these protections are incorporated into the FOIA through Exemption 3.[270] Indeed, it is worth reiterating in this regard that the protections afforded classified information under Exemption 1 can be applied only to information that has been properly classified under Executive Order 12,958, as amended. (For a further discussion of "safeguarding labels," see Exemption 2, Homeland Security-Related Information, below.)

EXEMPTION 2

Exemption 2 of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency."[1] It is unique among the FOIA exemptions in that the courts have interpreted this one statutory phrase to encompass two very different categories of information:

(a) internal matters of a relatively trivial nature -- often referred to as "low 2" information; and

(b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement -- often referred to as "high 2" information.[2]

In light of the threats posed by worldwide and domestic terrorism, this second category has come to play an essential role in providing necessary protection of information related to both national security most gener-

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[269](...continued)
(Dec. 16, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051216-10.html (setting out general guidelines for standardization of procedures related to "acquisition, access, retention, production, use, management, and sharing of Sensitive But Unclassified (SBU) information"), implemented by Information Sharing Environment Implementation Plan 94 (Nov. 16, 2006), available at http://www.ise.gov/docs/ISE-impplan-200611.pdf (speaking of future plans to address existing difficulties with "the growing and non-standardized inventory of SBU designations and markings").

[270] 6 U.S.C. § 133 (2000 & Supp. IV 2004); see also *FOIA Post*, "Homeland Security Law Contains New Exemption 3 Statute" (posted 1/27/03) (summarizing provisions and operation of new Exemption 3 statute).

[1] 5 U.S.C. § 552(b)(2) (2000 & Supp. IV 2004).

[2] See FOIA Update, Vol. X, No. 3, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two"); see, e.g., Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (describing "low 2" and "high 2" aspects of exemption).

ally and homeland security in particular.[3] It is important that all agencies consider Exemption 2 carefully in properly evaluating -- and, where appropriate, withholding -- sensitive information, including critical infrastructure information,[4] that is of current law enforcement significance.[5] A comprehensive examination of that vital means of information protection follows the discussions below of Exemption 2's historical development and of the case law addressing the "low 2" aspect of Exemption 2. (See also the further discussion under Exemption 2, Homeland Security-Related Information, below.)

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[3] See *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (highlighting government's "need to protect critical systems, facilities, stockpiles, and other assets from security breaches"); see also White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002) [hereinafter White House Homeland Security Memorandum], reprinted in *FOIA Post* (posted 3/21/02) (directing agencies, in accordance with accompanying memorandum from Information Security Oversight Office and Office of Information and Privacy, to review their documents in order to ensure that they are properly applying FOIA exemptions, specifically including Exemption 2, to information that is unclassified but nevertheless sensitive).

[4] See, e.g., USA PATRIOT Act of 2001, 42 U.S.C. § 5195c(e) (Supp. III 2003) (defining "critical infrastructure" as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters"); see also *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (discussing protection of "critical infrastructure information" within broader context of "protection of homeland security-related information").

[5] See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (emphasizing the importance of "enhancing the effectiveness of our law enforcement agencies" -- which agencies should "carefully consider . . . when making disclosure determinations under the FOIA"); see also White House Homeland Security Memorandum, reprinted in *FOIA Post* (posted 3/21/02) (calling upon agencies to identify and then safeguard "information that could be misused to harm the security of our nation and the safety of our people"); see also, e.g., Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1322 (D. Utah 2003) (recognizing, in light of terrorism concerns, law enforcement significance of agency maps detailing results of multiple dam failures in post-9/11 context); cf. *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (emphasizing critical distinction between "protecting" and "safeguarding" information).

Initial Considerations

Exemption 2's unique protection of two distinct categories of information can be traced back to the legislative history of the FOIA's enactment. For more than fifteen years after the passage of the Act four decades ago, much confusion existed concerning the intended coverage of Exemption 2 due to the differing approaches taken in the Senate and House Reports when the FOIA was enacted and the fact that these differences were not reconciled in a joint statement or report by both Houses of Congress. The Senate Report stated:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.[6]

The House Report provided a more expansive interpretation of Exemption 2's coverage, stating that it was intended to include:

> [o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners . . . but [that] this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.[7]

The Supreme Court confronted the conflict in Exemption 2's coverage of routine internal matters in a case in which a requester sought to obtain case summaries of Air Force Academy ethics hearings, and it found the Senate Report to be more authoritative. In Department of the Air Force v. Rose,[8] the Supreme Court construed Exemption 2's somewhat ambiguous language as protecting internal agency matters so routine or trivial that they could not be "subject to . . . a genuine and significant public interest."[9] The Court declared that Exemption 2 was intended to relieve agencies of the burden of assembling and providing access to any "matter in which the public could not reasonably be expected to have an interest."[10] At the same time, presaging the eventual development of the "high 2" aspect of

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[6] S. Rep. No. 89-813, at 8 (1965).

[7] H. Rep. No. 89-1497, at 10 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2427; see also id. at 5 ("[P]remature disclosure of agency plans that are undergoing development . . . , particularly plans relating to expenditures, could have adverse effects upon both public and private interest[s].").

[8] 425 U.S. 352 (1976).

[9] Id. at 369.

[10] Id. at 369-70.

EXEMPTION 2

Exemption 2, discussed below, the Court also suggested in Rose that the approach taken in the House Report could permit an agency to withhold matters of some public interest "where disclosure may risk circumvention of agency regulation."[11]

The Supreme Court's ruling in Rose helped to define the contours of Exemption 2, but it did not dispel all the confusion about its scope. Early judicial opinions subsequent to this ruling, particularly in the Court of Appeals for the District of Columbia Circuit, demonstrated judicial ambivalence about whether the exemption covered only internal personnel rules and personnel practices of an agency or, on the other hand, an agency's internal personnel rules and more general internal practices.[12]

The confusion and uncertainty finally were laid to rest, at least in the D.C. Circuit, in Founding Church of Scientology v. Smith,[13] which set out specific steps for determining the applicability of Exemption 2. In this important 1983 decision, the D.C. Circuit articulated the following approach:

> First, the material withheld should fall within the terms of the statutory language as a personnel rule or internal practice of the agency. Then, if the material relates to trivial administrative matters of no genuine public interest, exemption would be automatic under the statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.[14]

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[11] Id. at 369.

[12] Compare Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 764 (D.C. Cir. 1978) (en banc) (exemption covers "only internal personnel matters"), and Allen v. CIA, 636 F.2d 1287, 1290 (D.C. Cir. 1980) (exemption covers "nothing more than trivial administrative personnel rules"), with Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 485 (D.C. Cir. 1980) (exemption covers routine matters of merely internal interest), and Cox v. U.S. Dep't of Justice, 601 F.2d 1, 4 (D.C. Cir. 1979) (per curiam) (same). See generally DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 875-76 & n.10 (D. Me. 1996) (describing debate among various circuit courts on meaning of Exemption 2's language), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996).

[13] 721 F.2d 828 (D.C. Cir. 1983) (per curiam).

[14] Id. at 830-31 n.4 (citations omitted); see also Massey v. FBI, 3 F.3d 620, 622 (2d Cir. 1993) (holding that Exemption 2 applies to "non-employee" information, such as informant symbol numbers and file numbers); Schiller, 964 F.2d at 1208 (finding Exemption 2 appropriate to withhold Equal Access to Justice Act litigation strategies); Dirksen v. HHS, 803 F.2d 1456, 1458-59 (9th Cir. 1986) (approving use of Exemption 2 to withhold Medicare

(continued...)

In this decision, the D.C. Circuit thus made it clear that Exemption 2 allows the withholding of a great variety of internal rules, procedures, and guidelines -- effectively overruling its earlier decision in Allen v. CIA,[15] where it initially had indicated that Exemption 2 protection was intended for agency "personnel" records only. Consequently, agencies became free to consider withholding a wide range of information as appropriate under Exemption 2.[16]

Some differences among the courts of appeals for circuits other than the D.C. Circuit remain, however, with respect to the degree to which Exemption 2 information must be personnel-related as a threshold matter. Two 1997 appellate decisions, which are discussed in detail below -- see "High 2": Risk of Circumvention -- illustrate the narrow distinctions made in these jurisdictions, specifically the Courts of Appeals for the Ninth and Tenth Circuits, concerning this notion of "personnel-relatedness."[17] These decisions and their progeny, however, demonstrate the willingness[18] of the courts and Congress to accord appropriate protection to highly sensitive information under Exemption 2,[19] or otherwise.[20]

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[14](...continued)
claims-processing guidelines); Canning v. U.S. Dep't of the Treasury, No. 94-2704, slip op. at 15 (D.D.C. May 7, 1998) (concluding that the Secret Service's reliance on Exemption 2 for nondisclosure of an internal listing of offices to contact after "an incident of interest" was proper).

[15] 636 F.2d at 1290 n.21 (taking unduly narrow position in rejecting agency argument that Exemption 2 should apply to any routine internal matters in which public lacks interest).

[16] See FOIA Update, Vol. V, No. 1, at 10 ("FOIA Counselor: The Unique Protection of Exemption 2") (advising that Founding Church "expressly" held that the Allen "personnel" restriction no longer applies); see also, e.g., Crooker v. ATF, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc) (concluding that "personnel" should not be read as narrowly as was suggested in Jordan); Judicial Watch, Inc. v. U.S. Dep't of Transp., No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005) ("Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes.").

[17] See Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082 (9th Cir. 1997); Audubon Soc'y v. U.S. Forest Serv., 104 F.3d 1201 (10th Cir. 1997).

[18] See Schwaner v. Dep't of the Air Force, 898 F.2d 793, 796 (D.C. Cir. 1990) ("Judicial willingness to sanction a weak relation to 'rules and practices' may be greatest when the asserted government interest is relatively weighty.").

[19] See, e.g., L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 901-02 (C.D. Cal. 2006) (finding that a database of Serious Incident
(continued...)

EXEMPTION 2

"Low 2": Trivial Matters

Exemption 2 of the FOIA permits the withholding of internal matters that are of a relatively trivial nature.[21] As its legislative and judicial history make clear, in this "low 2" aspect Exemption 2 is the only exemption in the FOIA having a conceptual underpinning totally unrelated to any harm caused by disclosure per se.[22] Rather, this aspect of the exemption is based upon the rationale that the very task of processing and releasing

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[19](...continued)
Reports submitted by private security contractors in Iraq to the Army Corps of Engineers was "maintained for a law enforcement purpose," and protecting the names of contractors within the database); Gordon v. FBI, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005) (protecting details of FBI's aviation "watch list" program -- including records discussing "selection criteria" for lists and handling and dissemination of lists, and "addressing perceived problems in security measures"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 965 (C.D. Cal.) (finding law enforcement purpose, as necessary under Ninth Circuit precedent to uphold application of Exemption 2, for protection of container-inspection statistics at Los Angeles/Long Beach seaport), reconsideration denied, 272 F. Supp. 2d at 966-68 (C.D. Cal. 2003), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug. 26, 2003).

[20] See Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1317-18, 1321-22 (D. Utah 2003) (affirming withholding of flood maps under Exemption 7(F), rather than Exemption 2, while acknowledging that court was bound by 1997 Tenth Circuit precedent severely limiting application of Exemption 2 to records regarding personnel rules and personnel practices); Sw. Ctr. for Biological Diversity v. USDA, 170 F. Supp. 2d 931, 943-47 (D. Ariz. 2000) (upholding protection for rare bird site-location information based on post-Maricopa Exemption 3 statute), aff'd, 314 F.3d 1060 (9th Cir. 2002); see also Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1082 (6th Cir. 1998) (holding that the evidence presented was "insufficient to create the significant, meaningful relationship with IRS internal personnel rules and practices required by" Exemption 2, while at the same time explicitly recognizing that "the sensitive nature of certain information such as FBI informant codes gives the government in such cases a significant interest in nondisclosure," and ultimately applying another FOIA exemption instead); cf. Jones v. FBI, 41 F.3d 238, 244-45 (6th Cir. 1994) (concluding that FBI properly redacted, under Exemption 2, symbol numbers used internally to identify confidential sources).

[21] See, e.g., Dep't of the Air Force v. Rose, 425 U.S. 352, 369-70 (1976); Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 485 (D.C. Cir. 1980).

[22] See Rose, 425 U.S. at 369-70; see also, e.g., Edmonds v. FBI, 272 F. Supp. 2d 35, 51 (D.D.C. 2003) (observing that showings of "foreseeable adverse consequence[s]" are not necessary to withhold information that is trivial and of no public interest).

some requested records would place an administrative burden on the agency, a mere bother that would not be justified by any genuine public benefit.[23]

Accordingly, as a matter of longstanding practice, agencies have recognized that disclosing "low 2" information -- which by its very nature is nothing more than "trivial" -- is in many instances less burdensome than bothering to invoke the exemption to withhold it.[24] In practice, therefore, agencies may continue to disclose such information in the exercise of their administrative discretion.[25]

For information in a requested record to be properly withheld under the "low 2" aspect of Exemption 2, it must meet two criteria: First, the information must be "predominantly internal," and second, the information

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[23] See FOIA Update, Vol. V, No. 1, at 10-11 ("FOIA Counselor: The Unique Protection of Exemption 2"); see also, e.g., Dirksen v. HHS, 803 F.2d 1456, 1460 (9th Cir. 1986) (observing that "the thrust of Exemption 2 [i.e., "low 2"] is . . . to relieve agencies of the burden of disclosing information in which the public does not have a legitimate interest"); Martin v. Lauer, 686 F.2d 24, 34 (D.C. Cir. 1982) (Exemption 2 "serves to relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest."); Long v. U.S. Dep't of Justice, 450 F. Supp. 2d 42, 57 n.16 (D.D.C. 2006) (finding that the "limited public interest" in the withheld information was "outweighed by the government's interest in avoiding the significant burden involved in collecting and evaluating this information for release"), amended by 457 F. Supp. 2d 30 (D.D.C. 2006) (clarifying prior order), amended further on reconsideration, Nos. 00-0211 & 02-2467, 2007 WL 293508 (D.D.C. Feb. 2, 2007) (modifying amended order on other grounds), stay granted (D.D.C. Feb. 13, 2007); Carbe v. ATF, No. 03-1658, 2004 WL 2051359, at *6 (D.D.C. Aug. 12, 2004) ("'Low 2' information refers to internal procedures and practices of an agency where disclosure would constitute an administrative burden unjustified by any genuine and significant public benefit."); Fisher v. U.S. Dep't of Justice, 772 F. Supp. 7, 10 n.8 (D.D.C. 1991) (citing Martin, 686 F.2d at 34), aff'd, 968 F.2d 92 (D.C. Cir. 1992) (unpublished table decision).

[24] See Fonda v. CIA, 434 F. Supp. 498, 503 (D.D.C. 1977) (finding that where administrative burden is minimal and it would be easier to release information at issue, policy underlying Exemption 2 does not permit withholding); see also FOIA Update, Vol. V, No. 1, at 11 ("FOIA Counselor: The Unique Protection of Exemption 2") (advising agencies to invoke "low 2" aspect of Exemption 2 only where doing so truly avoids burden).

[25] See id.; accord Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (recognizing continued agency practice of making discretionary disclosure determinations under the FOIA, upon careful consideration of all interests involved).

must be of a trivial nature and not of any "genuine public interest."[26] Thus, "low 2" shares in common with "high 2" the requirement that the information withheld be "predominantly internal."[27] However, for "low 2" in particular, agencies should pay attention to whether the information at issue "shed[s] significant light" on an agency personnel rule or practice.[28] As one court recently observed: "Information is 'predominantly internal' if it does not 'purport to regulate activities among members of the public or set standards to be followed by agency personnel in deciding whether to proceed against or take action affecting members of the public.'"[29] Accordingly, courts have held that routine internal personnel matters, such as performance standards and leave practices, for example, are covered under "low 2."[30]

Over time, courts have continued to include a wide variety of trivial administrative information within the "low 2" aspect of Exemption 2's coverage. This includes not only relatively minor pieces of information[31] -- e.g.,

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[26] See Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) ("Predominantly internal documents that deal with trivial administrative matters fall under the 'low 2' exemption."); see also, e.g., ACLU v. FBI, 429 F. Supp. 2d 179, 189 (D.D.C. 2006) (explaining that "'low 2' [is designed] for materials related to trivial administrative matters of no genuine public interest").

[27] See, e.g., Schiller, 964 F.2d at 1207; Long, 450 F. Supp. 2d at 57 n.16; Edmonds, 272 F. Supp. 2d at 50.

[28] FOIA Update, Vol. XI, No. 2, at 2 (quoting Schwaner v. Dep't of the Air Force, 898 F.2d 793, 795 (D.C. Cir. 1990), and noting its stringent interpretation of Exemption 2); see also Canning v. U.S. Dep't of the Treasury, No. 94-2704, slip op. at 15 (D.D.C. May 7, 1998) (finding narrative information related to Secret Service contact list to be "clearly 'practices of an agency'" and therefore properly protected).

[29] Edmonds, 272 F. Supp. 2d at 50 (quoting Cox v. U.S. Dep't of Justice, 601 F.2d 1, 5 (D.C. Cir. 1979)).

[30] See, e.g., Small v. IRS, 820 F. Supp. 163, 168 (D.N.J. 1992) (employee service identification numbers); Pruner v. Dep't of the Army, 755 F. Supp. 362, 365 (D. Kan. 1991) (internal guidance regarding Army regulation governing discharge of conscientious objectors); FBI Agents Ass'n v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,058, at 83,566-67 (D.D.C. Jan. 13, 1983) (information relating to performance ratings, recognition and awards, leave practices, transfers, travel expenses, and allowances); NTEU v. U.S. Dep't of the Treasury, 487 F. Supp. 1321, 1324 (D.D.C. 1980) (bargaining history and IRS interpretation of labor contract provisions).

[31] See, e.g., Hale v. U.S. Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) (permitting the withholding of "administrative markings and notations on documents; room numbers, telephone numbers, and FBI employees' identification numbers; a checklist form used to assist special agents

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file or tracking numbers,[32] document routing information,[33] internal tele-

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[31](...continued)
in consensual monitoring; personnel directories containing the names and addresses of FBI employees; and the dissemination page of Hale's 'rap sheet'"), cert. granted, vacated & remanded on other grounds, 509 U.S. 918 (1993); Scherer v. Kelley, 584 F.2d 170, 175-76 (7th Cir. 1978) (approving agency's withholding of "file numbers, initials, signature and mail routing stamps, references to interagency transfers, and data processing references"); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-00377, 2006 WL 1826185, at *4 (D.D.C. June 30, 2006) (permitting withholding of twelve categories of "quintessentially internal" information, including file management procedures, paperwork completion instructions, and basic computer instructions); DiPietro v. Executive Office for U.S. Attorneys, 368 F. Supp. 2d 80, 82 (D.D.C. 2005) (holding that the agency properly withheld "an internal checklist of clerical actions, code numbers on a form for attorney time devoted to a task, a record of transmittals and receipts of records, a form used for inputting attorney work product data into a computer system, and identification and file numbers"); Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, No. 04-1919, 2005 WL 913268, at *3 (D.D.C. Apr. 20, 2005) (upholding nondisclosure of "computer function codes, internal file numbers, computer system and report identity, internal operation information, and internal agency procedures").

[32] See, e.g., Middleton v. U.S. Dep't of Labor, No. 06-72, 2006 WL 2666300, at *6 (E.D. Va. Sept. 15, 2006) ("department control identification number"); Long, 450 F. Supp. 2d at 54-59 (concluding after an extensive analysis that "low 2" permits the withholding of "file numbers assigned by the agencies that have referred matters to [United States Attorneys' Offices]," and finding in the process that "compiling information to track an agency's performance of its core functions . . . is a quintessential agency practice"); Odle v. Dep't of Justice, No. 05-2711, 2006 WL 1344813, at *13 (N.D. Cal. May 17, 2006) (Office of Professional Responsibility case file numbers); Newry Ltd. v. U.S. Customs & Border Prot., No. 04-02110, 2005 WL 3273975, at *3 (D.D.C. July 29, 2005) (administrative markings related to "internal agency file control systems"); Delta Ltd. v. U.S. Customs & Border Prot. Bureau, 384 F. Supp. 2d 138, 147 (D.D.C.) ("internal file numbers" and "internal agency procedures and filing numbers"), partial reconsideration granted on other grounds, 393 F. Supp. 2d 15 (D.D.C. 2005); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 583-84 (N.D. W. Va. 2005) ("Criminal Investigation Division tracking numbers"). But cf. Badalamenti v. U.S. Dep't of State, 899 F. Supp. 542, 547 (D. Kan. 1995) (determining that the agency's "bare assertion fails to demonstrate that the file and case numbers relate to an agency rule or practice or are otherwise encompassed within exemption 2"); cf. Fitzgibbon v. U.S. Secret Serv., 747 F. Supp. 51, 57 (D.D.C. 1990) (finding in the context of "high 2" analysis that "agencies have no generalized interest in keeping secret the method by which they store records").

phone and facsimile numbers,[34] and other similar administrative codes and markings[35] -- but also more extensive and substantive portions of adminis-

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[33] See, e.g., Morley v. CIA, 453 F. Supp. 2d at 148-49 & n.2 (D.D.C. 2006) (concluding that "low 2" covers "materials that include 'citation to or discussion of CIA personnel rules and practices (including administrative routing information)'" (quoting agency declaration)); Wheeler v. U.S. Dep't of Justice, 403 F. Supp. 2d 1, 13 (D.D.C. 2005) (finding exempt from disclosure "information concerning the distribution of copies of documents" to an unnamed agency, because the interest in release was personal to the plaintiff and there was no evidence of bad faith in the processing of the plaintiff's FOIA request); Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *14 (D.D.C. Aug. 10, 2005) (finding that "low 2" covers "message routing data"); Coleman v. FBI, 13 F. Supp. 2d 75, 78 (D.D.C. 1998) (listing "mail routing stamps" among types of information properly withheld under "low 2"); Wilson v. Dep't of Justice, No. 87-2415, 1991 WL 111457, at *3 (D.D.C. June 13, 1991) (applying "low 2" to State Department transmittal slips from low-level officials).

[34] See, e.g., Ray v. FBI, 441 F. Supp. 2d 27, 33 (D.D.C. 2006) (internal FBI telephone number); Odle, 2006 WL 1344813, at *13 ("non-public [Office of Professional Responsibility] fax numbers and telephone numbers"); Morales Cozier v. FBI, No. 99-0312, slip op. at 13 (N.D. Ga. Sept. 25, 2000) ("facsimile numbers of FBI employees"); Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *12 (S.D.N.Y. Nov. 9, 1999) (FBI telephone and facsimile numbers).

[35] See, e.g., Poulsen v. U.S. Customs & Border Prot., No. 06-1743, 2006 WL 2788239, at *6-9 (N.D. Cal. Sept. 26, 2006) (finding that certain information pertaining to agency computer network crash, such as "'incident i.d.' numbers" and administrative codes assigned to agency computers, was properly withheld); Baez v. FBI, 443 F. Supp. 2d 717, 727 (E.D. Pa. 2006) (concluding that the agency properly withheld administrative markings from an account statement, because they "could not be of any interest to the public"); Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316, 324 (D.D.C. 2005) (permitting withholding of "accounting numbers from purchase orders . . . because such information, similar to code numbers, is used for internal purposes and has no significant public interest"); Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at *17 (M.D. Fla. Oct. 1, 1997) (approving redaction of purely administrative Customs Service codes concerning individual pilot). But see Gerstein v. U.S. Dep't of Justice, No. C-03-4893, slip op. at 17-18 (N.D. Cal. Sept. 30, 2005) (ordering the disclosure of page numbers on records pertaining to delayed-notice searches, on the basis that "the public has an interest in learning about the aggregate length of notification delays" and "the redacted page numbers prevent [the requester] from linking documents together in a meaningful way"); Manna v. U.S. Dep't of Justice, 832 F. Supp. 866, 880 (D.N.J. 1993) (finding that "DEA failed to describe or explain what these 'internal markings' are . . . [and if they] relate to internal rules or practice and whether

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trative records and, most significantly, entire documents.[36]

One particular type of administrative document -- federal personnel lists -- has caused the courts to struggle with the problem of determining when the threshold Exemption 2 requirement of being "related to" internal agency rules and practices is satisfied. Agencies had considered the use of Exemption 2 for such lists because the personal privacy protection of Exemption 6 -- successfully invoked to protect the names and home addresses of most federal employees[37] -- is generally unavailable to protect the names and duty addresses of federal employees inasmuch as there ordinarily is no privacy interest in such information. (See the discussion of this point under Exemption 6, below.)

In 1990, the Court of Appeals for the District of Columbia Circuit dispositively addressed the possible protection of federal personnel lists un-

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[35](...continued)
these markings constitute trivial administrative matters of no public interest").

[36] See, e.g., Schiller v. NLRB, 964 F.2d at 1208 (internal time deadlines and procedures, recordkeeping directions, instructions on contacting agency officials for assistance and guidelines on agency decisionmaking); Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978) (cover letters of merely internal significance); Melville v. U.S. Dep't of Justice, No. 05-0645, 2006 WL 2927575, at *6 (D.D.C. Oct. 12, 2006) (opening and closing forms from criminal prosecution); Geronimo v. Executive Office for U.S. Attorneys, No. 05-1057, 2006 WL 1992625, at *3 (D.D.C. July 14, 2006) (opening/closing form used for reporting to supervisory prosecutors); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *5 (D. Minn. Oct. 24, 2005) (opening and closing reports from SEC investigation); Edmonds, 272 F. Supp. 2d at 50-51 (FBI internal rules and regulations for granting waivers from ordinary language-testing requirements); Amro v. U.S. Customs Serv., 128 F. Supp. 2d 776, 783 (E.D. Pa. 2001) ("record keeping directions, instructions on contacting agency officials for assistance and guidelines on agency decision making").

[37] See, e.g., FLRA v. U.S. Dep't of the Treasury, 884 F.2d 1446, 1452-53 (D.C. Cir. 1989) (relying on Exemption 6 to maintain protection of federal employees' home addresses); FOIA Update, Vol. III, No. 4, at 3 ("OIP Guidance: Privacy Protection Considerations") (delineating privacy protection considerations for federal employees); FOIA Update, Vol. VII, No. 3, at 3-4 ("FOIA Counselor: Protecting Federal Personnel Lists") (recognizing exceptions to disclosure of identities and work locations of certain law enforcement and military personnel); accord Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (placing particular emphasis on personal privacy interests).

der Exemption 2 in Schwaner v. Department of the Air Force.[38] In a two-to-one decision, it held that a list of the names and duty addresses of military personnel stationed at Bolling Air Force Base does not meet the threshold requirement of being "related solely to the internal rules and practices of an agency."[39] The panel majority ruled that "the list does not bear an adequate relation to any rule or practice of the Air Force as those terms are used in exemption 2."[40] In so doing, it gave a new, stricter interpretation to the term "related to" under Exemption 2, for "low 2" purposes,[41] holding that if the information in question is not itself actually a "rule or practice," then it must "shed significant light" on a "rule or practice" in order to qualify.[42] The D.C. Circuit concluded that "lists do not necessarily (or perhaps even normally) shed significant light on a rule or practice; insignificant light is not enough."[43] Thus, under Schwaner, this aspect of Exemption 2 is not available to shield agencies from the burdens of processing requests for federal personnel lists.[44]

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[38] 898 F.2d 793 (D.C. Cir. 1990).

[39] Id. at 794; see also Maydak, 362 F. Supp. 2d at 323 (holding Exemption 2 inapplicable to list of names and titles of prison staff; applying reasoning similar to that of Schwaner).

[40] Schwaner, 898 F.3d at 794.

[41] Id. at 796-97 (distinguishing agency practice of collecting information -- found to be insufficiently "related" to qualify for "low 2" protection -- from other agency practices, e.g., legitimate redaction of sensitive notations related to FBI informant symbol numbers (citing Lesar, 636 F.2d at 485-86)).

[42] Id. at 797; see also Audubon Soc'y v. U.S. Forest Serv., 104 F.3d 1201, 1204 (10th Cir. 1997) (concluding that maps of habitats of owls deemed "threatened" under Endangered Species Act are not sufficiently related to internal personnel rules and practices).

[43] Schwaner, 898 F.2d at 797; see DeLorme Publ'g Co. v. NOAA, 917 F. Supp. 867, 876 (D. Me. 1996) ("Nothing in Exemption 2 supports the proposition that government 'information may be withheld simply because it manifests an agency practice of collecting the information.'" (quoting Schwaner, 898 F.2d at 797)), appeal dismissed per stipulation, No. 96-1601 (1st Cir. July 8, 1996); see also Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1081, 1083 (6th Cir. 1998) (ruling that "information [contained in an IRS electronic database] . . . is not sufficiently related to a personnel rule or practice to satisfy . . . [the] Exemption 2 analysis," but can be protected under Exemptions 6 and 7(C)).

[44] See FOIA Update, Vol. XI, No. 2, at 2 (modifying prior guidance in light of controlling nature of ruling by D.C. Circuit, as circuit of "universal venue" under FOIA). But see Hale, 973 F.2d at 902 (ruling, in a post-Schwaner decision, that "personnel directories containing the names and [office] addresses of [most] FBI employees" are properly withheld as "trivial matters

(continued...)

In exceptional circumstances, however, information specific to individual federal employees, such as phone numbers and e-mail addresses, may be protectible under the "high 2" aspect of Exemption 2 on the basis that the consequences of disclosure would be harmful not only to the individuals but also to the effective operation of government offices.[45] (See also Exemption 2, "High 2": Risk of Circumvention, below.) Additionally, it is worth noting here that it is Department of Defense policy, based on specific statutory authority, and in coordination with the Office of Personnel Management, to accord extraordinary protection to the names and other identifying information of certain military service personnel under Exemption 6 of the FOIA.[46]

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[44](...continued)
of no genuine public interest").

[45] See, e.g., Truesdale v. U.S. Dep't of Justice, No. 03-1332, 2005 WL 3294004, at *5 (D.D.C. Dec. 5, 2005) (protecting FBI Special Agents' telephone and facsimile numbers, because disclosure "would disrupt official business and could subject the FBI's employees to harassing telephone calls"); Queen v. Gonzales, No. 96-1387, 2005 WL 3204160, at *4 (D.D.C. Nov. 15, 2005) (finding that internal facsimile numbers of FBI Special Agents and support personnel involved in plaintiff's narcotics investigation were properly withheld); Pinnavaia v. FBI, No. 03-112, slip op. at 8 (D.D.C. Feb. 25, 2004) (holding that FBI Special Agents' beeper numbers and cell phone numbers were properly withheld, because their "disclosure . . . would disrupt official business" and "would serve no public benefit"); Edmonds, 272 F. Supp. at 51 (concluding that the FBI properly withheld secure facsimile numbers, because "this equipment would be worthless to the FBI in supporting its investigations" if the fax numbers were to be released); cf. Poulsen, 2006 WL 2788239, at *7-8 (concluding -- without citing to any case law on point -- that agency properly withheld names of employees involved in repairing computer network); The News-Press v. DHS, No. 05-CV-102, 2005 WL 2921952, at *10-11 (M.D. Fla. Nov. 4, 2005) (finding in unusual decision that names and signatures of low-level FEMA employees were properly redacted from disaster-assistance documents, falling "well within ['low 2' aspect of] Exemption 2").

[46] See 10 U.S.C. § 130b (2000 & Supp. IV 2004) (providing for nondisclosure of personally identifying information for personnel in overseas, sensitive, or routinely deployable units); Department of Defense Freedom of Information Act Program Regulations, 32 C.F.R. § 286.12(f)(2)(ii) (2006) (restating express authority to withhold names and duty addresses for such personnel); Memorandum from Department of Defense Directorate for Freedom of Information and Security Review 1 (Oct. 26, 1999) (applying same delineation for electronic mail addresses, on privacy-protection grounds); cf. Department of Defense Directorate for Administration and Management Memorandum Regarding Personally Identifying Information Under the Freedom of Information Act (Nov. 9, 2001), available at www.defenselink.mil/pubs/foi/withhold.pdf (urging careful consideration, given heightened
(continued...)

EXEMPTION 2

The second part of the "low 2" formulation is whether there "is a genuine and significant public interest" in disclosure of the records requested.[47] When there is such an interest -- for example, with the honor code proceedings that were at issue in Department of the Air Force v. Rose -- the information is not covered by the "low 2" aspect of Exemption 2.[48] An illustration of how this "public interest" delineation has been drawn can be found in a decision in which large portions of a FOIA training manual used by the SEC were ruled properly withholdable as trivial and of no public interest,[49] while another portion, because of a discerned "public interest" in it, was

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[46](...continued)
security concerns, before DOD disclosure of any lists of names and other personally identifying information of DOD personnel).

[47] Rose, 425 U.S. at 369.

[48] See id. at 367-70; see also, e.g., Vaughn v. Rosen, 523 F.2d 1136, 1140-43 (D.C. Cir. 1975) (refusing to allow agency to withhold evaluations of how effectively agency policies were being implemented); Gerstein, No. C-03-04893, slip op. at 17-18 (N.D. Cal. Sept. 30, 2005) (ordering disclosure of page numbers on records concerning delayed-notice searches, because the public has an interest in such searches and "the redacted page numbers prevent [the requester] from linking documents together in a meaningful way"); Carlson v. USPS, No. C-02-05471, 2005 WL 756573, at *5 (N.D. Cal. Mar. 31, 2005) (rejecting agency's application of "low 2" to records pertaining to mailbox locations, in part because agency had released records in response to prior similar requests and in part because of media coverage praising requester's efforts to obtain requested information); Church of Scientology v. IRS, 816 F. Supp. 1138, 1149 (W.D. Tex. 1993) (stating that "public is entitled to know how IRS is allocating" taxpayers' money as it pertains to IRS advance of travel funds to its employees), appeal dismissed per stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993); Globe Newspaper Co. v. FBI, No. 91-13257, 1992 WL 396327, at *2-3 (D. Mass. Dec. 29, 1992) (finding that agency improperly invoked "low 2" for amount paid to FBI informant involved in "ongoing criminal activities"); News Group Boston, Inc. v. Nat'l R.R. Passenger Corp., 799 F. Supp. 1264, 1266-68 (D. Mass. 1992) (concluding that agency must disclose disciplinary actions taken against Amtrak employees), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992); North v. Walsh, No. 87-2700, slip op. at 3 (D.D.C. June 25, 1991) (finding "low 2" inapplicable to travel vouchers of senior officials of Office of Independent Counsel); FBI Agents Ass'n, 3 Gov't Disclosure Serv. at 83,566-67 (concluding that standards of conduct, grievance procedures, and EEO procedures were improperly withheld under "low 2"); Ferris v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,084, at 82,363 (D.D.C. Dec. 23, 1981) (holding that agency improperly withheld SES performance objectives).

[49] Am. Lawyer Media, Inc. v. SEC, No. 01-1967, 2002 U.S. Dist. LEXIS 16940, at *8 (D.D.C. Sept. 6, 2002) ("This information is the paradigmatic 'trivial administrative matter [that] is of no genuine public interest.'").

not.[50] This decision is reflective of the D.C. Circuit's admonition in Founding Church of Scientology v. Smith[51] that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interests."[52]

The nature of this "public interest" in "low 2" cases was affected by the Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press.[53] In Reporters Committee, the Supreme Court held that the "public interest" depended on the nature of the document sought and its relationship to "the basic purpose [of the FOIA] 'to open agency action to the light of public scrutiny.'"[54] The Court concluded that the FOIA's "core purposes" would not be furthered by disclosure of a record about a private individual, even if it "would provide details to include in a news story, [because] this is not the kind of public interest for which Congress enacted the FOIA."[55] It also emphasized that a particular FOIA requester's intended use of the requested information "has no bearing on the merits of his or her FOIA request" and that FOIA requesters therefore should be treated alike.[56] (See the further discussion of this decision under Exemption 6, The Reporters Committee Decision, below.)

Although the Supreme Court's decision in Reporters Committee was based on an analysis of Exemption 7(C), its interpretation of what constitutes "public interest" under the FOIA logically may be applicable under Exemption 2 as well.[57] After Reporters Committee, courts increasingly have focused upon the lack of any "legitimate public interest" when applying this aspect of Exemption 2 to information found to be related to an

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[50] Id. at *16 (finding that certain definitions "contain[ing] general legal instruction to SEC staff on how to analyze FOIA requests . . . must be disclosed").

[51] 721 F.2d 828 (D.C. Cir. 1983).

[52] Id. at 830-31 n.4.

[53] 489 U.S. 749 (1989).

[54] Id. at 772 (quoting Rose, 425 U.S. at 372).

[55] Id. at 774.

[56] Id. at 771; see also FOIA Update, Vol. X, No. 2, at 5 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision").

[57] See Schwaner, 898 F.2d at 800-01 (Revercomb, J., dissenting on issue not reached by majority) (relying on Reporters Committee's "core purposes" analysis and finding no "genuine" public interest in disclosure of names and duty addresses of military personnel).

agency's internal practices.[58] Indeed, a number of courts had already been taking such an approach in analyzing "low 2" cases before Reporters Committee.[59] Nevertheless, there remains the fact that this aspect of Exemption 2 simply does not cover any information in which there is "a genuine and significant public interest."[60]

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[58] See Hale, 973 F.2d at 902 (finding no public interest in administrative markings and notations, personnel directories containing names and addresses of FBI employees, room and telephone numbers, employee identification numbers, consensual monitoring checklist form, and rap sheet-dissemination page); Morley, 453 F. Supp. 2d at 149 ("Simply stated, there is no legitimate public interest that would justify disclosure of CIA personnel rules and practices, including administrative routing information."); Middleton, 2006 WL 2666300, at *6 (concluding that "it is apparent" that "the redacted ID numbers [do not] constitute a matter of genuine public interest"); Gavin, 2005 WL 2739293, at *5 (finding that opening and closing reports of investigation were properly withheld because there is "no public interest" in them); Morales Cozier, No. 99-0312, slip op. at 13 (N.D. Ga. Sept. 25, 2000) (ruling that "facsimile numbers of FBI employees . . . constitute trivial matter that could not reasonably be expected to be of interest to the public"); Germosen, 1999 WL 1021559, at *12 (S.D.N.Y. Nov. 9, 1999) (finding no legitimate or genuine public interest in source symbol numbers and agent identification numbers, as well as in computer access codes, telephone and facsimile numbers, and numbers used to denote different categories of counterfeit currency), appeal dismissed, No. 00-6041 (2d Cir. Sept. 12, 2000); Voinche, 46 F. Supp. 2d at 30 (applying Exemption 2 to telephone number of FBI's Public Corruption Unit as "trivial administrative matter of no genuine public interest"); News Group Boston, 799 F. Supp. at 1268 (holding that there is no public interest in payroll and job title codes); Buffalo Evening News, Inc. v. U.S. Border Patrol, 791 F. Supp. 386, 390-93 (W.D.N.Y. 1992) (declaring that there is no public interest in "soundex" encoding of alien's family name, in whether or not alien is listed in Border Patrol Lookout Book, in codes used to identify deportability, in narratives explaining circumstances of apprehension, or in internal routing information).

[59] See, e.g., Martin, 686 F.2d at 34 (Exemption 2 "is in part designed to screen out illegitimate public inquiries into the functioning of an agency"); Lesar, 636 F.2d at 485-86 (public has "no legitimate interest" in FBI's mechanism for internal control of informant identities); Struth v. FBI, 673 F. Supp. 949, 959 (E.D. Wis. 1987) (plaintiff offered no evidence of public interest in source symbol or source file numbers). But see Tax Analysts v. U.S. Dep't of Justice, 845 F.2d 1060, 1064 n.8 (D.C. Cir. 1988) (Exemption 2 found inapplicable, without discussion, due to "public's obvious interest" in agency copies of court opinions), aff'd on other grounds, 492 U.S. 136 (1989).

[60] Rose, 425 U.S. at 369; see also FOIA Update, Vol. V, No. 1, at 11 ("FOIA Counselor: The Unique Protection of Exemption 2") (emphasizing "low threshold" for required disclosure of such information).

As a final matter under this aspect of Exemption 2, it also is worth noting that in some cases courts have conflated the "low 2" and "high 2" aspects of the exemption or have applied the incorrect one.[61] This is perhaps due in part to a lack of clarity in some agency declarations regarding which aspect of Exemption 2 the agency is invoking.[62] It therefore is important that agency declarations clearly specify whether "low 2" or "high 2" is being invoked for any particular piece of information and that they explain exactly how the exemption applies, any case law suggesting to the contrary notwithstanding.[63] (See also the further discussion of this point under Litigation Considerations, "Vaughn Index," below.)

"High 2": Risk of Circumvention

The second category of information covered by Exemption 2 -- inter-

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[61] See, e.g., Baez, 443 F. Supp. 2d at 727 (holding that the agency properly withheld "allegedly sensitive" administrative markings, because they "could not be of any interest to the public"); Neuhausser v. U.S. Dep't of Justice, No. 6: 03-531, 2006 WL 1581010, at *10 (E.D. Ky. June 6, 2006) (discussing agency's "high 2" argument, but permitting redactions under "low 2" approach); Maydak v. U.S. Dep't of Justice, 254 F. Supp. 2d 23, 36 (D.D.C. 2003) (protecting Bureau of Prisons' internal codes for electronic systems on the ground that inmates "could access information regarding other inmates," and reiterating that courts have "consistently found no significant public interest in the disclosure of identifying codes"); Palacio v. U.S. Dep't of Justice, No. 00-1564, 2002 U.S. Dist. LEXIS 2198, at *15 (D.D.C. Feb. 11, 2002) (holding that FBI informant codes were properly withheld because "[t]he means by which the FBI refers to informants . . . is a matter of internal significance in which the public has no substantial interest" and "disclosure of the informant codes may . . . harm the FBI's legitimate investigative activities"), summary affirmance granted, No. 02-5247, 2003 U.S. App. LEXIS 1804 (D.C. Cir. Jan. 31, 2003); Voinche v. FBI, 46 F. Supp. 2d 26, 30 (D.D.C. 1999) (concluding that the "disclosure of [a telephone extension] could result in the circumvention of FBI law enforcement procedures and there is no significant public interest in [its] disclosure"); Coleman, 13 F. Supp. 2d at 79 (protecting FBI source symbol numbers and file numbers both as "low 2" "information [that] facilitates administrative operation and recordkeeping," and as "high 2" information, because disclosure could allow "criminals to redirect their activities [to] avoid legal intervention").

[62] See, e.g., Herrick's Newsletter, 2005 WL 3274073, at *2 (criticizing agency's "generic descriptions" and directing it to file new Vaughn Index that specifies whether information withheld under Exemption 2 is "low 2" or "high 2" information).

[63] See, e.g., Changzhou, 2005 WL 913268, at *3 ("[T]he Court is unaware of any authority requiring the government to designated [sic] whether a withholding falls within a 'low' or 'high' category.").

nal matters of a far more substantial nature[64] the disclosure of which would risk the circumvention of a statute or agency regulation -- has generated considerable controversy over the years. In Department of the Air Force v. Rose,[65] the Supreme Court specifically left open the question of whether such records fall within Exemption 2 coverage. Most of the courts wrestling with this question in the years after Rose did so in the context of law enforcement manuals containing sensitive staff instructions. For example, the Court of Appeals for the Eighth Circuit held that Exemption 2 does not apply to such matters, but that subsection (a)(2)(C) of the FOIA,[66] which arguably excludes law enforcement manuals from the automatic disclosure provisions of the FOIA, bars disclosure of manuals whose release to the public would significantly impede the law enforcement process.[67] Although tacitly approving the Eighth Circuit's argument, the Courts of Appeals for the Fifth and Sixth Circuits developed an alternative rationale for withholding law enforcement manuals: Disclosure would allow persons "simultaneously to violate the law and to avoid detection"[68] by impeding law enforcement efforts.[69]

However, the majority of the courts in other circuits that examined this issue in the first five years after Rose at least implicitly placed greater weight on the House Report in this respect[70] and accordingly held that Exemption 2 is applicable to internal administrative and personnel matters, including law enforcement manuals, to the extent that disclosure would risk circumvention of an agency regulation or statute or impede the

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[64] See, e.g., Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (citing safeguarding national security and enhancing effectiveness of law enforcement agencies as "fundamental values"); see also White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002) [hereinafter White House Homeland Security Memorandum], reprinted in *FOIA Post* (posted 3/21/02) (directing agencies to identify sensitive homeland security-related information for appropriate safeguarding).

[65] 425 U.S. 352, 364, 369 (1976).

[66] 5 U.S.C. § 552(a)(2)(C) (2000 & Supp. IV 2004).

[67] See Cox v. Levi, 592 F.2d 460, 462-63 (8th Cir. 1979); Cox v. U.S. Dep't of Justice, 576 F.2d 1302, 1306-09 (8th Cir. 1978).

[68] Hawkes v. IRS, 467 F.2d 787, 795 (6th Cir. 1972).

[69] See, e.g., id.; Sladek v. Bensinger, 605 F.2d 899, 902 (5th Cir. 1979).

[70] H. Rep. No. 89-1497, at 10 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2427.

effectiveness of an agency's law enforcement activities.[71]

The Court of Appeals for the District of Columbia Circuit firmly joined and solidified this majority approach when the full court addressed the issue in Crooker v. ATF, a case involving a law enforcement agents' training manual.[72] Although not explicitly overruling its earlier en banc decision in Jordan v. United States Department of Justice, which held that guidelines for the exercise of prosecutorial discretion were not properly withholdable,[73] the en banc decision in Crooker specifically rejected the rationale of Jordan that Exemption 2 could not protect law enforcement manuals or other documents whose disclosure would risk circumvention of the law.[74] The Crooker decision thus stands at the head of a long line of cases interpreting Exemption 2 to encompass protection for sensitive internal agency information.[75]

In Crooker, the D.C. Circuit fashioned a two-part test for determining which sensitive materials are exempt from mandatory disclosure under the "high 2" aspect of Exemption 2. This test requires both:

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[71] See, e.g., Hardy v. ATF, 631 F.2d 653, 656 (9th Cir. 1980); Caplan v. ATF, 587 F.2d 544, 547 (2d Cir. 1978); Wilder v. Comm'r, 607 F. Supp. 1013, 1015 (M.D. Ala. 1985); Ferri v. Bell, No. 78-841, slip op. at 7-9 (M.D. Pa. Dec. 15, 1983); Fiumara v. Higgins, 572 F. Supp. 1093, 1102 (D.N.H. 1983); Watkins v. Comm'r, No. C81-0091J, slip op. at 1 (D. Utah Mar. 29, 1982); see also Crooker v. ATF, 670 F.2d 1051, 1070 n.50 (D.C. Cir. 1981) (en banc) (stating that the Courts of Appeals for the Fourth and Seventh Circuits had not yet addressed the issue of "whether Exemption 2 applies to documents whose disclosure would risk circumvention of the law").

[72] 670 F.2d at 1074.

[73] 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc).

[74] See 670 F.2d at 1075 (repudiating rationale of Jordan "because it does not appear to comport with the full congressional intent underlying the FOIA").

[75] See, e.g., Massey v. FBI, 3 F.3d 620, 622 (2d Cir. 1993) (finding that disclosure of informant symbol numbers and source-identifying information "could do substantial damage to the FBI's law enforcement activities"); Schiller v. NLRB, 964 F.2d 1205, 1207-08 (D.C. Cir. 1992) (protecting records pertaining to agency's litigation strategy because disclosure "'would render those documents operationally useless'" (quoting NTEU v. U.S. Customs Serv., 802 F.2d 525, 530-31 (D.C. Cir. 1986)); Dirksen v. HHS, 803 F.2d 1456, 1458-59 (9th Cir. 1986) (affirming nondisclosure of claims-processing guidelines that could be used by healthcare providers to avoid audits); Hardy, 631 F.2d at 657 (holding that "law enforcement materials, disclosure of which may risk circumvention of agency regulation, are exempt from disclosure" under Exemption 2).

(1) that a requested document be "predominantly internal,"[76] and

(2) that its disclosure "significantly risks circumvention of agency regulations or statutes."[77]

Whether there is any public interest in disclosure is legally irrelevant under this "anti-circumvention" aspect of Exemption 2.[78] Rather, the concern under "high 2" is that a FOIA disclosure should not "'benefit those attempting to violate the law and avoid detection.'"[79] Thus, this aspect of Exemption 2 fundamentally rests upon a determination of reasonably expect-

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[76] Crooker, 670 F.2d at 1074 (adopting mere "predominant internality" standard proposed by Judge Leventhal in concurrence in Vaughn v. Rosen, 523 F.2d 1136, 1151 (D.C. Cir. 1975)); see also Judicial Watch, Inc. v. U.S. Dep't of Transp., No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005) ("Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes.").

[77] Crooker, 670 F.2d at 1073-74; see also Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2006 WL 1826185, at *5 (D.D.C. June 30, 2006) (rejecting the plaintiff's argument that an agency must show that circumvention "be almost certain," finding that instead "the test is satisfied so long as the information could assist individuals seeking to avoid or hinder lawful agency regulation"); Dorsett v. U.S. Dep't of the Treasury, 307 F. Supp. 2d 28, 36-37 (D.D.C. 2004) (upholding the applicability of "high 2" protection for Secret Service "internal protective investigative information," and reiterating that "'Congress evidenced a secondary purpose when it enacted FOIA of preserving the effective operation of governmental agencies'" (quoting Crooker, 670 F.2d at 1074)).

[78] See Gordon v. FBI, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (finding irrelevant the substantial public interest in records pertaining to aviation "watch lists," because "disclosing the information would assist terrorists in circumventing the purpose of the watch lists"); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 165 (D.D.C. 2004) ("In light of Exemption 2's anti-circumvention purpose, public interest in the disclosure is legally irrelevant."); Voinche v. FBI, 940 F. Supp. 323, 328 (D.D.C. 1996) (relying on Crooker test, where "public interest in disclosure is irrelevant," to find FBI information related to security of Supreme Court building and Supreme Court Justices properly withheld under Exemption 2), aff'd per curiam on other grounds, No. 96-5304, 1997 WL 411685 (D.C. Cir. June 19, 1997); Inst. for Policy Studies v. Dep't of the Air Force, 676 F. Supp. 3, 5 (D.D.C. 1987) (assuming "significant public interest," but nevertheless holding that classification procedures were properly withheld because of risk of circumvention in identifying vulnerabilities). But cf. Kaganove v. EPA, 856 F.2d 884, 889 (7th Cir. 1988) (suggesting that document might not meet Crooker test if its purpose were not "legitimate").

[79] Crooker, 670 F.2d at 1054 (quoting agency declaration).

ed harm.[80]

Essential to any determination of Exemption 2 applicability, of course, is consideration of the basic character of the records involved. Apart from the Tenth Circuit's decision in Audubon Society v. United States Forest Service,[81] discussed below, there is a common thread running through the cases that have considered the issue: Where the stakes are high -- e.g., the records at hand contain sensitive law enforcement or homeland security information -- judicial endorsement of "high 2" protection is commensurately highly likely.[82]

Indeed, in Crooker, the foundation case for "high 2" protection, the D.C. Circuit based its decision to uphold an agency's decision to protect a sensitive law enforcement training manual on "the overall design of FOIA, the explicit comments made in the House [legislative history], the caution-

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[80] See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Commerce, 83 F. Supp. 2d 105, 110 (D.D.C. 1999) (applying "high 2" based upon determination that disclosure of government credit card numbers "would present an opportunity for misuse and fraud"); see also H. Rep. No. 89-1497, at 5 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2422 (emphasizing potential damage to public and private interests as basis for withholding agency plans); accord Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (establishing governmentwide FOIA policy).

[81] 104 F.3d 1201 (10th Cir. 1997); cf. Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1086-87 (9th Cir. 1997) (Ninth Circuit decision following counterpart Tenth Circuit decision on virtually identical facts, but only in that those facts did not involve anything that could be deemed "law enforcement material").

[82] See Schwaner v. Dep't of the Air Force, 898 F.2d 793, 796 (D.C. Cir. 1990) (acknowledging presciently that "[j]udicial willingness to sanction a weak relation to 'rules and practices' may be greatest when the asserted government interest is relatively weighty"); see also Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980) (upholding Exemption 2 protection for FBI symbol numbers that are used to identify confidential informants, without evident regard for any relation to internal personnel rules or practices); cf. Maricopa, 108 F.3d at 1086-87 (distinguishing goshawk nesting site information, found to be unprotected by Exemption 2, from law enforcement records, such as claims-processing guidelines and training manuals, the disclosure of which was found to risk circumvention of law (citing Dirksen, 803 F.2d at 1458, and Hardy, 631 F.2d at 656)). See generally *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (advising of "high 2" protection that is available for highly sensitive "critical infrastructure information" generated by federal agencies); cf. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926 (D.C. Cir. 2003) (recognizing that agencies that specialize in law enforcement are entitled to deference when claiming law enforcement purpose under one of Exemption 7's subparts).

ary words of the Supreme Court in Rose, and even common sense."[83] Citing its seminal reliance on Exemption 2 to protect the informant codes that were at issue in Lesar,[84] the full D.C. Circuit in Crooker pointedly declared, once and for all, that "the scope of Exemption 2 [is not restricted] to minor employment matters."[85]

To meet the first part of the "high 2" Crooker standard, agencies must demonstrate that the information withheld is "predominantly internal."[86] While this is the same as for under "low 2," relatively speaking, because of the nature of the information protected by "high 2," courts might well be more willing to find that agencies have met the first part of the Crooker test" when considering the use of "high 2."[87] The D.C. Circuit established specific guidance on what constitutes an "internal" document in Cox v. United States Department of Justice, which held to be protectible information that

> does not purport to regulate activities among members of the public . . . [and] does [not] set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public. Differently stated, the unreleased information is not "secret law," the primary tar-

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[83] 670 F.2d at 1074.

[84] 636 F.2d at 485-86.

[85] Crooker, 670 F.2d at 1069.

[86] See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Transp., 2005 WL 1606915, at *11 (rejecting agency's application of Exemption 2 to letter from private company to FAA official, because agency did not explain how letter was "predominantly internal").

[87] See Schwaner, 898 F.2d at 796 ("Judicial willingness to sanction a weak relation to 'rules and practices' may be greatest when the asserted government interest is relatively weighty."); see also, e.g., Kaganove, 856 F.2d at 889 (finding that agency, like any employer, "reasonably would expect" applicant rating plan to be internal); NTEU v. U.S. Customs Serv., 802 F.2d 525, 531 (D.C. Cir. 1986) (holding that "appointments of individual members of the lower federal bureaucracy is primarily a question of 'internal' significance for the agencies involved"); Shanmugadhasan v. U.S. Dep't of Justice, No. 84-0079, slip op. at 31-34 (C.D. Cal. Feb. 18, 1986) (finding that DEA periodical distributed to more than 1700 state, federal, and foreign agencies was "predominantly internal," by reasoning that it did not "modify or regulate public behavior" and that DEA took "stringent steps" to ensure that it was distributed only to law enforcement agencies); Inst. for Policy Studies, 676 F. Supp. at 5 ("[I]t is difficult to conceive of a document that is more 'predominantly internal' than a guide by which agency personnel classify documents.").

get of [the FOIA's] broad disclosure provisions.[88]

Accordingly, federal law enforcement documents that were widely disseminated have been held to be sufficiently internal for purposes of Exemption 2 protection.[89] In one case that delineates the outer bounds of this concept, a law enforcement document distributed to 1700 state, federal, and foreign law enforcement agencies was held to meet the test of "predominant internality" when its dissemination was necessary for maximum law enforcement effectiveness and access by the general public was prohibited.[90]

Indeed, reflecting the high degree of deference that is implicitly accorded law enforcement activities under this substantive aspect of Exemption 2,[91] courts have treated a wide variety of information pertaining to

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[88] 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam); see also Herrick's Newsletter, 2006 WL 1826185, at *7 ("The information properly withheld as 'high 2' does not purport to regulate interactions involving members of the public, and in no way constitutes the 'secret law' at which FOIA takes aim."); Sousa v. U.S. Dep't of Justice, No. 95-375, 1996 U.S. Dist. LEXIS 18627, at *11 (D.D.C. Dec. 9, 1996) (finding that "the exemption only applies to information 'used for a predominantly internal purpose'" (quoting Schiller, 964 F.2d at 1207)); cf. Gordon, 388 F. Supp. 2d at 1036-37 (requiring disclosure of "the legal basis for detaining someone whose name appears on a watch list").

[89] See, e.g., L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 901 (C.D. Cal. 2006) (rejecting plaintiff's arguments that the withheld information could not be "'predominantly internal'" because it had been "'widely disseminated'"; finding instead that the distribution to private contractors "does not negate th[e] fact" that the withheld information was "compiled for predominantly internal purposes," in part because of access restrictions placed on the private contractors).

[90] See Shanmugadhasan, No. 84-0079, slip op. at 31-34 (C.D. Cal. Feb. 18, 1986) (protecting sensitive portions of DEA periodical that contained drug-enforcement techniques and exchanges of law enforcement information); *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (noting governmentwide applicability of safeguarding requirements for federal information required to be established pursuant to section 893 of Homeland Security Act of 2002, 6 U.S.C. § 483 (Supp. IV 2004)); cf. Presidential Memorandum for the Heads of Executive Departments and Agencies Concerning Guidelines and Requirements in Support of the Information Sharing Environment (Dec. 16, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051216-10.html (discussing importance of, and establishing guidelines for, sharing "terrorism information" with state, local, tribal, and private entities).

[91] See Schwaner, 898 F.2d at 796 (acknowledging pragmatically and of

(continued...)

such activities as "internal," including:

(1) general guidelines for conducting investigations;[92]

(2) guidelines for conducting post-investigation litigation;[93]

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[91](...continued)
necessity that "[j]udicial willingness to sanction a weak relation to 'rules and practices' may be greatest when the asserted government interest is relatively weighty"); Wiesenfelder v. Riley, 959 F. Supp. 532, 535 (D.D.C. 1997) (pointing out deference properly accorded law enforcement activities); cf. Ctr. for Nat'l Sec. Studies, 331 F.3d at 927-28 (recognizing need for deference to be afforded government's top counterterrorism officials who can best make "predictive judgment of harm that will result from disclosure of information" concerning ongoing national security investigation into 9/11 terrorist attacks) (Exemption 7(A)).

[92] See, e.g., PHE, Inc. v. U.S. Dep't of Justice, 983 F.2d 248, 251 (D.C. Cir. 1993) ("FBI guidelines as to what sources of information are available to its agents"); Sinsheimer v. DHS, 437 F. Supp. 2d 50, 56 (D.D.C. 2006) ("'agency procedures for the conduct of sexual harassment investigations'" (quoting agency declaration)); Sussman v. U.S. Marshals Serv., No. 03-0610, 2005 WL 3213912, at *5 (D.D.C. Oct. 13, 2005) ("guidelines for threat investigations and threat assessments") (appeal pending); Suzhou Yuanda Enter. v. U.S. Customs & Border Prot., 404 F. Supp. 2d 9, 12 (D.D.C. 2005) (internal instructions on handling seized property); Delta Ltd. v. U.S. Customs & Border Prot. Bureau, 384 F. Supp. 2d 138, 147-48 (D.D.C.) (same), partial reconsideration granted on other grounds, 393 F. Supp. 2d 15 (D.D.C. 2005); Becker v. IRS, No. 91-C-1203, 1992 WL 67849, at *6 n.1 (N.D. Ill. Mar. 27, 1992) (operational rules, guidelines, and procedures for law enforcement investigations and examinations), motion to amend denied (N.D. Ill. Apr. 12, 1993), aff'd in part & rev'd in part on other grounds, 34 F.3d 398 (7th Cir. 1994); Goldsborough v. IRS, No. 81-1939, 1984 WL 612, at *7 (D. Md. May 10, 1984) (manual with guidelines for criminal investigation).

[93] See, e.g., Schiller, 964 F.2d at 1207-08 (upholding the district court's finding that litigation strategy pertaining to the Equal Access to Justice Act passes Exemption 2's "threshold test" of being "predominantly internal"; rejecting the requester's contention that it does not simply because it "involves the [agency's] relations with outsiders"); Silber v. U.S. Dep't of Justice, No. 91-876, transcript at 19-20 (D.D.C. Aug. 13, 1992) (bench order) (deciding that agency's fraud litigation monograph was "predominantly internal," and observing that this phrase "has been read very broadly and expansively"); see also Shumaker, Loop & Kendrick, L.L.P. v. Commodity Futures Trading Comm'n, No. 97-7139, slip op. at 9 (N.D. Ohio May 27, 1997) (relying on Schiller to determine that agency settlement guidelines are similar to exempt litigation strategies, and implicitly finding that they are "predominantly internal"). But see Dayton Newspapers, Inc. v. Dep't of the Air Force, 107 F. Supp. 2d 912, 920 (S.D. Ohio 1999) (rejecting agencies' invoca-
(continued...)

(3) guidelines for identifying law violators;[94]

(4) a study of agency practices and problems pertaining to undercover agents;[95]

(5) information related to prison security;[96] and

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[93](...continued)
tion of Exemption 2 for individual malpractice case settlement amounts, which court treated as not covered by "'internal personnel rules and practices'" and, therefore, as "presum[ptively] . . . subject to disclosure" absent the applicability of any other exemption).

[94] See, e.g., Dirksen, 803 F.2d at 1458-59 (affirming nondisclosure of claims-processing guidelines that could be used by health care providers to avoid audits); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) ("personal characteristics used by the Secret Service in evaluating the dangerousness of a subject" found "clearly exempt from disclosure" under both Exemptions 2 and 7(E)), summary affirmance granted, No. 00-5453, 2001 WL 674636 (D.C. Cir. May 10, 2001); Voinche, 940 F. Supp. at 328-29 (protecting as internal manual describing techniques used by professional gamblers to evade prosecution); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) (protecting "information about internal law enforcement techniques, practices, and procedures used by the IRS to coordinate the flow of information regarding Scientology"); Buffalo Evening News, Inc. v. U.S. Border Patrol, 791 F. Supp. 386, 393 (W.D.N.Y. 1992) (finding methods of apprehension and statement of ultimate disposition of case to be internal); Williston Basin Interstate Pipeline Co. v. FERC, No. 88-592, 1989 WL 44655, at *1-2 (D.D.C. Apr. 17, 1989) (holding portions of audit report to be "functional equivalent" of investigative techniques manual, and thus protectible under Exemptions 2 and 7(E), because disclosure would reveal techniques used by agency personnel to ascertain whether plaintiff was in compliance with federal law); Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 409-10 (D.D.C. 1983) (protecting computer program under Exemptions 2 and 7(E) because it merely instructs computer how to detect possible law violations, rather than modifying or regulating public behavior).

[95] See Cox v. FBI, No. 83-3552, slip op. at 1 (D.D.C. May 31, 1984) (holding that a report concerning undercover agents "is exclusively an internal FBI document which does not affect the public and contains no 'secret law'"), appeal dismissed, No. 84-5364 (D.C. Cir. Feb. 28, 1985).

[96] See Miller v. Dep't of Justice, No. 87-0533, 1989 WL 10598, at *1-2 (D.D.C. Jan. 31, 1989) (finding "predominantly internal" sections of Bureau of Prisons manual that summarize procedures for security of prison control centers, including escape-prevention plans, control of keys and locks within prison, instructions regarding transportation of federal prisoners, and arms and defensive equipment inventories maintained in facility); see also
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(6) vulnerability assessments.[97]

On the other hand, some courts have been reluctant to extend Exemption 2 protections in a non-law enforcement context without first finding that the records at issue are clearly "predominantly internal." In 1992, the District Court for the District of Columbia held that a computer-calculating technique used by the Department of Transportation to determine the safety rating for motor carriers was not purely internal because it was used to ascertain "whether and to what extent certain violations will have any legal effect or carry any legal penalty."[98] That same court held that documents relating to the procurement of telecommunications services by the federal government could not qualify as "primarily" internal because of the project's "massive" scale and significance.[99] Another district court, the United States District Court for the District of Oregon, held that a daily diary used to verify contract compliance did not contain internal instructions to government officials and therefore could not be withheld under Exemp-

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[96](...continued)
Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 417810, at *19 (D.D.C. June 6, 1995) (protecting numerical symbols used for identifying prisoners, because disclosure could assist others in breaching prisoners' security); Kuffel v. U.S. Bureau of Prisons, 882 F. Supp. 1116, 1123 (D.D.C. 1995) (same).

[97] See, e.g., Inst. for Policy Studies, 676 F. Supp. at 5; see also FOIA Update, Vol. X, No. 3, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two"); cf. Dorsett, 307 F. Supp. 2d at 36-37 (concluding that a Secret Service document used to "analyze and profile factual information concerning individuals" met the "predominantly internal" standard); Schwarz, 131 F. Supp. 2d at 150 (finding "the threat potential to individuals protected by the Secret Service" to be exempt from disclosure under both Exemptions 2 and 7(E)); Voinche, 940 F. Supp. at 328-29 (protecting as "predominantly internal" information relating to security of Supreme Court building and Supreme Court Justices); Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, 1990 WL 236133, at *5 (D.D.C. Dec. 19, 1990) (upholding on basis of Exemption 7(E) agency decision to protect final contingency plan in event of attack on United States).

[98] Don Ray Drive-A-Way Co. of Cal. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992). But see Wilder v. Comm'r, 601 F. Supp. 241, 242-43 (M.D. Ala. 1984) (determining that agreement between state and federal agencies concerning merely when to exchange information relevant to potential violations of tax laws is sufficiently internal procedure because it does not interpret substantive law).

[99] MCI Telecomms. Corp. v. GSA, No. 89-0746, 1992 WL 71394, at *5 (D.D.C. Mar. 25, 1992).

tion 2.[100]

In two decisions narrowly construing Exemption 2, the Courts of Appeals for the Ninth and Tenth Circuits refused to protect maps showing nest site locations of two different species of birds because the documents lacked sufficient "predominant internality" under a rigid interpretation of Exemption 2's language.[101] Declaring that the statutory phrase "internal personnel" modified both "rules" and "practices" of an agency, the Tenth Circuit turned down arguments from the Forest Service that the maps related to agency practices in that they helped Forest Service personnel perform their management duties.[102] Refusing to consider the potential harm from disclosure of such maps,[103] the Tenth Circuit declared that it would "stretch[] the language of the exemption too far to conclude that owl maps 'relate' to personnel practices of the Forest Service."[104] In reaching this decision, however, the Tenth Circuit relied on the D.C. Circuit case of Jordan v. United States Department of Justice,[105] even though the D.C. Circuit, sitting en banc, had explicitly repudiated the rationale of Jordan in this respect.[106]

Agreeing in a related case that such wildlife maps may not be protected from disclosure despite the potential risk of harm from their disclo-

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[100] Tidewater Contractors, Inc. v. USDA, No. 95-541, 1995 WL 604112, at *3-4 (D. Or. Oct. 4, 1995), appeal dismissed voluntarily, No. 95-36238 (9th Cir. Mar. 5, 1996).

[101] See Maricopa Audubon Soc'y, 108 F.3d 1082; Audubon Soc'y, 104 F.3d 1201.

[102] Audubon Soc'y, 104 F.3d at 1204; see also Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1317-18 (D. Utah 2003) (finding that "inundation maps," e.g., for Hoover Dam, do not meet extremely narrow "high 2" test used by Tenth Circuit requiring relation to "personnel practices").

[103] But see also Pease v. U.S. Dep't of Interior, No. 99CV113, slip op. at 2-4 (D. Vt. Sept. 17, 1999) (finding, on basis of National Park Omnibus Management Act of 1998, 16 U.S.C. § 5937 (2000), that agency properly withheld information pertaining to location of wildlife in Yellowstone National Park ecosystem) (Exemption 3).

[104] Audubon Soc'y, 104 F.3d at 1204; see also Thompson v. U.S. Dep't of Justice, No. 96-1118, slip op. at 30 (D. Kan. July 15, 1998) (following Audubon Society to deny protection to file numbers found not to qualify under rigid application of "personnel practices" requirement).

[105] See Audubon Soc'y, 104 F.3d at 1204 (citing Jordan, 591 F.2d at 764).

[106] See Crooker, 670 F.2d at 1075 (repudiating "the rationale of Jordan because it does not appear to comport with the full congressional intent underlying FOIA") (subsequent en banc action).

sure, the Ninth Circuit did not unqualifiedly accept the rationale of its circuit neighbor: Although declaring that the maps bore "no meaningful relationship to the 'internal personnel rules and practices' of the Forest Service,"[107] it instead stressed that the maps "do[] not tell the Forest Service how to catch lawbreakers [or] tell lawbreakers how to avoid the Forest Service's enforcement efforts," and it thereby specifically distinguished (and thus left undisturbed) its previous significant Exemption 2 decisions involving law enforcement records.[108] The Ninth Circuit's decision therefore has left much room for "high 2" protection of any information holding law enforcement significance.[109]

Once the "internality" of the information involved is established, courts readily move to the second "high 2" requirement and focus on what constitutes circumvention of legal requirements. As is discussed in more detail below, such legal requirements need not be criminally oriented and instead can be of a civil or regulatory nature.[110] Further, the potential law-

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[107] Maricopa, 108 F.3d at 1086.

[108] Id. at 1087 (distinguishing Hardy, 631 F.2d at 656-57, and Dirksen, 803 F.2d at 1458-59).

[109] See Maricopa, 108 F.3d at 1087 (emphasizing that nest-site information "does not constitute 'law enforcement material'" entitled to protection under Exemption 2); see also, e.g., Lahr v. NTSB, 453 F. Supp. 2d 1153, 1171 (C.D. Cal. 2006) (reiterating Ninth Circuit's distinction between "law enforcement materials" and "administrative materials" in applying "high 2"); L.A. Times, 442 F. Supp. 2d at 901 (citing Hardy and Dirksen in finding that Army reconstruction efforts in Iraq had law enforcement purpose); Gordon, 388 F. Supp. 2d at 1035-36 (relying on Hardy in holding that FBI aviation "watch list" records were properly withheld under "high 2"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 965 (C.D. Cal.) (recognizing both protective room left by Ninth Circuit -- in that its Hardy rule remains "still in force today" -- and agency's consequently qualifying law enforcement purpose for container-inspection data at Los Angeles/Long Beach seaport), reconsideration denied, 272 F. Supp. 2d at 966-68 (C.D. Cal. 2003), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug. 26, 2003).

[110] See, e.g., Schiller, 964 F.2d at 1208 ("[W]e have not limited the 'high 2' exemption to situations where penal or enforcement statutes could be circumvented."); cf. Jefferson v. Dep't of Justice, 284 F.3d 172, 178 (D.C. Cir. 2002) (reiterating that Exemption 7 "'covers investigatory files related to enforcement of all kinds of laws,' including those involving 'adjudicative proceedings'" (quoting Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 n.46 (D.C. Cir. 1974)); Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 550 (6th Cir. 2001) (explaining that the "Court has adopted a per se rule" that Exemption 7 applies not only to records from criminal enforcement actions, but to "records compiled for civil enforcement purposes as well"); Gordon, 388 F. Supp. 2d at 1036 ("Exemption 7(E) is not limited to documents created in connection

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breakers from whom the information is being protected need not be outside of the government -- meaning that information can be withheld to protect even against circumvention of legal requirements by agency employees.[111]

There are a number of different categories of information for which the risk of circumvention is readily apparent. Critically important are records that reveal the nature and extent of a particular investigation; these have been repeatedly held protectible on this "anti-circumvention" basis.[112] One common form of such information is sensitive administrative codes that contain information about agency investigations.[113]

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[110](...continued)
with a criminal investigation.").

[111] See, e.g., Sinsheimer, 437 F. Supp. 2d at 56 (approving the withholding of "'agency procedures for the conduct of sexual harassment investigations'" because they could allow the subjects of such investigations (i.e., employees) to "'potentially foil investigative tactics'" (quoting agency declaration)); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 166 (holding that "guidelines for internal audits of Commerce expenses and travel vouchers" were properly withheld, because release "could enable Commerce employees to evade the law").

[112] See, e.g., Williams v. U.S. Dep't of Justice, No. 02-2452, slip op. at 6 (D.D.C. Feb. 4, 2004) (protecting FBI confidential source numbers because disclosure could reveal "the identity, scope, and location of FBI source coverage within a particular area"), reconsideration denied (D.D.C. Mar. 10, 2004), aff'd per curiam, 171 F. App'x 857 (D.C. Cir. 2005); Rosenberg v. Freeh, No. 97-0476, slip op. at 4-6 (D.D.C. May 12, 1998) (disclosure of FBI source numbers, banking codes, and code name would risk circumvention of law); Barkett v. U.S. Dep't of Justice, No. 86-2029, 1989 WL 930993, at *1 (D.D.C. July 18, 1989) ("The non-disclosure of information which reveals the nature and extent of a particular criminal investigation has been upheld under this exemption."); cf. KTVK-TV v. DEA, No. 89-379, 1989 U.S. Dist. LEXIS 10348, at *3 (D. Ariz. Aug. 29, 1989) (finding that disclosure of tape of speech by local police chief, given at seminar sponsored by DEA, which contained remarks on police department programs used or contemplated to discourage illegal drug use would "tend to discourage illegal use of drugs" rather than "enable drug users to avoid detection").

[113] See, e.g., Chavez-Arellano v. U.S. Dep't of Justice, No. 05-2503, 2006 WL 2346450, at *5-6 (D.D.C. Aug. 11, 2006) (protecting internal DEA codes because disclosure "would help identify the priority given to particular investigations" and "could allow suspects to avert detection and apprehension"); Neuhausser v. U.S. Dep't of Justice, No. 6: 03-531, 2006 WL 1581010, at *10 (E.D. Ky. June 6, 2006) (approving redaction of sensitive law enforcement codes); Wilson v. DEA, 414 F. Supp. 2d 5, 12 (D.D.C. 2006) (approving withholding of DEA Geographical Drug Enforcement Program (G-DEP)
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EXEMPTION 2

Another set of information that courts have recognized the importance of protecting is computer access codes, instructions, and programs used by agencies that might assist in gaining wrongful access to agencies' electronically stored information.[114] Nondisclosure of other sensitive information that might permit unauthorized access to agency computer or communications systems also has been upheld.[115]

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[113](...continued)
codes); Butler v. U.S. Dep't of Justice, 368 F. Supp. 2d 776, 786 (E.D. Mich. 2005) (finding that disclosure of DEA "violator identifiers" could allow suspects to "decode this information and change their pattern of drug trafficking"), summary affirmance granted, No. 05-1922 (6th Cir. Jan. 25, 2006); Santos v. DEA, No. 02-0734, 2005 WL 555410, at *1 (D.D.C. Mar. 7, 2005) (concluding that disclosure of sensitive DEA codes "would compromise narcotics investigations by allowing drug users to alter their drug usage and exposing information regarding individuals cooperating with the agency"); Augarten v. DEA, No. 93-2192, 1995 WL 350797, at *1 (D.D.C. May 22, 1995) (acknowledging that release of "drug codes, information identification codes, and violator identification codes" would reveal nature and extent of specific investigations); Manna v. U.S. Dep't of Justice, 832 F. Supp. 866, 872, 880 (D.N.J. 1993) (finding that release of G-DEP and NADDIS numbers "would impede" investigative and enforcement efforts).

[114] See, e.g., Dirksen, 803 F.2d at 1457, 1459 (protecting instructions for computer coding); Masters v. ATF, No. 04-2274, slip op. at 8-9 (D.D.C. Sept. 25, 2006) (protecting computer data indicating "the terminal from which a query was made and the route by which the record was retrieved"); Doyharzabal v. Gal, No. 00-2995, 2001 WL 35810671, at *6, *10 (D.S.C. Apr. 25, 2001) (magistrate's recommendation) (protecting "an internal computer access code utilized by only [agency] employees in the course of their law enforcement duties"), adopted (D.S.C. Sept. 13, 2001), summary affirmance granted sub nom. Doyharzabal v. Fed. Bureau of Prisons, 31 F. App'x 144 (4th Cir. 2002); Boyd v. U.S. Marshal Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *6-7 (D.D.C. Mar. 15, 2002) (protecting unspecified computer codes), summary judgment granted, 2002 U.S. Dist. LEXIS 27735 (D.D.C. Oct. 7, 2002); Ferranti v. ATF, 177 F. Supp. 2d 41, 45 (D.D.C. 2001) (protecting "internal BATF computer codes" as "clearly fall[ing] within Exemption 2"); Kuffel, 882 F. Supp. at 1123 (protecting computer and teletype routing symbols, access codes, and computer option commands); Beckette v. USPS, No. 90-1246, 1993 WL 730711, at *4 (E.D. Va. Mar. 11, 1993) (protecting control file, which "is a set of instructions that controls the means by which data is entered and stored in the computer"), aff'd, 25 F.3d 1038 (4th Cir. 1994) (unpublished table decision); see also Windels, 576 F. Supp. at 412-14 (protecting computer program under Exemptions 2 and 7(E)); Kiraly v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 82,465, at 83,135 (N.D. Ohio Feb. 17, 1982) (protecting computer codes under Exemptions 2 and 7(E)), aff'd, 728 F.2d 273 (6th Cir. 1984).

[115] See, e.g., Knight v. NASA, No. 2:04-cv-2054, 2006 WL 3780901, at *6
(continued...)

[115](...continued)
(E.D. Cal. Dec. 21, 2006) (observing that "high 2" protects "information facilitating a computer hacker's access to vulnerable agency databases, like file pathnames, keystroke instructions, directory address and other internal information," and approving agency's withholding of information that would reveal a server's "directory structure"); Poulsen v. U.S. Customs & Border Prot., No. 06-1743, 2006 WL 2788239, at *6-9 (N.D. Cal. Sept. 26, 2006) (holding that the agency properly withheld certain specific technical details of repairing a computer network, such as the "identifying codes for machines and workstations," the "names or other specific identifying information for databases or the patch installed," and the "work tickets" generated in response to employees' requests for assistance); Odle v. Dep't of Justice, No. 05-2711, 2006 WL 1344813, at *13 (N.D. Cal. May 17, 2006) (upholding agency's use of Exemption 2 to protect "'location codes, allegations codes, and computer pathnames that are used to access [agency's] computerized databases'" (quoting agency declaration)); Sussman, 2005 WL 3213912, at *5 (finding that agency properly withheld computer pathnames, which give location of files on computer network); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 109 (D.D.C. 2005) (protecting "information [that] would allow access to an otherwise secure database"); Truesdale v. U.S. Dep't of Justice, No. 03-1332, 2005 WL 3273093, at *7 (D.D.C. July 22, 2005) (finding that "internal administrative codes used in criminal law enforcement databases" were properly withheld because release "would allow individuals to circumvent the computer system"); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 166 (protecting file numbers and administrative markings because release could render computer system "vulnerable to hacking," and also protecting information pertaining to an internal DOD communication method); Robert v. U.S. Dep't of Justice, No. 99-3649, 2001 WL 34077473, at *5 (E.D.N.Y. Mar. 22, 2001) (recognizing necessity of redacting FBI file numbers to "protect against unauthorized access to [agency] computer system"), aff'd, 26 F. App'x 87 (2d Cir. 2002); Jefferson v. U.S. Dep't of Justice, No. 00-1489, slip op. at 3 (D.D.C. Nov. 30, 2000) (ruling that disclosure of case file numbers and computer pathnames "might be used to compromise the security" of agency's electronic databases and computer systems), aff'd in part & remanded in part on other grounds, 284 F.3d 172 (D.C. Cir. 2002); Bartolotta v. FBI, No. 99-1145, slip op. at 7 (D.D.C. July 13, 2000) (finding teletype access codes to be properly withheld because release "would enable individuals to interfere with [agency's] communications with other law enforcement agencies"); Linn, 1995 WL 417810, at *18-19, *21-22, *24-25 (protecting "access codes and routing symbols" withheld by Marshals Service because disclosure "could allow unauthorized access to and compromise of data in law enforcement communications systems," but refusing to protect similar information withheld by INTERPOL and Customs Service because asserted risks of compromising integrity of agencies' recordkeeping system were found to be "plainly insufficient"); Hall v. U.S. Dep't of Justice, No. 87-0474, 1989 WL 24542, at *2 (D.D.C. Mar. 8, 1989) (protecting various items that
(continued...)

EXEMPTION 2

Exemption 2's "anti-circumvention" protection also is readily applicable to vulnerability assessments, which are perhaps the quintessential type of record warranting protection on that basis; such records generally assess an agency's vulnerability (or that of another institution) to some form of outside interference or harm by identifying those programs or systems deemed the most sensitive and describing specific security measures that can be used to counteract such vulnerabilities.[116] A prime example of vulnerability assessments warranting protection under "high 2" are the computer security plans that all federal agencies are required by law to prepare.[117] In a decision involving such a document, for example, Schreibman v. United States Department of Commerce,[118] Exemption 2 was invoked to prevent unauthorized access to information which could result in "alternation [sic], loss, damage or destruction of data contained in the computer system."[119] It should be remembered, however, that even such a sensitive document must be reviewed to determine whether any "reasonably segregable" portion can be disclosed without harm.[120] (See the further

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[115](...continued)
"could facilitate unauthorized access to [agency] communications systems"); Inst. for Policy Studies, 676 F. Supp. at 5 (according Exemption 2 protection to a record revealing the most sensitive portions of an agency system which "could be used to seek out the [system's] vulnerabilities"); see also FOIA Update, Vol. X, No. 3, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two") (discussing case law according "protection to items of sensitive computer-related information").

[116] See FOIA Update, Vol. X, No. 3, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two") (observing that "Exemption 2 should be fully available to protect vulnerability assessments, wherever it reasonably is determined that disclosure risks circumvention of the law or of some lawful requirement," and collecting cases); see also *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (urging necessary protection of information regarding "critical systems, facilities, stockpiles, and other assets [which themselves hold potential for] use as weapons of mass destruction").

[117] See FOIA Update, Vol. X, No. 3, at 4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two") (citing Computer Security Act of 1987, Pub. L. No. 100-235, 101 Stat. 1724 (1988)).

[118] 785 F. Supp. 164 (D.D.C. 1991).

[119] Id. at 166.

[120] See id.; see also, e.g., PHE, 983 F.2d at 252 (remanding for "high 2" segregation; "district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability" (citing Schiller, 964 F.2d at 1210)); Wightman v. ATF, 755 F.2d 979, 982-83 (1st Cir. 1985) (remanding for determination on
(continued...)

discussions of this point under Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, below.)

Release of various categories of information other than those that already have been described above also has been found likely to result in harmful circumvention:

(1) information that would reveal the identities of informants;[121]

(2) information that would jeopardize undercover agents or op-

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[120](...continued)
segregability); FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation"); Schrecker v. U.S. Dep't of Justice, 74 F. Supp. 2d 26, 32 (D.D.C. 1999) (finding that FBI properly "shield[ed] from disclosure [confidential informant] source codes [and] identifying data . . . no portion of [which] is reasonably segregable"), aff'd in part, rev'd & remanded in part, all on other grounds, 254 F.3d 162 (D.C. Cir. 2001); Archer v. HHS, 710 F. Supp. 909, 911-12 (S.D.N.Y. 1989) (upon in camera review, ordering disclosure of Medicare reimbursement-review criteria, but with specific audit trigger number segregated for protection).

[121] See, e.g., Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1065 (3d Cir. 1995) (upholding protection for informant codes); Jones v. FBI, 41 F.3d 238, 244-45 (6th Cir. 1994) (same); Massey, 3 F.3d at 622 (finding that disclosure of informant symbol numbers and source-identifying information "could do substantial damage to the FBI's law enforcement activities"); Lesar, 636 F.2d at 485 (finding that "informant codes plainly fall within the ambit of Exemption 2"); Williams, No. 02-2452, slip op. at 6 (D.D.C. Feb. 4, 2004) ("The release of the source symbol number could result in the disclosure of the informant's identity or the identity, scope, and location of FBI source coverage within a particular area."); Summers v. U.S. Dep't of Justice, No. 98-1837, slip op. at 13 (D.D.C. Mar. 10, 2003) (determining that informant designations and file numbers are properly covered by Exemption 2); Mack v. Dep't of the Navy, 259 F. Supp. 2d 99, 107 n.3 (D.D.C. 2003) (finding cooperating witness identification numbers to be "strictly internal and . . . sensitive because they conceal the identity of informants who were promised confidentiality in exchange for their cooperation"); Raulerson v. Ashcroft, 271 F. Supp. 2d 17, 24 (D.D.C. 2002) (finding FBI source symbol numbers to be properly withheld as category of information that is "amenable to nonspecific explanation"); Shores v. FBI, 185 F. Supp. 2d 77, 83 (D.D.C. 2002) (recognizing that disclosing "informant symbol and file numbers," and thereby "compromising the identities of government informants," readily "could deter individuals from cooperating with the government"); Sinito v. U.S. Dep't of Justice, No. 87-0814, slip op. at 12 (D.D.C. July 12, 2000) (concluding that protection of source numbers continues even after death of informants); cf. Globe Newspaper Co. v. FBI, No. 91-13257, 1992 WL 396327, at *3 (D. Mass. Dec. 29, 1992) (ordering release of amount paid to FBI informant personally involved in continuing criminal activity).

erations;[122]

(3) sensitive administrative codes and notations in law enforcement files;[123]

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[122] See Peltier v. FBI, No. 02-4328, slip op. at 16-17 (D. Minn. Oct. 24, 2006) (magistrate's recommendation) (concluding that the FBI properly withheld "'the specific dollar amount of funds paid to an informant for his/her undercover operational expenses,'" and distinguishing Globe Newspaper, 1992 WL 396327 (quoting agency declaration)), adopted (D. Minn. Feb. 9, 2007); Russell v. FBI, No. 03-0611, slip op. at 8 (D.D.C. Jan. 9, 2004) (holding that release of "funds used for undercover operations . . . 'would impede the effectiveness of the FBI's internal law enforcement procedures'" (quoting agency declaration)), summary affirmance granted sub nom. Russell v. Dep't of Justice, No. 04-5036, 2004 WL 1701044 (D.C. Cir. July 29, 2004); Barkett, 1989 WL 930993, at *1 (finding that disclosure of "sensitive, detailed codes of current [DEA] activities could place the lives of undercover DEA agents in extreme peril"); Cox v. FBI, No. 83-3552, slip op. at 2 (D.D.C. May 31, 1984) (protecting report concerning FBI's undercover agent program because of potential for discovering identities of agents). But see also Homick v. U.S. Dep't of Justice, No. 98-00557, slip op. at 15 (N.D. Cal. Sept. 16, 2004) (ordering disclosure of twenty-two-year-old records concerning undercover vehicle because FBI failed to show that same type of vehicle was still being used), appeal dismissed voluntarily, No. 04-17568 (9th Cir. July 5, 2005).

[123] See, e.g., Founding Church of Scientology v. Smith, 721 F.2d 828, 830-31 (D.C. Cir. 1983) (protecting sensitive instructions regarding administrative handling of document); Boyd, 2002 U.S. Dist. LEXIS 27734, at *6-7 (protecting ATF "voucher numbers" and "law enforcement technique codes"); Coleman v. FBI, 13 F. Supp. 2d 75, 79 (D.D.C. 1998) (finding that the disclosure of file numbers "could potentially reveal a sequence of information including the dates, times, and identities of . . . informant transactions thereby exposing the depth of FBI's informant coverage"); Cappabianca v. Comm'r, U.S. Customs Serv., 847 F. Supp. 1558, 1563 (M.D. Fla. 1994) (protecting Customs Service file numbers "containing information such as the type and location of the case" because "if the code were cracked, [it] could reasonably lead to circumvention of the law"); Curcio v. FBI, No. 89-941, 1990 WL 179605, at *2 (D.D.C. Nov. 2, 1990) (protecting expense accounting in FBI criminal investigation). But see, e.g., Thompson, No. 96-1118, slip op. at 29-30 (D. Kan. July 15, 1998) (requiring release of Office of Professional Responsibility file numbers, even though recognizing their "sensitive and confidential" nature); Fitzgibbon v. U.S. Secret Serv., 747 F. Supp. 51, 57 (D.D.C. 1990) (rejecting the agency's argument regarding the integrity of its recordkeeping system, and finding that "agencies have no generalized interest in keeping secret the method by which they store records"); Wilkinson v. FBI, 633 F. Supp. 336, 342 & n.13 (C.D. Cal. 1986) (holding codes that identify law enforcement techniques not readily protectible under Exemption 2).

(4) security techniques used in prisons;[124]

(5) agency audit guidelines;[125]

(6) agency testing or employee rating materials;[126]

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[124] See, e.g., Cox v. U.S. Dep't of Justice, 601 F.2d at 4-5 (upholding nondisclosure of weapon, handcuff, and transportation security procedures); Jimenez v. FBI, 938 F. Supp. 21, 27 (D.D.C. 1996) (approving nondisclosure of criteria for classification of prison gang member); Hall, 1989 WL 24542, at *2 (reasoning that disclosure of teletype routing symbols, access codes, and data entry codes maintained by Marshals Service "could facilitate unauthorized access to information in law enforcement communications systems, and [thereby] jeopardize [prisoners' security]"); Miller, 1989 WL 10598, at *1 (disclosure of sections of Bureau of Prisons (BOP) Custodial Manual that describe procedures for security of prison control centers would "necessarily facilitate efforts by inmates to frustrate [BOP's] security precautions"); cf. Thornburgh v. Abbott, 490 U.S. 401, 417 (1989) (rejecting requester's constitutional challenge to BOP regulation excluding publications that, although not necessarily likely to lead to violence, are determined by warden "to create an intolerable risk of disorder . . . at a particular prison at a particular time") (non-FOIA case). But see Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 631847, at *4-5 (D.D.C. Aug. 22, 1995) (rejecting as "conclusory" BOP's argument that release of case summary and internal memoranda would cause harm to safety of prisoners).

[125] See, e.g., Dirksen, 803 F.2d at 1458-59 (upholding protection of internal audit guidelines in order to prevent risk of circumvention of agency Medicare reimbursement regulations); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 166 (holding that agency properly withheld "guidelines for internal audits of Commerce expenses and travel vouchers"); Wiesenfelder, 959 F. Supp. at 535, 539 (protecting benchmarks signifying when enforcement action taken, errors identifying agency's tolerance for mistakes, and dollar amounts of potential fines); Archer, 710 F. Supp. at 911-12 (ordering Medicare reimbursement-review criteria disclosed, but protecting specific number that triggers audit); Windels, 576 F. Supp. at 412-13 (withholding computer program containing anti-dumping detection criteria). But see Don Ray Drive-A-Way, 785 F. Supp. at 200 (ordering disclosure based upon finding that knowledge of agency's regulatory priorities would allow regulated carriers to concentrate efforts on correcting most serious safety breaches).

[126] See, e.g., Patton v. FBI, 626 F. Supp. 445, 447 (M.D. Pa. 1985) (finding that testing materials were properly withheld because release would impair effectiveness of system and give future applicants unfair advantage), aff'd, 782 F.2d 1030 (3d Cir. 1986) (unpublished table decision); Oatley v. United States, 3 Gov't Disclosure Serv. (P-H) ¶ 83,274, at 84,065 (D.D.C. Aug. 16, 1983) (concluding that civil service testing materials satisfy two-part Crooker test); see also Kaganove, 856 F.2d at 890 (holding that disclo-

(continued...)

(7) codes that would identify intelligence targets;[127]

(8) agency credit card numbers;[128]

(9) an agency's unclassified manual detailing the categories of information that are classified, as well as their corresponding classification levels;[129]

(10) information concerning border security;[130]

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[126](...continued)
sure of applicant rating plan would render it ineffectual and allow future applicants to "embellish" job qualifications); NTEU, 802 F.2d at 528-29 (determining that disclosure of hiring plan would give unfair advantage to some future applicants); Samble v. U.S. Dep't of Commerce, No. 92-225, slip op. at 12-13 (S.D. Ga. Sept. 22, 1994) (finding that release of evaluative criteria would compromise validity of rating process). But see Commodity News Serv. v. Farm Credit Admin., No. 88-3146, 1989 U.S. Dist. LEXIS 8848, at *13-16 (D.D.C. July 31, 1989) (holding the steps to be taken in selecting a receiver for liquidation of a failed federal land bank, including the sources an agency might contact when investigating candidates, to be not protectible under "high 2" because the agency did not demonstrate how the disclosure would allow any applicant to "gain an unfair advantage in the . . . process").

[127] See Tawalbeh v. U.S. Dep't of the Air Force, No. 96-6241, slip op. at 13 (C.D. Cal. Aug. 8, 1997) (finding that disclosure of Air Force internal intelligence collection codes "would allow unauthorized persons to decode classified . . . messages"); cf. Schrecker, 74 F. Supp. 2d at 32 (finding that the disclosure of identity of "governmental unit that submitted a particular document" could "risk circumvention of the ability of the [Defense Intelligence Agency] to collect or relay intelligence information").

[128] See Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 166 (approving redaction of "government credit card numbers to prevent public access and misuse"); Boyd, 2002 U.S. Dist. LEXIS 27734, at *6-7 (finding that credit card account numbers were properly withheld under Exemption 2); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 83 F. Supp. 2d at 110 (upholding protection of government credit card numbers based upon "realistic possibility of . . . misuse and fraud").

[129] See Inst. for Policy Studies, 676 F. Supp. at 5 (upholding the use of Exemption 2 to protect an Air Force security classification guide from which "a reader can gauge which components [of a classified emergency communication system] are the most sensitive and consequently the most important").

[130] See Herrick's Newsletter, 2006 WL 1826185, at *5 (approving withholding of portions of manual pertaining to seized property, in part because
(continued...)

(11) details of laboratory testing procedures;[131]

(12) law enforcement team and operation names;[132] and

(13) guidelines for protecting government officials.[133]

Even within sensitive law enforcement contexts, however, courts have rejected justifications for withholding when they fail to sufficiently articulate, with adequate evidentiary support, the potential harm from disclosure.[134] Similarly, in an exceptionally unusual decision, one court refused to

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[130](...continued)
they could assist those wanting to smuggle contraband into country); Coastal Delivery Corp., 272 F. Supp. 2d at 965 (recognizing Exemption 2 protection for the number of inspections performed on shipping containers at a particular port by Customs Service, based on law enforcement purpose).

[131] See VoteHemp, Inc. v. DEA, No. 02-985, slip op. at 18-19 (D.D.C. Oct. 15, 2004) (concluding that DEA properly withheld "internal procedures for certifying a future [laboratory] testing procedure," because disclosure "could 'significantly risk future circumvention of federal drug control regulations'" (quoting agency declaration)).

[132] See Delta, 384 F. Supp. 2d at 148 (affording "high 2" protection to "law enforcement team or operation names and nomenclature"); Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, No. 04-1919, 2005 WL 913268, at *3 (D.D.C. Apr. 20, 2005) (protecting "law enforcement investigation case name" and "investigation team name").

[133] See Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 166 (finding that "guidelines for protecting the Secretary of Commerce on trade missions" were properly withheld, as disclosure "would compromise the Secretary's safety, making the Secretary subject to unlawful attacks"); Voinche, 940 F. Supp. at 329, 331 (approving nondisclosure of information relating to security of Supreme Court building and Justices).

[134] See, e.g., Gerstein v. U.S. Dep't of Justice, No. C-03-04893, slip op. at 18-21 (N.D. Cal. Sept. 30, 2005) (ordering disclosure of a compilation detailing each United States Attorney's Office's use of certain delayed-notice warrants, because the technique "is a matter of common knowledge" and disclosure would not reduce the technique's effectiveness); Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *14 (D.D.C. Aug. 10, 2005) (rejecting as "conclusory" agency's argument that release of documents concerning congressman's discussions with foreign officials "would reveal certain internal rules and practices" of agency; conjecturing that such an approach "would sweep into Exemption 2 nearly every record" maintained by agency); Carlson v. USPS, No. C-02-05471, 2005 WL 756573, at *6-7 (N.D. Cal. Mar. 31, 2005) (rejecting the agency's use of "high 2" to protect records
(continued...)

apply the "high 2" aspect of Exemption 2 to procedures that were designed to protect against any state agency's "circumventi[on]" of federal audit criteria for welfare reimbursement -- purely as a matter of special regard for the legal status of states.[135]

Under some circumstances, Exemption 2 may be applied to prevent potential circumvention through a "mosaic" approach -- information which would not by itself reveal sensitive law enforcement information can nonetheless be protected to prevent damage that could be caused by the assembly of different pieces of similar information by a requester.[136] This cir-

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[134](...continued)
pertaining to mailbox locations, because the "plaintiff debunks defendant's efforts to show that releasing the information could be used to facilitate lawlessness" and because some of the agency's arguments were found to be "far-fetched," "speculative[,] and unsupported by evidence in the record"); Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316, 322 (D.D.C. 2005) (finding raw data from psychological test of prisoner not protectible under Exemptions 2 or 7(F) because agency's reasoning was "too speculative and not based upon competent evidence"); Homick, No. 98-00557, slip op. at 14-15 (N.D. Cal. Sept. 16, 2004) (ordering disclosure of information related to a twenty-year-old polygraph test because "the FBI has provided no statement that the type of machine, test, and number of charts used twenty years ago are the same or similar to those utilized today," and for similar reasons also ordering disclosure of information in twenty-two-year-old records related to an undercover vehicle).

[135] See Massachusetts v. HHS, 727 F. Supp. 35, 42 (D. Mass. 1989) ("The Act simply cannot be interpreted in such a way as to presumptively brand a sovereign state as likely to circumvent federal law. The second prong of Exemption 2 does not apply when it is [the state] itself that seeks the information.").

[136] See, e.g., Brunetti v. FBI, 357 F. Supp. 2d 97, 104 (D.D.C. 2004) (reasoning that FBI source symbol numbers and informant file numbers were properly withheld because "it would be possible . . . to discern patterns of information associated with particular sources," thereby allowing "[a]n individual with knowledge of the people and facts [to] be able to deduce the identities of these sources"); Dorsett, 307 F. Supp. 2d at 36 (concluding that certain Secret Service information, the disclosure of which in isolation would be "relatively harmless," could "in the aggregate" benefit those attempting to violate the law); Accuracy in Media v. FBI, No. 97-2107, slip op. at 5 (D.D.C. Mar. 31, 1999) (finding persuasive the FBI's argument that, with release of informant symbol numbers, "over time an informant may be identified by revealing . . . connections with dates, times, places, events"); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 712 (W.D.N.Y. 1991) (ruling that source symbol and administrative identifiers were properly withheld on basis that "accumulation of information" known to be from same source could lead to detection); cf. Ctr. for Nat'l Sec. Studies, 331 F.3d at 928-29
(continued...)

cumstance first arose in the Exemption 2 context in a case involving a request for "Discriminant Function Scores" used by the IRS to select tax returns for examination.[137] Although the IRS conceded that release of any one individual's tax score would not disclose how returns are selected for audit, it took the position that the routine release of such scores would enable the sophisticated requester to discern, in the aggregate, its audit criteria, thus facilitating circumvention of the tax laws; the court accepted this rationale as an appropriate basis for affording protection under Exemption 2.[138] In a related case, one court upheld the denial of access to an IRS memorandum containing tolerance criteria used by the agency in its investigations, finding that disclosure would "undermine the enforcement of . . . internal revenue laws."[139] Increasingly, the "mosaic" approach has been used to protect information related to national security and homeland security, whether under Exemption 2,[140] or otherwise.[141] (See Exemption 1, Additional Considerations, above, for further discussion of the "mosaic"

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[136](...continued)
(finding danger, in context of national security, based partly on "mosaic" concept); Davin, 60 F.3d at 1064-65 (remanding for agency to specify content of documents for which it raises "mosaic" argument).

[137] Ray v. U.S. Customs Serv., No. 83-1476, 1985 U.S. Dist. LEXIS 23091, at *10-11 (D.D.C. Jan. 28, 1985).

[138] See id.; see also Novotny v. IRS, No. 94-549, 1994 WL 722686, at *3 (D. Colo. Sept. 8, 1994); Wilder, 607 F. Supp. at 1015.

[139] O'Connor v. U.S. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988). But cf. Archer, 710 F. Supp. at 911-12 (requiring careful segregation so that only truly sensitive portion of audit criteria is withheld).

[140] See, e.g., L.A. Times, 442 F. Supp. 2d at 898-99, 902 (using "mosaic" analysis in context of Exemptions 2 and 7(F) to find names of private security contractors protectible, because insurgents could use names in conjunction with other data "to organize attacks on vulnerable" companies and "to disrupt U.S. reconstruction efforts"); Coastal Delivery Corp., 272 F. Supp. 2d at 964-65 (concluding that the Customs Service had established that the release of seaport cargo-inspection data, combined with other known data, could -- through a "mosaic" analysis -- lead to the identification of highly sensitive security information and "risk circumvention of agency regulations as well as the law"); Inst. for Policy Studies, 676 F. Supp. at 5 (reasoning that classification guidelines could reveal which parts of sensitive communications system are most sensitive, which would enable foreign intelligence services to gather related unclassified records and seek out system's vulnerabilities).

[141] See, e.g., Ctr. for Nat'l Sec. Studies, 331 F.3d at 928-29 (finding danger, in context of national security and law enforcement, based partly on "mosaic" concept) (Exemption 7(A)); Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) (applying "mosaic" analysis in context of Exemptions 1 and 3).

concept.)

Although originally, as in Crooker, the "anti-circumvention" protection afforded by Exemption 2 was applied almost exclusively to sensitive portions of criminal law enforcement manuals, it since has been extended to civil enforcement and regulatory matters, including some matters that are not law enforcement activities in the traditional sense.[142] In a pivotal case on this point, the National Treasury Employees Union sought documents known as "crediting plans," records used to evaluate the credentials of federal job applicants; the Customs Service successfully argued that disclosure of the plans would make it difficult to evaluate the applicants because they could easily exaggerate or even fabricate their qualifications, such falsifications would go undetected because the government lacked the resources necessary to verify each application, and unscrupulous future applicants could thereby gain an unfair competitive advantage.[143] The D.C. Circuit approved the withholding of such criteria under a refined application of Crooker, which focused directly on its second requirement, and held that the potential for circumvention of the selection program, as well as the general statutory and regulatory mandates to enforce applicable civil service laws, was sufficient to bring the information at issue within the protection of Exemption 2.[144] The agency demonstrated "circumvention" by showing that disclosure would either render the documents obsolete for their intended purpose, make the plan's criteria "operationally useless" or compromise the utility of the selection program.[145]

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[142] See, e.g., Dirksen, 803 F.2d at 1459 (finding guidelines for processing Medicare claims properly withheld when disclosure could allow applicants to alter claims to fit them into certain categories and guidelines would thus "lose the utility they were intended to provide"); L.A. Times, 442 F. Supp. 2d at 901 (relying on Dirksen and Hardy in finding that the law enforcement purpose of the Army Corps of Engineers' Reconstruction Operations Center in Iraq was "to synthesize battlefield intelligence and make it available to military and [private security contractor] personnel in order to protect the lives of those individuals"); Wiesenfelder, 959 F. Supp. at 537-38 (finding trigger figures, error rate tolerances, and amounts of potential fines properly withheld because release would "substantially undermine" agency's regulatory efforts); Archer, 710 F. Supp. at 911 (protecting number of particular health procedures performed, which HHS contractor used to determine whether healthcare providers' claims for reimbursement under Medicare should be subjected to greater scrutiny; disclosure would allow providers "to avoid review and ensure automatic payment by submitting claims below the number . . . scrutinized").

[143] See NTEU, 802 F.2d at 528-29.

[144] See id. at 529-31.

[145] Id. at 530-31; cf. U.S. Dep't of Justice v. FLRA, 988 F.2d 1267, 1269 (D.C. Cir. 1993) (holding "crediting plans" to be also not subject to disclo-

(continued...)

This approach was expressly followed by the Court of Appeals for the Seventh Circuit in Kaganove to withhold from an unsuccessful job applicant the agency's merit promotion rating plan on the basis that disclosure of the plan "would frustrate the document's objective [and] render it ineffectual" for the very reasons noted in the NTEU case.[146] Similarly, the District Court for the District of Columbia permitted the Department of Education to withhold information consisting of trigger figures, error rates, and potential fines that provide "internal guidance to staff about how, when, and why they should concentrate their regulatory oversight."[147] The court agreed with the agency that "[g]iving institutions the wherewithal to engage in a cost/benefit analysis in order to choose their level of compliance would substantially undermine [its] regulatory efforts and thwart its program oversight."[148]

It is noteworthy that the Seventh Circuit in Kaganove,[149] the Ninth Circuit in Dirksen,[150] and the D.C. Circuit in NTEU[151] all reached their results even in the absence of any particular agency regulation or statute to be circumvented.[152] Thus, the second part of the Crooker test should properly be satisfied by a showing that disclosure would risk circumvention of general legal requirements.[153] In this regard, it is worth noting that the

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[145](...continued)
sure under Federal Service Labor-Management Relations Act, 5 U.S.C. § 7114(b)(4)(B) (2000)).

[146] Kaganove, 856 F.2d at 889; see also Samble, No. CV192-225, slip op. at 12 (S.D. Ga. Sept. 22, 1994) (citing Kaganove, 856 F.2d at 889, to protect criteria used to evaluate job applicants).

[147] Wiesenfelder, 959 F. Supp. at 537.

[148] Id. at 537-38.

[149] 856 F.2d at 889.

[150] 803 F.2d at 1458-59.

[151] 802 F.2d at 529-31.

[152] See FOIA Update, Vol. X, No. 3, at 4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two") (advising that "the D.C. Circuit has expressly declined to impose any requirement that a particular statute or regulation be involved" (citing NTEU, 802 F.2d at 530-31)).

[153] See NTEU, 802 F.2d at 530-31 ("Where disclosure of a particular [record] would render [it] operationally useless, the Crooker analysis is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure."); see also, e.g., Edmonds v. FBI, 272 F. Supp. 2d 35, 51 (D.D.C. 2003) (secure facsimile numbers found to be properly with-
(continued...)

EXEMPTION 2

District Court for the District of Columbia has expressly ruled, in the context of Exemption 2, that the "passage of time" does not necessarily "reduce[] the protections of a properly asserted exemption."[154]

Lastly, under the Freedom of Information Reform Act of 1986,[155] many of the materials previously protectible only on a "high 2" basis may be protectible also under Exemption 7(E).[156] Numerous post-amendment cases

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[153](...continued)
held because "this equipment would be worthless to the FBI in supporting its investigations" if the fax numbers were to be released); Knight v. DOD, No. 87-480, slip op. at 4 (D.D.C. Feb. 11, 1988) (memorandum detailing specific inventory audit guidelines held protectible because disclosure "would reveal [agency] rationale and strategy" for audit and would "create a significant risk that this information would be used by interested parties to frustrate ongoing or future . . . audits"); Boyce v. Dep't of the Navy, No. 86-2211, slip op. at 4 (C.D. Cal. Feb. 17, 1987) (routine hearing transcript properly withheld under Exemption 2 where disclosure would circumvent terms of contractual agreement entered into under labor-relations statutory scheme).

[154] Willis v. FBI, No. 96-1455, slip op. at 7 (D.D.C. Aug. 6, 1997) (magistrate's recommendation) (finding that DEA numbers -- G-DEP, NADDIS, and informant identifier codes -- are protectible even after case is long closed), adopted (D.D.C. Feb. 14, 1998), remanded on other grounds, 194 F.3d 175 (D.C. Cir. 1999) (unpublished table decision); see also Buckner v. IRS, 25 F. Supp. 2d 893, 899 (N.D. Ind. 1998) ("Because DIF scores are investigative techniques . . . still used by the IRS in evaluating tax returns . . . the age of the scores is of no consequence" in determining their releasability.) (Exemption 7(E)). But see Homick, No. 98-00557, slip op. at 14-15 (N.D. Cal. Sept. 16, 2004) (taking age of records into account in ordering disclosure because agency failed to show that same techniques currently were in use).

[155] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48, 3207-49 (codified as amended at 5 U.S.C. § 552(b)(2)).

[156] See, e.g., Kaganove, 856 F.2d at 888-89 (recognizing the congruence between the protection of information under Exemptions 2 and 7(E) based on the "risk [of] circumvention of the law"); Coastal Delivery Corp., 272 F. Supp. 2d at 965 (observing that the same reasons apply under both Exemptions 2 and 7(E) to protect from disclosure "information [that] has a law enforcement purpose . . . [where disclosure] would risk circumvention of agency regulations as well as the law"); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 16-17 & n.32 (Dec. 1987) (observing that amendment of Exemption 7(E) in 1986 in some respects widened protections then available under Exemption 2); cf. NARA v. Favish, 541 U.S. 157, 169 (evincing Supreme Court's reliance on "Attorney General's consistent interpretation of" FOIA in successive such
(continued...)

have held such information to be exempt from disclosure under both Exemption 2 and Exemption 7(E).[157] Although Exemption 2 must still be used if any information fails to meet Exemption 7's "law enforcement" threshold, Exemption 2's history and judicial interpretations should be helpful in applying Exemption 7(E). (See the discussion of Exemption 7(E), below.)

Homeland Security-Related Information

Since the horrific events of September 11, 2001, and given the potential for further terrorist activity in their aftermath, all federal agencies are concerned with the need to protect unclassified but sensitive information, including information pertaining to critical systems, facilities, stockpiles, and other assets (often referred to as "critical infrastructure") from security breaches and harm -- and in some instances from their potential use as weapons of mass destruction in and of themselves. Such protection efforts, of course, necessarily must include focus on any agency information that reasonably could be expected to enable someone to succeed in causing the feared harm, not all of which can appropriately be accorded national security classification protection as a practical matter.[158]

In addressing these heightened homeland security concerns, agency personnel responsible for reviewing documents responsive to FOIA requests prior to their disclosure should be sure to avail themselves of the full measure of Exemption 2's protection for national security- and home-

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[156](...continued)
Attorney General memoranda), reh'g denied, 541 U.S. 1057 (2004).

[157] See, e.g., PHE, 983 F.2d at 251 (upholding FBI judgment, relying on both Exemptions 2 and 7(E), that release of "who would be interviewed, what could be asked, and what records or other documents would be reviewed" in FBI investigatory guidelines would risk circumvention of law); Gordon, 388 F. Supp. 2d at 1035-36 (holding that records concerning aviation "watch lists" were properly withheld under both Exemptions 2 and 7(E)); Schwarz, 131 F. Supp. 2d at 150 (finding Secret Service code names and White House gate numbers "clearly exempt from disclosure" under both Exemptions 2 and 7(E)); Peralta v. U.S. Attorney's Office, 69 F. Supp. 2d 21, 32, 35 (D.D.C. 1999) (applying both Exemptions 2 and 7(E) to radio channels used by FBI during physical surveillance); Voinche, 940 F. Supp. at 329, 331 (approving nondisclosure of information relating to security of Supreme Court building and Justices on basis of both Exemptions 2 and 7(E)).

[158] Cf. *FOIA Post*, "Executive Order on National Security Classification Amended" (posted 4/11/03) (noting coverage of "information that 'reveal[s] current vulnerabilities of systems, installations, infrastructures, or projects relating to national security,' in new Section 3.3(b)(8)" of Executive Order 12,958, as amended).

land security-related information.[159] That responsibility is of utmost importance when considering the need to protect particularly sensitive critical infrastructure information from security breaches and harmful consequences.[160] In response to continued threats of terrorism, guidance issued by the White House Chief of Staff in March 2002 highlighted the crucial nature of that responsibility:

> The need to protect . . . sensitive information [related to America's homeland security] from inappropriate disclosure should be carefully considered, on a case-by-case basis, together with the benefits that result from the open and efficient exchange of scientific, technical, and like information.[161]

The types of information that may warrant Exemption 2 protection for homeland security-related reasons include, for example, agency vulnerability assessments[162] and evaluations of items of critical infrastructure that

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[159] See *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (emphasizing Exemption 2's applicability to homeland security-related information, including "[a]ny agency assessment of, or statement regarding, the vulnerability of" critical infrastructure); see also *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (drawing attention to the "protection of homeland security-related information [as] a subject of growing importance within all levels of government," and analyzing homeland security-related cases).

[160] See *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01).

[161] White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002) [hereinafter White House Homeland Security Memorandum], reprinted in *FOIA Post* (posted 3/21/02) (directing agencies to give "full and careful consideration to all applicable FOIA exemptions," through an attached memorandum from the National Archives and Records Administration's Information and Security Oversight Office and the Department of Justice's Office of Information and Privacy that specifies Exemption 2 as a basis for protection of sensitive critical infrastructure information); see also Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/02) (emphasizing the importance of "safeguarding our national security [and] enhancing the effectiveness of our law enforcement agencies"); cf. *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (highlighting growing importance in post-9/11 environment of safeguarding "sensitive homeland security information").

[162] See FOIA Update, Vol. X, No. 3, at 3-4 ("OIP Guidance: Protecting (continued...)

are internal to the federal government.[163] Since September 11, 2001, nearly all courts that have considered nonclassified but nonetheless highly sensitive information have justifiably determined -- either under Exemption 2 or, upon a finding of a sufficient law enforcement connection,[164] under Exemptions 7(E) or 7(F)[165] -- that such information must be protected from disclo-

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[162](...continued)
Vulnerability Assessments Through Application of Exemption Two"); see also, e.g., Inst. for Policy Studies v. Dep't of the Air Force, 676 F. Supp. 3, 5 (D.D.C. 1987) (upholding "use of Exemption 2 to withhold internal agency information on grounds of national security"); cf. Dorsett v. U.S. Dep't of the Treasury, 307 F. Supp. 2d 28, 36 (D.D.C. 2004) (concluding that a Secret Service document used to "analyze and profile factual information concerning individuals" could be "used to gain insight into the methods and criteria . . . [used] to identify and investigate persons of interest, and could alter such individuals' behavior to avoid detection"); Voinche v. FBI, 940 F. Supp. 323, 329, 332 (D.D.C. 1996) (approving nondisclosure of information relating to security of Supreme Court building and Supreme Court Justices on basis of both Exemptions 2 and 7(E)); Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, 1990 WL 236133, at *5-6 (D.D.C. Dec. 19, 1990) (approving an agency decision based on Exemption 7(E) to protect certain planning information developed for use in the event of an attack on the United States, because its "release . . . could assist terrorists in 'planning their attacks and escapes' and imperil the safety of Customs officers").

[163] See Homeland Security Presidential Directive (HSPD-7) 39 Weekly Comp. Pres. Doc. 1816 (Dec. 22, 2003) (defining "critical infrastructure" and "key resources," and also directing all Federal departments and agencies to "appropriately protect information . . . that would facilitate terrorist targeting of . . . [those] resources"), available at www.gpoaccess.gov/wcomp/v39no51.html; cf. *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (detailing protection for certain information that is submitted to agencies by private-sector and other nonfederal entities, in contrast to information that is entirely internal to federal government).

[164] See Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926, 927-28 (D.C. Cir. 2003) (counseling "deference in national security matters," and finding law enforcement purpose established where agency demonstrated both "rational nexus" between agency investigation and its law enforcement duties as well as connection between person or incident and possible security risk or law violation).

[165] See, e.g., L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 900, 902 (C.D. Cal. 2006) (protecting names of private security contractors in Iraq under Exemptions 2 and 7(F)); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-00377, 2006 WL 1826185, at *5 (D.D.C. June 30, 2006) (protecting, under Exemptions 2, 7(E), and 7(F), portions of law enforcement manual pertaining to
(continued...)

sure in order to avoid the harms described both in the Homeland Security Presidential Directive concerning "Critical Infrastructure Identification, Prioritization, and Protection"[166] and by Congress in the exemptions to the Freedom of Information Act.[167]

Such information found to be protected under Exemption 2 since the attacks of September 11, 2001 includes:

(1) cargo container-inspection data from particular seaport;[168]

(2) records pertaining to aviation "watch lists";[169]

(3) the storage locations of explosives-detection equipment used in aviation security;[170]

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[165](...continued)
handling of seized property); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1321-22 (D. Utah 2003) (concluding that maps of flooding likely to result from damage to Hoover Dam or Glen Canyon Dam were properly withheld under Exemption 7(F), instead of under Exemption 2 or Exemption 7(E), due largely to atypically narrow interpretation of law within particular judicial circuit).

[166] Homeland Security Presidential Directive (HSPD-7), 39 Weekly Comp. Pres. Doc. 1816 (Dec. 22, 2003).

[167] See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01) (encouraging agencies to carefully consider protecting sensitive information when making disclosure determinations).

[168] See Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 964-65 (C.D. Cal.) (quoting Crooker v. ATF, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc), as having "acknowledged the rule in the Ninth Circuit -- still in force today -- 'that law enforcement materials, disclosure of which may risk circumvention of agency regulation, are exempt from disclosure'"), reconsideration denied, 272 F. Supp. 2d at 966-68 (C.D. Cal. 2003), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug. 26, 2003); cf. Living Rivers, 272 F. Supp. 2d at 1321-22 (recognizing importance of guarding against terrorist "target selection") (Exemption 7(F) case).

[169] See Gordon v. FBI, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005) (protecting details of FBI's aviation "watch list" program, including records detailing "selection criteria" for lists, describing handling and dissemination of lists, and providing guidance on "addressing perceived problems in security measures").

[170] See Judicial Watch, Inc. v. U.S. Dep't of Transp., No. 02-566, 2005 WL
(continued...)

(4) the names of private security contractors in a war zone;[171]

(5) guidelines for protecting high-ranking officials on overseas trips;[172] and

(6) records pertaining to the security of national borders.[173]

(See also the discussions of related exemptions under Exemption 7, Exemption 7(E), and Exemption 7(F), below.) However, in a limited number of recent contrary decision worth noting, courts have rejected agencies' "high 2" defenses pertaining to homeland security-related information because they concluded that the agencies did not sufficiently articulate the potential disclosure harm.[174] These exceptional cases stand as a reminder

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[170](...continued)
1606915, at *9 (D.D.C. July 7, 2005) (agreeing with the agency that "release of this information would enable an individual or group to cause harm to the explosive detection systems prior to their installation").

[171] See L.A. Times, 442 F. Supp. 2d at 900, 902 (approving agency's withholding of such names under Exemptions 2 and 7(F) on basis that insurgents could target more vulnerable contractors, thereby putting lives in danger and "disrupt[ing] U.S. reconstruction efforts").

[172] See Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 166 (D.D.C. 2004) (finding that "guidelines for protecting the Secretary of Commerce on trade missions" were properly withheld, as disclosure "would compromise the Secretary's safety, making the Secretary subject to unlawful attacks").

[173] See Elec. Info. Privacy Ctr. v. DHS, No. 04-1625, 2006 U.S. Dist. LEXIS 94615, at *16-19 (D.D.C. Dec. 22, 2006) (magistrate's recommendation) (approving agency's withholding of "'current and proposed operational practices'" that "'concern procedures for the detection . . . of illegal border crossing activities'" (quoting agency declaration)), adopted (D.D.C. Jan. 23, 2007); Herrick's Newsletter, 2006 WL 1826185, at *5 (acknowledging that withheld portions of property-seizure law enforcement manual are "intertwined with overarching concerns of national security" because "individuals seeking to evade capture by customs officials, to smuggle illegal contraband into the country, [or] to reclaim or otherwise obtain seized contraband . . . would be privy to the most effective ways in which to do so" if the manual were disclosed).

[174] See Poulsen v. U.S. Customs & Border Prot., No. 06-1743, 2006 WL 2788239, at *6-9 (N.D. Cal. Sept. 26, 2006) (holding that agency improperly withheld certain general information about computer network "crash," but also holding that it properly withheld specific technical information about repairing network); Carlson v. USPS, No. C-02-05471, 2005 WL 756573, at *6-7 (N.D. Cal. Mar. 31, 2005) (concluding that disclosure of data pertaining (continued...)

to agency personnel that the potential harms from disclosure must be clearly and sufficiently identified and articulated in order to properly withhold information under "high 2."[175]

Lastly, something connected to homeland security-related information is the fact that agencies use a variety of safeguarding labels for "sensitive information," which should not be confused with FOIA exemptions.[176] Whatever the safeguarding label that an agency might (or might not) use for the information maintained by it that has special sensitivity -- e.g., "for official use only" (FOUO), "sensitive but unclassified" (SBU), or "sensitive homeland security information" (SHSI)[177] -- whenever "predominantly" internal agency records may reveal information the disclosure of which could reasonably be expected to cause any of the harms described above, responsible federal officials should carefully consider the propriety of protect-

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[174](...continued)
to mailbox locations would not risk use of postal system to distribute biological or chemical agents because agency failed to demonstrate that such data actually could be used to determine mail collection routes); see also Gordon, 388 F. Supp. 2d at 1036-37 (requiring disclosure of "the legal basis for detaining someone whose name appears on a watch list").

[175] See, e.g., Poulsen, 2006 WL 2788239, at *7 ("Although defendant repeatedly asserts that this [descriptive] information [regarding the scope of the incident] would render the [agency] computer system vulnerable, defendant has not articulated how this general information would do so.").

[176] See, e.g., Presidential Memorandum for the Heads of Executive Departments and Agencies Concerning Guidelines and Requirements in Support of the Information Sharing Environment (Dec. 16, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051216-10.html (setting out guidelines for standardization of procedures related to "acquisition, access, retention, production, use, management, and sharing of Sensitive But Unclassified (SBU) information"); see also Intelligence Reform and Terrorism Prevention Act of 2004, 6 U.S.C. § 485 (Supp. IV 2004) (establishing an "information sharing environment for the sharing of terrorism information in a manner consistent with national security and with applicable legal standards relating to privacy and civil liberties").

[177] See, e.g., Homeland Security Act of 2002, 6 U.S.C. § 482 (Supp. IV 2004) (directing implementation of procedures for safeguarding "sensitive homeland security information" in order to facilitate its sharing with appropriate state and local personnel); see also *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (describing Department of Homeland Security report to Congress (dated Feb. 20, 2004) as addressing development of policy and procedures for handling "sensitive homeland security information").

ing such information under Exemption 2.[178] (See the additional discussion of such matters under Exemption 1, "Homeland Security-Related information," above.) Of course, such labels do not by themselves accord any necessary protection from disclosure under Exemption 2 (or any other FOIA exemption) -- meaning that agency personnel should ensure that both aspects of the "high 2" standard have been satisfied before withholding any information so labeled.[179]

EXEMPTION 3

Exemption 3 of the FOIA incorporates the various nondisclosure provisions that are contained in other federal statutes. As enacted in 1966, Exemption 3 was broadly phrased so as to simply cover information "specifically exempted from disclosure by statute."[1] Nearly a decade later, in FAA v. Robertson, the Supreme Court interpreted this language as evincing a congressional intent to allow statutes which permitted the withholding of confidential information, and which were enacted prior to the FOIA, to remain unaffected by the disclosure mandate of the FOIA; it accordingly held that a broad withholding provision in the Federal Aviation Act which delegated almost unlimited discretion to agency officials to withhold specific documents in the "interest of the public" was incorporated within Exemption 3.[2] Fearing that this interpretation could allow agencies to evade the FOIA's disclosure intent, Congress in effect overruled the Supreme Court's decision by amending Exemption 3 in 1976.[3]

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[178] See Attorney General Ashcroft's FOIA Memorandum (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (urging all federal agencies to "consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise"); cf. White House Security Memorandum, reprinted in *FOIA Post* (posted 3/21/02) (calling upon agencies to identify and then safeguard "information that could be misused to harm the security of our nation and the safety of our people").

[179] See *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (emphasizing critical distinction between "protecting" and "safeguarding" information); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 04/27/06) (Part I.21.) (suggesting "[i]n-house training on 'safeguarding label'/FOIA exemption distinctions" as potential improvement area for agencies to address in their plans developed pursuant to Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005)).

[1] Pub. L. No. 89-487, 80 Stat. 250, 251 (1966) (subsequently amended).

[2] 422 U.S. 255, 266 (1975).

[3] See Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976) (single FOIA amendment enacted together with the Government in the Sunshine Act in 1976,

(continued...)