D.D.C. Aug. 13, 1997) (stating that "once an informant's confidentiality has been established, almost nothing can eviscerate Exemption 7(D) protection").

<sup>126</sup> Parker v. DOJ, 934 F.2d 375, 380 (D.C. Cir. 1991); see also Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000) (observing that "the statute by its terms does not provide for . . . waiver"); Irons v. FBI, 880 F.2d 1446, 1456-56 (1st Cir. 1989) (citing DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 779 (1989)).

<sup>127</sup> Parker, 934 F.2d at 378 (quoting Dow Jones & Co. v. DOJ, 908 F.2d 1006, 1011 (D.C. Cir.), superseded, 917 F.2d 571 (D.C. Cir. 1990)); see, e.g., Ray v. FBI, 441 F. Supp. 2d 27, 37 (D.D.C. 2006) (stating that court is not inclined to protect source's confidentiality, because source clearly stated that "he ha[d] waived any reliance he may have had" and that "FBI has no such duty to afford" source continued confidentiality against his will); Billington v. DOJ, 69 F. Supp. 2d 128, 139 (D.D.C. 1999) (concluding that plaintiff's allegation that source was "unafraid," even if true, does not constitute "absolutely solid evidence" that source "manifested complete disregard for confidentiality"); Billington v. DOJ, 11 F. Supp. 2d 45, 69 (D.D.C. 1998) (finding that alleged source did not exhibit "complete disregard for confidentiality" by giving newspaper interview); Freeman v. DOJ, No. 92-0557, 1993 WL 260694, at \*3-4 (D.D.C. June 28, 1993) (ruling that the "fact that federal, state, and local authorities were publicly cooperating in the . . . investigation, or that certain individuals publicly acknowledged that they were

(continued...)

Thus, "[t]he per se limitation on disclosure under 7(D) does not disappear if the identity of the confidential source becomes known through other means."<sup>128</sup> Moreover, even authorized or official disclosure of some information provided by a confidential source does not open the door to disclosure of any of the other information the source has provided.<sup>129</sup> In this vein, it is well established that source-identifying and source-provided information remains protected even when some of it has been the subject of testimony in open court.<sup>130</sup>

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<sup>127</sup>(...continued)

'working closely' with the investigation . . . does not 'manifest complete disregard for confidentiality'), vacated in other part on denial of reconsideration, No. 92-0557, 1994 WL 35871 (D.D.C. Jan. 26, 1994).

<sup>128</sup> L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 925 (11th Cir. 1984) (citing Radowich v. U.S. Attorney, Dist. of Md., 658 F.2d 957, 960 (4th Cir. 1981)); see, e.g., Lesar v. DOJ, 636 F.2d 472, 491 (D.C. Cir. 1980) (finding that no waiver of confidentiality occurs when confidential information finds its way into public domain); Keeney v. FBI, 630 F.2d 114, 119 n.2 (2d Cir. 1980) (declaring that Exemption 7(D) continues to protect confidential sources even after their identification).

<sup>129</sup> See Brant Constr. Co. v. EPA, 778 F.2d 1258, 1265 n.8 (7th Cir. 1985) (ruling that "subsequent disclosure of the information, either partially or completely, does not affect its exempt status under 7(D)"); Shaw v. FBI, 749 F.2d 58, 62 (D.C. Cir. 1984) (holding that "[d]isclosure of one piece of information received from a particular party -- and even the disclosure of that party as its source -- does not prevent that party from being a 'confidential source' for other purposes"); Johnson v. DOJ, 758 F. Supp. 2, 5 (D.D.C. 1991) (stating that the fact that someone made public statement concerning incident "does not constitute a waiver of the Bureau's confidential file [because a] . . . press account may be erroneous or false or, more likely, incomplete"); cf. United Techs. Corp. v. NLRB, 777 F.2d 90, 95-96 (2d Cir. 1985) (finding release of informant-related material to party aligned with agency in administrative proceeding in no way diminished government's ability to invoke Exemption 7(D) in response to subsequent request by nonallied party).

<sup>130</sup> See, e.g., Neely, 208 F.3d at 466 (recognizing that a source can "remain a 'confidential source' . . . even if the source's communication with [the agency] is subsequently disclosed at trial"); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (holding that Exemption 7(D) "provides for nondisclosure of all sources who provided information with an understanding of confidentiality, not for protection of only those sources whose identity remains a secret at the time of future FOIA litigation [because they do not testify]"); Davis v. DOJ, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (concluding that an informant's testimony in open court did not "waive the [government's] right to invoke Exemption 7(D)" (quoting Parker, 934 F.2d at 379-80)); Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992) (affirming that local law enforcement officer does not lose status as confidential source by testifying in court); Parker, 934 F.2d at 379-81 (stating that "government agency is not required to disclose the identity of a confidential source or information conveyed to the agency in confidence in a criminal investigation notwithstanding the possibility that the informant may have testified at a public trial"); Irons, 880 F.2d at 1454 (recognizing that "[t]here is no reason grounded in fairness for requiring a source who disclosed information during testimony to reveal, against his will (or to have the FBI reveal for him), information that he did not disclose in public"); Kimberlin v. Dep't of the Treasury, 774

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In order to demonstrate a waiver by disclosure through authorized channels, the requester must demonstrate both that "the exact information given to the [law enforcement authority] has already become public, and the fact that the informant gave the same information to the [law enforcement authority] is also public."<sup>131</sup> Consequently, the Court of Appeals for the District of Columbia Circuit has found that the government is not required even to "confirm or deny that persons who testify at trial are also confidential informants."<sup>132</sup>

The protection of Exemption 7(D) has been found not to be forfeited by "court-ordered and court-supervised" disclosure to an opponent in civil discovery.<sup>133</sup> Moreover, because

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<sup>130</sup>(...continued)

F.2d 204, 209 (7th Cir. 1985) (determining that "disclosure [prior to or at trial] of information given in confidence does not render non-confidential any of the information originally provided"); Doolittle v. DOJ, 142 F. Supp. 2d 281, 285-86 (N.D.N.Y. 2001) (protecting identities of confidential sources that "prosecutors [had] disclosed . . . in open court during [plaintiff's] sentencing hearing"); Daniel v. DOJ, No. 99-2423, slip op. at 4 (D.D.C. Mar. 30, 2001) (holding that Exemption 7(D) remains applicable even though source information was "produced at or before trial pursuant to . . . criminal discovery rules"); Guerrero v. DEA, No. 93-2006, slip op. at 10 (D. Ariz. Feb. 21, 1996); Johnson v. BOP, No. 90-645, 1990 U.S. Dist. LEXIS 18358, at \*8-9 (N.D. Ala. Nov. 1, 1990); see also LaRouche v. DOJ, No. 90-2753, slip op. at 12 (D.D.C. Nov. 17, 2000) (noting that an agency is not obliged to identify sources "[e]ven if another agency ha[s] done so"); cf. Sanderson v. IRS, No. 98-2369, 1999 WL 35290, at \*3 (E.D. La. Jan. 25, 1999) (concluding that source's deposition testimony in civil action did not act as "wholesale waiver" of information provided to agency). But see Homick v. DOJ, No. 98-0557, slip op. at 4 (N.D. Cal. Oct. 27, 2004) (concluding that FBI's source waived confidentiality by later testifying).

<sup>131</sup> Parker, 934 F.2d at 378; Dow Jones & Co. v. DOJ, 917 F.2d 571, 577 (D.C. Cir. 1990); see also Davis, 968 F.2d at 1280 (holding that government is entitled to withhold tapes obtained through informant's assistance "unless it is specifically shown that those tapes, or portions of them, were played during the informant's testimony"); Bullock v. FBI, 577 F. Supp. 2d 75, 80 (D.D.C. 2008) (holding plaintiff "needs to show that the 'exact information' contained in the reports is already in the public domain" in order to establish waiver by disclosure); Sanderson, 1999 WL 35290, at \*3-4 (ordering disclosure of "exact information to which [source] testified in her deposition"); cf. Hale v. DOJ, No. 89-1175, slip op. at 6 (W.D. Okla. Jan. 17, 1995) (stating that "individuals who testified in court could not be expected to have their identities or the topic of their testimony withheld"), rev'd in part on other grounds, 99 F.3d 1025 (10th Cir. 1996).

<sup>132</sup> Schmerler v. FBI, 900 F.2d 333, 339 (D.C. Cir. 1990) (reasoning that testimony by source does not automatically waive confidentiality because source may be able "to camouflage his true role notwithstanding his court appearance" (quoting Irons v. FBI, 811 F.2d 681, 687 (1st Cir. 1987))); see also Parker, 934 F.2d at 381.

<sup>133</sup> Donohue v. DOJ, No. 84-3451, 1987 U.S. Dist. LEXIS 15185, at \*14 (D.D.C. Dec. 23, 1987); see Glick v. DOJ, No. 89-3279, 1991 WL 118263, at \*4 (D.D.C. June 20, 1991) (finding that disclosure "pursuant to discovery in another case . . . does not waive the confidentiality of the information or those who provided it"); see also Parker, 934 F.2d at 380 (observing that judicial efforts to create "waiver" exception run "contrary to statute's intent to provide workable rules"

(continued...)

Exemption 7(D) "mainly seeks to protect law enforcement agencies in their efforts to find future sources,"<sup>134</sup> acts of "waiver" by 'sources' will not automatically prove sufficient to release the [source-provided] information.<sup>135</sup> (See the discussion of this point under Discretionary Disclosure and Waiver, below.)

Exemption 7(D)'s protection for sources and the information they have provided is not diminished by the fact that an investigation has been closed.<sup>136</sup> Moreover, courts have consistently recognized that its protections cannot be lost through the mere passage of

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<sup>133</sup>(...continued)

(citing Irons, 880 F.2d at 1455-56)); Sinito v. DOJ, No. 87-0814, slip op. at 24 (D.D.C. July 12, 2000) (holding that "[n]o further release of information . . . is warranted" even though "the names of certain informants were made a matter of public record through release of civil discovery material"), summary affirmance granted in pertinent part, No. 00-5321 (D.C. Cir. Apr. 11, 2001).

<sup>134</sup> Irons, 880 F.2d at 1453; see, e.g., Koch v. USPS, No. 92-0233, slip op. at 12 (W.D. Mo. Dec. 17, 1992) (stating that individuals would be less likely to come forward with information in future investigations if informants' identities were disclosed), aff'd, 7 F.3d 1042 (8th Cir. 1993) (unpublished table decision).

<sup>135</sup> Irons, 880 F.2d at 1452; see, e.g., Canning v. DOJ, No. 01-2215, slip op. at 12 (D.D.C. Mar. 9, 2004) (stating that "an informant's later actions do not waive an agency's right to withhold information"); Guerrero, No. 93-2006, slip op. at 10 (D. Ariz. Feb. 21, 1996) (holding that "full disclosure of information provided by confidential informant . . . not required simply because" informant made "public statements"); Spurlock v. FBI, No. 91-5602, slip op. at 2 (C.D. Cal. Nov. 29, 1993) (concluding that the "fact that [source] had any sense of braggadocio in his telling the world he had talked to the FBI cannot vitiate the protections of the exemption and the nature of his statements to the FBI as confidential"), rev'd on other grounds, 69 F.3d 1010 (9th Cir. 1995). But see Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 567 n.16 (1st Cir. 1992) (holding that express waiver of confidentiality by source vitiates Exemption 7(D) protection); Blanton v. DOJ, 63 F. Supp. 2d 35, 49 (D.D.C. 1999) (ruling that sources "have waived any assurance of confidentiality, express or implied, by writing books about their experiences as confidential FBI informants").

<sup>136</sup> See Ortiz v. HHS, 70 F.3d 729, 733 (2d Cir. 1995) ("the status of the investigation is . . . immaterial to the application of the exemption"); KTVY-TV v. United States, 919 F.2d 1465, 1470-71 (10th Cir. 1990); Akron Standard Div. of Eagle-Picher Indus. v. Donovan, 780 F.2d 568, 573 (6th Cir. 1986); Ortiz v. DOJ, No. 97-140-A-3, slip op. at 10 (E.D. La. Aug. 25, 1998) ("information and/or identity of the individual remains confidential subject to Exemption 7(D) after the investigation is concluded"); Almy v. DOJ, No. 90-0362, 1995 WL 476255, at \*13 (N.D. Ind. Apr. 13, 1995) (protection "not diminished" when investigation closed); Church of Scientology v. IRS, 816 F. Supp. 1138, 1161 (W.D. Tex. 1993) (source identity and information provided "remains confidential . . . after the investigation is concluded"); Soto v. DEA, No. 90-1816, slip op. at 7 (D.D.C. Apr. 13, 1992) ("[i]t is of no consequence that these sources provided information relating to a criminal investigation which has since been completed"); Gale v. FBI, 141 F.R.D. 94, 98 (N.D. Ill. 1992) (statements protected even "while no investigation is pending" under Exemption 7(D)).



time.<sup>137</sup> Additionally, unlike with Exemption 7(C),<sup>138</sup> the safeguards of Exemption 7(D) remain undiminished by the death of the source.<sup>139</sup>

### Exclusion Considerations

Finally, the FOIA affords special source-identification protection through the "(c)(2) exclusion,"<sup>140</sup> which permits a criminal law enforcement agency to entirely exclude records from the FOIA under specified circumstances when necessary to avoid divulging the existence of a source relationship. (See the discussion of this provision under Exclusions, below.)

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<sup>137</sup> See, e.g., Halpern v. FBI, 181 F.3d 279, 300 (2d Cir.1999) (declaring that "it makes no difference in our analysis whether now, in hindsight, the objective need for confidentiality has diminished; what counts is whether then, at the time the source communicated with the FBI, the source understood that confidentiality would attach"); Schmerler, 900 F.2d at 336 (indicating that Exemption 7(D) "contains no sunset provision"); Keys v. DOJ, 830 F.2d 337, 346 (D.C. Cir. 1987) (stating that "Congress has not established a time limitation for exemption (7)(D) and it would be both impractical and inappropriate for the Court to do so" (quoting Keys v. DOJ, No. 85-2588, slip op. at 9 (D.D.C. May 12, 1986))); Irons v. FBI, 811 F.2d 681, 689 (1st Cir. 1987) (applying Exemption 7(D) protection to information regarding 1948-1956 Smith Act trials); Brant Constr., 778 F.2d at 1265 n.8 (emphasizing that "policy of [Exemption] 7(D) [is] to protect future sources of information" and that passage of time "does not alter status" of source-provided information); Fitzgibbon v. U.S. Secret Serv., 747 F. Supp. 51, 60 (D.D.C. 1990) (protecting information regarding alleged 1961 plot against President Kennedy by Trujillo regime in Dominican Republic); Abrams v. FBI, 511 F. Supp. 758, 762-63 (N.D. Ill. 1981) (protecting twenty-seven-year-old documents).

<sup>138</sup> See, e.g., Schrecker v. DOJ, 14 F. Supp. 2d 111, 118 (D.D.C. 1998) (noting that "the FBI does not withhold third party information concerning Exemption 7(C) if it can determine that the third party's age would exceed 100 years").

<sup>139</sup> See, e.g., Blanton v. DOJ, 64 F. App'x 787, 790 (D.C. Cir. 2003) (rejecting plaintiff's "claim that the death of a confidential source eliminates the applicability of Exemption 7(D)"); McDonnell v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (holding that issue of whether source is "deceased does not extend to the information withheld pursuant to Exemption 7(D)"); Kiraly v. FBI, 728 F.2d 273, 279 (6th Cir. 1984) (finding information provided by deceased source who also testified at trial properly withheld); Cohen v. Smith, No. 81-5365, slip op. at 4 (9th Cir. Mar. 25, 1983); Bullock, 577 F. Supp. 2d at 80 (recognizing Exemption 7(D) continues to apply after death of confidential source); see also FOIA Update, Vol. IV, No. 3, at 5; cf. Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998) (recognizing that "posthumous disclosure of [attorney-client] communications may be as feared as disclosure during the client's lifetime") (non-FOIA case); Allen v. DOD, 658 F. Supp. 15, 20 (D.D.C. 1986) (protecting identities of deceased intelligence sources under Exemption 1). But see Homick, No. 98-0557, slip op. at 4 (N.D. Cal. Oct. 27, 2004) (concluding that Exemption 7(D) is inapplicable to deceased source).

<sup>140</sup> 5 U.S.C. § 552(c)(2) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.