Lowered Expectations:

Supreme Court's Milner Decision Prompts Closer Study of Alternatives to FOIA Exemption "High 2"

By Christopher Julka
DON FOIA Policy Lead & Public Liaison

In Milner v. the Department of the Navy, Supreme Court Justice Elena Kagan stated, "[W]e acknowledge that our decision today upsets three decades of agency practice . . . and therefore may force considerable adjustments."

She was right then, and three years later continues to be right.

The Milner case remains widely viewed as a landmark in the interpretation of the Freedom of Information Act (FOIA). For the public, it may lead to greater access to Federal government records—though not necessarily and possibly at the cost of longer processing times. For the FOIA practitioner, it means closer study of FOIA law to avoid reliance on the (b)(2) exemption, which the Court in this decision eliminated, as will now be discussed.

In Milner, the Supreme Court sharply changed course from decades of precedent in federal government public disclosure law in order to steer clear of an exemption in the FOIA which it had found ominously cloudy. The FOIA is a law that generally requires the federal government to make its records available to the public. Enacted by Congress in 1967, it was not the first such law. Up to that point, a disclosure provision had existed within the Administrative Procedure Act (APA), which dates back to 1946.

But according to Justice Kagan, this pre-FOIA law "was plagued with vague phrases" and gradually had become more "a withholding statute than a disclosure statute." She saw this same problem resurfacing within the FOIA statute, in an exemption nicknamed "High 2" (sometimes this exemption is also called "High b(2)" because it exists within subsection (b) of the FOIA statute, at title 5, section 552 of the U.S. Code). In an opinion supported by an 8-1 vote, Kagan in Milner handed down a simple, clear solution: invalidate High 2.

What is exemption 2? As it appears in the FOIA statute, it is the protection from disclosure of material that is "related solely to the internal personnel rules and practices of an agency." What that single phrase means was the subject of varying interpretations. By the time of Milner, two views had emerged, as summarized by the Washington D.C. Circuit Court in *Crooker v. ATF*, 670 F2d 1051 (1981): (1) "Low 2," which protected only records about personnel; (2) High 2, which would prohibit any record that might "significantly risk circumvention of the law."

The High 2 reading proved too expansive for the Supreme Court. At issue in Milner was a request to the Department of the Navy (DON) for maps and data detailing "'minimum separation distances' for explosives," which the DON used in constructing storage facilities for weapons, ammunition, and other explosives at the Naval Magazine Indian Island in Puget Sound,

Washington. The DON refused to release these records to the requester, a Puget Sound resident, on grounds that "disclosure would threaten the security of the base and surrounding community." Exemption 2 protected such information, the DON argued, under the High 2 interpretation.

The Court, however, found that this argument "suffers from a patent flaw: it is disconnected from Exemption 2's text." In fact, nothing sounding like High 2 actually exists in the text of the statute, and the legislative history is ambiguous. The lone dissenter Justice Stephen Breyer had urged the Court to let "sleeping dogs lie." But to the rest of the Court, the dog was actually an elephant in the room. Concluded Kagan, "When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, *we must choose the language*."

Nevertheless, the request in Milner posed a genuine risk to national security and thus a problem to the DON. In the wake of the Court's decision to invalidate High 2, what could it do?

Of no avail was FOIA exemption 1, which prohibits disclosure of classified material. Ordinarily, exemption 1 is a mainstay for the protection of national security, but in Milner, it was unavailable. The problem, explains Grant Lattin, director of the Department of the Navy Judge Advocate General's (JAG) General Litigation Division, is that information about the explosives in question needs to be available to first responders, such as local police and fire fighters. For this reason, it could not be classified. "But it was still essential," he said "because bad guys can use such information to circumvent base security."

It was a gap in the law that was just one of many due to the demise of High 2. Left with only Low 2, Exemption 2 appears to protect only trivia. The reason is that the Supreme Court reads the word "solely" to mean that the personnel records mentioned by this exemption must be devoid of public interest. Under the Obama administration, which has requested disclosure of all records except in cases of "foreseeable harm" (through a memorandum circulated by Attorney General Eric Holder), Exemption 2 is a dead letter, according to Lattin.

"The traditional interpretation of Exemption 2 was definitely overbroad," he said. "But now we must be very precise in how we use the FOIA statute."

This new precision typically involves a new look at the following FOIA exemptions:

*__Exemption 3__. This exemption refers to protections created by statutes other than the FOIA. Within a year of the Milner decision and at the recommendation of the Defense Department, Congress enacted a statute now codified as Title 10, Section 130e. It provides protection for "Critical Infrastructure Security Information (CISI)," as a direct attempt to plug the gap caused by the Court's elimination of High 2.

According to Lattin, the new provision has been an effective remedy, but not entirely. "One disadvantage of 130e is that each request has to go to DoD for approval," he said, a requirement which prolongs the process.

Although the process is slower, requesters can now get more information due to the elimination of High 2's vagueness, said James Hogan, chief of the DoD Freedom of Information Policy Office, who oversees implementation and policy for Section 130e on behalf of DoD. "Before Milner, b(2) was misused," he said. "The end result of Milner is that we have released more information."

*__Exemption 7__. This exemption covers information compiled for law enforcement purposes. It includes 7(E), which concerns tactics, techniques and procedures, and 7(F), which

provides for protection where life or limb might otherwise be in jeopardy. In a concurring opinion in Milner, Justice Samuel Alito held that 7(F) would have protected the DON even though High 2 had not.

In fact, Alito held further that 7(F) could apply not merely to criminal investigations but also to records bearing on crime prevention. The DON continues to rely on this more expansive construction of 7(F), Lattin said.

In summary, the Supreme Court's decision to clean up the FOIA statute means FOIA practitioners cannot simply invoke "(b)(2)" to deny a request for unclassified information that bears on national security. Instead, numerous alternatives must be considered.

"Milner remains an active issue," Lattin said. "I don't think you can fault the majority of the Supreme Court on how it dealt with b(2), given how broadly it had been construed without identifying any statutory language to support it. But the loss of High 2 has made life more complicated."