No. 17-

IN THE

Supreme Court of the United States

WILLIAM L. PICKARD,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an informant who is compelled to testify by the federal government in a public criminal trial (and who otherwise openly and notoriously discloses his work as an informant for the government) is a "confidential" source within the meaning of Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(D).

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Merriam-Webster Dictionary Online (May 2018) 25

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PETITION FOR WRIT OF CERTIORARI

William L. Pickard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum decision of the court of appeals, as amended on denial of rehearing and rehearing en banc (Pet. App. 1a), is available at 713 Fed. Appx. 609. The relevant opinion of the United States District Court for the Northern District of California (Pet. App. 5a) is published at 217 F. Supp. 3d 1081.

JURISDICTION

The amended judgment of the court of appeals was entered on February 22, 2018. (Pet. App. 52a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requires that "each agency, upon any request for records . . . , shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

FOIA has nine enumerated exemptions. 5 U.S.C. § 552(b)(1)-(9). Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), allows the government to withhold "records or information compiled for law enforcement purposes" that:

> . . . *could reasonably be expected to disclose the identity of a confidential source*, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, *and*, in the case of a record or information compiled by 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* . . . .

5 U.S.C. § 552(b)(7)(D) (emphasis added).

INTRODUCTION

In *Dep't of Justice v. Landano*, 508 U.S. 165 (1993), this Court reserved the question presented by this case: whether a source's public testimony waives or otherwise alters the government's ability to claim that source is "confidential" under FOIA's Exemption 7(D), 5 U.S.C. § 552(b)(7)(D). *See Landano*, 508 U.S. at 173-74.

Twenty-five years later, the courts of appeals remain divided. The Second, Fourth, Sixth, Seventh, and Eleventh Circuits have held that that a source remains "confidential" under Exemption 7(D), notwithstanding the source's public testimony. In contrast, the D.C. Circuit and, arguably, the First Circuit have recognized a limited "waiver" of the exemption relating to information that the source actually disclosed at trial. And the First and Third Circuits (in addition to the Second, Ninth, and Tenth, in cases involving labor law investigations) have suggested a similar, albeit doctrinally independent, approach: that a source's public testimony is evidence that the informant

was never, or no longer is, a "confidential" source within the meaning of the statute.

This question repeatedly recurs in the federal courts. In the twenty-five years since *Landano*, the lower federal courts have considered hundreds of FOIA lawsuits implicating this question. And federal agencies, charged with interpreting those decisions and administering the law, have responded to an order of magnitude more FOIA requests during that time. This Court's review will provide needed clarity for courts, federal agencies, and FOIA requesters alike.

In addition to their sheer volume, these cases are significant for another reason: they regularly concern important information about the operation and administration of the criminal justice system. These cases arise from FOIA requests sent by historians, by journalists, and by the wrongly convicted—all seeking information about the consequential relationship between the federal government and the sources of information it uses to investigate crime and secure federal criminal convictions.

This case provides the correct vehicle to definitively resolve this important and recurring question of federal statutory interpretation. Petitioner respectfully urges the Court to grant certiorari and reverse the decision of the Ninth Circuit below.

STATEMENT OF THE CASE

A. Factual Background

In 2003, petitioner was convicted in federal court for crimes relating to the manufacture and distribution of LSD. Pet. App. 7a.

The prosecution relied in substantial part on the testimony of one witness: Gordon Todd Skinner, an accomplice turned government informant. Pet. App. 5a. Skinner received immunity from the government in exchange for the information he supplied, and, during multiple days of public testimony, he provided critical evidence for the prosecution. *See United States v. Pickard*, 00-cr-40104 (D. Kan. 2003) (ECF Nos. 269-273, 299-303) (Volumes I-X of Skinner's Testimony).[1]

Following his conviction, Mr. Pickard was sentenced to life in prison. Skinner walked away without charge.

Just months after serving as the star witness at Mr. Pickard's trial, Skinner kidnapped, violently tortured, and nearly killed a teenager, Brandon Green. Skinner spent six days injecting Green with drugs and physically abusing him, "with the apparent dual purpose of permanently disabling and disfiguring Green sexually and of keeping him in a prolonged state of unconsciousness." *Skinner v. State*, 210 P.3d 840, 843 (Ok. Ct. Crim. App. 2009). He then arranged for his victim to be dumped in a field in another

1. Much of this testimony is now publicly available on the Internet, too. *See, e.g.*, https://www.scribd.com/doc/22076036/Trial-testimony-in-William-Pickard-LSD-lab-trial.

state, "naked and nearly lifeless." *Id.* at 846. Skinner was charged with kidnapping and assault in Oklahoma state court and ultimately sentenced to life in prison. *Id.* at 841.

In an attempt to avoid prosecution, Skinner repeatedly—and publicly—asserted that his prior work as an informant for the federal government immunized him from prosecution.[2] *Id.* at 842 n.6, 846-47; *Skinner v. Addison*, 2012 WL 4093795, *7-8 (N.D. Ok. Sept. 17, 2012); *Skinner v. Addison*, 527 Fed. Appx. 692, 695 (10th Cir. 2013). Indeed, Skinner's prosecution brought to light a long history between Skinner and the federal government—a history that had not been fully disclosed to Mr. Pickard or his defense during his prosecution. *Compare United States v. Pickard*, 278 F. Supp. 2d 1217, 1244 (D. Kan. 2003) ("The government indicated it was only aware of one other instance where Skinner had been an informant and that was related to [a state case in New Jersey]."), *with United States v. Pickard*, 2009 WL 939050, *8 (D. Kan. 2009) (noting Skinner's possible work as an FBI informant in San Antonio, Las Vegas, Phoenix, Denver, Miami, San Francisco, Albuquerque, Seattle, Kansas City, and Boston); *see also* Plaintiff-Appellant's Excerpts of Record ("ER") Volume I, at 86-87 (testimony disclosing Skinner had been a government informant "[f]ive to six times" by 1993).

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2. Skinner invoked his immunity to avoid prosecution for good reason: it was a strategy that had worked in the past. Shortly after Skinner began providing information to the DEA about the LSD lab, he was arrested by state authorities in Kansas and charged with manslaughter. *See United States v. Pickard*, 211 F. Supp. 2d 1287, 1293 (D. Kan. 2002). Those charges were dismissed as a result of Skinner's immunity, albeit under questionable circumstances. *See* Plaintiff-Appellant's Opening Brief, at 7.

Seeking a full accounting of the government's use of Skinner as an informant, Mr. Pickard submitted a FOIA request to the Department of Justice in 2005, requesting disclosure of a variety of agency records related to the government's prior use and handling of its relationship with Skinner. Pet. App. 7a. After the Department failed to produce records in response to his request, Mr. Pickard filed suit in the Northern District of California. Pet. App. 8a.

B. Procedural Background

Today, over a decade after the initiation of litigation, the Department has yet to release a single word from the 325 pages of records it identified as responsive to Mr. Pickard's request.

1. Indeed, from 2006 to 2011, the Department refused to confirm that it had *any* records responsive to Mr. Pickard's request—notwithstanding Skinner's public testimony and confirmation about his work as a government informant. Pet. App. 8a. After the district court granted summary judgment for the Department, in 2011, the Ninth Circuit reversed and ordered the government to identify responsive records and to otherwise proceed with the case. *See Pickard v. Dep't of Justice*, 653 F.3d 782, 784 (9th Cir. 2011)

On remand, the government asserted a constellation of exemptions, including Exemption 7(D), to withhold all responsive records in their entirety. Pet. App. 47a-48a. The case was eventually referred to a magistrate judge who found that—after a decade of litigation—the Department's repeated failure to satisfy its statutory burden justified

the release of some information. Pet. App. 45a. The magistrate ordered the government to release Skinner's name and information Skinner had already publicly disclosed, including information he disclosed through his testimony during Mr. Pickard's trial in Kansas—two categories of information in the withheld records that Mr. Pickard had specifically sought through partial summary judgment. *Id*. The Department sought the district court's *de novo* review of the magistrate's order. Pet. App. 13a.

2. Before the district court, the Department pressed its claim that FOIA's Exemption 7(D), which allows for withholding of records that would disclose the "identity of a confidential source" and "information furnished by a confidential source," 5 U.S.C. § 552(b)(7)(D), justified the withholding of Skinner's name and the information he disclosed in his testimony at Mr. Pickard's trial. Pet. App. 21a. Mr. Pickard, in turn, argued that Skinner's public testimony was evidence that he was not a "confidential" source within the meaning of the statute, Pet. App. 22a & 23a n. 8; and, alternatively, that his public testimony and his open and public reliance on his work for the government "waived" the Department's ability to claim Exemption 7(D) as to information that had already been disclosed. Pet. App. 24a-34a.

The district court sided with the Department. The judge first determined that Skinner was a "confidential source" within the meaning of the statute because "the DEA explicitly assured Skinner confidentiality"—notwithstanding Skinner's later compelled, public testimony about the information he provided. Pet. App. 23a n. 8.

The court then turned to waiver of Exemption 7(D). The district judge acknowledged that a split exists among the circuits: the court recognized that, while the D.C. Circuit has held that Exemption 7(D) can be waived through a source's public testimony, "[o]ther circuits have not so held." Pet. App. 33a. The judge sided with those courts that focused on "whether information was originally given in confidence, regardless of whether or not the information later becomes public," and therefore concluded that Exemption 7(D) could not be waived. Pet. App. 33a (emphasis omitted). Mr. Pickard appealed. Pet. App. 1a.

3. On appeal, Mr. Pickard renewed his argument that Skinner's public testimony was evidence Skinner was not a "confidential" source under the statute. Alternatively, he argued that Skinner's public testimony, coupled with his complete disregard for confidentiality, waived any claim to Exemption 7(D)'s protection.

As to the first argument, the Ninth Circuit, relying on this Court's decision in *Landano*, held that the only relevant inquiry for Exemption 7(D) purposes was "whether Skinner spoke, at the time he spoke, on the understanding that his communication to the government would remain confidential." Pet. App. 2a. According to the Ninth Circuit, "a senior lawyer for the DEA swore in a declaration that DEA gives express assurances of confidentiality to its informants in Skinner's position, and his written agreement confirms that the assurance was given to him." Pet. App. 3a. In the Ninth Circuit's view, the fact that the government later forced Skinner to disclose that information in public testimony did not alter the conclusion. *See id.* Skinner, therefore, was a "confidential" source under the statute.

To the second argument, the Ninth Circuit held that "[e]ven assuming" Exemption 7(D) can be waived by public testimony or disclosure, that waiver would only entitle Mr. Pickard "to exactly the same information that has been publicly disclosed." *Id.* The Ninth Circuit reasoned that, although Mr. Pickard seeks records that may contain the "*same* information about which Skinner testified," it is not "*exactly the same* information that was publicly disclosed." *Id.* (emphasis added) (suggesting that only a "videotape" of the testimony might qualify). The exemption, therefore, had not been waived. Mr. Pickard sought rehearing of the decision.

4. After amending its initial order, the Ninth Circuit denied Mr. Pickard's petition for rehearing and rehearing en banc. Pet. App. 53a.[3]

REASONS FOR GRANTING THE WRIT

Landano left undecided the consequence of an informant's public testimony on the "confidential" nature of a source under Exemption 7(D). The courts of appeals have divided on this important question—one that consistently recurs in the federal courts and implicates the fair and transparent operation of the criminal justice system. This case presents an ideal vehicle for resolving this conflict.

A source is not "confidential"—under the statute or any reasonable definition of the term—when he testifies publicly in federal court and otherwise openly and

3. Mr. Pickard does not seek review of other issues addressed in the opinions of the district court or the court of appeals, beyond the application of Exemption 7(D).

notoriously discloses his work as an informant for the federal government. This court should grant certiorari here and reverse the contrary decision of the Ninth Circuit below.

I. The lower federal courts are divided over the question presented.

1. At least five circuits—the Second, Fourth, Sixth, Seventh, and Eleventh—have held that public testimony by an informant does not affect the government's ability to withhold information under Exemption 7(D).

For example, in *Neely v. FBI*, 208 F.3d 461 (4th Cir. 2000), a federal inmate sought disclosure of all records relating to him maintained in the FBI's files. He specifically sought information, withheld under Exemption 7(D), related to "a key government witness, Michael Giacolone," in order to prove he had "perjured himself at Neely's criminal trial." *Id. at* 463. The Fourth Circuit, relying on this Court's decision in *Landano*, held "that a source could remain a 'confidential source' for purposes of Exemption 7(D), even if the source's communication with the FBI is subsequently disclosed at trial or pursuant to the government's *Brady* obligations." *Id*. at 466 (citing *Landano*, 508 U.S. at 173-74); *but see Landano*, 508 U.S. at 173 (reserving question of whether disclosure at trial "waives" the exemption).

Likewise, in *Ferguson v. FBI*, 957 F.2d 1059 (2d Cir. 1992), an incarcerated former activist sought information in FBI files about an "undercover New York City policeman who infiltrated the group led by Ferguson and testified extensively at his criminal trial about the conspiracy." 957 F.2d at 1061. The NYPD had also released

records to Ferguson about the undercover police effort through New York's Freedom of Information law. *Id.* at 1061. Nevertheless, the FBI maintained that information disclosed in public testimony and by the NYPD itself remained subject to withholding under Exemption 7(D). Although the Second Circuit noted the "confusion" that exists concerning the proper interpretation of the exemption, *id.* at 1066, the court ultimately agreed with the FBI: it "reject[ed] the idea that subsequent disclosures of the identity of a confidential source or of some of the information provided by a confidential source requires full disclosure of the information provided by such a source." *Id.* at 1068.

Decisions of the Sixth, Seventh, and Eleventh Circuits have reached similar conclusions. *See Kiraly v. FBI*, 728 F.2d 273, 279 (6th Cir. 1984) (allowing withholding, even where source had testified at trial); *Kimberlin v. Dep't of Treasury*, 774 F.2d 204, 209 (7th Cir. 1985) ("The disclosure of information given in confidence does not render non-confidential any of the information originally provided."); *L&C Marine Transp., Ltd. v. United States*, 740 F.2d 919, 925 (11th Cir. 1984) (holding the "limitation on disclosure under 7(D) does not disappear if the identity of the confidential source later becomes known through other means"); *see also Peltier v. FBI*, 563 F.3d 754, 762 (8th Cir. 2009) (declining to decide, but indicating agreement with, the principle that Exemption 7(D) cannot be waived).

2. In contrast, the D.C. Circuit has held that public testimony "waives" Exemption 7(D) as to information actually disclosed at trial. The First Circuit has arguably held the same.

In *Davis v. Dep't of Justice*, 968 F.2d 1276 (D.C. Cir. 1992), the requester sought tape recordings made during the course of a criminal investigation. *Id.* at 1278. Portions of the tapes, containing recordings of a government informant, had been entered into evidence at trial, but the Department nevertheless claimed those portions qualified for withholding under Exemption 7(D). *Id*. at 1281. The D.C. Circuit disagreed. Although it recognized that an informant's public testimony does not alter the government's ability to withhold '"information furnished by a confidential source [and] not actually revealed in public,'" public testimony *did* waive the government's right to withhold information "actually revealed in public." *Id*. at 1281, quoting *Parker v. Dep't of Justice*, 934 F.2d 375, 379-80 (D.C. Cir. 1991). The exemption was therefore unavailable for the "exact information" that had been disclosed at trial, and the government was obligated to disclose any tapes or portions of the tapes that had been entered into evidence. *Id*.

An en banc decision of the First Circuit, *Irons v. FBI*, 880 F.2d 1446, 1447 (1st Cir. 1989), ostensibly reached the same conclusion. There, historians researching the McCarthy era sued the government to obtain information contained in the FBI's Smith Act investigation files concerning informants who had testified at trial. The initial appeals panel held that, because the informants had testified at public trials, the Department thereby waived its ability to claim Exemption 7(D)—both for information that was "actually revealed" at trial and for information that might have "fallen within the 'hypothetical scope of cross examination' at the previous public trial," whether or not it was actually disclosed. *Id*. at 1447.

Then-Judge Breyer, writing for the en banc court, substantially narrowed the scope of required disclosure. After reviewing Exemption 7(D)'s text, legislative history, and the decisions of other courts, the *Irons* court held that "plaintiffs are not entitled to information furnished to the FBI by confidential sources, *beyond what has been actually disclosed in the source's prior public testimony*." *Id*. at 1457 (emphasis added). Although the court limited the *scope* of the waiver ordered by the original appeals panel, the holding nonetheless anticipates "a waiver of the government's right to invoke Exemption 7(D) for information that has been actually disclosed in the source's prior public testimony." *Irons*, 880 F.2d at 1457 (Selya, J., *dissenting*) (noting majority was "quite right in finding a waiver").[4] *See also Radowich v. United States Att'y for the District of Maryland*, 658 F.2d 957, 960 (4th Cir. 1981) (suggesting Exemption 7(D) can be waived if "the beneficiary of the promise of confidentiality waives disclosure"); *but see Neely*, 208 F.3d at 466.

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4. Despite the seemingly plain language of the holding, the First Circuit has interpreted *Irons* as not addressing the question of whether a "waiver" occurs for information actually disclosed in public trials or testimony. *See Moffet v. Dep't of Justice*, 716 F.3d 244, 253 (1st Cir. 2013) (stating that *Irons* "reserved the question of whether 7(D) continues to apply to the specific information that has already been publicly disclosed"). This stems from the FBI's decision in *Irons* to only seek rehearing as to part of the panel opinion—that part finding a waiver for information within the "hypothetical scope of cross examination." *See Irons*, 880 F.2d at 1448. The FBI did "not contest the plaintiffs' right to obtain documents that reveal no more than what the FBI sources have already revealed at trial." *Id*. at 1446.

3. Decisions of the First and Third Circuits, in addition to the Second, Ninth, and Tenth Circuits in cases involving labor law investigations, have endorsed a different approach. These circuits have recognized that an informant's public testimony is evidence that the "assurance of confidentiality" received from the government—a necessary precondition for qualifying as a "confidential source" under the statute, *Landano*, 508 U.S. at 172—was either invalid, intended by the parties to expire in the event of public testimony, or otherwise insufficient.

In *Lame v. Dep't of Justice*, 654 F.2d 917, 925 (3d 1981), a journalist sought records related to informants who had provided testimony in the federal prosecution of two former members of the Pennsylvania legislature. 654 F.2d at 919. The Third Circuit held that "the subsequent disclosure of information originally given in confidence does not render non-confidential any of the information originally provided." *Id*. at 925. Nevertheless, the court also recognized that "information which is subsequently disclosed, such as by the source's testimony at trial, may be evidence of the fact that there has been no assurance of confidentiality given by the government." *Id*. According to the Third Circuit, if "a source expects that he will, at some later date, publicly testify regarding the information he has provided," it may be "difficult" to demonstrate that an assurance of confidentiality has been provided, "despite the possible sensitive nature of the information given." *Id*.

The *Irons* court also endorsed that approach, noting that "the fact that a source later gave public testimony might show that a law enforcement agency *never* gave a valid assurance of confidentiality in the first place." 880

F.2d at 1448 (emphasis in original). Public testimony might also "show that an assurance [of confidentiality] was intended by all parties to expire after a certain time." *Id.*

And three circuits, in cases involving FOIA requests seeking the identities or information provided by informants in labor law investigations,[5] have indicated that a source's future expectation about testifying, or the source's actual testimony, is evidence that a source was not "confidential" within the meaning of the exemption. *See United Technologies Corp. v. NLRB,* 777 F.2d 90, 93 (2d Cir. 1985) ("We believe that the proper interpretation of the term "confidential source" includes an informant who is promised or reasonably expects confidentiality *unless and until the agency needs to call him as a witness at trial.*") (emphasis added); *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 986 (9th Cir. 1985) (holding that "persons submitting affidavits to the agency have no reasonable expectation of confidentiality and should expect their names and testimony to be revealed if the investigation results in a formal hearing"); *Poss v. NLRB*, 565 F.2d 654, 658 (10th Cir. 1977) ("[A]ll concerned must have understood . . . that if a complaint were in fact filed, then many of those interviewed would be called up to actually testify at an ensuing hearing on the matter.").

5. Because these cases involve civil, rather than criminal, law enforcement, they do not "address the issue raised by the second clause of Exemption 7(D) which protects 'information compiled by a criminal law enforcement authority in the course of a criminal investigation [and] furnished by a confidential source." *Parker v. Dep't of Justice*, 934 F.2d 375, 381 (D.C. Cir. 1991) (quoting 5 U.S.C. § 552(b)(7)(D)) (internal case citation omitted). They do, however, implicate the first prong of Exemption 7(D), which relates to the withholding of an informant's "identity" in both civil and criminal law enforcement investigations. 5 U.S.C. § 552(b)(7)(D).

Even in the labor law context, however, "the circuits themselves are in conflict." *Irons*, 880 F.2d at 1455 (citing cases).

4. In the decision below, the Ninth Circuit adopted a hybrid approach. The decision rejected the notion that public testimony alters or affects the "confidential" nature of a source—a holding in apparent tension with the court's earlier decision in *Van Bourg*. *Compare* Pet. App. 2a-3a, *with Van Bourg*, 751 F.2d at 986. And, while it assumed that public testimony could "waive" application of Exemption 7(D), it held that the scope of a waiver was not broad enough to encompass the information sought here. Pet. App. 3a.

The lower federal courts are intractably divided by the question. This Court should grant certiorari to resolve the division.

II. The question presented is significant and frequently recurs in the federal courts.

Even setting aside the division that exists among the federal courts, this Court should grant certiorari in light of the significance of the question presented. Historians, journalists, and the wrongly convicted, for example, all seek information from the government through FOIA that implicates this question. Additionally, the federal courts—and federal agencies—consider a substantial volume of FOIA requests that raise this question each year. The uncertainty in the law that currently exists generates additional expense and taxes the resources of FOIA requesters, the federal courts, and executive branch agencies alike.

1. Information withheld under Exemption 7(D), by definition, touches on the significant relationship between sources of information and federal law enforcement authorities. This type of information implicates concerns no less vital than the fair and transparent administration of federal criminal law. An interpretation of Exemption 7(D) that sweeps too broadly risks shielding information with significant current and historic value from public scrutiny.[6]

The published decisions concerning Exemption 7(D) provide a glimpse of the myriad purposes for which FOIA requesters seek information that involves the exemption. In *Irons*, a group of historians sought information about sources used by the FBI during the McCarthy Era. 880 F.2d at 1446. In *Memphis Pub. Co. v. FBI*, a reporter for the Memphis *Commercial Appeal* sought information concerning Ernest Withers, "a noted photographer of the civil rights movement" who was also an FBI informant. 879 F. Supp. 2d 1, 2 (D.D.C. 2012). In *Rosenfeld v. Dep't*

6. The value in seeking disclosure through FOIA of information that has already been disclosed by an informant may not be obvious. But journalists, historians, and others, for good reason, have an interest in such material: information provided by a source is often interposed with *other* information in the same agency record, and the conjunction of the two types of information often reveals additional facts about the operation of the federal government. For example, in addition to information provided by a source, a government record might also contain the date the government received that information, or a government agent's assessment of the credibility of the source. Both types of information would likely fall outside Exemption 7(D), at least in part, but could nevertheless yield valuable information about the government's operation when paired with specific, already-known information disclosed by the source.

of Justice, an author and journalist sought disclosure of records of FBI investigations of the Free Speech Movement at the University of California, Berkeley. 57 F.3d 803, 806 (9th Cir. 1995). And in *Wiener v. FBI*, a professor sought records from the FBI concerning its investigation of the Beatles' John Lennon. 943 F.2d 972, 976 (9th Cir. 1991). In each of these cases, the government claimed Exemption 7(D) in an attempt to withhold important historical information from public disclosure.

Cases implicating Exemption 7(D) are important for reasons beyond their historical value. Many cases, like this one, are brought by those accused or convicted of crimes seeking information from the federal government about the law enforcement investigation giving rise to their prosecution—information that is often improperly withheld during the course of the prosecution. Indeed, in *Landano*, the requester had been convicted of murdering a New Jersey police officer. 508 U.S. at 167. He sought information from the FBI about its investigation of the murder. *Id.* at 168. Information released through his FOIA lawsuit revealed exculpatory evidence that the prosecution had failed to disclose—information that ultimately contributed to the reversal of the murder conviction and Mr. Landano's eventual acquittal. *See National Registry of Exonerations*, Vincent James Landano (2012).[7]

2. In light of the significance of the information sought in these cases, it is no surprise that the federal courts hear a substantial volume of cases involving Exemption 7(D) each year. As of the date of this petition, in 2018,

7. *Available at* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3370.

federal courts have issued decisions in ten cases where information was withheld under Exemption 7(D).[8] In 2017, federal courts issued decisions in thirty-six cases.[9]

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8. *See Donato v. Exec. Office for United States Atty's*, 2018 WL 1801168 (D.D.C. Apr. 16, 2018); *Viola v. Dep't of Justice*, 2018 WL 1583307 (D.D.C. Mar. 31, 2018); *Poitras v. Dep't of Homeland Security*, 2018 WL 1702392 (D.D.C. Mar. 29, 2018); *Bagwell v. Dep't of Justice*, 2018 WL 1440177 (D.D.C. Mar. 22, 2018); *Dutton v. Dep't of Justice*, 2018 WL 1384123 (D.D.C. Mar. 19, 2018); *Garcia v. Exec. Office for United States Atty's*, 2018 WL 1320669 (D.D.C. Mar. 14, 2018); *Rodriguez v. FBI*, 2018 WL 999908 (D.D.C. Feb. 21, 2018); *Montgomery v. IRS*, 292 F. Supp. 3d 391 (D.D.C. 2018); *Judicial Watch v. Dep't of Justice*, 293 F. Supp. 3d 124 (D.D.C. 2018).

9. *See Corley v. Sessions*, 280 F. Supp. 3d 164 (D.D.C. 2017); *Sandoval v. Dep't of Justice*, 2017 WL 5075821 (D.D.C. Nov. 2, 2017); *Cornucopia Institute v. Dep't of Agriculture*, 282 F. Supp. 3d 150 (D.D.C. 2017); *N.Y. Times Co. v. Dep't of Justice*, 2017 WL 4712636 (S.D.N.Y. Sep. 29, 2017); *DiGirolamo v. DEA*, 2017 WL 4382097 (S.D.N.Y. Sep. 29, 2017); *Spataro v. Dep't of Justice*, 279 F. Supp. 3d 191 (D.D.C. 2017); *Abdul-Alim v. Wray*, 277 F. Supp. 3d 199 (D. Mass. 2017); *Sarno v. Dep't of Justice*, 278 F. Supp. 3d 112 (D.D.C. 2017); *King & Spalding, LLP v. Dep't of Health and Human Services*, 270 F. Supp. 3d 46 (D.D.C. 2017); *Gatson v. FBI*, 2017 WL 3783696 (D. N.J. Aug. 31, 2017); *Hetznecker v. NSA*, 2017 WL 3617107 (E.D. Pa. Aug. 23, 2017); *Villar v. FBI*, 2017 WL 3602008 (D. N. H. Aug. 21, 2017); *Cornucopia Institute v. Agric. Marketing Serv.*, 261 F. Supp. 3d 35 (D.D.C. Aug 16, 2017); *Shapiro v. CIA*, 272 F. Supp. 3d 115 (D.D.C. 2017); *Mattachine Society of Washington, D.C. v. Dep't of Justice*, 267 F. Supp. 3d 218 (D.D.C. Jul. 28, 2017); *American Marine, LLC v. IRS*, 2017 WL 3194167 (S.D. Cal. Jul. 26, 2017); *Smart-Tek Automated Serv. Inc. v. IRS*, 2017 WL 3085950 (S.D. Cal. Jul. 20, 2017); *Canning v. Dep't of Justice*, 263 F. Supp. 3d 303 (D.D.C. Jul. 13, 2017) & *Canning v. Dep't of Justice*, 2017 WL 2438765 (D.D.C. Jun. 5, 2017); *Smart-Tek Serv. Solutions. Corp. v. IRS*, 2017 WL 2936762 (S.D. Cal. Jul. 10, 2017); *Trucept, Inc. v. IRS*, 2017 WL 2869531

Complicating matters, many cases raising this question involve incarcerated, pro se litigants seeking information about their convictions. A review of 762 FOIA lawsuits filed in 2017 shows that twenty-eight were complaints against the Department of Justice or a component brought by an incarcerated, pro se plaintiff[10]—roughly accounting for

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(S.D. Cal. Jul. 5, 2017); *Di Montenegro v. FBI*, 2017 WL 2692613 (E.D. Va. Jun. 22, 2017); *Kuzma v. Dep't of Justice*, 692 Fed. Appx. 30 (2d Cir. 2017); *Broward Bulldog, Inc. v. Dep't of Justice*, 2017 WL 2119675 (S.D. Fla. May 16, 2017) & *Broward Bulldog, Inc*, *v. Dep't of Justice*, 2017 WL 746410 (S.D. Fla. Feb. 27, 2017); *Widi v. McNeil*, 2017 WL 1906602 (D. Me. May 8, 2017); *CREW v. Dep't of Justice*, 854 F.3d 675 (D.C. Cir. 2017); *Shapiro v. CIA*, 247 F. Supp. 3d 53 (D.D.C. 2017); *Patino-Restrepo v. Dep't of Justice*, 246 F. Supp. 3d 233 (D.D.C. 2017); *Pinson v. Dep't of Justice*, 245 F. Supp. 3d 225 (D.D.C. 2017); *Borda v. Dep't of Justice*, 245 F. Supp. 3d 52 (D.D.C. 2017); *King v. Dep't of Justice*, 245 F. Supp. 3d 153 (D.D.C. 2017); *Smith v. Sessions*, 247 F. Supp. 3d 19 (D.D.C. 2017); *ACLU v. NSA*, 2017 WL 1155910 (S.D.N.Y. Mar. 27, 2017); *Gilliam v. Dep't of Justice*, 236 F. Supp. 3d 259 (D.D.C. 2017); *Rad v. United States Atty's Office*, 2017 WL 436260 (D. N.J. Jan. 31, 2017); *Davis v. Dep't of Justice*, 235 F. Supp. 3d 266 (D.D.C. 2017).

10. *See, e.g.*, *Allen v. Dep't of Justice*, 17-cv-01197 (D.D.C. Jun. 16, 2017); *Bartko v. Dep't of Justice*, 17-cv-00781 (D.D.C. Apr. 27, 2017); *Bell v. ATF*, 17-cv-01221 (D.D.C. Jun. 15, 2017); *Bowser v. FBI*, 17-cv-01794 (D.D.C. Sep. 1, 2017); *Burwell v. ATF*, 17-cv-00562 (D.D.C. Mar. 29, 2017); *Casey v. FBI*, 17-cv-00009 (D.D.C. Jan. 4, 2017); *Chase v. United States*, 17-cv-00274 (D.D.C. Feb. 13, 2017); *Cox v. Dep't of Justice*, 17-cv-03329 (S.D. Il. Jun. 9, 2017); *Elliot v. FBI*, 17-cv-01556 (D.D.C. Jul. 24, 2017); *Elliot v. Exec. Office for the United States Atty*, 17-cv-01477 (D.D.C. Jul. 24, 2017); *Gonzalez-Gallegos v. Dep't of Justice*, 17-cv-00421 (D. Az. Aug. 24, 2017); *Henley v. FBI*, 17-cv-01034 (S.D. Ind. Apr. 3, 2017); *Henareh v. United States*, 17-cv-00630 (S.D.N.Y. Jan. 26, 2017); *Hill v. Exec. Office for United States Atty's*, 17-cv-00027 (W.D. Va. Apr. 25, 2017); *Jackson v. Exec. Office for United States Atty's*,

15% of all FOIA cases filed against the Department that year.[11] Clarity in the correct interpretation of Exemption 7(D) is particularly important in these cases, in light of the considerable obstacles pro se litigants face in bringing what may be otherwise meritorious claims.

While the volume of litigation concerning Exemption 7(D) is significant, the number of requests agencies consider each year implicating the exemption is even more substantial. According to statistics compiled by the Department, for the 2017 fiscal year, the agency relied on Exemption 7(D) to withhold information in response to 2,179 FOIA requests. *See* United States Dep't of Justice, *Annual Freedom of Information Act Report* (FY 2017), at 30-31.[12] During the same period, the Department of

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17-cv-02052 (D.D.C. Oct. 2, 2017); *Kanaya v. ATF*, 17-cv-01103 (D.D.C. May 26, 2017); *Liounis v. Krebs*, 17-cv-01621 (D.D.C. Aug. 9, 2017); *Michael v. Dep't of Justice*, 17-cv-00197 (D.D.C. Jan. 31, 2017); *Ortiz-Miranda*, 17-cv-00680 (D.D.C. Apr. 17, 2017); *Petroff v. Sessions*, 17-cv-00067 (M.D. Ga. Mar. 27, 2017); *Reynolds v. Dep't of Justice*, 17-cv-02484 (D.D.C. Nov. 14, 2017); *Richardson v. Dep't of Justice*, 17-cv-01181 (D.D.C. Jun. 12, 2017); *Richardson v. United States*, 17-cv-01557 (D.D.C. Jul. 31, 2017); *Rorrer v. FBI*, 17-cv-00751 (M.D. Pa. Apr. 27, 2017); *Sluss v. Dep't of Justice*, 17-cv-00064 (D.D.C. Jan. 11, 2017); *Spurling v. Dep't of Justice*, 17-cv-00780 (D.D.C. Apr. 27, 2017); *Stoddard v. Dep't of Justice*, 17-cv-00892 (D.D.C. May 16, 2017); *Zullo v. Dep't of Justice*, 17-cv-12323 (D. Mass. Nov. 27, 2017).

11. *See* FOIA Project, *FOIA Agency Information: Department of Justice*, *available at* http://foiaproject.org/lawsuits-show-agency/?locate=Go&deforgid=DOJ (DOJ sued 197 times in FY 2017).

12. *Available at* https://www.justice.gov/oip/page/file/1024596/download.

Homeland Security relied on the exemption 18,523 times. *See* United States Dep't of Homeland Security, *Annual Freedom of Information Act Report* (FY 2017), at 7.[13]

Clarity from this Court on the exemption's reach would define the scope of information to which requesters are entitled; it would assist federal agencies in responding to these requests; and, ultimately, it could reduce the volume of cases for which judicial review is necessary.

III. This case is an ideal vehicle for resolving the division and confusion that exists in the lower federal courts.

The Court should use this case to clarify the correct interpretation of Exemption 7(D) for three reasons: the decisions below squarely addressed the question presented; no alternative grounds formed the basis for those decisions; and no factual dispute exists about Skinner's work as a source of information for the government and his public testimony about that work.

All relevant decisions below squarely decided the question presented by this petition: whether an informant who testifies at trial qualifies as a "confidential" source under Exemption 7(D). Both the district court and Ninth Circuit concluded that Skinner's name and information he disclosed in his public testimony at trial could be withheld from records under Exemption 7(D). *See* Pet. App. 6a-7a (district court holding that "the government may withhold

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13. *Available at* https://www.dhs.gov/sites/default/files/publications/FY_202017_20DHS_20FOIA_20Annual_20Report.pdf.

Skinner's name and the information that he voluntarily disclosed to the public under FOIA Exemption 7(D)"); Pet. App. 2a (Ninth Circuit addressing whether "FOIA exemption 7(D) prohibited the release of Skinner's name and the information that he had divulged previously at trial").

Neither of the decisions below rested on alternative grounds. Both courts only addressed the application of Exemption 7(D) to the information at issue. *See* Pet. App. 7a (district court declining to address alternative grounds); Pet. App. 2a-3a. Petitioner does not seek review of other issues discussed in the decisions of the courts below.

Finally, there is no factual dispute about Skinner's work as a source or that Skinner actually testified about that work at Mr. Pickard's trial. The Ninth Circuit, in an earlier decision, recognized that the government had "officially confirmed" Skinner was a government source in Mr. Pickard's case. *Pickard*, 653 F.3d at 783. And there is also no dispute that Skinner testified extensively about the information he provided to the government. Indeed, ten volumes of Skinner's testimony exist. *See United States v. Pickard*, 00-cr-40104 (D. Kan. 2003) (ECF Nos. 269-273, 299-303) (Volumes I-X of Skinner's Testimony). Thus, the only material at issue in this petition is "information that the parties agree is already known" because Skinner disclosed it. Pet. App. 6a.

IV. The Ninth Circuit's decision is incorrect.

The court below concluded that Exemption 7(D) allows the government to withhold Skinner's name and information that he disclosed during days of public and compelled testimony in a federal criminal trial. That determination is incorrect: first, as a matter of statutory interpretation, it stretches the word "confidential" in Exemption 7(D) beyond what it can bear. Second, it risks turning every source of information into a "confidential" one—a result at odds with Congress' intent and *Landano* itself.

Instead, the correct interpretation of Exemption 7(D) is the one suggested by the First and Third Circuits (and by the series of labor law cases from the Second, Ninth, and Tenth Circuits): that public testimony by a source is evidence that the source's assurance of confidentiality would only extend up to the point the source disclosed information at trial. The exemption does not apply, then, to information actually disclosed by the source at trial, or to the source's identity in relation to information that was actually disclosed. This interpretation comports best with the plain language of the statute, Congress' intent, and this Court's precedent.

1. According to the Ninth Circuit, the definition of a "confidential" source under Exemption 7(D) is broad enough to encompass an informant who has: (a) testified for days in a public criminal trial about his work as a source of information for the government and the information he provided; (b) repeatedly and publicly relied on his work as a source in an attempt to avoid criminal charges; and

(c) talked to the media and others about his work as a government informant.[14]

That stretches the word "confidential" beyond what its plain meaning can bear. *See Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011). "Confidential" means "marked by intimacy or willingness to confide" or "private, secret." Merriam-Webster Dictionary Online (May 2018).[15] Black's Law Dictionary defines "confidential" similarly: as information "meant to be kept secret" or "characterized by trust and a willingness to impart secrets to the other." Black's Law Dictionary (10th ed. 2014). Neither Skinner's identity (which was widely disclosed through his compelled public testimony) nor the information he provided the government (which likewise was disclosed in his testimony) is now private or secret. None of it, then, is "confidential."

Although this Court recognized in *Landano* that "confidentiality" does not require "*total* secrecy," 508 U.S. at 174 (emphasis added), it must require some level of discretion greater than unchecked public disclosure. *See also id.* at 173. Accordingly, a "confidential" source, under any reasonable definition of the term, cannot be one that openly discloses and publicly relies on his work as a government informant.

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14. *See, e.g.*, Michael Mason, Chris Sandel & Lee Roy Chapman, *Subterranean Psychonaut: the Strange and Dreadful Saga of Gordon Todd Skinner*, This Land Press (Jul. 2013), *available at* http://thislandpress.com/2013/07/28/subterranean-psychonaut/.

15. *Available at* https://www.merriam-webster.com/dictionary/confidential.

2. The Ninth Circuit erred in an additional respect: it concluded that, so long as the government *offers* an assurance of confidentiality to an informant, that offer is sufficient to justify the application of Exemption 7(D)—whether or not that offer is actually honored. Pet. App. 3a. In this respect, it adopted the approach of those courts that have concluded that public testimony has no consequences for the "confidential" nature of a source. *See supra* at Section I. (1.)

That rule misapplies this Court's teaching in *Landano*, which must be understood, at minimum, to require the government to provide a *valid* assurance of confidentiality for a source to be deemed "confidential." *Cf. Irons*, 880 F.2d at 1448. That is, regardless of whether the assurance was express or implied, the government must have *actually kept* its promise to closely guard the source's identity and information the source provided. *See Landano*, 508 U.S. at 174. If the rule were otherwise, the government could sweep every source of information into Exemption 7(D), simply by offering empty assurances to those sources—assurances that it never intends to honor. *See id.* at 178-79. Indeed, the rule adopted by the Ninth Circuit more closely resembles the one rejected in *Landano*—a presumption that attaches, even when the government makes promises it has no intention of keeping—rather than the "particularized" approach, based on the facts and circumstances of each case, that this Court has required. *Id.* at 181 (rejecting proposition that a source is confidential "whenever the source provides information to the FBI in the course of a criminal investigation").

Here, even if the government offered an "express promise" of confidentiality, Pet. App. 3a, the government did not honor that promise: the Department compelled Skinner to publicly testify at Mr. Pickard's trial. *See* Order Granting Motion to Compel Testimony, *United States v. Pickard*, 00-cr-40104 (Jan. 28, 2003) (Dkt. No. 257). That compelled, public testimony is evidence that the assurance of confidentiality provided by the Department was either invalid or intended by the parties to expire. *See Irons,* F.2d at 1448; *United Technologies Corp.*, 777 F.2d at 93.

Therefore, at least as to information disclosed during his testimony, Skinner was not a "confidential" source for purposes of Exemption 7(D).

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: May 23, 2018

Respectfully Submitted,

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APPENDIX

APPENDIX A — AMENDED MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 22, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15945

D.C. No. 3:06-cv-00185-CRB

WILLIAM LEONARD PICKARD,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

December 6, 2017, Argued and Submitted,
San Francisco, California
February 22, 2018, Filed

Appendix A

AMENDED MEMORANDUM*

Before: GRABER and N.R. SMITH, Circuit Judges, and ZIPPS,** District Judge.

Plaintiff William L. Pickard filed this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking records held by the Drug Enforcement Agency ("DEA") pertaining to a confidential informant named Gordon Todd Skinner.

1. We review *de novo* whether, as the district court held, FOIA exemption 7(D) prohibited the release of Skinner's name and the information that he had divulged previously at trial.[1] *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 990 (9th Cir. 2016) (*per curiam*) (*en banc*). We conclude that the exemption applies and that the information was properly withheld.

The question for decision is whether Skinner spoke, at the time he spoke, on the understanding that his communication to the government would remain confidential. *United States DOJ v. Landano*, 508 U.S.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jennifer G. Zipps, United States District Judge for the District of Arizona, sitting by designation.

1. On appeal, Plaintiff does not challenge the district court's application of exemption 7(E) to the request for Skinner's identifying number. He therefore has waived any challenge to that ruling. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

165, 172, 113 S. Ct. 2014, 124 L. Ed. 2d 84 (1993). One way for a source to be confidential is for the government to give an express assurance of confidentiality. *Id.* An express promise is essentially unassailable and is easy to prove. *Rosenfeld v. DOJ*, 57 F.3d 803, 814 (9th Cir. 1995). Here, a senior lawyer for the DEA swore in a declaration that the DEA gives express assurances of confidentiality to its informants in Skinner's position, and his written agreement confirms that the assurance was given to him. The fact that the government stated that it could not "guarantee" that Skinner's identity would never be divulged merely describes the reality that the future cannot be known, but does not undermine the assurance of confidentiality at the time Skinner gave information to the DEA.

Plaintiff argues that public disclosure of information avoids the exemption. Even assuming that Plaintiff is correct that exemption 7(D) may be "waived," he is entitled only to exactly the same information that has been publicly disclosed. *Pickard v. DOJ*, 653 F.3d 782, 786 (9th Cir. 2011). If, for instance, the DEA had in its possession a videotape of Skinner's trial testimony, Plaintiff might be entitled to that videotape. But what Plaintiff seeks—records that may contain some of the same information about which Skinner testified—is not exactly the same information that was publicly disclosed, so FOIA exemption 7(D) applies.

2. The district court "consider[ed]" Plaintiff's request for all additional materials to have been "withdrawn." Plaintiff did not ask to withdraw his other claims, so we view this ruling as, in essence, an involuntary dismissal

under Federal Rule of Civil Procedure 41(b), a decision that we review for abuse of discretion. *Tillman v. Tillman*, 825 F.3d 1069, 1074 (9th Cir. 2016). We conclude that the district court abused its discretion. The mere failure to seek summary judgment on all claims does not mean that a party abandons the remaining claims. Rather, it means (in the absence of some other indicator of failure to prosecute) simply that the party intends to go to trial on those claims because issues of fact remain. Indeed, the district court did not grant Defendant's motion for summary judgment regarding all categories of information, and Plaintiff specifically opposed Defendant's motion for summary judgment alleging remaining issues of fact. Accordingly, we vacate the involuntary dismissal of these claims and remand for further proceedings.

3. We review *de novo* the sufficiency of a *Vaughn* index.[2] *Hamdan v. DOJ*, 797 F.3d 759, 769 (9th Cir. 2015). The most recent *Vaughn* index gave sufficient detail. We therefore affirm on this issue.

4. The district court failed to make findings on segregability. But no such findings were necessary as to the two categories of information that are at issue on appeal, because Plaintiff is not legally entitled to any of the information. Thus there is nothing to segregate.

AFFIRMED in part; VACATED in part; and REMANDED. The parties shall bear their own costs on appeal.

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2. *Vaughn v. Rosen*, 484 F.2d 820, 157 U.S. App. D.C. 340 (D.C. Cir. 1973).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED NOVEMBER 15, 2016

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 06-00185 CRB

WILLIAM LEONARD PICKARD,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

November 15, 2016, Decided;
November 15, 2016, Filed

ORDER GRANTING MOTION FOR DE NOVO REVIEW AND HOLDING THAT GOVERNMENT MAY WITHHOLD MATERIALS

This is a long-standing FOIA case involving a convicted LSD manufacturer's search for information about a confidential informant who testified against him. The particular motion that is pending, however—Defendant United States Department of Justice's Second Motion for De Novo Determination of Dispositive Matter Referred to Magistrate Judge, 2d Mot. for De Novo

Review (dkt. 260)—involves information that the parties agree is already known, because a confidential informant has already disclosed it. The motion challenges an order by Magistrate Judge Nathanael M. Cousins holding that none of the government's claimed FOIA exemptions apply, and ordering released the three categories of materials that Plaintiff William L. Pickard currently seeks: (1) confidential informant Gordon Skinner's name, (2) information Skinner has voluntarily disclosed to the public, and (3) Skinner's NADDIS number.[1] *See generally* Order to Release (dkt. 243).

That Pickard only currently seeks the three categories that he does makes the Court's task unusual. Ordinarily, it is clear to the Court that its rulings will have some impact on the parties before it. That Pickard only currently seeks the three categories that he does also makes the Court's task more difficult. While the Court has the benefit of the government's Vaughn index, and a set of documents compiled by the government in response to Pickard's broader *initial* FOIA request, the Court does not know which portions of which documents represent material that "Skinner has voluntarily disclosed to the public." Accordingly, the Court cannot do a meaningful in camera review of the relevant materials.

Nevertheless, and in the absence of controlling authority in the Ninth Circuit, the Court concludes that the government may withhold Skinner's name and

1. NADDIS stands for the Narcotics and Dangerous Drugs Information System, and is a data collection system operated by the DEA. *See* Fifth Supp. Little Decl. (dkt. 184-1) ¶ 6.

the information that he voluntarily disclosed to the public under FOIA Exemption 7(D), which pertains to confidential informants. The Court does not reach the question of whether the same materials could also be withheld under Exemption 7(F), which pertains to safety, or Exemption 7(C), which pertains to privacy interests. The Court further holds that the government may withhold Skinner's NADDIS number under Exemption 7(E), which pertains to law enforcement techniques.

I. BACKGROUND

Plaintiff is an inmate at the U.S. Penitentiary in Tucson, Arizona, having been convicted in 2003 of offenses relating to LSD, and sentenced to life in prison. D MSJ (dkt. 184) at 1. In January 2005, Plaintiff submitted a request to the Drug Enforcement Administration ("DEA") seeking information and documents pertaining to DEA informant Skinner. *Id.* at 2. Specifically, he sought any information on

> (1) Skinner's criminal history (including records of arrests, convictions, warrants, or other pending cases), (2) records of all case names, numbers, and judicial districts where he testified under oath, (3) records of all monies paid in his capacity as a federal government informant, (4) all records of instances where the DEA intervened on his behalf to assist him in avoiding criminal prosecution, (5) all records of administrative sanctions imposed for dishonesty, false claims, or other deceit, (6) all

> records of any benefits of any nature conferred, (7) all records of deactivation as a confidential informant and the reasons for deactivation, and (8) all records concerning Skinner's participation in criminal investigations.

Id. In February 2005, the DEA denied this request, citing FOIA Exemptions 6 and 7(C), without confirming or denying the existence of any records about Skinner. *Id.* The Office of Information and Privacy upheld that response. *Id.*

Plaintiff then brought suit in this court. *Id.* The government moved for summary judgment, and the Court denied the motion without prejudice, holding that the DEA had not adequately demonstrated that a *Glomar* response (a refusal to confirm or deny the existence of records pertaining to an individual) was appropriate. Order Denying MSJ (dkt. 62) at 5-6. The government then brought a second motion for summary judgment, fully briefing the *Glomar* response issue. *See Pickard v. Dep't of Justice*, 653 F.3d 782, 784-85 (9th Cir. 2011). The Court granted that motion, finding that Skinner's identity as a confidential informant had not been "officially confirmed" under the Privacy Act, and that a *Glomar* response was appropriate under Exemptions 7(C) and 7(D). *Id.* at 785.

In July 2011, the Ninth Circuit reversed and remanded, holding that, because the government had publicly disclosed Skinner's status as a confidential informant in open court in the course of official proceedings, a *Glomar* response was no longer appropriate. *Id.* at 787-88. The

court explained, "[t]his is not to say that the DEA is now required to disclose any of the particular information requested by Pickard." *Id.* at 788. The government was to produce a Vaughn index, "raise whatever other exemptions may be appropriate, and let the district court determine whether the contents, as distinguished from the *existence*, of the officially confirmed records may be protected from disclosure under the DEA's claimed exemptions." *Id.*

In March 2012, the government filed its third Motion for Summary Judgment but did not file a Vaughn index. *See generally* D 3rd MSJ (dkt. 140). Plaintiff filed a cross-motion for summary judgment. *See generally* P 3rd MSJ (dkt. 152). The Court denied both motions and ordered the government to file a Vaughn index within 5 days. *See* Minutes (dkt. 165). The government did so. *See* Vaughn Index (dkt. 166).

In May 2014, the Court denied the government's fourth motion for summary judgment after finding its Vaughn index "supremely unhelpful." MSJ Order (dkt. 198) at 1, 7, 11. The Court also denied Pickard's cross-motion for summary judgment, which requested release of the same three categories of information at issue in the present motion. *Id.* at 11; P MSJ Reply (dkt. 191) at 3. The Court found that without an adequate Vaughn index, "the Court [could not] know if releasing something as basic as Skinner's name would compromise an important privacy interest, endanger any individual's (including Skinner's) physical safety, or run afoul of one of the other claimed exemptions." MSJ Order at 9. The Court then ordered the government "to submit (1) an adequate Vaughn index and

(2) all of the responsive documents that the government continues to withhold in full or in part to Magistrate Judge Nathanael Cousins for review of 'whether the contents, as distinguished from the *existence*, of the officially confirmed records may be protected from disclosure under the DEA's claimed exemptions.'" *Id.* at 11 (citations omitted).

On December 24, 2015, Judge Cousins issued a tentative ruling, concluding that "the government has provided no evidence to carry its burden of proving that documents in the three categories qualify for exemptions," and ordered the release of documents in the three categories. *See* Tentative Ruling (dkt. 227) at 1. The parties submitted additional briefing and an additional declaration, and on May 2, 2016, Judge Cousins issued an order releasing the three categories of documents. *See generally* Order to Release. The order explained that "the government may not offer only general government interests that are present in virtually all cases." *Id.* at 2. It relied on *United States v. Apperson*, 642 Fed. Appx. 892, 2016 WL 898885 (10th Cir. 2016), which involved Pickard's challenge to a Kansas district court's denial of his motion to unseal Skinner's confidential informant file. *Id.* at 2-3. Although Judge Cousins recognized that a motion to unseal a file "applies a different standard than a FOIA request," he nonetheless found *Apperson* relevant because it, too, found the government's articulated interests to be too generalized. *Id.* at 3.[2] Judge Cousins also cited to a case

2. That case ultimately vacated the district court's order and remanded for further proceedings. *See Apperson*, 642 F. App'x at 893. This Court asked the parties about the District of Kansas/

that this Court decided about Vaughn indexes, *see* Order at 2 (citing *Muchnick v. Dep't of Homeland Sec.*, No. CV 15-3060 CRB, 2016 U.S. Dist. LEXIS 22683, 2016 WL 730291, at *3 (N.D. Cal. Feb. 24, 2016) (holding that boilerplate explanations for withholdings are improper)), although Judge Cousins had already found the Vaughn index in this case sufficient, *see generally* Order Finding Vaughn Index Sufficient (dkt. 219). The order did not discuss any documents or any claimed exemptions. *See generally* Order to Release. Judge Cousins ordered the parties to meet by May 16, 2016, to determine what information had been publicly disclosed, but the parties did not meet. Order to Release at 3; Response to Order Requesting Additional Information (dkt. 253) at 1 (explaining that because the government moved for De Novo determination, the parties have not conferred).[3]

Tenth Circuit litigation at the motion hearing, observing that Pickard might still win access to Skinner's file in that litigation. *But see id.* ("Although Defendants' counsel *already had access to an unredacted copy*, Defendants sought to unseal the file in order to use it in connection with ongoing litigation under [FOIA], and other proceedings.") (emphasis added). Counsel stated that they believed that nothing had happened in the *Apperson* case—despite the Tenth Circuit's remand taking place approximately six months ago—and agreed to file a status report updating this Court on that litigation. The Court continues to await that filing.

3. This Court also ordered the government to tell the Court what information within the file Skinner had publicly disclosed. *See* Order Requesting Additional Information (dkt. 252). The government requested that the Court make the Exemption 7(D) determination before it participated in the laborious task of combing through testimony. *See* D Response to Order Requesting Additional Information (dkt. 253) at 1-2. The Court granted the

The government filed a Motion for De Novo Determination of Dispositive Matter Referred to Magistrate Judge as to whether the government must release the withheld documents. *See generally* D Mot. De Novo (dkt. 244). Pickard opposed. P Opp'n to D Mot. De Novo (dkt. 246) at 1-2. However, the Court required the parties to re-file, as their briefs inappropriately incorporated previous briefs. *See* Order Terminating Motion, Vacating Hearing, Directing Filing of New Briefs, and Setting New Hearing Date (dkt. 255) at 2 ("Endless references to past briefs require the Court to scour the docket to determine what the parties are actually arguing."). The government re-filed a Motion for De Novo Review of Judge Cousins's order, 2d Mot. for De Novo Review, Pickard has opposed that motion, Opp'n to 2d Mot. for De Novo Review (dkt. 264), and the government has replied, Reply re 2d Mot. for De Novo Review (dkt. 265).

II. LEGAL STANDARD

"The Freedom of Information Act was enacted to facilitate public access to Government documents." *United States Dep't of State v. Ray*, 502 U.S. 164, 173, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991). The purpose of the Act is "'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Id.* (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)). "Consistently with this purpose, as well as the plain language of the Act,

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request. *See* Order Regarding Request for More Information (dkt. 254). Therefore, as previously noted, the Court does not know what material within the documents is presently in dispute.

the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *Id.*

"Pursuant to 28 U.S.C. § 636(b)(1), Federal Rule of Civil Procedure 72(b), and Civil Local Rule 72-3, a party may object to a magistrate judge's proposed findings and recommendations by filing a motion for a de novo determination of a dispositive matter[] referred to a magistrate judge." *REO Capital Fund 4, LLC v. Fuller*, No. 15-cv-03252-JST, 2015 U.S. Dist. LEXIS 109831, 2015 WL 4941742, at *1 (N.D. Cal. Aug. 19, 2015) . The motion "must be filed within fourteen days of the magistrate's recommendation and must specifically identify the portions of the findings and recommendations to which the party objects, and the reasons for the objection(s)." *Id.* Upon the filing of such a motion, the court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *See* 28 U.S.C.A. § 636(b)(1). While Judge Cousins issued an order rather than a recommendation, the order references Fed. R. Civ. P. 72(b) regarding dispositive matters. *See* Order to Release at 4.

III. DISCUSSION

The government argues that Judge Cousins erred in ordering the release of the three categories of material sought, because (A) official confirmation does not require

any records to be released; (B) the threshold requirement of Exemption 7 has been met; (C) Exemption 7(D) applies to Skinner's name and the materials he disclosed; (D) Exemptions 7(F) and 7(C) apply to Skinner's name and the materials he disclosed; and (E) Exemption 7(E) applies to Skinner's NADDIS number. *See generally* 2d Mot. for De Novo Review. This order concludes that withholding is proper under Exemptions 7(D) and 7(E).

A. Official Acknowledgment[4]

The government argues that official acknowledgment does not require the release of any of the materials in this case for two reasons: first, because "the Ninth Circuit already rejected [that argument] in this very case," and second, because Pickard has not made the showing required. 2d Mot. for De Novo Review at 6-7. Pickard responds that the Ninth Circuit did not mean what it said about official confirmation, and that it is the government's fault that he is unable to make the required showing. Opp'n to 2d Mot. for De Novo Review at 13-15.

1. Holding in *Pickard* re Official Acknowledgment

As to the Ninth Circuit's holding in this case, the court explained: "[W]hen information has been either 'officially acknowledged' or 'officially confirmed,' *an agency is not precluded from withholding information pursuant to*

4. Like the parties, this order uses the terms official acknowledgment, official confirmation, and the "public domain doctrine" interchangeably.

an otherwise valid exemption claim; however, a *Glomar* response is no longer appropriate. . . ." *Pickard*, 653 F.3d at 786 (emphasis added). The Ninth Circuit went on to cite to *Wolf v. CIA*, 473 F.3d 370, 379, 374 U.S. App. D.C. 230 (D.C. Cir. 2007), for the proposition that official acknowledgment related only to the existence or nonexistence of records, and that the government was to either disclose any officially acknowledged records or establish that the contents are exempt and that exemption had not been waived. *Id.* It also cited *Benavides v. DEA*, 968 F.2d 1243, 1248, 296 U.S. App. D.C. 372 (D.C. Cir. 1992), for the proposition that "Congress intended to permit the DEA to withhold documents under 7(C) and 7(D), even if the agency must, under subsection (c)(2) acknowledge their existence." *Id.* Both *Wolf* and *Benavides* therefore recognize that official confirmation does not necessarily negate the application of other exemptions.

Pickard argues that the sentence the government relies on from *Pickard* "is dicta" and "likely the product of a drafting error." Opp'n to 2d at 14. The sentence is not dicta—it was central to the court's ruling both that a *Glomar* response was inappropriate once the government officially confirmed Skinner's status as a confidential informant, and that the parties were required to return to this Court and litigate the validity of any claimed exemptions. Nor is there any plausible drafting error. The cited portion of *Wolf* does not "state[] precisely the opposite" of what the court ordered here. *See id.* Rather, *Wolf* envisions that officially acknowledged records might still be subject to valid exemptions. *See Wolf*, 473 F.3d at 379. That is what the *Pickard* court held as well. *See*

Pickard, 653 F.3d at 786. Further undercutting the idea of a "drafting error," the court in *Pickard* repeated the same point a couple of pages later, explaining that while a *Glomar* response was "no longer available," "[t]his is not to say that the DEA is now required to disclose any of the particular information requested by Pickard." *Pickard*, 653 F.3d at 788. It explained that, having officially confirmed Skinner as an informant, the government was to produce a Vaughn index, "raise whatever other exemptions may be appropriate, and let the district court determine whether the contents, as distinguished from the *existence*, of the officially confirmed records may be protected from disclosure under the DEA's claimed exemptions." *Id.* (citing *Wolf* and *Benavides*). The government is therefore correct that the ruling in this case defeats the argument that official confirmation of Skinner as a confidential informant merits the disclosure of all of the information Pickard seeks. If the Ninth Circuit had believed that official confirmation worked as Pickard suggests, it could easily have said so.

2. Requirements for Official Acknowledgment

As to the required showing for official acknowledgment, the court in *Pickard* explained:

> A fact is deemed "officially acknowledged" only if it meets three criteria: First, the information requested must be as specific as the information previously released. Second, the information requested must match the information previously disclosed; we noted, for

> example, that official disclosure did not waive the protection to be accorded information that pertained to a later time period. Third, we held that the information requested must already have been made public through an official and documented disclosure.

Pickard, 653 F.3d at 786 (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765, 286 U.S. App. D.C. 13 (D.C. Cir. 1990)). It is the plaintiff's burden to point to specific information in the public domain that appears to duplicate that being withheld. *See Davis v. Dep't of Justice*, 968 F.2d 1276, 1279, 296 U.S. App. D.C. 405 (D.C. Cir. 1992) (explaining that the ultimate burden of persuasion rests with the government but that a party who asserts a claim of prior disclosure must bear the initial burden or pointing to specific information). "This is so because the task of proving the negative—that information has *not* been revealed—might require the government to undertake an exhaustive, potentially limitless search." *Id.* at 1279.

There is no question that Pickard has successfully pointed to Skinner's name, which the government officially acknowledged. *See Pickard*, 653 F.3d at 784 ("the government officially confirmed Skinner's status as an informant in open court in the course of official proceedings"). But the Court does not imagine that what Pickard seeks are entire documents with everything redacted but Skinner's name. Moreover, as discussed below, Exemption 7(D) presents a formidable hurdle to disclosing even Skinner's name.

In his effort to obtain information Skinner has already disclosed and Skinner's NADDIS number, Pickard has failed entirely to point to specific information that the government is withholding and that matches information previously disclosed. *See Pickard*, 653 F.3d at 786. The government asserts: "he simply points to literally thousands of pages of Skinner's transcripts and court filings and asks this Court to order information released *if* it matches based on the government's review." 2d Mot. for De Novo Review at 7 (noting that there are ten volumes of testimony from Pickard's criminal trial, another transcript from the District of Kansas case, and 41 exhibits from a Northern District of Oklahoma case). Pickard disputes this, saying that he "has repeatedly directed the government's attention to (1) the five days of public testimony Skinner provided . . . and (2) the numerous documents from Skinner's informant file (provided to him by the government) that Skinner has published in public court filings," *see* Opp'n to 2d Mot. for De Novo Review, but he has neither directed the Court to such materials, nor specified which materials overlap.[5] Pickard actually agrees that he "is unable to tie specific portions of Skinner's public testimony to specific withheld documents," but he argues that this "is not a fault owing to

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5. Pickard points to several documents that Skinner released through court filings. *See* Habeas Exhibits at 33, 37, 42, 45, 50, 57, 74, 85, 90, 94, 99, 102 (dkt. 20-2). However, even if some of those documents are being withheld under 7(D), Skinner's having released government documents does not trigger the public domain doctrine. Pickard asserts that the government gave Skinner these documents, but Pickard has not shown an official disclosure by the government. *See Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983).

Mr. Pickard. Rather, the government's refusal to provide specific descriptions of the withheld records renders such a task impossible." *Id.* at 14-15. This argument, which Pickard repeated at the motion hearing, fails because the Court has found the Vaughn index in this case acceptable. *See generally* Order Finding Vaughn Index Sufficient; Order Denying Mot. (dkt. 222). It is also curious that Pickard cannot make such a showing if in fact he already has access to an unredacted copy of Skinner's file from the District of Kansas/Tenth Circuit litigation. *See Apperson*, 642 F. App'x at 893.

Because Pickard has failed to make an adequate showing of official acknowledgment, the Court will proceed to analyzing the claimed exemptions.[6]

6. Pickard makes an additional argument that he should be permitted to take discovery in this case before a subsequent round of summary judgment. *See* Opp'n to 2d Mot. for De Novo Review at 9-12. He argues that "[g]iven the incomplete factual record present here, the Court need not . . . consider the government's exemption claims." *Id.* at 11. The Court denies this request, as Pickard has already unsuccessfully sought discovery in this case, *see* Order Denying Without Prejudice Plaintiff's Motion to Lift Stay of Discovery (dkt. 179) at 2 (quoting *Lawyers' Committee for Civil Rights of S.F. Bay Area v. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1132 (N.D. Cal. 2008) ("Discovery is usually not permitted in a FOIA case if the government's affidavits were made in good faith and provide specific detail about the methods used to produce the information.")). No doubt Pickard would like to use discovery as another means of obtaining the same documents. But "this circuit has affirmed denials of discovery where . . . the plaintiff's requests consisted of 'precisely what defendants maintain is exempt from disclosure to plaintiff pursuant to the FOIA." *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008) (quoting *Pollard v. FBI*, 705 F.2d 1151, 1154 (9th Cir. 1983)).

B. Threshold Requirement

All of the government's claimed exemptions in this case arise under Exemption 7, which pertains to documents "compiled for law enforcement purposes." *See generally* 2d Mot. for De Novo Review (claiming application of Exemptions 7(D), 7(F), 7(C), and 7(E)); *FBI v. Abramson*, 456 U.S. 615, 622, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982). This Court has already held that the documents were all compiled for law enforcement purposes. *See* Order Granting Defendant's Motion for Summary Judgment at 6 ("In view of the nature of plaintiff's FOIA request and the descriptions of the systems of records where responsive records likely would be located, the court is satisfied that any responsive records would be law enforcement records covered by FOIA Exemption 7."). The evidence continues to support that conclusion. *See* Tenth Supp. Little Decl. (dkt. 233-1) ¶ 7 ("The records requested by plaintiff were law enforcement records gathered in accordance with DEA's responsibilities under the Comprehensive Drug Abuse Prevention and Control Act of 1970.").

Pickard acknowledges that the government has satisfied the Exemption 7 threshold requirement for all the documents but one: "a letter written by the DEA to the CHP that describes one instance of the DEA intervening on Skinner's behalf to avoid criminal charges." Opp'n to 2d Mot. for De Novo Review at 15. Pickard argues that because the government represents that "it is not the practice of DEA to intervene on behalf of any individual to assist them in avoiding criminal prosecution," then "the letter falls outside DEA's practices and law enforcement

mandate." *Id.* (citing *Pratt v. Webster*, 673 F.2d 408, 420-21, 218 U.S. App. D.C. 17 (D.C. Cir. 1982); *Taylor v. DOJ*, 257 F. Supp. 2d 101, 108 (D.D.C. 2003)).

This argument is unpersuasive for two reasons. First, having reviewed the document, the Court observes that it was plausibly compiled for law enforcement purposes. Second, as Pickard is only currently seeking materials that Skinner disclosed, and the only disclosure of this information appears to have come from Skinner's wife, *see* Rumold Decl. Ex. E at 63, the document is not subject to disclosure in this motion. Accordingly, the government has met the threshold requirement of Exemption 7—that the relevant documents be compiled for law enforcement purposes—and so the Court will turn to the individual claimed exemptions.

C. Exemption 7(D)

The first individual exemption the government asserts is Exemption 7(D). Exemption 7(D) allows the government to withhold law enforcement records or information if it "could reasonably be expected to disclose the identity of a confidential source. . . and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation, . . . information furnished by a confidential source." 5 U.S.C. § 552 (b)(7)(D). The government argues here that "[u]nder the plain language of the statute, Skinner's name is properly withheld because it would literally disclose the identity of a confidential source, and information Skinner provided is properly withheld, even if he later testified

about it, because it would literally disclose information furnished by a confidential source." 2d Mot. for De Novo Review at 8. The government asserts: "Exemption 7(D) cannot be waived." *Id.* Pickard disagrees, arguing that because the government officially confirmed Skinner as a DEA informant, because Skinner testified, and because the government provided documents to Skinner, "continued withholding . . . under Exemption 7(D) is improper." Opp'n to 2d Mot. for De Novo Review at 16. The Court agrees with the government.

1. Ninth Circuit Authority on Exemption 7(D)

Unfortunately, there is no particularly relevant precedent from the Ninth Circuit on Exemption 7(D).

Pickard asserts that "In this circuit, an informant's public testimony waives Exemption 7(D)'s protection for *all* information provided by the informant—even if that information was not disclosed at trial." *See* Opp'n to 2d Mot. for De Novo Review at 16 (citing *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 986 (9th Cir. 1985)). That assertion misrepresents *Van Bourg*, however, which involved a labor investigation, not a criminal investigation, and which turned on whether the informant was truly a confidential source. *See* 751 F.2d at 986 ("for exemption 7(D) to be applicable, there must be a finding that the source of the affidavit was explicitly or implicitly guaranteed confidentiality."). *Van Bourg* provides no support for Pickard's argument at the motion hearing that once an informant testifies, he loses his expectation

of confidentiality; instead *Van Bourg* focuses on the informant's understanding at the time that he provided information to the government. The Ninth Circuit noted that individuals who submit affidavits to the NLRB "have no reasonable expectation of confidentiality and should expect their names and testimony to be revealed if the investigation results in a formal hearing." *Id.* In other words, there was no confidential source in *Van Bourg* to begin with.[7] That is an altogether different scenario than this case, in which there is no question that Skinner was a confidential informant in a criminal investigation. *See Pickard*, 653 F.3d at 788 (referencing "Skinner's status as a confidential informant in Pickard's case").[8]

The government claims that *Prudential Locations LLC v. Dept. of Housing & Urban Development*, 739 F.3d

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7. This is also how the First Circuit interpreted *Van Bourg. See Irons v. F.B.I.*, 880 F.2d 1446, 1455 (1st Cir. 1989) (characterizing *Van Bourg* as a case about "whether a source, *knowing he is likely to testify at the time he furnishes information* to the agency, is, or remains after testimony, a 'confidential source' within the meaning of the statute") (emphasis added). *See also Parker v. Dep't of Justice*, 934 F.2d 375, 381, 290 U.S. App. D.C. 87 (D.C. Cir. 1991) (finding *Van Bourg* "inapposite" and noting that it involved civil law enforcement, whereas the second clause of Exemption 7(D) involves criminal law enforcement).

8. Pickard suggests that "the government has failed to demonstrate that an adequate 'express' or 'implied' assurance of confidentiality was provided to Skinner," Opp'n to 2d Mot. for De Novo Review at 17, but this argument fails: it is the law of the case that Skinner was a confidential informant. Furthermore, the DEA explicitly assured Skinner confidentiality. *See* Tenth Supp. Little Decl. ¶ 13; *in camera* materials.

424 (9th Cir. 2013), serves as precedent, but that case was primarily about Exemption 6. The Ninth Circuit in *Prudential Locations* explained that, under Exemption 7(D), "[i]f the individual is a 'confidential source,' that is the end of the matter; there is no need to balance the individual's privacy interest against the public interest in disclosure, as is required under Exemption 6." 739 F.3d at 434. The government clings to the "end of the matter" language, and also relies on the language from *Church of Scientology of Cal. v. Dep't of Justice*, 612 F.2d 417, 426-27 (9th Cir. 1979), stating that Exemption 7(D) must be interpreted according to its "plain meaning." *See* 2d Mot. for De Novo Review at 8. While both cases mildly support the government's position, neither involves a confidential informant who has testified in criminal proceedings and disclosed some information.

2. Out-of-Circuit Authority on Exemption 7(D)

More helpful is authority from other circuits.

The landmark case about Exemption 7(D) is the en banc decision in *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989), which both the government and Pickard rely on in support of their positions. *See* 2d Mot. for De Novo Review at 8, 10-11; Opp'n to 2d Mot. for De Novo Review at 16-17, 19. Importantly, the court in *Irons* explicitly did not rule on whether public testimony could waive Exemption 7(D) protection for information publicly disclosed at trial.

See Irons, 880 F.2d at 1448.[9] The court's holding, which Pickard's counsel read aloud at the motion hearing, was "that public testimony by 'confidential sources' cannot 'waive' the FBI's right under the second clause of exemption 7(D) to withhold 'information furnished by a confidential source' and *not actually revealed in public*." *Id.* at 1456-57 (emphasis added). The court noted, however, that some courts have held that even information disclosed at trial is protected under Exemption 7(D). *See id.* at 1448 (citing *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 925 (11th Cir. 1984); *Lame v. Dep't of Justice*, 654 F.2d 917, 925 n.8 (3d Cir. 1981); *Lesar v. Dep't of Justice*, 636 F.2d 472, 491, 204 U.S. App. D.C. 200 (D.C. Cir. 1980)).

Even though *Irons* did not reach the issue of materials publicly disclosed by an informant, it unambiguously held that Exemption 7(D) cannot be waived, and it provided extensive support for that conclusion. *See Irons*, 880 F.2d at 1448-49. First, the court noted that neither the plain language of Exemption 7(D) "nor any other relevant language, says anything at all about 'waiver.' Other courts (indeed virtually all other courts) have interpreted the statute's language literally in this respect." *Id.* at 1449. The court cited approvingly to *Lame*, 654 F.2d at 925, which held that "*all* the information given by a confidential source is exempt," and that "the subsequent disclosure of information originally given in confidence does not render nonconfidential *any* of the information originally provided." *Id.* Second, the court examined the legislative

9. This is because the FBI in that case did not contest the plaintiff's request for information revealed by confidential sources at trial. *See id.* The government has taken a different position here.

history, concluding that Congress intended "a literal interpretation," as it intended the exemption "to help law enforcement agencies to recruit, and to maintain, confidential sources; its object was not simply to protect the source, but also to protect the flow of information to the law enforcement agency." *Id.*[10] Third, the court observed that circuits have "specifically interpreted the 'information furnished' exemption to apply irrespective of subsequent public identification of the source" and "irrespective of the nature of the information (so long as the information meets the criteria in the exemption)." *Id.* at 1452. Fourth, the court explained that, "while courts in some exemption 7(D) cases have used the word 'waiver,' . . . they have not used that word in any context or in any way that argues for application of a 'waiver doctrine' in the type of case before us." *Id.*[11] Fifth, the court held

10. *See also Church of Scientology*, 612 F.2d at 426 ("paramount concern was the loss of sources of confidential information").

11. In this section, the court criticized the "single district court case" to "hold that actual testimony waives the right to nondisclosure," an opinion from this district. *Irons*, 880 F.2d at 1455 (discussing *Powell v. Dep't of Justice*, 584 F. Supp. 1508, 1530 (N.D. Cal. 1984)). The court explained that "[t]hat case . . . speaks only about the waiver of the right to withhold a source's 'identity' once the source has testified; it says nothing about disclosure of the information furnished by the source." *Id.* It also observed that the *Powell* court confused the notion of "confidential" with "secret," "which, as we have noted above . . . is not the proper interpretation." *Id. Powell* is also distinguishable because it turns on whether "persons who supplied information . . . did so under an implied inference of confidentiality." *Powell*, 584 F. Supp. at 1529. The court in *Powell* stated that it would "carefully review the documents to determine the specific circumstances under which the source agreed to testify

that creating a waiver exception would "run[] afoul of the statute's intent to provide 'workable' rules." *Id.* at 1455-56 (internal quotation marks omitted).

Irons did not, as Pickard claims, "[find] that Exemption 7(D) did not apply to (1) the identity of an informant . . . ; and (2) information that was actually disclosed by the informant in public testimony." *See* Opp'n to Mot. for De Novo Review at 17; *Moffat v. Dep't of Justice*, 716 F.3d 244, 253 (1st Cir. 2013) (observing that *Irons* "reserved the question of whether 7(D) continues to apply to the specific information that has already been publically disclosed"). Moreover, given its logic and reasoning, the most plausible reading of *Irons* is that Exemption 7(D) applies to such information. *See Irons*, 880 F.2d at 1456 ("exemption 7(D) contains language that, without qualification, exempts from disclosure 'information furnished by a confidential source.'").

Other courts to actually address the issue of information derived from a confidential source and subsequently publicly disclosed have held that Exemption 7(D) applied.[12] In *Ferguson v. FBI*, 957 F.2d 1059, 1068 (2d

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and [would] then decide whether an implied assurance can reasonably be inferred." *Id.* at 1530. Again, in our case, there is no reasonable dispute that Skinner was a confidential informant.

12. Pickard cites to *Hidalgo v. F.B.I*, No. 04-0562 (JR), 2005 U.S. Dist. LEXIS 46753, 2005 WL 6133690, at *2 (D.D.C. Sept. 29, 2005), and *Powell*, 584 F. Supp. at 1529, to support his argument that official confirmation waives Exemption 7(D). *See* Opp'n to 2d Mot. for De Novo Review at 16. But *Hidalgo* involves the use of a *Glomar* response, not Exemption 7(D). *See Hidalgo*, No. 04-0562 (JR), 2005

Cir. 1992), the Second Circuit endorsed the reasoning in *Irons* and "reject[ed] the idea that subsequent disclosures of the identity of the confidential source or of some of the information provided by a confidential source requires full disclosure of information provided by such a source." The court explained that "Exemption 7(D) is concerned not with the content of the information, but only with the circumstances in which the information was obtained." *Id.* at 1069. In *Parker v. Dep't of Justice*, 934 F.2d 375, 380, 290 U.S. App. D.C. 87 (D.C. Cir. 1991), the D.C. Circuit held that "once an agency establishes that it received the requested information in confidence, 'the source will

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U.S. Dist. LEXIS 46753, 2005 WL 6133690, at *2 (D.D.C. Sept. 29, 2005) (also holding that Exemption 7(D) might be appropriate if the government were to acknowledge the existence of responsive records and sought an appropriate 7(D) exemption using a Vaughn index). As discussed above, *Powell*, in which a court in this district found that testimony in court waives an informant's right to withhold his identity, is distinguishable. *See Powell*, 584 F. Supp. at 1529. Pickard also cites to *Marino v. DEA*, 685 F.3d 1076, 1082, 401 U.S. App. D.C. 452 (D.C. Cir. 2012), for the proposition that "a federal prosecutor's decision to release information [concerning an informant] at trial is enough to trigger the public domain exception," Opp'n to 2d Mot. for De Novo Review at 18, but that case also involved the propriety of a *Glomar* response, and not Exemption 7(D). *See Marino*, 685 F.3d at 1078-79 (DEA issued *Glomar* response, invoking Exemption 7(C)). That section of Pickard's brief also cites, without an explanatory parenthetical, *Irons*, for the proposition that when the government discloses the source's identity, it cannot subsequently withhold the information in response to a FOIA request. *See* Opp'n to Mot. for De Novo Review at 18. However the cited pages in *Irons* include the explanation that "exemption 7(D) contains language that, without qualification, exempts from disclosure 'information furnished by a confidential source.'" *Irons*, 880 F.2d at 1456.

be deemed a confidential one, and both the identity of the source and the information he or she provided will be immune from FOIA disclosure.'" In *Lame*, 654 F.2d at 925, one of the cases discussed in *Irons*, the Third Circuit explained that "once there has been an expressed or implied assurance of confidentiality, a subsequent release or publication by the government of a portion of the information does not negate the exemption for any of the information originally given."[13] In *Neely v. FBI*, 208 F.3d 461, 466 (4th Cir. 2000), the Fourth Circuit relied on the Supreme Court's explanation of "confidential source" in *Department of Justice v. Landano*, 508 U.S. 165, 113 S. Ct. 2014, 124 L. Ed. 2d 84 (1993), concluding that "in *Landano*, the Supreme Court defined 'confidential source' in terms of the 'understanding' reached between the informant and the FBI at the time the information was communicated to the FBI, not in terms of whether the information subsequently remained non-public." The Fourth Circuit held that "a source could remain a 'confidential source' for purposes of Exemption 7(D), even if the source's communication with the FBI is subsequently disclosed at trial or pursuant to the government's *Brady* obligations." *Id.* (citing *Landano*, 508 U.S. at 173-74). *See*

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13. The court explained that a source's testimony might be evidence that there had not been an assurance of confidentiality. *Id.* Again, that is not an issue here. *Lame* further explained: "Exemption 7(D) differs from other FOIA exemptions in that its applicability depends not on the specific factual contents of a particular document; instead, the pertinent question is whether the information at issue was furnished by a 'confidential source' during the course of a legitimate criminal law investigation. Once that question is answered in the affirmative, all such information obtained from the confidential source receives protection." *Id.*, 654 F.2d at 925.

also Kimberlin v. Dep't of Treasury, 774 F.2d 204, 209 (7th Cir. 1985) ("The disclosure of information given in confidence does not render non-confidential any of the information originally provided."); *Kiraly v. FBI*, 728 F.2d 273, 278 (6th Cir. 1984) (discussing legislative intent behind Exemption 7(D) and concluding that it "protects without exception and without limitation the identity of informers," even where individual's identity as FBI informant was already known).

Pickard tries to steer the Court away from the weight of the authority on this issue with two arguments: one involves trying to distinguish that authority, and the other involves the D.C. Circuit, which has held that official acknowledgment can waive Exemption 7(D).

Pickard first tries to distinguish *Ferguson*, 957 F.2d 1059, *Kiraly*, 728 F.2d 273, and *Parker*, 934 F.2d 375, 290 U.S. App. D.C. 87, just three of the cases upon which the government relies. *See* Opp'n to 2d Mot. for De Novo Review at 18-19. Pickard asserts that in these cases, state governments were eliciting testimony about a federal confidential informant, and that "no informant was ever confirmed by the federal government." *Id.* However, courts do not seem to focus on the state/federal dynamic, or on whether it was the informants or the government that revealed the informants' status. In fact, the *Ferguson* court explained that "[t]he statutory language does not leave room for a judicial balancing of the equities, or for a determination of whether any harm would result from disallowing an exemption." *Ferguson*, 957 F.2d at 1069. By that reasoning, Exemption 7(D) would still cover

information disclosed publicly even if doing so seemed meaningless. Further, the *Irons* court noted that "[t]he words 'furnished by a confidential source' do not mean that the information or identity of the source is secret; they simply mean that the information was 'provided in confidence' at the time it was communicated to the [DEA]." *See Irons*, 880 F.2d at 1448. Accordingly, Pickard's attempt to distinguish some of the relevant authority is unpersuasive.

More significant is *Davis*, 968 F.2d 1276, 296 U.S. App. D.C. 405, which Pickard just briefly mentions. *Davis* chiefly concerned the burden of proof when the government asserted a number of exemptions, including Exemption 7(D), and the plaintiff claimed that the tapes at issue had already been publicly disclosed at trial. 968 F.2d at 1279. The court noted that the government was willing to give the plaintiff "only exactly what he can find in hard copy," requiring "the requester to point to 'specific' information identical to that being withheld." *Id.* at 1280. "It does not suffice to show . . . that *some* of the tapes were played to shift the burden to the government"—the plaintiff had to "point to specific information in the public domain." *Id.* The court in *Davis* agreed that because the informant was a confidential source, "the application of Exemption 7(D) is automatic." *Id.* at 1281. It observed that "[e]ven when the source testifies in open court . . . he does not thereby 'waive the [government's] right to invoke Exemption 7(D) to withhold . . . information furnished by a confidential source not actually revealed in public." *Id.* (citing *Parker*, 934 F.2d at 379-80). It went on to hold, however, that "[t]he government is obliged to disclose

only the 'exact information' to which the source actually testified." *Id.* (citing *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 577 (D.C. Cir. 1990)).

The court in *Dow Jones & Co.*, had held that in extraordinary circumstances, "if the exact information given to the FBI has already become public, and the fact that the informant gave the same information to the FBI is also public, there would be no grounds to withhold." 917 F.2d at 577. However, "[t]he requester will rarely, if ever, have absolutely solid evidence showing that the source of an FBI interview in a law enforcement investigation has manifested complete disregard for confidentiality." *See id.* at 577, n.5 ("One can imagine, for instance, a source falsely describing publicly what he or she told the FBI privately.").[14] And indeed, in *Davis*, the court explained that "[w]hat that means for this case, essentially, is that the government is entitled to withhold the tapes obtained through the informant's assistance unless it is specifically shown that those tapes, or portions of them, were played during the informant's testimony." 968 F.2d at 1281.

Davis therefore shows the D.C. Circuit recognizing the application of the official acknowledgment doctrine to Exemption 7(D). *See also Cobar v. Dep't of Justice*, 81 F. Supp. 3d 64, 72 (D.D.C. 2015) (relying on *Parker* and *Irons*, holding in Exemption 7(D) context that "for information or a record to lose its protected status based on public disclosure, the information must truly be in the

14. Documents from the *in camera* review suggest that Skinner has publicly lied about what he told the DEA.

public domain and there must be an exact identity between the publicly disclosed information or document and the information or documents sought under the FOIA.").[15] Other circuits have not so held. *See, e.g.*, *Lame*, 654 F.2d at 925 (citation omitted) ("once there has been an expressed or implied assurance of confidentiality, a subsequent release or publication by the government of a portion of information does not negate the exemption for any of the information originally given."). And the Ninth Circuit has not reached the issue.

Because this Court finds persuasive the numerous courts to focus on whether information was *originally given in confidence*, regardless of whether or not that information later becomes public, this Court holds that Exemption 7(D) justifies the withholding of Skinner's name and the information he has publicly disclosed.[16] The

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15. That court also stated that a more difficult question was whether official confirmation of a confidential source's *identity* required disclosure of *information* that would identify or tend to identify the source. *Id.* (emphasis in original). The court relied on *Parker* in holding that "public disclosure of the identity of a confidential source does not waive Exemption D's applicability." *Id.*

16. Even if this circuit were to adopt the D.C. Circuit's reasoning and hold that information officially confirmed (as opposed to merely publicly disclosed) cannot be withheld under Exemption 7(D), the Court would conclude that Pickard has not met his burden of demonstrating *specific instances of official confirmation*—aside from Skinner's name. *See Pickard*, 653 F.3d at 786; *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 702-03 (9th Cir. 1989). Again, the Court cannot imagine that what Pickard seeks in this motion are entire documents with everything redacted but Skinner's name. Moreover, the government might argue (although it has not yet) that releasing

Court notes that because it does not know which portions of which of the documents in the in camera materials are "information Skinner has publicly disclosed," the Court cannot independently verify whether all such information is covered by Exemption 7(D). However, the government represented to the Court at the motion hearing that all of the "information Skinner has publicly disclosed" is covered by Exemption 7(D), the Court's in camera review of the broader set of responsive materials gives it no reason to doubt this characterization, and—though he contends that the government/Skinner has *waived* Exemption 7(D)—Pickard has not disputed that the relevant materials "could reasonably be expected to disclose the identity of a confidential source" or constitute "information furnished by a confidential source." *See* 5 U.S.C. § 552 (b)(7)(D).

D. Exemptions 7(F) and 7(C)

The next individual exemptions the government asserts for Skinner's name and the information he has publicly disclosed are Exemptions 7(F) and 7(C). Exemption 7(F) allows the government to withhold law enforcement records or information if they "could reasonably be expected to endanger the life or physical safety of any individual." *See* 5 U.S.C. § 552 (b)(7)(F). Exemption 7(C) allows the government to withhold law enforcement records or information if they "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See* 5 U.S.C. § 552 (b)(7)(C). Both of these exemptions require the Court to do

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the exact number of times the file mentions Skinner's name might reveal more than the information in the public domain (such as, the degree of interaction he had with the DEA).

a document-by-document review—in the case of 7(F), to determine whether material in one document might endanger Skinner's life but material in another might not, and in the case of 7(C), to balance the relevant privacy and public interests implicated by material in each document. *See Van Bourg v. NLRB*, 656 F.2d 1356, 1358 (9th Cir. 1981) (courts are to "state in reasonable detail the reasons for its decision as to each document in dispute").

Because the Court does not know which portions of which of the documents in the in camera materials are "information Skinner has publicly disclosed," the Court cannot conduct such a review. The Court is also concerned that Pickard's request, which would require the government to compile a subset of the in camera documents in a form that is presently unavailable to the general public, is problematic under *Department of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989).[17] Accordingly, rather than opine on matters in the abstract, the Court does not reach the parties' arguments as to Exemptions 7(F) or 7(C).

E. Exemption 7(E)

Finally, the government asserts Exemption 7(E) as the basis for its withholding of Skinner's NADDIS number. 2d Mot. for De Novo Review at 18-20. Exemption

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17. *Reports Committee*, 489 U.S. at 764, recognized that "[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."

7(E) allows the government to withhold law enforcement records or information if they "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." 5 U.S.C. § 552 (b)(7)(E). The Ninth Circuit recently clarified that the restrictive language, "if such disclosure could reasonably be expected to risk circumvention of the law," only applies to the second clause, which means that the first clause, "would disclose techniques and procedures for law enforcement investigations or prosecutions," is sufficient for withholding. *See Hamdan v. Dep't of Justice*, 797 F.3d 759, 778 (9th Cir. 2015). In other words, the first clause "provides categorical protection for techniques and procedures used in law enforcement investigations or prosecutions" and "requires no demonstration of harm or balancing of interests." *See Keys v. Dep't of Homeland Sec.*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (internal quotation marks, citations and brackets omitted). However, "7(E) only exempts investigative techniques not generally known to the public." *See Rosenfeld v. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995) (affirming the district court's decision that a pretext phone call is a well-known investigative technique, and thus not protected by exemption 7(E)).

The government argues that disclosing Skinner's NADDIS number would disclose a law enforcement technique, and that the use of NADDIS numbers is not generally known to the public. 2d Mot. for De Novo Review

at 19. In support of those assertions, the government relies primarily on their agent's declaration. *Id.* The declaration states that NADDIS numbers are a part of the DEA's procedure; they are "part of the DEA's system of identifying information and individuals" and are used "within the DEA investigative records system as directed by the DEA Agents Manual." Tenth Supp. Little Decl. ¶ 17. NADDIS numbers are "assigned to drug violators and suspected drug violators known to DEA and entities that are of investigative interest. Each number is unique and is assigned only to one violator within DEA NADDIS indices." *Id.* ¶ 19. They "are assigned by DEA for internal use only" and "relate solely to internal DEA investigative practices and guidelines." *Id.* ¶ 17. "The precise manner in which NADDIS functions and the manner in which NADDIS numbers are assigned and utilized by DEA is not commonly known to the general public." *Id.* ¶ 21.

At the motion hearing, the Court challenged the notion that disclosing a single NADDIS number really "would disclose techniques and procedures." *See* 5 U.S.C. § 552 (b)(7)(E). Pickard had argued in his briefing that he does not "seek information about *how* the government uses the NADDIS system. . . only . . . the release of a single number." Opp'n to 2d Mot. for De Novo Review at 25. At first blush, it appeared that the government had disclosed more information about the NADDIS procedures in its declaration in this case than would be disclosed if the government were to simply release Skinner's NADDIS number to Pickard. But the government argued persuasively that the DEA uses a particular method to assign NADDIS numbers, and that the more NADDIS

numbers get out, the more people will be able to discern that methodology. Documents released pursuant to FOIA are released to all of the world; the Court must therefore consider the release of Skinner's NADDIS number not only to Pickard but to "the general public." *See Lahr v. NTSB*, 569 F.3d 964, 977 n.12 (9th Cir. 2009). If Skinner's number is released, and other numbers are released, then the public might be able to deduce, for example, that the DEA assigns individuals NADDIS numbers starting with 1 if those individuals are cooperating with the government, or live in a particular state, or have a criminal history, or have a particular racial makeup, or any number of other characteristics.

Pickard argues that a NADDIS number is a technique generally known to the public. *See* Response to Tentative at 8 (dkt. 237).[18] He cites to a few instances in which NADDIS numbers have surfaced, although that evidence does not support his position. *See* Opp'n to 2d Mot. for De Novo Review at 25. In *Zavala v. DEA*, 667 F. Supp. 2d 85, 97 (D.D.C. 2009), the court did refer to an individual's NADDIS number—by number—but held that NADDIS

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18. Pickard also argues that Skinner has publicly released his NADDIS number. *See id.* at 7; Opp'n to 2d Mot. for De Novo Review at 25. The government objects to the authenticity of the number because the DEA did not release it. *See* D Reply to Tentative (dkt 239) at 8. It appears that Skinner released a number himself, *see* P Response at 7, and so this is not an official confirmation issue. In any case, this appears to be a red herring: whether or not Skinner's NADDIS number has been released (or whether Pickard already knows it), *see* Reply re 2d Mot. for De Novo Review at 25 ("Skinner's NADDIS number, 2002804, is already publicly available through a number of channels. In fact, it has been in the record of this case for years."), what matters is whether the investigative technique is generally known, not whether one individual's number is known.

numbers properly and "routinely are withheld" under Exemption 2. Rumold Decl. Ex. J, which pertained to the purported NADDIS number of an individual named Owsley Stanley involves a deceased individual; moreover, the government objects to this evidence as unauthenticated, *see* 2d Mot. for De Novo Review at 20, re doc. # 173-1, Ex 1, Ex. A. And in *Marino v. DEA*, 15 F. Supp. 3d 141, 146 (D.D.C. 2014), while the court observed that "Marino suspected that 3049901 was the NADDIS number assigned to Lopez, and therefore, his request effectively sought the DEA's investigative file on Lopez," the court did not disclose (or confirm) the NADDIS number and merely held that the government could not use a *Glomar* response. None of Pickard's cases involve courts granting FOIA requests to disclose NADDIS numbers.

On the other hand, there is precedent for withholding NADDIS numbers under Exemption 7(E). In *Miller v. Dep't of Justice*, 872 F. Supp. 2d 12, 29 (D.D.C. 2012), the court stated that "[b]ecause the NADDIS numbers were created for a law enforcement purpose and their disclosure may disclose techniques and procedures for law enforcement investigation, this Court finds that they are properly withheld under Exemption 7(E)." The court also observed that NADDIS numbers "reflect procedures prescribed by the DEA Agents Manual, which according to defendant, identify law enforcement techniques." *Id.* at 28-29 (internal quotation marks omitted). Other courts have also so held. *See, e.g.*, *Dorsey v. Executive Office for U.S. Attorneys*, 83 F. Supp. 3d 347, 357 (D.D.C. 2015); *Ortiz v. Dep't of Justice*, 67 F. Supp.3d 109, 123 (D.D.C. 2014); *Higgins v. Dep't of Justice*, 919 F. Supp. 2d 131, 150-51

(D.D.C. 2013).[19] And the Ninth Circuit appears to have adopted its reasoning on this exemption from the D.C. district courts. *See Rosenfeld*, 57 F.3d at 815 (citing D.C. district court opinions, stating, "[w]e agree with these courts' reasoning, and adopt it as the law of this Circuit.").

Because the Court concludes that disclosing Skinner's NADDIS number would reveal techniques and procedures that are not generally known to the public, the Court holds that withholding is proper under Exemption 7(E).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the motion for de novo review, and HOLDS that the government may withhold (1) Skinner's name and information Skinner has publicly released under Exemption 7(D), and (2) Skinner's NADDIS number under Exemption 7(E).

IT IS SO ORDERED .

Dated: November 15, 2016

/s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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19. *See also* O'Reilly, *Federal Information Disclosure* § 17:120 ("Because NADDIS numbers were created for a law enforcement purpose and their disclosure may disclose techniques and procedures for law enforcement investigation, the codes are properly withheld under Exemption 7(E)." (citing *Miller*, 872 F. Supp. 2d 12).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED MAY 2, 2016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 06-cv-00185 CRB (NC)

WILLIAM LEONARD PICKARD,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

May 2, 2016, Decided
May 2, 2016, Filed

ORDER TO RELEASE DOCUMENTS FOLLOWING *IN CAMERA* REVIEW

Re: Dkt. No. 227

In this Freedom of Information Act case, plaintiff William Leonard Pickard seeks information about confidential informant Gordon Skinner, who testified against Pickard at his criminal trial. The district court denied both parties' fourth motions for summary judgment because "without context," the court could not

know if releasing 325 relevant documents the government withheld as exempt under FOIA, "would compromise an important privacy interest, endanger any individual's (including Skinner's) physical safety, or run afoul of one of the [government's] other claimed exemptions." Dkt. No. 198 at 9.

The question before this Court is whether, per Pickard's request, the Court should release three categories of materials in the 325 documents: (1) Skinner's name, (2) information Skinner has voluntarily disclosed to the public, including information he offered in the federal court proceedings in Kansas, and (3) Skinner's Narcotics and Dangerous Drugs Information System (NADDIS) number. Dkt. No. 198 at 11. The Court has conducted *in camera* review of "whether the contents, as distinguished from the *existence*, of the officially confirmed records may be protected from disclosure under the DEA's claimed exemptions." *Id.* (emphasis in original). The Court tentatively ordered the release of the three categories of materials because, following denial of its motion for summary judgment, the government provided no evidence to carry its burden of proving that documents in the three categories of materials qualify for exemptions. Dkt. No. 227.

The government has responded to the Court's tentative order. Dkt. No. 239. The government argues, as it has before, that release of the documents would "disclose the identity of, and information furnished by, a confidential source; have a chilling effect on confidential informants; risk circumvention of the law; endanger Skinner's

physical safety; and violate a strong and substantial privacy interest." *Id.* at 6. Pickard's reply argues that the government's objections are overly broad and that "[u]nder the specific facts of this case, the information at issue can and should be public." Dkt. No. 242 at 6.

When seeking an exemption from FOIA, the government may not offer only general governmental interests that are present in virtually all cases. When a FOIA request is made, a governmental agency may withhold all or portions of a document "only if the material at issue falls within one of the nine statutory exemptions found in § 552(b)." *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997). The exemptions "'must be narrowly construed' in light of FOIA's 'dominant objective' of 'disclosure, not secrecy.'" *Id.* (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)). "FOIA's strong presumption in favor of disclosure means that an agency that invokes one of the statutory exemptions . . . bears the burden of demonstrating that the exemption properly applies to the documents." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 692 (9th Cir. 2012). "Boilerplate explanations for withholdings . . . are improper, and efforts must be 'made to tailor the explanation to the specific document withheld.'" *Muchnick v. Dep't of Homeland Sec.*, 15-cv-3060 CRB, 2016 U.S. Dist. LEXIS 22683, 2016 WL 730291, at *3 (N.D. Cal. Feb. 24, 2016) (quoting *Wiener v. F.B.I.*, 943 F.2d 972, 979 (9th Cir. 1991)).

Both parties reference the recent opinion in *United States v. Apperson*, 642 Fed. Appx. 892, 2016 U.S. App.

LEXIS 4587, 2016 WL 898885, at *7 (10th Cir. Mar. 9, 2016), vacating a district court's order and remanding because the district court failed to provide an adequate explanation of its reasoning in denying the defendants' motion to unseal Skinner's confidential informant file. *Apperson* addressed a sealing order, which applies a different standard than a FOIA request. However, the case is relevant because the record in *Apperson* suggested that the government lacked case-specific reasons for its request to seal. The Tenth Circuit stated, "the record does not adequately reflect the court's balancing—with respect to particular documents or categories of documents—of the specific interests of the public and the government (the party opposing disclosure) relative to the factual circumstances of this case. Instead, the court relied on the government's general interests regarding confidentiality, a potential 'chilling effect,' and the need for law enforcement to secure the cooperation of other confidential sources in the future." *Id.*

The court noted that "[t]hough these matters are unquestionably, in principle, legitimate governmental interests, they are likely to be present to some degree in virtually every case where a member of the public seeks access to law-enforcement informant files. Therefore, lest the common-law presumption of access be rendered a dead letter as to this class of cases, courts cannot justify denying disclosure by endorsing such generalized governmental interests. They must analyze the government's interests in the context of the specific case—with respect to particular documents or categories of documents—and explicitly undergird their conclusions with fact-specific analysis." *Id.*

Here, the government's brief responding to the Court's tentative order is not sufficiently tailored to the case at hand. Because the government did not provide reasons tailored to this case not to release the documents, the Court's tentative view remains unchanged. Therefore, the Court orders the release of documents in the three categories: (1) Skinner's name, (2) information Skinner has voluntarily disclosed to the public, including information he offered in the federal court proceedings in Kansas, and (3) Skinner's NADDIS number. The parties have until May 16, 2016, to confer with each other about what information Skinner has voluntarily disclosed and is therefore subject to release if it is stated in the government files. The government has until May 30, 2016, to produce the documents to Pickard and to file a status report stating its compliance with this order. The government may redact any part of the 325 documents that is not responsive to this order. Either party may object to this order within fourteen days. Fed. R. Civ. P. 72(b).

IT IS SO ORDERED.

Dated: May 2, 2016

/s/ Nathanael M. Cousins
NATHANAEL M. COUSINS
United States Magistrate Judge

APPENDIX D — TENTATIVE RULING OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED DECEMBER 24, 2015

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 06-cv-00185 CRB (NC)

WILLIAM LEONARD PICKARD,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

December 24, 2015, Decided
December 24, 2015, Filed

TENTATIVE RULING ORDERING RELEASE OF DOCUMENTS FOLLOWING *IN CAMERA* REVIEW

Re: Dkt. No. 198

I. BACKGROUND

In this Freedom of Information Act case, plaintiff William Leonard Pickard requests information about confidential informant Gordon Skinner, who testified

against Pickard at his criminal trial. Most recently in the case, the district court denied both parties' fourth motions for summary judgment because "without context," the court could not know if releasing 325 relevant documents the government withheld as exempt under FOIA, "would compromise an important privacy interest, endanger any individual's (including Skinner's) physical safety, or run afoul of one of the [government's] other claimed exemptions." Dkt. No. 198 at 9.

The question is whether, per Pickard's request, the Court should release three categories of materials in the 325 documents: Skinner's name, information Skinner has voluntarily disclosed to the public, and Skinner's NADDIS number. Dkt. No. 198 at 11. The district court has tasked this Court with conducting *in camera* review of "whether the contents, as distinguished from the *existence*, of the officially confirmed records may be protected from disclosure under the DEA's claimed exemptions." *Id.* Because following denial of its motion for summary judgment, the government has provided no evidence to carry its burden of proving that documents in the three categories of materials qualify for exemptions, the Court's tentative ruling is to order the release of the three categories of materials. The government has 14 days to bring forward evidence of why FOIA exemptions should apply.

II. DISCUSSION

The government argues that the documents are exempt from disclosure under FOIA exemptions 7(C),

7(D), 7(E), and 7(F). Dkt. No. 225. However, Judge Breyer has already held that the government cannot assert a categorical exemption for "[a]ll records relating to Skinner" and has rejected the government's arguments that all 325 documents must be withheld. Dkt. No. 198 at 6. Specifically, he found that the government failed to show that exemption 7(E) applies to Skinner's NADDIS number, that release of Skinner's name would be dangerous, or that exemptions should apply to the portions of the DEA file that have been made public in *United States v. Pickard*, 733 F.3d 1297, 1304-05 (10th Cir. 2013).

Judge Breyer stated, "the government's objection to revealing Skinner's NADDIS number seems to rely only on exemption 7(E) . . . It is not clear how release of Skinner's NADDIS number would help Skinner avoid detection or apprehension, as he is already incarcerated, or how it would help anyone else avoid detection or apprehension, as the number is presumably unique to Skinner. In addition, Plaintiff contends that Skinner's purported NADDIS number is already a matter of public record. See P Reply at 9. If so, then it is hard to see how exemption 7(E) applies." Dkt. No. 198 at 11.

At summary judgment, the government argued that Pickard had not shown "that the use of NADDIS numbers, or the numbers themselves, are commonly known to the public," but Judge Breyer rejected that argument because "it is the government's burden to establish that an exemption applies." *Id.* at 10 n. 7 (citing *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 692 (9th Cir. 2012) (agency's burden to demonstrate that one of the statutory exemptions applies)).

Judge Breyer also observed that disclosure of some documents could be appropriate because "other court proceedings have resulted in the release of some materials presumably among the 325 documents at issue here." Dkt. No. 198 at 10. In *United States v. Pickard*, No. 00-40104-01, 02-JTM, 2014 U.S. Dist. LEXIS 47473 (D. Kan. April 7, 2014), the court found that "government interest is sufficient to overcome the presumption in favor of public access to judicial records" as to some materials, but unsealed "those portions of the DEA file which have been made public," including (a) Skinner's criminal felony docket in Tulsa County, Oklahoma of July 31, 2006, (b) the Pottawattamie County Kansas order dated August 21, 2000, (c) Skinner's criminal felony docket for Tulsa County, Oklahoma of March 24, 2004, (d) Skinner's eleven-point risk assessment, and (e) Skinner's confidential source agreement form dated October 18, 2000. Dkt. No. 198 at 11. Judge Breyer pointed out that "[s]uch disclosures would seem to undermine the government's position here that *none* of the documents responsive to Plaintiff's FOIA request can be released." *Id.* (emphasis in original).

Since the denial of its motion for summary judgment, the government has supplied no evidence to address the deficiencies that Judge Breyer identified. Instead, the government simply states, "[t]he government identifies all legal authorities cited in support of the government's arguments in Defendant's Fourth Motion for Summary Judgment (ECF No. 184), in Defendant's Reply in Support of Fourth Motion for Summary Judgment and Opposition to Plaintiff's Cross Motion for Partial Summary Judgment (ECF No. 189), in Defendant's Objections to Plaintiff's

Reply Evidence (ECF No. 193), in Defendant's Statement of Recent Decision (ECF No. 195), and in Defendant's Statement of Recent Decision (ECF No. 197)" and cites two supplemental cases without identifying facts in this case. Dkt. No. 225 at 1-2. In other words, the government reuses and reincorporates its arguments for summary judgment which the district court already found unavailing.

Further, after reviewing the documents in question, the Court does not find that the documents provide a reason to withhold under the exemptions. As the district court stated, "[w]ithout *context*, the Court cannot know if releasing [the documents] would compromise an important privacy interest, endanger any individual's (including Skinner's) physical safety, or run afoul of one of the other claimed exemptions." Dkt. No. 198 at 9 (emphasis added). The government's brief at docket 225 fails to provide any more "context" or explain to this Court why release of the documents would be dangerous to Skinner or anyone else. Because the government has failed to do anything to bolster the arguments that Judge Breyer rejected at summary judgment, this Court's tentative ruling is to release documents in the three categories of materials: Skinner's name, information Skinner has voluntarily disclosed to the public, including information released in the federal court proceedings in Kansas, and Skinner's NADDIS number. The government has 14 days to provide a reason not to release these documents. The parties must attend a telephonic case management conference on January 20, 2016, at 11 a.m. in San Jose, with both parties to file status reports on next steps proposed by January 13, 2016.

IT IS SO ORDERED.

Dated: December 24, 2015

/s/ Nathanael M. Cousins
NATHANAEL M. COUSINS
United States Magistrate Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 22, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15945

D.C. No. 3:06-cv-00185-CRB

WILLIAM LEONARD PICKARD,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant-Appellee.

Before: GRABER and N.R. SMITH, Circuit Judges, and ZIPPS,* District Judge.

ORDER

The memorandum disposition filed on December 13, 2017, is amended by the memorandum disposition filed concurrently with this order, as follows:

On page 3 of the memorandum disposition, in the paragraph beginning "Plaintiff argues that," delete

* The Honorable Jennifer G. Zipps, United States District Judge for the District of Arizona, sitting by designation.

everything in the paragraph except for the first sentence. Replace the deleted text with the following:

> Even assuming that Plaintiff is correct that exemption 7(D) may be "waived," he is entitled only to exactly the same information that has been publicly disclosed. *Pickard v. DOJ*, 653 F.3d 782, 786 (9th Cir. 2011). If, for instance, the DEA had in its possession a videotape of Skinner's trial testimony, Plaintiff might be entitled to that videotape. But what Plaintiff seeks—records that may contain some of the same information about which Skinner testified—is not exactly the same information that was publicly disclosed, so FOIA exemption 7(D) applies.

With this amendment, the panel has voted to deny Appellant's petition for panel rehearing. Judges Graber and Smith have voted to deny Appellant's petition for rehearing *en banc*, and Judge Zipps has so recommended.

The full court has been advised of the petition for rehearing *en banc*, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing *en banc* is DENIED. No further petitions for panel rehearing and rehearing *en banc* may be filed.