OIP Guidance:

Exemption 2 After the Supreme Court's Ruling in *Milner v. Department of the Navy*

On March 7, 2011, the Supreme Court issued an opinion pertaining to Exemption 2 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(2) (2006 & Supp. III 2009), that overturned thirty years of established FOIA precedents and significantly narrowed the scope of that exemption. *See Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011). This guidance will discuss the newly defined contours of Exemption 2 in the wake of *Milner* and will address possible alternatives that agencies can consider to protect sensitive information that is no longer covered by Exemption 2.

The Supreme Court's Decision

At issue in *Milner* were maps and data detailing "'minimum separation distances' for explosives" which aid the Department of the Navy in designing and constructing storage facilities to hold weapons, ammunition, and other explosives stored at the Naval Magazine Indian Island in Puget Sound, Washington. *Id.* at 1263. A resident of Puget Sound had requested the maps and data, and the Department of the Navy withheld them under Exemption 2, "stating that disclosure would threaten the security of the base and surrounding community." *Id.* at 1264. The requester challenged the decision. The District Court for the Western District of Washington and the Court of Appeals for the Ninth Circuit both upheld the Navy's decision to invoke what was commonly called "High 2." *See id.* Specifically, the Ninth Circuit held that disclosure of the data and maps "'would risk circumvention of the law' by 'point[ing] out the best targets for those bent on wreaking havoc' — for example, '[a] terrorist who wished to hit the most damaging target.'" *Id.* (quoting Ninth Circuit opinion, 575 F.3d 959, 971 (9th Cir. 2009)).

The Supreme Court granted certiorari, citing "the Circuit split respecting Exemption 2's meaning," and reversed. *Id.* In a ruling that is limited to the scope of Exemption 2, the Supreme Court then held that "Exemption 2, consistent with the plain meaning of the term 'personnel rules and practices,' encompasses only records relating to issues of employee relations and human resources." *Id.* at 1271. Utilizing that newly developed interpretation of the exemption, the Court found that "[t]he explosives maps and data requested here do not qualify for withholding under that exemption." *Id.* The case was then remanded back

to the Ninth Circuit for consideration of the applicability of Exemption 7(F), 5 U.S.C. § 552 (b)(7)(F), to the data and maps. The Navy had asserted Exemption 7(F) as an alternative ground for protection of the material and that claim now remains open for the Ninth Circuit to address. *See id.*

The Supreme Court's Focus on the Text of Exemption 2

In reaching its decision, the Court began by stating that its "consideration of Exemption 2's scope starts with its text." *Id.* at 1264. The Court noted that although other court decisions had analyzed the meaning of the exemption, "comparatively little attention has focused on the provision's 12 simple words: 'related solely to the internal personnel rules and practices of an agency.'" *Id.* Of those words, the Court found, "[t]he key word" and "the one that most clearly marks the provision's boundaries" is the word "personnel." *Id.* That word, in common usage, "means 'the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with [or involving] employees or their representatives.'" *Id.*

The Court found that using this commonly understood definition of the term "personnel," the phrase "personnel rules and practices" in Exemption 2 should be understood to mean "rules and practices dealing with employee relations or human resources." *Id.* at 1265. Indeed, the Court held, all the rules and practices encompassed within Exemption 2 "share a critical feature: They concern the conditions of employment in federal agencies — such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id.* The Court went on to note that other courts "have had little difficulty identifying the records that qualify for withholding under this reading: They are what now commonly fall within the Low 2 exemption." *Id.* The Court concluded by declaring that its "construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all . . .)." *Id.*

Exemption 2 Before Milner *— High 2" and "Low 2" Under* Crooker

Prior to *Milner*, the leading interpretation of the meaning of Exemption 2 was that provided by the Court of Appeals for the District of Columbia Circuit in *Crooker v. ATF*, 670 F.2d 1051 (1981). It is from that decision that the concept of "Low 2" and "High 2" were first established. Under the interpretation of Exemption 2 given by the D.C. Circuit in *Crooker*, the statutory language was read to imply a two-part test: to qualify for protection the records had to be first "predominantly internal," and second either of no genuine public interest, or trivial, which was referred to as "Low 2," or be matters of a more substantial nature if the disclosure would significantly risk circumvention of the law, which was referred to as "High 2." *See id.* at 1073-74; *see also Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992); *Founding Church of Scientology v. Smith*, 721 F.2d 828, 830 (D.C. Cir. 1983).

As the Supreme Court noted in *Milner*, the D.C. Circuit had fashioned this two-prong test for Exemption 2 based on language contained in an earlier Supreme Court decision in *Department of the Air Force v. Rose*, 425 U.S. 352, 362, 369 (1976). In *Rose*, the Supreme

Court had rejected the argument that case summaries of honor code and ethics proceedings held at the United States Air Force Academy were encompassed by Exemption 2. *Id.* at 367. As the *Milner* Court described its holding in *Rose*, the honor code case summaries did not fall within Exemption 2 "because they 'd[id] not concern only routine matters' of merely internal significance." *Milner*, 131 S.Ct at 1262. Still, the *Rose* decision contained a "possible caveat" to that narrow interpretation of Exemption 2, with the Court stating that the narrow interpretation applied "'at least where the situation is not one where disclosure may risk circumvention of agency regulation.'" *Id*. (quoting *Rose,* 425 U.S. at 369).

After this decision in *Rose,* the D.C. Circuit in *Crooker* took the caveat provided by the Supreme Court in *Rose* and fashioned "High 2" as a means of protecting internal matters where disclosure would risk circumvention of the law. *See* 670 F.2d at 1074. The D.C. Circuit reasoned that this interpretation of the Exemption "flowed from FOIA's 'overall design,' its legislative history, 'and even common sense,' because Congress could not have meant to 'enac[t] a statute whose provisions undermined . . . the effectiveness of law enforcement agencies.'" *Milner,* 131 S.Ct. at 1263 (quoting *Crooker*, 670 F.2d at 1074). Over the years, the Courts of Appeals for the Second, Seventh, and Ninth Circuits adopted the D.C. Circuit's two-prong approach to Exemption 2. *See id.*

The Supreme Court in *Milner* described the effects of the *Crooker* decision as having "spawned a new terminology; Courts applying the *Crooker* approach now refer to the 'Low 2' exemption when discussing matters concerning human resources and employee relations and to the 'High 2' exemption when assessing records whose disclosure would risk circumvention of the law." *Id.* Notably, though, this characterization of what was historically covered by "Low 2" both *omits* the requirement that there be no public interest in disclosure and *includes* the requirement that the information be connected with "human resources and employee relations." *See id.* In fact, though, many cases decided under what used to be known as "Low 2" required that the information be of no public interest, or trivial, and at the same time did not demand that it necessarily be related to human resources and employee relations. *See, e.g.*, *Hale v. DOJ*, 973 F.2d 894, 902 (10th Cir. 1992) (withholding checklist form used by FBI agents to assist them in consensual monitoring as well as administrative markings and document notations because such records constitute trivial matters of no genuine public interest); *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (affirming withholding under "Low 2" of internal agency time deadlines and procedures, recordkeeping instructions, directions for contacting agency officials for assistance, and guidelines on agency decisionmaking); *Antonelli v. BOP*, 569 F. Supp. 2d 61, 65 (D.D.C. 2008) (protecting investigatory case file numbers as internal information of no genuine public interest); *Wheeler v. DOJ*, 403 F. Supp. 2d 1, 13 (D.D.C. 2005) (withholding document routing information of no genuine interest to public); *Maydak v. DOJ*, 362 F. Supp. 2d 316, 324 (D.D.C. 2005) (upholding nondisclosure of purchase order accounting numbers that are used for internal purposes and bear no significant public interest).

The Supreme Court's Rejection of Crooker

In *Milner,* the government argued for the adoption of *Crooker's* two-pronged interpretation of Exemption 2. *See Milner,* 131 S. Ct. at 1266. The Supreme Court,

however, found that such an argument "suffers from a patent flaw: It is disconnected from Exemption 2's text." *Id.* at 1267. The "High 2" test, the Court found, "ignores the plain meaning of the adjective 'personnel,' . . . and adopts a circumvention requirement with no basis or referent in Exemption 2's language." *Id.*

The government argued that both the legislative history of Exemption 2 and Congress' subsequent action in amending the FOIA in 1986 supported the adoption of the *Crooker* formulation. The Court rejected both those arguments. First, with regard to the legislative history of the exemption, the Court noted that at the time of the enactment of the FOIA, the Senate and the House issued conflicting reports on the new FOIA law. *See id.* The House Report appeared to support the "High 2" construction of Exemption 2 while rejecting the concept of "Low 2." *See id.* The Senate Report, on the other hand, supported solely the "Low 2" interpretation of the exemption. *See id.* While the Court noted that it had previously weighed in on the interpretation of Exemption 2 in *Rose* and found the Senate Report to be "the more reliable of the two," the Court went on to expressly declare in *Milner* that "the more fundamental point is what we said before: Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it. . . . When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, *we must choose the language*." *See id.* (emphasis added). Thus, for the Supreme Court, the legislative history of Exemption 2 does not control its interpretation since the text of the exemption is clear.

Second, in *Milner* the Court rejected the government's argument that Congress' 1986 amendment of Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), to contain a "circumvention of the law" standard constituted its "ratification" of the *Crooker* test. *See id.* at 1267-68. In rejecting that contention, the Court stated that *Crooker's* "High 2" formulation was so broad that it "renders Exemption 7(E) superfluous and so deprives that amendment of any effect." *Id.* at 1268. As such, the Court found, "if Congress had agreed with *Crooker's* reading of Exemption 2, it would have had no reason to alter Exemption 7(E)." *Id.* Moreover, Congress' decision to amend Exemption 7(E) and not Exemption 2 "suggests that Congress approved the circumvention standard only as to law enforcement materials, and not as to the wider set of records High 2 covers." *Id.*

The Supreme Court's Rejection of a "Clean Slate" Approach to Exemption 2

The final argument advanced by the government in *Milner* was for adoption of a "clean slate" approach to Exemption 2, based on its text, that would encompass "'records concerning an agency's internal rules and practices for its personnel to follow in the discharge of their governmental functions.'" 131 S. Ct. at 1269. This argument too, was rejected by the Supreme Court as too sweeping and not sufficiently focused on the ordinary meaning of the phrase "personnel rule or practice." *Id.* The Court found that the use of the word "personnel" in terms such as "personnel file," "personnel department," and a "personnel rule or practice" signify "not that the file or department or practice/rule is *for* personnel, but rather that the file or department or practice/rule is *about* personnel — i.e., that it relates to employee relations or human resources." *Id.* Because the sweep of the proposed "clean slate" interpretation of the exemption would be so broad, and "would tend

to engulf other FOIA exemptions, rendering ineffective the limitations Congress placed on their application," the Court found that to adopt it would "violate[] the rule favoring narrow construction of FOIA exemptions" and this it declined to do. *Id.* at 1270.

The Supreme Court's Conclusion

In concluding its opinion the Supreme Court expressly stated that it "recognize[d] similar information." 131 S. Ct. at 1270. Significantly, it also acknowledged that its decision "upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments." *Id.* at 1271. The Court pointed out though, that agencies have "other tools at hand to shield national security information and other sensitive materials," citing to possible application of Exemptions 1, 3, and 7 of the FOIA, 5 U.S.C. § 552 (b)(1), (3), (7). *See Milner*, 131 S. Ct. at 1271. Indeed, the *Milner* case was itself remanded for consideration of Exemption 7(F). Finally, the Court pointed out that if existing exemptions "do not cover records whose release would threaten the Nation's vital interests, the Government may of course seek relief from Congress." *Id.* It declared: "All we hold today is that Congress has not enacted the FOIA exemption the Government desires." *Id.*

Thus, in light of the Supreme Court's newly established interpretation of Exemption 2, it held that the explosive maps and data at issue in *Milner* did not qualify for Exemption 2 protection. *See id.* As the Court explained, the data and maps "concern the physical rules governing explosives, not the workplace rules governing sailors; they address the handling of dangerous materials, not the treatment of employees." *Id.* at 1266. As a result, Exemption 2 was not available to protect the material.

Justice Alito issued a concurring opinion supporting the majority's textual reading of Exemption 2. Justice Alito stated that he wrote separately to "underscore the alternative argument that the Navy raised below, which rested on Exemption 7(F)." *Id.* at 1271.

Justice Breyer issued a lengthy dissent from the opinion. He summed up his views this way: "Where the courts have already interpreted Exemption 2, where that interpretation has been consistently relied upon and followed for 30 years, where Congress has taken note of that interpretation in amending other parts of the statute, where that interpretation is reasonable, where it has proved practically helpful and achieved common-sense results, where it is consistent with the FOIA's overall statutory goals, where a new and different interpretation would require Congress to act just to preserve a decades-long status quo, I would let sleeping legal dogs lie." *Id.* at 1278.

The New Parameters of Exemption 2

The question now is how much of Exemption 2 remains in the wake of *Milner*. As a starting point, the Supreme Court has made clear that the Exemption must be read according to its clear statutory language. That language provides for exemption of matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Thus, the old formulations of "High 2" and "Low 2" — which were based on

legislative history and not on this statutory language — no longer control. There is now just plain "Exemption 2," which is defined according to its text.

A. New Three-Part Test

Based on that text, and as set forth by the Supreme Court's decision in *Milner*, there are three elements that must be satisfied in order for information to fit within Exemption 2.

1. The Information Must be Related to "Personnel" Rules and Practices

First and most importantly, as the Supreme Court emphasized, the "key word" in the exemption and the one word which "most clearly marks the provision's boundaries – is personnel." *Milner, 131 S. Ct.* at 1264. Thus, to qualify for protection under Exemption 2, agencies must ensure that the information at issue satisfies the requirement that it relate to an agency's *personnel* rules and practices. The Supreme Court gave several examples of what it viewed as constituting such personnel rules and practices. It described them as encompassing "'the selection, placement, and training of employees and . . . the formulations of policies, procedures, and relations with [or involving] employees or their representatives.'" *Id.* (*quoting* Webster's Third International Dictionary 1687 (1966)). It also described personnel rules and practices as the rules "dealing with employee relations or human resources," which "concern the conditions of employment in federal agencies — such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id.* at 1265. All these examples illustrate the close connection information must have with employment in order to constitute a "personnel rule and practice."

Significantly, this requirement is cabined by the Court's rejection of the proposition that the term "personnel rules and practices" could be read to encompass those rules and practices that are written "for" personnel. *Id.* at 1269. The Court found that such an interpretation of Exemption 2 could be accomplished "only by stripping the word 'personnel' of any real meaning," since "agencies necessarily operate through personnel." *Id.* Given that many documents generated by an agency "aid employees in carrying out their responsibilities," the Court held that such a broad interpretation of Exemption 2 "would tend to engulf other FOIA exemptions." *Id.* at 1270. Accordingly, Exemption 2 does not reach those rules and practices of an agency that are not themselves related to "personnel." This requirement of Exemption 2, which the Supreme Court held is the key requirement for the exemption, significantly limits its scope. For the three decades preceding *Milner,* agencies focused on whether information was "predominantly internal" — a term significantly broader than "personnel rule or practice." Now, after *Milner*, agencies can only consider Exemption 2 for matters that relate to an agency's *personnel* rules or practices.

2. The Information Must Relate "Solely" to those Personnel Rules and Practices

In addition to this key requirement, the Supreme Court made clear that there are two additional requirements for invoking Exemption 2, *see id.* at *1265 n.4,* both of which are also directly taken from the text of the exemption. Although the Court gives very little

attention to these other requirements, addressing them only in a footnote, the Court states that they too must be satisfied in order to protect information under Exemption 2. *See id.* The first of these additional requirements is that the information at issue must "relate solely" to the agency's personnel rules and practices. *See id.* The Court defines this phrase by its "usual" meaning, which is "exclusively or only." *Id.*

3. The Information Must be "Internal"

The last requirement is that the information must be "internal," meaning that "the agency must typically keep the records to itself for its own use." *Id.* As the Court noted, these additional requirements would typically be met for human resource matters. *Id.* They also form distinct requirements for Exemption 2 that must be met before it is invoked by agencies. In interpreting these last two requirements, the prior decision of the Court in *Rose* provides guidelines that remain applicable today.

Impact of the Rose *Decision in Determining Whether Information "Relates Solely" to "Internal" Rules and Practices*

In declining to adopt a reading of Exemption 2 that was based on legislative history, the Supreme Court in *Milner* rejected the old "circumvention of the law" theory for protecting material under what used to be known as "High 2." In doing so, the Court in *Milner* was addressing the "caveat" to its earlier interpretation of Exemption 2 announced in *Rose,* which had alluded to the possibility of a circumvention standard. In *Rose* itself, there was no concern with any possible circumvention of regulations or standards and so that issue was not addressed by the Court in that case. *See* 425 U.S. at 365. *Milner* has now disposed of the circumvention caveat, but the core holding in *Rose* remains. That holding, in turn, impacts the scope of the last two requirements of Exemption 2, i.e., the requirements that the information must relate "solely" to "internal" personnel rules and practices of an agency.

In *Rose,* the Supreme Court denied Exemption 2 protection for case summaries of honor and ethics code hearings concerning cadets at the United States Air Force Academy. *See* 425 U.S. at 355. These summaries concerned the discipline of cadets and so would readily qualify under *Milner* as pertaining to "personnel." In *Rose,* Exemption 2 was found inapplicable to the honor code summaries due to the "genuine and significant public interest" in their disclosure. *Id.* at 369. The Supreme Court "agree[d]" with the conclusion of the Court of Appeals for the Second Circuit which had found that the summaries fell outside of Exemption 2 because they "'have a substantial potential for public interest outside the Government.'" *Id.* at 367. The Court went on to state that "the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintain for public inspection matter in which the public could not reasonably be expected have an interest." *Id.* at 369-70. It further explained that the honor code case summaries "plainly do not fit that description," and "are not matter with purely internal significance." *Id.* at 370. Moreover, the Court found, "[t]hey do not concern only routine matters" and "[t]heir disclosure entails no particular administrative burden." *Id.* As a result, the Court held that the summaries could not be protected under Exemption 2. *See id.*

In ruling that Exemption 2 did not apply to matters "subject to a genuine and significant public interest," the Court focused on the unique role of the military and the importance and significance of discipline within its ranks. *See id.* at 368-69. It also "agree[d]" with the Second Circuit's conclusion that even apart from the public interest generated by the government itself concerning the workings of the Academy's honor code, "there would be interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership." *Id.* at 369. The Court also "agree[d]" with the Second Circuit's conclusion that this public interest "differentiate(s) the summaries from matters of daily routine like working hours, which in the words of Exemption Two, do relate 'Solely to the internal personnel rules and practices of any agency.'" *Id.* at 369 (quoting Second Circuit).

In *Milner,* the Court summarized its holding in *Rose* by stating that in that case it had "concluded that the case summaries did not fall within the exemption because they 'di[d] not concern only routine matters' of 'merely internal significance.'" 131 S. Ct. at 1262. The Court also noted that in *Rose* it had "suggested" that the exemption "primarily targets material concerning employee relations or human resources; 'use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like.'" *Id.* at 1262 (quoting Senate Report).

Thus, in assessing whether information relates "solely" to the "internal" personnel rules and practices of an agency, it is necessary for agencies to assess whether there is a "genuine and significant public interest in disclosure." When there is a genuine and significant public interest in disclosure, the material falls outside of Exemption 2 as that interest would preclude it from satisfying the requirements of Exemption 2 that it relate "solely" to the "internal" personnel rules and practices of the agency.

So, while the Court in *Milner* included a broad list of examples of personnel-related items covered by Exemption 2, items such as "rules and practices dealing with employee relations or human resources," and "such matters as hiring and firing, work rules and discipline, compensation and benefits," 131 S. Ct. at 1271, there likely will some records falling within these categories where disclosure will be of "genuine and significant public interest." In those cases, the information would not be eligible for protection under Exemption 2 because it would fail the tests for sole internality.

In the end, the twelve words of Exemption 2 are all given meaning in determining its scope. The exemption protects matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552 (b)(2). There is no doubt that the primary criterion for determining the exemption's scope is now the requirement that the information be related to "personnel." To the extent the material requested also *relates solely* to the *internal* personnel rules and practices of an agency — which means there is no genuine and significant public interest in its disclosure, the material is eligible for protection. Such routine matters, while eligible for protection, are, however, excellent candidates for discretionary release under the Attorney General's FOIA Guidelines.

Attorney General Holder's FOIA Guidelines

In analyzing records for possible Exemption 2 applicability, agencies should be mindful to consider, as they should for all exemptions, Attorney General Holder's FOIA Guidelines. Those Guidelines encourage agencies to make discretionary releases and to not withhold records absent a determination that disclosure would cause foreseeable harm. Exemption 2 has always held great potential for discretionary releases. *See* OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines: Creating a New Era of Open Government (advising agencies that "[i]nformation covered by "Low 2" is, by definition, trivial to begin with, thus there would be no reasonably foreseeable harm from release, and discretionary release should be the general rule" and further advising that "[b]efore applying High 2 to a record, agencies should ensure that they are not withholding based on "speculative or abstract fears").

The opportunities to make discretionary disclosures of material technically protected by the newly defined Exemption 2 remain as viable as ever. Thus, before invoking Exemption 2, agencies should ensure that they first make a determination whether disclosure of the information at issue would cause foreseeable harm. The Supreme Court emphasized in *Milner* that the harm sought to be prevented by Exemption 2 was "'simply to relieve agencies of the burden of assembling and maintaining [such information] for public inspection.'" 131 S.Ct. at 1262 (quoting *Rose*, 425 U.S. at 369). Certainly, there will be many examples of matters relating solely to internal personnel rules and practices where there is no foreseeable harm from release as there is no real burden involved in assembling and maintaining the information. Indeed, it is often more burdensome to withhold information than it is to release it. In the absence of harm, the information should be released as a matter of discretion in accordance with the Attorney General's FOIA Guidelines.

Possible Alternatives to Exemption 2

Recognizing that its new interpretation of Exemption 2 "may force considerable adjustments" to agency FOIA processing, the Supreme Court itself discussed the potential applicability of other exemptions to sensitive records, including Exemptions 1, 3, and 7. *See Milner*, 131 S. Ct. at 1270-71. Indeed, as mentioned above, with regard to the records at issue in *Milner*, the court noted that while Exemption 2 was not applicable, the government could still pursue on remand its argument that Exemption 7(F) applied to them. *Id.* at 1271. For other cases likewise in litigation, this significant change to the scope of Exemption 2 could constitute an "extraordinary" circumstance under 28 U.S.C. § 2106 (2006), which would permit the government to raise new exemption claims after initial briefing. *See Ryan v. Department of Justice,* 617 F.2d 781, 792 (D.C. Cir. 1980).

In *Milner*, the court conceded that there might be instances where the existing FOIA exemptions would not allow for the withholding of records whose release could clearly be

harmful. *Id.* While acknowledging this reality, the Court stated that the remedy for agencies is to "seek relief from Congress" rather than from the courts. *Id.* In the absence of such Congressional relief, for records that were formerly withheld under the old "High 2" standard, but which do not now fit within the newly defined parameters of Exemption 2, agencies should carefully consider the applicability of other FOIA exemptions to the material. A comprehensive discussion and legal analysis of all the FOIA's exemptions, their requirements, and court interpretations, is contained in the *United States Department of Justice Guide to the Freedom of Information Act (2009 ed.).* Agencies should consult this reference volume when considering the possible applicability of other exemptions to information formerly protected under Exemption 2.

Exemption 1

First, for disclosures that could risk harm to national security, Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1), is potentially available to protect records from public disclosure. Such protection is available for information that meets the criteria for classification set forth in Executive Order 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010). To classify information the agency must find that its unauthorized release "reasonably could be expected to result in damage to the national security." Exec. Order No. 13,526, § 1.1. The Executive Order specifies categories of information that can be considered for classification. *See id.* § 1.4. Those categories include matters such as military plans, weapons systems, or operations; foreign government information or foreign relations or activities; intelligence activities or sources or methods; scientific, technological, or economic matters relating to national security; programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of systems, or infrastructures related to national security; or development, production, or use of weapons of mass destruction. *See id.* Once classified, the information must then be properly marked and safeguarded. *See id.* §§ 1.6, 4.1.

The Supreme Court in *Milner* specifically noted that despite its ruling on the scope of Exemption 2, "the Government has other tools at hand to shield national security information and other sensitive materials," through, "[m]ost notably, Exemption 1 of the FOIA." 131 S. Ct. at 1271. The Court further noted that the "government generally may classify material even after receiving a FOIA request" and so "an agency therefore may wait until that time to decide whether the dangers of disclosure outweigh the costs of classification." *Id.* Thus, Exemption 1 is an alternative exemption that agencies can consider for particularly sensitive records that meet the classification requirements of the Executive Order.

Exemption 3

Second, Exemption 3 is another potential means for withholding sensitive information that is no longer covered by Exemption 2. Exemption 3 provides for the withholding of records that are themselves protected from public release by another statute. *See* 5 U.S.C. § 552(b)(3). To qualify under Exemption 3, the other statute must either 1) be an absolute prohibition on disclosure or 2) provide specific criteria for withholding or refer to particular types of records that should be withheld. 5 U.S.C. §

552(b)(3)(A). For any withholding statute enacted after the date of enactment of the OPEN FOIA Act of 2009, Pub. L. No. 111-83, 121 Stat. 2184, the statute must specifically reference Exemption 3 of the FOIA in order to qualify as an Exemption 3 statute.

Agencies should first consider whether there is an existing Exemption 3 statute that affords protection to any information that no longer qualifies for protection under Exemption 2. In the absence of an existing Exemption 3 statute, agencies can consider seeking relief from Congress in the form of a new Exemption 3 statute. The Supreme Court itself recognized that Exemption 3 offers "Congress an established, streamlined method to authorize the withholding of specific records that FOIA would not otherwise protect." *Milner,* 131 S. Ct at 1271. Despite the difficulties inherent in passing new legislation, if an agency determines that certain categories of highly sensitive information will regularly be at issue in future FOIA requests, pursuing an Exemption 3 statute might be advisable.

Exemption 4

Third, Exemption 4 may provide a legal basis for withholding certain sensitive records, providing those records were obtained from outside the federal government. Exemption 4 provides for, *inter alia,* the withholding of "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). The term "commercial or financial" has been broadly defined by courts as encompassing any records in which the submitter has a commercial interest. *See, e.g.*, *Pub. Citizen Health Research Group*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). A "person" for purposes of Exemption 4 is also very broadly interpreted, applying to corporations, banks, and state or foreign governments, among other entities. *See, e.g.*, Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). Finally, in determining whether information is "confidential," agencies must apply different tests depending on the manner in which the information is provided to the government. *See, e.g.*, *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

First, if the information was provided to the agency voluntarily, it is subject to protection under Exemption 4 if it would not be customarily released to the public by the submitter of the information. *See id.* Second, if submission of the information was required by the government, there are three ways in which it can protected: 1) if disclosure would impair the government's ability to obtain necessary information in the future; 2) if disclosure would be likely to cause substantial harm to the competitive position of the person from whom the information was obtained; and 3) if disclosure would harm other identifiable governmental interests, such as agency program effectiveness. *See id.*; *see also National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765, 770 n.17 (D.C. Cir. 1974). After *Milner*, information supplied from outside the federal government that no longer can be protected under old "High 2" may be eligible for Exemption 4 protection under the tests for either a voluntary or a required submission.

For example, if a nonfederal entity provides an agency with the plans for a nuclear power plant or other critical infrastructure, agencies should consider whether Exemption 4 might apply. Such plans would likely be of commercial interest to the owners or operators

of the plants or infrastructure and since those nonfederal government entities are "persons" under Exemption 4, the threshold will be met. If such plans were provided voluntarily to the agency and are not customarily released by the submitter, they could qualify for protection under the *Critical Mass* test. Conversely, if the plans were provided to the agency as a required submission, and otherwise satisfy the threshold elements of Exemption 4, they can be considered for protection under the third test for required submissions — interference with program effectiveness. Agencies charged with regulating the safety of power plants could determine that their program's effectiveness would be diminished if records were disclosed that could facilitate security breaches at the facility.

Similarly, for information provided to an agency by a bank, such as agency credit card numbers or bank account numbers, such records could readily satisfy the threshold of Exemption 4. This information could also be considered for protection under the program effectiveness test because if an agency were required to release bank account numbers and credit card numbers to the public, the effectiveness of the agency's programs would be undermined, as for example, by the possible fraudulent use of the requested information by the public.

Exemption 6

Fourth, agencies can consider the applicability of Exemption 6, which protects "personnel and medical files and similar files" when disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Supreme Court has previously held, based on its review of the FOIA's legislative history, that the term "similar file" should be interpreted broadly to include all information that "applies to a particular individual." *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). To determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy, agencies must first identify a privacy interest that is at stake. Again, the Supreme Court has previously ruled on this point and, drawing on "the common law and the literal understanding of [the term] privacy," held that privacy "encompasses the individual's control of information concerning his or her person." *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989). That privacy interest must be more than *de minimis. Multi-Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). Once a privacy interest is identified, it must be balanced against any public interest in disclosure. To qualify as a FOIA-recognized public interest in disclosure the information must "shed[] light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. In the absence of a qualifying FOIA public interest in disclosure, the privacy interest will prevail. It is possible that information that previously was withheld under Exemption 2 could qualify for protection under Exemption 6. For example, telephone numbers and passcodes assigned to participants of a conference call could be protected under this exemption as those participants have a privacy interest in ensuring that no uninvited person is listening in on the call and there is no public interest in disclosure of such numbers.

Exemption 7

Fifth, and finally, agencies should consider whether Exemption 7 is available to protect information that no longer qualifies under Exemption 2. In *Milner* itself, the Navy's assertion of Exemption 7(F) for the explosives data and maps at issue will now be reviewed by the lower courts. In Justice Alito's concurring opinion in *Milner,* he opined that the phrase "compiled for law enforcement purposes" should be construed to encompass not only traditional law enforcement in the sense of investigating and prosecuting bad actors for crimes that have already occurred, but also preventative law enforcement and security, meaning the prevention of future illegal acts. 131 S. Ct. at 1272. In his words, "[t]he ordinary understanding of law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity and to maintain security." *Id.*

Justice Alito provided specific examples of this type of law enforcement activity, such as steps taken by Secret Service agents to protect federal officials and efforts made by law enforcement officers to prevent a terrorist attack. *Id.*; *see, e.g., Moorefield v. U.S. Secret Service,* 611 F.2d 1021, 1024 (5th Cir. 1980) (finding that records compiled to assist the Secret Service in protecting the lives and safety of the President and his family qualify under Exemption 7).

Similarly, Justice Alito pointed out that records not originally compiled for a law enforcement purpose, "may fall within Exemption 7 if they are later assembled for law enforcement purposes." 131 S. Ct. at 1273. He gives as an example "federal building plans and related information — which may have been compiled originally for architectural planning or internal purposes — [and which] may fall within Exemption 7 if that information is later compiled and given to law enforcement officers for security purposes." *Id.* Additionally, Justice Alito opines that "[d]ocuments compiled for multiple purposes are not necessarily deprived of Exemption 7's protection," since the "text of Exemption 7 does not require that the information be compiled *solely* for law enforcement purposes." *Id.* Thus, he opines that "it may be enough that law enforcement purposes are a significant reason for the compilation." *Id.*

Agencies should use these guidelines in determining whether the information at issue qualifies under Exemption 7. To fall within the threshold of Exemption 7 the information must have been compiled, either originally or at some later date, for a law enforcement purpose, which includes crime prevention and security measures, even if that is only one of many purposes for the compilation. If this threshold is met, then the agency will next need to consider whether the requirements of the various subparts of Exemption 7 are satisfied.

Two of the subparts of Exemption 7, in particular, are likely to be applicable to information that no longer qualifies under Exemption 2. First, there is Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), which protects records or information compiled for law enforcement purposes when production of such records "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." This exemption has been found

to apply to techniques and procedures used in civil as well as criminal law enforcement investigations. *See, e.g.*, *Nowak v. IRS*, No, 98-56656, 2000 WL 60067, at *1 ((9th Cir. Jan. 18, 2000); *Mosby v. U.S. Marshals Serv.*, No, 04-2083, 2005 WL 3273974, at *5 (D.D.C. Sept.1, 2005). It has also been applied in the context of preventative law enforcement. For example, some courts have allowed the protection of details pertaining to "watch list" programs. *See, e.g.*, *Asian Law Caucus v. DHS*, No. 08-00842, 2008 WL 5047839, at *4 (N.D. Cal. Nov. 24, 2008); *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005) (protecting "selection criteria" for lists and handling and dissemination of lists). Other courts have allowed the withholding of techniques used by agents to protect federal employees. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 181-82 (D.D.C. 2004) (approving withholding of "firearm specifications" and "radio frequencies" used by agents protecting Secretary of Commerce); *U.S. News & World Report v. Dep't of the Treasury*, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at *8 (D.D.C. Mar. 26, 1986) (protecting Secret Service's contract specifications for President's armored limousine). Moreover, prior to *Milner,* Exemption 2 and Exemption 7(E) were often used in conjunction. *See, e.g.*, *Voinche v. FBI*, 940 F. Supp. 323, 329, 332 (D.D.C. 1996) (approving nondisclosure of information "relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices" under both Exemptions 2 and 7(E)). For such information no longer falling within Exemption 2, Exemption 7(E) alone could provide protection.

Second, Exemption 7(F), 5 U.S.C. § 552(b)(7(F), which protects records compiled for law enforcement purposes when disclosure "could reasonably be expected to endanger the life or physical safety of any individual" is another option agencies may consider for records no longer falling within Exemption 2 when the harm that is foreseen is harm to the safety of individuals. It is Exemption 7(F) that will be considered by the lower courts for the explosives data and maps at issued in *Milner* itself. Moreover, as Justice Alito noted in his concurrence in *Milner*, "the Navy has a fair argument that the [explosives data and maps] fall[] within Exemption 7(F)," given that they are used "'for the purpose of identifying and addressing security issues,' and for the 'protection of people and property on the base, as well as in [the] nearby community, from the damage, loss, death, or injury that could occur from an accident or breach of security.'" *131 S. Ct. at 1273* (quoting Government's brief). As such, Justice Alito opined that, assuming Exemption 7's threshold was satisfied, the explosives data and maps "may fall comfortably within Exemption 7(F)." *Id.*

Agencies may at times be faced with requests for similar types of records where their concern is that disclosure could cause harm to individuals. If the record satisfies the threshold of Exemption 7, including compilation for a preventative law enforcement purpose, it can potentially be withheld pursuant to Exemption 7(F). *See, e.g., Living River*s *v. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1321 (D. Utah 2003) (protecting "inundation" maps that could reasonably be expected to place at risk the lives of individuals who lived downstream in areas that could be flooded by breach of dams; finding that such inundation maps were used by the Bureau of Reclamation to aid in its law enforcement mandate to maintain law and order and to protect people and property within reclaimed lands, and further finding that disclosure "could increase the risk of an attack on

the dams"). *But see ACLU v. DOD*, 543 F.3d 59, 63, (2d Cir. 2008) (rejecting applicability of Exemption 7(F) to certain detainee photographs based on argument that release "could endanger United States troops, other Coalition forces, and civilians in Iraq and Afghanistan," finding that the phrase "individual" as used in Exemption 7(F) "may be flexible, but is not vacuous," and does not apply to "members of a group so large that risks which are clearly speculative for any particular individuals become reasonably foreseeable for the group"), *vacated & remanded*, 130 S. Ct. 777 (2009) (vacating and remanding for further consideration in light of newly enacted statute affording protection to certain photographs).

While Exemptions 1, 3, 4, 6, and 7 all serve valuable roles in protecting sensitive information that was formerly withheld pursuant to Exemption 2, it seems inevitable that there will be some sensitive records that will not satisfy the standards of any of the Exemptions. Indeed, Justice Breyer recognized this conundrum in his dissent. In criticizing the majority's holding and its acknowledgement that "considerable adjustments" may need to be made, Justice Breyer posits the question "how are these adjustments to be made?" 131 S. Ct. at 1277. He asks what can be done "for information that is *not* compiled for law enforcement purposes." *Id.* He notes that "classification is at best a partial solution," that "takes time" and "is subject to its own rules." *Id.* Likewise, legislative action "takes time" and Congress "has much to do." *Id.* Justice Breyer, therefore, believed that "Congress' public information objectives" were appropriately left to the courts to turn "into workable agency practice[s] and [that courts should] adhere to such interpretations once they are settled." *Id.* His views, however, did not persuade the majority.

Conclusion

In *Milner,* the Supreme Court overturned decades of judicial interpretation of the scope of Exemption 2. The exemption is no longer divided into "High 2" and "Low 2." Rather, a strict textual reading of the exemption must be now be employed, with the key requirement being a focus on the word "personnel." Only those matters "related solely to the internal personnel rules and practices of the agency" are eligible for protection under the newly defined Exemption 2. Agencies should consider making discretionary releases of such information in accordance with the Attorney General's FOIA Guidelines whenever they determine that release would not cause foreseeable harm. For those instances where there is foreseeable harm, and yet due to the narrowed scope of Exemption 2, the information can no longer be protected under that exemption, agencies should consider whether other exemptions afford protection. In making those determinations, agencies are encouraged to call OIP's FOIA Counselor line to discuss the matter. The Supreme Court's decision in *Milner* represents a landmark case in the history of the FOIA, and this guidance should serve as a starting point for agencies to work through its many implications for their FOIA-processing efforts.