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28IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM LEONARD PICKARD,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

No. C 06-00185 CRB

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

This is a long-standing FOIA case involving a convicted LSD manufacturer's search for information about a confidential informant who testified against him. The particular motion that is pending, however—Defendant United States Department of Justice's Second Motion for De Novo Determination of Dispositive Matter Referred to Magistrate Judge, 2d Mot. for De Novo Review (dkt. 260)—involves information that the parties agree is already known, because a confidential informant has already disclosed it. The motion challenges an order by Magistrate Judge Nathanael M. Cousins holding that none of the government's claimed FOIA exemptions apply, and ordering released the three categories of materials that Plaintiff William L. Pickard currently seeks: (1) confidential informant Gordon Skinner's name, (2) information Skinner has voluntarily disclosed to the public, and (3) Skinner's NADDIS number.¹ See generally Order to Release (dkt. 243).

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

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

9 Nevertheless, and in the absence of controlling authority in the Ninth Circuit, the
10 Court concludes that the government may withhold Skinner's name and the information that
11 he voluntarily disclosed to the public under FOIA Exemption 7(D), which pertains to
12 confidential informants. The Court does not reach the question of whether the same
13 materials could also be withheld under Exemption 7(F), which pertains to safety, or
14 Exemption 7(C), which pertains to privacy interests. The Court further holds that the
15 government may withhold Skinner's NADDIS number under Exemption 7(E), which
16 pertains to law enforcement techniques.

17 **I. BACKGROUND**

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

23 (1) Skinner's criminal history (including records of arrests, convictions, warrants, or
24 other pending cases), (2) records of all case names, numbers, and judicial districts
25 where he testified under oath, (3) records of all monies paid in his capacity as a
26 federal government informant, (4) all records of instances where the DEA intervened
27 on his behalf to assist him in avoiding criminal prosecution, (5) all records of
28 administrative sanctions imposed for dishonesty, false claims, or other deceit, (6) all
records of any benefits of any nature conferred, (7) all records of deactivation as a
confidential informant and the reasons for deactivation, and (8) all records concerning
Skinner's participation in criminal investigations.

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

4 Plaintiff then brought suit in this court. Id. The government moved for summary
5 judgment, and the Court denied the motion without prejudice, holding that the DEA had not
6 adequately demonstrated that a Glomar response (a refusal to confirm or deny the existence
7 of records pertaining to an individual) was appropriate. Order Denying MSJ (dkt. 62) at 5–6.
8 The government then brought a second motion for summary judgment, fully briefing the
9 Glomar response issue. See Pickard v. Dep’t of Justice, 653 F.3d 782, 784–85 (9th Cir.
10 2011). The Court granted that motion, finding that Skinner’s identity as a confidential
11 informant had not been “officially confirmed” under the Privacy Act, and that a
12 Glomar response was appropriate under Exemptions 7(C) and 7(D). Id. at 785.

13 In July 2011, the Ninth Circuit reversed and remanded, holding that, because the
14 government had publicly disclosed Skinner’s status as a confidential informant in open court
15 in the course of official proceedings, a Glomar response was no longer appropriate. Id. at
16 787–88. The court explained, “[t]his is not to say that the DEA is now required to disclose
17 any of the particular information requested by Pickard.” Id. at 788. The government was to
18 produce a Vaughn index, “raise whatever other exemptions may be appropriate, and let the
19 district court determine whether the contents, as distinguished from the existence, of the
20 officially confirmed records may be protected from disclosure under the DEA’s claimed
21 exemptions.” Id.

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

27 In May 2014, the Court denied the government’s fourth motion for summary
28 judgment after finding its Vaughn index “supremely unhelpful.” MSJ Order (dkt. 198) at 1,

1 7, 11. The Court also denied Pickard’s cross-motion for summary judgment, which
2 requested release of the same three categories of information at issue in the present motion.
3 Id. at 11; P MSJ Reply (dkt. 191) at 3. The Court found that without an adequate Vaughn
4 index, “the Court [could not] know if releasing something as basic as Skinner’s name would
5 compromise an important privacy interest, endanger any individual’s (including Skinner’s)
6 physical safety, or run afoul of one of the other claimed exemptions.” MSJ Order at 9. The
7 Court then ordered the government “to submit (1) an adequate Vaughn index and (2) all of
8 the responsive documents that the government continues to withhold in full or in part to
9 Magistrate Judge Nathanael Cousins for review of ‘whether the contents, as distinguished
10 from the existence, of the officially confirmed records may be protected from disclosure
11 under the DEA’s claimed exemptions.’” Id. at 11 (citations omitted).

12 On December 24, 2015, Judge Cousins issued a tentative ruling, concluding that
13 “the government has provided no evidence to carry its burden of proving that documents in
14 the three categories qualify for exemptions,” and ordered the release of documents in the
15 three categories. See Tentative Ruling (dkt. 227) at 1. The parties submitted additional
16 briefing and an additional declaration, and on May 2, 2016, Judge Cousins issued an order
17 releasing the three categories of documents. See generally Order to Release. The order
18 explained that “the government may not offer only general government interests that are
19 present in virtually all cases.” Id. at 2. It relied on United States v. Apperson, Nos. 14-3069,
20 14-3070, 2016 WL 898885 (10th Cir. March 9, 2016), which involved Pickard’s challenge to
21 a Kansas district court’s denial of his motion to unseal Skinner’s confidential informant file.
22 Id. at 2–3. Although Judge Cousins recognized that a motion to unseal a file “applies a
23 different standard than a FOIA request,” he nonetheless found Apperson relevant because it,
24 too, found the government’s articulated interests to be too generalized. Id. at 3.² Judge

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26 ² That case ultimately vacated the district court’s order and remanded for further proceedings.
27 See Apperson, 642 F. App’x at 893. This Court asked the parties about the District of Kansas/Tenth
28 Circuit litigation at the motion hearing, observing that Pickard might still win access to Skinner’s file
in that litigation. But see id. (“Although Defendants’ counsel already had access to an unredacted copy,
Defendants sought to unseal the file in order to use it in connection with ongoing litigation under
[FOIA], and other proceedings.”) (emphasis added). Counsel stated that they believed that nothing had

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

11 The government filed a Motion for De Novo Determination of Dispositive Matter
12 Referred to Magistrate Judge as to whether the government must release the withheld
13 documents. See generally D Mot. De Novo (dkt. 244). Pickard opposed. P Opp'n to D Mot.
14 De Novo (dkt. 246) at 1-2. However, the Court required the parties to re-file, as their briefs
15 inappropriately incorporated previous briefs. See Order Terminating Motion, Vacating
16 Hearing, Directing Filing of New Briefs, and Setting New Hearing Date (dkt. 255) at 2
17 (“Endless references to past briefs require the Court to scour the docket to determine what
18 the parties are actually arguing.”). The government re-filed a Motion for De Novo Review of
19 Judge Cousins’s order, 2d Mot. for De Novo Review, Pickard has opposed that motion,
20 Opp'n to 2d Mot. for De Novo Review (dkt. 264), and the government has replied, Reply re
21 2d Mot. for De Novo Review (dkt. 265).

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24 happened in the Apperson case—despite the Tenth Circuit’s remand taking place approximately six
25 months ago—and agreed to file a status report updating this Court on that litigation. The Court
continues to await that filing.

26 ³ This Court also ordered the government to tell the Court what information within the file
27 Skinner had publicly disclosed. See Order Requesting Additional Information (dkt. 252). The
28 government requested that the Court make the Exemption 7(D) determination before it participated in
the laborious task of combing through testimony. See D Response to Order Requesting Additional
Information (dkt. 253) at 1–2. The Court granted the request. See Order Regarding Request for More
Information (dkt. 254). Therefore, as previously noted, the Court does not know what material within
the documents is presently in dispute.

1 **II. LEGAL STANDARD**

2 “The Freedom of Information Act was enacted to facilitate public access to
3 Government documents.” United States Dep’t of State v. Ray, 502 U.S. 164, 173 (1991).
4 The purpose of the Act is “to pierce the veil of administrative secrecy and to open agency
5 action to the light of public scrutiny.” Id. (citing Dep’t of Air Force v. Rose, 425 U.S. 352,
6 361 (1976)). “Consistently with this purpose, as well as the plain language of the Act, the
7 strong presumption in favor of disclosure places the burden on the agency to justify the
8 withholding of any requested documents.” Id.

9 “Pursuant to 28 U.S.C. § 636(b)(1), Federal Rule of Civil Procedure 72(b), and Civil
10 Local Rule 72–3, a party may object to a magistrate judge’s proposed findings and
11 recommendations by filing a motion for a de novo determination of a dispositive matter[]
12 referred to a magistrate judge.” REO Capital Fund 4, LLC v. Fuller, No. 15–cv–03252–JST,
13 2015 WL 4941742, at *1 (N.D. Cal. Aug. 19, 2015). The motion “must be filed within
14 fourteen days of the magistrate’s recommendation and must specifically identify the portions
15 of the findings and recommendations to which the party objects, and the reasons for the
16 objection(s).” Id. Upon the filing of such a motion, the court “shall make a de novo
17 determination of those portions of the report or specified proposed findings or
18 recommendations to which objection is made. A judge of the court may accept, reject, or
19 modify, in whole or in part, the findings or recommendations made by the magistrate judge.”
20 See 28 U.S.C.A. § 636(b)(1). While Judge Cousins issued an order rather than a
21 recommendation, the order references Fed. R. Civ. P. 72(b) regarding dispositive matters.
22 See Order to Release at 4.

23 **III. DISCUSSION**

24 The government argues that Judge Cousins erred in ordering the release of the three
25 categories of material sought, because (A) official confirmation does not require any records
26 to be released; (B) the threshold requirement of Exemption 7 has been met; (C) Exemption
27 7(D) applies to Skinner’s name and the materials he disclosed; (D) Exemptions 7(F) and 7(C)
28 apply to Skinner’s name and the materials he disclosed; and (E) Exemption 7(E) applies to

1 Skinner’s NADDIS number. See generally 2d Mot. for De Novo Review. This order
2 concludes that withholding is proper under Exemptions 7(D) and 7(E).

3 **A. Official Acknowledgment**⁴

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

11 **1. Holding in Pickard re Official Acknowledgment**

12 As to the Ninth Circuit’s holding in this case, the court explained: “[W]hen
13 information has been either ‘officially acknowledged’ or ‘officially confirmed,’ an agency is
14 not precluded from withholding information pursuant to an otherwise valid exemption claim;
15 however, a Glomar response is no longer appropriate. . . .” Pickard, 653 F.3d at 786
16 (emphasis added). The Ninth Circuit went on to cite to Wolf v. CIA, 473 F.3d 370, 379
17 (D.C. Cir. 2007), for the proposition that official acknowledgment related only to the
18 existence or nonexistence of records, and that the government was to either disclose any
19 officially acknowledged records or establish that the contents are exempt and that exemption
20 had not been waived. Id. It also cited Benavides v. DEA, 968 F.2d 1243, 1248 (D.C. Cir.
21 1992), for the proposition that “Congress intended to permit the DEA to withhold documents
22 under 7(C) and 7(D), even if the agency must, under subsection (c)(2) acknowledge their
23 existence.” Id. Both Wolf and Benavides therefore recognize that official confirmation does
24 not necessarily negate the application of other exemptions.

25 Pickard argues that the sentence the government relies on from Pickard “is dicta” and
26 “likely the product of a drafting error.” Opp’n to 2d at 14. The sentence is not dicta—it was
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28 ⁴ Like the parties, this order uses the terms official acknowledgment, official confirmation, and
the “public domain doctrine” interchangeably.

1 central to the court’s ruling both that a Glomar response was inappropriate once the
2 government officially confirmed Skinner’s status as a confidential informant, and that the
3 parties were required to return to this Court and litigate the validity of any claimed
4 exemptions. Nor is there any plausible drafting error. The cited portion of Wolf does not
5 “state[] precisely the opposite” of what the court ordered here. See id. Rather, Wolf
6 envisions that officially acknowledged records might still be subject to valid exemptions.
7 See Wolf, 473 F.3d at 379. That is what the Pickard court held as well. See Pickard, 653
8 F.3d at 786. Further undercutting the idea of a “drafting error,” the court in Pickard repeated
9 the same point a couple of pages later, explaining that while a Glomar response was “no
10 longer available,” “[t]his is not to say that the DEA is now required to disclose any of the
11 particular information requested by Pickard.” Pickard, 653 F.3d at 788. It explained that,
12 having officially confirmed Skinner as an informant, the government was to produce a
13 Vaughn index, “raise whatever other exemptions may be appropriate, and let the district
14 court determine whether the contents, as distinguished from the existence, of the officially
15 confirmed records may be protected from disclosure under the DEA’s claimed exemptions.”
16 Id. (citing Wolf and Benavides). The government is therefore correct that the ruling in this
17 case defeats the argument that official confirmation of Skinner as a confidential informant
18 merits the disclosure of all of the information Pickard seeks. If the Ninth Circuit had
19 believed that official confirmation worked as Pickard suggests, it could easily have said so.

20 2. Requirements for Official Acknowledgment

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

23 A fact is deemed “officially acknowledged” only if it meets three criteria: First,
24 the information requested must be as specific as the information previously
25 released. Second, the information requested must match the information
26 previously disclosed; we noted, for example, that official disclosure did not
27 waive the protection to be accorded information that pertained to a later time
28 period. Third, we held that the information requested must already have been
made public through an official and documented disclosure.

1 Pickard, 653 F.3d at 786 (citing Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990)). It
2 is the plaintiff’s burden to point to specific information in the public domain that appears to
3 duplicate that being withheld. See Davis v. Dep’t of Justice, 968 F.2d 1276, 1279 (D.C. Cir.
4 1992) (explaining that the ultimate burden of persuasion rests with the government but that a
5 party who asserts a claim of prior disclosure must bear the initial burden of pointing to
6 specific information). “This is so because the task of proving the negative—that information
7 has not been revealed—might require the government to undertake an exhaustive, potentially
8 limitless search.” Id. at 1279.

9 There is no question that Pickard has successfully pointed to Skinner’s name, which
10 the government officially acknowledged. See Pickard, 653 F.3d at 784 (“the government
11 officially confirmed Skinner’s status as an informant in open court in the course of official
12 proceedings”). But the Court does not imagine that what Pickard seeks are entire documents
13 with everything redacted but Skinner’s name. Moreover, as discussed below, Exemption
14 7(D) presents a formidable hurdle to disclosing even Skinner’s name.

15 In his effort to obtain information Skinner has already disclosed and Skinner’s
16 NADDIS number, Pickard has failed entirely to point to specific information that the
17 government is withholding and that matches information previously disclosed. See Pickard,
18 653 F.3d at 786. The government asserts: “he simply points to literally thousands of pages of
19 Skinner’s transcripts and court filings and asks this Court to order information released if it
20 matches based on the government’s review.” 2d Mot. for De Novo Review at 7 (noting that
21 there are ten volumes of testimony from Pickard’s criminal trial, another transcript from the
22 District of Kansas case, and 41 exhibits from a Northern District of Oklahoma case). Pickard
23 disputes this, saying that he “has repeatedly directed the government’s attention to (1) the
24 five days of public testimony Skinner provided . . . and (2) the numerous documents from
25 Skinner’s informant file (provided to him by the government) that Skinner has published in
26 public court filings,” see Opp’n to 2d Mot. for De Novo Review, but he has neither directed
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1 the Court to such materials, nor specified which materials overlap.⁵ Pickard actually agrees
2 that he “is unable to tie specific portions of Skinner’s public testimony to specific withheld
3 documents,” but he argues that this “is not a fault owing to Mr. Pickard. Rather, the
4 government’s refusal to provide specific descriptions of the withheld records renders such a
5 task impossible.” Id. at 14–15. This argument, which Pickard repeated at the motion
6 hearing, fails because the Court has found the Vaughn index in this case acceptable. See
7 generally Order Finding Vaughn Index Sufficient; Order Denying Mot. (dkt. 222). It is also
8 curious that Pickard cannot make such a showing if in fact he already has access to an
9 unredacted copy of Skinner’s file from the District of Kansas/Tenth Circuit litigation.
10 See Apperson, 642 F. App’x at 893.

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

13 **B. Threshold Requirement**

14 All of the government’s claimed exemptions in this case arise under Exemption 7,
15 which pertains to documents “compiled for law enforcement purposes.” See generally 2d
16 Mot. for De Novo Review (claiming application of Exemptions 7(D), 7(F), 7(C), and 7(E));
17 FBI v. Abramson, 456 U.S. 615, 622 (1982). This Court has already held that the documents

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

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

1 were all compiled for law enforcement purposes. See Order Granting Defendant’s Motion
2 for Summary Judgment at 6 (“In view of the nature of plaintiff’s FOIA request and the
3 descriptions of the systems of records where responsive records likely would be located, the
4 court is satisfied that any responsive records would be law enforcement records covered by
5 FOIA Exemption 7.”). The evidence continues to support that conclusion. See Tenth Supp.
6 Little Decl. (dkt. 233-1) ¶ 7 (“The records requested by plaintiff were law enforcement
7 records gathered in accordance with DEA’s responsibilities under the Comprehensive Drug
8 Abuse Prevention and Control Act of 1970.”).

9 Pickard acknowledges that the government has satisfied the Exemption 7 threshold
10 requirement for all the documents but one: “a letter written by the DEA to the CHP that
11 describes one instance of the DEA intervening on Skinner’s behalf to avoid criminal
12 charges.” Opp’n to 2d Mot. for De Novo Review at 15. Pickard argues that because the
13 government represents that “it is not the practice of DEA to intervene on behalf of any
14 individual to assist them in avoiding criminal prosecution,” then “the letter falls outside
15 DEA’s practices and law enforcement mandate.” Id. (citing Pratt v. Webster, 673 F.2d 408,
16 420–21 (D.C. Cir. 1982); Taylor v. DOJ, 257 F. Supp. 2d 101, 108 (D.D.C. 2003)).

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

24 **C. Exemption 7(D)**

25 The first individual exemption the government asserts is Exemption 7(D). Exemption
26 7(D) allows the government to withhold law enforcement records or information if it “could
27 reasonably be expected to disclose the identity of a confidential source. . . and, in the case of
28 a record or information compiled by criminal law enforcement authority in the course of a

1 criminal investigation, . . . information furnished by a confidential source.” 5 U.S.C. § 552
2 (b)(7)(D). The government argues here that “[u]nder the plain language of the statute,
3 Skinner’s name is properly withheld because it would literally disclose the identity of a
4 confidential source, and information Skinner provided is properly withheld, even if he later
5 testified about it, because it would literally disclose information furnished by a confidential
6 source.” 2d Mot. for De Novo Review at 8. The government asserts: “Exemption 7(D)
7 cannot be waived.” *Id.* Pickard disagrees, arguing that because the government officially
8 confirmed Skinner as a DEA informant, because Skinner testified, and because the
9 government provided documents to Skinner, “continued withholding . . . under Exemption
10 7(D) is improper.” *Opp’n to 2d Mot. for De Novo Review* at 16. The Court agrees with the
11 government.

12 **1. Ninth Circuit Authority on Exemption 7(D)**

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

15 Pickard asserts that “In this circuit, an informant’s public testimony waives Exemption
16 7(D)’s protection for all information provided by the informant—even if that information
17 was not disclosed at trial.” *See Opp’n to 2d Mot. for De Novo Review* at 16 (citing Van
18 Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 986 (9th Cir. 1985)). That
19 assertion misrepresents Van Bourg, however, which involved a labor investigation, not a
20 criminal investigation, and which turned on whether the informant was truly a confidential
21 source. *See* 751 F.2d at 986 (“for exemption 7(D) to be applicable, there must be a finding
22 that the source of the affidavit was explicitly or implicitly guaranteed confidentiality.”). Van
23 Bourg provides no support for Pickard’s argument at the motion hearing that once an
24 informant testifies, he loses his expectation of confidentiality; instead Van Bourg focuses on
25 the informant’s understanding at the time that he provided information to the government.
26 The Ninth Circuit noted that individuals who submit affidavits to the NLRB “have no
27 reasonable expectation of confidentiality and should expect their names and testimony to be
28 revealed if the investigation results in a formal hearing.” *Id.* In other words, there was no

1 confidential source in Van Bourg to begin with.⁷ That is an altogether different scenario than
2 this case, in which there is no question that Skinner was a confidential informant in a
3 criminal investigation. See Pickard, 653 F.3d at 788 (referencing “Skinner’s status as a
4 confidential informant in Pickard’s case”).⁸

5 The government claims that Prudential Locations LLC v. Dept. of Housing & Urban
6 Development, 739 F.3d 424 (9th Cir. 2013), serves as precedent, but that case was primarily
7 about Exemption 6. The Ninth Circuit in Prudential Locations explained that, under
8 Exemption 7(D), “[i]f the individual is a ‘confidential source,’ that is the end of the matter;
9 there is no need to balance the individual’s privacy interest against the public interest in
10 disclosure, as is required under Exemption 6.” 739 F.3d at 434. The government clings to
11 the “end of the matter” language, and also relies on the language from Church of Scientology
12 of Cal. v. Dep’t of Justice, 612 F.2d 417, 426–27 (9th Cir. 1979), stating that Exemption
13 7(D) must be interpreted according to its “plain meaning.” See 2d Mot. for De Novo Review
14 at 8. While both cases mildly support the government’s position, neither involves a
15 confidential informant who has testified in criminal proceedings and disclosed some
16 information.

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

18 More helpful is authority from other circuits.

19 The landmark case about Exemption 7(D) is the en banc decision in Irons v. FBI, 880
20 F.2d 1446 (1st Cir. 1989), which both the government and Pickard rely on in support of their
21 positions. See 2d Mot. for De Novo Review at 8, 10–11; Opp’n to 2d Mot. for De Novo

22 ⁷ This is also how the First Circuit interpreted Van Bourg. See Irons v. F.B.I., 880 F.2d 1446,
23 1455 (1st Cir. 1989) (characterizing Van Bourg as a case about “whether a source, knowing he is likely
24 to testify at the time he furnishes information to the agency, is, or remains after testimony, a
25 ‘confidential source’ within the meaning of the statute”) (emphasis added). See also Parker v. Dep’t
26 of Justice, 934 F.2d 375, 381 (D.C. Cir. 1991) (finding Van Bourg “inapposite” and noting that it
involved civil law enforcement, whereas the second clause of Exemption 7(D) involves criminal law
enforcement).

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

1 Review at 16–17, 19. Importantly, the court in Irons explicitly did not rule on whether public
2 testimony could waive Exemption 7(D) protection for information publicly disclosed at trial.
3 See Irons, 880 F.2d at 1448.⁹ The court’s holding, which Pickard’s counsel read aloud at the
4 motion hearing, was “that public testimony by ‘confidential sources’ cannot ‘waive’ the
5 FBI’s right under the second clause of exemption 7(D) to withhold ‘information furnished by
6 a confidential source’ and not actually revealed in public.” Id. at 1456–57 (emphasis added).
7 The court noted, however, that some courts have held that even information disclosed at trial
8 is protected under Exemption 7(D). See id. at 1448 (citing L & C Marine Transport, Ltd. v.
9 United States, 740 F.2d 919, 925 (11th Cir. 1984); Lame v. Dep’t of Justice, 654 F.2d 917,
10 925 n.8 (3d Cir. 1981); Lesar v. Dep’t of Justice, 636 F.2d 472, 491 (D.C. Cir. 1980)).

11 Even though Irons did not reach the issue of materials publicly disclosed by an
12 informant, it unambiguously held that Exemption 7(D) cannot be waived, and it provided
13 extensive support for that conclusion. See Irons, 880 F.2d at 1448–49. First, the court noted
14 that neither the plain language of Exemption 7(D) “nor any other relevant language, says
15 anything at all about ‘waiver.’ Other courts (indeed virtually all other courts) have
16 interpreted the statute’s language literally in this respect.” Id. at 1449. The court cited
17 approvingly to Lame, 654 F.2d at 925, which held that “all the information given by a
18 confidential source is exempt,” and that “the subsequent disclosure of information originally
19 given in confidence does not render nonconfidential any of the information originally
20 provided.” Id. Second, the court examined the legislative history, concluding that Congress
21 intended “a literal interpretation,” as it intended the exemption “to help law enforcement
22 agencies to recruit, and to maintain, confidential sources; its object was not simply to protect
23 the source, but also to protect the flow of information to the law enforcement agency.” Id.¹⁰
24 Third, the court observed that circuits have “specifically interpreted the ‘information
25 furnished’ exemption to apply irrespective of subsequent public identification of the source”

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

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

1 and “irrespective of the nature of the information (so long as the information meets the
2 criteria in the exemption).” Id. at 1452. Fourth, the court explained that, “while courts in
3 some exemption 7(D) cases have used the word ‘waiver,’ . . . they have not used that word in
4 any context or in any way that argues for application of a ‘waiver doctrine’ in the type of
5 case before us.” Id.¹¹ Fifth, the court held that creating a waiver exception would “run[]
6 afoul of the statute’s intent to provide ‘workable’ rules.” Id. at 1455–56 (internal quotation
7 marks omitted).

8 Irons did not, as Pickard claims, “[find] that Exemption 7(D) did not apply to (1) the
9 identity of an informant . . . ; and (2) information that was actually disclosed by the informant
10 in public testimony.” See Opp’n to Mot. for De Novo Review at 17; Moffat v. Dep’t of
11 Justice, 716 F.3d 244, 253 (1st Cir. 2013) (observing that Irons “reserved the question of
12 whether 7(D) continues to apply to the specific information that has already been publically
13 disclosed”). Moreover, given its logic and reasoning, the most plausible reading of Irons is
14 that Exemption 7(D) applies to such information. See Irons, 880 F.2d at 1456 (“exemption
15 7(D) contains language that, without qualification, exempts from disclosure ‘information
16 furnished by a confidential source.’”).

17 Other courts to actually address the issue of information derived from a confidential
18 source and subsequently publicly disclosed have held that Exemption 7(D) applied.¹² In
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20 ¹¹ In this section, the court criticized the “single district court case” to “hold that actual testimony
21 waives the right to nondisclosure,” an opinion from this district. Irons, 880 F.2d at 1455 (discussing
22 Powell v. Dep’t of Justice, 584 F. Supp. 1508, 1530 (N.D. Cal. 1984)). The court explained that “[t]hat
23 case . . . speaks only about the waiver of the right to withhold a source’s ‘identity’ once the source has
24 testified; it says nothing about disclosure of the information furnished by the source.” Id. It also
25 observed that the Powell court confused the notion of “confidential” with “secret,” “which, as we have
26 noted above . . . is not the proper interpretation.” Id. Powell is also distinguishable because it turns on
whether “persons who supplied information . . . did so under an implied inference of confidentiality.”
Powell, 584 F. Supp. at 1529. The court in Powell stated that it would “carefully review the documents
to determine the specific circumstances under which the source agreed to testify and [would] then decide
whether an implied assurance can reasonably be inferred.” Id. at 1530. Again, in our case, there is no
reasonable dispute that Skinner was a confidential informant.

27 ¹² Pickard cites to Hidalgo v. F.B.I., No. 04–0562 (JR), 2005 WL 6133690, at *2 (D.D.C. Sept.
28 29, 2005), and Powell, 584 F. Supp. at 1529, to support his argument that official confirmation waives
Exemption 7(D). See Opp’n to 2d Mot. for De Novo Review at 16. But Hidalgo involves the use of
a Glomar response, not Exemption 7(D). See Hidalgo, No. 04–0562 (JR), 2005 WL 6133690, at *2
(D.D.C. Sept. 29, 2005) (also holding that Exemption 7(D) might be appropriate if the government were

1 Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992), the Second Circuit endorsed the
2 reasoning in Irons and “reject[ed] the idea that subsequent disclosures of the identity of the
3 confidential source or of some of the information provided by a confidential source requires
4 full disclosure of information provided by such a source.” The court explained that
5 “Exemption 7(D) is concerned not with the content of the information, but only with the
6 circumstances in which the information was obtained.” Id. at 1069. In Parker v. Dep’t of
7 Justice, 934 F.2d 375, 380 (D.C. Cir. 1991), the D.C. Circuit held that “once an agency
8 establishes that it received the requested information in confidence, ‘the source will be
9 deemed a confidential one, and both the identity of the source and the information he or she
10 provided will be immune from FOIA disclosure.’” In Lame, 654 F.2d at 925, one of the
11 cases discussed in Irons, the Third Circuit explained that “once there has been an expressed
12 or implied assurance of confidentiality, a subsequent release or publication by the
13 government of a portion of the information does not negate the exemption for any of the
14 information originally given.”¹³ In Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000), the
15 Fourth Circuit relied on the Supreme Court’s explanation of “confidential source” in
16 Department of Justice v. Landano, 508 U.S. 165 (1993), concluding that “in Landano, the
17 Supreme Court defined ‘confidential source’ in terms of the ‘understanding’ reached between

18 _____
19 to acknowledge the existence of responsive records and sought an appropriate 7(D) exemption using
20 a Vaughn index). As discussed above, Powell, in which a court in this district found that testimony in
21 court waives an informant’s right to withhold his identity, is distinguishable. See Powell, 584 F. Supp.
22 at 1529. Pickard also cites to Marino v. DEA, 685 F.3d 1076, 1082 (D.C. Cir. 2012), for the proposition
23 that “a federal prosecutor’s decision to release information [concerning an informant] at trial is enough
24 to trigger the public domain exception,” Opp’n to 2d Mot. for De Novo Review at 18, but that case also
25 involved the propriety of a Glomar response, and not Exemption 7(D). See Marino, 685 F.3d at
26 1078–79 (DEA issued Glomar response, invoking Exemption 7(C)). That section of Pickard’s brief
27 also cites, without an explanatory parenthetical, Irons, for the proposition that when the government
28 discloses the source’s identity, it cannot subsequently withhold the information in response to a FOIA
request. See Opp’n to Mot. for De Novo Review at 18. However the cited pages in Irons include the
explanation that “exemption 7(D) contains language that, without qualification, exempts from disclosure
‘information furnished by a confidential source.’” Irons, 880 F.2d at 1456.

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

1 the informant and the FBI at the time the information was communicated to the FBI, not in
2 terms of whether the information subsequently remained non-public.” The Fourth Circuit
3 held that “a source could remain a ‘confidential source’ for purposes of Exemption 7(D),
4 even if the source’s communication with the FBI is subsequently disclosed at trial or
5 pursuant to the government’s Brady obligations.” Id. (citing Landano, 508 U.S. at 173–74).
6 See also Kimberlin v. Dep’t of Treasury, 774 F.2d 204, 209 (7th Cir. 1985) (“The disclosure
7 of information given in confidence does not render non-confidential any of the information
8 originally provided.”); Kiraly v. FBI, 728 F.2d 273, 278 (6th Cir. 1984) (discussing
9 legislative intent behind Exemption 7(D) and concluding that it “protects without exception
10 and without limitation the identity of informers,” even where individual’s identity as FBI
11 informant was already known).

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

15 Pickard first tries to distinguish Ferguson, 957 F.2d 1059, Kiraly, 728 F.2d 273, and
16 Parker, 934 F.2d 375, just three of the cases upon which the government relies. See Opp’n at
17 2d Mot. for De Novo Review at 18–19. Pickard asserts that in these cases, state governments
18 were eliciting testimony about a federal confidential informant, and that “no informant was
19 ever confirmed by the federal government.” Id. However, courts do not seem to focus on the
20 state/federal dynamic, or on whether it was the informants or the government that revealed
21 the informants’ status. In fact, the Ferguson court explained that “[t]he statutory language
22 does not leave room for a judicial balancing of the equities, or for a determination of whether
23 any harm would result from disallowing an exemption.” Ferguson, 957 F.2d at 1069. By
24 that reasoning, Exemption 7(D) would still cover information disclosed publicly even if
25 doing so seemed meaningless. Further, the Irons court noted that “[t]he words ‘furnished by
26 a confidential source’ do not mean that the information or identity of the source is secret;
27 they simply mean that the information was ‘provided in confidence’ at the time it was
28

1 communicated to the [DEA].” See Irons, 880 F.2d at 1448. Accordingly, Pickard’s attempt
2 to distinguish some of the relevant authority is unpersuasive.

3 More significant is Davis, 968 F.2d 1276, which Pickard just briefly mentions. Davis
4 chiefly concerned the burden of proof when the government asserted a number of
5 exemptions, including Exemption 7(D), and the plaintiff claimed that the tapes at issue had
6 already been publicly disclosed at trial. 968 F.2d at 1279. The court noted that the
7 government was willing to give the plaintiff “only exactly what he can find in hard copy,”
8 requiring “the requester to point to ‘specific’ information identical to that being withheld.”
9 Id. at 1280. “It does not suffice to show . . . that some of the tapes were played to shift the
10 burden to the government”—the plaintiff had to “point to specific information in the public
11 domain.” Id. The court in Davis agreed that because the informant was a confidential
12 source, “the application of Exemption 7(D) is automatic.” Id. at 1281. It observed that
13 “[e]ven when the source testifies in open court . . . he does not thereby ‘waive the
14 [government’s] right to invoke Exemption 7(D) to withhold . . . information furnished by a
15 confidential source not actually revealed in public.” Id. (citing Parker, 934 F.2d at 379–80).
16 It went on to hold, however, that “[t]he government is obliged to disclose only the ‘exact
17 information’ to which the source actually testified.” Id. (citing Dow Jones & Co. v. Dep’t of
18 Justice, 917 F.2d 571, 577 (D.C. Cir. 1990)).

19 The court in Dow Jones & Co., had held that in extraordinary circumstances, “if the
20 exact information given to the FBI has already become public, and the fact that the informant
21 gave the same information to the FBI is also public, there would be no grounds to withhold.”
22 917 F.2d at 577. However, “[t]he requester will rarely, if ever, have absolutely solid
23 evidence showing that the source of an FBI interview in a law enforcement investigation has
24 manifested complete disregard for confidentiality.” See id. at 577, n.5 (“One can imagine,
25 for instance, a source falsely describing publicly what he or she told the FBI privately.”).¹⁴
26 And indeed, in Davis, the court explained that “[w]hat that means for this case, essentially, is
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28 ¹⁴ Documents from the in camera review suggest that Skinner has publicly lied about what he
told the DEA.

1 that the government is entitled to withhold the tapes obtained through the informant’s
2 assistance unless it is specifically shown that those tapes, or portions of them, were played
3 during the informant’s testimony.” 968 F.2d at 1281.

4 Davis therefore shows the D.C. Circuit recognizing the application of the official
5 acknowledgment doctrine to Exemption 7(D). See also Cobar v. Dep’t of Justice, 81 F.
6 Supp. 3d 64, 72 (D.D.C. 2015) (relying on Parker and Irons, holding in Exemption 7(D)
7 context that “for information or a record to lose its protected status based on public
8 disclosure, the information must truly be in the public domain and there must be an exact
9 identity between the publicly disclosed information or document and the information or
10 documents sought under the FOIA.”).¹⁵ Other circuits have not so held. See, e.g., Lame, 654
11 F.2d at 925 (citation omitted) (“once there has been an expressed or implied assurance of
12 confidentiality, a subsequent release or publication by the government of a portion of
13 information does not negate the exemption for any of the information originally given.”).
14 And the Ninth Circuit has not reached the issue.

15 Because this Court finds persuasive the numerous courts to focus on whether
16 information was originally given in confidence, regardless of whether or not that information
17 later becomes public, this Court holds that Exemption 7(D) justifies the withholding of
18 Skinner’s name and the information he has publicly disclosed.¹⁶ The Court notes that
19 because it does not know which portions of which of the documents in the in camera
20 materials are “information Skinner has publicly disclosed,” the Court cannot independently
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22 ¹⁵ That court also stated that a more difficult question was whether official confirmation of a
23 confidential source’s identity required disclosure of information that would identify or tend to identify
24 the source. Id. (emphasis in original). The court relied on Parker in holding that “public disclosure of
the identity of a confidential source does not waive Exemption D’s applicability.” Id.

25 ¹⁶ Even if this circuit were to adopt the D.C. Circuit’s reasoning and hold that information
26 officially confirmed (as opposed to merely publicly disclosed) cannot be withheld under Exemption
27 7(D), the Court would conclude that Pickard has not met his burden of demonstrating specific instances
28 of official confirmation—aside from Skinner’s name. See Pickard, 653 F.3d at 786; Mobil Oil Corp.
v. EPA, 879 F.2d 698, 702–03 (9th Cir. 1989). Again, the Court cannot imagine that what Pickard seeks
in this motion are entire documents with everything redacted but Skinner’s name. Moreover, the
government might argue (although it has not yet) that releasing the exact number of times the file
mentions Skinner’s name might reveal more than the information in the public domain (such as, the
degree of interaction he had with the DEA).

1 verify whether all such information is covered by Exemption 7(D). However, the
2 government represented to the Court at the motion hearing that all of the “information
3 Skinner has publicly disclosed” is covered by Exemption 7(D), the Court’s in camera review
4 of the broader set of responsive materials gives it no reason to doubt this characterization,
5 and—though he contends that the government/Skinner has waived Exemption 7(D)—Pickard
6 has not disputed that the relevant materials “could reasonably be expected to disclose the
7 identity of a confidential source” or constitute “information furnished by a confidential
8 source.” See 5 U.S.C. § 552 (b)(7)(D).

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

10 The next individual exemptions the government asserts for Skinner’s name and the
11 information he has publicly disclosed are Exemptions 7(F) and 7(C). Exemption 7(F) allows
12 the government to withhold law enforcement records or information if they “could
13 reasonably be expected to endanger the life or physical safety of any individual.” See 5
14 U.S.C. § 552 (b)(7)(F). Exemption 7(C) allows the government to withhold law enforcement
15 records or information if they “could reasonably be expected to constitute an unwarranted
16 invasion of personal privacy.” See 5 U.S.C. § 552 (b)(7)(C). Both of these exemptions
17 require the Court to do a document-by-document review—in the case of 7(F), to determine
18 whether material in one document might endanger Skinner’s life but material in another
19 might not, and in the case of 7(C), to balance the relevant privacy and public interests
20 implicated by material in each document. See Van Bourg v. NLRB, 656 F.2d 1356, 1358
21 (9th Cir. 1981) (courts are to “state in reasonable detail the reasons for its decision as to each
22 document in dispute”).

23 Because the Court does not know which portions of which of the documents in the in
24 camera materials are “information Skinner has publicly disclosed,” the Court cannot conduct
25 such a review. The Court is also concerned that Pickard’s request, which would require the
26 government to compile a subset of the in camera documents in a form that is presently
27 unavailable to the general public, is problematic under Department of Justice v. Reporters
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1 Committee For Freedom of the Press, 489 U.S. 749 (1989).¹⁷ Accordingly, rather than opine
2 on matters in the abstract, the Court does not reach the parties’ arguments as to Exemptions
3 7(F) or 7(C).

4 **E. Exemption 7(E)**

5 Finally, the government asserts Exemption 7(E) as the basis for its withholding of
6 Skinner’s NADDIS number. 2d Mot. for De Novo Review at 18–20. Exemption 7(E) allows
7 the government to withhold law enforcement records or information if they “would disclose
8 techniques and procedures for law enforcement investigations or prosecutions, or would
9 disclose guidelines for law enforcement investigations or prosecutions if such disclosure
10 could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552 (b)(7)(E).
11 The Ninth Circuit recently clarified that the restrictive language, “if such disclosure could
12 reasonably be expected to risk circumvention of the law,” only applies to the second clause,
13 which means that the first clause, “would disclose techniques and procedures for law
14 enforcement investigations or prosecutions,” is sufficient for withholding. See Hamdan v.
15 Dep’t of Justice, 797 F.3d 759, 778 (9th Cir. 2015). In other words, the first clause “provides
16 categorical protection for techniques and procedures used in law enforcement investigations
17 or prosecutions” and “requires no demonstration of harm or balancing of interests.” See
18 Keys v. Dep’t of Homeland Sec., 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (internal quotation
19 marks, citations and brackets omitted). However, “7(E) only exempts investigative
20 techniques not generally known to the public.” See Rosenfeld v. Dep’t of Justice, 57 F.3d
21 803, 815 (9th Cir. 1995) (affirming the district court’s decision that a pretext phone call is a
22 well-known investigative technique, and thus not protected by exemption 7(E)).

23 The government argues that disclosing Skinner’s NADDIS number would disclose a
24 law enforcement technique, and that the use of NADDIS numbers is not generally known to
25 the public. 2d Mot. for De Novo Review at 19. In support of those assertions, the
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27 ¹⁷ Reports Committee, 489 U.S. at 764, recognized that “[p]lainly there is a vast difference
28 between the public records that might be found after a diligent search of courthouse files, county
archives, and local police stations throughout the country and a computerized summary located in a
single clearinghouse of information.”

1 government relies primarily on their agent’s declaration. Id. The declaration states that
2 NADDIS numbers are a part of the DEA’s procedure; they are “part of the DEA’s system of
3 identifying information and individuals” and are used “within the DEA investigative records
4 system as directed by the DEA Agents Manual.” Tenth Supp. Little Decl. ¶ 17. NADDIS
5 numbers are “assigned to drug violators and suspected drug violators known to DEA and
6 entities that are of investigative interest. Each number is unique and is assigned only to one
7 violator within DEA NADDIS indices.” Id. ¶ 19. They “are assigned by DEA for internal
8 use only” and “relate solely to internal DEA investigative practices and guidelines.” Id. ¶ 17.
9 “The precise manner in which NADDIS functions and the manner in which NADDIS
10 numbers are assigned and utilized by DEA is not commonly known to the general public.”
11 Id. ¶ 21.

12 At the motion hearing, the Court challenged the notion that disclosing a single
13 NADDIS number really “would disclose techniques and procedures.” See 5 U.S.C. § 552
14 (b)(7)(E). Pickard had argued in his briefing that he does not “seek information about how
15 the government uses the NADDIS system. . . only . . . the release of a single number.” Opp’n
16 to 2d Mot. for De Novo Review at 25. At first blush, it appeared that the government had
17 disclosed more information about the NADDIS procedures in its declaration in this case than
18 would be disclosed if the government were to simply release Skinner’s NADDIS number to
19 Pickard. But the government argued persuasively that the DEA uses a particular method to
20 assign NADDIS numbers, and that the more NADDIS numbers get out, the more people will
21 be able to discern that methodology. Documents released pursuant to FOIA are released to
22 all of the world; the Court must therefore consider the release of Skinner’s NADDIS number
23 not only to Pickard but to “the general public.” See Lahr v. NTSB, 569 F.3d 964, 977 n.12
24 (9th Cir. 2009). If Skinner’s number is released, and other numbers are released, then the
25 public might be able to deduce, for example, that the DEA assigns individuals NADDIS
26 numbers starting with 1 if those individuals are cooperating with the government, or live in a
27 particular state, or have a criminal history, or have a particular racial makeup, or any number
28 of other characteristics.

1 Pickard argues that a NADDIS number is a technique generally known to the public.
2 See Response to Tentative at 8 (dkt. 237).¹⁸ He cites to a few instances in which NADDIS
3 numbers have surfaced, although that evidence does not support his position. See Opp'n to
4 2d Mot. for De Novo Review at 25. In Zavala v. DEA, 667 F. Supp. 2d 85, 97 (D.D.C.
5 2009), the court did refer to an individual's NADDIS number—by number—but held that
6 NADDIS numbers properly and “routinely are withheld” under Exemption 2. Rumold Decl.
7 Ex. J, which pertained to the purported NADDIS number of an individual named Owsley
8 Stanley involves a deceased individual; moreover, the government objects to this evidence as
9 unauthenticated, see 2d Mot. for De Novo Review at 20, re doc. # 173-1, Ex 1, Ex. A. And
10 in Marino v. DEA, 15 F. Supp. 3d 141, 146 (D.D.C. 2014), while the court observed that
11 “Marino suspected that 3049901 was the NADDIS number assigned to Lopez, and therefore,
12 his request effectively sought the DEA’s investigative file on Lopez,” the court did not
13 disclose (or confirm) the NADDIS number and merely held that the government could not
14 use a Glomar response. None of Pickard’s cases involve courts granting FOIA requests to
15 disclose NADDIS numbers.

16 On the other hand, there is precedent for withholding NADDIS numbers under
17 Exemption 7(E). In Miller v. Dep’t of Justice, 872 F. Supp. 2d 12, 29 (D.D.C. 2012), the
18 court stated that “[b]ecause the NADDIS numbers were created for a law enforcement
19 purpose and their disclosure may disclose techniques and procedures for law enforcement
20 investigation, this Court finds that they are properly withheld under Exemption 7(E).” The
21 court also observed that NADDIS numbers “reflect procedures prescribed by the DEA
22 Agents Manual, which according to defendant, identify law enforcement techniques.” Id. at
23 28–29 (internal quotation marks omitted). Other courts have also so held. See, e.g., Dorsey

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

1 v. Executive Office for U.S. Attorneys, 83 F. Supp. 3d 347, 357 (D.D.C. 2015); Ortiz v.
2 Dep't of Justice, 67 F. Supp.3d 109, 123 (D.D.C. 2014); Higgins v. Dep't of Justice, 919 F.
3 Supp. 2d 131, 150–51 (D.D.C. 2013).¹⁹ And the Ninth Circuit appears to have adopted its
4 reasoning on this exemption from the D.C. district courts. See Rosenfeld, 57 F.3d at 815
5 (citing D.C. district court opinions, stating, “[w]e agree with these courts’ reasoning, and
6 adopt it as the law of this Circuit.”).


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

10 **IV. CONCLUSION**

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

15 **IT IS SO ORDERED.**

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17 Dated: November 15, 2016



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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