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."[1]

Introduction

It has "long been recognized" that Exemption 7(D) affords "the most comprehensive protection of all [the] FOIA's law enforcement exemptions."[2] The Court of Appeals for the District of Columbia Circuit has remarked that Exemption 7(D) was enacted "to assist federal law enforcement agencies" in their efforts "to obtain, and to maintain, confidential sources, as well as to guard the flow of information to these agencies."[3] Exemption 7(D) ensures that "confidential sources are not lost because of

* This section primarily includes case law, guidance and statutes up until October 31, 2023. While some legal authorities after this date may be included, for a comprehensive accounting of all recent court decisions, please visit OIP's Court Decisions webpage (https://www.justice.gov/oip/court-decisions-overview). Please also note that this section generally only includes subsequent case history in the citations when it is relevant to the point for which the case is being cited.

[1] 5 U.S.C. § 552(b)(7)(D) (2018).

[2] Billington v. DOJ, 301 F. Supp. 2d 15, 22 (D.D.C. 2004) (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) (en banc).

[3] Parker v. DOJ, 934 F.2d 375, 380 (D.C. Cir. 1991).

retaliation against the sources for past disclosure or because of the sources' fear of future disclosure."[4]

Exemption 7(D) is comprised of two distinct clauses.[5] The first clause protects the identity of confidential sources.[6] The second clause broadly protects all information obtained from those sources in criminal investigations and national security intelligence investigations.[7] Courts, including the D.C. Circuit, have held that Exemption 7(D) contains no balancing test.[8]

---

[4] Brant Constr. Co. v. EPA, 778 F.2d 1258, 1262 (7th Cir. 1985); see also 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 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 J. 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 the 'drying-up' of sources of information necessary to conduct criminal investigations" (citing Irons, 880 F.2d at 1451)); Shaw v. FBI, 749 F.2d 58, 61 (D.C. Cir. 1984) (holding that purpose of Exemption 7(D) is "to prevent the FOIA from causing the 'drying up' of sources of information in criminal investigations"); Sellers v. DOJ, 684 F. Supp. 2d 149, 161 (D.D.C. 2010) (noting that exemption "not only protects confidential sources, but also protects the ability of law enforcement agencies to obtain relevant information from such sources"); 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, 15 (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).

[5] 5 U.S.C. § 552(b)(7)(D); see Hulstein v. DEA, 671 F.3d 690, 694 (8th Cir. 2012) (finding Exemption 7(D) "can be divided into two separate sections – the first exempting information that could reveal the identity of a confidential source, and the second exempting information provided by a confidential source to law enforcement in the course of a criminal investigation").

[6] 5 U.S.C. § 552(b)(7)(D) (protecting information which "could reasonably be expected to disclose the identity of a confidential source, including a [s]tate, local, or foreign agency or authority or any private institution which furnished information on a confidential basis").

[7] Id.; see also Georgacarakos v. FBI, 908 F. Supp. 2d 176, 185 (D.D.C. 2012) (rejecting plaintiff's assertion that Exemption 7(D) could only protect identity of confidential sources and confirming exemption also protects "information provided by that source").

[8] See, e.g., Roth v. DOJ, 642 F.3d 1161, 1184 (D.C. Cir. 2011) (declaring that "[u]nlike Exemptions 6 and 7(C), Exemption 7(D) requires no balancing of public and private interests" (citing Parker, 934 F.2d at 380)); Jones v. FBI, 41 F.3d 238, 247 (6th Cir. 1994) (clarifying that Exemption 7(D) "does not involve a balancing of public and private

The legislative history of the 1974 amendments to the FOIA indicates that the term "confidential source" was specifically chosen, because it encompasses a broader group than would have been included had the word "informer" been used.[9] The Freedom of Information Reform Act of 1986[10] reinforced this by adding to the statute specific categories of individuals and institutions to be included in the term "source."[11] Thus, state and local law enforcement agencies,[12] state employees,[13] foreign law enforcement agencies,[14] and foreign commercial institutions[15] have qualified as sources. In addition,

---

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 "Exemption 7(D) does not entail a balancing of public and private interests"); Nadler v. DOJ, 955 F.2d 1479, 1487 n.8 (11th Cir. 1992) (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"); Irons v. FBI, 811 F.2d 681, 685 (1st Cir. 1987) (stating "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"); Brant Constr. Co., 778 F.2d at 1262-63 (observing that "[n]o judicial 'balancing' of the competing interests is permitted" under Exemption 7(D)).

[9] See S. Conf. Rep. No. 93-1200, at 13, reprinted in 1974 U.S.C.C.A.N. 6285, 6291.

[10] Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48.

[11] Id.

[12] See, e.g., Halpern v. FBI, 181 F.3d 279, 299 (2d Cir. 1999) (foreign and local law enforcement agencies); Williams v. FBI, 69 F.3d 1155, 1160 (D.C. Cir. 1995) (local law enforcement agencies); Jones, 41 F.3d at 248 (nonfederal law enforcement agencies); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 & n.27 (10th Cir. 1989) (state law enforcement agency); Radar Online LLC v. FBI, No. 17-3956, 2023 WL 6122691 (S.D.N.Y. Sept. 19, 2023) (local law enforcement agencies); Richardson v. DOJ, 730 F. Supp. 2d 225, 238 (D.D.C. 2010) (Washington D.C. Metropolitan Police Department).

[13] See, e.g., Parton v. DOJ, 727 F.2d 774, 776-77 (8th Cir. 1984) (state prison officials interviewed in connection with civil rights investigation); Garcia v. DOJ, 181 F. Supp. 2d 356, 377 (S.D.N.Y. 2002) (protecting "'name and identity of a state governmental employee' . . . who provided 'professional opinions as well as observations'" regarding "'plaintiff and his criminal activities'" (quoting agency declaration)).

[14] 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 (foreign law enforcement agencies); Founding Church of Scientology v. Regan, 670 F.2d 1158, 1163-64 (D.C. Cir. 1981) (foreign INTERPOL national bureau); Shem-Tov v. DOJ, 531 F. Supp. 3d 102, 112-13 (D.D.C. 2021) (foreign government agency seeking information from United States protected as source).

[15] See, e.g., Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 785 (E.D. Pa. 2008).

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).[16]

Courts have interpreted the term "source" to include a broad range of individuals and institutions that are not necessarily specified in the statute – such as crime victims or those close to them,[17] citizens providing unsolicited allegations of misconduct,[18] citizens providing information to law enforcement agencies,[19] private employees responding to OSHA investigators,[20] and employees providing information about their employers and

---

[16] Kuzma v. IRS, 775 F.2d 66, 69 (2d Cir. 1985) (applying "plain language definition of 'source' as '[t]hat from which anything comes forth'" (quoting Keeney v. FBI, 630 F.2d 114, 117 (2d Cir. 1980))). But cf. Retail Credit Co. v. FTC, No. 75-0895, 1976 WL 1206, at *4 n.3 (D.D.C. Feb. 2, 1976) (noting that other federal agencies cannot act as confidential source).

[17] See, e.g., Hale v. DOJ, 226 F.3d 1200, 1205 (10th Cir. 2000) (concluding that "implied promise of confidentiality was based on a special or close relationship with the victim and the nature of the information disclosed"); Coleman v. FBI, 13 F. Supp. 2d 75, 82 (D.D.C. 1998) (holding that "[i]t is reasonable to conclude that the nature of this crime and the victim's relation to it should equally protect her when she divulges information to state or local law enforcement officials that in turn communicate with the FBI"); Gula v. Meese, 699 F. Supp. 956, 960 (D.D.C. 1988) (concluding that implied confidentiality was appropriate where victims of alleged criminal activity provided information to law enforcement).

[18] See, e.g., Brant Constr. Co. v. EPA, 778 F.2d 1258, 1263-64 (7th Cir. 1985); Pope v. United States, 599 F.2d 1383, 1386-87 (5th Cir. 1979) (concluding that "[t]he applicability of Exemption 7 is unaffected by the fact that the communications giving rise to the three documents in this case were unsolicited").

[19] See, e.g., Providence J. Co. v. U.S. Dep't of the Army, 981 F.2d 552, 563-65 (1st Cir. 1992) (witness statements solicited as part of alleged misconduct investigation); Ramaci v. FBI, 568 F. Supp. 3d 378, 394-95 (S.D.N.Y. 2021) (statements provided by bystanders to daytime kidnapping perpetrated by terrorist group); Wash. Post Co. v. Special Inspector Gen. for Afg. Reconstruction, No. 18-2622, 2021 WL 4502106, at *8-9 (D.D.C. Sept. 30, 2021) (records of interviews conducted with individuals with direct and indirect knowledge of U.S. reconstruction programs); Spurling v. DOJ, 425 F. Supp. 3d 1, 21-22 (D.D.C. 2019) (inmate interviews conducted as part of a murder and escape investigation).

[20] See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 924-25 (11th Cir. 1984) (disagreeing with lower court's determination and holding that employee-witnesses should have been declared confidential sources); Butler v. U.S. Dep't of Lab., 316 F. Supp. 3d 330, 337-39 (D.D.C. 2018) (holding that handwritten confidential witness statements by natural gas company employees to OSHA were properly withheld).

co-workers.[21] Courts have likewise afforded source protection to prisoners,[22] mental healthcare facilities,[23] medical personnel,[24] commercial or financial institutions,[25] company employees,[26] state employees,[27] and social organizations' officials and employees.[28]

The Supreme Court has found that the adjective "confidential" signifies that the "source furnished information with the understanding that the . . . [agency] would not divulge the communication except to the extent the . . . [agency] thought necessary for

---

[21] See, e.g., United Techs. Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985) (recognizing fear of employer retaliation as creating a "justified expectation of confidentiality"); Canning v. DOJ, 567 F. Supp. 2d 104, 112 (D.D.C. 2008) (finding that "[p]roviding potentially damaging information about one's employer might place the jobs and livelihoods of witnesses in danger and thus gives rise to an assurance of confidentiality"); Gov't Accountability Project v. U.S. Nuclear Regul. Comm'n, 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 a legitimate expectation of confidentiality).

[22] See, e.g., Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1188-89 (11th Cir. 2019) (determining that information provided by jailhouse informant about terrorism and unsolved homicides was entitled to Exemption 7(D) protection); Berard v. BOP, 209 F. Supp. 3d 167, 173 (D.D.C. 2016) (finding Exemption 7(D) applicable when "third parties and their families would be exposed to significant harm, whether it be physical or mental, if they were identified as cooperators or informers even in a minimum-security prison camp").

[23] See, e.g., Sanders v. DOJ, No. 91-2263, 1992 WL 97785, at *4 (D. Kan. Apr. 21, 1992) (finding information furnished by mental health care facility regarding alleged civil rights violations entitled to protection).

[24] See, e.g., Putnam v. DOJ, 873 F. Supp. 705, 716 (D.D.C. 1995) (finding information obtained from doctor and nurse about murder victim entitled to protection).

[25] See, e.g., Jones v. FBI, 41 F.3d 238, 248 (6th Cir. 1994); Council on Am.-Islamic Relations, Cal. v. FBI, 749 F. Supp. 2d 1104, 1122 (S.D. Cal. 2010) (holding, after in camera review, that "implied claim of confidentiality with respect to commercial institution is supported").

[26] See, e.g., Halpern v. FBI, 181 F.3d 279, 300 (2d Cir. 1999) (providing source protection for employees of meatpacking industry who provided information to FBI); Butler v. U.S. Dep't of Lab., 316 F. Supp. 3d 330, 337 (D.D.C. 2018) (concluding employee statements appropriately withheld).

[27] See, e.g., Williams v. FBI, 69 F.3d 1155, 1158-59 (D.C. Cir. 1995) (finding that Ohio state employee's identity was properly withheld because the information provided "was so singular in nature that to release information would divulge source's identity").

[28] See Halpern, 181 F.3d at 300.

law enforcement purposes."[29] The most significant 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."[30]

The Confidentiality Analysis

Sources are confidential when they have provided information either under an express promise of confidentiality[31] or "in circumstances from which such an assurance could be reasonably inferred."[32] However, as the Supreme Court made clear in DOJ v.

---

[29] DOJ v. Landano, 508 U.S. 165, 174 (1993).

[30] Id. at 172; see Billington v. DOJ, 233 F.3d 581, 585 (D.C. Cir. 2000) (holding that "[i]mplied confidentiality analysis proceeds from the perspective of an informant, not [that of] the law enforcement agency"); Ortiz v. HHS, 70 F.3d 729, 734 (2d Cir. 1995) (finding that although agency did not solicit letter from letter writer, it was writer's expectation that letter would be kept secret); McDonnell v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (holding that "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 J. Co. v. U.S. Dep't of the Army, 981 F.2d 552, 563 (1st Cir. 1992) (explaining that "[d]ocument confidentiality depends not on the contents but on the terms and circumstances under which the information was acquired by the agency"); 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"); Gordon v. Thornburgh, 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'").

[31] See S. Conf. Rep. No. 93-1200, at 13, reprinted in 1974 U.S.C.C.A.N. 6285, 6291 (specifying that term "confidential source" was substituted for "informer" "to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred"); see also Rosenfeld v. DOJ, 57 F.3d 803, 814 (9th Cir. 1995) (stating "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 v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (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)").

[32] See S. Conf. Rep. No. 93-1200 at 13; see also Parker v. DOJ, 934 F.2d 375, 378 (D.C. Cir. 1991) (finding source can be confidential because of circumstances from which assurance of confidentiality may be reasonably inferred); Keys v. DOJ, 830 F.2d 337, 345 (D.C. Cir. 1987) (noting that "circuits agree without dissent that courts should find an assurance of

Landano,[33] a landmark Exemption 7(D) decision, not all sources furnishing information during criminal investigations are entitled to a presumption of confidentiality.[34] Instead, confidentiality must be determined on a case-by-case basis,[35] and such a presumption should not be applied automatically to cooperating law enforcement agencies.[36]

Before Landano, there was 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 or formal hearing occurred.[37] In Landano, the Supreme Court resolved this conflict by holding that confidentiality exists if the source provided information that the source and the government understood would only be disclosed "to the extent . . . thought necessary for law enforcement purposes."[38] The effect of a source's actual testimony upon continued Exemption 7(D) protection presents a different issue,[39] which is addressed below together with other issues regarding waiver of this exemption.

Express Confidentiality

---

confidentiality where it is reasonable to infer from the circumstances that its absence would impair the [FBI's] ability to elicit the information").

[33] 508 U.S. 165 (1993).

[34] See id. at 175.

[35] Id. at 179-80.

[36] Id. at 176; see also FOIA Update, Vol. XIV, No. 3, at 10 ("Justice Changes Policy on Exemption 7(D) Disclosure").

[37] 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 Schmerler v. FBI, 900 F.2d 333, 339 (D.C. Cir. 1990) (confidentiality recognized), Irons v. FBI, 811 F.2d 681, 687-89 (1st Cir. 1987) (same), and United Techs. Corp. v. NLRB, 777 F.2d 90, 95 (2d Cir. 1995) (same).

[38] 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").

[39] See Parker v. DOJ, 934 F.2d 375, 378 (D.C. Cir. 1991) (distinguishing cases in which 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'" (quoting Irons v. FBI, 880 F.2d 1446, 1455 (1st Cir. 1989))).

Courts have uniformly recognized that express promises of confidentiality deserve protection under Exemption 7(D).[40] Express confidentiality usually requires an affidavit specifically demonstrating the existence of an express promise.[41] Express promises can be supported by notations made on the face of documents indicating that the information is to be kept confidential pursuant to an express promise;[42] by statements from the agents or sources involved in which they attest to their personal knowledge of an express

---

[40] 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); Schoenman v. FBI, 763 F. Supp. 2d 173, 200 (D.D.C. 2011) (finding FBI properly invoked Exemption 7(D) where it "explain[ed], in a reasonably detailed and non-conclusory manner, that the information at issue in each instance was received in connection with an express grant of confidentiality").

[41] See, e.g., Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1101 (D.C. Cir. 2014) (noting that agency must "'present probative evidence that [a] source did in fact receive an express grant of confidentiality'" (quoting Campbell v. DOJ, 164 F.3d 20, 34 (D.C. Cir. 1998))); Boyd v. Crim. Div. of DOJ, 475 F.3d 381, 389-90 (D.C. Cir. 2007) (finding ATF's affidavit properly demonstrated that confidential source received express promise); Citizens for Resp. & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, 467 F. Supp. 2d 40, 54 (D.D.C. 2006) (finding sufficient the 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)).

[42] See, e.g., Frankenberry v. FBI, 567 F. App'x 120, 124 (3d Cir. 2014) (finding agency established express grant of confidentiality because withheld records "contain[ed] notations proving that the source had expressly requested and been granted confidentiality"); Hodge v. FBI, 703 F.3d 575, 581 (D.C. Cir. 2013) (affirming existence of express confidentiality where FBI explained in sworn declaration that witness interview documents were marked "'protect'" or "'protect identity'" based on promises to two witnesses); Roth v. DOJ, 642 F.3d 1161, 1186 (D.C. Cir. 2011) (holding that FBI properly withheld documents that "themselves contain[ed] positive indications that the FBI gave the sources express assurances of confidentiality" as evidenced by the words "'protect identity'" and a notation that source "'desired to remain anonymous'"); Hammouda v. OIP, 920 F. Supp. 2d 16, 25 (D.D.C. 2013) (finding interview from source properly protected where "'Protect Identity'" appeared whenever source's name was referenced); Peltier v. FBI, No. 03-905S, 2005 WL 735964, at *19 (W.D.N.Y. Mar. 31, 2005) (finding that evidence of express confidentiality was present when documents contained designations "'PROTECT,'" "'protect identity,'" and "'protect by request'"); see also Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000) (remanding with instructions that if "district court finds that the [withheld] documents . . . do in fact, as the FBI claims, bear evidence 'on their face' of 'express assurances of confidentiality,' . . . then the FBI would most likely be entitled to withhold such documents" (quoting government's brief)).

promise;[43] or by specific agency practices or procedures regarding the routine treatment of confidential sources,[44] including those for "symbol-numbered" sources.[45]

---

[43] See, e.g., Garza v. USMS, No. 18-5311, 2020 U.S. App. LEXIS 1917, at *3 (D.C. Cir. Jan. 22, 2020) (holding that agencies properly withheld information that would disclose sources' identities, because sources mentioned in responsive records were provided express assurances of confidentiality); Bullock v. FBI, 577 F. Supp. 2d 75, 80 (D.D.C. 2008) (holding that signed agreement between confidential source and law enforcement agency proved express promise); Adamowicz v. IRS, 552 F. Supp. 2d 355, 371 (S.D.N.Y. 2008) (finding statements of auditor who provided assurance of confidentiality demonstrated express confidentiality); Wheeler v. DOJ, 403 F. Supp. 2d 1, 16 (D.D.C. 2005) (finding 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 in camera affidavit of source "confirms that the source . . . was assured [with] an express grant of confidentiality").

[44] See, e.g., Wash. Post Co. v. Special Inspector Gen. for Afg. Reconstruction, No. 18-2622, 2021 WL 4502106, at *9 (D.D.C. Sept. 30, 2021) (finding express assurance of confidentiality in records of interviews which were categorized as anonymous or contained selected "off the record," "on background," or "non-attribution" box after agency declarant testified that such categorization meant that the request is considered mandatory); Shem-Tov v. DOJ, 531 F. Supp. 3d 102, 114 (D.D.C. 2021) (finding INTERPOL has its own rules for data that is included in INTERPOL Information System under which foreign law enforcement agency shared information with INTERPOL "with the express understanding that it would remain confidential"); Holt v. DOJ, 734 F. Supp. 2d 28, 46 (D.D.C. 2010) (finding express promise of confidentiality for "source material contained in the ViCAP [Violent Criminal Apprehension Program, a system that collects and analyzes behavioral and other data from crimes of violence] file" based in part on FBI's Rules of Behavior for ViCAP which "clearly state that the ViCAP [w]eb database is a confidential system"); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 528-29 (S.D.N.Y. 2010) (deciding that witness statements made during course of CIA OIG investigation were made pursuant to express promise of confidentiality, because CIA OIG regulations require CIA OIG to maintain confidentiality of statements made in course of investigations except when CIA OIG deems disclosure to be necessary); 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" (quoting agency declaration)); Neuhausser v. DOJ, No. 06-0531, 2006 WL 1581010, at *7 (E.D. Ky. June 6, 2006) (finding DEA has longstanding policy that coded sources received 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), aff'd, 180 F. App'x 180 (D.C. Cir. Mar. 29, 2006).

[45] See, e.g., Mays v. DEA, 234 F.3d 1324, 1329 (D.C. Cir. 2000) (holding agency affidavit "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, 164 F.3d at 34)); Manna v. DOJ, 51 F.3d 1158, 1167 (3d Cir. 1995) (finding express confidentiality exists as to sources "assigned

Courts have found that unsupported statements asserting the existence of an express promise from third parties without direct knowledge, or vague or generalized recitations of harm are generally insufficient to show express confidentiality.[46]

---

numbers" who provided information regarding organized crime); McDonnell v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (reasoning that "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" demonstrating express confidentiality); Clemente v. FBI, 741 F. Supp. 2d 64, 87 (D.D.C. 2010) (agreeing FBI's declaration showed that informants with source symbol numbers received express grant of confidentiality); Butler v. DOJ, 368 F. Supp. 2d 776, 786 (E.D. Mich. 2005) (recognizing that "coded informants" are assured by DEA that their identities and information they provide will remain confidential).

[46] See, e.g., Cooper Cameron Corp. v. U.S. Dep't of Lab., 280 F.3d 539, 550 (5th Cir. 2002) (holding that 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 581, 585 (D.C. Cir. 2000) (requiring the FBI "[a]t the very least" to "indicate where [express] assurances of confidentiality are memorialized"); Halpern v. FBI, 181 F.3d 279, 299 (2d Cir. 1999) (finding 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" insufficient to demonstrate express confidentiality); Campbell v. DOJ, 164 F.3d 20, 34-35 (D.C. Cir. 1998) (remanding case to district court because 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 v. DOJ, 60 F.3d 1043, 1062 (3d Cir. 1995) (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"); Rosenfeld v. DOJ, 57 F.3d 803, 814-15 (9th Cir. 1995) (determining FBI affidavits did not demonstrate that symbol-numbered sources were given express promises of confidentiality); Lazaridis v. DOJ, 766 F. Supp. 2d 134, 148 (D.D.C. 2011) (denying summary judgment on claim that there was express confidentiality where declarant did "not claim to have any personal knowledge of the agreement . . . and . . . presented no probative evidence of such an agreement"); Banks v. DOJ, 813 F. Supp. 2d 132, 145 (D.D.C. 2010) (denying motion for summary judgment with regard to Exemption 7(D), because United States Postal Inspection Service failed to present "probative evidence" of express confidentiality and did not describe circumstances supporting inference of confidentiality); Fischer v. DOJ, 596 F. Supp. 2d 34, 49 (D.D.C. 2009) (finding "bare assertion that a foreign authority provided information to FBI under express assurance of confidentiality" was insufficient to establish that source received express grant); McCoy v. United States, No. 04-101, 2006 WL 463106, at *10 (N.D. W.Va. Feb. 24, 2006) (rejecting adequacy of affidavit that indicated that coded sources "generally" receive express assurances of confidentiality because agency failed to show that individuals in question were given express assurances of confidentiality).

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.[47]

In DOJ v. Landano, the Supreme Court found that Congress did not intend to provide for a "universal" presumption or broad categorical withholding under Exemption 7(D);[48] rather, it declared, a "more particularized approach" is required.[49] Under this refined approach, an agency seeking to invoke Exemption 7(D) must prove expectations of confidentiality based upon the "circumstances" of each case.[50] Specific showings of

---

[47] See DOJ v. Landano, 508 U.S. 165, 181 (1993) (rejecting blanket presumption of confidentiality for sources supplying information to FBI, while acknowledging there are certain situations where confidentiality can be inferred); Light v. DOJ, 968 F. Supp. 2d 11, 28 (D.D.C. 2013) (stating that a source is confidential if that person provided information under facts where confidentiality can be inferred); see also Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1191 (11th Cir. 2019) (concluding that, in request involving terrorism related records, name of security guard "should not have been withheld under Exemption 7(D) because his actions – including his speaking on the record to a journalist before he spoke to the Bureau – would not support an inference that he spoke to the Bureau under an implied assurance of confidentiality").

[48] Landano, 508 U.S. at 174-78; see Rosenfeld v. DOJ, 57 F.3d 803, 814 (9th Cir. 1995) (reiterating that "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 "[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 that 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 promise of confidentiality").

[49] Landano, 508 U.S. at 180; see Quiñon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (restating that "[Supreme] Court rejected such 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 180)).

[50] Landano, 508 U.S. at 179-81; see Cooper Cameron Corp., v. U.S. Dep't of Lab., 280 F.3d 539, 552 (5th Cir. 2002) (declaring "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 "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 "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

confidentiality can be made on a "generic" basis,[51] when "certain circumstances characteristically support an inference of confidentiality."[52]

The Supreme Court cited two "factors": "the nature of the crime . . . and the source's relation to it" as examples of the more narrowly defined circumstances where confidentiality may be inferred.[53] Many courts that have addressed implied confidentiality since Landano have applied these two factors as the primary considerations in determining whether implied confidentiality exists.[54] However, the

---

(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").

[51] Landano, 508 U.S. at 179.

[52] Id. at 177.

[53] Id. at 179; see Djenasevic v. EOUSA, No. 18-5262, 2019 WL 5390964, at *1 (D.C. Cir. Oct. 3, 2019) ("DEA properly invoked Exemption 7(D) to withhold information that would disclose the identity of, and information provided by, a confidential source . . . [where] [t]he nature of the underlying crime [drug and weapons offenses] sufficiently demonstrated that there was an implied assurance of confidentiality."); Blanton v. DOJ, 64 F. App'x 787, 790 (D.C. Cir. 2003) ("Landano does not require that both the nature of the crime and the relationship of the source must be investigated in all implied confidentiality situations; instead [Landano] only emphasized that the government could not rely on a blanket presumption that all information . . . was covered by an implied confidentiality agreement.").

[54] See Garza v. USMS, No. 18-5311, 2020 U.S. App. LEXIS 1917, at *3 (D.C. Cir. Jan. 22, 2020) (concluding that "both agencies have demonstrated that confidentiality was implied as to [certain] sources in light of the nature of the underlying crimes"); Hulstein v. DEA, 671 F.3d 690, 695 (8th Cir. 2012) (determining that "implied assurance of confidentiality rests on the nature of the alleged crime and the witness's relationship to the crime"); Hale, 226 F.3d at 1203 (same); Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 487 (2d Cir. 1999) (finding implied confidentiality after examining sources' relationship with target of investigation, "seriousness of the underlying offenses being investigated," and concomitant risk of retaliation); Ortiz v. HHS, 70 F.3d 729, 735 (2d Cir. 1995) (finding implied confidentiality after considering "the serious nature of the allegations, the author's apparently close relationship to [plaintiff], the possibility of retaliation, and the author's anonymity . . . without relying solely on any one of them"); Rosenfeld v. DOJ, 57 F.3d 803, 814 (9th Cir. 1995) (affirming district court's inquiry applying "Landano's command to infer that the informant received an implied assurance of confidentiality only if factors like the nature of the crime being investigated and the source's relationship with the FBI made it reasonable to infer that the informant expected such an assurance"); Gamboa v. EOUSA, 126 F. Supp. 3d 13, 19-20 (D.D.C. 2015) (concluding that implied confidentiality exists based on nature of drug trafficking offenses and proximity between the offenses and business entity, third party individuals who had direct knowledge of criminal activity, and local law enforcement sources); Dent v. EOUSA, 926 F. Supp. 2d 257, 271 (D.D.C. 2013)

Court of Appeals for the District of Columbia Circuit has identified two other factors: "whether the source received payment, and whether the source has an ongoing relationship with the law enforcement agency and typically communicates with the agency only at locations and under conditions which assure the contact will not be noticed."[55] Courts have also recognized that a key consideration is the potential for retaliation against the source, whether based on actual threats of retaliation by defendants or requesters;[56] prior retaliatory acts by perpetrators or against sources;[57] the possibility of reprisals by third parties;[58] the specific dangers faced by prison

---

(opining that "nature of the crime investigated and informant's relationship to it are the most important factors in determining whether implied confidentiality exists").

[55] Labow v. DOJ, 831 F.3d 523, 531 (D.C. Cir. 2016) (quoting Roth v. DOJ, 642 F.3d 1161, 1184 (D.C. Cir. 2011)); see also Sennett v. DOJ, 39 F. Supp. 3d 72, 79 (D.D.C. 2014) (internal citations omitted).

[56] See, e.g., Meserve v. DOJ, No. 04-1844, 2006 WL 2366427, at *9 (D.D.C. Aug. 14, 2006) (concluding 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 "[i]n light of the nature of the alleged threats . . . the informant could reasonably be assumed to suffer reprisal if his identity were disclosed"); 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. 98-1294, 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").

[57] See, e.g., Smith v. FBI, 663 F. Supp. 2d 1, 2 (D.D.C. 2009) (concluding that withholding information under Exemption 7(D) was justified because of facts offered in defendant's declaration concerning nature of crime and plaintiff's "'propensity for violence'" and because he had "'threatened the victim and a witness in relation to his criminal trial'" (quoting agency declaration)); Garcia v. DOJ, 181 F. Supp. 2d 356, 377 (S.D.N.Y. 2002) (holding that "sources expected their identities to be kept private in order to avoid retaliation by" 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 who was being investigated for serious criminal charge had previously harassed and threatened government informants).

[58] See, e.g., Hale, 226 F.3d at 1204 (stating "people who provided detailed information surrounding [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"); Sebastian Brown, III v. FBI, No. 21-01639, 2023 WL 5333210, at *15 (D.D.C. Aug. 18, 2023) (finding implied confidentiality based on FBI statement that "'[a]lthough the suspected shooters are deceased, like-minded individuals or others sympathetic to the San Bernardino suspects

could seek to deter a source's cooperation with law enforcement through reprisal'" (quoting agency declaration)); Coleman v. FBI, 13 F. Supp. 2d 75, 82 (D.D.C. 1998) (recognizing potential for "third party retaliation" even when imprisoned murderer, rapist, and kidnapper has "slim likelihood" of freedom).

informants;[59] or the violent or intimidating nature of the crime itself.[60] Courts have also found that a possibility of retaliation exists for paid informants,[61] cooperative witnesses,[62]

---

[59] See, e.g., Maydak v. DOJ, 362 F. Supp. 2d 316, 324 (D.D.C. 2005) (concluding that "individual providing confidential information about an 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 v. Dep't of the Treasury, No. 95-1931, 1997 U.S. Dist. LEXIS 802, at *10 (D.D.C. Jan. 14, 1997) (recognizing danger of cooperating with prison or law enforcement officials).

[60] See, e.g., Hodge v. FBI, 703 F.3d 575, 581-82 (D.C. Cir. 2013) (noting "vicious nature of the crimes" supported FBI's position that there was implied promise of confidentiality to sources who provided information about plaintiff's involvement in a murder); Williams v. FBI, 69 F.3d 1155, 1159-60 (D.C. Cir. 1995) (finding withholding of sources justified based on "risk of retaliation, harassment and bodily harm" for current or former members who provided information about organization tied to "rebellion or insurrection, seditious conspiracy, and advocating overthrow of the government"); Koch v. USPS, 93-4387, 1993 U.S. App. LEXIS 26130, at *3-4 (8th Cir. Oct. 8, 1993) (finding withholding proper as to Postal Service whistleblower who reported another employee's threat to bring grenade in to work because of "nature of the alleged threat"); Sebastian Brown, III, 2023 WL 5333210, at *15 (finding implied confidentiality based on violent nature of mass shooting described in records at issue); Ramaci v. FBI, 568 F. Supp. 3d 378, 394-95 & n.6 (S.D.N.Y. 2021) (holding, after conducting in camera review, that statements provided by bystanders to daytime kidnapping perpetrated by terrorist group qualified for implied assurance of confidentiality due, in part, to "the violent nature of the crime and the threats faced by Iraqis willing to assist U.S. personnel"); Gamboa v. EOUSA, 126 F. Supp. 3d 13, 20 (D.D.C. 2015) (concluding that it was "reasonable for . . . sources to fear retaliation from [company] employees and/or the commercial establishment because the investigation involved drug trafficking and other violent criminal behavior of plaintiff and his associates" (quoting agency declaration)); Brown v. FBI, 873 F. Supp. 2d 388, 407 (D.D.C. 2012) (upholding "precedent of implying confidentiality to sources who provide information about drug crimes" given violent nature of such crimes); 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 "crime of government corruption, while not inherently violent, gives rise to an implied assurance of confidentiality" (citing Garcia, 181 F. Supp. 2d at 377)); Putnam v. DOJ, 873 F. Supp. 705, 716 (D.D.C. 1995) (concluding that FBI properly withheld "names and information provided by relatives and close associates of the victim and of the plaintiff" fearing retribution when former FBI Special Agent pled guilty to first-degree manslaughter and admitted to murdering an informant).

[61] See, e.g., DOJ v. Landano, 508 U.S. 165, 179 (1993) (concluding "it is reasonable to infer that paid informants normally expect their cooperation with the FBI to be kept confidential"); Lewis v. DOJ, 867 F. Supp. 2d 1, 21 (D.D.C. 2011) (determining paid informant could be confidential source); Zavala v. DEA, 667 F. Supp. 2d 85, 101 (D.D.C.

and anonymous sources.[63] Moreover, courts have recognized the "danger of retaliation encompasses more than the source's physical safety."[64] Courts have found that risk of retaliation could be extended to include potential physical or mental threats to family members if the source's identity is disclosed.[65]

2009) (stating "[a] confidential source may be an individual, such as a private citizen or paid informant").

[62] See Fischer v. DOJ, 596 F. Supp. 2d 34, 49 (D.D.C. 2009) (finding "inherent risk of harm" sufficient to infer confidentiality of cooperative witnesses).

[63] See, e.g., Ortiz v. HHS, 70 F.3d 729, 734 (2d Cir. 1995) (viewing anonymity as additional factor supporting implied assurance of confidentiality); Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at *28-29 (M.D. Fla. Oct. 1, 1997) (concluding "it is reasonable to assume that the anonymous informant would not have given any information had that person known that the information would not be kept confidential").

[64] Ortiz, 70 F.3d at 733 (citing Irons v. FBI, 880 F.2d 1446, 1451 (1st Cir. 1989)); see Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 488 (2d Cir. 1999) (recognizing that retaliation "may constitute work place harassment, demotions, job transfers or loss of employment"); Council on Am. Islamic Rel., Cal. v. FBI, 749 F. Supp. 2d 1104, 1122 (S.D. Cal. 2010) (concluding, after in camera review, that risk of competitive harm to commercial institutions justified withholding information on basis of implied confidentiality); 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").

[65] See, e.g., Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1190 (11th Cir. 2019) (concluding that "disclosure of 'specific, singular, detailed information' related to the 'investigation of terrorism activities' by the [FBI] 'could subject [the informant], as well as [his] famil[y] to embarrassment, humiliation, and/or physical or mental harm'" (quoting agency declaration)); Burnett v. DEA, No. 19-00870, 2021 WL 1209142, at *5 (D.D.C. Mar. 31, 2021) (upholding unchallenged use of Exemption 7(D) where defendant asserted "that disclosure of the withheld information could jeopardize DEA operations or threaten confidential sources and their family members"), aff'd, No. 21-5092, 2021 WL 6102268 (D.C. Cir. Dec. 3, 2021); Concepcion v. FBI, 606 F. Supp. 2d 14, 42-43 (D.D.C. 2009) (informants who receive source symbol numbers should receive an express grant of confidentiality, because "[t]hese sources and their families 'could be subjected to embarrassment, humiliation, and physical/mental harm' if their identities were disclosed" (quoting agency declaration)); Shores v. FBI, 185 F. Supp. 2d 77, 84 (D.D.C. 2002) (concluding that implied confidentiality should be provided for witnesses who provided information against the requester who was convicted of murder and subsequently tried to procure the murder of a family member of one of the witnesses).

Courts have found implied confidentiality in circumstances involving organized crime,[66] murder,[67] drug trafficking,[68] extortion,[69] illegal possession of firearms,[70]

---

[66] See, e.g., Clemente v. FBI, 741 F. Supp. 2d 64, 87 (D.D.C. 2010) (finding implied confidentiality for informants who provided information regarding Mafia); 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" (quoting agency declaration)); Brunetti v. FBI, 357 F. Supp. 2d 97, 107 (D.D.C. 2004) (inferring confidentiality for witnesses based on plaintiff's forty-year conviction for Racketeer Influenced and Corrupt Organizations crimes as part of La Cosa Nostra); Pray v. FBI, No. 95-0380, 1998 WL 440843, at *4-5 (S.D.N.Y. Aug. 3, 1998) (sale and distribution of illegal narcotics and racketeering investigation); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) ("[a] major racketeering investigation focusing on groups and individuals involved in extortion, gambling, loan sharking, narcotics trafficking and interstate transportation of stolen property"); Cudzich v. INS, 886 F. Supp. 101, 107 (D.D.C. 1995) (suspected alien smuggling ring); Landano v. DOJ, 873 F. Supp. 884, 888 (D.N.J. 1994) (possible motorcycle gang-related violence); Manna v. DOJ, 832 F. Supp. 866, 876-77 (D.N.J. 1993) (organized crime activity), aff'd, 51 F.3d 1158 (3d Cir. 1995).

[67] See, e.g., Higgs v. U.S. Park Police, 933 F.3d 897, 906 (7th Cir. 2019) (finding implied confidentiality where crime was triple murder, sources were close to people who committed murder, sources provided singular information about assailants, and FBI believed sources put themselves at risk by providing information); Hale v. DOJ, 226 F.3d 1200, 1204 (10th Cir. 2000) (finding implied confidentiality where crime was violent murder and kidnapping that occurred in small community); Plunkett v. DOJ, 924 F. Supp. 2d 289, 303 (D.D.C. 2013) (finding Exemption 7(D) properly applied to protect "witness to a murder for hire conspiracy" under an implied confidentiality analysis); Richardson v. DOJ, 730 F. Supp. 2d 225, 238 (D.D.C. 2010) (determining that implied confidentiality existed for sources that were eyewitnesses to an attempted murder); Kishore v. DOJ, 575 F. Supp. 2d 243, 258 (D.D.C. 2008) ("[i]t may be reasonably inferred that an individual conveying information about a murder plot would speak in confidence for fear of reprisal from the target of the investigation").

[68] See, e.g., Ibarra-Cortez v. DEA, 36 F. App'x 598, 598-99 (9th Cir. 2002) (finding implied confidentiality in relation to drug trafficking); Mays v. DEA, 234 F.3d 1324, 1331 (D.C. Cir. 2000) (emphasizing "[t]hat a conspiracy to distribute cocaine 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"); Engelking v. DEA, 119 F.3d 980, 981 (D.C. Cir. 1997) (finding implied confidentiality in relation to large-scale drug trafficking that had a connection to numerous weapons); Bell v. FBI, No. 93-1485, 1993 U.S. App. LEXIS 27235, at *5 (6th Cir. Oct. 18, 1993) (finding confidentiality implied regarding local law enforcement and relationship to drug trafficking); Burnett, No. 19-00870, 2021 WL 1209142, at *5 (concluding that "DEA has explained that it applied Exemption 7(D) to information about or provided by confidential sources involved in the [drug distribution] investigation into [plaintiff's] illegal activities"); Moffat v. DOJ, No. 09-12067, 2011 WL 3475440, at *18 (D. Mass. Aug. 5, 2011) (holding that FBI properly withheld records based upon both express and implied promises of confidentiality for sources who provided information concerning murder and illegal drug trafficking); Sellers v. DOJ, 684 F. Supp. 2d

149, 162 (D.D.C. 2010) (concluding that it was reasonable to find implied assurance of confidentiality given "plaintiff's convictions for violent felonies" including drug trafficking, firearms violations, and kidnapping); Fischer v. DOJ, 596 F. Supp. 2d 34, 49 (D.D.C. 2009) (inferring confidentiality where foreign authority provided information to FBI in connection with large scale narcotics trafficking investigation); Lewis-Bey v. DOJ, 595 F. Supp. 2d 120, 137 (D.D.C. 2009) (finding implied confidentiality for drug trafficking where plaintiff previously murdered grand jury witness).

[69] See, e.g., Wolfson v. United States, 672 F. Supp. 2d 20, 34 (D.D.C. 2009) (observing that "courts have concluded that the investigation of crimes such as racketeering, loan sharking, and extortion are circumstances under which sources have provided information under an implied assurance of confidentiality"); Perrone v. FBI, 908 F. Supp. 24, 27 (D.D.C. 1995) (finding that extortion is "such a serious [crime] and potentially violent [in] nature that a cooperating source reasonably could expect to be treated as confidential"); Delviscovo, 903 F. Supp. at 3 (finding that "[a] major racketeering investigation focusing on groups and individuals involved in [serious crimes like] extortion . . . gives rise to . . . inference [of confidentiality] without the need for elaboration").

[70] See Mendoza v. DEA, 465 F. Supp. 2d 5, 13 (D.D.C. 2006) (highlighting that plaintiff was in possession of nine firearms when concluding implied confidentiality should be afforded for individuals who provided information against him); Perrone, 908 F. Supp. at 27 (noting that illegal possession of firearms in connection with crime is "of such a serious and potentially violent nature that a cooperating source reasonably could expect to be treated as confidential").

domestic terrorism,[71] international terrorism,[72] national security,[73] loan sharking and gambling,[74] armed robbery,[75] bribery,[76] interstate transportation of stolen property,[77] tax

---

[71] See, e.g., Jud. 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 investigation of bombing of an African-American church "during a time of great unrest in the South").

[72] See Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1190-91 (11th Cir. 2019) (holding that "the informant spoke under an implied assurance of confidentiality because he provided information about terrorism" where information pertained to Saudi Arabian family that allegedly had ties to individuals associated with the September 11, 2001 attacks); 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 categorical presumption by the D.C. Circuit, are violent in nature and implicate a grave risk of retaliation").

[73] See Jud. Watch, Inc. v. DOJ, No. 18-2107, 2020 WL 6939763, at *4 (D.D.C. Nov. 25, 2020) (concluding that "[g]iven that the source was in a unique position to provide information that would place them in the crossfire of two global superpowers, it is difficult to imagine that they would have provided such information without an assurance of confidentiality"); Campbell v. DOJ, No. 89-3016, 1996 WL 554511, at *9 (D.D.C. Sept. 19, 1996) (finding implied confidential relationship "[g]iven the customary trust" that exists for relaying information between nonfederal and foreign law enforcement agencies and FBI), rev'd on other grounds, 164 F.3d 20 (D.C. Cir. 1998).

[74] See Delviscovo, 903 F. Supp. at 3 (finding that gambling and loan sharking "gives rise to . . . inference [of confidentiality] without the need for elaboration").

[75] See Thomas v. DOJ, 531 F. Supp. 2d 102, 111 (D.D.C. 2008) (finding agency properly protected identities of eyewitnesses who provided information about violent and intimidating armed robbery); 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).

[76] See McQueen v. United States, 264 F. Supp. 2d 502, 523 (S.D. Tex. 2003) (stating that bribery is on a "categorical list" where implied confidentiality can be inferred); Melius v. Nat'l Indian Gaming Comm'n, No. 98-2210, 1999 U.S. Dist. LEXIS 17537, at *17 (D.D.C. Nov. 3, 1999) (holding that criminal investigation involving allegations of bribery and source's personal knowledge that would reveal their identity suggests implied promise of confidentiality).

[77] See Delviscovo, 903 F. Supp. at 3 (finding interstate transportation of stolen property "gives rise to . . . inference [of confidentiality] without the need for elaboration").

evasion,[78] kidnapping,[79] financial crimes,[80] corruption by state law enforcement officials,[81] passport fraud, and contempt of Congress.[82]

Moreover, one court found that terms of a Mutual Legal Assistance Treaty gave rise to an implied assurance of confidentiality.[83] Other instances where implied confidentiality has been found include where former members of targeted organizations

---

[78] See McQueen, 264 F. Supp. 2d at 523 (holding that diesel tax fraud operation inspired "very real" fear in agency's confidential sources, and reasoning that "this 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").

[79] See Hale v. DOJ, 226 F.3d 1200, 1204-05 (10th Cir. 2000) (finding implied confidentiality for kidnapping that occurred in small community).

[80] See Lewis v. U.S. Dep't of the Treasury, 851 F. App'x 214, 216 (D.C. Cir. 2021) (finding "FinCEN met its burden under Exemption 7(D) . . . [for withholding] information in these documents [that] was provided from foreign agencies either pursuant to express confidentiality agreements or in circumstances where an assurance of confidentiality could reasonably be inferred"); Giovanetti v. FBI, 174 F. Supp. 3d 453, 457-58 (D.D.C. 2016) (finding withholding of information provided by local law enforcement during course of financial fraud investigation appropriate); Day, Jr. v. U.S. Dep't of State, No. 20-2004, 2022 WL 3700904, at *8 (D.D.C. Aug. 26, 2022) (finding implied assurance of confidentiality where confidential sources cooperated with law enforcement in an investigation concerning wire fraud, money laundering, and smuggling). But see Davis v. DOJ, No. 00-2457, slip op. at 20-21 (D.D.C. Mar. 21, 2003) (requiring agency to provide more detail regarding circumstances of interviews with sources for nonviolent financial crimes, because it failed to demonstrate the sources spoke to the agency under the impression that the communications would remain confidential).

[81] See Garcia v. DOJ, 181 F. Supp. 2d 356, 377 (S.D.N.Y. 2002) (finding implied confidentiality in case involving "investigation . . . into serious allegations of corruption within the state police").

[82] See Schrecker v. DOJ, 74 F. Supp. 2d 26, 35 (D.D.C. 1999) (holding "passport fraud and contempt of Congress" are "serious enough crimes" to imply confidentiality). But see Singh v. FBI, 574 F. Supp. 2d 32, 51 (D.D.C. 2008) (holding that FBI did not establish significant risk of violence or retaliation necessary for implied confidentiality where plaintiff was only convicted of passport fraud).

[83] Biear v. DOJ, 684 F. Supp. 3d 296, 312 (M.D. Pa. 2023) (agreeing that "'all of the articles contained in the U.S.-Austl., MLAT, including the confidentiality provisions, even if not specifically invoked, applied to all evidence and information provided by either country'" under implied assurance of confidentiality (citing agency declaration)).

disclosed self-incriminating information;[84] where sources provided information as a result of plea-bargains;[85] where sources provided information in response to a subpoena;[86] where sources provided information to an Inspector General during a criminal investigation;[87] where an employee provided information about an employer;[88] and where sources furnished information in a civil law enforcement proceeding.[89]

Some courts have found agency attestations as to the circumstances surrounding a claim of implied confidentiality to be insufficient, holding a more "specific" showing is required under Landano.[90]

---

[84] See Campbell v. DOJ, No. 89-3016, 1996 WL 554511, at *9 (D.D.C. Sept. 19, 1996) (holding that "in instances where former members of organizations which were the target of FBI investigations disclosed self-incrimination information, in implied confidential relationship exists"), rev'd on other grounds, 164 F.3d 20 (D.C. Cir. 1998) (finding FBI needed to clarify declaration regarding instances of express confidentiality).

[85] See Borda v. DOJ, 245 F. Supp. 3d 52, 60-61 (D.D.C. 2017) (concluding that individuals who, pursuant to plea agreements, provided specific and detailed information about a conspiracy to distribute cocaine were provided implied confidentiality because of the potential for harm or reprisal if their names were disclosed); Homick v. DOJ, No. 98-0557, slip op. at 9 (N.D. Cal. Oct. 27, 2004) (finding "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 WL 1901329, at *2 (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).

[86] See Gamboa v. EOUSA, 126 F. Supp. 3d 13, 20 (D.D.C. 2015) (finding FBI appropriately withheld identity of specific business entity which responded to administrative subpoena with detailed information pertaining to proceeds of legal business transaction funded by illegal money).

[87] See United Am. Fin., Inc. v. Potter, 667 F. Supp. 2d 49, 61 (D.D.C. 2009) (determining that promise of confidentiality in Inspector General Act and pendency of criminal investigation were circumstances supporting implied assurance of confidentiality).

[88] See, e.g., Gov't Accountability Project v. U.S. Nuclear Regul. Comm'n, No. 86-1976, No. 86-3201, 1993 WL 13033518, at *4 (D.D.C. July 2, 1993) (finding implied confidentiality regarding identifying information of persons who provided information to agency investigators about potentially criminal matters involving co-workers because "such a situation plainly implicates a risk of reprisal").

[89] See, e.g., Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 487-88 (2d Cir. 1999) (stating that "[t]hough 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").

[90] See, e.g., Billington v. DOJ, 233 F.3d 581, 585-86 (D.C. Cir. 2000) (instructing FBI on remand to "supply evidence that informants predicated their assistance on an implied

Scope of Protection

Once a source has been deemed confidential, based on either an express or implied grant of confidentiality, Exemption 7(D) protects the identity of the source, and in certain circumstances, all of the information obtained from the source.[91] The first clause of

---

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 v. DOJ, 99 F.3d 1025, 1033 (10th Cir. 1996) (finding that government's claim of implied confidentiality lacked "particularized justification"); Church of Scientology Int'l v. DOJ, 30 F.3d 224, 234 (1st Cir. 1994) (finding 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[;] [r]ather, the government has an obligation to spell out that relationship . . . [without] compromising the very interests it is seeking to protect"); Bagwell v. DOJ, 588 F. Supp. 3d 58, 71-72 (D.D.C. 2022) (finding that "Penn State is a large and well-represented public institution – a far cry from the 'witness[ ] to a gang-related murder' the Supreme Court offered as an example of someone who might be 'unwilling to speak . . . except on the condition of confidentiality'" and instructing agency to "show that circumstances at the time gave rise to an 'implied *assurance* of confidentiality'" (quoting DOJ v. Landano, 508 U.S. 165, 179 (1993))); King & Spalding LLP v. HHS, 330 F. Supp. 3d 477, 496 (D.D.C. 2018) (finding that agency failed to justify its 7(D) withholding where court lacked information about source including proximity to alleged misconduct); Hetzler v. Record/Info. Dissemination Section, FBI, 896 F. Supp. 2d 207, 219-20 (W.D.N.Y. 2012) (determining that information provided by foreign source could not be withheld without additional justification given age of documents and their declassification by the FBI); McRae v. DOJ, 869 F. Supp. 2d 151, 167-68 (D.D.C. 2012) (denying ATF's motion for summary judgment with regard to its assertion of implied confidentiality because ATF's "declaration is silent . . . as to the confidential source's relationship to or knowledge of plaintiff's criminal activities"); Island Film, S.A. v. U.S. Dep't of Treasury, 869 F. Supp. 2d 123, 137 (D.D.C. 2012) (noting that act at issue is "economic in nature and not inherently violent" and directing Treasury to supplement affidavit with more details explaining why correspondence concerning blocked assets should be afforded implied confidentiality); Lazaridis v. DOJ, 766 F. Supp. 2d 134, 148 (D.D.C. 2011) (rejecting agency's assertion of implied confidentiality because "[i]t is unknown what relationship the source had to [plaintiff] and his or her knowledge of any alleged activity from which a reasonable fear of retaliation may be found"); Raulerson v. Ashcroft, 271 F. Supp. 2d 17, 27 (D.D.C. 2002) (ruling that "dispositive issue must therefore be more than simply whether the crime is violent," and that agency cannot generalize circumstances from one source to all but rather must demonstrate fear of retaliation for each source); Hall v. DOJ, 26 F. Supp. 2d 78, 81 (D.D.C. 1998) (finding "FBI's generalized assertion of crimes relating to Communist Party activities is not enough to support . . . 'reasonable assumption'" that sources expected confidentiality).

[91] 5 U.S.C. § 552(b)(7)(D) (2018).

Exemption 7(D) protects the identity of a confidential source.[92] Courts have recognized this clause safeguards not only obviously identifying information such as an informant's name and address,[93] but also all information that would "tend to reveal" the source's identity,[94] including source symbol numbers,[95] telephone numbers,[96] the time and place

---

[92] Id.

[93] See, e.g., Cuccaro v. Sec'y of Lab., 770 F.2d 355, 359-60 (3d Cir. 1985); Piper v. DOJ, 374 F. Supp. 2d 73, 81 (D.D.C. 2005) (protecting source's name and address and calling Plaintiff's argument that "mere revelation of the source's address would not likely reveal the source's identity . . . wishful thinking"), aff'd, 428 F. Supp. 1 (D.C. Cir. 2006).

[94] See, e.g., Labow v. DOJ, 831 F.3d 523, 532 (D.C. Cir. 2016) (noting agency declaration stating that sources "'provided specific detailed information that is singular in nature' . . . [and] describes the kind of information that . . . could be traced to a particular source"); Pollard v. FBI, 705 F.2d 1151, 1155 (9th Cir. 1983) (holding entire document properly withheld where disclosure "would tend to reveal [source's] identity"); Palacio v. DOJ, No. 00-1564, 2002 U.S. Dist. LEXIS 2198, at *24 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 WL 242751 (D.C. Cir. Jan. 31, 2003); 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"); 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").

[95] See Skinner v. DOJ, 744 F. Supp. 2d 185, 212 (D.D.C. 2010) (concluding that agency properly withheld "information pertaining to the cooperating witnesses or informants . . . and the numbers assigned to them"); Amuso v. DOJ, 600 F. Supp. 2d 78, 99 (D.D.C. 2009) (agreeing with FBI assertions "that source symbol numbers properly are withheld under Exemption 7(D)" (citing agency declaration)); Putnam v. DOJ, 873 F. Supp. 705, 716 (D.D.C. 1995) (holding that "coded identification numbers, file numbers and information that could be used to identify sources were properly withheld").

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

of events or meetings,[97] and other information provided by the source that could allow the source's identity to be deduced.[98]

Accordingly, courts have found that protection for source-identifying information extends beyond information that is merely a substitute for the source's name.[99] For

---

[97] See, e.g., Halpern v. FBI, No. 94-365, slip op. at 25-26 (W.D.N.Y. Aug. 31, 2001) (protecting times and places that information was obtained because release could reveal the sources' identity) (citing agency declaration); Accuracy in Media v. FBI, No. 97-2107, slip op. at 5 (D.D.C. Mar. 21, 1999) (finding agency's argument persuasive that "informant may be identified by revealing . . . dates, times, places, events, or names connected with certain cases").

[98] See, e.g., Ibarra-Cortez v. DEA, 36 F. App'x 598, 599 (9th Cir. 2002) (finding nothing more is required where requester "might be able to deduce the identity of the informants because [the records] detail specific events and circumstances"); Hale v. DOJ, 226 F.3d 1200, 1203-04 n.2 (10th Cir. 2000) (finding that "public dissemination of the documents [supplied by sources] would reveal the[ir] identit[ies]" because "case took place in a small town where most everyone knew everyone else"); Barnett v. U.S. Dep't of Lab., No. 09-146, 2010 WL 985225, at *1 & n.1 (E.D. Tex. Mar. 15, 2010) (withholding "substantive factual information that reasonably can be expected to disclose the identity of a witness", including handwritten statement because handwriting analysis could be used to link statement to source); 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); Billington v. DOJ, 69 F. Supp. 2d 128, 138 (D.D.C. 1999) (finding that "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 identities of foreign agencies that requested an exchange of law enforcement information where disclosure 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).

[99] See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923-25 (11th Cir. 1984) (holding that employee-witnesses interviewed during Occupational Safety and Health investigation and expressly promised confidentiality were confidential sources and accordingly "names and other identifying information relating to the witnesses are exempt from disclosure"); Ramaci v. FBI, 568 F. Supp. 3d 378, 394-95 (S.D.N.Y. 2021) (holding that FBI's witnesses "'provided information that was singular in nature'" where their "unique perspectives were informed by either their position in a relevant community, their specific knowledge about the victims and/or possible perpetrators of the crime, or their interactions with the victims and/or possible perpetrators of the crime . . . [which] could allow the sources' identities to be inferred from the information they provided"); Concepcion v. FBI, 606 F. Supp. 2d 14, 41 (D.D.C. 2009) (finding that 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)

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 dealing with the agency – has been protected.[100]

Additionally, 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.[101] However, courts have held a Glomar response is unavailable when an individual has been identified as a confidential informant at trial.[102]

The second clause of Exemption 7(D) broadly protects all the information provided by confidential sources when it is "compiled by a criminal law enforcement authority in the course of a criminal investigation"[103] or if it is compiled by an agency "conducting a

---

(protecting information "'so singular that to release it would likely identify the individual'" (quoting agency declaration)).

[100] See Birch v. USPS, 803 F.2d 1206, 1212 (D.C. Cir. 1986) (determining that person who provided information to Postal Service agent, as well as the agent, were entitled to protection under Exemption 7(D)); United Techs. Corp. v. NLRB, 777 F.2d 90, 95 (2d Cir. 1985) (concluding that "identity of [an NLRB] agent was properly withheld as information in an investigatory record that could lead to the disclosure of a confidential source").

[101] See, e.g., Montgomery v. IRS, 40 F.4th 702, 712 (D.C. Cir. 2022) (affirming agency's Glomar policy because "[i]f the IRS only asserts Glomar when whistleblower records exist, and gives a negative answer when no records exist, savvy requesters would both (1) recognize that a Glomar Response indicates the positive existence of whistleblower documents; and (2) may well be able to deduce the identity of a potential whistleblower himself, the very information the IRS is required to protect"); Withey v. FBI, 477 F. Supp. 3d 1167, 1172 (W.D. Wash. 2020) (holding that "if responding to the request would itself reveal the identity of a confidential source or information furnished by the confidential source, then the government may provide a Glomar response by refusing to confirm or deny the existence of any records responsive to the request"); Benavides v. DEA, 769 F. Supp. 380, 382 (D.D.C. 1990) (stating that "[i]f DEA denies a request for specific records concerning a third party on the ground that disclosure would reveal a confidential source, this denial may give the requester enough information to expose the subject of inquiry to harassment and actual danger"), rev'd & remanded on procedural grounds, 968 F.2d 1243 (D.C. Cir. 1992), modified, 976 F.2d 751 (D.C. Cir. 1992).

[102] See Pickard v. DOJ, 653 F.3d 782, 787-88 (9th Cir. 2011) (concluding that Glomar response was unavailable where individual was called at trial and identified as confidential informant in testimony stating "[h]aving previously officially confirmed [the individual's] status as an informant, [the agency] may no longer refuse to confirm or deny that fact"); North v. DOJ, 810 F. Supp. 2d 205, 208-09 (D.D.C. 2011) (refusing to affirm Glomar response where trial testimony identified individual's status as informant).

[103] 5 U.S.C. § 552(b)(7)(D); see, e.g., Hulstein v. DEA, 671 F.3d 690, 695 (8th Cir. 2012) (holding that second clause of exemption permits withholding of information obtained from

lawful national security intelligence investigation."[104] Confidential source information that falls within the broad coverage of this second clause need not necessarily be source-identifying to be found protectable.[105] For the purposes of this clause, criminal law

---

sources during criminal investigations and finding that DEA properly withheld "Details" section of report provided by source who had implied assurance confidentiality); Shaw v. FBI, 749 F.2d 58, 63-65 (D.C. Cir. 1984) (explaining that law enforcement undertaking satisfies "criminal investigation" threshold if agency can identify individual or incident as object of investigation as well as connection between individual or incident and violation of federal or state law); Reiter v. DEA, No. 96-0378, 1997 WL 470108, at *6-7 (D.D.C. Aug. 13, 1997) (holding that "[i]f the informant is deemed confidential, Exemption 7(D) then protects all information provided by that informant" under Exemption 7(D)'s second clause), summary affirmance granted, No. 97-5246, 1998 WL 202247 (D.C. Cir. Mar. 3, 1998); see also Kuffel v. BOP, 882 F. Supp. 1116, 1126 (D.D.C. 1995) (finding that "qualifying criminal investigation" exists because "FBI was gathering 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").

[104] 5 U.S.C. § 552(b)(7)(D); see, e.g., Ferguson v. FBI, 957 F.2d 1059, 1069 (2d Cir. 1992) (finding that "[o]nce it is shown 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"); Jud. 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 "confidential informant who reported a possible terrorist threat against the INS Miami District Office"); Campbell v. DOJ, No. 89-3016, 1996 WL 554511, at *9 (D.D.C. Sept. 19, 1996) (concluding that government properly withheld identities and information provided by third parties, as well as nonfederal and foreign law enforcement agencies in connection with investigations related to national security), rev'd on other grounds, 164 F.3d 20 (D.C. Cir. 1998); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act at 14 (Dec. 1987) (explaining that modifications made in the FOIA Reform Act were intended to make "clear beyond any possible doubt that *all* information furnished by a confidential source is exempt, so long as it was furnished in connection with a criminal or lawful national security investigation").

[105] See, e.g., Parker v. DOJ, 934 F.2d 375, 380 (D.C. Cir. 1991) (noting that circuits agree that "once the agency receives information from a '"confidential source" during the course of a legitimate criminal investigation . . . *all* such information obtained from the confidential source receives protection'" (quoting Lesar v. DOJ, 636 F.2d 472, 492 n. 114 (D.C. Cir. 1980))); Shaw, 749 F.2d at 62 (noting that Exemption 7(D) "establishes two separate categories of exemption: (1) information that would 'disclose the identity of a confidential source,' and (2) information that would 'disclose confidential information furnished only by the confidential source'" and opining that "[r]equiring the second category to come within the first as well would render it entirely redundant"); Radowich v. U.S. Att'y, Dist. of Md., 658 F.2d 957, 964 (4th Cir. 1981) (noting information provided by source in criminal investigation is protected); Webster v. DOJ, No. 02-0603, 2020 WL 1536303, at *7-8 (D.D.C. Mar. 31, 2020) (finding that information provided by third parties during course of investigation is protectable); Simon v. DOJ, 752 F. Supp. 14, 22 (D.D.C. 1990) (noting that "[e]ven if the information supplied by the confidential source could in no way identify him,

enforcement authorities include federal agencies' Inspectors General.[106] Additionally, the statutory requirement of an "investigation," while not a component of Exemption 7's threshold language, is "a predicate of exemption under the second clause of paragraph (D)."[107]

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.[108] 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 nonfederal criminal investigations.[109]

---

the second clause of Exemption 7(D) nevertheless allows the [agency] to withhold this information"); see also FOIA Update, Vol. XIV, No. 3, at 10 ("Justice Changes Policy on Exemption 7(D) Disclosure") (pointing out breadth of Exemption 7(D) coverage).

[106] 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 . . . used [anonymous] letter to launch a criminal investigation of [plaintiff]"); Providence J. 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").

[107] Keys v. DOJ, 830 F.2d 337, 343 (D.C. Cir. 1987); see also ACLU of Wash. v. DOJ, No. 09-0642, 2011 WL 887731, at *6 (W.D. Wash. Mar. 10, 2011) (rejecting FBI attempt to withhold document in its entirety and not just source-identifying information because FBI "ha[d] not alleged, much less shown, that the information was compiled 'in the course of a criminal investigation' or 'lawful national security intelligence investigation'" to satisfy second clause of Exemption 7(D)).

[108] 5 U.S.C. § 552(b)(7)(D); see, e.g., Sandoval v. DOJ, 296 F. Supp. 3d 1, 20 (D.D.C. 2017) (finding Exemption 7(D) appropriate when "FBI received information from a local law enforcement agency and that '[i]nherent in this cooperative effort is a mutual understanding that the identities of the local law enforcement agency's sources and the information provided will be held in confidence by the FBI, and not released pursuant to FOIA and Privacy Act requests'" (quoting agency's declaration)); Harvey v. DOJ, 747 F. Supp. 29, 38 (D.D.C. 1990) (finding that investigatory records from local police department provided to the United States Attorney's Office were properly withheld to protect "identity of and information provided by a confidential source").

[109] 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 from state law enforcement investigation and results of FBI's analysis), overruled on other grounds, Sawyer v. Smith, 497 U.S. 227 (1990); Gordon v. Thornburgh, 790 F. Supp. 374, 377-78 (D.R.I. 1992) (emphasizing that "[w]hen a state law enforcement agency sends material to an FBI lab for testing [here, arson records in connection with plaintiff's criminal case], confidentiality is 'inherently implicit'" and that "all information from another agency must be protected to provide the confidence necessary to law enforcement cooperation"); Rojem

However, in Landano, the Supreme Court stated that greater disclosure should occur when "institutional" sources – such as local law enforcement agencies or private commercial enterprises – are involved because these sources typically provide a "wide variety of information" under circumstances that do not necessarily warrant confidentiality.[110]

Waiver of Confidentiality

Courts have held that any "judicial effort to create a 'waiver' exception to [E]xemption 7(D)'s language runs afoul of the statute's 'intent to provide "workable" rules.'"[111] As the Court of Appeals for the District of Columbia Circuit has declared, a waiver of Exemption 7(D)'s protections should be found *only* upon "'absolutely solid evidence showing that the source . . . has manifested complete disregard for confidentiality.'"[112] Accordingly, because Exemption 7(D) "mainly seeks to protect law

---

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 seeking FBI's assistance); 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" as part of homicide investigation (citing agency declaration)).

[110] DOJ v. Landano, 508 U.S. 165, 176 (1993); see, e.g., Hale v. DOJ, 99 F.3d 1025, 1032-33 (10th Cir. 1996) (finding that agency did not adequately justify withholding information provided by commercial and financial institutions); Bagwell v. DOJ, 588 F. Supp. 3d 58, 71-72 (D.D.C. 2022) (finding that "Penn State is a large and well-represented public institution – a far cry from the 'witness[ ] to a gang-related murder' the Supreme Court offered as an example of someone who might be 'unwilling to speak . . . except on the condition of confidentiality'"(quoting Landano, 508 U.S. at 179)); Linn v. DOJ, No. 92-1406, 1995 WL 417810, at *32 (D.D.C. June 6, 1995) (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).

[111] Irons v. FBI, 880 F.2d 1446, 1455 (1st Cir. 1989) (citing FTC v. Grolier, Inc., 462 U.S. 19, 27 (1983)); see also Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000) (observing that "statute by its terms does not provide for . . . waiver"); Parker v. DOJ, 934 F.2d 375, 380 (D.C. Cir. 1991) (noting "[a]bsent from the language of Exemption 7(D) is any mention of 'waiver'").

[112] Parker, 934 F.2d at 378 (quoting Dow Jones & Co. v. DOJ, 908 F.2d 1006, 1011 (D.C. Cir. 1990)), 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); see also Ramaci v. FBI, 568 F. Supp. 3d 378, 392-93 (S.D.N.Y. 2021) (finding that surviving

enforcement agencies in their efforts to find future sources,"[113] acts of implied waiver by a source do not inevitably result in the release of either the source's identity or the source provided information.[114]

Additionally, to demonstrate a waiver by disclosure through authorized channels, courts have required the requester to 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.'"[115]

---

victim's "subtle and passing references to having spoken with law enforcement (in conversations where she was using an alias) do not amount to a total disregard for any and all confidentiality she may have expected from those purported conversations"); 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" that would constitute a waiver of Exemption 7(D) protection), aff'd in pertinent part, vacated in part & remanded on other grounds, 233 F.3d 581 (D.C. Cir. 2000).

[113] Irons, 880 F.2d at 1453.

[114] Id. at 1452; see, e.g., Providence J. Co. v. U.S. Dep't of the Army, 981 F.2d 552, 567 n.16 (1st Cir. 1992) (holding that because "uncertainty about the precise scope of a waiver might 'dry up' law enforcement sources, [the court has] consistently refused to find an *implied* waiver where the subjective intent of the informant to relinquish confidentiality can be inferred only from ambiguous conduct, often occurring long after the informant provided the confidential information"); Billington v. DOJ, 11 F. Supp. 2d 45, 68-69 (D.D.C. 1998) (finding alleged source did not exhibit "complete disregard for confidentiality" by giving newspaper interview (quoting Parker, 934 F.2d at 378)), vacated in pertinent part on other grounds, 233 F.3d 581 (D.C. Cir. 2000); Freeman v. DOJ, No. 92-0557, 1993 WL 260694, at *4 (D.D.C. June 28, 1993) (ruling the "fact that federal, state, and local authorities were publicly cooperating in the . . . investigation, or that certain individuals publicly acknowledged that they were 'working closely' with the investigation . . . does not 'manifest complete disregard for confidentiality'"). But see 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").

[115] Parker, 934 F.2d at 378 (concluding that "public testimony by 'confidential sources' does not waive agency's right to invoke Exemption 7(D) to withhold the identity of a confidential source or information furnished by a confidential source not actually revealed in public" (citing Irons, 880 F.2d at 1456-57)); accord Dow Jones & Co. v. DOJ, 917 F.2d 571, 577 (D.C. Cir. 1990); see also Montgomery v. IRS, 40 F.4th 702, 710 (D.C. Cir. 2022) (finding no official agency acknowledgement where "the information requested by the [Plaintiff] does not match the information previously released by the IRS"); Pickard v. DOJ, 713 F. App'x 609, 610 (9th Cir. 2018) (explaining that "[e]ven assuming that . . . exemption 7(D) may be 'waived,' [the plaintiff] is entitled only to exactly the same information that has been publicly disclosed"); Davis v. DOJ, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (holding that "government is entitled to withhold the tapes obtained through informant's assistance

Thus, "[t]he per se limitation on disclosure under 7(D) does not disappear if the identity of the confidential source later becomes known through other means"[116] or because the requester knows the source's identity.[117] Likewise, some courts have held the

---

unless it is specifically shown that those tapes, or portions of them, were played during the informant's testimony"); Shem-Tov v. DOJ, 531 F. Supp. 3d 102, 116 (D.D.C. 2021) (rejecting plaintiff's argument that "several alleged public disclosures of at least some of the information at issue [constitute waiver]" and finding that "even if these sources disclosed some or all of the information at issue or the identity of the foreign NCB, they would not waive the protection afforded to the confidential information and source by Exemption 7(D)"); Cobar v. DOJ, 81 F. Supp. 3d 64, 72 (D.D.C. 2015) (noting that "[t]o the extent plaintiff is arguing that public knowledge of a confidential source's *identity* precludes application of 7(D) to protect *information provided by* that source, that proposition is clearly wrong") (emphasis in original); Span v. DOJ, 696 F. Supp. 2d 113, 122 (D.D.C. 2010) (rejecting plaintiff's waiver argument for failure to identify "'specific information in the public domain that appears to duplicate that being withheld'" (quoting Cottone v. Reno, 193 F.3d 550, 555-56 (D.C. Cir. 1999))); Sanderson v. IRS, No. 98-2369, 1999 WL 35290, at *4 (E.D. La. Jan. 25, 1999) (ordering disclosure of "exact information to which [source] testified in her deposition"); cf. Moffat v. DOJ, 716 F.3d 244, 253 (1st Cir. 2013) (stating Exemption 7(D)'s "shield does not necessarily disappear when some fraction of the information requested has come to light").

[116] L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 925 (11th Cir. 1984) (citing Radowich v. U.S. Att'y, Dist. of Md., 658 F.2d 957, 960 (4th Cir. 1981)); see, e.g., Rimmer v. Holder, 700 F.3d 246, 261 (6th Cir. 2012) (affirming that "district court correctly dispensed with [plaintiff's] claim that his personal knowledge of the identity of most of the government's confidential sources neutralized the personal-privacy protection afforded them under Exemption 7(D)"); 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); Lesar v. DOJ, 455 F. Supp. 921, 925 (D.D.C. 1978) (finding no waiver of confidentiality occurs when confidential information finds its way into public domain), aff'd, 636 F.2d 472 (D.C. Cir. 1980).

[117] See, e.g., Watters v. DOJ, 576 F. App'x 718, 725 (10th Cir. 2014) (rejecting requester's argument that identities of sources are well known and recognizing that "the protections of 7(D) apply even if a confidential source is later revealed" (quoting Rimmer, 700 F.3d at 253 n.4)); 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"); L&C Marine, 740 F.2d at 923-25 (noting that fact that employee witnesses "could be matched to their statements" does not diminish or eliminate Exemption 7(D) protection); Radowich, 658 F.2d at 960 (declaring Exemption 7(D) applies even when "identities of the confidential sources were known"); Keeney, 630 F.2d at 119 n.2 (ruling Exemption 7(D) applies to "local law enforcement agencies [that] have now been identified"); Bullock v. FBI, 577 F. Supp. 2d 75, 80 (D.D.C. 2008) (holding "Exemption 7(D) applies even when the source's identity is no longer a secret"); Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 185 (D.N.H. 1993) (stating that source's identity need not be secret to justify withholding information);

protection of Exemption 7(D) is not forfeited by "court-ordered and court-supervised" disclosure to an opponent in civil discovery.[118] Moreover, even authorized or official disclosure of some information provided by a confidential source does not open the door to disclosure of any other information the source has provided.[119] 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.[120]

Church of Scientology of Tex. v. IRS, 816 F. Supp. 1138, 1161 (W.D. Tex. 1993) (declaring it "irrelevant that the identity of the confidential source is known").

[118] See Glick v. DOJ, No. 89-3279, 1991 WL 118263, at *4 (D.D.C. June 20, 1991) (finding disclosure "pursuant to discovery in another case . . . does not waive the confidentiality of the information or those who provided it"); see also Sinito v. DOJ, No. 87-0814, 2000 WL 36691372, at *11 (D.D.C. July 12, 2000) (holding that "[n]o further release of information . . . is warranted" even though "names of certain informants were made a matter of public record through release of civil discovery material").

[119] See Djenasevic v. EOUSA, No. 18-5262, 2019 WL 5390964, at *1 (D.C. Cir. Oct. 3, 2019) (concluding the "'public domain' exception does not apply because appellant has failed to show that the information withheld under this exemption has been officially acknowledged in a prior disclosure"); Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000) (explaining that statute does not mention waiver and that "once the prerequisites of a 'confidential source' and a record compiled 'in the course of a criminal [or national security] investigation' are satisfied, Exemption 7(D) protects from disclosure 'information furnished by [that] confidential source'" (citing Parker, 934 F.2d at 380)); Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992) (holding that subsequent disclosure of source's identity or of some information provided by source does not require "full disclosure of information provided by such a source"); Cleary v. FBI, 811 F.2d 421, 423 (8th Cir. 1987) (finding that fact that identity of source is known "does not prevent the confidential source exemption from protecting the information that [the sources] gave to the F.B.I. 'under circumstances from which assurances of confidentiality could reasonably be inferred'" (quoting Parton v. DOJ, 727 F.2d 774, 776 (8th Cir. 1984))); 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 someone making a 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 that 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 non-allied party).

[120] See, e.g., O'Brien v. DOJ, No. 22-2335, 2023 WL 2770824, at *2 (3d Cir. Apr. 4, 2023) (concluding that Plaintiff was mistaken in arguing "that an agency may not withhold any information about a confidential source if that source testifies at trial"); Pickard, 713 F. App'x at 610 (finding "what Plaintiff seeks – records that may contain some of the same information about which [an informant] testified – is not exactly the same information that

Consequently, the D.C. Circuit has found the government is not required even to acknowledge that a person who testified at trial or a deposition was a confidential source.[121] Relatedly, courts have upheld a Glomar response – neither confirming nor denying the existence of responsive records – where responding to a request would reveal

---

was publicly disclosed, so FOIA exemption 7(D) applies"); Peltier v. FBI, 563 F.3d 754, 762 (8th Cir. 2009) (noting that "several courts of appeals have held that public testimony does not 'waive' the applicability of Exemption 7(D) to information provided to the FBI by a confidential source, or to information that would disclose the identity of a confidential source"); Neely, 208 F.3d at 466 (recognizing that source can "remain a 'confidential source' . . . even if the source's communication with [the agency] is subsequently disclosed at trial"); Jones, 41 F.3d at 249 (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, 968 F.2d at 1281 (concluding that 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, 957 F.2d at 1068 (affirming that local law enforcement officer does not lose status as confidential source by testifying in court); Parker, 934 F.2d at 379 (stating "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 v. FBI, 880 F.2d 1446, 1454 (1st Cir. 1989) (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 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"); Young v. DOJ, No. 21-739, 2022 WL 17668806, at *4 (D.D.C. Dec. 14, 2022) (concluding that "Exemption 7(D) allows the government to withhold confidential sources' identities and the information they provided even after those sources testify in court"); Abdul-Alim v. Wray, 277 F. Supp. 3d 199, 220 (D. Mass. 2017) (holding that "the identities of confidential sources are protected even if the requestor has been able to place a name to that person, either through testimony by the source in court proceedings, by the requestor's process of elimination based on information available to him or otherwise"); Dent v. EOUSA, 926 F. Supp. 2d 257, 271 (D.D.C. 2013) (stating "[e]ven if the identity of or information provided by a source had been disclosed at trial, for example, a government agency [may] still invoke[] Exemption 7(D) to protect the source's identity"); Doolittle v. DOJ, 142 F. Supp. 2d 281, 285-86 (N.D.N.Y. 2001) (protecting identities of confidential sources that prosecutors disclosed during plaintiff's sentencing).

[121] See Parker, 934 F.2d at 381 (rejecting plaintiff's attempt to discover whether any of confidential informants whose identities are being protected by FBI are also witnesses who testified against plaintiff at plaintiff's criminal trial); 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))), abrogated on other grounds, DOJ v. Landano, 508 U.S. 165 (1993).

a source's identity or the information provided by the source.[122] However, a Glomar response was found to be unavailable when an individual was expressly identified as a confidential source during trial.[123]

Significantly, 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.[124] Many courts have recognized that these protections cannot be lost through the mere passage of

---

[122] See Withey v. FBI, 477 F. Supp. 3d 1167, 1173 & n.4 (W.D. Wash. 2020) (concluding that FBI's Glomar response was proper, even though third party was dead and had testified in a deposition that third party was an informant); see also White v. EOUSA, 444 F. Supp. 3d 930, 947 (S.D. Ill. 2020) (determining FBI's use of Glomar under Exemption 7(D) was proper to protect whether confidential informants were used, because "[p]laintiff's request was most certainly aimed at gaining information regarding the FBI's use of informants"); cf. Montgomery v. IRS, 40 F.4th 702, 710-11 (D.C. Cir. 2022) (upholding IRS' use of Glomar response even though IRS asserted in prior litigation that no whistleblower existed, because IRS never confirmed whether whistleblower records exist).

[123] See Pickard v. DOJ, 653 F.3d 782, 786-88 (9th Cir. 2011) (concluding Glomar response was unavailable where individual was called at trial and identified as confidential informant in testimony); North v. DOJ, 810 F. Supp. 2d 205, 208-09 (D.D.C. 2011) (refusing to affirm Glomar response where trial testimony identified individual's status as informant).

[124] See Ortiz v. HHS, 70 F.3d 729,733 (2d Cir. 1995) (noting that "status of the investigation is . . . immaterial to the application of the exemption"); KTVY-TV v. United States, 919 F.2d 1465, 1471 (10th Cir. 1990) (rejecting argument that confidentiality was no longer needed because investigation ended); Church of Scientology of Tex. v. IRS, 816 F. Supp. 1138, 1161 (W.D. Tex. 1993) (finding that source identity and information provided "remains confidential . . . after the investigation is concluded"); Gale v. FBI, 141 F.R.D. 94, 98 (N.D. Ill. 1992) (protecting statements provided even "while no investigation is pending").

time.[125] Additionally, unlike with Exemption 7(C),[126] the safeguards of Exemption 7(D) remain undiminished by the death of the source.[127]

---

[125] See, e.g., Hulstein v. DEA, 671 F.3d 690, 695 (8th Cir. 2012) (noting implied confidentiality was still warranted "even after the passage of time and whether or not the allegations were acted upon by the authorities"); Halpern v. FBI, 181 F.3d 279, 300 (2d Cir. 1999) (declaring "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" and concluding that interviews that occurred sixty years earlier with sources now deceased were properly withheld); Keys v. DOJ, 830 F.2d 337, 346 (D.C. Cir. 1987) (stating "'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 7 (D.D.C. May 12, 1986))); Brant Constr. Co. v. EPA, 778 F.2d 1258, 1266 n.8 (7th Cir. 1985) (emphasizing that "policy of [Exemption] 7(D) [is] to protect future sources of information" and that passage of time "does not alter the status" of source-provided information).

[126] 5 U.S.C. § 552(c)(2) (2018); see, e.g., Schrecker v. DOJ, 14 F. Supp. 2d 111, 118 (D.D.C. 1998) (noting that "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").

[127] 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, 278-79 (6th Cir. 1984) (finding information provided by deceased source who also testified at trial properly withheld); Bullock v. FBI, 577 F. Supp. 2d 75, 80 (D.D.C. 2008) (recognizing Exemption 7(D) continues to apply after death of confidential source); see also FOIA Update, Vol. IV, No. 3, at 5 ("FOIA Counselor: Questions & Answers").

Exclusion Considerations

Finally, the FOIA affords special source-identification protection through the "(c)(2) exclusion," which permits a criminal law enforcement agency to exclude records from the requirements of the FOIA under specified circumstances when necessary to avoid divulging the existence of an unacknowledged source relationship.[128] (See the discussion of this provision under Exclusions.)

[128] 5 U.S.C. § 552(c)(2) (2018) (providing that "informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier" are "not subject to the requirements of [the FOIA]" when they "are requested by a third party according to the informant's name or personal identifier, . . . unless the informant's status as an informant has been officially confirmed"); Memphis Publ'g Co. v. FBI, 879 F. Supp. 2d 1, 7 (D.D.C. 2012) (concluding that "[a]lthough Exemption 7(D) typically allows an agency to withhold information to prevent the identification of confidential sources, invoking the exemption in response to a request seeking files on a named individual would confirm that the suspected individual is indeed a confidential informant"); see also OIP Guidance: Implementing FOIA's Statutory Exclusion Provisions (posted 9/14/2012).