



United States Department of Justice

Office of Information Policy

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

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The Supreme Court's Decision

In *Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011), the Supreme Court issued an opinion pertaining to Exemption 2 of the FOIA that overturned thirty years of established FOIA precedents and significantly narrowed the scope of that exemption.

At issue: 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.

Requester: A resident of Puget Sound had requested the maps and data.

The Department of the Navy's decision:
Protected under Exemption 2 as "disclosure would threaten the security of the base and surrounding community."

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."

The Supreme Court granted certiorari, citing “the Circuit split respecting Exemption 2’s meaning” and reversed.

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.”

Utilizing that newly developed interpretation, the Court found that “[t]he explosives maps and data requested here do not qualify for withholding under that exemption.”

The case was then remanded back to the Ninth Circuit for consideration of the applicability of Exemption 7(F) to the data and maps.

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

Exemption 2's twelve simple words: “related solely to the internal personnel rules and practices of an agency.”

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.”

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.’”

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.”

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 . . .).”

Exemption 2 Before *Milner* - “High 2” and “Low 2” Under *Crooker*

Crooker v. ATF, 670 F.2d 1051 (D.C. Cir. 1981).

Under *Crooker*, the statutory language was read to imply a two-part test. To qualify for protection the records had to be:

- I. “predominantly internal” and

II. A. either of no genuine public interest, or trivial, which was referred to as “Low 2,” or

B. be matters of a more substantial nature if the disclosure would significantly risk circumvention of the law, which was referred to as “High 2.”

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).

At issue in *Rose* were case summaries of honor code and ethics proceedings held at the United States Air Force Academy.

Exemption 2 was rejected for the summaries “because they ‘d[id] not concern only routine matters’ of merely internal significance.”

Still, the *Rose* decision contained a “possible caveat” for situations where disclosure may risk circumvention of the law.

The Supreme Court's Rejection of *Crooker*

In *Milner*, the government argued for the adoption of *Crooker's* two-pronged interpretation of Exemption 2.

The Supreme Court, however, found that such an argument “suffers from a patent flaw: It is disconnected from Exemption 2’s text.”

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.”

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.

Regarding legislative history argument:

The Court noted that in *Rose* it had found the Senate Report to be “the more reliable of the two” Reports.

Yet, it declared 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.*”

Regarding Congressional action argument:

If Exemption 2 already contained a circumvention provision, amendment of Exemption 7(E) would have been “superfluous” and so deprived of any effect.

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.”

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

The final argument advanced by the government in *Milner*:

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.””

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.”

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.”

The Supreme Court's Conclusion

In concluding its opinion the Supreme Court expressly stated that it “recognize[d] the strength of the Navy’s interest in protecting the [explosives] data and maps and other similar information.”

It also acknowledged that its decision “upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments.”

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).

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.”

It declared: “All we hold today is that Congress has not enacted the FOIA exemption the Government desires.”

Concurrence and Dissent

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).”

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

(cont. . .)

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.”

The New Parameters of Exemption 2

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.

New Three-Part Test

I. The Information Must be Related to “Personnel” Rules and Practices

- 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: “the selection, placement, and training of employees and . . . the formulations of policies, procedures, and relations with [or involving] employees or their representatives.”

- 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.”

- 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.
- 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."
- Such an interpretation "would tend to engulf other FOIA exemptions

II. The Information Must Relate “Solely” to those Personnel Rules and Practices

- The information at issue must “relate solely” to the agency’s personnel rules and practices. The Court defines this phrase by its “usual” meaning, which is “exclusively or only.”

III. 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.”
- The Court noted, these additional requirements would typically be met for human resource matters.

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

In *Rose*, Exemption 2 was found inapplicable to the honor code summaries due to the “genuine and significant public interest” in their disclosure.

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.’”

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.”

It further explained that the honor code case summaries “plainly do not fit that description,” and “are not matter with purely internal significance.” Moreover, the Court found, “[t]hey do not concern only routine matters” and “[t]heir disclosure entails no particular administrative burden.”

In so ruling, the Court in *Rose* focused on the unique role of the military and the importance and significance of discipline within its ranks.

It also found that “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.”

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.’”

In *Milner*, the Court 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.’”

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,” there likely will be 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.

Attorney General Holder's FOIA Guidelines

The opportunities to make discretionary disclosures of material technically protected by the newly defined Exemption 2 remain as viable as ever.

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.””

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.

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.

In such situations, the remedy for agencies is to “seek relief from Congress” rather than from the courts.

Exemption 1

First, for disclosures that could risk harm to national security, Exemption 1 of the FOIA 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.”

The Executive Order specifies categories of information that can be considered for classification. 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.

Once classified, the information must then be properly marked and safeguarded.

Exemption 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.

Exemption 4

Third, Exemption 4 may provide a legal basis for withholding certain sensitive records, provided that 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).

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.

Second, if submission of the information was required by the government, there are generally three ways in which it can be 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.

Examples:

- plans for a nuclear power plant or other critical infrastructure
- agency credit card numbers or bank account numbers

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).

It is possible that information that previously was withheld under Exemption 2 could qualify for protection under Exemption 6.

Example: telephone numbers and pass codes assigned to participants of a conference call.

Exemption 7

Fifth, and finally, agencies should consider whether Exemption 7 is available to protect information that no longer qualifies under Exemption 2.

Threshold: 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.

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.”

Example: steps taken by Secret Service agents to protect federal officials and efforts made by law enforcement officers to prevent a terrorist attack

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.”

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.”

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.”

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.

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.

It has also been applied in the context of preventative law enforcement.

Examples:

- details pertaining to “watch list” programs
- techniques used by agents to protect federal employees
- information “relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices”

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.

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.’”

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).

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 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 (202 514-FOIA) to discuss the matter.