ADMINISTRATIVE LAW—FREEDOM OF INFORMATION ACT, EXEMPTION 7D—AGENCIES ARE NOT ENTITLED TO A PRESUMPTION OF CONFIDENTIALITY IN MOST EXEMPTION 7D CLAIMS MADE PURSUANT TO THE FREEDOM OF INFORMATION ACT—*United States Department of Justice v. Landano*, 113 S. Ct. 2014 (1993).

In a formal attempt to guarantee public access to government records, Congress enacted the Administrative Procedure Act of 1946 (APA).[1] As a result of APA abuses and overall dissatisfaction

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[1] Ch. 324, § 3, 60 Stat. 238 (1946) (codified as amended at 5 U.S.C. 552 (1986)). *See generally* 1 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 2.02, at 2-2 to 2-7 (2d ed. 1990). As one commentator observed:

> [I]t was not through political maneuvering or compromises that the need for [the] Act arose. It was a system of secrecy which had, for example, kept secret the memoirs of a Confederate Army general, added a confidentiality statement at the end of a call-in taped weather forecast, declined to give security clearance to a textbook of George Washington's intelligence methods and perpetrated a host of other obscure and absurd witholdings of information from the public. . . . [W]ithout agency attitudes as these were, the best legislative work would have been fruitless.

Id. at 2-6 to 2-7.

The Administrative Procedure Act (APA) permitted the suppression of information if it was in the public's interest, the records related solely to internal agency management and/or for good cause. *See* 5 U.S.C. § 1002 (1964). Specifically, § 1002 provided:

> Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—
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> (A) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) description of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.
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> (B) OPINION AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.
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> (C) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made

with disclosure law,[2] however, Congress passed the Freedom of Information Act (FOIA or Act).[3] From the time of the Act's incep-

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available to persons properly and directly concerned except information held confidential for good cause found.

Id.

The goals of the APA included curtailment of the practice where the agency was sole arbiter of requests for information. HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 224 (1953). It was hoped that the APA would produce a uniform procedure for such requests, particularly for the benefit of the bar. *Id.* The APA further required proof that no other statute blocked the requested information's release and that the information "properly and directly concerned" the inquirer. 1 O'REILLY, *supra*, § 2.02, at 2-3; *see also* DAVID M. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 160 (1981) (citing Congress's enactment of more than 200 statutes relating to the confidentiality of agency information in the post-World War II era); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219-32 (1986) (recounting the APA's development from 1933 to its passage in 1946).

[2] According to one commentator, the broad terms of the APA empowered agencies with a great deal of discretion which resulted in abuse of their statutory powers. CROSS, *supra* note 1, at 228. In a study of federal information law published in 1953, Cross decried the erosion of the APA goal of governmental openness. *Id.* at 224-25. Specifically, Cross criticized Congress's enactment of legislation which, in whole or in part, exempted certain legislative acts from the APA. *Id.* at 225 (citations omitted). The author noted that these exemptions included the Federal Civil Defense Act and the Defense Production Act of 1950. *Id.* (citations omitted). Cross also commented that Congress voided a United States Supreme Court opinion which held that the Immigration and Naturalization Service was an agency governed by the APA. *Id.* (citation omitted). Additionally, Cross observed that the judiciary had played a role in assisting agencies to avoid the APA, citing a Ninth Circuit ruling that the United States Board of Parole was not subject to the Act. *Id.* (citation omitted). Lastly, Cross pointed to another court holding that the APA was inapplicable to the Post Office Department's administrative hearings adjudicating mail fraud. *Id.* (citation omitted).

Congressman John Moss of California initiated the campaign to revise disclosure law. *See* 1 O'REILLY, *supra* note 1, § 2.02, at 2-2, 2-4. From 1955 to 1960, Representative Moss, as head of the Government Information Subcommittee of the House Committee on Government Operations, gathered 17 volumes of transcripts and 14 volumes of reports from a total of 173 hearings on agency disclosure practices. *Id.* at 2-4, 2-5.

[3] 5 U.S.C. § 552 (1966). FOIA was enacted in 1966 as an amendment to § 3 of the APA. Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 762 (1967). Exemption seven of the 1966 version of FOIA provided: "(b) This section does not apply to matters that are— . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552 (1966).

FOIA in its present form provides that agencies shall make available to the public: (1) information regarding internal agency organizations, rules, forms, and procedures through publication in the Federal Register; (2) final opinions, orders, policy statements and interpretations that are not published in the Federal Register and administrative staff materials; and (3) all records reasonably identified and made in accordance with published rules. 5 U.S.C. § 552(a) (1974). Section (a) also contains procedures for setting fees and utilizing the court system to obtain records. *Id.*

For information on FOIA in its various forms, see generally SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (Comm. Print 1975) [hereinafter SENATE COMM.] (detailing legislative

tion, critics charged that FOIA failed to substantially change the preexisting state of disclosure law.[4] Some commentators viewed

history of the 1974 Amendments); Charles P. Bennett, *The Freedom of Information Act, Is it a Clear Public Records Law?*, 34 BROOK. L. REV. 72, 74-81 (1967) (focusing on FOIA subsection (e)); Senator Orrin G. Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. CONTEMP. L. 1, 2-7 (1983) (tracing the history of the debate over the scope of public access to government information); Senator Edward M. Kennedy, *Foreword: Is the Pendulum Swinging Away from Freedom of Information?*, 16 HARV. C.R.-C.L. L. REV. 311, 316 (1981) (defending then-existing FOIA law and opposing substantial change to the law); Patsy T. Mink, *The Mink Case: Restoring the Freedom of Information Act*, 2 PEPP. L. REV. 8, 8 (1974) (criticizing the *Mink* case for undermining the 1966 Act); Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1, 2 (1970) (charging agencies with perversion of the 1966 Act); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 660-61, 683 (1984) (detailing the range of information uncovered by FOIA requests and arguing that individual freedom would be compromised if FOIA failed); Jennifer A. Clemens, Comment, *Freedom of Information Act Exemption Seven is Broadened in* John Doe Agency v. John Doe Corp., 16 J. CORP. L. 963, 963-79 (1991) (discussing the background of FOIA as a prelude to case analysis); Glenn Dickinson, Comment, *The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act*, 59 U. CIN. L. REV. 191, 193-98 (1990) (discussing the history and purposes of FOIA); John K. Hoerster, Note, *The 1966 Freedom of Information Act — Early Judicial Interpretations*, 44 WASH. L. REV. 641, 645 (1969) (charging that early interpretations of the 1966 Act did not carry out legislative intent); John Moon, Note, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157, 1161, 1164 (1985) (applying fundamental contradiction theory, that examines the contradictory desire of citizens to be both informed and protected from information, in order to understand FOIA's function); Kenneth D. Salomon & Lawrence H. Wechsler, Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 151 (1969) (noting the failure of the 1966 Act to achieve its goals); Comment, *The Freedom of Information Act: Access to Law*, 36 FORDHAM L. REVIEW 765, 765-66 (1968) [hereinafter *Access*] (analyzing the 1966 version of FOIA in view of the APA); Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COL. L. REV. 895 (1974) [hereinafter *Seven Year Assessment*] (examining comprehensively the impact of FOIA from 1966 to 1974).

The Supreme Court first took the opportunity in *EPA v. Mink* to contrast the semantic and substantive differences between the APA and FOIA. EPA v. Mink, 410 U.S. 73, 79-80 (1973). The Court noted that § 3 of the APA was especially problematic because of its vagueness. *Id.* at 79. The Court criticized the APA's restrictions, specifically that "'matters of official record'" were available only to those "properly and directly concerned" with the information. *Id.* The Court emphasized that the APA did not provide relief for unfair denial of records. *Id.* In contrast, the Court noted that FOIA was "broadly conceived" and stressed that FOIA eliminated the "properly and directly concerned" requirement. *Id.* at 79, 80. Instead, the Court noted that throughout FOIA official information was to be provided "to the public" and "for public inspection." *Id.* The Court explained that FOIA's nine exemptions were exclusive and were there to provide "concrete, workable standards" for determining whether materials should be withheld. *Id.* Further, the Court explained, FOIA gave citizens a "speedy remedy" in the district court which had de novo review power. *Id.* Moreover, the Court observed, the burden was on the government to justify non-disclosure. *Id.* (citation omitted). Failure to comply with the district court's orders, the Court explicated, would be met with contempt proceedings. *Id.* See *infra* notes 33-38 and accompanying text for a discussion of *Mink*.

[4] *See* Salomon & Wechsler, *supra* note 3, at 162-63 (asserting that the Act failed to

the Act as an important component to a democratic society, despite its prohibitive administrative costs.[5] Others, however, considered openness in government records as a hindrance to the government's ability to protect the public.[6] Congress provoked

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substantially change disclosure law and arguing that the combination of FOIA's vagueness, the narrow interpretation of the statute contained in an Attorney General memorandum, a House Committee on Government Operations report, and the federal judiciary's adoption of those interpretations all resulted in the statute's failure); Hoerster, *supra* note 3, at 685 (arguing that FOIA left disclosure largely to agency discretion, as did the APA); Bennett, *supra* note 3, at 74 (criticizing the Act's revisions for failing to alleviate the APA's imprecision); Joan M. Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1261-62 (1970) (proffering the view that FOIA did not meet its advocates' expectations due to agencies' manipulation of the ambiguous exemptions).

Ralph Nader claimed that the Act's exemptions provided loopholes by allowing agencies a great amount of discretion which fostered abuse. Nader, *supra* note 3, at 4. The author explained that even in the absence of agency discretion, various tactics were employed to prevent the release of information. *Id.* at 5-13. Specific examples of abuse cited by Nader included the disappearance of materials on pesticides from the Department of Agriculture's library and the National Highway Safety and Transportation Board's outright denial of knowledge of a report, which had been privately released to General Motors and concerned possible carbon monoxide leakage in General Motors cars. *Id.* at 10-11.

Another commentator noted that the same provisions and legislative history of the Act were used to support both broad and narrow interpretations. *See* Moon, *supra* note 3, at 1185. The author suggested that the malleability of the statute's terms allowed agencies to manipulate the interpretation of the Act's provisions. *Id.* According to the author, this analysis showed that the Act produced holdings tending to mirror the subjective views of advocates and the judiciary and therefore failed to adequately balance societal interests. *Id. See generally* Davis, *supra* note 3, at 761 (criticizing FOIA's unclear language and poor drafting).

[5] Wald, *supra* note 3, at 650. Judge Wald, United States Court of Appeals for the District of Columbia Circuit, noted that since the Act's inception, conflicting estimates placed government costs on information request processing at anywhere from $47 to $250 million annually. *Id.* at 660. The author put that figure into perspective, however, by comparing it to the government's annual expenditure of nearly $100 million on military bands. *Id.* at 665 (citation omitted). Additionally, the author argued that the government's interests in secrecy and the general need for government accountability were protected under FOIA. *Id.* at 664; *see also* Moon, *supra* note 3, at 1159 (explaining that FOIA balanced society's incongruous desire for self-sufficiency against its desire for community). *But see infra* notes 10 & 54 (detailing the Reagan administration's 1986 amendment of the Act that made FOIA even more restrictive).

[6] *See* Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 583 (1986). The acquisition of knowledge, the author explained, is "sometimes a bad thing." *Id.* Benjamin DuVal, Project Director, American Bar Foundation, further articulated, for example, that disclosure of foreign policy information should be foreclosed where its release could potentially harm military plans and political negotiation. *Id.* at 668. Concerned about domestic issues, the author claimed that the risk that undercover agents' and informants' identities would be revealed could subject them to harm and neutralize their effectiveness. *Id.* at 669. The author posited that some of the functions served by secrecy are: protecting international relations, preserving privacy, and fostering beneficial social conduct. *Id.* at 669-70. *But see*

further debate with its 1974 amendments to the Act,[7] which included the confidentiality provisions of Exemption 7D.[8] Exemption 7D allowed information contained in an investigatory record obtained from confidential sources for law enforcement purposes to be withheld if it would disclose the source's identity.[9] After many years of controversy over the scope of Exemption 7D, FOIA was again amended in 1986 to make the provision more restrictive.[10]

Kennedy, *supra* note 3, at 314 (asserting that since FOIA's inception, the disclosure of an informant's identity had not resulted in a single incidence of harm).

7 *See* Larry P. Ellsworth, *Amended Exemption 7 of the Freedom of Information Act*, 25 AM. U. L. REV. 37, 39 (1975) (concluding that Congress, in passing the amendments, balanced the benefits of broader disclosure against the added burden to agencies); Ralph Nader, *New Opportunities for Open Government: The 1974 Amendments to the Freedom of Information Act and the Federal Advisory Committee Act*, 25 AM. U. L. REV. 1, 1 (1975) (asserting that the amendments represented an attempt to prevent administrative agency circumvention of the regulatory process); *Seven Year Assessment*, *supra* note 3, at 943-48 (analyzing case law in an attempt to reconcile the ambiguity of subsection (b)(7) in both its original and amended form). *But see* Davis, *supra* note 3, at 764, 766, 811 (advocating extensive use of executive privilege to avoid the Act, supporting a judicial balancing of interests test, and proposing amendments to FOIA). For the text of FOIA's 1974 Amendments, see *infra* note 44.

8 5 U.S.C. § 552 (b)(7)(D) (1974).

9 *Id.* Congress, according to one commentator, intended the exemption to cover both criminal and civil law enforcement. 2 O'REILLY, *supra* note 1, at § 17.02 (citation omitted). Further, Exemption 7D precluded the Act's application to criminal investigatory records compiled for law enforcement purposes in order to exclude confidential information provided by a confidential source. 5 U.S.C. § 552 (b)(7)(D) (1974); *cf.* 5 U.S.C. § 552 (b)(7) (1966) (omitting specific exemption of confidential sources in the 1966 statute). *See generally* Note, *FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations*, 65 MINN. L. REV. 1139, 1156-62, 1165 (1981) (analyzing how courts have applied Exemption 7 to unlawful FBI investigations relating to domestic intelligence and proposing that the FBI be required to demonstrate a nexus between each document withheld and a lawful investigatory purpose).

10 5 U.S.C. § 552 (b)(7)(D) (1986); *see* Hatch, *supra* note 3, at 17 (proposing that modifications to the 1974 Act counteract confidential sources' purported fears that their identities would be revealed and the dilemma of law enforcement in remedying that concern); Kennedy, *supra* note 3, at 314 (discussing Congress's deliberations regarding the 1974 Act, which could potentially restrict the statute).

Congress subsequently amended FOIA's Exemption 7 in 1974 and 1986. *See* 5 U.S.C. § 552(b)(7) explanatory notes (1974); 5 U.S.C. § 552 historical and statutory notes (Supp. 1986). The 1986 Amendments to § (b)(7) provided in pertinent part:

> (b) This section does not apply to matters that are — . . . (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) 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

Recently, in *United States Department of Justice v. Landano*,[11] the United States Supreme Court articulated that agencies were not entitled to a presumption of confidentiality in Exemption 7D claims, and that an individualized approach was the appropriate method to adjudicate most of these claims.[12] The Court decided that an approach examining, among other things, the type of crime and the source's link to the crime, would allow a court enough facts to justify the government's inference of confidentiality.[13]

Vincent James Landano was tried and convicted of felony murder for the 1976 shooting death of Newark police officer John Snow.[14] As part of his appeal,[15] Landano submitted a FOIA disclosure request[16] with the Federal Bureau of Investigation (FBI) de-

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> a record or information compiled by 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, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Id.

[11] 113 S. Ct. 2014 (1993).

[12] *Id.* at 2023.

[13] *Id.*

[14] Landano v. United States Dep't of Justice, 751 F. Supp. 502, 504 (D.N.J. 1990), *aff'd in part and rev'd in part*, 956 F.2d 422, 423 (3d Cir. 1992), *vacated*, 113 S. Ct. 2014, 2024 (1993). On August 13, 1976, Officer Snow was shot by one of two gunmen during a robbery of the Hi-Way Check Cashing Service in Kearny, New Jersey. *Id.* A grand jury indicted Vincent Landano along with Victor Forni, whose file Landano later requested from the Federal Bureau of Investigation (FBI), and two other men. *Id.* On May 17, 1977, Landano was found guilty of felony murder and other crimes committed in connection with the robbery. *Id.*

[15] In an effort to overturn his conviction, Landano filed an application for federal habeas corpus relief. Landano v. Rafferty, 670 F. Supp. 570 (D.N.J. 1987), *rev'd*, 897 F.2d 661 (3d Cir.) (en banc), *cert. denied*, 498 U.S. 811 (1990).

In the years following his conviction, Landano accused the Hudson County Prosecutor of wrongfully concealing exculpatory evidence that was essential to his defense. *Id.* at 575. Landano based his claim on the 1982 recantation testimony of a key government witness, Raymond Portas. *Id.* at 576. Portas claimed that despite his failure to initially identify Landano, the Hudson County Prosecutor's Office influenced Portas to identify him in a photographic lineup eight months later and just ten days prior to trial. *Id.* at 576-77. Recently, the New Jersey Superior Court, Appellate Division, reversed Landano's conviction on the grounds of prosecutorial misconduct and remanded for a new trial. Richard Pliskin, *State's Options Narrow After* Landano *Remand*, 136 N.J. L.J. 861, 861 (Feb. 28, 1994).

[16] Landano also filed a motion for a new trial based on the *Brady v. Maryland* prohibition against a prosecutor's withholding of exculpatory evidence (Brady claim) concerning the nondisclosure of information surrounding Portas's failure to identify

manding release of all files relating to the murder.[17] The FBI released only a substantially redacted portion of the requested file.[18]

In response to the paucity of information provided, Landano brought suit in the Federal District Court of New Jersey to enjoin the FBI from withholding the files.[19] Addressing the government's Exemption 7D claim, the district court permitted the FBI to withhold information leading to the identification of confidential sources or undercover agents.[20] The court noted that it would

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Landano. *Landano*, 670 F. Supp. at 576-77 (citing Brady v. Maryland, 373 U.S. 83 (1963)).

In *Brady v. Maryland*, the Supreme Court ruled that, regardless of the prosecution's motives, suppression of exculpatory evidence requested by a criminal defendant violated his due process rights. *Brady*, 373 U.S. at 87. In *Brady*, the defendant and a companion had been convicted of first-degree murder and sentenced to death. *Id.* at 84. Before the trial, Brady requested all statements made by his co-defendant. *Id.* At trial, Brady alleged that his companion committed the actual murder. *Id.* Brady did not receive his co-defendant's statement, which validated his story, until after the affirmation of his conviction. *Id.* On appeal, the Supreme Court held that suppression of a requested statement favorable to the accused violated the Due Process Clause of the Fourteenth Amendment where the evidence was "material" to conviction or sentencing. *Id.* at 86, 87. *See generally* Nicholas A. Lambros, Note, *Conviction and Imprisonment Despite Nondisclosure of Evidence Favorable to the Accused by the Prosecution: Standard of Materiality Reconsidered*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 103 (1993) (analyzing the *Brady* doctrine and current standards on nondisclosure affecting a defendant's conviction).

17 *Landano*, 751 F. Supp. at 504. On September 30, 1988, Landano requested all FBI information related to the murder of Police Officer John Snow (Snow request) from the FBI Field Office in Newark, New Jersey. *Id.* On January 10, 1989, Landano also requested the FBI file on co-defendant Victor Forni. *Id.* Forni initially contested Landano's request for his file, but later authorized release of the file prior to the circuit court's final decision. *Id.* Therefore, the district court solely ruled on the Snow request. *Id.*

18 *Id.* On May 8, 1990, 19 months after Landano's initial request, the FBI responded by releasing 324 redacted pages from a 726-page file. *Id.* Of the pages given, the names of sources and a significant number of passages were deleted. *Id.* The FBI defended its denial of the information by claiming Exemption 7D. *Id.* at 505. The Department of Justice also raised exemptions contained in § 552 (b)(2), (b)(6), and (b)(7)(C). *Id.*

19 *Id.* at 504. Judge Sarokin, ruling on Landano's motion for summary judgment, noted that courts were required to examine FOIA claims *de novo*. *Id.* at 505 (citing 5 U.S.C. § 552 (a)(4)(B)). The government, the judge stated, had the burden of proving that the withheld information belonged within a statutory exemption. *Id.* The judge further explained that courts had to adhere to the strong statutory presumption in favor of disclosure. *Id.* (citation omitted).

20 *Id.* at 508. Throughout its decision, the district court relied upon a recent Supreme Court ruling that discussed an Exemption 7C claim. *Id.* at 505-08 (citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)). *See supra* note 3 for the text of Exemption 7C. Applying the *Reporters Committee* approach of balancing the public's interest in the requested information against the individual's privacy interest ("categorical balancing"), the district court

grant an exemption of nondisclosure to all other information only after making a case-specific evaluation.[21]

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allowed the government to withhold information should there be a realistic risk that an FBI informant or undercover agent's identity would be revealed. *Landano*, 751 F. Supp. at 508 (citation omitted). For any other information, the court required the FBI to provide reasons for nondisclosure on a case-by-case basis. *Id.* In a later opinion, the court clarified its position by stating that the government's proposal of extending *Reporters Committee* to exempt *all* informers who supply the FBI with information went against the grain of FOIA's purpose. Landano v. Dep't of Justice, 758 F. Supp. 1021, 1025 (D.N.J. 1991) (emphasis added).

In *Reporters Committee*, a CBS news correspondent and the Reporters Committee for Freedom of the Press sought Charles Medico's "rap sheet," an FBI compilation of his criminal record, on the grounds that the sheet contained public knowledge. *Reporters Committee*, 489 U.S. at 751, 757 (citation omitted). The Supreme Court reasoned that the language and legislative history of Exemption 7C evidenced a broader standard for evaluating invasion of privacy claims than did other provisions in the Act. *Id.* at 756 & n.9 (citations omitted). The Court opined that Exemption 7C required a balancing of the public's interest in obtaining the information against the individual's privacy interest in maintaining rap sheet confidentiality. *Id.* at 762.

The Court began its analysis by finding that the common law meaning of privacy supported an individual's right to control information regarding himself. *Id.* at 763. Addressing FOIA, the Court observed that the Act's terms protected private citizens from the disclosure of personal information held by the government. *Id.* at 765-66 & n.18 (citation omitted). Lastly, the Court explained that Congress's policy to protect computerized personal information, as demonstrated in the Privacy Act, was relevant to the Court's evaluation of the privacy interest contained in rap sheets. *Id.* at 766 (citations omitted). Even though the events contained in a rap sheet were not considered private, the Court held that the privacy interest in a rap sheet itself was substantial. *Id.* at 770-71 (citation omitted).

The Supreme Court recognized the need for "categorical decisions" when information could appropriately be classified in a particular way, rendering individual review unnecessary. *Id.* at 776. Stating that a strong privacy interest in rap sheet information was always present, the Court held that rap sheets could be categorically withheld from the public. *Id.* at 780. Such bright-line rules, the Court explained, would prevent ad hoc decisionmaking. *Id. But see* Dickinson, *supra* note 3, at 208-09 (claiming that the Supreme Court's decision in *Reporters Committee* was not strongly supported by judicial precedent and served to camouflage the Court's narrowing of the personal privacy inquiry). *See also* Sean E. Andrussier, *The Freedom of Information Act in 1990: More Freedom for the Government; Less Information for the Public*, 1991 DUKE L.J. 753, 755 (advancing that lower courts have broadly interpreted *Reporters Committee* to other exemptions despite opposing legislative history requiring narrow interpretation of FOIA exemptions).

[21] *Landano*, 751 F. Supp. at 508. Due to the government's failure to show specific reasons for nondisclosure, the court ordered that information not related to informants or undercover agents be released to Landano. *Id.* Additionally, the court rejected the need for an in camera investigation, authorized by § 552 (a)(4)(B), by reasoning that the drawbacks of in camera review outweighed its usefulness. *Id.* at 508-09. A detailed description of the disputed documents (*Vaughn* index), the court held, could sufficiently enable the courts to decide these matters. *Id.* at 509.

For a discussion of the *Vaughn* index, see Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In *Vaughn*, Robert G. Vaughn, a law professor, sought disclosure of evaluations of federal personnel management and other reports for use in his research on the Civil Service Commission. *Id.* at 821-22. The Bureau of Personnel Management refused to tender the reports, thus necessitat-

The United States Court of Appeals for the Third Circuit affirmed the lower court's analysis of the Exemption 7D claim.[22] Relying on the exemption's legislative history, the circuit court explained that confidentiality could be reasonably inferred even if it was not expressly articulated.[23] The court emphasized that the exemption's purpose was not to protect the source's identity, but to ensure the ability of law enforcement agencies to procure information from private sources.[24] The court interpreted the statute to

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ing Vaughn's FOIA action. *Id.* at 822-23. The Civil Service Commission responded to the action by filing affidavits which concluded that the documents were not covered by FOIA. *Id.* at 823. The lower court accepted the government's affidavit and granted the motion for summary judgment. *Id.* The court explained that procedures exisiting at the time violated Congress's intent to place the burden of justification for nondisclosure on the agency. *Id.* at 825. Under these procedures, the court explained, the government only had to state that the information fell under an exemption without giving the requester any information to contest the government's characterization. *Id.* at 825-26. The court asserted that this would encourage agencies to claim the broadest exemptions and even prodded agencies to let the decision fall on the judiciary. *Id.* at 826. Therefore, the court required government agencies to produce an index stating with particularity what sensitive information is contained within a file and the relevant FOIA exemptions that apply (a *Vaughn* index). *Id.* at 826-27. The court expressed the hope that its decision would effect a change in agency disclosure practices so that agencies would voluntarily create procedures to more easily distinguish between disclosable and nondisclosable information. *Id.* at 828; *see* Recent Case, 87 HARV. L. REV. 854, 858 (1974) (asserting that the *Vaughn* index procedure could leave the requester with only enough information to formulate arguments too general to be of assistance to the court, thus leaving the court with the responsibility of determining exemption claims) (citation omitted)).

22 Landano v. United States Dep't of Justice, 956 F.2d 422, 436 (3rd Cir. 1992), *vacated*, 113 S. Ct. 2014, 2024 (1993).

23 *Id.* at 433 (citation omitted). The court explained that the 1986 Amendments exempted information that "*could* reasonably be expected to disclose" the confidential source. *Id.* (emphasis added). The court acknowledged that Congress had changed the wording of the statute from records that "*would* disclose" a confidential source's identity. *Id.* (emphasis added). The court posited that this semantic difference lessened the agency's burden in claiming Exemption 7D. *Id.*

Analyzing the Amendments' legislative history, the court observed that the Conference Committee specifically chose the term "confidential source" rather than the term "informer." *Id.* The 1986 Amendments, the court additionally noted, failed to define "confidential source" with any more clarity than the 1974 Amendments. *Id.* The court emphasized, however, that Congress gave no indication that every person interviewed in the course of a criminal investigation be considered a confidential source. *Id.* The court explained that the term was meant to clarify that confidential sources included not only undercover agents and paid informants, but also "citizen volunteers." *Id.* (citation omitted). "Citizen volunteers," the court defined, were those who provided information under an implied or express assurance of confidentiality and were entitled to receive the same protection as paid informers. *Id.*

24 *Id.* at 431. The court emphasized that under Exemption 7D an agency could withhold not only an informant's identity, but also any information given by that informant. *Id.* Comparing Exemption 7D to 7C, the court noted that the difference between the two was that 7D did not require any balancing of interests, whereas 7C did. *Id.* Rather, the court enunciated, a finding of confidentiality would foreclose

require the FBI to establish, with only a "minimum evidentiary showing," an assurance of confidentiality to the source.[25] However, the Third Circuit rejected a presumption of confidentiality in witness statements for every criminal investigation.[26] Lastly, the court rebuffed the proposed in camera[27] investigation to establish a source's confidentiality, because it improperly shifted the government's burden of proof onto the judiciary.[28]

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disclosure under 7D despite any strong public policy in favor of its release. *Id.* Underlying the rule, the court explained, was Exemption 7D's purpose to protect law enforcement's ability to procure the help of others in obtaining important information. *Id.*

25 *Id.* at 433. The issue in this matter, the court posited, was what justified classifying a source as "confidential." *Id.* The court opined that the government's burden could be met by showing that there was a "rational inference" that the informant fell within Congress's "confidential source" definition. *Id.* The court reasoned that the government was not afforded a presumption by only having to establish a minimum evidentiary showing to support its inference of confidentiality. *Id.* at 433-34. The court posited that Congress most likely intended an assurance that the agency would not disclose the source unless such disclosure was determined to be necessary to effectuate the agency's law enforcement objectives. *Id.* at 434. Reciting Third Circuit precedent from *Lame v. United States Department of Justice*, the court stated that the government had to submit a detailed affidavit explaining the circumstances of the source's assurance of confidentiality. *Id.* at 434-35 (citing Lame v. United States Dep't of Justice (*Lame I*), 654 F.2d 917, 923, 928 (3rd Cir. 1981)). *Compare Lame I*, 654 F.2d at 923, 928 (explaining affidavit requirements) *with Vaughn*, 484 F.2d at 826-27 (explaining index requirements). *See supra* note 21 (outlining requirement of a *Vaughn* index submission to court).

26 *Landano*, 956 F.2d at 434-35 (citations omitted). Although the court of appeals acknowledged that many circuits had adopted this presumption, the court found itself bound by its prior decision in *Lame I*. *Id.* at 434 (citing *Lame I*, 654 F.2d at 929 (citations omitted)). In *Lame I*, the plaintiff requested forms that related to the FBI's investigation of two Pennsylvania legislators. *Lame I*, 654 F.2d at 919. The forms, the court explained, were employed by the FBI to record statements that could later be used as testimony. *Id.* The *Lame I* court evaluated samples of the disputed forms in an in camera proceeding and found the government's minimal explanation for the need for confidentiality inadequate. *Id.* at 928. The court explained that the government's justifications for exemption from disclosure had to be individually asserted and accordingly remanded for further proceedings. *Id.* at 928-29. *Contra* Conoco Inc. v. United States Dep't of Justice, 687 F.2d 724, 730 (3d Cir. 1982) (requiring agencies only to "identify the document and state that the information was furnished by a confidential source" without a showing that it agreed to hold the information in confidence); *but see* Keys v. United States Dep't of Justice, 830 F.2d 337, 345 (D.C. Cir. 1987) (asserting that *Conoco* "made no suggestion of readiness to accept such an assertion automatically in the face of contrary evidence").

27 In camera is defined as: "In chambers; in private. A judicial proceeding is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom." BLACK'S LAW DICTIONARY 760 (6th ed. 1990).

28 *Landano*, 956 F.2d at 436. The court explained, "[w]hile it is clearly appropriate for an agency to so tender its files [in camera], it cannot through such a tactic require the court to do its homework for it." *Id.* The court distinguished this holding from *Lame II*, which permitted an in camera inspection, by emphasizing that the govern-

The United States Supreme Court granted certiorari[29] to determine whether the government was entitled to a presumption of confidentiality[30] for any source providing information to the FBI relating to a criminal investigation.[31] The Court interpreted the exemption to require individualized review and ruled that a presumption of confidentiality was not appropriate in all cases.[32]

In *EPA v. Mink*,[33] the Supreme Court's first significant opinion on FOIA, the Court severely limited the scope of the Act.[34] Congresswoman Patsy Mink, the plaintiff, sought information on underground nuclear testing,[35] which had been withheld by the Executive Branch for purported national security reasons.[36] The Court held that an Executive Order merely designating documents[37] as "top secret" justified withholding the information.[38]

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ment in that case had submitted an in camera affidavit with sufficient detail to enable the court to render its decision. *Id.* (citing Lame v. United States Dep't. of Justice (*Lame II*), 767 F.2d 66 (3d Cir. 1985)).

29 United States Dep't of Justice v. Landano, 113 S. Ct. 51 (1992).

30 The Court opined that the meaning of the term "confidential" was the one employed in everyday usage. United States Dep't of Justice v. Landano, 113 S. Ct. 2014, 2020 (1993). *See infra* notes 74-78 (explaining the *Landano* Court's reasoning concerning the word "confidential").

31 *Landano*, 113 S. Ct. at 2017.

32 *Id.* at 2022-24. Although the Court found that it was unreasonable to assume that all FBI source information was confidential, the Court opined that some generic circumstances would support such a presumption. *Id.* at 2023. *See infra* notes 80-81 (discussing situations where such a presumption might be warranted).

33 410 U.S. 73 (1973).

34 *Id.* at 81-84.

35 *Id.* at 75. Congresswoman Patsy Mink began her quest after a newspaper article appeared reporting that President Nixon had been given conflicting reports on the potential impact of future nuclear testing. *Id.* Shortly after the article's publication, the Congresswoman sent a message to the President requesting immediate release of the reports. *Id.* When her request was denied, Congresswoman Mink, joined by many of her colleagues, brought a FOIA action to obtain the reports. *Id.* Mink was opposed to testing in the seismically active Aleutian islands off Alaska because she feared that such testing would cause ecological harm in Hawaii. Mink, *supra* note 3, at 8-9.

36 *Mink*, 410 U.S. at 74-75. The government claimed that FOIA Exemptions (b)(1) and (b)(5) justified the withholding. *Id.* The Court recited that Exemption (b)(1) exempted materials "'specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.'" *Id.* at 74 (quoting 5 U.S.C. § 552 (b)(1) (1966)). Exemption (b)(5), the Court enunciated, allowed withholding of "'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.'" *Id.* (quoting 5 U.S.C. § 552 (b)(5) (1966)).

37 Representative Mink asserted that the Court erred greatly by interchanging "documents" with the "matters" that the documents contained. *See* Mink, *supra* note 3, at 19. The Congresswoman argued that the Act specified that only "matters" could be exempted from disclosure, not entire documents. *Id.* The Act, Mink asserted, was intended to curb the former practice of using Executive Orders to classify entire documents that were only in need of selective redaction. *Id.* at 74-75; *see also Mink*, 410

Against a backdrop of the circuit courts' inconsistent interpretations of Exemption 7,[39] the District of Columbia Circuit issued a series of decisions severely limiting the public's access to information under FOIA.[40] As a result of the negative reception to these

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U.S. at 84 (designating matters as "Top Secret" and "Secret"). Further, in *FBI v. Abramson*, Justice White, writing for the majority, clarified that the statute required agencies to delete confidential information and leave non-confidential information intact when releasing documents. FBI v. Abramson, 456 U.S. 615, 626 (1982). The statute, the Justice explained, did not permit agencies to prevent disclosure of an entire file simply because one portion of it contained confidential material. *Id.* (citation omitted). See *infra* notes 47-52 and accompanying text for a discussion of the *Abramson* decision.

38 *Mink*, 410 U.S. at 84. In reaching its decision, the Court found it untenable that FOIA would allow a citizen, through judicial review, to challenge the Executive's judgment in document classification. *Id.* Additionally, the Court held that Exemption 1 did not authorize an in camera review so that the Court could decide whether passages were "secret" or "nonsecret." *Id.* The Court clarified that although in camera inspection was permissible in some instances, it was not necessary in every case. *Id.* at 93. Thereafter, the Court remanded the case. *Id.* at 97.

Criticizing the Court's decision, Representative Mink asserted that the APA was replaced by FOIA because the APA permitted too much executive discretion. Mink, *supra* note 3, at 14. The Executive Branch, the Congresswoman feared, could use the *Mink* decision to legitimize the reappearance of discretionary Executive Orders permitting document suppression. *Id.* at 19. In light of the Act's history to curb such discretion, the author found it difficult to understand the Court's misinterpretation of the statute, which would effectively result in furthering the Executive Branch's independence in deciding the standards for information release. *Id.* at 17-18. Representative Mink stated: "It seems to this writer that the majority opinion went to ridiculous lengths to arrive at some fabricated interpretation of the Act." *Id.* at 17. This discretion was so contrary to FOIA's purposes, Mink asserted, that it empowered the government to designate even the Manhattan telephone book as top secret. *Id.* at 18. Lastly, Mink asserted that of the branches of government, the Supreme Court alone had arrived at this "extreme and undemocratic interpretation" of the Act. *Id.* at 19.

39 *Compare* Frankel v. SEC, 460 F.2d 813, 817 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972) (applying the exemption even after termination of enforcement proceedings) *and* Evans v. Department of Transportation, 446 F.2d 821, 824 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (reading exemption broadly to protect source of information that was over a decade old) *with* Wellford v. Hardin, 444 F.2d 21, 23, 25 (4th Cir. 1971) (strictly construing the statute so that records of past administrative enforcement actions were not covered by the exemption). *See also* John B. Warden, Note, 51 TEX. L. REV. 119, 120 (1973) (asserting that imprecision of the exemption's wording caused courts to produce differing interpretations).

40 *See, e.g.*, Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 372 (D.C. Cir. 1974) (denying the release of a report on segregation in northern schools to a civil rights organization, on Exemption 7 grounds); Aspin v. Department of Defense, 491 F.2d 24, 24-25 (D.C. Cir. 1973) (preventing disclosure, partially on Exemption 7 grounds, of the army's report on the My Lai massacre to Representative Les Aspin).

In *Ditlow v. Brinegar*, the court presumed that the mere labelling of a file as an investigatory record was sufficient reason to deny public access to the information. Ditlow v. Brinegar, 494 F.2d 1073, 1074 (D.C. Cir.) (per curiam), *cert. denied*, 419 U.S. 974 (1974). The *Ditlow* court declared that its role was to refrain from second-guess-

decisions,[41] congressional disapproval of the 1966 Act's application,[42] and in light of the Watergate scandal,[43] Congress passed the

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ing Congress's intent to exempt files that were merely labelled as "investigatory." *Id.* The court refused to consider the requester's arguments that the government would not be injured if the documents were released. *Id.* Therefore, the circuit court held that because the documents were clearly classified as "investigatory files compiled for law enforcement purposes," the exemption automatically attached. *Id.* Despite the district court's finding that there was no concern of revealing confidential sources or premature disclosure, the court of appeals held that an automobile manufacturer's report submitted to the government was exempt. *Id.* at 1074 & n.2.

In *Weisberg v. United States Department of Justice*, a journalist, researching the assassination of John F. Kennedy, requested various analyses on metal and bullet fragments. Weisberg v. United States Dep't of Justice, 489 F.2d 1195, 1196-97 & nn.1, 3 (D.C. Cir. 1973) (en banc), *cert. denied*, 416 U.S. 993 (1974). The journalist asserted that because there was no federal law prohibiting a presidential assassination at the time of the President's murder, only the State of Texas had jurisdiction over the investigation. *Id.* at 1197 (citation omitted). The reporter claimed that because a federal law was not violated, the FBI materials were not compiled for a law enforcement purpose, and he was therefore entitled to the materials as a matter of law. *Id.* at 1197-98. Denying the journalist's requests, the court held that the combination of the investigatory nature of the documents and their compilation for law enforcement purposes, justified the affirmation of the district court's order exempting the files from disclosure on Exemption 7 grounds. *Id.* at 1197, 1198, 1203 (footnote omitted).

[41] Senator Phillip Hart, who viewed the decisions as a "stone wall" preventing public access to information, led the movement in the Senate to amend Exemption 7. 1 O'REILLY, *supra* note 1, § 3.08 at 3-28 & n.177 (citation omitted). The Senator charged that the courts allowed the agencies to apply the exemption without justification for nondisclosure. *Id.*

The *Mink* decision was also cited in a House Debate as one of the factors in bringing about the Amendments. SENATE COMM., *supra* note 3, at 247. In debate, Representative Erlenborn specifically stated that one purpose of the bill was to override the *Mink* case, which held that classification of a document by Executive Order precluded judicial review. *Id.* Specifically, the Congressman stated that it was the committee's intention to make "secret" documents subject to in camera inspection and allow the court to decide the classification's propriety. *Id.*; *see also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 226 (1978) (acknowledging that Congressional disagreement with *Mink* was one of the motivating factors behind the 1974 Amendments); Roshon L. Magnus, Note, *Judicial Erosion of the Standard of Public Disclosure of Investigatory Records Under the FOIA After* FBI v. Abramson, 26 How. L.J. 1613, 1638 (1983) (discussing the improper judicial contruction of the Act that led to Congress's enactment of the 1974 Amendments).

[42] Among the 1966 Act's "Major Problem Areas" listed during congressional hearings were bureaucratic delays as long as 83 days for agency decisions; excessive charges for services that effectively denied information to most people; the inconvenience and legal costs borne by the individual requester in invoking the Act's remedy; political appointees' power to make significant decisions with little input from public information specialists; the press's inability to utilize the Act due to the excessive time delays; and top-level administrators' failure to give FOIA requests appropriate attention. SENATE COMM., *supra* note 3, at 15.

[43] The Watergate scandal was mentioned prominently in the Congressional Debates concerning the amendments. SENATE COMM., *supra* note 3, at 344. Responding to an FBI memorandum opposing the amendments, Senator Weicker remarked that his greatest concern regarding Watergate was the lack of accountability and prevalence of abuse of power perpetrated by federal law enforcement and intelligence

1974 Amendments to the Act.[44] The Amendments specifically provided for protection against the disclosure of a confidential source's identity and, in the case of a criminal investigation, all of the source's information.[45] Despite these assurances, some mem-

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agencies. *Id.* The Senator went on to comment that the faith of the American people and the agencies themselves would be strengthend by public access to its inner functions. *Id.* at 344-45. Senator Kennedy stated that he looked upon the Amendments as part of the nation's movement away from the Watergate era. *Id.* at 436. Senator Kennedy criticized President Ford for compromising his promise of a more open government because of political pressure. *Id.* The Senator cited cases that illustrated the need for the amendments, including the FBI's denial of a Congressman's request for his own file. *Id.* at 440. These cases, the Senator posited, demonstrate that "not even the FBI should be placed beyond the law." *Id.* Watergate, the Senator urged, taught the public that "unreviewability and unaccountability in Government agencies breeds irresponsibility of Government officials." *Id.* For these reasons, Senator Kennedy urged adoption of the amendments. *Id.* at 440-41.

Senator Orrin Hatch observed that the Watergate scandal overshadowed certain FOIA issues. Hatch, *supra* note 3, at 8. The author posited that FOIA's costs could have been avoided if Congress had adequately considered the ramifications of amending the statute. *Id.* at 9. The Senator considered the "overly optimistic" cost projections of the amendments to be an example of Congress's inattention. *Id.* at 8.

[44] 5 U.S.C. § 552(b)(7) (1974). Section (b)(7) was amended to read:

> (b) This section does not apply to matters that are — . . . (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record 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, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Id.; *see* Pollard v. FBI, 705 F.2d 1151, 1155 (9th Cir. 1983) (interpreting the amendment to exempt information that "would tend" to reveal the source's identity); Ian C. Crawford, Note, FBI v. Abramson *and the FOIA: Exemption Seven Shields Political Records,* 17 SUFFOLK U. L. REV. 748, 750-54 (1983) (outlining the history of FOIA, focusing on Exemption 7). *See generally* 2 O'REILLY, *supra* note 1, § 17.03 (tracing the evolution of the Amendments from 1967 to 1974).

Addressing Exemption 7 in his veto message to Congress, President Ford asserted that some of the Amendments' provisions were problematic. SENATE COMM., *supra* note 3, at 398. The President was concerned that some of the Amendments' requirements threatened the confidentiality of FBI documents. *Id.* The President also expressed concern that the amendments were overly burdensome because law enforcement agencies lacked the staff and resources to meet the proposed statutory deadlines. *Id.* Lastly, President Ford asserted that, in evaluating Exemption 7, judges should not be required to evaluate whether material should be classified under an exemption "in sensitive and complex areas where they have no particular expertise." *Id.*

[45] 5 U.S.C. § 552 (b)(7)(D) (1974). The statute required that the agency's information *would* result in discovery of the source's identity before information would be suppressed. *Id.* President Ford had objected to this language, which forced agencies

bers of Congress feared that Exemption 7D's language did not provide agencies with enough power to protect their sources' confidentiality.[46]

Addressing this concern, the Supreme Court took the opportunity to interpret the 1974 Amendments in *FBI v. Abramson*.[47] In *Abramson*, the FBI denied, pursuant to Exemption 7, a journalist's requests for copies of reports on President Richard Nixon's political opponents.[48] The Court ruled that information originally compiled for law enforcement purposes did not lose its exemption

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to prove that the release of information "would" cause a specified harm as a prerequisite for suppression. SENATE COMM., *supra* note 3, at 398.

46 2 O'REILLY, *supra* note 1, § 17.04, at 17-16. According to O'Reilly, the chief opponent of the Amendments was conservative Republican Senator Roman Hruska. *Id.* The Senator feared, O'Reilly explained, that greater access to law enforcement files would cause a corresponding decrease in the number of cooperating informers. *Id.* (citation omitted). O'Reilly posited that most Senators, however, were strongly influenced by the distrust resulting from Watergate. *Id.* at 17-16 to 17-17. O'Reilly concluded by noting that the Senate bill passed 51 to 33, after Senator Hart compromised on the legislative history. *Id.* at 17-17 (citation omitted).

Miller v. Bell was a leading case in the movement toward finding a promise of confidentiality implicit in FBI interviews. Miller v. Bell, 661 F.2d 623 (7th Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 960 (1982). The plaintiff in *Miller* was a self-described litigious individual who was on an anti-government crusade. *Id.* at 628. Miller requested the FBI's investigation file of a third-party wiretap on his telephone. *Id.* at 625. The FBI gave Miller 54 pages of the file, after redacting much of it for the purpose of protecting the confidentiality and privacy of individuals who had been interviewed in the investigation. *Id.* In its analysis, the court relied heavily upon the 1974 Amendment's legislative history. *Id.* at 626-27. The court recited legislative history explaining that the drafters did not intend to greatly burden the agencies by requiring them to justify nondisclosure. *Id.* Therefore, the Seventh Circuit found a promise of confidentiality inherently implicit in every FBI criminal investigatory interview. *Id.* at 627 (citation omitted); *see also* Ingle v. United States Dep't. of Justice, 698 F.2d 259, 269 (6th Cir. 1983) (reciting the Seventh Circuit's ruling that a promise of confidentiality was inherent in all FBI interviews) (citation omitted).

47 456 U.S. 615 (1982). The Supreme Court encountered difficulty in interpreting the terms of the 1974 Amendments because of FOIA's failure to define the term "record," and Congress's use of the words "documents," "records," "matters," and "information" interchangeably. *Id.* at 626.

For more discussion of the *Abramson* decision, see Crawford, *supra* note 44, at 757-59 (surveying *Abramson*); Magnus, *supra* note 41, at 1638 (criticizing *Abramson*'s misinterpretation of the amendments) (citation omitted); Michael A. Stroud, Note, *Law Enforcement Exemption May Prevent Disclosure of Records not Compiled for Law Enforcement Purposes*, 57 TUL. L. REV. 1564, 1574 (1983) (accusing the *Abramson* opinion of bypassing the Amendments' purposes).

48 *Abramson*, 456 U.S. at 618. In 1976, Howard Abramson filed a FOIA request seeking specific documents concerning President Nixon's critics. *Id.* The FBI denied the request, relying partially on Exemption 7C invasion of privacy grounds. *Id.* at 618-19. Because Abramson believed that the request was rejected for its specific language, he filed a broader second request. *Id.* at 619. The FBI denied access, however, due to Abramson's failure to "reasonably describe the records sought" pursuant to § 552(a)(3). *Id.* (citation omitted).

status when recompiled in a new record for different goals.[49]

The Court established a threshold two-prong test for judicial review of Exemption 7 claims.[50] First, the Court mandated that the information in question had to have been "an investigatory record compiled for law enforcement purposes."[51] If the first prong was

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49 *Id.* at 628, 631-32; *see also* Doe v. FBI, 936 F.2d 1346, 1357 (D.C. Cir. 1991) (contrasting the proper analysis of recompiled records under *Abramson* to the analysis recommended under the Privacy Act). *Compare Abraham*, 456 U.S. at 628, 631-32 (ruling that the information did not lose its Exemption 7 protection when recompiled, even for political purposes) *with* Willamette Indus. v. United States, 689 F.2d 865, 868 & n.1 (9th Cir. 1982) (noting that *Abramson* did not impact on the court's decision to disclose certain tax information that the Internal Revenue Service had initially compiled for a non-exempt purpose).

In dissent, Justice Blackmun reproached the majority for substituting the word "information" for "record" against Congress's true intent. *Id.* at 632-33 (Blackmun, J., dissenting). Justice Blackmun further asserted that the Court's refusal to adhere to the statute's plain meaning required judges to independently determine whether the information contained in the agency records warranted Exemption 7 status. *Id.* at 633 (Blackmun, J., dissenting).

Separately dissenting, Justice O'Connor charged the majority with redrafting the statute despite its obligation to give deference to Congress's choice of words. *Id.* at 635 (O'Connor, J., dissenting). Justice O'Connor explored the judicial maxim that the court may reject the plain language of a statute to avoid "patently absurd consequences." *Id.* at 640 (O'Connor, J., dissenting) (citation omitted). Nonetheless, Justice O'Connor criticized the majority for disregarding the Court's own statutory construction rules by avoiding the statute's ordinary meaning. *Id.* at 634 (O'Connor, J., dissenting). The Justice later stated that no direct legislative history indicated that the statute was ambiguous. *Id.* at 639 (O'Connor, J., dissenting). Justice O'Connor declared that the distinction between exempt and non-exempt materials was for Congress, and not the Court, to draw. *Id.* at 640-41 (O'Connor, J., dissenting).

50 *Abramson*, 456 U.S. at 622; *see* Crawford, *supra* note 44, at 760 (asserting that the Court's failure to carefully apply the Act's threshold requirements changed the statutory meaning of Exemption 7).

51 *Abramson*, 456 U.S. at 622. Circuit courts were divided over the application of the first prong of the *Abramson* test. Richard A. Kaba, Note, *Threshold Requirements for the FBI under Exemption 7 of the Freedom of Information Act*, 86 MICH. L. REV. 620, 622 (1987). One commentator explained that various decisions have held that Exemption 7 applied to *all* FBI investigative files, notwithstanding that their compilation may have been for a purpose not recognized by the exemption. *Id.* & n. 21 (citing Williams v. FBI, 730 F.2d 882 (2d Cir. 1984); Kuehnert v. FBI, 620 F.2d 662 (8th Cir. 1980); Irons v. Bell, 596 F.2d 468 (1st Cir. 1979)). These courts, the author clarified, employed a per se rule such that the FBI's mere labeling of its file as "investigative" justified denial of the information regardless of whether it was compiled for law enforcement purposes. *Id.* at 622. In contrast, the author pointed to the District of Columbia Circuit Court which imposed a "threshold rule" whereby the information had to have actually been compiled for law enforcement purposes. *Id.* at 622-23 & n.22 (citing Keys v. United States Dep't of Justice, 830 F.2d 337, 340 (D.C. Cir. 1987); Stern v. FBI, 737 F.2d 84 (D.C. Cir. 1984); Pratt v. Webster, 673 F.2d 408 (D.C. Cir. 1982)). The author noted that Congress failed to offer any guidance on the application of the first prong in the 1986 revisions to the exemptions. *Id.* at 623. As a possible solution, the author proposed adoption of a "modified per se rule," whereby the court would presume that all FBI records were compiled for law enforcement pur-

satisfied, the Court instructed that, to fulfill the second prong, law enforcement agencies had to demonstrate that the disclosure would result in a harm specified by the statute.[52]

Despite the *Abramson* ruling, circuit courts continued to differ on the application of Exemption 7D.[53] Congress's enactment of the 1986 amendments did little to promote a uniform standard

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poses unless the requester could show a "reasonable likelihood under the circumstances" that the purpose of the investigation was improper. *Id.* at 624, 639-45.

[52] *Abramson*, 456 U.S. at 622. *See supra* note 42 (listing the six harms under § 552(b)(7) (1974)). The Supreme Court, in *NLRB v. Robbins Tire & Rubber Co.*, made only a small reference, in *dicta*, that gave any guidance on how to resolve the second prong of *Abramson* with regard to Exemption 7D. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223 (1978). In *Robbins*, an employer requested copies of all potential witness statements gathered by the National Labor Relations Board (NLRB or Board) during an unfair labor practice investigation. *Id.* at 216. At issue was the NLRB's denial of the request on Exemption 7A grounds, which allowed suppression to the extent that disclosure would interfere with law enforcement proceedings. *Id.* (citation omitted). The *Robbins* Court contrasted Exemption 7A's language with Exemptions 7B, 7C, and 7D. *Id.* at 223-24. The Court noted that the latter exemptions had particular references to "a person," "an unwarranted invasion," and "a confidential source," thus necessitating a case-by-case showing that these factors were present, while Exemption 7A allowed for categorical determinations to be made. *Id. See generally* Ruth D. Raisfeld, Note, *NLRB Discovery After* Robbins: *More Peril for Private Litigants*, 47 FORDHAM L. REVIEW 393 (1978) (analyzing the implications of *Robbins* for the discovery process). *But see* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 779 (1989) (rejecting the *Robbins* holding that Exemption 7C compelled an "ad hoc" balancing of a person's privacy interest against the value to the public of such disclosure).

[53] *See, e.g.*, Parton v. United States Dep't of Justice, 727 F.2d 774, 776 (8th Cir. 1984) (holding that production of affidavits justifying inference that assurances of confidentiality were made as adequate grounds for non-disclosure); New England Apple Council v. Donovan, 725 F.2d 139, 145 (1st Cir. 1984) (invoking the 7D requirement that the government must show only that the informant provided information under express or implied assurance of confidentiality and that a balancing of the interests was unnecessary); Keeney v. FBI, 630 F.2d 114, 119-20 (2d Cir. 1980) (stating that whether an express or implied promise of confidentiality existed was a question of fact to be determined individually); Nix v. United States, 572 F.2d 998, 1003 (4th Cir. 1978) (ruling that a demonstration allowing the court to reasonably infer confidentiality was sufficient to justify nondisclosure) (footnote & citation omitted). *See generally* Judith A. Bigelow, Comment, *Meeting the Agency Burden Under the Confidential Source Exemption to the Freedom of Information Act*, 60 WASH. L. REV. 873, 878-82 (1985) (offering a comprehensive study of the split in the circuit courts of appeals prior to the 1986 Amendments). *But see* Keys v. United States Dep't of Justice, 830 F.2d 337, 345 (D.C. Cir. 1987) (asserting that the circuit split was "more apparent than real").

In applying Exemption 7D, various circuits addressed the issue of the source's assumption of confidentiality. *See, e.g.*, Johnson v. United States Dep't. of Justice, 739 F.2d 1514, 1518 (10th Cir. 1984) (upholding a source's assumption of confidentiality except where unreasonable so as to prevent the problem of deterring sources from coming forward); Scherer v. Kelley, 584 F.2d 170, 176 (7th Cir. 1978) (stating that an agency's withholding of records to protect citizens who volunteered information to law enforcement agencies was proper), *cert. denied*, 440 U.S. 964 (1979).

among the courts.[54]

Soon after the 1986 amendments were passed, the Second Circuit, in *Donovan v. FBI*,[55] espoused a "functional approach" in determining when an implicit promise of confidentiality may be found under Exemption 7D.[56] In *Donovan*, the plaintiff sought disclosure of documents relating to the murder of American missionaries in El Salvador.[57] Concluding that the information's disclosure would generally hamper the effectiveness of FBI investigations and harm specific sources, the court denied access to the

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54 5 U.S.C. § 552(b)(7)(D) (Supp. I 1986), effective date Oct. 27, 1986; *see also* Susan L. Beesley & Theresa A. Newman Glover, Note, *Developments Under the Freedom of Information Act—1986*, 1987 DUKE L.J. 521, 557-64 (discussing the emergence of a split among courts on the proper interpretation of Exemption 7 under the 1986 Amendments). See *supra* note 1 for amended text.

Congress expanded Exemption 7D to increase the protection of confidential sources by including any information given by the source, not just confidential information, and by changing the 1974 statutory language from "investigatory records" to the broader 1986 language of "records or information compiled for law enforcement purposes." *Compare* 5 U.S.C. § 552 (b)(7) (1974) *with* 5 U.S.C. § 552 (b)(7) (1986). The 1986 Amendments also clarified that both businesses and individuals could be considered "confidential sources." *See* 5 U.S.C. § 552 (b)(7)(D) (1986); *We Should Keep the FBI Accountable*, N.J. L.J., Feb. 22, 1993, at 18 [hereinafter *FBI Accountable*]. Additionally, Congress revised the Exemption to information that "could reasonably be expected to disclose" the identity from information that "would disclose" as originally provided for under the 1966 Act. *Compare* 5 U.S.C. § 552 (b)(7)(D) (1974) *with* 5 U.S.C. § 552 (b)(7)(D) (1986).

Prior to the Amendments' passage, some commentators opposed amending Exemption 7. *See* David L. Sobel, *The Freedom of Information Act: A Case Against Amendment*, 8 J. CONTEMP. L. 47 (1982). David Sobel, Staff Counsel, Campaign for Political Rights in Washington, argued that the Reagan Administration's efforts to enact broader provisions for Exemption 7 were unnecessary due to considerable judicial deference to FBI claims. *Id.* at 59. Sobel asserted that the proposed Amendments would return FOIA to its original restrictive APA status. *Id. But see* Hatch, *supra* note 3, at 17-34, app. at 39 (advocating amendment, Hatch proposed revising Exemption 7D to prohibit release of information that would "tend to disclose" a source's identity). *See generally* Eugene Ferguson, Jr., Comment, *The Freedom of Information Act: A Time for Change?*, 1983 DET. C.L. REV. 171, 187-89 (chronicling the political debate on FOIA amendments in response to the Reagan Administration's 1981 proposal to amend).

55 806 F.2d 55 (2d Cir. 1986).

56 *Id.* at 60. The *Donovan* Court stated: "Under the functional approach, an implicit promise of confidentiality may be found when 'it is apparent that the agency's investigatory function depends for its existence upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known.'" *Id.* at 61 (citing Diamond v. FBI, 707 F.2d 75, 78 (2d Cir. 1983), *cert denied*, 465 U.S. 1004 (1984) (quotation omitted)).

57 *Id.* at 57. The families of four churchwomen murdered in El Salvador brought suit in 1982 to compel disclosure of all FBI documents relating to the investigation. *Id.* The central issue was the propriety of the court's in camera review of the documents and its subsequent order to release the documents. *Id.* at 56. The FBI claimed various exemptions under § 552(b). *Id.* at 59-60.

information.[58]

The District of Columbia Circuit adopted a different approach to Exemption 7D, favoring the protection of law enforcement interests by establishing a presumption of confidentiality in *Schmerler v. FBI*.[59] In *Schmerler*, the plaintiff brought a FOIA action seeking disclosure of the FBI's fifty-five-year-old investigation into the murder of his aunt.[60] Rejecting the district court's analysis that allowed the release of the requested information,[61] the circuit court awarded agencies a virtually irrebuttable presumption of confidentiality.[62] Finding the plaintiff's claim insufficient to rebut the pre-

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58 *Id.* at 61 (citing *Diamond*, 707 F.2d at 78). In addition to *Diamond*, the court also cited as support *Williams v. FBI*. *Id.* (citing Williams v. FBI, 730 F.2d 882 (2d Cir. 1984)). *But see Williams*, 730 F.2d at 885 (failing to articulate the functional approach in its analysis). Thereafter, the *Donovan* court found the district court's order in favor of disclosure in error and reversed. *Id.*

59 900 F.2d 333, 337 (D.C. Cir. 1990); *see FBI Allowed To Protect Sources Indefinitely, Court Rules*, REUTERS, Apr. 6, 1990, *available in* LEXIS/Nexis Library (recounting struggle of *Schmerler* plaintiff); Harry Hammitt, *FOIA Suffering from Restrictive New Court Rulings; Freedom of Information Act Special Report*, THE QUILL, Oct. 1991, at 29, *available in* LEXIS/Nexis Library (asserting that *Schmerler* was one of the D.C. Circuit's decisions which made success for FOIA plaintiffs "practically impossible").

60 *Schmerler*, 900 F.2d at 334. The FBI acceded to Schmerler's request for his aunt's file, but deleted the names of certain sources. *Id.* at 335. After reviewing the file, Schmerler deduced who the missing sources were and brought suit to confirm his hypothesis. *Id.*

61 The court dismissed the district court's justifications for its order to release the names, among which were the long time lapse between the request for the documents and the incident itself and the lack of danger to the FBI sources. *Id.* at 336. Rejecting this reasoning, the court of appeals held that the Act did not permit a balancing of interests. *Id.* Moreover, the court pronounced that the statute did not contain a "sunset" provision for agency promises of confidentiality. *Id.* A "sunset law" is defined as:

> A statute or provision in a law that requires periodic review of the rationale for the continued existence of the particular law or the specific administrative agency or other governmental function. The legislature must take positive steps to allow the law, agency, or functions to continue in existence by a certain date or such will cease to exist.

BLACK'S LAW DICTIONARY 1436 (6th ed. 1990). According to the court, once a source's confidentiality had been determined, the government had no obligation to provide additional justification for its nondisclosure to parties making claims in the public interest. *Schmerler*, 900 F.2d at 336.

62 *Id.* at 337 (citation omitted). To overcome this presumption, the *Schmerler* court required the plaintiff to present evidence that the government had not promised confidentiality to the source at the time the information was gathered. *Id.*; *see also* Keys v. United States Dep't of Justice, 830 F.2d 337, 345 (D.C. Cir. 1987) (citations omitted) (finding an implicit assurance of confidentiality where "its absence would impair the Bureau's ability to elicit the information").

One judge in the same circuit, in *Dow Jones & Co. v. Department of Justice*, declared that *Schmerler*'s presumption of confidentiality was incompatible with FOIA's purpose and structure. Dow Jones & Co. v. Dep't of Justice, 908 F.2d 1006, 1012 (D.C. Cir. 1990) (Edwards, J., concurring). Although Judge Edwards conceded that *Schmerler* governed, the judge nonetheless criticized that decision for its "flawed interpretation"

sumption, the court suppressed the documents.[63]

Citing to *Schmerler*, the District of Columbia Circuit, in *Dow Jones & Co. v. Department of Justice*,[64] formally recognized that its presumption of confidentiality was practically irrebuttable.[65] In

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of FOIA and questioned its future viability. *Id.* The judge asserted that Congress's intention was to burden the agency with sustaining its claim of exemption. *Id.* Judge Edwards was concerned, however, that the *Schmerler* court disregarded this directive by mandating that it was the FOIA plaintiff's responsibility to rebut the government's presumption. *Id.* (citation omitted). The government, the concurrence explained, could easily meet its obligation under *Schmerler* by filing a *Vaughn* index without even including enough information to support an inference of confidentiality or non-confidentiality. *Id.* Accordingly, the judge concluded that *Schmerler*'s presumption was irrebuttable. *Id.*

In a later *Dow Jones* decision commenting on *Schmerler*, the court stated that "but for the presumption which *Schmerler*, in truth, strengthened over that employed in *Keys*, the case would have come out the other way; the government's actual evidence of confidentiality was rather thin." Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571, 576 n.4 (1990) (citation omitted). For a complete discussion of the court of appeals' decision in *Dow Jones*, see *infra* notes 65-67.

63 *Schmerler*, 900 F.2d at 339. The court conceded that the FBI had little evidence to support its claim that confidentiality was assured and was relying heavily on its presumption. *Id.* at 337. Further, the court rejected Schmerler's argument that the information's favorable content was an indication that no assurances of confidentiality were given. *Id.* at 337-38. Citing former Judge Scalia, the court emphasized that Exemption 7D's protection turned on the source's confidentiality rather than on the file's factual contents. *Id.* at 338 (quoting Shaw v. FBI, 749 F.2d 58, 61 (D.C. Cir. 1984)).

Rejecting Schmerler's claim that confidentiality was compromised by the case's publicity, the court reasoned that the publicity had taken place subsequent to FBI interviews with the sources. *Id.*

The court next acknowledged other circuits' acceptance of the proposition that sources who could become trial witnesses were not entitled to a presumption of confidentiality. *Id.* (citing Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 986 (9th Cir. 1985) (ruling that witnesses who submitted affidavits should expect to have their names released and be called to testify at formal hearing, and not expect confidentiality); Poss v. NLRB, 565 F.2d 654, 658 (10th Cir. 1977) (holding that NLRB assurances that the information furnished would remain confidential unless the sources were called to testify did not amount to a "guarantee of total anonymity")). Nonetheless, the court concluded that Exemption 7D's purpose would be contravened if it were held that a source lost his right to confidentiality when it was possible that he would testify at trial. *Id.* at 339 (citation omitted). Accordingly, the court stated that the plaintiff was incapable of rebutting the presumption that confidentiality was assured. *Id.*

64 917 F.2d 571 (D.C. Cir. 1990). For criticism of the *Dow Jones* decision see, Hammitt, *supra* note 59, at 29 (reproaching the *Dow Jones* decision and positing that the media should become involved in making changes to FOIA); Richard J. Tofel, *Victims of the Vault; The Freedom of Information Act is supposed to unlock government secrecy, but it is most often interpreted to prevent disclosure*, THE RECORDER, Jan. 24, 1992, at 8 (criticizing the length of delay caused by FOIA and positing that the information may become stale before the action's conclusion).

65 *Dow Jones*, 917 F.2d at 577. The court conceded that the Act imposed the burden of proof on agencies. *Id.* at 576. Nevertheless, the court mandated that confidentiality was inherently implicit in FBI interviews. *Id.* (citation omitted). The court

Dow Jones, the plaintiff requested a copy of a Justice Department report relating to the alleged misconduct of a United States Congressman.[66] Explaining that an individualized approach to Exemption 7D claims would result in ad hoc determinations, the court accepted the agency's presumption of confidentiality and denied relief to the plaintiff.[67]

The Ninth Circuit utilized a more flexible approach in addressing the applicability of Exemption 7D in *Wiener v. Department of Justice*.[68] In *Wiener*, a history professor sought the FBI's investigatory records on rock musician John Lennon.[69] The circuit court refused to accept the FBI's mere assertion of confidentiality as justification for its Exemption 7D claim.[70] An agency claim of implied

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reiterated that so long as the FBI showed that information was solicited in the course of a law enforcement investigation, there existed a presumption that assurances were given. *Id.* (citation omitted). The court acknowledged that its presumption, as applied in past decisions, was close to irrebutable because it was highly unlikely that a requester could prove the FBI's failure to consider the need for confidentiality. *Id.* at 577. Absent "extraordinary circumstances," such as where the source's information was already public, the court stated, the presumption would govern. *Id.*

66 *Id.* at 572. The Department of Justice (Department) had conducted a grand jury investigation of Representative Fernand J. St. Germain for illegally accepting free meals and entertainment. *Id.* Because the Department was unsure about its success at a possible trial, it decided to release the information to the House Ethics Committee in a letter summarizing the results of its investigation. *Id.* The plaintiff sought the names of the interviewees. *Id.* at 572-73.

67 *Id.* at 573. The court reasoned that it was merely following the Supreme Court's rationale in *Reporters Committee* that "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *Id.* (quoting United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776 (1989)). The court explained that individualized review of claims would be a "terrible burden" upon courts and would result in "unprincipled" decisions. *Id.* (citation omitted). For an extended discussion of *Reporters Committee*, see *supra* note 20.

Other circuits adopted the presumption of confidentiality under similar reasoning. *See* Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1486 & n.7 (11th Cir. 1992) (analogizing *Reporters Committee*); *cf.* Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 564-65 (1st Cir. 1992) (asserting that subsequent review of confidentiality claims was undesirable due to courts' difficulty in evaluating these claims).

68 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992). For a discussion of *Wiener* see, Elizabeth A. Vitell, Note, *Toeing the Line in the Ninth Circuit: Proper Agency Justification of FOIA Exemptions Clarified in* Wiener v. FBI, 42 DE PAUL L. REV. 795, 830-32 (1992) (asserting that *Wiener* stood for the revitalization of the courts' adherence to FOIA and reduction of FOIA litigation).

69 *Wiener*, 943 F.2d at 976-77. Professor Jonathan M. Wiener believed that the FBI's investigations of Lennon would reveal the Executive Branch's attempt to stifle political dissidents. *Id.* at 977. The FBI withheld the requested information and justified its actions by invoking, *inter alia*, Exemption 7D. *Id.* at 977 n.2.

70 *Id.* at 979. The court criticized the FBI for providing a boilerplate explanation to deal with FOIA requests. *Id.* at 978-79 (footnote omitted). The court noted that

confidentiality, the court concluded, required a case-specific, "highly contextual" inquiry.[71] Finally, the court found the FBI's use of the *Vaughn* index[72] inadequate for its failure to specify its "law enforcement purpose" and accordingly remanded.[73]

To resolve the split among the circuit courts regarding the appropriate standard for evaluating Exemption 7D claims, the United States Supreme Court granted certiorari in *United States Department of Justice v. Landano*.[74] Justice O'Connor, writing for the unanimous Court, explained the underlying issue of Exemption 7D as whether there was an understanding that the source's statement to the agency would remain confidential.[75]

The Court employed the common usage of the word "confidential" in response to FOIA's failure to define the term.[76] Exam-

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such forms had previously been rejected for being manifestly inadequate. *Id.* at 979 (citing King v. United States Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987)). The court noted that the approach taken by the FBI failed to give Wiener a realistic opportunity to argue his case. *Id.* Further, the court explained, effective advocacy was impossible because the FBI gave alternative explanations for withholding without stating a precise reason for non-disclosure. *Id.* The court declared that the FBI was affirmatively obligated to disclose as much information as possible under the circumstances. *Id.* (citation omitted). Failure to do so, the court enunciated, would undermine the adversarial process because the requester, without being advised of the facts surrounding the claim, would be unable to make an intelligent argument in his favor. *Id.* at 986.

[71] *Id.* (citing United Technologies Corp. v. NLRB, 777 F.2d 90, 93-94 & n.4 (2d Cir. 1985)). The court deemed an express grant of confidentiality to be "virtually unassailable" and stated that when given, the FBI only had to establish that the informant was told that his name would be kept confidential. *Id.*

[72] The *Vaughn* index refers to the procedure by which an agency provides a detailed description of contested documents rather than producing the documents themselves. *See supra* note 21 (providing a complete explanation of the *Vaughn* index and its origin).

[73] *Wiener*, 943 F.2d at 985, 989. The court explained that the FBI's *Vaughn* index simply stated that John Lennon was under investigation for civil disobedience and unlawful rioting. *Id.* at 985 (citations omitted). Further, the court noted that the FBI made generalizations in the index that were unhelpful to the court's determination of whether disclosure was reasonable. *Id.* at 987. For the text of Exemption 7D, see *supra* note 10.

[74] 113 S. Ct. 51 (1992). For reaction to the *Landano* decision, see Daniel J. Capra, *Past Recollection Recorded; Informant's Privilege*, N.Y. L.J., Sept. 10, 1993, at 3 (discussing the practical implications of *Landano*); *We Should Keep the FBI Accountable*, 133 N.J. L.J. 599 (Feb. 22, 1993) (positing that exempting law enforcement agencies from FOIA would "threaten the legitimacy of our democratic government").

[75] *Landano*, 113 S. Ct. 2014, 2019-20. The Justice explained that a confidential source within the meaning of Exemption 7D was one who provided the information "'under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.'" *Id.* at 2019 (citation omitted). The Court further clarified that an Exemption 7D inquiry did not concern the document's confidentiality. *Id.*

[76] *Id.* at 2020. The Court elaborated that, "confidentiality is not limited to com-

ining the limits of confidentiality,[77] the Court concluded that a source, who conveyed information intending that it would be published only to the extent necessary for law enforcement purposes, was confidential.[78]

Justice O'Connor explained that the central issue was defining how the government could meet its burden to establish that confidentiality was impliedly assured.[79] Acknowledging that the Court had supported evidentiary presumptions in the past,[80] the Justice nevertheless dismissed the government's presumption of confidentiality for all cooperating sources in criminal investigations.[81] Jus-

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plete anonymity or secrecy. A statement can be made 'in confidence' even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately." *Id.* (citation omitted).

77 *Id.* The Court rejected Landano's argument that confidentiality existed only where the source was promised that the information would not be disclosed to anyone. *Id.* The Court explained that a policy of complete secrecy would frustrate even routine intra-agency work, because agents would not be able to share information with each other. *Id.* (citing Dow Jones & Co v. Department of Justice, 917 F.2d 571, 579 (D.C. Cir. 1990) (Silberman, J., concurring)). Such restrictions on disclosure, the Court posited, would effectively render the information meaningless. *Id.*

78 *Id.* Agreeing with the lower court, the Court explained that the word "confidential," as referenced in Exemption 7D, encompassed something "less than total secrecy." *Id.* The Court further stated that since neither the source nor the FBI knew whether the information would be disclosed at the time of the interview, an interpretation limiting the exemption only to sources who expected total anonymity would render the statute completely ineffective. *Id.* The Court expressly refused to consider the question of whether an agency waived its Exemption 7D privileges where the witness's testimony was made public through judicial proceedings. *Id.* (citing Irons v. FBI, 880 F.2d 1446 (1st Cir. 1989) (en banc)).

79 *Id.* The Court noted that the agency carried the burden of establishing the exemption. *Id.* at 2019. The Court further pointed out that in this case the government did not attempt to demonstrate that the FBI made an explicit assurance of confidentiality. *Id.* at 2020. The FBI did not often make explicit assurances, the Court explained, because there was no policy to discuss with sources whether confidentiality would be maintained. *Id.*

80 *Id.* at 2021 (citing Basic Inc. v. Levinson, 485 U.S. 224, 245 (1988)). The Supreme Court noted its past willingness to accept presumptions that were supported by fairness and probability. *Id.* (quoting *Basic*, 485 U.S. at 245). Nonetheless, Justice O'Connor criticized the government's proposed presumption of confidentiality that would exist in almost all instances. *Id.* The Court articulated that the government considered only wiretaps, published news articles, and people who did not realize they were communicating with an undercover agent, as not presumptively confidential sources. *Id.* The Court therefore objected to the government's broad exemption because it did not comport with "common sense and probability." *Id.* (quotation omitted).

81 *Id.* The Court noted the government's contention that the presumption could be overcome only with the requester's presentation of specific evidence that the disputed source had no interest in confidentiality. *Id.* Justice O'Connor also rejected the government's position that the statutory phrase referring to the release of infor-

tice O'Connor found the presumption unreasonable,[82] unfair,[83] and unsupported by legislative history.[84] The Justice, however, held that certain narrowly defined situations could give rise to a presumption of confidentiality.[85] Excepting specialized circumstances,[86] the Court required individual evaluation of requests, which would provide the requester with a viable opportunity to argue against the claimed 7D exemption.[87] Noting that the court of appeals had erroneously ruled that it could not infer confidentiality in discrete circumstances, the Court accordingly remanded for further proceedings.[88]

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mation that "could reasonably be expected to" disclose a confidential source, implied a presumption in every situation. *Id.* at 2022.

82 *Id.* at 2021-22. Justice O'Connor criticized the government for its inference that the source expected confidentiality without any justification other than administrative ease and other conclusory statements. *Id.* The Justice rejected the government's arguments that it was "convinced" that a "traditional understanding of confidentiality" motivated sources to give information. *Id.* Moreover, the Justice refuted the government's assertion that cooperating private institutions would be threatened with legal action and lost business for their disclosures. *Id.* at 2022.

83 *Id.* (citing *Basic*, 485 U.S. at 245). The *Landano* Court stated that the government had acknowledged that its position on confidentiality in the Exemption 7D context amounted to an irrebuttable presumption. *Id.* (citation omitted). Further, the Court noted that the requester would very rarely be able to present evidence that the source in question had no confidentiality interest. *Id.*

84 *Id.* The Court acknowledged that several Senators had recognized the role of confidentiality in FBI investigations. *Id.* (citation omitted) (reciting Senator Strom Thurmond's statement that the assurance of confidentiality enabled a wide variety of people to contribute to agency efforts). Nonetheless, the Court emphasized that none of the changes made in the Amendments expressly adopted the government's proposed presumption of confidentiality for the FBI. *Id.* The Justice posited that, if it had wanted to do so, Congress would have clearly enunciated that agencies could meet their burden by merely asserting that the source relayed information to the FBI during an investigation. *Id.* at 2022-23 (citation omitted).

85 *Id.* at 2023. For instance, the Court allowed the inference to be granted after a limited inquiry into the informant's relationship to the FBI. *Id.* The Court explained that such an inference would be justified if an informant had gone to great lengths to conceal his involvement with the FBI. *Id.* (citation omitted). The Justice also maintained that paid informers would usually fall within this classification. *Id.*

86 *Id.* For example, the Court posited, the government might be able to claim Exemption 7D, without detailing the surrounding circumstances, when the request sought information in connection with a gang-related murder investigation. *Id.* According to the Court, this "more particularized approach" was in accordance with Congress's goal of enacting "workable rules" for FOIA disclosure. *Id.* at 2023-24 (citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 779 (1989) (quotation omitted); EPA v. Mink, 410 U.S. 73, 80 (1973)).

87 *Id.* The Court noted that the government did not deny that it would normally be possible to enunciate the factors necessary for the court to find confidentiality. *Id.* The *Landano* Court ruled, however, that when "legitimate interests" were threatened by the government's affidavit, in camera review would then become viable. *Id.* at 2024.

88 *Id.*

The *Landano* Court's decision to allow a presumption of confidentiality in some circumstances but not others[89] has set the stage for further circuit court division by inviting the ad hoc reasoning the Court has rejected in the past.[90] Although the situation of the paid informant may admittedly warrant a general denial of access, the Court's balancing of various factors[91] to determine which sources should be protected will most likely lead to an unacceptable level of judicial activism on the issue.[92]

Both confidential sources who provide information to the government concerning a credit card fraud ring and sources who furnish information relating to a biker gang murder[93] should be entitled to the same degree of confidentiality, if assurances were in

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89 *Id.*; *see* Manna v. United States Dep't of Justice, 832 F. Supp. 866 (D.N.J. 1993). In *Manna*, the plaintiff, Louis Anthony Manna, filed a complaint against the Department of Justice and the Drug Enforcement Administration to obtain records concerning or referencing the plaintiff. *Id.* at 869 (citation omitted). Judge Ackerman, writing for the court, held that confidentiality could be fairly inferred from the mere disclosure of data concerning organized crime activity, claiming that the *Landano* Court allowed such presumptions "by examining the nature of the crime, or the source's relation to the crime." *Id.* at 876-77 (citing *Landano*, 113 S. Ct. at 2022-23).

90 *See, e.g.*, *Reporters Committee*, 489 U.S. at 778, 779 (frowning upon *ad hoc* balancing with regard to Exemption 7C); Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 576 (D.C. Cir. 1990) (disapproving of *ad hoc* determinations).

91 *Landano*, 113 S. Ct. at 2022-23 (reciting factors courts should take into consideration when evaluating Exemption 7D claims). Under the test issued by the *Landano* Court, the merits of the source's involvement with the FBI would be scrutinized. *Id.*; *see also* Dickinson, *supra* note 3, at 209-10 (stating that *Reporters Committee* reintroduced merit requirements for disclosure).

92 Thus far, recent circuit court opinions on the exemption have consisted of vacating and remanding decisions for reconsideration in light of *Landano*. *See* McDonnell v. United States, 4 F.3d 1227, 1260 (3d Cir. 1993); Massey v. FBI, 3 F.3d 620, 623, 625 (2d Cir. 1993); Hale v. United States Dep't of Justice, 2 F.3d 1055, 1057-58 (10th Cir. 1993); Oliva v. United States Dep't of Justice, 996 F.2d 1475, 1477 (2d Cir. 1993).

Potentially, a disparate list of exceptions to Exemption 7D could begin to develop in each circuit. Thus far, under *Landano* the presumption has been applied to all of organized crime in New Jersey. *Manna*, 832 F. Supp. at 876-77. *Landano* failed to indicate how courts should rule in cases such as *Schmerler* where no immediate threat of bodily harm to the source existed and where many sources had died long before the case was tried. *See* Schmerler v. FBI, 900 F.2d 333 (D.C. Cir. 1990); *see also supra* notes 59-63 (discussing *Schmerler* in detail); *supra*, notes 53-73 (explaining the circuit court division regarding the proper standard by which Exemption 7D claims should be decided prior to *Landano*).

93 *Landano*, 113 S. Ct. at 2023. Because of fear, the Court proposed, a witness to a gang murder would probably not cooperate with authorities absent a promise of confidentiality. *Id.* This proposition is clearly not absolute in light of the fact that the prosecutor released information regarding individuals who cooperated in the investigation of Landano without any reported harm to those sources. *See* Brief for the Respondent at 3, *Landano*, 113 S. Ct. 2014 (No. 91-2054). In pretrial discovery, the prosecutor released FBI investigative materials containing all the names and some addresses of 82 witnesses and law enforcement personnel. *Id.*

fact given.[94] Although these sources' level of personal risk from exposure is debatable, both arguably have been instrumental in solving a crime.

The *Landano* Court could have taken a more equitable—though more costly—route and safeguarded the interests of both the requester and the potentially confidential source by requiring use of *Lame*'s in camera investigation.[95] Congress could resolve this conflict of interests simply by amending FOIA to require agencies to ask the source whether there was an understanding of confidentiality or whether the source would object to the file's release.[96]

The *Landano* decision, preventing entire categories of citizens who have been investigated by the FBI from exercising their "right to know"[97] through a presumption of confidentiality, is not consonant with the Court's considerations of "fairness" and is unsupported by the Act.[98] As the Court concedes, there can be no better safeguard from the shroud of excessive government secrecy than an informed citizenry; nonetheless, the *Landano* Court's willingness to utilize presumptions—without narrowly defining the circumstances under which they may be used—exposes its failure to recognize fully the vitality of this fundamental concept now turned mere truism.

Tamara M. Burke

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94 5 U.S.C. § 552 (b)(7)(D) (1986) (omitting distinctions between classes of confidential sources).

95 *See* Lame v. United States Dep't of Justice, 654 F.2d 917, 928 (3d Cir. 1981). For a discussion of *Lame*, see *supra* notes 25-26. *But see supra* note 28 (stating that use of the in camera investigation is generally disfavored as a cumbersome litigation tactic).

96 *Cf.* Wald, *supra* note 3, at 680 (advancing implementation of procedures that would allow sources to be notified of the imminent disclosure of the information they provided and would enable them to seek court protection) (citation omitted).

97 *Cf. id.* at 652 (noting that the right to government information is not constitutionally protected).

98 *See FBI Accountable*, *supra* note 54, at 18 (asserting that the use of presumptions to shield information from the public "flies in the face of [FOIA's] plain meaning, legislative history, and purpose . . ."). Additionally, the author posited, an informant who may legitimately fear for his life will request and receive anonymity. *Id.*