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MEETING THE AGENCY BURDEN UNDER THE CONFIDENTIAL SOURCE EXEMPTION TO THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA)[1] opens government records for public scrutiny. The Act allows concerned citizens to obtain information about the actions of public officials and administrative agencies. Citizens can use this information to assure the efficiency and legality of government conduct.[2]

Although the FOIA generally requires complete disclosure, release of some government information could interfere with important policy goals. For example, society's interest in encouraging individuals to volunteer information to law enforcement agencies requires agencies to protect the identities of informers. Congress enacted exemption 7(D) of the FOIA to prevent disclosure of the identities of law enforcement confidential sources and the information acquired from them.[3]

The FOIA provides that an agency invoking one of its exemptions bears the burden of demonstrating that the exemption applies.[4] Courts construing exemption 7(D) have struggled with the question of what evidence an agency must present to meet this burden. The federal courts of appeals have developed three different approaches to the problem of proving that information came from a confidential source.[5]

This Comment analyzes the approaches of the courts of appeals to the confidential source exemption. First, the Comment presents a brief history of the Freedom of Information Act and the development of exemption 7(D) in Congress and the courts. The Comment explains and criticizes the conflicting judicial treatment of the agency's burden under the exemption. Finally, the Comment proposes a uniform approach to the agency burden that is consistent with the policies underlying both the Act and the exemption.

I. HISTORY OF THE FOIA AND EXEMPTION 7(D)

The FOIA is a congressional commitment to make government information available to the public. This commitment is based upon the theory that

1. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982)) [hereinafter cited as FOIA].
2. 120 CONG. REC. 17,016 (1974) (remarks of Senator Kennedy).
3. 5 U.S.C. § 552(b)(7)(D) (1982). The FOIA does not apply to law enforcement investigatory records to the extent that these records: "(D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation . . . confidential information furnished only by the confidential source."
4. 5 U.S.C. § 552(a)(4)(B) (1982).
5. *See infra* part II.

an open government is more responsive and responsible to the public.[6] The Watergate scandal and abuses of law enforcement authority in domestic intelligence investigations demonstrated that secrecy is the "incubator for corruption."[7]

Under the FOIA the federal government must promptly release all requested records.[8] Congress recognized, however, that complete disclosure is not always appropriate[9] and it therefore enacted exemptions to cover situations where disclosure would be against society's interests.[10]

Balancing the FOIA policy of maximum disclosure against the need to protect law enforcement confidentiality has raised important policy issues in Congress and the federal courts. Investigatory files of law enforcement agencies were not a major concern to the drafters of the original FOIA in 1966.[11] They believed that these records were adequately protected under existing criminal discovery provisions.[12] Agency testimony convinced them that disclosure of information from law enforcement investigations might interfere with government prosecutions of offenders by giving parties seeking disclosure earlier or greater access to information than existing laws allowed.[13] The original exemption for law enforcement information

6. HOUSE COMM. ON GOV'T OPERATIONS, SUBCOMM. ON GOV'T INFORMATION AND INDIVIDUAL RIGHTS, SENATE COMM. ON JUDICIARY, SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P. L. 93-502), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 285 (Joint Comm. Print 1975) [hereinafter cited as SOURCEBOOK].

7. *Id.* (statement of Senator Kennedy quoting then Chief Justice Warren); *see also id.* at 344 (remarks of Senator Weicker); 2 J. O'REILLY, FEDERAL INFORMATION DISCLOSURE, ch. 17.07, at 17-14 (1984); Kennedy, *Foreward: Is the Pendulum Swinging Away from Freedom of Information?*, 16 HARV. C.R.-C.L. L. REV. 311, 311–12 (1981); Comment, *The Freedom of Information Act: A Time for a Change?*, 1983 DET. C.L. REV. 171, 182; Note, *Freedom of Information Act—Investigatory Records Exemption—Summarized or Reproduced Information Retains Exemption*, 29 WAYNE L. REV. 1269, 1274–75 (1983).

8. 5 U.S.C. § 552(a)(3) provides that each agency shall make information available promptly when a member of the public makes a proper request.

9. 2 J. O'REILLY, *supra* note 7, ch. 17.04, at 17–18; *see* FBI v. Abramson, 456 U.S. 615, 621 (1982).

10. The exemptions to the general disclosure rule of the FOIA, 5 U.S.C. § 552, are listed in subsection (b). The exemptions cover: (1) material classified as secret in the interest of national defense or foreign policy; (2) material related solely to agency personnel rules and practices; (3) material specifically exempted from disclosure by statute; (4) privileged or confidential trade secrets and commercial or financial information obtained from a person; (5) inter-agency or intra-agency material which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel, medical, or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory records compiled for law enforcement purposes, to the extent that the production of such records would cause specific harms; (8) material related to the regulation or supervision of financial institutions; and (9) certain geological and geophysical information.

Agencies must provide any reasonably segregable portion of a record after deleting the exempt portions. 5 U.S.C. § 552(b) (1982).

11. 2 J. O'REILLY, *supra* note 7, ch. 17.02, at 17-6.

12. *Id.*, ch. 17.02, at 17-5.

13. *Id.*; SOURCEBOOK, *supra* note 6, at 332.

addressed this problem by exempting law enforcement investigatory files except to the extent already available under prior law.[14]

Courts interpreted this first law enforcement files exemption so broadly that the exception threatened to swallow the rule of disclosure.[15] The label "law enforcement" on a file became sufficient to justify withholding all of the information in the file, regardless of whether disclosure would interfere with law enforcement proceedings.[16] Under this "per se" interpretation of exemption 7, the FOIA goal of promoting public scrutiny of government conduct was seriously undermined. Proponents of open government feared that less information was available under the 1966 Act than under previous law.[17]

Congress amended the law enforcement information exemption drastically in 1974 to remedy these broad court interpretations.[18] The extensive

14. *See* 5 U.S.C. § 552(b)(7), Pub. L. No. 90-23, 80 Stat. 383 (1967) for the text of the original exemption 7. The drafters had two main purposes: (1) to avoid expanding criminal discovery beyond that allowed by the Jencks Act, Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified at 18 U.S.C. § 3500 (1982)), and (2) to preserve NLRB discovery procedures. 2 J. O'REILLY, *supra* note 7, ch. 17.02, at 17-6.

15. Agencies abused the law enforcement files exemption in two ways. First, agencies combined exempt and nonexempt material in single files, which were then withheld. Second, agencies exempted entire files as soon as they were characterized as "law enforcement." 2 J. O'REILLY, *supra* note 7, ch. 17.03, at 17-9.

16. A series of cases decided by the District of Columbia Circuit in the early 1970's adopted a per se approach to the exemption. Note, *supra* note 7, at 1272–73 & n.19. This approach allowed agencies to withhold information simply by stating that the requested record was compiled for law enforcement purposes. If so, it was automatically exempt. It is particularly significant that the D.C. Circuit adopted this approach because a great many FOIA suits are brought in that circuit. *Id.* at 1274 n.28, 1277.

17. SOURCEBOOK, *supra* note 6, at 333 (remarks of Senator Hart); *see also* 2 J. O'REILLY, *supra* note 7, ch. 17.03, at 17-11; Ellsworth, *Amended Exemption 7 of the Freedom of Information Act*, 25 AM. U.L. REV. 37, 41 (1975) (noting a "gaping rift between judicial interpretation and congressional intent"); Comment, *The Freedom of Information Act: A Survey of Litigation Under the Exemptions*, 48 MISS. L.J. 784, 812 (1977) ("mechanical, strictly literal test. . . violated both the spirit of the Act and the specific intent of the exemption").

18. Amendments to the Freedom of Information Act, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (amending 5 U.S.C. § 552 (1970)). The "last straw" cases, decided by the D.C. Circuit in 1973 and 1974, strongly influenced Congress' decision to amend the FOIA. Note, *Backdooring the NLRB: Use and Abuse of the Amended FOIA for Administrative Discovery,* 8 LOY. U. CHI. L.J. 145, 153–62 (1976); *see also* 2 J. O'REILLY, *supra* note 7, ch. 17.01, at 17-2, 17-12 (the exemption was motivated by frustration with 1974 decisions).

Four cases particularly concerned Congress. In Weisberg v. United States Dep't of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 993 (1974), the court held that files were exempt if they were (1) investigatory and (2) compiled for law enforcement purposes. A congressman's request for a report on the My Lai massacre was denied in Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973), even though judicial proceedings were virtually concluded. In the third case, a consumer group sought to compel disclosure of correspondence between auto manufacturers and the National Highway Traffic Safety Administration in connection with pending safety defect investigations. Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir.) (per curiam), *cert. denied,* 419 U.S. 974 (1974). In *Ditlow,* the court upheld an agency denial despite the district court's conclusion that releasing the information would not have caused any harm to the investigations. Finally, the court extended *Weisberg* to its outer limits in Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 372 (D.C. Cir. 1974), holding that a court need only inquire whether information was included in

legislative history of the 1974 amendments indicates that Congress carefully weighed policy issues in drafting the new version of exemption 7.[19] Congress was determined to narrow the scope of the exemption to prevent law enforcement agencies and the courts from withholding information unnecessarily.[20] To achieve this goal, Congress created a two-part test for exemption of investigatory records. First, the agency must show that a record is in fact investigatory and compiled for law enforcement purposes. Second, the agency must show that disclosure of the information will cause a specific harm.[21]

Congress also recognized the need to adequately protect the identities of law enforcement informers.[22] The 1974 amendments made the identities of confidential sources exempt from disclosure under the FOIA.[23] Even where the agency carefully deletes the names of sources, a person with knowledge of the events investigated may be able to determine an informer's identity.[24] To provide additional protection for informers in criminal investigations, Congress made both the identities of sources and any confidential information given by confidential sources exempt.[25]

Despite Congress' clear intent to narrow the scope of the law enforcment files exemption through the 1974 amendments, federal courts of appeals have disagreed on how to define the requirements for invoking exemption 7(D). Some circuits have created a presumption that information collected by a criminal law enforcement agency is confidential,[26] while others

"investigatory files compiled for law enforcement purposes." Thus information collected in an investigation by the Department of Health, Education and Welfare that was unlikely to lead to any action need not be disclosed to a civil rights group. *See also* Note, *Developments Under the Freedom of Information Act—1977*, 1978 DUKE L.J. 189, 217 & n.183; Note, *Freedom of Information Act Exemption 7: A Postamendment Interpretation*, 14 SUFFOLK U.L. REV. 202, 207 (1980).

19. See the extensive discussion of exemption 7 issues in SOURCEBOOK, *supra* note 6, at 284–475; *see also* Antonelli v. FBI, 721 F.2d 615, 618 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2399 (1984).

20. SOURCEBOOK, *supra* note 6, at 332–45.

21. *See* 5 U.S.C. § 552(b)(7); FBI v. Abramson, 456 U.S. 615, 622 (1982); Ellsworth, *supra* note 17, at 45; Note, *Developments Under the Freedom of Information Act—1982*, 1983 DUKE L.J. 390, 417.

22. SOURCEBOOK, *supra* note 6, at 229–30.

23. 5 U.S.C. § 552(b)(7)(D) (1982); *see supra* note 3 for text.

24. SOURCEBOOK, *supra* note 6, at 340–43, 369–71; 2 J. O'REILLY, *supra* note 7, ch. 17.04, at 17-16 & ch. 17.10, at 17-47; Comment, *FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations*, 65 MINN. L. REV. 1139, 1149 (1981).

In some instances, such as investigations of organized crime, an informer's life could be threatened if his or her identity is revealed. Senator Hatch, a longtime critic of the FOIA, suggests that "the criminal element, particularly organized crime, has learned to detect informant identities, and the status of investigations by sifting through sensitive records obtained via F.O.I.A. requests." Hatch, *Refinements Are Needed to Stop Abuses*, 69 A.B.A. J. 556, 556 (1983). Potential informants may refuse to cooperate with law enforcement agencies because of fear that their identities will be revealed in response to a FOIA request, *id.; see also* SOURCEBOOK, *supra* note 6, at 371.

25. 5 U.S.C. § 552(b)(7)(D) (1982); *see supra* note 3 for text.

26. *See infra* part IIA.

require an agency to affirmatively prove confidentiality.[27] One circuit has held that an agency can invoke exemption 7(D) merely by stating that information came from a confidential source with nothing more.[28] The Tenth Circuit Court of Appeals recently considered these divergent doctrines in *Johnson v. United States Department of Justice*.[29]

The facts of *Johnson* highlight the significance of the problem of defining the agency's burden. In *Johnson,* the FBI investigated Harold Johnson concerning possible bank fraud and embezzlement. No charges were brought against him. When Johnson sought disclosure of his file under the FOIA, the FBI withheld much of the information, claiming that exemption 7(D) for information from confidential sources applied. Johnson sued in federal court to compel disclosure of the remaining portions of his file.[30]

The Justice Department filed a statement detailing the particular exemption that applied to each undisclosed portion of Johnson's file and moved for summary judgment. The trial judge, unable to determine the applicability of exemptions from the declaration, reviewed Johnson's entire file in camera. The judge determined that the exemptions claimed by the FBI did not apply and ordered the file disclosed.[31]

The court of appeals reversed the trial court. At issue was the evidence that must be shown before an agency can invoke exemption 7(D).[32] After examining the approaches to this problem taken by other circuits, the court held that a promise of confidentiality was implicit in all FBI criminal investigations, unless evidence in the record indicated otherwise.[33] In so holding, the court explicitly found that most people believe that information given to the FBI will be kept confidential.[34] The court held that the sources contributing information to Johnson's file had been promised confidentiality because the record presented no contrary evidence. Thus, the FBI declaration was found sufficient to justify application of exemption 7(D).[35]

27. *See infra* part IIB.
28. *See infra* part IIC.
29. 739 F.2d 1514 (10th Cir. 1984).
30. *Id.* at 1515–16.
31. *Id.* at 1515.
32. *Id.* at 1517.
33. *Id.* at 1518.
34. *Id.*
35. *Id.* at 1519.

II. DIFFERING APPROACHES TO THE AGENCY BURDEN UNDER EXEMPTION 7(D)

A. *Rebuttable Presumption of Confidentiality*

In addition to the Tenth Circuit, the Sixth and Seventh Circuits also hold that information provided during an investigation is presumptively confidential, but evidence may be introduced to rebut this presumption.[36] These circuits find that the nature of a criminal law enforcement investigation itself implies confidentiality.[37] They also apply the rebuttable presumption approach in order to insure that informers will remain willing to volunteer information. These circuits reason that allowing an agency to invoke exemption 7(D) more freely will assure informers that they can provide information without fear of disclosure.[38]

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36. In Miller v. Bell, 661 F.2d 623, 627 (7th Cir. 1981) (per curiam), *cert. denied,* 456 U.S. 960 (1982), the Seventh Circuit specifically rejected the district court's requirement that the FBI show evidence of express or implied promise of confidentiality. The court cited an earlier Seventh Circuit case requiring that an agency show an express or implied promise of confidentiality, Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977), to support a holding that FBI affidavits were sufficient. The affidavits in *Miller* were not tested under the *Maroscia* standard, however, and the conflict between the two standards was not discussed. *See also* Scherer v. Kelley, 584 F.2d 170 (7th Cir. 1978), *cert. denied,* 440 U.S. 964 (1979) (investigation for law enforcement purposes was held to imply promise of confidentiality).

In Ingle v. United States Dep't of Justice, 698 F.2d 259, 269 (6th Cir. 1983), the Sixth Circuit cited *Miller* with approval, holding that the FBI need not prove a promise of confidentiality because such a promise was inherently implicit in FBI interviews. A recent Sixth Circuit case, Osborn v. IRS, 754 F.2d 195 (6th Cir. 1985), indicates that the agency must still provide an index of the file, however. See *infra* note 64 for a discussion of indices under the standard established by Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974).

In a recent case, the Sixth Circuit confused the balancing test applied under FOIA exemption 7(C) with the standard for determining when material should be protected under exemption 7(D). Kiraly v. FBI, 728 F.2d 273 (6th Cir. 1984). Exemption 7(C) requires that courts use different standards than when applying exemption 7(D). Because the issue at stake in exemption 7(C) is privacy, the court must balance the interests of the public in having the information released against the privacy interest of the individuals who might be harmed by releasing the information. *See, e.g.,* Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981). However, a different policy underlies exemption 7(D). A confidential source's identity is protected to further the public interest in law enforcement. Therefore, all information that meets the criteria for exemption 7(D) is exempt, even if there is a strong public interest in releasing the information. New England Apple Council v. Donovan, 725 F.2d 139, 145 (1st Cir. 1984); Lame v. United States Dep't of Justice, 654 F.2d 917, 923 (3d Cir. 1981). *But see* Nix v. United States, 572 F.2d 998, 1002–03, 1005 (4th Cir. 1978) (approved balancing test for use in exemption 7(D)).

37. Miller v. Bell, 661 F.2d 623, 627 (7th Cir. 1981) (per curiam), *cert. denied,* 456 U.S. 960 (1982). The District of Columbia Circuit discussed the rebuttable presumption test in the context of the Privacy Act exemption (k)(5), 5 U.S.C. § 552a(k)(5)(1982), in Londrigan v. FBI, 670 F.2d 1164 (D.C. Cir. 1981). The court held that it would not sanction a blanket assumption of confidentiality when the FBI investigates a person's qualifications for federal employment. *Id.* at 1173. The court required the FBI to produce more information than the affidavit of an agent who had not been involved in the interviews in question when the affidavit asserted only a general assumption of confidentiality. *Id.* at 1172–73. The Second Circuit limited *Londrigan* to qualifications investigations under the Privacy Act in Diamond v. FBI, 707 F.2d 75, 78 (2d Cir. 1983) (FBI need not produce personal knowledge affidavits in cases involving exemption 7(D)), *cert. denied,* 104 S. Ct. 995 (1984).

38. *See, e.g., Kiraly,* 728 F.2d at 278; *Scherer,* 584 F.2d at 176.

Under the rebuttable presumption approach the agency can meet its initial burden under exemption 7(D) by simply stating that the requested information came from a confidential source. The agency need not show a specific promise of confidentiality. Therefore, the agency can easily withhold information.

To rebut the presumption of confidentiality, the party seeking disclosure must show that sources received no express or implied promise of confidentiality. It will often be impossible to refute the agency's claim of confidentiality, however, because details of the circumstances surrounding the collection of the information are in the agency's hands.[39] It would be particularly difficult if the agency, instead of the source, had some purpose in not disclosing the requested information.[40]

The rebuttable presumption approach is particularly disturbing given the procedure used by the FBI to determine whether to invoke an exemption. The Bureau assumes that all information it receives is to be kept confidential. It automatically uses the confidential source exemption to withhold information unless it has a notarized authorization for release from the source on file.[41]

B. *Agency Must Prove an Express or Implied Assurance of Confidentiality*

The rebuttable presumption approach is not universally followed. Other circuits that have considered the confidential source issue hold that the agency must demonstrate an express or implied promise of confidentiality in order to invoke exemption 7(D). The District of Columbia,[42] First,[43]

39. Poss v. NLRB, 565 F.2d 654 (10th Cir. 1977), is a rare example of a case where a judge decided on the basis of the agency affidavit alone that no guarantee of confidentiality had been given. In *Poss*, NLRB witnesses knew that they might be called to testify at trial. *Id.* at 658.

40. For example, an agency might be reluctant to disclose information exposing illegal investigations or revealing administrative blunders.

41. Lame v. United States Dep't of Justice, 654 F.2d 917, 925 (3d Cir. 1981).

42. Lykins v. United States Dep't of Justice, 725 F.2d 1455 (D.C. Cir. 1984), held that an agency must supply affidavits to support claims of exemption and may not justify withholding on the basis of sweeping or conclusory statements.

The Tenth Circuit in Johnson v. United States Dep't of Justice, 739 F.2d 1514, 1517 (10th Cir. 1984), erroneously categorized the D.C. Circuit as having adopted the per se approach, *see infra* part IIC, based upon the legislative history cited in Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980). See *infra* note 60 for a discussion of the relevant legislative history. The major issue in *Lesar* was whether a local law enforcement agency could be a confidential source. *Lesar*, 636 F. 2d at 489–91. The *Lesar* court also considered the sufficiency of the agency's affidavits for purposes of invoking exemption 7(D). *Id.* at 491–92. The court quoted from the legislative history of the 1974 amendments, noting that an express or implied promise of confidentiality was required to invoke exemption 7(D). *Id.* Furthermore, the court in *Lesar* found that an explicit promise of confidentiality had been given. *Id.*

43. Crooker v. United States Parole Comm'n, 730 F.2d 1, 10 (1st Cir. 1984) (criminal law enforcement), *vacated on other grounds*, 105 S. Ct. 317 (1984); New England Apple Council v. Donovan, 725 F.2d 139, 145 (1st Cir. 1984) (civil law enforcement).

Second,[44] Fourth,[45] Ninth,[46] and Eleventh[47] Circuits have adopted this test.[48] These courts rely on the legislative history of the 1974 amendments to determine the agency burden. To meet that burden, the agency must show that a "person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred."[49]

Putting the burden on the agency to demonstrate confidentiality properly focuses attention on the circumstances under which the information was obtained rather than upon the contents of the document.[50] The test requires agencies to explain the circumstances under which information was given. The agency must describe these circumstances with sufficient detail to enable a court to find that a promise of confidentiality was either explicitly or implicitly given.[51] Usually, the agency can meet this burden by submitting affidavits from the agents who collected the information.[52] The agency

44. Keeney v. FBI, 630 F.2d 114, 119–20 (2d Cir. 1980).

45. Nix v. United States, 572 F.2d 998, 1002–03, 1005 (4th Cir. 1978). In this case, the court confused exemption 7(C) and 7(D), and applied an inappropriate balancing of the public interest in disclosure against the public interest in protecting informants. *Id.* at 1002. The court, however, placed the burden of proving confidentiality on the agency. *Id.* at 1003. For an analysis of the distinctions between exemptions 7(C) and 7(D), see *New England Apple Council*, 725 F.2d at 145:

> Exemption 7(D) provides greater protection to a narrower class of persons than does 7(C). To invoke 7(D), the government must show that the informant provided information to government officials under an express or implied assurance of confidentiality. If the government can make this showing, it need not then demonstrate, as it must under 7(C), that privacy interests outweigh the public interest in disclosure.

46. Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 986 (9th Cir. 1985).

47. L & C Marine Transport Ltd. v. United States Dep't of Labor, 740 F.2d 919, 923–24 (11th Cir. 1984).

48. The Fifth Circuit has not explicitly adopted a test for the confidential source exemption. However, a 1979 case involving disclosure of IRS records allowed exemption from disclosure when an in camera examination revealed that the IRS had received information under an implied promise of confidentiality. Pope v. United States, 599 F.2d 1383, 1386–87 (5th Cir. 1979).

49. *Lesar*, 636 F.2d at 490; *Nix*, 572 F.2d at 1003 n.5; *see also Crooker*, 730 F.2d at 10; *Keeney*, 630 F.2d at 119–20.

50. Shaw v. FBI, 749 F.2d 58, 61 (D.C. Cir. 1984) (citing Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1492 (D.C. Cir. 1984) and *Lesar*, 636 F.2d at 492). The court in *Shaw* specifically addressed the issue of whether "public" information from a confidential source could be confidential information for the purposes of the FOIA and held that "confidential information" referred to the nature of the agreement between the source and the agency, not to whether the information was available elsewhere. *Id.*

51. Lame v. United States Dep't of Justice, 654 F.2d 917, 928 (3d Cir. 1981).

52. Affidavits from agents indicating that sources expected confidentiality are usually sufficient to satisfy the burden of proof for the agency. *See, e.g.*, Parton v. United States Dep't of Justice, 727 F.2d 774, 776 (8th Cir. 1984); *Lesar*, 636 F.2d at 491; *Maroscia v. Levi*, 569 F.2d 1000, 1002 (7th Cir. 1977). A dissent by Justice Wilkey in Baez v. United States Dep't of Justice, 647 F.2d 1328 (D.C. Cir. 1980), suggested that agency affidavits may not be sufficient if bad faith by the agency is an issue. *Id.* at 1341 (Wilkey, J., dissenting).

affidavits and explanations can be reviewed in camera if necessary to protect a confidential source's identity.[53]

C. Agency Assertion of Confidentiality Invokes Exemption Per Se

Initially, the Third Circuit placed the burden on the agency to prove that a source gave information with an expectation of confidentiality. In *Lame v. United States Department of Justice*,[54] it held that an affidavit from an FBI agent stating that the Bureau assumes sources want information to be kept confidential was not sufficient to invoke exemption 7(D).[55] One year later, however, the court implicitly overruled *Lame* by approving a district court holding that an agency need only state that information came from a confidential source to invoke the exemption.[56]

This per se approach to exemption 7(D) ignores the plain language of the 1974 amendments and collides with congressional intent to prevent an agency from invokng FOIA exemptions by merely "rubber stamping" documents.[57] Both Congress and the courts in other circuits have condemned such mechanical applications of the FOIA.[58] Moreover, the approach of the Third Circuit does not preserve a right of the party seeking disclosure to present evidence that the source is not confidential. The Third Circuit holding, reaching much further than necessary,[59] represents a serious departure from the FOIA policy of broad disclosure.[60]

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53. *See, e.g.*, Lykins v. United States Dep't of Justice, 725 F.2d 1455, 1464 (D.C. Cir. 1984); *Parton*, 727 F.2d at 776.

54. 654 F.2d 917 (3d Cir. 1981).

55. *Id.* at 927; *see also id.* at 924 n.7 (noting that Senator Hart's statement that all the FBI needs to do is state that information came from a confidential source and it is exempt does not mean that courts must automatically defer to FBI characterizations of information).

56. Conoco Inc. v. United States Dep't of Justice, 687 F.2d 724, 730 (3d Cir. 1982). The court stated that there is no requirement that the agency show a promise or an agreement on the agency's part to hold the information provided by a source in confidence. All the agency must do is state that the information was furnished by a confidential source and identify the document. To require more detail would greatly increase the possibility that the source and content of the confidential correspondence would be revealed. *Id.*

57. SOURCEBOOK, *supra* note 6, at 344.

58. *E.g.*, *Lykins*, 725 F.2d at 1463; Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); SOURCEBOOK, *supra* note 6, at 304 (remarks of Senator Muskie); *id.* at 335–36 (remarks of Senator Kennedy).

59. The broad holding in *Conoco* was not needed to decide the case. The affidavits provided by the government "sufficiently detail[ed] the confidential nature of both documents." *Conoco*, 687 F.2d at 730. In fact, the Third Circuit's result is contrary to language in the opinion that states that conclusory statements are not sufficient to meet the government burden of proof under the FOIA. *Id.* at 728.

60. There is some support for the per se approach in the legislative history of the 1974 amendments. The sponsor of the investigatory records amendment, Senator Philip Hart, urged senators to override a presidential veto of the amendments. He pointed out that President Ford's objections to the

D. *Different Tests for Civil and Criminal Law Enforcement Agencies*

The Eighth Circuit has not consistently applied one standard to determine whether agencies have adequately justified application of exemption 7(D). The circuit appears to distinguish between civil and criminal law enforcement agencies. Civil agencies such as the NLRB must affirmatively prove the expectation of confidentiality,[61] while a mere assertion of confidentiality is probably adequate for the FBI.[62]

III. A UNIFORM APPROACH

The federal courts of appeals should adopt a single, uniform approach to the agency's burden under exemption 7(D). The rights of a party seeking disclosure under the FOIA should be the same in all federal courts. Considering the purposes of the FOIA and the legislative history of the 1974 amendments, placing the burden on the agency is the only approach consistent with congressional intent. Courts should require an agency to prove an express or implied promise of confidentiality in order to invoke exemption 7(D).

The traditional adversarial system is seriously distorted in FOIA disputes.[63] The party seeking disclosure does not know the contents of the

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investigatory records amendment had already been taken into account in drafting a House-Senate compromise bill. 120 CONG. REC. 36,871 (1974), *reprinted in* SOURCEBOOK, *supra* note 6, at 451. To answer President Ford's concern that identities of informers would be exposed, Senator Hart noted that the amendments provided extensive protection for confidential sources. He stated that all information from confidential sources in a criminal investigation was exempt and concluded that all the FBI had to do was "state that information was furnished by a confidential source and it is exempt." *Id.*

Despite Senator Hart's comment, the per se approach is not consistent with the weight of the legislative history of the 1974 amendments. Elsewhere in the record, Senator Hart made clear the importance of placing on the agency the burden of justifying the application of exemptions. SOURCEBOOK, *supra* note 6, at 333. He emphasized that conclusory statements do not satisfy this burden. *Id.* It would have surprised and displeased Senator Hart to learn that an isolated remark had become a judicial test. Given the remainder of the legislative history, he probably meant to say "all the FBI has to do is *prove* that the information came from a confidential source and it is exempt."

61. Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1137 (4th Cir. 1977).

62. Parton v. United States Dep't of Justice, 727 F.2d 774, 776 (8th Cir. 1984). The court cited Senator Hart's statement that all the FBI must do is state that information came from a confidential source and it is exempt. *See supra* note 60. This application of the legislative history is overly narrow. *See supra* note 60. The court went on to find that an FBI affidavit clearly showing that a promise of confidentiality could be implied under the circumstances was sufficient to warrant exemption. *Parton*, 727 F.2d at 776.

63. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), was one of the first cases to reject an agency's attempt to shift the burden of proof to the plaintiff or the court on this ground. *See* Comment, *Freedom of Information: Judicial Review of Executive Security Classifications*, 28 U. FLA. L. REV. 551, 556–57 (1976); Lively, *Catch 7(A): The Plaintiff's Burden Under the Freedom of Information Act*, 28 VILL. L. REV. 75, 76–77 (1982-83) (plaintiff normally at great disadvantage in FOIA suits).

documents sought or the circumstances under which the documents were prepared. Thus, the party most interested in disclosure has no information to challenge government claims of exemption. Only the agency opposing disclosure has access to the information that might be used to compel disclosure.[64] Congress, recognizing the predicament of the party seeking disclosure, placed the burden of justifying the applicability of claimed exemptions on the agency.[65]

The Supreme Court has stressed the importance of attention to legislative history in determining congressional intent when interpreting the FOIA.[66] The 1974 amendments were an unmistakable message from Congress to the courts: interpret FOIA exemptions narrowly and favor disclosure over secrecy. The purpose of the amendments was to insure that all information requested under the FOIA would be disclosed unless the agency could prove that the information fell within one of a few narrow exemptions.[67]

In 1974 Congress entirely rewrote the law enforcement files exemption; the exemption's scope was narrowed and its coverage confined to cases in which the government could prove that disclosure would cause harm.[68] Allowing an automatic exemption for requested information on the basis of a presumption or an agency assertion that the information came from a confidential source is directly contrary to the scheme of the 1974 amendments. On the other hand, placing the burden on the agency to prove a promise of confidentiality accords with congressional intent in requiring the agency to comply with the FOIA requirement of demonstrating that an exemption applies.

Supreme Court interpretations of other FOIA exemptions can provide guidance for interpreting exemption 7(D). For example, exemption 7(A), which prevents the release of information that would interfere with law enforcement proceedings, was considered recently by the Supreme Court.[69] The Court held that the exemption did not require the NLRB to make specific, case-by-case findings of interference, but rather that generic

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64. *Vaughn*, 484 F.2d at 823–24. The court held that an agency should prepare a specific index for documents and portions of documents exempted, correlating the documents and the government's reasons for refusing to disclose. *Id.* at 827. This itemized index would help the trial judge determine the applicability of exemptions. Where necessary, the court could examine some or all of the documents in camera as well. *Id.* at 823. Other circuits now require a Vaughn Index or similar document from the agency to justify application of an exemption.

65. 5 U.S.C. § 552(a)(4)(B) (1982).

66. In interpreting the FOIA, the Supreme Court has examined congressional intent as expressed in the legislative history of the Act. *See, e.g.*, NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978); FAA Adm'r v. Robertson, 422 U.S. 255, 262 (1975); EPA v. Mink, 410 U.S. 73, 81 (1973).

67. 2 J. O'Reilly, *supra* note 7, ch. 17.03, at 17–9 n.2; Note, *supra* note 7, at 1272 n.18.

68. *See supra* note 21 and accompanying text.

69. *Robbins Tire*, 437 U.S. at 214.

determinations could be made based on the type of document requested.[70] In reaching this decision, however, the Court, in dicta, contrasted exemption 7(A) with other exemptions including 7(D). The Court noted that for these other exemptions, the statutory language referring to particular cases indicated that factors made relevant by the statute *must be present* in each individual situation before the exemption can be applied.[71]

The Supreme Court has granted great deference to agency classification of documents related to national security under exemption 1.[72] In the case of investigatory records, however, this deference is not appropriate. Classification of national security information involves an exercise of administrative judgment. Congress specifically indicated that agencies should have discretion to determine whether information has national security implications.[73] In contrast, a determination that information came from a confidential source involves a question of fact concerning the circumstances under which the information was collected. There is no reason for courts to defer in this determination to the agency. No special discretion has been granted to the agency to decide such questions.

A recent Supreme Court decision under exemption 3 also indicates that courts should not allow an agency to withhold information under exemption 7(D) without adequate justification. In *CIA v. Sims*,[74] the Court considered whether the CIA could withhold information under FOIA exemption 3, which provides that an agency need not disclose matters specifically protected by statute.[75] The Court decided that section 102(d)(3) of the National Security Act of 1947 qualified as a withholding statute under exemption 3.[76] The Court examined the legislative history of section 102(d)(3) to determine the degree of discretion granted to the agency under the statute to categorize information as coming from an "intelligence source," and found that the agency had great discretion.[77] In making this determination, the Court contrasted the term "intelligence source" with the term "confidential source" as used in exemption 7(D). It

70. *Id.* at 224–25.
71. *Id.* at 224.
72. EPA v. Mink, 410 U.S. 73 (1973).
73. *Id.* at 81–84.
74. 105 S. Ct. 1881 (1985).
75. 5 U.S.C. § 552(b)(3) (1982).
76. *Sims*, 105 S. Ct. at 1887.
77. *Id.* at 1887–88.

noted that "confidential source" was a much narrower category of protected information sources.[78] The concurring opinion found that "intelligence source" should receive the same treatment in the courts as "confidential source": the information should be exempted when given under an explicit or implicit assurance of confidentiality.[79]

Critics of the FOIA policy of releasing most law enforcement records have pointed to instances where organized crime has used the FOIA to discover informers' identities.[80] They believe that the FOIA creates a perception among informers that their confidentiality is no longer protected. These critics fear that this perception will hamper law enforcement. They assert that the FOIA "dries up" information by making informers less likely to come forward. Yet no agency has presented evidence that fewer people are willing to volunteer information in the circuits that require an agency to prove confidentiality to invoke exemption 7(D).

Adoption of a uniform standard requiring agencies to prove a promise of confidentiality would not endanger confidential sources of law enforcement information. The test used to prove the application of exemption 7(D) does not affect the protection of legitimate confidential sources. Placing the burden on the agency to prove confidentiality will not require law enforcement agencies to release more or less information from truly confidential sources than previously released. It will only make the agency invoking the exemption comply with FOIA requirements to prove that the exemption applies. The agency must indicate the reasons why the exemption applies to legitimately withhold information.

Requiring the agency to prove confidentiality does not place an excessive burden on law enforcement.[81] The agency has all of the information about the circumstances surrounding the collection of the information easily available; it is in the best position to present this evidence. It is unlikely that the government would be unable to demonstrate an express or implied promise of confidentiality in any legitimate case. Furthermore, if the

78. *Id.* n.13.

79. *Id.* at 1896.

80. 2 J. O'REILLY, *supra* note 7, ch. 17.01, at 17-4; Hatch, *supra* note 24, at 556.

81. Even if placing the burden on the agency significantly increased the agency's administrative workload, this would not justify refusing to comply with the FOIA. Congress overrode President Ford's veto of the 1974 amendments despite the President's concern with increased administrative burdens. SOURCEBOOK, *supra* note 6, at 541–42; *see also* Ellsworth, *supra* note 17, at 39 & n.10; Note, *supra* note 21, at 419; Note, *The Title Guarantee Theory and Related Decisions: Are the Courts Interfering With Exemption 7 of the FOIA?*, 23 N.Y.L. SCH. L. REV. 275, 297–98 (1977) (quoting Senator Weicker).

agency cannot show an express or implied promise of confidentiality, other FOIA exemptions may justify nondisclosure.[82]

The concern expressed by some courts that information given to law enforcement agencies should be presumed to be confidential because most people expect confidentiality is similarly unconvincing. The FOIA encourages close judicial scrutiny of agency determinations, not judicial deference based on generalizations. The best way to achieve the FOIA goal of maximum disclosure is to reveal the circumstances under which the requested information was collected and let the trial judge decide the issue. When the agency can demonstrate circumstances showing that a promise of confidentiality should be implied, courts will support agency withholding of information. If the circumstances surrounding the collection of the information do not convince the trial judge that the source could reasonably expect confidentiality, the information should not be withheld.

An additional benefit of requiring detailed explanations from law enforcement agencies is that this will encourage agencies to exercise greater care. This may make agencies less likely to release information erroneously. The agency knows that the trial judge will review the material submitted to support an assertion of exemption 7(D) and may choose to examine the documents in camera.[83] The agency will therefore be careful to justify adequately its decision to withhold. Both the public interest in agency accountability and the private interest of the party seeking disclosure are served by requiring adequate explanations for invoking FOIA exemptions.

Requiring an agency to prove an express or implied promise of confidentiality might not thwart a determined agency coverup, but it will encourage agency honesty. The more difficult it is to cover up, the less likely it is that agency improprieties can be explained as carelessness or error. It is much easier to conceal information when it simply can be stamped "confidential" than when the agency must submit affidavits describing the circumstances surrounding the collection of the information and prepare a detailed index for judicial review. Requiring the agency to justify nondisclosure with evidence, not mere assertions, is the only way to achieve the FOIA goal of open government.

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82. For example, exemption 7 also protects investigatory records compiled for law enforcement purposes when disclosure: (1) interferes with enforcement proceedings, (2) denies a person's right to a fair trial or an impartial adjudication, (3) unwarrantedly invades personal privacy, (4) reveals investigative techniques and procedures, or (5) threatens the life or physical safety of law enforcement personnel. 5 U.S.C. § 552(b)(7) (1982).

83. The prospect of justifying its decision to a judge may cause an agency to be more thorough and objective. Stein v. United States Dep't of Justice, 662 F.2d 1245, 1254 (7th Cir. 1981).

IV. CONCLUSION

The courts of appeals should adopt a uniform approach to exemption 7(D) of the FOIA. A requirement that an agency must prove that information came from a confidential source to invoke the exemption is the best approach. Requiring that the agency show an express or implied promise of confidentiality is consistent with the purpose and legislative history of the FOIA. This requirement is fair to both the agency and the party seeking disclosure, because the agency is uniquely able to produce this information.

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