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EXEMPTION 7(D) OF THE FREEDOM OF INFORMATION ACT—THE EVIDENTIARY SHOWING THE GOVERNMENT MUST MAKE TO ESTABLISH THAT A SOURCE IS CONFIDENTIAL

United States Department of Justice v. Landano, 113 S. Ct.
2014 (1993)

I. INTRODUCTION

In *United States Department of Justice v. Landano*,¹ the Supreme Court held that Federal Bureau of Investigation (FBI) sources in criminal investigations are not presumed to be “confidential sources” pursuant to Exemption 7(D) of the Freedom of Information Act (FOIA).² The Court established two factors in determining whether or not a particular source is presumed confidential: (1) the nature of the crime and (2) the source’s relation to the crime.³ If these considerations support an inference that the source gave information in confidence, then the source qualifies as a confidential source.⁴

This Note examines the Court’s treatment in *Landano* of the tension between the broad disclosure of FOIA and the broad protection from disclosure of Exemption 7(D). This Note contends that the Court properly interpreted the statute as it currently exists. However, this Note suggests that a rebuttable presumption of confidentiality for FBI sources in criminal investigations would better serve Exemption 7(D)’s purpose of effective law enforcement without compromising FOIA’s purpose of public scrutiny. Thus, this Note argues that Congress should amend Exemption 7(D) of FOIA to provide a presumption of confidentiality.

¹ 113 S. Ct. 2014 (1993).

² *Id.*

³ *Id.* at 2023-24.

⁴ *Id.* at 2024.

II. LEGISLATIVE AND JUDICIAL BACKGROUND

A. LEGISLATIVE HISTORY

In 1966, Congress enacted FOIA to protect "the public's right to know the operations of its Government" by "establish[ing] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."⁵ Eager to strengthen this philosophy of full disclosure, Congress amended the statute in 1974.⁶ The amendment required that the Government "specify some harm in order to claim the exemption" instead of "affording all law enforcement matters a blanket exemption."⁷ Congress intended "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."⁸

Congress expressly limited the disclosure by delineating exemptions, but did not intend them to detract from FOIA's policy of public disclosure.⁹ Thus, exemptions generally are construed narrowly.¹⁰ Nonetheless, the public's interest extends only to information that exposes the government's performance of its duties,¹¹ and the exemptions are intended to have meaningful reach and applica-

⁵ S. REP. NO. 813, 89th Cong., 1st Sess. 8, 3 (1965); see *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1304 (8th Cir. 1978).

⁶ *Irons v. FBI*, 880 F.2d 1446, 1451-52 (1st Cir. 1989); see H.R. REP. NO. 876, 93d Cong., 2d Sess. 5 (1974) (noting that "this bill seeks to reach the goal of more efficient, prompt, and full disclosure of information"); see also *Cox*, 576 F.2d at 1304.

⁷ 120 CONG. REC. 36,626 (1974) (statement of Rep. Reid); see *FBI v. Abramson*, 456 U.S. 615, 627 (1982).

⁸ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); see also S. REP. NO. 813, 89th Cong., 1st Sess. 10 (1965) ("A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."); *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (finding that the basic purpose of FOIA was "to open agency action to the light of public scrutiny"); *Hale v. United States Dep't of Justice*, 973 F.2d 894, 898 (10th Cir. 1992) (finding that the purpose is to ensure that the public can scrutinize the government's performance and thereby promote governmental honesty).

⁹ See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989) (noting that "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act") (quoting *Rose*, 425 U.S. at 361).

¹⁰ See, e.g., *Rose*, 425 U.S. at 361; *Parton v. United States Dep't of Justice*, 727 F.2d 774, 776 (8th Cir. 1984) (finding that "exemptions are to be narrowly construed in accordance with the legislative purpose of Congress that disclosure rather than secrecy is the dominant objective of FOIA").

¹¹ *Hale*, 973 F.2d at 898; see *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989) (finding that "FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government [but that reveals little or nothing about the agency's own conduct] be so disclosed").

tion.¹² Furthermore, since FOIA was not intended as a supplement for discovery,¹³ litigants (such as Landano) merely have the same right to information as the rest of the public; their claim cannot be enhanced by their predicament.¹⁴

Despite the narrow construction of the exemptions, when Congress first enacted FOIA, Exemption 7 *broadly* protected all law enforcement investigatory files.¹⁵ Congress recognized that "it is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the [FBI]."¹⁶ While Congress wanted to strengthen disclosure in 1974, it simultaneously wanted to enact a broad exemption for law enforcement.¹⁷ Consequently, it created Exemption 7(D), which, according to Senator Hart (who authored and proposed the exemption), allowed the FBI "not only [to] withhold information which would disclose the identity of a confidential source but also [to] provide blanket protection for any information supplied by a confidential source. . . . [A]ll the FBI has to do is to state that the information was furnished by a confidential source and it is exempt."¹⁸ Additionally, in 1986 Congress amended FOIA and further broadened Exemption 7(D).¹⁹ The exemption now protects a

¹² *John Doe Agency*, 493 U.S. at 152; *Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1485 (11th Cir. 1992).

¹³ See, e.g., *John Doe Agency*, 493 U.S. at 153 (finding that FOIA was not intended to supplement or displace rules of discovery); *Baldrige v. Shapiro*, 445 U.S. 345, 360 n. 14 (1982).

¹⁴ See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n. 23 (1978); *Nix v. United States*, 572 F.2d 998, 1003 (4th Cir. 1978).

Since FOIA attempts to allow public scrutiny, all citizens—including a historian doing research and a criminal defendant formulating a defense—have equal access to information. *Irons v. FBI*, 880 F.2d 1446, 1456 (1st Cir. 1989). It is not the responsibility of law enforcement agencies to compile information for the defense.

¹⁵ *United State Dep't of Justice v. Landano*, 113 S. Ct. 2014, 2019 (1993) (quoting *FBI v. Abramson*, 456 U.S. 615, 621 (1982)).

¹⁶ S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965); see *EPA v. Mink*, 410 U.S. 73, 80 n. 6 (1973); see also 120 CONG. REC. 17,040 (1974) (statement of Sen. Hart) (stating that "Exemption 7(D) would not hinder the Bureau's [ability to gather information] in any way").

¹⁷ *Irons*, 880 F.2d at 1451-52. The *Irons* court found that the 1974 amendment sought to enact a broad exemption to protect the source and the flow of information to law enforcement agencies. *Id.* at 1449. This court also found that in the 1986 amendment Congress sought to broaden the reach of 7(D) and to considerably ease the agency's burden in invoking it. *Id.* at 1451-52.

¹⁸ 120 CONG. REC. S6871 (1974) (statement of Sen. Hart); see *Miller v. Bell*, 661 F.2d 623, 626-27 (7th Cir. 1981).

¹⁹ *Irons*, 880 F.2d at 1452. The revision expanded "records" to "records or information," replaced the word "would" with the phrase "could reasonably be expected to," deleted the word "only" from before "confidential source," and clarified that a confidential source could be a state, local, or foreign agency or a private institution. *Id.* at 1451.

wide range of information.

[Exemption 7(D) protects] records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source.²⁰

Thus, the broad protection of Exemption 7(D) undermines FOIA's general philosophy of broad disclosure with narrowly construed exemptions.

FOIA explicitly places the burden of proving that exemptions apply on the Government.²¹ Exemption 7(D)'s application depends not upon the nature of the information itself, but upon whether the information was furnished by a confidential source.²² The Conference Report of the 1974 Amendment determined that a source was confidential if it "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred."²³ Since determining whether an agent gave an *express* assurance is usually straightforward, disputes usually arise over whether an assurance may be *inferred* from the circumstances. Ultimately, Congress sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence."²⁴ Given this legislative history, it was left up to the courts to determine exactly how the Government could satisfy its burden of proof to invoke Exemption 7(D).

B. JUDICIAL BACKGROUND

The circuit courts took two approaches in determining what the Government must prove to withhold information under Exemption

²⁰ 5 U.S.C. § 552(b)(7)(D) (1986).

²¹ 5 U.S.C. § 552(a)(4)(B) (1986).

²² United States Dep't of Justice v. Landano, 113 S. Ct. 2014, 2019 (1993); Dow Jones & Co. v. United States Dep't of Justice, 917 F.2d 571, 575 (D.C. Cir 1990) (finding that Exemption 7 does not depend on the factual content of the requested document, but rather upon whether the source was confidential).

²³ S. REP. NO. 1200, 93d Cong., 2d Sess. 13 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6291; see Landano, 113 S. Ct. at 2019-20.

²⁴ H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2423; see John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989); see also S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) (stating that "[s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure").

7(D). Some circuits placed a significant burden upon the Government and required it to prove that the circumstances could indeed support an inference of an assurance of confidentiality.²⁵ Other circuits placed a considerably more lenient burden on the Government, recognizing that assurances of confidentiality are “inherently implicit” during Government investigations.²⁶

1. *The First Approach: The Government Bears a Significant Burden*

The first approach, and all its variations, emphasized the fact that FOIA placed the burden of proof on the Government, not the “requester.”²⁷ In an early case, *Vaughn v. Rosen*,²⁸ the Court of Appeals for the District of Columbia found that the requester typically does not have any knowledge of the information being withheld, and thus could not effectively contest the decision.²⁹ To preserve fairness and the benefits of the adversarial system, the court developed the “Vaughn Index,” which required the Government to present a detailed justification for withholding information and to specify which exemption it was employing for each portion of a document it chose to withhold.³⁰ The court recognized that the burden on the Government was substantial, but found that the alternative—allowing the Government to utilize an exemption by merely asserting it applied—essentially shifted the burden to the requester.³¹ This shift, the court held, was inconsistent with the statutory mandate of placing the burden on the agency seeking to avoid disclosure.³² While subsequent D.C. Circuit decisions have strayed from this approach,³³ *Vaughn* laid the foundation for those circuits that placed a significant burden on the Government.

²⁵ See *infra* notes 27-49 and accompanying text.

²⁶ See *infra* notes 50-76 and accompanying text.

²⁷ The “requester” refers to the person who, under FOIA, requests access to information contained by the Government.

²⁸ 484 F.2d 820 (D.C. Cir. 1973).

²⁹ *Id.* at 823-24 (noting that since it would be extremely difficult to oppose the Government’s decision, this would allow for abuses of the exemptions); see also *infra* notes 68-69 and accompanying text for the proposition that this lack of information leads to a practically irrefutable presumption against disclosure.

³⁰ *Id.* at 826-27. The court reasoned that this information would provide a requester with sufficient knowledge to contest the Government’s use of an exemption. *Id.* at 828. Further, it found that “an analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information.” *Id.* at 826. Assuming this to be true, producing this information would not defeat the exemption (by informing the requester of the information the Government is attempting to withhold) while trying to determine whether it applies.

³¹ *Id.* at 828.

³² *Id.*

³³ See *infra* notes 56-62 and accompanying text.

The Ninth Circuit utilized a slight variation of this approach. As in *Vaughn*, the Ninth Circuit focused on providing the requester with the opportunity to effectively contest the use of the exemption, thereby utilizing the adversarial system.³⁴ In *Wiener v. FBI*,³⁵ Professor Wiener requested access to all FBI records pertaining to John Lennon for academic research.³⁶ The Ninth Circuit found that in addition to the circumstances supporting an inference of an assurance of confidentiality, they must also support an inference that the FBI concluded that the source would not have cooperated absent such an assurance.³⁷ Since the FBI did not describe the circumstances with particularity, the court held that the Bureau failed to meet its burden.³⁸

The Second Circuit's variation, its "functional approach," required both that the source would not have revealed the information and that the lack of information would have hindered the investigation.³⁹ In *Donovan v. FBI*,⁴⁰ the families of four American churchwomen who were murdered in El Salvador requested access to all government documents pertaining to the FBI's investigation of the murders.⁴¹ The Second Circuit determined that "an implicit promise of confidentiality may be found when 'it is apparent that the agency's investigatory function depends for its existence upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known.'"⁴² The court held that the agency satisfied its burden because the FBI's investigation would have been severely curtailed if its sources had feared disclosure.⁴³

Like the Second Circuit, the Fourth and Eighth Circuits' variation did not emphasize the importance of effective advocacy.⁴⁴ In *Nix v. United States*,⁴⁵ plaintiff sought records of an investigation

³⁴ See *Wiener v. FBI*, 943 F.2d 972, 977, 987 (9th Cir. 1991).

³⁵ *Id.*

³⁶ *Id.* at 976-77.

³⁷ *Id.* at 987 (holding that the FBI "must state the circumstances surrounding the receipt of information which led the FBI to conclude that the informant would not have given the information without an implicit assurance of confidentiality").

³⁸ *Id.*

³⁹ See *Donovan v. FBI*, 806 F.2d 55 (2d Cir. 1986); *Diamond v. FBI*, 707 F.2d 75 (2d Cir. 1983).

⁴⁰ 806 F.2d at 55.

⁴¹ *Id.* at 57.

⁴² *Id.* at 61 (quoting *Diamond*, 707 F.2d at 78).

⁴³ *Id.*

⁴⁴ See, e.g., *Nix v. United States Dep't of Justice*, 572 F.2d 998, 1003 (4th Cir. 1978); *Parton v. United States Dep't of Justice*, 727 F.2d 774 (8th Cir. 1984).

⁴⁵ 572 F.2d 998.

based on his complaint of an assault while he was in prison.⁴⁶ The Fourth Circuit found that the agency had “to *show* that the information was furnished under circumstances from which an assurance of confidentiality could reasonably be inferred.”⁴⁷ The Government met its burden by proving that the information was provided from a prison setting with the threat of violent reprisals.⁴⁸ The court held that these circumstances supported the inference of an assurance of confidentiality.⁴⁹ This variation, along with all the other variations, followed the express language of the statute by placing the burden on the Government to convince the court that information was furnished under circumstances from which an assurance of confidentiality could reasonably be inferred.

2. *The Second Approach: The Government Does Not Bear a Significant Burden*

The majority of the circuits took the second approach and placed a considerably more lenient burden on the Government.⁵⁰ The Sixth, Seventh, Tenth, and Eleventh Circuits all considered promises of confidentiality to be “inherently implicit” in FBI interviews.⁵¹ In *Miller v. Bell*,⁵² the plaintiff requested access to records pertaining to his complaint that someone wiretapped his telephone.⁵³ The Seventh Circuit found that “unless there is evidence to the contrary . . . , promises of confidentiality are *inherently implicit* in FBI interviews conducted pursuant to a criminal investigation.”⁵⁴ Consequently, the FBI merely had to prove that it interviewed the sources in a criminal investigation. Predictably, the court held that all the sources were confidential except for a woman who expressly

⁴⁶ *Id.* at 1000-01.

⁴⁷ *Id.* at 1003 (emphasis added); see also *supra* note 23 and accompanying text.

⁴⁸ *Nix*, 998 F.2d at 1003.

⁴⁹ *Id.* at 1004.

⁵⁰ While the Second, Fourth, Eighth, and Ninth Circuits placed a significant burden on the Government (see *supra* notes 34-49 and accompanying text), the Third, Sixth, Seventh, Tenth, Eleventh and District of Columbia Circuits have prescribed a more lenient burden in a larger number of cases. See *infra* notes 51-76 and accompanying text; see also *infra* notes 56 and 72 (for clarification of the D.C. and the Third Circuits' respective positions).

⁵¹ See, e.g., *Ingle v. United States Dep't of Justice*, 698 F.2d 259, 269 (6th Cir. 1983); *Brant Construction Co. v. EPA*, 778 F.2d 1258, 1263 (7th Cir. 1985); *Hale v. United States Dep't of Justice*, 973 F.2d 894, 899 (10th Cir. 1992); *Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1486 (11th Cir. 1992).

⁵² 661 F.2d 623 (7th Cir. 1981) (the first case to utilize the “inherently implicit” approach).

⁵³ *Id.* at 625.

⁵⁴ *Id.* at 627 (emphasis added).

waived her confidential status.⁵⁵

The D.C. Circuit's variation of this approach expressly provided the Government with a *presumption* that sources who cooperated during a criminal investigation did so with assurances of confidentiality.⁵⁶ In *Dow Jones & Co. v. United States Department of Justice*,⁵⁷ plaintiff attempted to obtain access to a letter to the House Ethics Committee that summarized the results of a Justice Department's probe into possible wrongdoings of a Congressman.⁵⁸ Even though the D.C. Circuit remarked that the burden was on the Government, the court protected the letter from disclosure.⁵⁹ The court concluded that, since promises of confidentiality are inherently implicit when the FBI solicits information (as long as it was solicited during a law enforcement investigation), the FBI had the *presumption* that such assurances were given.⁶⁰ The court readily admitted that in practical terms this presumption was essentially irrefutable.⁶¹ Nevertheless, the D.C. Circuit denied a rehearing because it found that "at least some element of confidentiality [was] virtually always present" in FBI interviews, and that this "element of confidentiality . . . satisfy[d] the 'confidential source' standard."⁶²

The D.C. Circuit struggled with the tension between this presumption and the statutory language of FOIA.⁶³ In his concurring opinion, Judge Edwards felt constrained by an earlier case, but still highlighted two discrepancies between the majority's ruling and the language of FOIA.⁶⁴ First, since Exemption 7(D) applies to sources who cooperate during a criminal investigation only if they are confidential, the concurring opinion suggested that Congress anticipated that some sources may not be confidential.⁶⁵ Thus, the word "confi-

⁵⁵ *Id.* at 628.

⁵⁶ *Parker v. United States Dep't of Justice*, 934 F.2d 375, 378 (D.C. Cir. 1991). The D.C. Circuit still required the Government to satisfy the Vaughn Index by justifying why, and under which exemption, the information was withheld. See *supra* note 30 and accompanying text. However, this burden became a matter of procedure prior to adjudication, and it could typically be satisfied with categorical justifications. The D.C. Circuit then adopted the "inherently implicit" approach in adjudication, and this approach recently developed into a presumption against disclosure for criminal investigative sources. See *Schmerler v. FBI*, 900 F.2d 333, 337 (D.C. Cir. 1990).

⁵⁷ 917 F.2d 571 (D.C. Cir. 1990), *reh'g denied en banc*, 917 F.2d 578 (D.C. Cir. 1990).

⁵⁸ *Id.* at 572.

⁵⁹ *Id.* at 576-77.

⁶⁰ *Id.*

⁶¹ *Id.* at 577.

⁶² *Id.* at 579 (Silberman, J., concurring in decision to deny rehearing).

⁶³ See *id.* at 577-78 (Edwards, J., concurring).

⁶⁴ *Id.* at 577 (Edwards, J., concurring) (citing *Schmerler v. FBI*, 900 F.2d 333, 337 (D.C. Cir. 1990)).

⁶⁵ See *id.* (Edwards, J., concurring).

dential" was meant as a limitation on the application of 7(D).⁶⁶ Consequently, the majority's invention of a presumption that all criminal investigative sources are confidential simply voids Congress' express limitation.⁶⁷ Second, the presumption of confidentiality shifted the burden of proof to the requester who has essentially no knowledge of the withheld material.⁶⁸ Thus, the requester would be unable to refute the presumption.⁶⁹ This shift contradicts the express mandate of FOIA, which places the burden of proof to invoke the exemption on the Government.⁷⁰ As the dissent in the denial of a rehearing *en banc* stated, "a burden that is presumed satisfied is, of course, no burden at all."⁷¹

The Third Circuit's variation, consistent with the D.C. Circuit's approach, merely allowed the Government to assert that the exemption applied.⁷² In *Conoco Inc. v. United States Department of Justice*,⁷³ the plaintiff attempted to obtain access to records of an investigation of a scheme by some of the plaintiff's employees to circumvent petroleum price controls.⁷⁴ The court found that the Government simply had to "identify the document and state that the information was furnished by a confidential source. To require more detail than this would greatly increase the possibility that the source and content of the confidential correspondence [would] be revealed."⁷⁵ Not surprisingly, the court held that the Government satisfied this "burden," and the documents were exempt.⁷⁶

Given the legislative history and the dichotomy between the circuits, the United States Supreme Court had to decide what the Gov-

⁶⁶ *Id.* (Edwards, J., concurring).

⁶⁷ *Id.* at 580 (Edwards, J., dissenting from decision to deny rehearing).

⁶⁸ *Id.* at 578 (Edwards, J., concurring).

⁶⁹ *Id.* (Edwards, J., concurring). Since the requester had no knowledge of the withheld information, it would be almost impossible for the requester to develop an argument to overcome the presumption. Thus, such a presumption would be essentially irrefutable. See *supra* note 29 and accompanying text.

⁷⁰ *Id.* at 580 (Edwards, J., dissenting from decision to deny rehearing).

⁷¹ *Id.* (Edwards, J., dissenting from decision to deny rehearing).

⁷² See *Conoco Inc. v. United States Dep't of Justice*, 687 F.2d 724, 730 (3d Cir. 1982). A year earlier, the Third Circuit required that it be provided with detailed explanations relating to each alleged confidential source. See *Lame v. United States Dep't of Justice*, 654 F.2d 917, 928 (3d Cir. 1981). The *Conoco* case does not mention the *Lame* case, and to complicate matters, the Circuit later reverted back to the *Lame* standard without mentioning *Conoco*. See *Landano v. United States Dep't of Justice*, 956 F.2d 422 (3d Cir. 1992) (the court considered itself bound by *Lame*); see also *infra* notes 99-100.

⁷³ 687 F.2d at 724.

⁷⁴ *Id.* at 726.

⁷⁵ *Id.* at 730.

⁷⁶ *Id.*

ernment had to do to satisfy its burden of proving that its source was confidential.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

On August 13, 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearney, New Jersey.⁷⁷ One of the gunmen shot & killed a police officer.⁷⁸ Respondent Vincent Landano was convicted in a New Jersey state court of murdering Newark Police Officer John Snow in the course of the robbery.⁷⁹ Evidence at trial indicated that the robbery was orchestrated by Victor Forni and a motorcycle gang known as "the Breed."⁸⁰ Moreover, testimony at trial indicated that the Breed recruited Landano for the robbery.⁸¹ Landano maintained his innocence and claimed that Forni was the man who killed Officer Snow.⁸² Landano attempted to obtain state post-conviction and federal habeas relief, but both efforts were unsuccessful.⁸³

While pursuing a claim in state courts that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*,⁸⁴ Landano filed FOIA requests with the FBI to support his cause of action. Landano sought disclosure of all information the Bureau had compiled in its investigation of Officer Snow's murder, as well as the files it had on Forni.⁸⁵ The FBI released several hundred

⁷⁷ *Landano v. United States Dep't of Justice*, 956 F.2d 422, 425 (3d Cir. 1992).

⁷⁸ *Id.*

⁷⁹ *United States Dep't of Justice v. Landano*, 113 S. Ct. 2014, 2017 (1993).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See State v. Landano*, 483 A.2d 153 (N.J. 1984) (appeal denied); *Landano v. Rafferty*, 670 F. Supp. 570 (D.N.J. 1987) (finding that a witness's recantation of testimony that he saw Landano driving the get-away car was not credible), *aff'd*, 856 F.2d 569 (3d Cir. 1988) (holding that the trial court's finding was binding, even though the circuit court was convinced the recantation was believable), *cert. denied*, 489 U.S. 1014 (1989); *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989) (issuing a conditional writ of habeas corpus), *rev'd*, 897 F.2d 661 (3d Cir. 1990) (holding that Landano had not exhausted his state law remedies), *cert. denied*, 498 U.S. 811 (1990).

⁸⁴ 373 U.S. 83 (1963). In *Brady*, the Court held that suppression by the prosecution of evidence favorable to an accused violates due process where evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution. *Id.* at 87.

⁸⁵ *Landano*, 113 S. Ct. at 2017. Initially there was an issue of whether Landano could get Forni's file, but then Forni gave his consent. *Landano v. United States Dep't of Justice*, 751 F. Supp. 502, 504 (D.N.J. 1990). The only remaining issue was how much of the file the FBI was required to disclose. *See id.* Since this was the same issue concerning Landano's other request, they were all handled together. *Id.*

pages, some which were redacted, and withheld several hundred others.⁸⁶ Landano filed an action in the United States District Court for the District of New Jersey seeking complete disclosure of all the files that he requested.⁸⁷ Then the Government submitted the declaration of FBI Special Agent Regina Superneau, which explained the Bureau's reasons for withholding portions of the files.⁸⁸ Next, both Landano and the Government moved for summary judgment.⁸⁹

B. PROCEDURAL BACKGROUND

On the cross-motions for summary judgment, the district court rejected the Government's categorical claim that all sources of criminal investigations deserve confidential status.⁹⁰ The district court held that the Government must provide specific reasons why each particular source qualified as a "confidential source."⁹¹ Evidently, the court was willing to assume that the FBI informants were confidential sources, but it held that the FBI had to articulate "case specific reasons for non-disclosure" of all other information withheld under Exemption 7(D).⁹² It concluded that the Government had not met its burden of establishing that each withheld document reasonably could be expected to disclose the identity of, or information provided by, a "confidential source."⁹³

The Court of Appeals for the Third Circuit affirmed this portion of the decision.⁹⁴ The court relied on legislative history, and declared that if the source received an explicit assurance of confidentiality, or if there are circumstances from which an assurance could reasonably be inferred, then that source is confidential within the meaning of Exemption 7(D).⁹⁵ The court found that an "assurance of confidentiality" is not a promise of complete anonymity, but rather an assurance that the FBI would not disclose the information

⁸⁶ *Landano*, 113 S. Ct. at 2017.

⁸⁷ *Id.* at 2018.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *Landano v. United States Dep't of Justice*, 751 F. Supp. 502 (D.N.J. 1990), clarified on reconsideration, 758 F. Supp. 1021 (D.N.J. 1991).

⁹¹ *Landano*, 751 F. Supp. at 508.

⁹² *Landano*, 113 S. Ct. at 2018 (referring to *Landano*, 751 F. Supp. at 508).

⁹³ *Id.* (citing *Landano*, 751 F. Supp. at 508). Exemption 7(D) protects both the identity and information provided by confidential sources. See *supra* note 20 and accompanying text.

⁹⁴ *Landano v. United States Dep't of Justice*, 956 F.2d 422, 435 (3d Cir. 1992).

⁹⁵ *Id.* at 433 (quoting S. REP. NO. 1200, 93d Cong., 2d Sess. 13 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6291).

except to further the “success of its law enforcement objective.”⁹⁶ The court of appeals then turned to the Government’s categorical claim that whenever any individual or institutional source supplies information to the FBI during a criminal investigation, they should be presumed confidential.⁹⁷ The court recognized that other circuits supported the Government’s claim;⁹⁸ however, the court found that it had previously decided this issue.⁹⁹ Since there had been no intervening decisions by the Supreme Court requiring a departure from precedent, the court considered itself bound.¹⁰⁰ The court of appeals determined that the Government must provide “detailed explanations relating to each alleged confidential source” in order to justify withholding the information under Exemption 7(D).¹⁰¹

The United States Supreme Court granted certiorari¹⁰² to resolve the circuit split over the Government’s evidentiary burden under Exemption 7(D).¹⁰³ The Court focused on “whether the Government is entitled to a presumption that all sources supplying information to the [FBI] in the course of a criminal investigation are confidential sources.”¹⁰⁴

IV. THE SUPREME COURT OPINION

The United States Supreme Court, in a unanimous opinion written by Justice O’Connor, concluded that not all of the FBI’s criminal investigative sources should automatically be presumed confidential.¹⁰⁵ The Court determined that if the nature of the crime investigated and the source’s relation to it support the inference of confidentiality, the Government is entitled to this presumption.¹⁰⁶ Since the Court of Appeals for the Third Circuit decided it could not rely on these circumstances, its decision was vacated, and

⁹⁶ *Id.* at 434.

⁹⁷ *Id.*

⁹⁸ *Id.* at 432-33; *see supra* notes 50-76 and accompanying text.

⁹⁹ *Landano*, 956 F.2d at 434 (referring to *Lame v. United States Dep’t of Justice*, 654 F.2d 917, 928 (3d Cir. 1981) (holding that the “court, in order to find that assurances [of confidentiality], express or implied, were given, had to be furnished with detailed explanations relating to each alleged confidential source”)).

¹⁰⁰ *Id.* (the court apparently overlooked *Conoco Inc. v. United States Dep’t of Justice*, 687 F.2d 724, 730 (3d Cir. 1982) (*see supra* notes 70-74 and accompanying text) or implicitly found that the situation was not analogous).

¹⁰¹ *Id.* at 435 (quoting *Lame v. United States*, 654 F.2d 917, 928 (3d Cir. 1981)).

¹⁰² *United States Dep’t of Justice v. Landano*, 113 S. Ct. 51 (1992).

¹⁰³ *United States Dep’t of Justice v. Landano*, 113 S. Ct. 2014, 2019 (1993).

¹⁰⁴ *Id.* at 2017.

¹⁰⁵ *Id.* at 2024.

¹⁰⁶ *Id.*

the case was remanded for further proceedings.¹⁰⁷

The Court focused on the Government's burden of establishing that a source is "confidential" within the meaning of Exemption 7(D).¹⁰⁸ After recognizing that the Government must prove that the exemption applies, the Court declared that 7(D) does not focus on the type of information given, but rather on whether that information was given with an understanding that it would remain confidential.¹⁰⁹ In this case, the Government did not attempt to prove that the FBI made explicit promises of confidentiality to particular sources.¹¹⁰ The Court recognized that such proof apparently is not possible because "[t]he FBI does not have a policy of discussing confidentiality with every source, and when such discussions do occur, agents do not always document them."¹¹¹ Thus, "the precise question before [the Court] . . . is how the Government can meet its burden of showing that a source provided information on an implied assurance of confidentiality."¹¹²

In order to preserve some meaning in Exemption 7(D), the Court agreed with the Third Circuit and rejected Landano's contention that the exemption was limited to sources who were assured—explicitly or implicitly—of complete anonymity.¹¹³ At the time of the interview, neither the source nor the interviewer ordinarily knows whether the information will need to be disclosed (for example, to other officers, other agencies, or at trial).¹¹⁴ Affirming Landano's claim would limit the exemption so much that, practically speaking, it would have no effect.¹¹⁵ Thus, the Court held that "'confidential,' as used in Exemption 7(D), refers to a degree of confidentiality less than total secrecy."¹¹⁶

The Court rejected the Government's contention that assurances of confidentiality are "inherently implicit" whenever a source cooperates with the FBI in a criminal investigation, because this rule

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 2020.

¹⁰⁹ *Id.* at 2019; *see supra* notes 22-23 and accompanying text.

¹¹⁰ *Landano*, 113 S. Ct. at 2020.

¹¹¹ *Id.*

¹¹² *Id.* Since the Court concluded that it was not possible to prove express assurances of confidentiality, it focused on implied assurances. *Id.*

¹¹³ *Id.* *See supra* note 96 and accompanying text for the Third Circuit holding.

¹¹⁴ *See Landano*, 113 S. Ct. at 2020.

¹¹⁵ *Id.* (citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (FOIA exemptions "are intended to have meaningful reach and application")).

¹¹⁶ *Id.* (holding that under Exemption 7(D), "a source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes").

would essentially exempt all FBI sources.¹¹⁷ While the Court has used a categorical approach with another exemption,¹¹⁸ at least with respect to FBI sources, this approach would in effect be universal—not categorical.¹¹⁹ This approach does not comport with “common sense and probability” because the FBI gets all types of information from all types of sources, and it is highly improbable that all of them should be presumed confidential.¹²⁰ The Court found that such an approach would be unfair because the requester, who has no knowledge about the particular source or the information being withheld, very rarely will be in a position to offer persuasive evidence that the source should not be confidential.¹²¹ In essence, this would be an irrefutable presumption.¹²² Finally, since FOIA placed the burden of proof on the Government, and the Government offered no persuasive evidence that Congress intended the Bureau to be able to satisfy its burden by simply asserting that a source communicated with the FBI during a criminal investigation, the Court found this approach to be inconsistent with the imposed burden of proof and congressional intent.¹²³

The unanimous Court established considerations to help determine whether or not the source should be presumed confidential.¹²⁴ If the character of the crime at issue and the source’s relation to the crime “support an inference of confidentiality, the Government is entitled to a presumption.”¹²⁵ The Court asserted that this more

¹¹⁷ See *id.* at 2021 (implying that most if not all of the FBI’s sources provide information during a criminal investigation).

¹¹⁸ See *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (holding that under Exemption 7(C) the category of criminal “rap sheet” information was categorically exempt).

¹¹⁹ *Landano*, 113 S. Ct. at 2021 (implicitly finding that the Government’s category of all sources that cooperate during a criminal investigation encompasses all FBI’s sources, and thus is not truly a subsection or category, but rather a totality or universal approach).

¹²⁰ *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988)). The Court recognized that confidentiality is important for law enforcement, but held that the presumption could not apply to either individual or institutional sources. *Id.* First, reprisals against individual sources are aberrant, and the Government offered no explanation other than administrative ease for presuming their confidentiality. *Id.* Second, the Court found no argument that, absent the presumption, other law enforcement agencies would be deterred from disclosing information. *Id.* at 2022. Again, with institutional sources, the Court concluded that to say that private institutions may be subject to legal action is merely conclusory.

¹²¹ *Id.* (citing *Dow Jones & Co. v. United States Dep’t of Justice*, 917 F.2d 571, 577 (D.C. Cir 1990)); see *supra* note 69 and accompanying text.

¹²² *Landano*, 113 S. Ct. at 2022.

¹²³ *Id.* at 2022-23.

¹²⁴ See *id.* at 2023-24.

¹²⁵ *Id.* at 2024. The Court also listed other cases which have implicitly taken these factors into account. *Id.* at 2023 (citing *Keyes v. United States Dep’t of Justice*, 830 F.2d

particularized approach is consistent with Congress' intent to provide "workable rules" of FOIA disclosure.¹²⁶ The justices determined that the test seemed feasible because it is generally possible to establish these factors.¹²⁷ Furthermore, the Court determined that the test was fair because, knowing these factors, the requester will have a more realistic opportunity to contend that 7(D) should not apply.¹²⁸

Despite recognizing some merits in the proposed "prophylactic rule protecting the identities of all FBI criminal investigative sources," the Court refused to interpret the statute as including a blanket exemption.¹²⁹ The Court concluded that this ruling was consistent with the Court's obligation to construe FOIA exemptions narrowly in favor of disclosure.¹³⁰

V. ANALYSIS

This Note contends that the *Landano* Court correctly denied the presumption of confidentiality because it would be inconsistent with the statutory construction. Moreover, this Note critiques the considerations established by the Court and concludes that, while they fail to provide concrete guidance to the Government and lower courts, they do help narrow the relevant considerations. Furthermore, taking into consideration the purpose of FOIA and Exemption 7(D) from a policy perspective, this Note argues that criminal investigative sources should be presumed confidential. However, the Government should be generally required to inform the requester of the circumstances under which the information was obtained. Essentially, Congress should amend FOIA, or specifically Exemption 7(D), to allow for a rebuttable presumption.

337, 345-46 (D.C. Cir. 1987); *Donovan v. FBI*, 806 F.2d 55, 60-61 (2d Cir. 1986); *Parton v. United States Dep't of Justice*, 727 F.2d 774, 776-77 (8th Cir. 1984); *Miller v. Bell*, 661 F.2d 623, 628 (7th Cir. 1981); *Nix v. United States*, 572 F.2d 998, 1003-04 (4th Cir. 1978)).

¹²⁶ *Landano*, 113 S. Ct. at 2023-24 (citing Reporters Comm. for Freedom of the Press, 489 U.S. 749, 779 (1989) (quoting *FTC v. Grolier Inc.*, 462 U.S. 19, 27 (1983))); see *supra* note 24 and accompanying text.

¹²⁷ *Landano*, 113 S. Ct. at 2024.

¹²⁸ *Id.* (finding that, to the extent that the Government's proof of these factors may compromise legitimate interests (such as practically exposing the source before its status is determined), the Government can still attempt to meet its burden with in camera affidavits).

¹²⁹ *Id.* (recognizing that the proposed rule would both serve the Government's law enforcement interest and be easy for the FBI and the courts to implement).

¹³⁰ *Id.* (citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)); see *supra* notes 9-10 and accompanying text.

A. THE STATUTORY CONSTRUCTION PROHIBITS THE PRESUMPTION

Landano alludes to two reasons why a presumption of confidentiality would be inconsistent with the construction of FOIA and Exemption 7(D). First, as *Landano* found, a presumption would, in effect, negate FOIA's explicit provision for placing the burden of proof on the agency.¹³¹ Second, a presumption would moot the meaning of the word "confidential" in the phrase "confidential source," thereby negating its limiting purpose.

The *Landano* Court correctly held that the Government had the burden of proving Exemption 7(D) applies and that the FBI cannot satisfy its burden merely by asserting that its source cooperated during a criminal investigation.¹³² Allowing the burden to be satisfied by such an assertion effectively shifts the burden of proof to the requester.¹³³ Since the statute explicitly places the burden on the Government,¹³⁴ the Court should not place the burden on the requester to come forth with evidence to rebut a presumption.¹³⁵

The Government may respond in two ways, neither of which will refute the inconsistency. First, the FBI may contend that the presumption would not shift the burden of proof because the Bureau still must establish that the source furnished information during a criminal investigation. However, empirically this burden has been satisfied by the Government's mere assertions that it was true, because the requester lacked the knowledge to contend such assertions.¹³⁶ Thus, there is actually no burden affirmatively to prove anything. Second, the FBI may contend that the presumption would not shift the burden *per se*, but rather decrease the quantum of proof needed to satisfy it.¹³⁷ Nevertheless, once the quantum becomes zero (meaning that there is nothing *affirmatively to prove*—one can merely *assert* facts), the burden ceases to exist. "A burden presumed satisfied is, of course, no burden at all."¹³⁸ As the Court observed in *Landano*, it is not logical that Congress intended the

¹³¹ *Landano*, 113 S. Ct. at 2023.

¹³² See *id.* at 2022-23; see also *supra* notes 21, 68-71 and accompanying text.

¹³³ See *supra* notes 68-71 and accompanying text.

¹³⁴ See *supra* note 21 and accompanying text.

¹³⁵ See *Dow Jones & Co. v. United States Dep't of Justice*, 917 F.2d 571, 577 (D.C. Cir. 1990) (Edwards, J., concurring) (criticizing *Schmerler v. FBI*, 900 F.2d 333, 337 (D.C. Cir. 1990), for placing the burden on the FOIA requester).

¹³⁶ See *supra* notes 56-71 and accompanying text for examples of cases in which the Government satisfied the burden with assertions.

¹³⁷ *Dow Jones*, 917 F.2d 571 (D.C. Cir. 1990), *reh'g denied en banc*, 917 F.2d 578, 579 (D.C. Cir. 1990) (Silberman, J., concurring in decision to deny a rehearing).

¹³⁸ *Id.* at 580 (Edwards, J., dissenting from decision to deny rehearing); see *supra* note 71 and accompanying text.

Government to prevail on an Exemption 7(D) claim merely by asserting it.¹³⁹

The *Landano* Court implicitly observed that the presumption would essentially moot any limitation on the type of FBI source that qualified under Exemption 7(D).¹⁴⁰ The Court found the Government's contention defective because it was a universal—rather than categorical—approach.¹⁴¹ The Court meant that, at least with regards to FBI sources, almost every source would be presumed confidential.¹⁴² Furthermore, the Court found that this presumption would practically be irrefutable.¹⁴³ Thus, this approach moots the meaning of the word “confidential” in the exemption because it assumes away the issue of whether or not the particular FBI source is confidential.

Examining the statutory construction can illustrate the Court's position. Congress used the phrase “confidential source” to clarify that the identity of persons and institutions other than paid informants may be protected as long as they provided information under express assurances of confidentiality or circumstances from which such assurances could be inferred.¹⁴⁴ Nonetheless, the phrase is still a limitation, because a source could be assured of confidentiality and give information outside the context of a criminal investigation, and because a criminal investigative source may not have received an assurance—express or inferred—of confidentiality. Thus, “confidential source” and “criminal investigative source” are not synonymous phrases. Since the FBI uses sources mainly for law enforcement investigative purposes, to consider each such source a “confidential source” practically makes the phrases synonymous.

¹³⁹ See *United States Dep't of Justice v. Landano*, 113 S. Ct. 2014, 2022-23 (1993) (holding that if Congress meant to create such a rule, it could have done so much more clearly).

¹⁴⁰ *Id.* at 2021; see *supra* notes 65-67 and accompanying text, which illustrate that the phrase “confidential source” is supposed to be a limitation on the sources that qualify under Exemption 7(D).

¹⁴¹ *Landano*, 113 S. Ct. at 2021.

¹⁴² *Id.*; see also *supra* notes 117-19 and accompanying text. The FBI could contend that there are other sources than those obtained during an investigation (e.g., agency directives, correspondence, and manuals) that would not be exempt. However, the other sources would only allow the public to scrutinize how the agencies were *supposed to be* fulfilling their duties, not how they are *actually* fulfilling their duties. The purpose of FOIA is to allow for public scrutiny of agencies' actual conduct. See *supra* note 11 and accompanying text. Regardless, “confidential” would still be devoid of any unique meaning.

¹⁴³ *Landano*, 113 S. Ct. at 2022; see also *supra* notes 68-71 and accompanying text.

¹⁴⁴ See *supra* note 23 and accompanying text; see also *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 489 (D.C. Cir. 1980) (holding that the phrase applies to more than just paid informants).

Hence, such a presumption moots the meaning of the word “confidential,” along with any limiting effect that Congress intended.¹⁴⁵

To avoid judicially shifting the burden that was legislatively placed on the Government, and to avoid mootting a limitation within Exemption 7(D), the Court correctly applied the language of the statute and rejected this approach.

B. THE COURT’S CONSIDERATIONS

The Court established two considerations to help determine when a source can be deemed confidential: (1) the character of the crime, and (2) the source’s relation to the crime.¹⁴⁶ If these considerations “support an inference of confidentiality, the Government is entitled to a presumption.”¹⁴⁷

The Court’s approach has a number of benefits. First, it is consistent with the statutory language¹⁴⁸ and with the Court’s obligation to construe FOIA’s exemptions narrowly.¹⁴⁹ Next, it seems to require common sense determinations, because it forces courts to find that a source should be granted confidential status only when it is reasonable to do so.¹⁵⁰ Moreover, since the information concerning these considerations is generally accessible to the Government, the approach should be feasible.¹⁵¹ Even if revealing this information to a requester would reveal the source, this approach allows the Government to attempt to invoke the exemption through in camera review.¹⁵² Finally, general knowledge of these considerations would afford a requester the meaningful opportunity to contend the determination of confidentiality.¹⁵³

There are also some difficulties, however, with using the

¹⁴⁵ See *supra* notes 65-67 and accompanying text.

¹⁴⁶ *Landano*, 113 S. Ct. at 2023-24; see *supra* notes 124-26 and accompanying text.

¹⁴⁷ *Landano*, 113 S. Ct. at 2024. Note that the Court employs an atypical use of the term “presumption.” Typically, presumptions do not require the party that obtains them to do anything before they are invoked (e.g., the presumption of innocence does not require the accused to prove anything before she is considered innocent). However, under the Court’s use of the word, the Government must establish facts (the nature of the crime and the source’s relation to it) and have a judicial ruling on these facts in order to invoke the presumption.

¹⁴⁸ See *supra* notes 131-45 and accompanying text.

¹⁴⁹ *Landano*, 113 S. Ct. at 2024; see *supra* notes 9-10 and accompanying text.

¹⁵⁰ See *Landano*, 113 S. Ct. at 2023. The Court held that narrowly defined circumstances will support a presumption of confidentiality. *Id.* It gave the examples of an informant and a witness to a gang-related murder, both of which reasonably should be given confidential status and are granted such status under the Court’s derivation. *Id.*

¹⁵¹ See *supra* note 127 and accompanying text.

¹⁵² See *supra* note 128.

¹⁵³ See *supra* note 128 and accompanying text; see also *infra* notes 163-64 and accompanying text.

Court's considerations as a standard. First, it will be difficult for lower courts and government agencies to apply. It is unclear whether both the nature of the crime *and* the source's relation to it must support an inference of confidentiality. It is also unclear whether either consideration is afforded more weight than the other. Furthermore, the Court did not suggest a resolution if only one consideration supports an inference. Next, the considerations are time-sensitive: for example, circumstances may not have supported an inference of confidentiality when a source divulged information, but developments since then may clearly support such an inference. The converse might also be true. The Court does not deal with this temporal issue. Furthermore, aside from the extreme cases obviously requiring confidentiality that the Court cites,¹⁵⁴ the considerations themselves are unclear and somewhat arbitrary. What types of crimes and relations would indicate that it is reasonable to infer confidentiality? The answer to this question is left to judicial discretion. It is true that this may allow for flexibility in the judicial system, but the considerations themselves provide little guidance as to how they should be utilized. Thus, as is often the case, the cost of the flexibility of judicial discretion is decreased uniformity in judicial rulings.

Despite the difficulties of implementing the *Landano* Court's standard, it at least narrows the relevant considerations. Prior to *Landano*, the circuits that adopted similar reasoning and placed a significant burden of proof on the Government simply forced the agencies to prove that the circumstances reasonably could support an inference of confidentiality.¹⁵⁵ The *Landano* Court also required this proof; however, instead of leaving it open ended, the Court attempted to focus the inquiry on the two considerations it found to be pertinent.¹⁵⁶ Thus, though the Government and the lower courts may have difficulty applying the Court's standard, it at least focuses the inquiry on the relevant considerations.

The easiest way for the FBI to circumvent the statutory language would be to implement a policy that expressly assured each criminal investigative source confidentiality at the initial interview. The FBI already has a long-standing policy of treating as confidential all information obtained during the course of an investigation.¹⁵⁷ However, raising the issue may cause a source to

¹⁵⁴ See *supra* note 150.

¹⁵⁵ See *supra* notes 34-49 and accompanying text.

¹⁵⁶ See *Landano*, 113 S. Ct. at 2023.

¹⁵⁷ *Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1486 (11th Cir. 1992); see also *Londrigan v. FBI*, 722 F.2d 840, 843-44 (D.C. Cir. 1983).

contemplate the risk of disclosure and chill a source who otherwise might speak freely.¹⁵⁸ Thus, under the current statute, the FBI must either risk this chilling effect, or risk disclosing their sources, which may deter future sources from cooperating.¹⁵⁹

C. THE POLICY RATIONALE

There are two competing interests reflected in the Act. First, FOIA seeks broad disclosure with narrow exemptions to provide the public with a check consistent with the scheme of checks and balances.¹⁶⁰ Second, Exemption 7(D) seeks broad protection from disclosure to aid law enforcement.¹⁶¹ Thus, in determining what qualifies as a confidential source, one must balance the public's right to know and the Government's need to keep information in confidence.¹⁶² A refutable presumption of confidentiality for criminal investigative sources would be a proper balance for several reasons.

First, a refutable presumption would be fair to the requester and would preserve FOIA's purpose of allowing public scrutiny. As the *Landano* Court recognized, fairness mandates that the requester receive some information to avoid what would otherwise be an irrefutable presumption negating FOIA's purpose of public scrutiny.¹⁶³ However, to supply the requester with the information needed to contend the presumption may negate the exemption, for the purpose of the exemption is to prevent the disclosure of just that sort of information. If the circumstances surrounding the interview would not reasonably expose the identity of the source, then the Government should be required as a matter of pre-adjudicative procedure to divulge these circumstances to the requester.¹⁶⁴ If this is a point of contention, then a judicial in camera review could allow for a disinterested party experienced in making such judgments to determine whether or not that information can be divulged. This balance would establish a refutable presumption, which would both be fair

¹⁵⁸ *Nadler*, 955 F.2d at 1486.

¹⁵⁹ See *infra* notes 165-69 and accompanying text.

¹⁶⁰ See *supra* notes 8-9 and accompanying text.

¹⁶¹ See *supra* notes 15-20 and accompanying text.

¹⁶² See *supra* note 24 and accompanying text.

¹⁶³ *United States Dep't of Justice v. Landano*, 113 S. Ct. 2014, 2022 (1993); see *supra* notes 119-20 and accompanying text.

¹⁶⁴ Note that this requirement is consistent with the presumption that a FBI source is confidential. A presumption would simply denote a particular bias the court should take. Divulging this information would be a matter of procedure, and may provide the requester with the necessary information to overcome the presumption. Thus when this Note contends that Congress should amend FOIA and grant the FBI a presumption of confidentiality, there is no internal tension between that and recognizing the need for fairness to the requester because the presumption would be refutable. See *infra* part VI.

to the requester (by providing the opportunity to meaningfully contend it) and maintain the public's right to scrutinize the Government.

As the *Landano* Court recognized, a presumption would increase the ability of the FBI to elicit information that is necessary for productive law enforcement.¹⁶⁵ First, often sources have nothing to gain by cooperating with the FBI (except possibly peace of mind), and even a small chance of negative publicity may be enough to deter them from cooperating. Second, the FBI typically investigates serious offenses.¹⁶⁶ Consequently, subjects of investigations are more likely to be in a position to seek reprisals. A presumption of confidentiality may help alleviate these concerns. Moreover, most sources assume, and rely on their assumption, that their cooperation is confidential; even mentioning one's name in connection with an FBI investigation often creates a stigma and could subject one to unnecessary public attention and harassment.¹⁶⁷ Finally, since Exemption 7(D) attempts to protect the sources,¹⁶⁸ it should be up to the sources, not the government, to decide whether or not to reveal their identity.¹⁶⁹

The Court in *Landano* distinguished between individual and institutional sources and found that it was not reasonable to infer an implied understanding of confidentiality in *all* cases.¹⁷⁰ However, if it is reasonable to imply confidentiality in most cases, the existence of a couple of exemptions is no reason to reject a presumption—especially if it would further the purpose of law enforcement without compromising the purpose of public scrutiny or fairness to the requester.

The majority of individual sources expect their cooperation to be confidential.¹⁷¹ First, as *Landano* grants, informants should be

¹⁶⁵ *Landano*, 113 S. Ct. at 2024 (finding that the presumption would undoubtedly serve the Government's law enforcement objective).

¹⁶⁶ *But see id.* at 2021 (finding that the presumption should not apply because the FBI investigates various activities).

¹⁶⁷ *Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1486 (11th Cir. 1992); *Johnson v. United States Dep't of Justice*, 739 F.2d 1514, 1518 (10th Cir. 1984).

¹⁶⁸ *See supra* note 21 and accompanying text.

¹⁶⁹ *See Ingle v. Dep't of Justice*, 698 F.2d 259, 269 (6th Cir. 1983) (finding that, even if the source was not subject to intrusion or harassment, "it seems clear that it is properly the right of those sources themselves to waive any protection afforded by cooperating with the FBI and 'not the role of the FBI to suffer them to do so' ") (citing *Conoco Inc. v. United States Dep't of Justice*, 687 F.2d 724, 730 (3d Cir. 1982); *see also* *Miller v. Bell*, 661 F.2d 623, 628 (7th Cir. 1981) (holding that the sources may waive their right to confidentiality, but it is not the role of the FBI to do so regardless of the possibly beneficial purpose)).

¹⁷⁰ *Landano*, 113 S. Ct. at 2021-22.

¹⁷¹ *See Johnson*, 739 F.2d at 1518 (finding that most sources assume the information

confidential sources. It is clear that they are crucial to law enforcement and likely to be deterred from cooperating if their identity is disclosed. Second, individual witnesses should be confidential sources. As noted previously, there is a stigma simply in being associated with the FBI during a criminal investigation. This stigma may well subject the individual to unwanted attention or harassment.¹⁷² If for some reason sources desire the attention, then certainly they could waive their confidential status. But this decision should be made by the source, not the Government.¹⁷³

The Court in *Landano* rejected the Government's contention that individual sources should be presumed confidential because the risk of reprisals or other negative attention is inherent in criminal investigations.¹⁷⁴ The Court found that in any given case reprisals may not be threatened.¹⁷⁵ However, this finding does not deny that in any given case reprisals may indeed be threatened.¹⁷⁶ Given the types of individuals the FBI investigates and the stigma associated with the Bureau, reprisals seem more likely than not. These reasons support a presumption of confidentiality for individual sources, unless the requester can illustrate that such an inference would be unreasonable. Thus, a refutable presumption again appears to be a proper balance.

The majority of institutional sources expect their cooperation to be confidential as well.¹⁷⁷ First, private institutions should be deemed confidential sources. They are subject to the same stigma and possible unwanted attention as individual sources.¹⁷⁸ Although they may be able to take the publicity and turn it into a marketing tool, negative publicity could damage their business. In addition, they may even be subject to possible legal action.¹⁷⁹ The Court merely asserted that these contentions were conclusory and that,

they give will be kept confidential); *Nadler*, 955 F.2d at 1486 (finding that most sources expect their contact to be held in confidence); see also *Landano*, 113 S. Ct. at 2021 (recognizing that most people may expect confidentiality).

¹⁷² See *Nadler*, 955 F.2d at 1486.

¹⁷³ See *supra* note 169 and accompanying text.

¹⁷⁴ *Landano*, 113 S. Ct. at 2021.

¹⁷⁵ See *id.*

¹⁷⁶ It is important to note that reprisals are not limited to physical threats (such as a gang member getting revenge on an informant), but include economic threats (such as a store owner losing business because he was involved with the FBI), as well as harassment or unwanted attention (such as from curious neighbors) that may dissuade a source from cooperating because they get nothing in return.

¹⁷⁷ *Keyes v. United States Dep't of Justice*, 830 F.2d 337, 346 (D.C. Cir. 1987) (finding that "law enforcement authorities and other institutional sources would likewise have expected the information they provided to be kept in the strictest confidence").

¹⁷⁸ See *supra* note 172 and accompanying text.

¹⁷⁹ See *Landano*, 113 S. Ct. at 2022.

given the variety of information received, it was not reasonable to infer confidentiality in all cases.¹⁸⁰ The Court did not contend, however, that it would be unreasonable in a significant number of cases; and, as with the individual sources, it should be the institution's decision whether or not to waive their confidential status.¹⁸¹ Furthermore, if a refutable presumption was established, then in those cases where it is unreasonable to infer confidentiality, the presumption would simply be rebutted.

Second, public agencies should be deemed confidential sources. The Court found no basis for the argument "that disclosure ordinarily would affect cooperating agencies adversely or that the agencies otherwise would be deterred from providing even the most non sensitive information."¹⁸² However, the exchange of crime-related information among law enforcement agencies often depends on an implicit promise of confidentiality.¹⁸³ Cooperation between agencies can be an integral part of law enforcement. To summarily open such cooperation to public scrutiny may inhibit frank discussion and impair the quality of decisions.¹⁸⁴ This seems needlessly to constrain the officers needlessly. A presumption could lessen that constraint.

Essentially, a refutable presumption is consistent with the two competing purposes of FOIA and Exemption 7(D). First, it would serve FOIA's goal of public scrutiny because it allows the public the opportunity to contest the presumption meaningfully. Second, it would serve 7(D)'s goal by facilitating the law enforcement's ability to obtain information. As the Eleventh Circuit stated, "it is beyond dispute that an increased fear of exposure would chill the public's willingness to cooperate with the FBI in the course of criminal investigations."¹⁸⁵ This fact applies to both individual and institutional sources. Thus, a refutable presumption would fulfill Congress' purpose of achieving a proper balance.¹⁸⁶

VI. CONCLUSION

This Note examined the legislative and legal background of Ex-

¹⁸⁰ *Id.*

¹⁸¹ See *supra* note 169 and accompanying text.

¹⁸² *Landano*, 113 S. Ct. at 2022.

¹⁸³ *Keyes v. United States Dep't of Justice*, 830 F.2d 337, 346 (D.C. Cir. 1987).

¹⁸⁴ See *Dow Jones & Co. v. United States Dep't of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990) (quoting *Ryan v. United States Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980)) (applying the same rationale to communications between Congress and the Executive Branch).

¹⁸⁵ *Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1486 (11th Cir. 1992).

¹⁸⁶ See *supra* note 24 and accompanying text.

emption 7(D) as well as the Government's evidentiary burden of invoking 7(D). After discussing the background and decision in *Landano*, this Note contended that the statutory construction of FOIA prevents a presumption of confidentiality for FBI sources that cooperated during a criminal investigation. Critiquing the Court's holding in *Landano*, the Note found that it correctly rejected the presumption, and focused the inquiry for future courts in deciding whether or not a source is confidential. Once fairness to the requester was considered and safeguards were in place to prevent a presumption from becoming irrefutable, this Note found that a rebuttable presumption would facilitate the Government's law enforcement objective. Additionally, it would protect the purpose of public scrutiny inherent in FOIA. Consequently, Congress should amend Exemption 7(D) to place the burden of proof on the requester but, as a matter of pre-adjudicative procedure, require the agency to divulge information such as the nature of the crime and the source's relation to it. This would afford the requester with the opportunity to rebut the presumption and serve the competing interests.

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