



## **Exemption 7(D)**

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

### **Introduction**

It has "long been recognized" that Exemption 7(D) affords "the most comprehensive protection of all [the] FOIA's law enforcement exemptions."<sup>2</sup> Indeed, as the Court of Appeals for the District of Columbia Circuit has remarked, 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."<sup>3</sup> Exemption 7(D) ensures that "confidential sources are not lost through retaliation against the sources for past disclosure or because of the sources' fear of future disclosure."<sup>4</sup>

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<sup>1</sup> [5 U.S.C. § 552\(b\)\(7\)\(D\) \(2012 & Supp. V 2017\)](#).

<sup>2</sup> [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).

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

<sup>4</sup> [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 "goal of Exemption 7(D) [is] to protect the ability of law enforcement agencies to obtain the cooperation of persons having relevant information and who expect a degree of confidentiality in return for their cooperation"); [Providence Journal Co. v. U.S. Dep't of the Army](#), 981 F.2d 552, 563 (1st Cir. 1992) (explaining that Exemption 7(D) is intended to avert "drying-up" of sources) (citing [Irons](#), 880 F.2d at 1450-51); [Nadler v. DOJ](#), 955 F.2d 1479, 1486 (11th Cir. 1992) (observing that "fear of exposure would chill the

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

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public's willingness to cooperate with the FBI . . . [and] would deter future cooperation" (citing Cleary v. FBI, 811 F.2d 421, 423 (8<sup>th</sup> Cir. 1987); 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"); Schoenman v. FBI, 763 F. Supp. 2d 173, 200 (D.D.C. 2011) (concluding that FBI properly invoked Exemption 7(D) because as it stated in its declaration "public disclosure of [confidential source] information would have a chilling effect on the cooperation of other sources and thereby hinder its ability to gather confidential information"); 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); Garcia v. DOJ, 181 F. Supp. 2d 356, 375 (S.D.N.Y. 2002) (holding that "Exemption 7(D) [en]sures that confidential sources are protected from retaliation in order to prevent the loss of valuable sources of information").

<sup>5</sup> [5 U.S.C. § 552\(b\)\(7\)\(D\)](#).

<sup>6</sup> Id. (protecting information 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").

<sup>7</sup> Id.; see also Hulstein v. DEA, 671 F.3d 690, 694 (8<sup>th</sup> Cir. 2012) (finding that 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"); 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 that exemption also protects "information provided by that source").

<sup>8</sup> 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 (6<sup>th</sup> Cir. 1994) (clarifying that Exemption 7(D) "does not involve a balancing of public and private interests; if the source was confidential, the exemption may be claimed regardless of the public interest in disclosure"); McDonnell, 4 F.3d at 1257 (stating that Exemption "7(D) does not entail a balancing of public and private interests"); Nadler, 955 F.2d at 1487 n.8 (holding that "[o]nce a source has been found to be confidential, Exemption 7(D) does not require the Government

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.<sup>9</sup> This was reinforced in the Freedom of Information Reform Act of 1986,<sup>10</sup> which added to the statute specific categories of individuals and institutions to be included in the term "source."<sup>11</sup> Thus, state and local law enforcement agencies<sup>12</sup> and employees;<sup>13</sup> foreign law enforcement agencies;<sup>14</sup> and foreign commercial institutions<sup>15</sup> have been found to qualify as sources.

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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 that "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. v. EPA, 778 F.2d 1258, 1262-63 (7th Cir. 1985) (observing that "[n]o judicial 'balancing' of the competing interests is permitted" under Exemption 7(D)); Bretti v. DOJ, 639 F. Supp. 2d 257, 265 (N.D.N.Y. 2009) (noting that plaintiff had not articulated public benefit, but stating that "information furnished by a confidential source requires no balancing test and no consideration of the public interest in disclosure" in order to qualify for protection).

<sup>9</sup> See S. Conf. Rep. No. 93-1200, at 13, reprinted in 1974 U.S.C.C.A.N. 6285, 6291.

<sup>10</sup> Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48.

<sup>11</sup> Id.

<sup>12</sup> See, e.g., Halpern v. FBI, 181 F.3d 279, 299 (2d Cir. 1999); Williams v. FBI, 69 F.3d 1155, 1160 (D.C. Cir. 1995) (local law enforcement agency); Jones, 41 F.3d at 248 (law enforcement agencies); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 & n.27 (10th Cir. 1989) (state law enforcement agencies); Parton v. DOJ, 727 F.2d 774, 775-77 (8th Cir. 1984) (state prison officials interviewed in connection with civil rights investigation); Sellers, 684 F. Supp. 2d at 163 (state law enforcement agency); Richardson v. DOJ, 730 F. Supp. 2d 225, 238 (D.D.C. 2010) (Washington D.C. Metropolitan Police Department).

<sup>13</sup> See Garcia, 181 F. Supp. 2d at 377 (protecting identity of "state governmental employee" who provided "professional opinions as well as observations" regarding "plaintiff and his criminal activities").

<sup>14</sup> See, e.g., Billington v. DOJ, 233 F.3d 581, 586 n.5 (D.C. Cir. 2000) (foreign agencies); Halpern, 181 F.3d at 299; Shaw, 749 F.2d at 62 (foreign law enforcement agencies); Founding Church of Scientology v. Regan, 670 F.2d 1158, 1163-64 (D.C. Cir. 1981) (foreign INTERPOL national bureau); Blackwell v. FBI, 680 F. Supp. 2d 79, 95 (D.D.C. 2010) (foreign government agency); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 785 (E.D. PA. 2008) (foreign law enforcement entities); Badalamenti v. Dep't of State, 899 F. Supp. 542, 549 (D. Kan. 1995) (foreign law enforcement officials).

<sup>15</sup> Cozen O'Connor, 570 F. Supp. 2d at 785.

In addition, the Court of Appeals for the Second Circuit has held that a "federal government employee, like a local law enforcement agency, can be a confidential source" under Exemption 7(D).<sup>16</sup>

Courts have interpreted the term "source" to include a broad range of individuals and institutions that are not necessarily specified on the face of the statute – such as crime victims;<sup>17</sup> citizens providing unsolicited allegations of misconduct;<sup>18</sup> citizens responding to inquiries from law enforcement agencies;<sup>19</sup> private employees responding to OSHA investigators about the circumstances of an industrial accident;<sup>20</sup> and employees providing information about their employers and co-workers.<sup>21</sup> Courts have likewise

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<sup>16</sup> 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,'" and concluding that government employees at issue had "received an express or implied assurance of confidentiality" (quoting Keeney v. FBI, 630 F.2d 114, 117 (2d Cir. 1980) (quoting Webster's New International Dictionary 2405 (2d ed. 1957))). 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 "FTC cited the confidential source exemption as a further justification for withholding" document consisting of summary of meeting between Federal Housing Administration (FHA) and FTC, and commenting that "[c]ertainly the FHA cannot be a confidential source").

<sup>17</sup> See, e.g., Coleman v. FBI, No. 89-2773, slip op. at 21 (D.D.C. Dec. 10, 1991), summary affirmance granted, No. 92-5040, 1992 WL 373976 (D.C. Cir. Dec. 4, 1992); Gula v. Meese, 699 F. Supp. 956, 960 (D.D.C. 1988).

<sup>18</sup> See, e.g., Brant Constr., 778 F.2d at 1263; Pope v. United States, 599 F.2d 1383, 1386-87 (5th Cir. 1979).

<sup>19</sup> See, e.g., Providence Journal, 981 F.2d at 565; Miller v. Bell, 661 F.2d 623, 627-28 (7th Cir. 1981); Kowalczyk v. O'Brien, No. 94-1333, slip op. at 2 (D.D.C. Jan. 30, 1996).

<sup>20</sup> See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 924-25 (11th Cir. 1984). But cf. Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 552 (5th Cir. 2002) (stating that "[f]or us to hold . . . that OSHA's investigative records, as a category, are implicitly confidential would be unwarranted and would plow new ground").

<sup>21</sup> See, e.g., United Techs. Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985) (recognizing fear of employer retaliation as giving rise to "justified expectation of confidentiality"); Canning v. DOJ, 567 F. Supp. 2d 104, 112 (D.D.C. 2008) (same); Gov't Accountability Project v. NRC, No. 86-1976, No. 86-3201, 1993 WL 13033518, at \*4 (D.D.C. July 2, 1993) (holding that individuals who provided information to investigators about "potentially criminal matters involving co-workers" face risk of reprisal and are entitled to legitimate expectation of confidentiality).

afforded source protection to prisoners;<sup>22</sup> mental healthcare facilities;<sup>23</sup> medical personnel;<sup>24</sup> commercial or financial institutions;<sup>25</sup> company and state employees;<sup>26</sup> and social organizations' officials and employees.<sup>27</sup>

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 law enforcement purposes."<sup>28</sup> Most significantly, as the Supreme Court has declared, "the question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential."<sup>29</sup>

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<sup>22</sup> See, e.g., 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").

<sup>23</sup> See, e.g., Sanders v. DOJ, No. 91-2263, 1992 WL 97785, at \*4 (D. Kan. Apr. 21, 1992).

<sup>24</sup> See, e.g., Putnam v. DOJ, 873 F. Supp. 705, 716 (D.D.C. 1995).

<sup>25</sup> See, e.g., Council on American-Islamic Relations, California 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").

<sup>26</sup> See, e.g., Halpern, 181 F.3d at 300; Butler v. Dep't of Labor, 316 F. Supp. 3d 330, 337 (2018) (holding that handwritten confidential witness statements given by employees of natural gas company appropriately withheld); Williams, 69 F.3d at 1158-59 (finding Ohio state employees identity withholdable where information provided by employees was so singular in nature that to release information would divulge source's identity).

<sup>27</sup> See Halpern, 181 F.3d at 300.

<sup>28</sup> DOJ v. Landano, 508 U.S. 165, 174 (1993); accord Env'tl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 589 (N.D. W.Va. 2005).

<sup>29</sup> Landano, 508 U.S. at 172; see Billington, 233 F.3d at 585 (holding that "confidentiality analysis proceeds from the perspective of an informant, not [that of] the law enforcement agency"); Ortiz, 70 F.3d at 733 (finding that although agency did not solicit letter from letter writer, it was writer's expectation that letter would be kept secret); McDonnell, 4 F.3d at 1258 (holding that "content based test [is] not appropriate in evaluating a document for Exemption 7(D) status[;] rather the proper focus of the inquiry is on the source of the information"); Providence Journal, 981 F.2d at 563 (explaining that "confidentiality depends not on [document's] contents but on the terms and circumstances under which" agency acquired information); Ferguson v. FBI, 957 F.2d 1059, 1069 (2d Cir. 1992) (observing that "Exemption 7(D) is concerned not with the content of the information, but only with the circumstances in which the information was obtained"); Weisberg v. DOJ, 745 F.2d 1476, 1492 (D.C. Cir. 1984) (stating that availability of Exemption 7(D) depends not upon factual contents of document sought, but upon whether source was confidential); Gordon v.

### **The Confidentiality Analysis**

Sources are deemed confidential when they have provided information either under an express promise of confidentiality<sup>30</sup> or "under circumstances from which such an assurance could be reasonably inferred."<sup>31</sup> As the Supreme Court made clear in DOJ v. Landano,<sup>32</sup> not all sources furnishing information in the course of criminal investigations are entitled to a "presumption" of confidentiality.<sup>33</sup> Instead, source confidentiality must be determined on a case-by-case basis,<sup>34</sup> and such a presumption should not be applied automatically to cooperating law enforcement agencies.<sup>35</sup>

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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'").

<sup>30</sup> See S. Conf. Rep. No. 93-1200, at 13 (1974), 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 reasonably be inferred"); see also Rosenfeld v. DOJ, 57 F.3d 803, 814 (9th Cir. 1995) (stating that "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)").

<sup>31</sup> See S. Conf. Rep. No. 93-1200 at 13; see also Parker v. DOJ, 934 F.2d 375, 378 (D.C. Cir. 1991) (noting that source can be confidential based upon express assurance of confidentiality or 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 confidentiality where it is reasonable to infer from the circumstances that its absence would impair the [FBI's] ability to elicit the information"); Farrugia v. EOUSA, No. 04-0294, 2006 WL 335771, at \*8 (D.D.C. Feb. 14, 2006) (reasoning that "[b]ased on the nature of crime for which plaintiff was convicted and circumstances surrounding his arrest . . . it [was] reasonable to infer the existence of an implicit grant of confidentiality").

<sup>32</sup> 508 U.S. 165 (1993).

<sup>33</sup> Id. at 175.

<sup>34</sup> Id. at 179-80.

<sup>35</sup> Id. at 176; see also FOIA Update, Vol. XIV, No. 3, at 10 ("Justice Changes Policy on Exemption 7(D) Disclosure").

Before Landano, there existed conflict in the case law as to the availability of Exemption 7(D) protection for sources who were advised that they might be called to testify if a trial eventually were to take place.<sup>36</sup> However, in Landano, the Supreme Court resolved this conflict by holding that "[a] source should be deemed confidential if the source furnished information with the understanding that the [agency] would not divulge the communication except to the extent . . . thought necessary for law enforcement purposes."<sup>37</sup> (The effect of a source's actual testimony upon continued Exemption 7(D) protection presents a different issue,<sup>38</sup> which is addressed below together with other issues regarding waiver of this exemption.)

### **Express Confidentiality**

Courts have uniformly recognized that express promises of confidentiality deserve protection under Exemption 7(D),<sup>39</sup> and they usually require affidavits specifically demonstrating the existence of such an express promise.<sup>40</sup> Express promises can be

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<sup>36</sup> Compare Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 986 (9th Cir. 1985) (no confidentiality recognized), and Poss v. NLRB, 565 F.2d 654, 658 (10th Cir. 1977) (same), with Irons v. FBI, 811 F.2d 681, 687 (1st Cir. 1987) (confidentiality recognized), Schmerler v. FBI, 900 F.2d 333, 339 (D.C. Cir. 1990) (same), and United Techs. v. NLRB, 777 F.2d 90, 95 (2d Cir. 1995) (same).

<sup>37</sup> 508 U.S. at 174 (clarifying that "'confidential,' as used in Exemption 7(D), refers to a degree of confidentiality less than total secrecy"); see also Leveto v. IRS, No. 98-285, 2001 U.S. Dist. LEXIS 5791, at \*20 (W.D. Pa. Apr. 10, 2001) (finding confidentiality established for sources who were "assured that their identities would not be disclosed except to the extent necessary to obtain a search warrant, or at a future grand jury proceeding or criminal trial").

<sup>38</sup> See Parker, 934 F.2d at 381 (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'").

<sup>39</sup> See, e.g., Williams v. FBI, 69 F.3d 1155, 1159 (D.C. Cir. 1995) (finding information provided under express assurances of confidentiality to be exempt from disclosure); Jones v. FBI, 41 F.3d 238, 248 (6th Cir. 1994) (express confidentiality justified based on Court's in camera review); KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) (upholding express assurances of confidentiality given interviewees who provided information regarding postal employee who shot and killed fellow workers); Taccetta v. FBI, No. 10-6194, 2012 WL 2523075, at \*3-4 (D.N.J. June 29, 2012) (determining that FBI properly invoked Exemption 7(D) to protect identity of individual interviewed under express grant of confidentiality); Schoenman v. FBI, 763 F. Supp. 2d 173, 200 (D.D.C. 2011) (finding that 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"); Kortlander v. BLM, 816 F. Supp. 2d 1001, 1014 (D. Mont. 2011) (finding names, identifiers, and information provided by confidential sources properly withheld because law enforcement agency provided express assurances of confidentiality).

<sup>40</sup> See, e.g., CREW 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

supported by notations made on the face of documents indicating that the information in them is to be kept confidential pursuant to an express promise;<sup>41</sup> by statements from the agents or sources involved in which they attest to their personal knowledge of an express promise;<sup>42</sup> by specific agency practices or procedures regarding the routine treatment of

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confidentiality") (quoting Campbell v. DOJ, 164 F.3d 20, 34 (D.C. Cir. 1998)); Boyd v. Criminal Div. of DOJ, 475 F. 3d 381, 389 (D.C. Cir. 2007) (finding that ATF's affidavit properly demonstrated that confidential source received express promise); Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, 467 F. Supp. 2d 40, 54 (D.D.C. 2006) (finding sufficient agency's declaration that indicates "'confidential source . . . has been given an express guarantee that personal and contact information will not be disclosed to the public'" (quoting agency declaration)); DiPietro v. EOUSA, 357 F. Supp. 2d 177, 185 (D.D.C. 2004) (reiterating that when agency relies on express assurance of confidentiality to invoke Exemption 7(D), it must offer "probative evidence that the source did in fact receive an express grant of confidentiality").

<sup>41</sup> See, e.g., Frankenberry v. FBI, 567 Fed. App'x 120, 124 (3rd 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'" because two witnesses were promised confidentiality); 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 words "'protect identity'" and 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 pursuant to Exemption 7(D) where "'Protect Identity'" appears whenever source's name is referenced); Adionser v. DOJ, 811 F. Supp. 2d 284, 300 (D.D.C. 2011) (finding that "notations on the withheld documents – specifically the EOUSA's 'CI' notation and the DEA confidential informant code . . . provide[d] probative evidence that the source received an express grant of confidentiality"); Zavala v. DEA, 667 F. Supp. 2d 85, 101 (D.D.C. 2009) (agreeing with DEA that notations on documents obtained from state and local agencies established that there was express assurance of confidentiality where documents contained "expressed condition of confidentiality . . . prohibiting further distribution"); 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)).

<sup>42</sup> See, e.g., Bullock v. FBI, 577 F. Supp. 2d 75, 80 (D.D.C. 2008) (holding that signed agreement between confidential source and law enforcement agency was sufficient to prove express promise); Adamowicz v. IRS, 552 F. Supp. 2d 355, 371 (S.D.N.Y. 2008) (finding that statements of auditor who provided assurance of confidentiality were sufficient evidence of express grant of confidentiality); Wheeler v. DOJ, 403 F. Supp. 2d 1, 16 (D.D.C. 2005) (finding that FBI's declaration sufficiently demonstrated that agent had personal knowledge of express promise given to confidential source); Billington v. DOJ, 301 F. Supp. 2d 15, 22

confidential sources,<sup>43</sup> including those for "symbol-numbered" sources;<sup>44</sup> or by some combination of the above.<sup>45</sup>

Courts have found that unsupported statements asserting the existence of an express promise from third parties who are without direct knowledge, or vague or

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(D.D.C. 2004) (finding that in camera affidavit of source "confirms that the source . . . was assured [with] an express grant of confidentiality").

<sup>43</sup> See, e.g., 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 as well as in a reference file concerning a Racketeering Enterprise Investigation ('REI') of gang activity" based in part on FBI's Rules of Behavior for ViCAP web which "clearly state that the ViCAP [w]eb database is a confidential system"); Callaway v. U.S. Dep't of Treasury, 577 F. Supp. 2d 1, 3 (D.D.C. 2008) (finding Exemption 7(D) appropriately invoked where "declarant with 'firsthand knowledge' of Customs' policy with respect to the assignment of source symbol codes explain[ed] that codes are assigned only to those expressly granted an assurance of confidentiality"); Neuhausser, 2006 WL 1581010, at \*7 (finding that DEA has longstanding confidential source policy which provides that coded sources receive express assurances of confidentiality); Millhouse v. IRS, No. 03-1418, 2005 U.S. Dist. LEXIS 1290, at \*5 (D.D.C. Jan. 3, 2005) (finding that IRS's Special Agent followed IRS procedures for providing confidential sources with express grants of confidentiality).

<sup>44</sup> See, e.g., Mays v. DEA, 234 F.3d 1324, 1329 (D.C. Cir. 2000) (holding that agency affidavit that "plainly refers to 'notations on the face of [the] withheld document[s]' – specifically, the DEA confidential informant code – indicat[es] that [the] source received an express assurance of confidentiality" (quoting Campbell, 164 F.3d at 34)); Manna v. DOJ, 51 F.3d 1158, 1167 (3d Cir. 1995) (finding that express confidentiality exists as to sources "assigned numbers" who provided information regarding organized crime); McDonnell v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (reasoning that "source was considered so sensitive that he or she was assigned a symbol source number and was never referred to by name in the file [leading to the] conclusion that [the information is] exempt from disclosure under the express language of Exemption 7(D)"); Clemente v. FBI, 741 F. Supp. 2d 64, 87 (D.D.C. 2010) (agreeing that FBI's declaration showed that informants with source symbol numbers received express grant of confidentiality); Mendoza v. DEA, 465 F. Supp. 2d 5, 13 (D.D.C. 2006) (explaining DEA's practice that coded sources are expressly assured confidentiality); 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).

<sup>45</sup> See, e.g., 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 OIG regulations require OIG to maintain confidentiality of statements made in course of investigations except when OIG deems disclosure to be necessary); Neuhausser, 2006 WL 1581010, at \*7 (concluding that DEA's policy sufficiently established that coded sources received express assurances of confidentiality).

generalized recitations of harm are generally insufficient to support a showing of express confidentiality for a source.<sup>46</sup>

### **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.<sup>47</sup> Historically, many courts of appeals applied a

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<sup>46</sup> See, e.g., Cooper Cameron, 280 F.3d at 550 (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 "[at] the very least" to "indicate where [express] assurances of confidentiality are memorialized"); Halpern v. FBI, 181 F.3d 279, 299 (2d Cir. 1999) (finding to be insufficient agency's "bare assertions that express assurances were given to the sources in question, and that the information received was treated in a confidential manner during and subsequent to its receipt"); Campbell v. DOJ, 164 F.3d 20, 34-35 (D.C. Cir. 1998) (remanding 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"), aff'd on appeal after remand, 176 F.3d 471 (3d Cir. 1999) (unpublished table decision); Rosenfeld v. DOJ, 57 F.3d 803, 814-15 (9th Cir. 1995) (determining that FBI affidavits did not demonstrate that symbol-numbered sources were given express promises of confidentiality); ACLU of Wash. v. DOJ, No. 09-0642, 2011 WL 887731, at \*6 (W.D. Wash. Mar. 10, 2011) (refusing to approve application of Exemption 7(D) where source had been identified, some of information from source had been disclosed, and there was no evidence of promise 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 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 grant of express confidentiality or describe circumstances supporting inference of confidentiality); Fischer v. DOJ, 596 F. Supp. 2d 34, 49 (D.D.C. 2009) (finding bare assertion that foreign authority provided information to FBI under express assurance of confidentiality insufficient to carry burden of establishing 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).

<sup>47</sup> See DOJ v. Landano, 508 U.S. 165, 181 (1993) (rejecting blanket presumption of confidentiality for sources supplying information to FBI, although acknowledging that

"categorical" approach to implied confidentiality cases, recognizing a presumption of confidentiality in criminal investigations.<sup>48</sup> However, in its landmark Exemption 7(D) decision in DOJ v. Landano, the Supreme Court effectively reversed all of these cases on this point of evidentiary presumption.<sup>49</sup>

In Landano, the Supreme Court found that it was not Congress' intent to provide for a "universal" presumption or broad categorical withholding under Exemption 7(D);<sup>50</sup> rather, it declared, a "more particularized approach" is required.<sup>51</sup> Under this refined approach, agencies seeking to invoke Exemption 7(D) must prove expectations of confidentiality based upon the "circumstances" of each case.<sup>52</sup> The Supreme Court held

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"[m]ore narrowly defined circumstances, however, can provide a basis for inferring confidentiality").

<sup>48</sup> See, e.g., Nadler v. DOJ, 955 F.2d 1479, 1486 & n.7 (11th Cir. 1992); Parker v. DOJ, 934 F.2d 375, 378 (D.C. Cir. 1991); KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990); Dow Jones & Co. v. DOJ, 917 F.2d 571, 576 (D.C. Cir. 1990); Donovan v. FBI, 806 F.2d 55, 61 (2d Cir. 1986); Ingle v. DOJ, 698 F.2d 259, 269 (6th Cir. 1983); Kimberlin v. Dep't of the Treasury, 774 F.2d 204, 208 (7th Cir. 1985); Parton v. DOJ, 727 F.2d 774, 776 (8th Cir. 1984).

<sup>49</sup> See 508 U.S. 165, 179-80 (1993).

<sup>50</sup> 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 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").

<sup>51</sup> Landano, 508 U.S. at 179-80; see Quiñon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (restating that "[Supreme] Court rejected . . . a broad presumption of confidentiality in favor of a 'particularized approach' that looks to 'factors such as the nature of the crime that was investigated and the source's relation to it' in order to determine whether a promise of confidentiality may be inferred" (quoting Landano, 508 U.S. at 179-80)).

<sup>52</sup> Landano, 508 U.S. at 180; see Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 552 (5th Cir. 2002) (declaring that "implied confidentiality can arise . . . through the specific circumstances of a particular investigation"); Billington v. DOJ, 233 F.3d 581, 585 (D.C. Cir. 2000) (finding that "circumstances under which the FBI receives information might support a finding of an implied assurance of confidentiality"); Hale v. DOJ, 226 F.3d 1200, 1204 (10th Cir. 2000) (holding that "source's reluctance to speak directly with the FBI is a clear sign that the source wanted to remain confidential"); Hale v. DOJ, 99 F.3d 1025, 1030 (10th Cir. 1996) (explaining that inferences of confidentiality "should be evaluated on a case-by-case basis");

that specific showings of confidentiality can be made on a "generic" basis,<sup>53</sup> when "certain circumstances characteristically support an inference of confidentiality."<sup>54</sup>

The Supreme Court cited two "factors": "the nature of the crime . . . and the source's relation to it" as an example of the more narrowly defined circumstances under which confidentiality may be inferred.<sup>55</sup> The courts that have addressed implied confidentiality since the Landano decision have applied these two factors as the primary factors in determining whether implied confidentiality exists.<sup>56</sup> They have also

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see also FOIA Update, [Vol. XIV, No. 3](#), at 10 ("Landano Decision Requires Greater Disclosure").

<sup>53</sup> Landano, 508 U.S. at 179.

<sup>54</sup> Id. at 177.

<sup>55</sup> Id. at 179; see Blanton v. DOJ, 64 F. App'x 787, 790 (D.C. Cir. 2003) (holding that "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"); see also Mays v. DEA, 234 F.3d 1324, 1330-31 (D.C. Cir. 2000) (noting that source does not need to "have any particular relationship to the crime in order for the information he supplies to be deemed confidential," that "Landano plainly contemplates that courts will identify 'generic circumstances' in which an implied assurance of confidentiality fairly can be inferred," and further concluding that "whatever his 'relation to the crime,' an informant is at risk to the extent that the criminal enterprise he exposes is of a type inclined toward violent retaliation").

<sup>56</sup> See Frankenberry v. FBI, 567 Fed. App'x 120, 124 (3rd Cir. 2014) (agreeing that nature of investigation concerning armed robbery and source's relationship to investigation demonstrated withheld information was provided under implied assurance of confidentiality); 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 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, 57 F.3d at 814 (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"); Koch v. USPS, No. 93-1487, 1993 U.S. App. LEXIS 26130, at \*3-4 (8th Cir. Oct. 8, 1993) (finding implied confidentiality based upon Landano's direction to look at nature of crime and witness's relationship to it); Gamboa v. EOUSA, 126 F. Supp. 3d 13, 19-20 (D.D.C. 2015) (finding that nature of drug trafficking offenses and relationship of business entity, third party, and local law enforcement sources to offense supported conclusion of implied confidentiality); Dent v. EOUSA, 926 F. Supp. 2d

recognized that a key consideration is the potential for retaliation against the source, whether based on actual threats of retaliation by defendants or requesters;<sup>57</sup> prior retaliatory acts by perpetrators or against sources;<sup>58</sup> the possibility of reprisals by third parties;<sup>59</sup> the specific dangers faced by prison informants;<sup>60</sup> or the violent or intimidating

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257, 271 (D.D.C. 2013) (opining that "nature of the crime investigated and informant's relationship to it are the most important factors in determining whether implied confidentiality exists").

<sup>57</sup> See, e.g., Meserve v. DOJ, No. 04-1844, 2006 U.S. Dist. LEXIS 56732, at \*30 (D.D.C. Aug. 14, 2006) (concluding that agency properly applied Exemption 7(D) to protect eyewitness statements regarding armed robbery due to threats of harm made); Dohse v. Potter, No. 04-355, 2006 WL 379901, at \*7 (D. Neb. Feb. 15, 2006) (concluding that "in light of the nature of the alleged threats . . . the informant could reasonably be assumed to suffer reprisal if his identity were disclosed"); 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"), appeal dismissed for failure to prosecute, No. 00-6041 (2d Cir. Sept. 12, 2000).

<sup>58</sup> See, e.g., Smith v. FBI, 663 F. Supp. 2d 1, 2 (D.D.C. 2009) (concluding that withholding information under 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 had previously harassed and threatened government informants).

<sup>59</sup> See, e.g., Hale, 226 F.3d at 1204 (stating that "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"); 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).

<sup>60</sup> 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

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(D.D.C. Jan. 14, 1997) (recognizing danger of cooperating with prison or law enforcement officials).

nature of the crime itself.<sup>61</sup> Courts have also found that a possibility of retaliation exists for paid informants,<sup>62</sup> cooperative witnesses,<sup>63</sup> and anonymous sources.<sup>64</sup> Moreover,

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<sup>61</sup> See, e.g., Hodge v. FBI, 703 F.3d 575, 581-82 (D.C. Cir. 2013) (noting that "vicious nature of the crimes" supported FBI's position that there was implied promise of confidentiality); Mays, 234 F.3d at 1331 (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"); Hale, 99 F.3d at 1031 (recognizing that nature of kidnapping and murder crimes support inference of confidentiality when "discrete aspects" of it "make it particularly likely" for source to fear reprisal); Williams v. FBI, 69 F.3d 1155, 1159 (D.C. Cir. 1995) (finding withholding justified based on "risk of retaliation, harassment and bodily harm" tied to "rebellion or insurrection, seditious conspiracy, and advocating overthrow of the government"); Koch, 1993 U.S. App. LEXIS 26130, at \*3-4 (finding withholding proper as to whistleblower who reported another employee's threat to bring grenade in to work because of "nature of alleged threat" and possibility of retaliation); Gamboa, 126 F. Supp. 3d at 20 (concluding it was "reasonable for . . . sources to fear retaliation from [company] employees and/or . . . commercial establishment because the investigation involved drug trafficking and other violent criminal behavior"); 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); Miller v. DOJ, 872 F. Supp. 2d 12, 27 (D.D.C. 2012) (same); Adionser v. DOJ, 811 F. Supp. 2d 284, 300 (D.D.C. 2011) (finding that it was "reasonable to conclude that . . . sources disclosed information in confidence due to the fear of reprisal" because of "violence and risk of retaliation attendant to drug trafficking"); 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)); Wickline v. FBI, 923 F. Supp. 1, 3 (D.D.C. 1996) (finding withholding proper based on violent nature of crime when requester had been convicted of multiple dismemberment murders); Putnam v. DOJ, 873 F. Supp. 705, 716 (D.D.C. 1995) (fearing retribution, FBI properly withheld "names and information provided by relatives and close associates of the victim and of the plaintiff" when former FBI Special Agent pled guilty to first degree manslaughter of informant); Landano v. DOJ, 873 F. Supp. 884, 888 (D.N.J. 1994) (stating on remand from Supreme Court that "violent nature of the crime, the potential involvement of the motorcycle gang, and the broad publicization of the murder persuade the court that an implied assurance of confidentiality is warranted").

<sup>62</sup> See, e.g., Jones, 41 F.3d at 248.

<sup>63</sup> 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).

<sup>64</sup> See, e.g., Ortiz, 70 F.3d at 733-34; Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at \*28 (M.D. Fla. Oct. 1, 1997).

they have recognized that the "danger of retaliation encompasses more than the source's physical safety."<sup>65</sup>

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<sup>65</sup> Ortiz, 70 F.3d at 733 (citing Irons v. FBI, 880 F.2d 1446, 1451 (1st Cir. 1989)); see Grand Cent. P'ship, 166 F.3d at 488 (recognizing that retaliation "may constitute work place harassment, demotions, job transfers or loss of employment"); Council on Am. Islamic Relations, Cal. v. FBI, 749 F. Supp. 2d 1104, 1122 (S.D. Cal. 2010) (concluding 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"), aff'd in part, rev'd in part & remanded on other grounds, 254 F.3d 162 (D.C. Cir. 2001); see also United Techs. Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985) (concluding that "employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality").

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

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<sup>66</sup> 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); Peay v. DOJ, No. 04-1859, 2007 WL 788871, at \*6 (D.D.C. Mar. 14, 2007) (finding implied promise of confidentiality because of violent nature of organized crime/drug investigation); Brunetti v. FBI, 357 F. Supp. 2d 97, 107 (D.D.C. 2004) (inferring confidentiality based on plaintiff's forty-year conviction for Racketeering Influenced and Corrupt Organizations crimes); Pray v. FBI, No. 95-0380, 1998 WL 440843, at \*4-5 (S.D.N.Y. Aug. 3, 1998) (racketeering investigation); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (major racketeering investigation), summary affirmance granted, No. 95-5388, 1997 WL 68539 (D.C. Cir. Jan. 24, 1997); Cudzich v. INS, 886 F. Supp. 101, 107 (D.D.C. 1995) (suspected alien smuggling ring); Landano, 873 F. Supp. at 888 (possible motorcycle gang-related violence); Manna v. DOJ, 832 F. Supp. 866, 876 (D.N.J. 1993) (organized crime activity), aff'd, 51 F.3d 1158 (3d Cir. 1995).

<sup>67</sup> See, e.g., Hale, 226 F.3d at 1204-05; Plunkett v. DOJ, 924 F. Supp. 2d 289, 303 (D.D.C. 2013) (finding 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) (attempted murder); Lewis-Bey v. DOJ, 595 F. Supp. 2d 120, 137 (D.D.C. 2009) (murder of grand jury witness); Kishore v. DOJ, 575 F. Supp. 2d 243, 258 (D.D.C. 2008) (murder for hire); Miller v. DOJ, 562 F. Supp. 2d 82, 123 (D.D.C. 2008) (kidnapping, torture, murder and dismemberment of bodies).

<sup>68</sup> See, e.g., Ibarra-Cortez v. DEA, 36 F. App'x 598, 598 (9th Cir. 2002) (finding implied confidentiality in relation to drug trafficking); Mays, 234 F.3d at 1331 (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); 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); Gamboa, 126 F. Supp. 3d at 20 (concluding it was "reasonable for . . . sources to fear retaliation from [company] employees and/or . . . commercial establishment because the investigation involved drug trafficking and other violent criminal behavior"); 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); Lasko v. DOJ, 684 F. Supp. 2d 120, 134 (D.D.C. 2010) (finding that violence and risk of retaliation attendant to drug trafficking warrant implied grant of confidentiality); Concepcion v. FBI, 606 F. Supp. 2d 14, 42 (D.D.C. 2009) (stating that "given the drug trafficking activity in which plaintiff and his co-conspirators engaged, it is reasonable to conclude that the cooperating witness and confidential source provided information to the

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FBI with an expectation that their identities would not be disclosed"); Fischer, 596 F. Supp. 2d at 49 (promise of confidentiality inferred where foreign authority provided information to FBI in connection with large scale narcotics trafficking investigation).

<sup>69</sup> 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, 908 F. Supp. at 27 (finding that extortion is "such a serious and potentially violent nature that a cooperating source reasonably could expect to be treated as confidential"); Delviscovo, 903 F. Supp. at 3 (finding that extortion "gives rise to . . . inference [of confidentiality] without the need for elaboration").

<sup>70</sup> See Mendoza v. DEA, 465 F. Supp. 2d 5, 13 (D.D.C. 2006) (highlighting that plaintiff was in possession of nine firearms when considering confidentiality for individuals who provided information regarding him); Perrone, 908 F. Supp. at 27 (noting that 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,<sup>71</sup> international terrorism,<sup>72</sup> national security,<sup>73</sup> loan sharking and gambling,<sup>74</sup> armed robbery,<sup>75</sup> bribery,<sup>76</sup> interstate transportation of stolen property,<sup>77</sup> tax

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<sup>71</sup> See, e.g., Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at \*9 (D.D.C. Mar. 30, 2001) (finding implied confidentiality to be established for "confidential informant who reported a possible terrorist threat against the INS Miami District Office"); Blanton v. DOJ, 63 F. Supp. 2d 35, 49 (D.D.C. 1999) (finding implied confidentiality for sources who assisted in investigation of bombing of an African-American church "during a time of great unrest in the South"), on motion for partial reconsideration, 182 F. Supp. 2d 81, 88 (D.D.C. 2002), aff'd, 64 F. App'x 787 (D.C. Cir. 2003).

<sup>72</sup> See Owens v. DOJ, No. 04-1701, 2007 WL 778980, at \*10-11 (D.D.C. Mar. 9, 2007) (finding implied confidentiality arising from risk of violence and retaliation as "[t]errorist bombings that kill large numbers of civilians, even more so than the types of crimes already accorded a categorical presumption by the D.C. Circuit, are violent in nature and implicate a grave risk of retaliation").

<sup>73</sup> See Campbell v. DOJ, No. 89-3016, 1996 WL 554511, at \*9 (D.D.C. Sept. 19, 1996) (finding implied confidential relationship "given the customary trust" that exists for relaying information between nonfederal and foreign law enforcement agencies and the FBI), rev'd on other grounds, 164 F.3d 20 (D.C. Cir. 1998).

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

<sup>75</sup> See Thomas v. DOJ, 531 F. Supp. 2d 102, 111 (D.D.C. 2008) (finding that agency properly applied Exemption 7(D) to protect identities of eyewitnesses who provided information about violent and intimidating armed robbery); Anderson v. DOJ, No. 95-1880, 1999 U.S. Dist. LEXIS 5048, at \*9 n.8 (D.D.C. Apr. 12, 1999) (finding Exemption 7(D) properly applied when witnesses to armed bank robbery provided information during police line-up).

<sup>76</sup> See Melius v. Nat'l Indian Gaming Comm'n, No. 98-2210, 1999 U.S. Dist. LEXIS 17537, at \*17-18 (D.D.C. Nov. 3, 1999) (holding that criminal investigation involving allegations of bribery suggests implied promise of confidentiality).

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

evasion,<sup>78</sup> kidnapping,<sup>79</sup> financial crimes,<sup>80</sup> corruption by state law enforcement officials,<sup>81</sup> passport fraud, and contempt of Congress.<sup>82</sup>

Moreover, implied confidentiality has been found where former members of targeted organizations disclosed self-incriminating information,<sup>83</sup> where sources provided information as a result of plea-bargains,<sup>84</sup> where sources provided information

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<sup>78</sup> See McQueen v. United States, 264 F. Supp. 2d 502, 523 (S.D. Tex. 2003) (holding that diesel tax fraud operation inspired "very real" fear in agency's confidential sources, and then reasoning that "[t]his particular kind of tax fraud – involving big dollars, complex operations, vast numbers of transactions, and many people – is not qualitatively unlike other crimes on the 'categorical list,' such as organized crime, loan sharking and gambling, and bribery").

<sup>79</sup> See Hale, 226 F.3d at 1204-05.

<sup>80</sup> See Giovanetti v. FBI, 174 F. Supp. 3d 453, 457 (D.D.C. 2016) (finding that withholding of information provided by local law enforcement during course of financial fraud investigation appropriate); LaRouche, No. 90-2753, slip op. at 11-12 (D.D.C. Nov. 17, 2000). But see Billington, 233 F.3d at 586 n.7 (stating in dicta that "[w]e have doubts that [LaRouche political organization's] members' participation in financial crimes [after organization publicly disavowed violence], without more, would support an inference that sources received an implied assurance of confidentiality"); Canning v. DOJ, No. 01-2215, slip op. at 11 (D.D.C. Mar. 9, 2004) (reasoning that "prior convictions of members of the LaRouche organization for financial crimes does not rise to the level of creating . . . an implied assurance of confidentiality"); 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).

<sup>81</sup> See Garcia, 181 F. Supp. 2d at 377 (finding implied confidentiality in case involving "investigation . . . into serious allegations of corruption within the state police").

<sup>82</sup> See Schrecker, 74 F. Supp. 2d at 35 (holding "passport fraud and contempt of Congress" are "serious enough crimes to warrant . . . implied confidentiality"). But see Singh v. FBI, 574 F. Supp. 2d 32, 51 (D.D.C. 2008) (holding passport fraud does not establish significant risk of violence or retaliation necessary for implied confidentiality).

<sup>83</sup> See Campbell, 1996 WL 554511, at \*9 (holding that "in instances where former members of organizations which were the target of FBI investigations disclosed self-incriminating information, an 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).

<sup>84</sup> See Homick v. DOJ, No. 98-0557, slip op. at 8 (N.D. Cal. Oct. 27, 2004) (finding that "informant and attorney [names] are properly withheld under Exemption 7(D) due to an inference of confidentiality from the proffer discussion"); Engelking v. DEA, No. 91-0165, 1997 U.S. Dist. LEXIS 1881, at \*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).

in response to a subpoena,<sup>85</sup> where sources provided information to an inspector general during a criminal investigation<sup>86</sup> and where an employee provided information about an employer.<sup>87</sup>

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

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<sup>85</sup> See Gamboa, 126 F. Supp. 3d at 20 (finding that FBI appropriately withheld identity of specific business entity which in response to administrative subpoena supplied FBI with specific information pertaining to proceeds of legal business transaction funded by illegal money).

<sup>86</sup> 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).

<sup>87</sup> See, e.g., Government Accountability Project v. NRC, No. 86-1976, No. 86-3201, 1993 WL 13033518, at \*4 (D.D.C. July 2, 1993) (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").

<sup>88</sup> See, e.g., Billington, 233 F.3d at 585-86 (instructing FBI on remand to "supply evidence that informants predicated their assistance on an implied assurance of confidentiality" where the organization about which information was provided had "publicly disavowed violence"); Neely, 208 F.3d at 467 (remanding with observation that "district court would be well within its discretion to require the FBI . . . to fully shoulder its responsibility – which to date it has not done – to provide specific justifications" for claim of implied confidentiality); Hale, 99 F.3d at 1033 (finding that government's claim of implied confidentiality lacked particularized justification); 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."); King & Spalding LLP v. HHS, 330 F. Supp. 3d 477, 498 (D.D.C. 2018) (finding agency failed to justify its withholding pursuant to 7(D) where court lacked information about source including proximity to alleged misconduct); Hetzler v. Record/Info. Dissemination Section, FBI, 896 F. Supp. 2d 207, 220 (W.D.N.Y. 2012) (determining that information provided by foreign source could not be withheld without additional justification given age of documents); Island Film, S.A. v. U.S. Dep't of Treasury, 869 F. Supp. 2d 123, 137 (D.D.C. 2012) (noting that acts at issue are "economic in nature and not inherently violent" and directing Treasury to supplement affidavit with more details as to why correspondence concerning blocked assets should be withheld on basis of implied confidentiality); 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"); 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

### **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 by the source.<sup>89</sup> The first clause of Exemption 7(D) protects the identity of a confidential source.<sup>90</sup> Courts have recognized that this clause of Exemption 7(D) safeguards not only such obviously identifying information as an informant's name and address,<sup>91</sup> but also all information that would

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to [plaintiff] and his or her knowledge of any alleged activity from which a reasonable fear of retaliation may be found"); DiPietro v. EOUSA, 357 F. Supp. 2d 177, 186 (D.D.C. 2004) (rejecting agency's unsupported assertion of expressed and implied assurances of confidentiality); Raulerson v. Ashcroft, 271 F. Supp. 2d 17, 27 (D.D.C. 2002) (ruling that "dispositive issue . . . must 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 that "FBI's generalized assertion of crimes relating to Communist Party activities is not enough to support . . . 'reasonable assumption'" that sources expected confidentiality); .

<sup>89</sup> [5 U.S.C. § 552\(b\)\(7\)\(D\) \(2012 & Supp. V 2017\)](#).

<sup>90</sup> Id.

<sup>91</sup> See, e.g., Cuccaro v. Sec'y of Labor, 770 F.2d 355, 359-60 (3d Cir. 1985); Piper v. DOJ, 374 F. Supp. 2d 73, 81 (D.D.C. 2005) (protecting name and address).

"tend to reveal" the source's identity,<sup>92</sup> including source symbol numbers,<sup>93</sup> telephone numbers,<sup>94</sup> the time and place of events or meetings,<sup>95</sup> and other information provided by the source that could allow the source's identity to be deduced.<sup>96</sup>

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<sup>92</sup> 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 that 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 \*25 n.15 (D.D.C. Feb. 8, 2002) (withholding cooperating witness' "aliases, date of birth, address, identification numbers, . . . physical description, and [information which sets] forth his or her involvement in other investigations"), summary affirmance granted, No. 02-5247, 2003 U.S. App. LEXIS 1804 (D.C. Cir. Jan. 31, 2003); Lodi v. IRS, No. 96-2095, 1998 WL 419618, at \*1-2 (E.D. Cal. Apr. 16, 1998) (finding entire pages of material properly withheld because release would disclose identity of confidential source); Spirko v. USPS, No. 96-0458, slip op. at 2 (D.D.C. Apr. 11, 1997) (ruling that agency properly withheld location where certain event took place and specific information imparted by informant because release would allow "knowledgeable person to deduce informant's identity"), aff'd on other grounds, 147 F.3d 992 (D.C. Cir. 1998); Ajluni v. FBI, 947 F. Supp. 599, 606 (N.D.N.Y. 1996) (finding information properly withheld where disclosure could result in narrowing sources "to a limited group of individuals"); ; Doe v. DOJ, 790 F. Supp. 17, 21 (D.D.C. 1992) (stating that where source is well known to investigated applicant, agency must protect "even the most oblique indications of identity").

<sup>93</sup> 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)"); Putnam v. DOJ, 873 F. Supp. 705, 716 (D.D.C. 1995) (finding "coded identification numbers, file numbers and information that could be used to identify sources" properly withheld).

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

<sup>95</sup> See, e.g., Halpern, No. 94-365A(F), slip op. at 25-26 (W.D.N.Y. Aug. 31, 2001) (protecting times and places that information was obtained); Accuracy in Media, No. 97-2107, slip op. at 5 (reasoning that "informant may be identified by . . . dates, times, places, events, or names connected with certain cases").

<sup>96</sup> See, e.g., Ibarra-Cortez v. DEA, 36 F. App'x 598, 599 (9th Cir. 2002) (withholding documents where requester "might be able to deduce the identity of the informants because they detail specific events and circumstances"); Hale v. DOJ, 226 F.3d 1200, 1204 n.2 (10th Cir. 2000) (finding that "public dissemination of the documents [supplied by sources] would reveal the[ir] identit[ies]" because "case took place in a small town where most everyone knew everyone else"); Barnett v. U.S. Dep't of Labor, No. 09-146, 2010 WL 985225, at \*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

Accordingly, courts have found that protection for source-identifying information extends beyond information that is merely a substitute for the source's name.<sup>97</sup> For example, to prevent indirect identification of a source, even the name of a third party who is not a confidential source – but who acted as an intermediary for the source in his dealings with the agency – has been protected.<sup>98</sup>

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.<sup>99</sup>

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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); Bullock, 577 F. Supp. 2d at 80 (finding withholding proper where requested information could enable plaintiff to identify confidential source); Billington v. DOJ, 69 F. Supp. 2d 128, 138 (D.D.C. 1999) (finding that "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 law enforcement information where disclosure would "reveal that they have also agreed to provide such information in return" and therefore would "betray these foreign entities' status as confidential sources"), aff'd in pertinent part, vacated in part & remanded on other grounds, 233 F.3d 581 (D.C. Cir. 2000).

<sup>97</sup> 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"); Concepcion v. FBI, 606 F. Supp. 2d 14, 41 (D.D.C. 2009) (finding agency properly withheld identifying information and specific information provided by cooperating witness as "[t]he witness provided 'detailed information that is singular in nature concerning the criminal activities of plaintiff, his associates, and/or other subjects of this investigation,' such that disclosure of the information provided 'could enable others to discern [the witness] identity'" (quoting agency declaration)); Stone v. Def. Investigative Serv., 816 F. Supp. 782, 788 (D.D.C. 1993) (protecting information "so singular that to release it would likely identify the individual").

<sup>98</sup> See Birch v. USPS, 803 F.2d 1206, 1212 (D.C. Cir. 1986); 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"); see also Montgomery v. IRS, 330 F. Supp. 3d 161, 171 (D.D.C. 2018) (finding that "if the IRS does not consistently invoke Glomar, 'requesters will soon be able to determine when [it] is protecting records and when there are no records to protect'" (quoting agency declaration)).

<sup>99</sup> See, e.g., Benavides v. DEA, 769 F. Supp. 380, 381-82 (D.D.C. 1990), rev'd & remanded on procedural grounds, 968 F.2d 1243 (D.C. Cir. 1992), modified, 976 F.2d 751 (D.C. Cir. 1992).

Courts have held that a Glomar response is unavailable when an individual has been identified as a confidential informant at trial.<sup>100</sup>

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"<sup>101</sup> or is compiled by an agency "conducting a lawful national security intelligence investigation."<sup>102</sup> Confidential source information that falls within the broad coverage of this second clause of Exemption 7(D) need not necessarily

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<sup>100</sup> 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); 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).

<sup>101</sup> [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 sources in course of 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 all source-supplied information protectible under Exemption 7(D)'s second clause when source is confidential), summary affirmance granted, No. 97-5246, 1998 WL 202247 (D.C. Cir. Mar. 3, 1998; see also Kuffel v. BOP, 882 F. Supp. 1116, 1125-26 (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").

<sup>102</sup> [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"); Judicial Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at \*9 (D.D.C. Mar. 30, 2001) (finding agency properly withheld information pertaining to "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 the government properly withheld identities and information provided by third parties and non-federal 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").

be source-identifying to be found protectable.<sup>103</sup> For the purposes of this clause, criminal law enforcement authorities include federal agencies' inspector generals.<sup>104</sup> 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)."<sup>105</sup>

In an important elaboration on the definition of a "criminal investigation," courts have recognized that information originally compiled by local law enforcement authorities in conjunction with a nonfederal criminal investigation fully retains its criminal investigatory character when subsequently obtained by federal authorities.<sup>106</sup> In

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<sup>103</sup> 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 the Exemption "establishes two separate categories of exemption: (1) information that would 'disclose the identity of a confidential source,' and (2) information that would 'disclose information . . . [provided by] 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. Attorney, Dist. of Md., 658 F.2d 957, 964 (4th Cir. 1981) (noting that information provided by source in criminal investigation is protected); 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, the second clause of Exemption 7(D) nevertheless allows the defendant to withhold this information"); see also FOIA Update, Vol. XIV, No. 3, at 10 (pointing out breadth of Exemption 7(D) coverage).

<sup>104</sup> See Ortiz v. HHS, 70 F.3d 729, 732 (2d Cir. 1995) (ruling that Exemption 7(D) properly applied when "HHS's Office of Inspector General . . . used [anonymous] letter to launch a criminal investigation"); Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 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" and noting that it is "beyond cavil" that the [FBI and United States Attorney's Office] are 'criminal law enforcement authorities'").

<sup>105</sup> 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)).

<sup>106</sup> 5 U.S.C. § 552(b)(7)(D); see, e.g., Sandoval v. DOJ, 296 F. Supp. 3d 1, (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

addition, protection for source-provided information has been extended to information supplied to federal officials by state or local enforcement authorities seeking assistance in pursuing a nonfederal criminal investigation.<sup>107</sup>

However, in an important limitation on the reach of Exemption 7(D), in Landano the Supreme Court stated that when "institutional" sources – such as local law enforcement agencies and private commercial enterprises – are involved, greater disclosure should occur, because these sources typically provide a "wide variety of information" under circumstances that do not necessarily warrant confidentiality.<sup>108</sup>

### **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.'"<sup>109</sup> As the Court of Appeals for the District of Columbia Circuit has declared, a

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Attorney's office were properly withheld in order to protect "identity of and information provided by a confidential source").

<sup>107</sup> See, e.g., Hopkinson v. Shillinger, 866 F.2d 1185, 1222 (10th Cir. 1989) (protecting state law enforcement agency's request for FBI laboratory evaluation of evidence 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 v. DOJ, 775 F. Supp. 6, 12 (D.D.C. 1991) (finding that disclosure of criminal files provided to FBI by state authorities "would unduly discourage" states from enlisting FBI's assistance), appeal dismissed for failure to timely file, No. 92-5088 (D.C. Cir. Nov. 4, 1992); Payne v. DOJ, 722 F. Supp. 229, 231 (E.D. Pa. 1989) (stating that "requirement is met . . . [when] the documents sought are FBI laboratory and fingerprint examinations of evidence collected by local law enforcement agencies" as part of homicide investigation), aff'd, 904 F.2d 695 (3d Cir. 1990) (unpublished table decision).

<sup>108</sup> 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); 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).

<sup>109</sup> Irons v. FBI, 880 F.2d 1446, 1455 (1st Cir. 1989) (citing FTC v. Grolier, Inc., 462 U.S. 19, 27 (1983)); see also Parker v. DOJ, 934 F.2d 375, 380 (D.C. Cir. 1991) (same); Neely v. FBI,

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."<sup>110</sup> Accordingly, because Exemption 7(D) "mainly seeks to protect law enforcement agencies in their efforts to find future sources,"<sup>111</sup> acts of implied "'waiver' by 'sources' will not automatically prove sufficient to release the [source-provided] information."<sup>112</sup> (See the discussion of this point under Discretionary Disclosure and Waiver, below.)

Additionally, in order 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."<sup>113</sup>

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208 F.3d 461, 466 (4th Cir. 2000) (observing that "statute by its terms does not provide for . . . waiver").

<sup>110</sup> 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); 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").

<sup>111</sup> Irons, 880 F.2d at 1453.

<sup>112</sup> Id. at 1452; see, e.g., Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 567 n.16 (1st Cir. 1992) (holding that "since uncertainty about the precise scope of a waiver might 'dry up' law enforcement sources, [the court] consistently [has] 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, 69 (D.D.C. 1998) (finding that alleged source did not exhibit "complete disregard for confidentiality" by giving newspaper interview); Freeman v. DOJ, No. 92-0557, 1993 WL 260694, at \*4 (D.D.C. June 28, 1993) (ruling that the "fact that federal, state, and local authorities were publicly cooperating in the . . . investigation, or that certain individuals publicly acknowledged that they were 'working closely' with the investigation . . . does not 'manifest complete disregard for confidentiality'"), vacated in other part on denial of reconsideration, No. 92-0557, 1994 WL 35871 (D.D.C. Jan. 26, 1994). 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").

<sup>113</sup> Parker, 934 F.2d at 378; accord Dow Jones & Co. v. DOJ, 917 F.2d 571, 577 (D.C. Cir. 1990); see also Pickard v. DOJ, 713 Fed. 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 tapes obtained through

Thus, "[t]he per se limitation on disclosure under 7(D) does not disappear if the identity of the confidential source becomes known through other means"<sup>114</sup> or because the requester knows the source's identity.<sup>115</sup> Likewise, the protection of Exemption 7(D)

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informant's assistance "unless it is specifically shown that those tapes, or portions of them, were played during the informant's testimony"); 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))); Sellers v. DOJ, 684 F. Supp. 2d 149, 162 (D.D.C. 2010) (same); 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 that Exemption 7(D)'s shield does not necessarily disappear when some fraction of the information requested has come to light).

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

<sup>115</sup> See, e.g., Watters v. DOJ, 576 Fed. App'x 718, 725 (10th Cir. 2014) (rejecting requester's argument based on idea 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 v. Holder, 700 F.3d 246, 253 n. 4 (6th Cir. 2012)); 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, 925 (noting that fact that employee witnesses "could be matched to their statements" does not diminish Exemption 7(D) protection); Radowich v. U.S. Attorney, Dist. of Md., 658 F.2d 957, 960 (4th Cir. 1981) (declaring that Exemption 7(D) applies even when "identities of confidential sources . . . [are] known"); Keeney 630 F.2d at 120 n.2 (ruling that 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"); Crooker v. IRS, No. 94-0755, 1995 WL 430605, at \*6 (D.D.C. Apr. 27, 1995) (stating that "agency may withhold confidential information even if the requester or the public know[s] the source's identity"); Wickline v. FBI, No. 92-1189, 1994 WL 549756, at \*6 n.8 (D.D.C. Sept. 30, 1994) (reiterating that "confidentiality is not waived or revoked when a [requester] already knows the protected names"); Shafmaster Fishing Co. v. U.S., U.S. Coast Coard, 814 F. Supp. 182, 185 (D.N.H. 1993) (stating that source's identity need not be secret to justify withholding information under Exemption 7(D)); Church of Scientology of Texas v. IRS, 816 F. Supp. 1138,

has been found not to be forfeited by "court-ordered and court-supervised" disclosure to an opponent in civil discovery.<sup>116</sup> Moreover, even authorized or official disclosure of some information provided by a confidential source does not open the door to disclosure of any of the other information the source has provided.<sup>117</sup> In this vein, it is well established that

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1161 (W.D. Tex. 1993) (declaring it "irrelevant that the identity of the confidential source is known").

<sup>116</sup> See Glick v. DOJ, No. 89-3279, 1991 WL 118263, at \*4 (D.D.C. June 20, 1991) (finding that disclosure "pursuant to discovery in another case . . . does not waive the confidentiality of the information or those who provided it"); see also Parker, 934 F.2d at 380 (observing that judicial efforts to create "waiver" exception run "contrary to the statute's intent to provide workable rules" (citing Irons, 880 F.2d at 1455-56)); Sinito v. DOJ, No. 87-0814, slip op. at 24 (D.D.C. July 12, 2000) (holding that "[n]o further release of information . . . is warranted" even though "names of certain informants were made a matter of public record through release of civil discovery material"), summary affirmance granted in pertinent part, No. 00-5321 (D.C. Cir. Apr. 11, 2001).

<sup>117</sup> See Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000) (explaining that statute does not provide for 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 at 380)); Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992) (holding that subsequent disclosure of source's identity or of some of 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, 1266 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 fact that someone made public statement concerning incident "does not constitute a waiver of the Bureau's confidential file [because a] . . . press account may be erroneous or false or, more likely, incomplete"); cf. United Techs. Corp. v. NLRB, 777 F.2d 90, 95-96 (2d Cir. 1985) (finding release of informant-related material to party aligned with agency in administrative proceeding in no way diminished government's ability to invoke Exemption 7(D) in response to subsequent request by nonallied party); Adamowicz v. IRS, 672 F. Supp. 2d 454, 476 (S.D.N.Y. 2009) (rejecting argument that Exemption 7(D) protections no longer apply to source after IRS may have inadvertently disclosed source's identity because "privilege belongs to the beneficiary of the promise of confidentiality and continues until he or she waives it" (quoting United Techs. Corp. at 95-96)).

source-identifying and source-provided information remains protected even when some of it has been the subject of testimony in open court.<sup>118</sup>

Consequently, the D.C. Circuit has found that the government is not required even to "confirm or deny that persons who testify at trial are also confidential informants."<sup>119</sup>

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<sup>118</sup> See, e.g., Pickard v. DOJ, 713 Fed. Appx. 609, 610 (D.C. Cir. 2018) (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 was publicly disclosed, so FOIA exemption 7(D) applies), cert. denied, 139 S.Ct. 108 (2018); 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 that "government agency is not required to disclose the identity of a confidential source or information conveyed to the agency in confidence in a criminal investigation notwithstanding the possibility that the informant may have testified at a public trial"); Irons, 880 F.2d at 1454 (recognizing that "[t]here is no reason grounded in fairness for requiring a source who disclosed information during testimony to reveal, against his will (or to have the FBI reveal for him), information that he did not disclose in public"); Kimberlin v. Dep't of the Treasury, 774 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"); 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) (rejecting plaintiff's argument that FBI may not invoke Exemption 7(D) and stating that "[e]ven if the identity of or information provided by a source had been disclosed at trial, for example, a government agency still invokes Exemption 7(D) to protect the source's identity"); Smith v. FBI, 663 F. Supp. 2d 1, 2 (D.D.C. 2009) (determining that plaintiff failed to "carry his burden of identifying with specificity the exact testimony that is duplicated in withheld materials" in order to show that he is entitled to withheld confidential source material); Bretti v. DOJ, 639 F. Supp. 2d 257, 264 (N.D.N.Y. 2009) (noting that "information obtained from a source does not become subject to disclosure" simply because of trial testimony) (citing Scherer v. Kelley, 584 F.2d 170, 176 n.7 (7th Cir. 1978)); Doolittle v. DOJ, 142 F. Supp. 2d 281, 285-86 (N.D.N.Y. 2001) (protecting identities of confidential sources that "prosecutors [had] disclosed . . . in open court during [plaintiff's] sentencing hearing").

<sup>119</sup> Schmerler v. FBI, 900 F.2d 333, 339 (D.C. Cir. 1990) (reasoning that testimony by source does not automatically waive confidentiality because source may be able "'to camouflage his

When an individual has been expressly identified as a confidential source during trial, however, the Court of Appeals for the Ninth Circuit and the District Court for the District of Columbia have both concluded that a Glomar response was unavailable.<sup>120</sup>

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.<sup>121</sup> Courts have also consistently recognized that its protections cannot be lost through the

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true role notwithstanding his court appearance" (quoting Irons v. FBI, 811 F.2d 681, 687 (1st Cir. 1987)); see also Parker, 934 F.2d at 381.

<sup>120</sup> See Pickard v. DOJ, 653 F.3d 782, 787 (9th Cir. 2011) (concluding that 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).

<sup>121</sup> 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, 1470-71 (10th Cir. 1990) (rejecting argument that confidentiality was no longer needed because investigation has ended); Akron Standard Div. of Eagle-Picher Indus. v. Donovan, 780 F.2d 568, 573 (6th Cir. 1986) (examining whether confidentiality existed even though investigation was closed); Church of Scientology, 816 F. Supp. at 1161 (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" under Exemption 7(D)).

mere passage of time.<sup>122</sup> Additionally, unlike with Exemption 7(C),<sup>123</sup> the safeguards of Exemption 7(D) remain undiminished by the death of the source.<sup>124</sup>

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<sup>122</sup> See, e.g., Hulstein v. DEA, 671 F.3d 690, 695 (8th Cir. 2012), (noting that 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 that "it makes no difference in our analysis whether now, in hindsight, the objective need for confidentiality has diminished; what counts is whether then, at the time the source communicated with the FBI, the source understood that confidentiality would attach"); Schmerler, 900 F.2d at 336 (indicating that Exemption 7(D) "contains no sunset provision"); Keys v. DOJ, 830 F.2d 337, 346 (D.C. Cir. 1987) (stating that "'Congress has not established a time limitation for exemption (7)(D) and it would be both impractical and inappropriate for the Court to do so'" (quoting Keys v. DOJ, No. 85-2588, slip op. at 7 (D.D.C. May 12, 1986))); Irons v. FBI, 811 F.2d 681, 689 (1st Cir. 1987) (applying Exemption 7(D) protection to information regarding 1948-1956 Smith Act trials); Brant Constr., 778 F.2d at 1266 n.8 (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); Fitzgibbon v. U.S. Secret Serv., 747 F. Supp. 51, 60 (D.D.C. 1990) (protecting information regarding alleged 1961 plot against President Kennedy by Trujillo regime in Dominican Republic); Abrams v. FBI, 511 F. Supp. 758, 762-63 (N.D. Ill. 1981) (protecting twenty-seven-year-old documents).

<sup>123</sup> [5 U.S.C. § 552\(b\)\(7\)\(C\) \(2012 & Supp. V. 2017\)](#); 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").

<sup>124</sup> See, e.g., Blanton v. DOJ, 64 F. App'x 787, 790 (D.C. Cir. 2003) (rejecting plaintiff's "claim that the death of a confidential source eliminates the applicability of Exemption 7(D)"); McDonnell v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (holding that issue of whether source is "deceased does not extend to the information withheld pursuant to Exemption 7(D)"); Kiraly v. FBI, 728 F.2d 273, 279 (6th Cir. 1984) (finding information provided by deceased source who also testified at trial properly withheld); 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.

### **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.<sup>125</sup> (See the discussion of this provision under Exclusions, below.)

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<sup>125</sup> [5 U.S.C. § 552\(c\)\(2\) \(2012 & Supp. V. 2017\)](#), (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"); see also OIP Guidance: [Implementing FOIA's Statutory Exclusion Provisions](#) (2012, updated 2/21/2019).