



Exemption 2

Exemption 2 of the Freedom of Information Act exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency."¹ The courts have interpreted Exemption 2 to encompass two 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

When applying Exemption 2, it is important to first note that the President and the Attorney General have issued memoranda to all agencies emphasizing that the FOIA reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure."³ (For a discussion of these memoranda, see Procedural Requirements, President Obama's FOIA Memorandum & Attorney General Holder's FOIA Guidelines, above.) A comprehensive examination of both the "low 2" and "high 2" aspects of Exemption 2 is set forth below.

Initial Considerations

Exemption 2's protection of two distinct categories of information can be traced back

¹ 5 U.S.C. § 552(b)(2) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

² See, e.g., Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (describing "low 2" and "high 2" aspects of exemption); Judicial Watch, Inc. v. U.S. Secret Serv., 579 F. Supp. 2d 182, 186 (D.D.C. 2008) (describing types of records protected by "low 2" and "high 2").

³ Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum] (noting that "In the face of doubt, openness prevails"); accord Attorney General's Memorandum for Heads of Executive Departments and Agencies Regarding the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at <http://www.usdoj.gov/ag/foia-memo-march 2009.pdf>; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (providing guidance on implementing presumption favoring disclosure).

to the legislative history of the FOIA's enactment. For more than fifteen years after the passage of the Act, 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.⁴

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.⁵

The Supreme Court was confronted with this conflict in Department of the Air Force v. Rose.⁶ In that case, the Supreme Court construed Exemption 2, in line with the Senate's view, as protecting what is now known as "low 2" information, i.e., internal agency matters so routine or trivial that they could not be "subject to . . . a genuine and significant public interest."⁷ 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."⁸ At the same time, the Court left the door open for the future application of "high 2," in line with the House's view.⁹

The Supreme Court's ruling in Rose helped to define the contours of Exemption 2, but it did not dispel all the confusion about Exemption 2's scope. Early judicial opinions subsequent to this ruling, particularly in the Court of Appeals for the District of Columbia

⁴ S. Rep. No. 89-813, at 8 (1965).

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

⁶ 425 U.S. 352 (1976).

⁷ Id. at 369-370.

⁸ Id.

⁹ Id. at 369 (suggesting that approach taken in House Report could permit an agency to withhold matters of some public interest "where disclosure may risk circumvention of agency regulation.").

Circuit, demonstrated judicial ambivalence about whether Exemption 2 covered only personnel-related records or included more general internal agency practices.¹⁰ Additionally, these early cases did not entertain the possible existence of a "high 2" aspect of Exemption 2.

As is discussed in greater detail below, the D.C. Circuit eventually determined in Crooker v. ATF that Exemption 2 was intended to cover "high 2" records, whether or not such records were personnel-related.¹¹ Subsequently, in Founding Church of Scientology v. Smith, the court buttressed Crooker's holdings, conclusively establishing that Exemption 2 was not limited to agency personnel records.¹² Further, the court articulated the following approach for protecting records under either "low 2" or "high 2":

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.¹³

In this decision, the D.C. Circuit thus clarified that Exemption 2 allows the withholding of a great variety of internal rules, procedures, and guidelines, and not just those related to "personnel."¹⁴

¹⁰ Compare Allen v. CIA, 636 F.2d 1287, 1290 (D.C. Cir. 1980) (holding that exemption covers "nothing more than trivial administrative personnel rules"), and Jordan v. DOJ, 591 F.2d 753, 764 (D.C. Cir. 1978) (en banc) (ruling that exemption covers "trivia" pertaining only to "internal personnel matters"), with Lesar v. DOJ, 636 F.2d 472, 485 (D.C. Cir. 1980) (withholding non-personnel related records (informant codes) because exemption covers routine matters of merely internal interest), and Cox v. DOJ, 601 F.2d 1, 4 (D.C. Cir. 1979) (per curiam) (withholding non-personnel related law enforcement manuals as "routine matters of merely internal interest"). 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).

¹¹ 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc) (rejecting Jordan's rationale that Exemption 2 was limited to personnel records of little interest to general public, and endorsing protection for sensitive law enforcement manuals (citing Jordan, 591 F.2d at 763)).

¹² 721 F.2d 828, 830 (D.C. Cir. 1983) (per curiam) (rejecting Allen and Jordan to extent that they limited Exemption 2 to personnel records (citing Crooker, 670 F.2d at 1073)).

¹³ Id. at 830-31 n.4 (citations omitted); see also Morley v. CIA, 508 F.3d 1108, 1124-25 (D.C. Cir. 2007) (noting that records can be withheld under Exemption 2 if they "fall within the terms of the statutory language" and their release "risk[s] circumvention of agency regulation" or they pertain to "trivial administrative matters of no genuine public interest" (quoting Schwaner v. Dep't of the Air Force, 898 F.2d 793, 794 (D.C. Cir. 1990))).

¹⁴ Founding Church, 721 F.2d at 830 & n.2; see also, e.g., Bangoura v. U.S. Dep't of the Army,
(continued...)

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 from the Courts of Appeals for the Ninth and Tenth Circuits, which are discussed in detail below, utilize a more narrow approach to the concept of "personnel-relatedness."¹⁵

"Low 2": Trivial Matters

Exemption 2 of the FOIA permits the withholding of internal matters that are of a relatively trivial nature.¹⁶ 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.¹⁷ Rather, this aspect of the exemption is based upon the rationale that the very task of processing and releasing some requested records would place an administrative burden on the agency that would not be justified by any genuine public benefit.¹⁸

¹⁴(...continued)

607 F. Supp. 2d 134, 144 (D.D.C. 2009) ("personnel rules and practices' has been interpreted to include not only 'minor employment matters' but also 'other rules and practices governing agency personnel'" (quoting Kurdyukov v. U.S. Coast Guard, 578 F. Supp. 2d 114, 124 (D.D.C. 2008))); Concepcion v. FBI, 606 F. Supp. 2d 14, 30 (D.D.C. 2009) (same) (quoting Crooker, 670 F.2d at 1056) (appeal pending); Judicial Watch, Inc. v. DOT, No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005) (stating that "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"); FOIA Update, Vol. V, No. 1, at 10 ("FOIA Counselor: The Unique Protection of Exemption 2") (advising that Founding Church "expressly" held that Allen "personnel" restriction no longer applies).

¹⁵Maricopa 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).

¹⁶See, e.g., Dep't of the Air Force v. Rose, 425 U.S. 352, 369-70 (1976); Lesar v. DOJ, 636 F.2d 472, 485 (D.C. Cir. 1980).

¹⁷See 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]" not necessary to withhold information that is trivial and of no public interest).

¹⁸See, 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."); 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."); see also FOIA Update, Vol. V, No. 1, at 10-11 ("FOIA Counselor: The Unique Protection of Exemption 2").

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 invoking the exemption to withhold it.¹⁹

For information in a requested record to be properly withheld under "low 2," it must meet two criteria: First, the information must be "predominantly internal," and second, the information must be of a trivial nature and not of any "genuine public interest."²⁰ Thus, "low 2" shares in common with "high 2" the requirement that the information withheld be "predominantly internal."²¹ However, for "low 2" in particular, some courts have also focused on the literal language of the exemption to determine whether the information at issue sheds light on agency "rules and practices."²²

Applying this principle to federal personnel lists, the Court of Appeals for the District of Columbia Circuit held that a list of the names and duty addresses of military personnel stationed at Bolling Air Force Base did not meet the threshold requirement of being "related solely to the internal rules and practices of an agency."²³ The court held that, for "low 2"

¹⁹ 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).

²⁰ 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.").

²¹ See, e.g., id. (noting that "predominant internality" threshold must be met for both "low 2" and "high 2"); Long v. DOJ, 450 F. Supp. 2d 42, 57 n.16 (D.D.C. 2006) (same), amended on other grounds by 457 F. Supp. 2d 30 (D.D.C. 2006), amended further on reconsideration on other grounds, 479 F. Supp. 2d 23 (D.D.C. 2007) (appeal pending); Edmonds, 272 F. Supp. 2d at 50 (same).

²² Schwamer v. Dep't of the Air Force, 898 F.2d 793, 795 (D.C. Cir. 1990) (noting that courts may be more willing to "sanction a weak relation to 'rules and practices'" for weightier government interests); see also Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1081, 1083 (6th Cir. 1998) (holding that records pertaining to agency practice of collecting and compiling information was not sufficiently related to personnel rule or practice to qualify for Exemption 2, while acknowledging that where significant interest in non-disclosure of sensitive information exists, courts are more willing to "sanction a weak relation to 'rules and practices'" (quoting Schwamer, 898 F.2d at 795)); Long, 450 F. Supp. 2d at 58 n.19 (clarifying that records pertaining to "sensitive agency practices" may only be withheld if "predominantly internal," but noting that Schwamer may support weakened relationship to agency "rules and practices" for weighty government interests).

²³ Schwamer, 898 F.2d at 794; see also Maydak v. DOJ, 362 F. Supp. 2d 316, 323 (D.D.C. 2005) (holding Exemption 2 inapplicable to list of names and titles of prison staff; applying reasoning similar to that of Schwamer court), reconsideration denied, 579 F. Supp. 2d 105 (D.D.C. 2008). But see The News-Press v. DHS, No. 05-CV-102, 2005 WL 2921952, at *10-11

purposes, 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.²⁴ In doing so, the court acknowledged that it "often applied the 'predominant internality' test without emphasizing the words 'rules and practices' . . . [b]ut in such cases the requested information was typically a rule or practice in the most literal sense."²⁵

Most courts have not focused specifically on the issue of relatedness to agency rules or practices, but instead have focused solely on the meaning of the phrase "predominantly internal," which courts regularly interpret as follows:

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.'²⁶

(The "predominant internality" requirement for "high 2" records is discussed in greater detail below under Exemption 2, "High 2": Risk of Circumvention.)

Over time, courts have continued to include a wide variety of trivial administrative

²³(...continued)

(M.D. Fla. Nov. 4, 2005) (finding 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"), rev'd on other grounds, 489 F.3d 1173 (11th Cir. 2007).

²⁴ Schwaner, 898 F.2d at 797; see also, e.g., Abraham & Rose, 138 F.3d at 1081, 1083 (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)); 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); Bangoura v. U.S. Dept of the Army, 607 F. Supp. 2d 134, 145 (D.D.C. 2009) (finding "predominantly internal" the "special agent sequence numbers" used to identify agents, in part because withheld records need only be "related to" agency rules and practices (quoting Kurdyukov v. U.S. Coast Guard, 578 F. Supp. 2d 114, 124 (D.D.C. 2008))); Concepcion v. FBI, 606 F. Supp. 2d 14, 31 (D.D.C. 2009) (observing that information need not constitute "rules and practices" under Exemption 2 if it relates to such rules and practices (quoting Schwaner, 898 F.2d at 795)) (appeal pending); Singh v. FBI, 574 F. Supp. 2d 32, 43 (D.D.C. 2008) (same). But see Hale v. DOJ, 973 F.2d 894, 902 (10th Cir. 1992) (ruling, in post-Schwaner decision, that "personnel directories containing the names and [office] addresses of [most] FBI employees" are properly withheld as "trivial matters of no genuine public interest"), cert. granted, vacated & remanded on other grounds, 509 U.S. 918 (1993).

²⁵ Schwaner, 898 F.2d at 795.

²⁶ Edmonds, 272 F. Supp. 2d at 50 (quoting Cox v. DOJ, 601 F.2d 1, 5 (D.C. Cir. 1979)); see also, e.g., Bangoura, 607 F. Supp. 2d at 145 (determining that special agent identification numbers do not constitute "'secret law' . . . or [an] 'attempt to modify or regulate public behavior'" (quoting Crooker v. ATF, 670 F.2d 1051, 1073-75 (D.C. Cir. 1981) (en banc))).

information within the "low 2" aspect of Exemption 2's coverage. This includes file or tracking numbers,²⁷ document routing information,²⁸ internal telephone and fax numbers,²⁹ routine

²⁷ See, e.g., Antonelli v. BOP, 569 F. Supp. 2d 61, 65 (D.D.C. 2008) (file number used to index and retrieve information in investigatory files); 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 ("file numbers assigned by the agencies that have referred matters to [United States Attorneys' Offices]"); Odle v. DOJ, No. 05-2711, 2006 WL 1344813, at *13 (N.D. Cal. May 17, 2006) (OPR case file numbers); Env'tl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 583-84 (N.D. W. Va. 2005) ("Criminal Investigation Division tracking numbers").

²⁸ See, e.g., Wheeler v. DOJ, 403 F. Supp. 2d 1, 13 (D.D.C. 2005) ("information concerning the distribution of copies of documents" to unnamed agency); Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *14 (D.D.C. Aug. 10, 2005) ("message routing data"), aff'd on other grounds, No. 06-5112, 2009 WL 1258276 (D.C. Cir. May 8, 2009); Coleman v. FBI, 13 F. Supp. 2d 75, 78 (D.D.C. 1998) ("mail routing stamps").

²⁹ See, e.g., Hale, 973 F.2d at 902 (FBI room numbers, telephone numbers, and FBI employees' identification numbers; personnel directories containing names and addresses of FBI employees); Concepcion, 606 F. Supp. at 31-32 (telephone numbers of FBI employees, Assistant U.S. Attorneys and paralegals); James Madison Project v. CIA, No. 07-1382, 2009 WL 780228, at *9-10 (D.D.C. Mar. 26, 2009) (telephone and fax numbers of CIA employees); Durrani v. DOJ, No. 08-0609, 2009 WL 755219, at *9 (D.D.C. Mar. 24, 2009) (direct telephone numbers of Immigration and Customs Enforcement agents); Coleman v. Lappin, 607 F. Supp. 2d 15, 21 (D.D.C. 2009) (phone and fax numbers for BOP personnel); Kishore v. DOJ, 575 F. Supp. 2d 243, 255 (D.D.C. 2008) (internal FBI telephone and fax numbers) (appeal pending); Singh, 574 F. Supp. 2d at 44 (DEA telephone numbers); Odle, 2006 WL 1344813, at *13 ("non-public [OPR] 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), appeal dismissed, No. 00-6041 (2d Cir. Sept. 12, 2000).

personnel instructions,³⁰ other similar administrative codes and markings,³¹ routine internal computer codes and data,³² and a variety of other types of purely internal administrative

³⁰ Hale, 973 F.2d at 902 (checklist form used to assist FBI special agents in consensual monitoring); Schiller, 964 F.2d at 1208 (internal time deadlines and procedures, recordkeeping directions, instructions on contacting agency officials for assistance, and guidelines on agency decisionmaking); 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), summary affirmance granted on other grounds, No. 06-5427 (D.C. Cir. May 24, 2007); DiPietro v. EOUSA, 368 F. Supp. 2d 80, 82 (D.D.C. 2005) (holding that 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"); 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" (quoting agency's filing)).

³¹ See, e.g., Hale, 973 F.2d at 902 (administrative markings and notations on documents); Bangoura, 607 F. Supp. 2d at 145-46 (military special agent identification numbers); Concepcion, 606 F. Supp. 2d at 31-32 ("administrative markings relating to internal agency file control systems" and FBI source symbol numbers/informant numbers); Durrani, 2009 WL 755219, at *9 (internal codes from reports of investigation); Singh, 574 F. Supp. 2d at 44 (ICE case identification numbers, source symbol numbers, "case program codes," and other administrative codes); Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *6 (D. Minn. Aug. 23, 2007) (case names/numbers, dates investigations were opened/closed, checklists, classification codes, and staff names and telephone numbers); Baez v. FBI, 443 F. Supp. 2d 717, 727 (E.D. Pa. 2006) (administrative markings from account statement); Maydak, 362 F. Supp. 2d at 324 ("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) (Customs Service codes concerning individual pilot). But see Gerstein v. DOJ, No. C-03-4893, 2005 U.S. Dist. LEXIS 41276, at *36-38 (N.D. Cal. Sept. 30, 2005) (ordering disclosure of page numbers on records pertaining to delayed-notice searches, given 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. DOJ, 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 these markings constitute trivial administrative matters of no public interest").

³² See Asian Law Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at *5 (N.D. Cal. Nov. 24, 2008) (electronic storage location of interviewing procedures, data, and name of obsolete database); Poulsen v. U.S. Customs & Border Prot., No. 06-1743, 2006 WL 2788239, at *6-9 (N.D. Cal. Sept. 26, 2006) ("incident i.d.' numbers" and administrative codes assigned to agency computers); Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, No. 04-1919, 2005 WL 913268, at *3 (D.D.C. Apr. 20, 2005) ("computer function codes, internal file numbers, and computer system and report identity), partial reconsideration granted on other

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records.³³

The second part of the "low 2" formulation is whether there "is a genuine and significant public interest" in disclosure of the records requested.³⁴ As the Supreme Court observed, the purpose of "low 2" is to "relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest."³⁵ As the D.C. Circuit found in Founding Church of Scientology v. Smith, "a reasonably low threshold is maintained for determining when withheld administrative material relates to significant public interests."³⁶ When there is such an interest -- for example, with the Air Force Academy honor code proceedings that were at issue in Department of the Air Force v. Rose -- the information has been found not to be covered by the "low 2" aspect of Exemption 2.³⁷

³²(...continued)

grounds, 374 F. Supp. 2d 129 (D.D.C. 2005).

³³ See, e.g., Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978) (cover letters of merely internal significance); James Madison Project, 2009 WL 780228, at *9-10 (internal publications, employee bulletins, component abbreviations, names/numbers of internal CIA regulations, evaluations of employees' resumes, and policies regarding Publications Review Board review of nonofficial publications containing CIA information); Durrani, 2009 WL 755219, at *9 (incident reports, "a 'Record of Deportable/Inadmissible Alien,'" and custody receipts for seized evidence and property); James Madison Project v. CIA, 605 F. Supp. 2d 99, 112-13 (D.D.C. 2009) (various types of CIA personnel records, including policies and procedures regarding performance evaluations, employee grievances and complaints, employee reassignment, Exceptional Performance Awards, and employee benefits); Moayed v. U.S. Customs & Border Prot., 510 F. Supp. 2d 73, 84-85 & n.7 (D.D.C. 2007) (administrative procedures pertaining to agency operational responsibilities); Melville v. DOJ, No. 05-0645, 2006 WL 2927575, at *6 (D.D.C. Oct. 12, 2006) (opening and closing forms from criminal prosecution); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *5 (D. Minn. Oct. 24, 2005) (opening and closing reports from SEC investigation), partial reconsideration denied on other grounds, 2006 WL 208783 (D. Minn. Jan. 26, 2006); Edmonds, 272 F. Supp. 2d at 50-51 (FBI internal rules and regulations for granting waivers from ordinary language-testing requirements).

³⁴ Rose, 425 U.S. at 369.

³⁵ Id. at 369-70; see also Dirksen, 803 F.2d at 1460 (noting that "low 2's" purpose is to relieve agency burden of releasing information in which public has no "legitimate interest").

³⁶ 721 F.2d 828, 830-31 n.4 (D.C. Cir. 1983).

³⁷ Rose, 425 U.S. at 367-70; see also, e.g., Tax Analysts v. DOJ, 845 F.2d 1060, 1064 n.8 (D.C. Cir. 1988) (finding Exemption 2 inapplicable due to "public's obvious interest" in agency copies of court opinions), aff'd on other grounds, 492 U.S. 136 (1989); Vaughn v. Rosen, 523 F.2d 1136, 1140-43 (D.C. Cir. 1975) (refusing to allow agency to withhold evaluations of effectiveness of implementation of agency's policies due to legitimate public interest in them); Keeper of the Mountains Found. v. DOJ, 514 F. Supp. 2d 837, 848-50 (S.D. W. Va. 2007) (rejecting agency's argument that withheld information was trivial because document constituted substantive

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On the other hand, courts have allowed the withholding of records pursuant to the "low 2" aspect of Exemption 2 in the absence of any "legitimate public interest" in the information.³⁸

³⁷(...continued)

evidence of agency's role in assisting Senator's research into environmentalists' hypothesized role in breach of New Orleans levees during Hurricane Katrina); Gerstein, 2005 U.S. Dist. LEXIS 41276, at *36-38 (ordering disclosure of page numbers on records concerning delayed-notice searches, because public has 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), appeal dismissed voluntarily, No. 05-16039 (9th Cir. Sept. 16, 2005); 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 due to legitimate public interest in such documents), 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. ¶ 83,057, at 83,566-67 (concluding that standards of conduct, grievance procedures, and EEO procedures for FBI employees were improperly withheld under "low 2" because such records are of "public concern and interest"); 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 given that such matters "are of legitimate interest to the public").

³⁸ 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); Asian Law Caucus, 2008 WL 5047839, at *5 (finding no legitimate public interest in name of obsolete database); 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 (finding no legitimate public interest in source symbol numbers and agent identification numbers, as well as in computer access codes, telephone and fax numbers, and numbers used to denote different categories of counterfeit currency); Voinche v. FBI, 46 F. Supp. 2d 26, 30 (D.D.C. 1999) (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

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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,³⁹ while another portion, because of a discerned "public interest" in it, was not.⁴⁰

In some cases courts have conflated the "low 2" and "high 2" aspects of the exemption or have not specified which aspect of the Exemption was being applied.⁴¹ Courts have also reached differing conclusions as to whether agencies are required to specify that the "low 2" or "high 2" aspect of Exemption 2 is being invoked to protect records.⁴² (See also the further discussion of this point under Litigation Considerations, Vaughn Index, below.)

³⁸(...continued)

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).

³⁹ 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.'").

⁴⁰ Id. at *16 (finding that certain definitions "contain[ing] general legal instruction to SEC staff on how to analyze FOIA requests . . . must be disclosed").

⁴¹ See, e.g., Concepcion, 606 F. Supp. 2d at 31-32 (allowing the withholding of internal telephone numbers pursuant to "low 2," both because of lack of genuine public interest in such records and because employees could be subject to disruptive, harassing telephone calls); Bullock v. FBI, 577 F. Supp. 2d 75, 81 (D.D.C. 2008) (withholding information without specifying whether "low 2" or "high 2" was applicable); Lipsey v. DOJ, No. 06-423, 2007 WL 842956, at *3 (D.D.C. Mar. 19, 2007) (same); Baez, 443 F. Supp. 2d at 727 (holding that agency properly withheld "allegedly sensitive" administrative markings, because they "could not be of any interest to the public"); Neuhausser v. DOJ, 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. DOJ, 254 F. Supp. 2d 23, 36 (D.D.C. 2003) (protecting BOP's internal codes for electronic systems because inmates "could access information regarding other inmates," and reiterating that courts have "consistently found no significant public interest in the disclosure of identifying codes"); Voinche, 46 F. Supp. 2d at 30 (concluding that "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").

⁴² Compare Robinson v. Attorney General of U.S., 534 F. Supp. 2d 72, 80 (D.D.C. 2008) (finding that agency's declaration was inadequate because it failed to specify whether "high 2" or "low 2" was basis for withholding), appeal dismissed voluntarily, No. 08-5048 (D.C. Cir. June 23, 2008), with Moayed, 510 F. Supp. 2d at 84 (finding that agency need not designate withholdings as "high 2" or "low 2" in its Vaughn index (citing NYC Apparel FZE v. U.S. Customs & Border Prot., 484 F. Supp. 2d 77, 92 n.21 (D.D.C. 2007))), and Changzhou, 2005 WL 913268, at *3 ("[T]he Court is unaware of any authority requiring the government to designate[] whether a withholding falls within a 'low' or 'high' category.").

"High 2": Risk of Circumvention

The second category of information covered by Exemption 2 -- internal matters of a far more substantial nature the disclosure of which would risk the circumvention of a statute or agency regulation -- was not initially considered to be within the scope of Exemption 2's coverage. In Department of the Air Force v. Rose,⁴³ the Supreme Court specifically left open the question of whether such records fall within Exemption 2's coverage.⁴⁴

This question was resolved by the Court of Appeals for the District of Columbia Circuit when it addressed the issue in Crooker v. ATF, a case involving a law enforcement agents' training manual.⁴⁵ The Crooker decision stands at the head of a long line of cases interpreting Exemption 2 to encompass protection for sensitive internal agency information where disclosure would significantly risk circumvention of the law.⁴⁶

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:

- (1) that a requested document be "predominantly internal,"⁴⁷ and

⁴³ 425 U.S. 352 (1976).

⁴⁴ Id. at 364, 369.

⁴⁵ 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc).

⁴⁶ 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 v. ATF, 631 F.2d 653, 657 (9th Cir. 1980) (holding that "law enforcement materials, disclosure of which may risk circumvention of agency regulation, are exempt from disclosure" under Exemption 2); Kurdyukov v. U.S. Coast Guard, 578 F. Supp. 2d 114, 125-26 (D.D.C. 2008) (withholding sensitive documents pertaining to drug interdiction efforts because release of such records could lead to circumvention of law enforcement efforts), reconsideration denied, No. 07-1131 (D.D.C. Nov. 26, 2008), appeal dismissed, No. 08-5460, 2009 U.S. App. LEXIS 5600 (D.C. Cir. Mar. 17, 2009); Moayed v. U.S. Customs & Border Prot., 510 F. Supp. 2d 73, 82 (D.D.C. 2007) (recognizing applicability of "high 2" to "more substantial internal matters" where disclosure would significantly risk circumvention of the law).

⁴⁷ Crooker, 670 F.2d at 1074 (adopting requirement that records be "predominantly internal" to qualify for "high 2" protection as 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. DOT, 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

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(2) that its disclosure "significantly risks circumvention of agency regulations or statutes."⁴⁸

Historically, beginning with Crooker, courts typically found that any asserted public interest in disclosure is legally irrelevant under this "anti-circumvention" aspect of Exemption 2.⁴⁹ Rather, the concern under "high 2" is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection."⁵⁰ Notably, despite Crooker and its progeny, recent cases have given inconsistent treatment to the question of the relevance of public interest under "high 2."⁵¹

⁴⁷(...continued)

used for predominantly internal purposes.").

⁴⁸ 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. 04-00377, 2006 WL 1826185, at *5 (D.D.C. June 30, 2006) (rejecting plaintiff's argument that 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"), summary affirmance granted on other grounds, No. 06-5427 (D.C. Cir. May 24, 2007); Dorsett v. U.S. Dep't of the Treasury, 307 F. Supp. 2d 28, 36-37 (D.D.C. 2004) (upholding 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)).

⁴⁹ See, e.g., Crooker, 670 F.2d at 1074 ("It is not up to this court to balance the public interest in disclosure against any reason for avoiding disclosure."); Gordon v. FBI, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (finding irrelevant 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."); 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").

⁵⁰ Crooker, 670 F.2d at 1054 (quoting agency declaration).

⁵¹ Compare Moayed, 510 F. Supp. 2d at 85 (finding public interest in disclosure to be "legally irrelevant" under "high 2" (citing Judicial Watch, Inc., 337 F. Supp. 2d at 165)), and Peay v. DOJ, No. 04-1859, 2007 WL 788871, at *2 (D.D.C. Mar. 14, 2007) (unpublished disposition) (noting that Congress did not authorize weighing of public interest against reasons for withholding under Exemption 2 (quoting Crooker, 670 F.2d at 1074)), amended on other grounds (D.D.C. Mar. 27, 2007), with Duncan v. DEA, No. 06-1032, 2007 WL 1576316, at *5 (D.D.C. May 30, 2007) (finding "there is not a sufficient public interest to override the agency's appropriate interest . . ." in withholding G-DEP codes, NADDIS numbers, and other internal information for which release would risk legal circumvention), and Lipsey v. DOJ, No.

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To meet the first part of the "high 2" Crooker standard, agencies must demonstrate that the information withheld is "predominantly internal."⁵² As noted by the D.C. Circuit, "[j]udicial willingness to sanction a weak relation to 'rules and practices' may be greatest when the asserted government interest is relatively weighty."⁵³

The D.C. Circuit established specific guidance on what constitutes an "internal" document in Cox v. DOJ, where it protected 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 target of [the FOIA's] broad disclosure provisions.⁵⁴

As the District Court for the District of Columbia explained, because all internal rules and practices of an agency affect the public to some extent, "material is considered predominantly internal where it 'was designed to establish rules and practices for agency

⁵¹(...continued)

06-423, 2007 WL 842956, at *3 (D.D.C. Mar. 19, 2007) (finding public interest insufficient to overcome agency's interest in maintaining secrecy of records under Exemption 2), and L.A. Times Commc'ns, LLC v. Dept of the Army, 442 F. Supp. 2d 880, 902 (C.D. Cal. 2006) (concluding that public interest in disclosure of names of private security contractors outweighed by need to protect life and safety of such contractors (allowing withholding pursuant to Exemptions "high 2" and 7(F))).

⁵² See, 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"); Judicial Watch, Inc., 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"); 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."); Shanmugadhasan v. DOJ, 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).

⁵³ Schwanner v. Dep't of the Air Force, 898 F.2d 793, 796 (D.C. Cir. 1990).

⁵⁴ Cox v. DOJ, 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam); see also Herrick's Newsletter, 2006 WL 1826185, at *5 (withholding information and finding that it did not constitute "secret law" because records did not "attempt to modify or regulate public behavior -- only to regulate it for illegal activity" (quoting Wiesenfelder v. Riley, 959 F. Supp. 532, 535 (D.D.C. 1997))); 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").

personnel" and where it does not constitute "secret law" of the agency.⁵⁵ In Cox, the D.C. Circuit held that the requested documents did not constitute "secret law" because "no members of the public are likely to behave or to think differently owing to a revelation about [the contents of the records at issue]."⁵⁶ In some circumstances, even widely disseminated law enforcement documents have been held to be sufficiently internal for purposes of Exemption 2 protection.⁵⁷

Courts have treated a wide variety of information pertaining to law enforcement activities as "predominantly internal," including:

- (1) general guidelines for conducting investigations;⁵⁸

⁵⁵ Schoenman v. FBI, 575 F. Supp. 2d 136, 154 (D.D.C. 2008) (quoting Schiller, 964 F.2d at 1207).

⁵⁶ Cox, 601 F.2d at 5; see also Moayedi, 510 F. Supp. 2d at 84 (finding to be "predominantly internal" law enforcement documents regarding observations of members of public at airports because there was "no attempt to modify or regulate public behavior [,] only to observe it for illegal activity" (quoting Crooker, 670 F.2d at 1075)).

⁵⁷ See, e.g., Milner v. U.S. Dep't of the Navy, No. 06-1301, 2007 WL 3228049, at *7 (W.D. Wash. Oct. 30, 2007) (supporting as "predominantly internal" sensitive records used by Navy to design and construct ammunition and explosives storage facilities even though such records were made available to local municipalities) (appeal pending); L.A. Times, 442 F. Supp. 2d at 901 (rejecting plaintiff's arguments that withheld information could not be "predominantly internal" because it had been "widely disseminated"; finding instead that distribution to private contractors "does not negate th[e] fact" that withheld information was "compiled for predominantly internal purposes," in part because of access restrictions placed on private contractors); Shanmugadhasan, No. 84-0079, slip op. at 31-34 (C.D. Cal. Feb. 18, 1986) (protecting sensitive portions of DEA periodical disseminated to 1700 state, federal, and foreign law enforcement agencies because this dissemination was necessary for maximum law enforcement effectiveness and access by general public was prohibited); cf. Asian Law Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at *5 (N.D. Cal. Nov. 24, 2008) (withholding, under Exemption "high 2" and/or 7(E), procedures for coordination with other law enforcement agencies). But cf. Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1112-13 (D.C. Cir. 2007) (reversing lower court's determination that information pertaining to "inter-agency communications" is "predominantly internal" because agency provided "no evidence" to counter plaintiff's assertions to the contrary); El Badrawi v. DHS, 583 F. Supp. 2d 285, 316-17 (D. Conn. 2008) (finding that agency failed to provide evidence that records regarding collaboration with other law enforcement agencies is "predominantly internal" (citing Sussman, 494 F.3d at 1112-13)).

⁵⁸ See, e.g., PHE, Inc. v. DOJ, 983 F.2d 248, 251 (D.C. Cir. 1993) ("FBI guidelines as to what sources of information are available to its agents"); Azmy v. DOD, 562 F. Supp. 2d 590, 601 (S.D.N.Y. 2008) (guidelines used to investigate Guantanamo detainees and other "persons of investigative interest"); 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)); Suzhou Yuanda Enter. v. U.S. Customs & Border Prot., 404 F. Supp. 2d 9, 12

- (2) guidelines for conducting post-investigation litigation;⁵⁹
- (3) guidelines for identifying law violators;⁶⁰
- (4) a study of agency practices and problems pertaining to undercover agents;⁶¹

⁵⁸(...continued)

(D.D.C. 2005) (internal instructions on handling seized property); 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).

⁵⁹ See, e.g., Schiller, 964 F.2d at 1207-08 (upholding district court's finding that litigation strategy pertaining to Equal Access to Justice Act passes Exemption 2's "threshold test" of being "predominantly internal"; rejecting requester's contention that it does not simply because it "involves [agency's] relations with outsiders"); see also Shumaker, Loop & Kendrick, L.L.P. v. Commodity Futures Trading Comm'n, No. 97-7139, 1997 U.S. Dist. LEXIS 23993, at *10-15 (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' invocation of Exemption 2 for individual malpractice case settlement amounts, treating them as not covered by "internal personnel rules and practices" threshold and, therefore, as "presum[ptively] . . . subject to disclosure" absent applicability of any other exemption).

⁶⁰ 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); Moayed, 510 F. Supp. 2d at 84 (finding that instructions to agency personnel regarding observations of potentially illegal activity by members of public are "predominantly internal"); 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 v. FBI, 940 F. Supp. 323, 328-29 (D.D.C. 1996) (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 IRS to coordinate 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); 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).

⁶¹ See Cox v. FBI, No. 83-3552, slip op. at 1 (D.D.C. May 31, 1984) (holding that 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, (continued...))

(5) information related to prison security;⁶² and

(6) vulnerability assessments.⁶³

Courts have sometimes protected procedures for an agency's cooperation with other agencies,⁶⁴ but have also denied protection when the agency failed to make a sufficient showing that the information at issue was "predominantly internal."⁶⁵

⁶¹(...continued)
1985).

⁶² See Miller v. DOJ, No. 87-0533, 1989 WL 10598, at *1-2 (D.D.C. Jan. 31, 1989) (finding "predominantly internal" sections of BOP manual summarizing 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 Linn v. DOJ, 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).

⁶³ See Schreibman v. U.S. Dep't of Commerce, 785 F. Supp. 164, 166 (D.D.C. 1991) (protecting vulnerability assessment of agency's computer security plan); see also Dorsett, 307 F. Supp. 2d at 36-37 (concluding that Secret Service document used to "analyze and profile factual information concerning individuals" who may constitute threat to Secret Service protectees met "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); FOIA Update, Vol. X, No. 3, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two").

⁶⁴ See Asian Law Caucus, 2008 WL 5047839, at *5 (finding "predominantly internal" the guidelines for determining when Customs and Border Patrol officials should contact other law enforcement agencies to request assistance or cooperation); cf. Durrani v. DOJ, No. 08-0609, 2009 WL 755219, at *9 (D.D.C. Mar. 24, 2009) (withholding "information 'relating to the coordination of investigative efforts with other law enforcement agencies,'" implicitly finding such documents to be "predominantly internal").

⁶⁵ See Pub. Citizen, Inc. v. OMB, No. 08-5004, 2009 WL 1709216, at *4-7 (D.C. Cir. June 19, 2009) (reversing district court and holding that OMB documents containing "guidance to OMB officials regarding other agencies' ability to bypass presidential review of those agencies' budgetary and/or legislative recommendations" are not related predominantly to OMB's internal practices); Sussman, 494 F.3d at 1112-13 (finding that agency failed to meet burden of proof that information pertaining to communications between agencies is "predominantly internal"); Allard K. Lowenstein Int'l Human Rights Project v. DHS, 603 F. Supp. 2d 354, 363, 365 (D. Conn. 2009) (ordering release of names of other agencies participating in law enforcement operation and description of task delegation between agencies, because agency failed to demonstrate that such records are "predominantly internal" or that they would risk circumvention of law if released) (appeal pending); El Badrawi, 583 F. Supp. 2d at 316-17 (continued...)

In the non-law enforcement context in particular, courts have denied Exemption 2's protections when they do not find a sufficient showing of "predominant internality."⁶⁶ In two decisions narrowly construing Exemption 2, the Courts of Appeals for the Ninth and Tenth Circuits declined to protect maps showing nest site locations of two different species of birds because the documents lacked sufficient "predominant internality" under Exemption 2.⁶⁷ Declaring that the statutory phrase "internal personnel" modified both "rules" and "practices" of an agency, the Tenth Circuit did not accept arguments from the Forest Service that the maps related to agency practices in that they helped Forest Service personnel perform their management duties.⁶⁸ Declining to consider the potential harm from disclosure of such maps, 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."⁶⁹ In reaching this

⁶⁵(...continued)

(finding that agency failed to provide evidence that records regarding collaboration with other law enforcement agencies is "predominantly internal" (citing Sussman, 494 F.3d at 1112-13)).

⁶⁶ See In Def. of Animals v. NIH, 543 F. Supp. 2d 70, 80-81 (D.D.C. 2008) (rejecting agency's contention that information about building used to house chimpanzees was "predominantly internal" due to agency's failure to provide evidence to support its contention), remanded on other grounds, No. 08-5186 (D.C. Cir. Feb. 4, 2009); Tidewater Contractors, Inc. v. USDA, No. 95-541, 1995 WL 604112, at *3-4 (D. Or. Oct. 4, 1995) (determining that daily diary used to verify contract compliance was not withholdable because it did not contain internal instructions to government officials), appeal dismissed voluntarily, No. 95-36238 (9th Cir. Mar. 5, 1996); MCI Telecomms. Corp. v. GSA, No. 89-0746, 1992 WL 71394, at *5 (D.D.C. Mar. 25, 1992) (finding records relating to procurement of telecommunication services by federal government to lack internality, because of project's "massive" scale and significance); Don Ray Drive-A-Way Co. of Cal. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992) (finding technique used by DOT to determine motor carrier safety ratings not "predominantly internal" because technique was used to ascertain "whether and to what extent certain violations will have any legal effect or carry any legal penalty").

⁶⁷ 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). But cf. Pease v. U.S. Dept'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, Pub. L. No. 105-391, 112 Stat. 3501 (later codified at 16 U.S.C. § 5937), that agency properly withheld information pertaining to location of wildlife in Yellowstone National Park ecosystem) (Exemption 3).

⁶⁸ 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" for Hoover Dam do not meet test used by Tenth Circuit requiring relation to "personnel practices").

⁶⁹ Audubon Soc'y, 104 F.3d at 1204; see also Thompson v. DOJ, No. 96-1118, slip op. at 30 (D. Kan. July 15, 1998) (following Audubon Society to deny protection for file numbers found not to qualify under strict application of "personnel practices" requirement).

decision,⁷⁰ the Tenth Circuit relied on the D.C. Circuit case of Jordan v. DOJ,⁷¹ even though the D.C. Circuit, sitting en banc, had explicitly repudiated the rationale of Jordan in this respect.⁷²

Agreeing in a related case that such wildlife maps may not be protected despite the potential risk of harm from their disclosure, the Ninth Circuit declared that the maps bore "no meaningful relationship to the 'internal personnel rules and practices' of the Forest Service."⁷³ The court also 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 its previous Exemption 2 decisions involving law enforcement records.⁷⁴ Therefore, the Ninth Circuit's decision has left room for "high 2" protection of sensitive information holding law enforcement significance.⁷⁵

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. The "high 2" aspect of Exemption 2 is not limited to criminal matters, but is also commonly used for civil enforcement and other regulatory matters that are not law enforcement or national security activities in the traditional sense.⁷⁶ In a pivotal case on this

⁷⁰ Audubon Soc'y, 104 F.3d at 1204.

⁷¹ 591 F.2d 753, 764 (D.C. Cir. 1978) (en banc).

⁷² 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").

⁷³ Maricopa, 108 F.3d at 1086.

⁷⁴ Id. at 1087 (distinguishing Hardy, 631 F.2d at 656-57, and Dirksen, 803 F.2d at 1458-59).

⁷⁵ 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") (appeal pending); 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. 2003) (recognizing 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); cf. Milner, 2007 WL 3228049, at *6-7 (noting that Ninth Circuit cases do not limit application of "high 2" to law enforcement records).

⁷⁶ 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."); 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, thereby diminishing utility of such guidelines); Concepcion v. FBI, 606 F. Supp. 2d 14, 31 (D.D.C. 2009) (observing

(continued...)

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.¹⁰⁶

Under some circumstances, Exemption 2 may be applied to prevent potential

¹⁰⁵(...continued)

575 F. Supp. 2d 243, 255 (D.D.C. 2008) (protecting FBI "search" techniques and numerical ratings of effectiveness of such techniques as determined by FBI agents) (appeal pending).

¹⁰⁶ See, e.g., Lowenstein, 603 F. Supp. 2d at 363-65 (rejecting withholding of records pertaining to cooperation with other law enforcement agencies, past law enforcement initiatives, and discussion of news media coverage of law enforcement operation, where release of such records would not allow circumvention of the law); El Badrawi, 583 F. Supp. 2d at 312 (finding that agency failed to justify "high 2" withholdings by offering "conclusory assertions, restatements of statutory language and case law, and boilerplate warnings about 'jeopardizing' databases and 'revealing law enforcement procedures'"); Hidalgo, 541 F. Supp. 2d at 253-54 (ordering disclosure of dollar amounts paid to drug informant because FBI failed to demonstrate how such information could be used by drug traffickers to circumvent future investigations); Shearson v. DHS, No. 06-1478, 2007 WL 764026, at *5, *7 (N.D. Ohio Mar. 7, 2007) (finding inadequate agency's rationale for withholding certain documents pursuant to "high 2," which consisted solely of general recitation of applicable law), reconsideration granted on other grounds, 2008 WL 928487 (N.D. Ohio Apr. 4, 2008); Gerstein v. DOJ, No. C-03-04893, 2005 U.S. Dist. LEXIS 41276, at *39-43 & n.16 (N.D. Cal. Sept. 30, 2005) (ordering disclosure of compilation detailing each United States Attorney's Office's use of certain delayed-notice warrants, because technique "is a matter of common knowledge" and disclosure would not "facilitate criminal activity"); 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), aff'd on other grounds, No. 06-5112, 2009 WL 1258276 (D.C. Cir. May 8, 2009); Carlson v. USPS, No. C-02-05471, 2005 WL 756573, at *6-7 (N.D. Cal. Mar. 31, 2005) (rejecting agency's use of "high 2" to protect records pertaining to mailbox locations, because "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"), appeal dismissed voluntarily, No. 05-16039 (9th Cir. Sept. 16, 2005); Maydak v. DOJ, 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"), reconsideration denied, 579 F. Supp. 2d 105 (D.D.C. 2008); 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). But see Bullock v. FBI, 577 F. Supp. 2d 75, 81 (D.D.C. 2008) (upholding protection of information regarding law enforcement operations despite agency's "somewhat vague" articulation of harm because "courts have generally protected such information under similar circumstances" (citing Anderson v. DOJ, 518 F. Supp. 2d 1, 12 (D.D.C. 2007))).

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.¹⁰⁷ This circumstance 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.¹⁰⁸ 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 2.¹⁰⁹ In one relatively recent application of the "mosaic" approach, a court upheld protection for the number of containers inspected by

¹⁰⁷ See, e.g., James Madison Project, 605 F. Supp. 2d at 111-12 (agreeing that disclosure of seemingly harmless CIA security procedures and employee training materials "could risk circumvention of federal statutes or regulations if foreign intelligence services employed the 'mosaic' approach" (citing defendant's filing)); Fischer, 596 F. Supp. 2d at 46 (agreeing with agency that repeated disclosure of source symbol number in various documents could facilitate identification of informant (citing agency declaration)); Milner, 2007 WL 3228049, at *7 (noting that "mosaic" approach sometimes used by courts to prevent release of information not intrinsically harmful, which could be combined with similar information to cause Exemption 2 harms); 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"); 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, disclosure of which in isolation would be "relatively harmless," could "in the aggregate" benefit those attempting to violate law); 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); 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).

¹⁰⁸ Ray v. U.S. Customs Serv., No. 83-1476, 1985 U.S. Dist. LEXIS 23091, at *10-11 (D.D.C. Jan. 28, 1985).

¹⁰⁹ Id.; see also Novotny v. IRS, No. 94-549, 1994 WL 722686, at *3 (D. Colo. Sept. 8, 1994); O'Connor v. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988) (upholding denial of access to IRS "tolerance criteria" because release would undermine enforcement of tax laws); Wilder v. Comm'r, 607 F. Supp. 1013, 1015 (M.D. Ala. 1985). But cf. Archer, 710 F. Supp. at 911-12 (requiring careful segregation so that only truly sensitive portion of audit criteria is withheld).

Customs officials at a port of entry in Los Angeles.¹¹⁰ The court based its reasoning on the fact that, given publicly known information about the total number of incoming containers, smugglers could use such information combined with similar information pertaining to other ports of entry to target ports that inspect the smallest percentage of containers.¹¹¹ In another recent "mosaic" case, the court found the agency's argument "unconvincing" that confirming the existence of heightened background investigations for selected White House visitors could be used to "piece together" the reasons why the Secret Service chose to conduct such investigations for particular visitors.¹¹²

Lastly, there is a great deal of overlap between the coverage of "high 2" and Exemption 7(E).¹¹³ Numerous cases have protected information from disclosure under both Exemption 2 and Exemption 7(E).¹¹⁴

Homeland Security-Related Information

Courts have protected different types of information related to homeland security under "high 2." Protection has been afforded to:

¹¹⁰ Coastal Delivery Corp., 272 F. Supp. 2d at 964-65.

¹¹¹ Id.

¹¹² Judicial Watch, Inc. v. U.S. Secret Serv., 579 F. Supp. 2d 182, 186 (D.D.C. 2008) (refusing to allow agency to invoke Exemption 2 "Glomar" response in response to request for heightened background investigations for particular individuals).

¹¹³ See, e.g., Kaganove, 856 F.2d at 888-89 (recognizing congruence between protection of information under Exemptions 2 and 7(E) based on "risk [of] circumvention of the law"); Coastal Delivery Corp., 272 F. Supp. 2d at 965 (observing that 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").

¹¹⁴ See, e.g., PHE, 983 F.2d at 251 (relying on both Exemptions 2 and 7(E) because 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); EI Badrawi v. DHS, 596 F. Supp. 2d 389, 396 (D. Conn. 2009) (endorsing FBI's refusal to confirm or deny existence of plaintiff's name in Violent Gang and Terrorist Organization File database, pursuant to Exemptions 2 and 7(E)), amended on other grounds, No. 07-372 (D.D.C. Feb. 23, 2009); Asian Law Caucus, 2008 WL 5047839, at *4-5 (protecting non-public details of travel watchlists, Customs interrogation techniques, and other Customs procedures on basis of Exemptions 2 and 7(E)); Gordon v. FBI, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005) (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)).

¹²⁴(...continued)

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").