



## 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."<sup>1</sup> Prior to 2011, the widely-accepted interpretation of the meaning of Exemption 2 originated with Crooker v. ATF, a case decided by the Court of Appeals for the District of Columbia Circuit in 1981.<sup>2</sup> In 2011, however, the Supreme Court issued a landmark opinion in Milner v. Department of the Navy<sup>3</sup> that overturned Crooker and the many subsequent cases that had relied on Crooker to interpret Exemption 2. As a result of Milner, the scope of Exemption 2 was greatly narrowed,<sup>4</sup> and agencies can no longer rely on Crooker as the basis for interpreting the meaning of this exemption. Instead, agencies must look to the plain language of Exemption 2 to determine its scope.<sup>5</sup> (For a discussion on the current test for Exemption 2, please see Exemption 2's Three-part Test & Exemption 2 in the Wake of the Supreme Court's Decision in Milner, below)

### **Historical Interpretation of Exemption 2**

For more than fifteen years after the passage of the FOIA in 1966, much confusion existed concerning the intended coverage of Exemption 2 due to the differing interpretations of the exemption set forth in the legislative history of the enactment of the FOIA. Specifically, the Senate and House Reports differed greatly in their explanation of the intended meaning of Exemption 2, and these differences were not reconciled in a joint statement or report by both Houses of Congress. The Senate Report reflected a narrow

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<sup>1</sup> [5 U.S.C. § 552\(b\)\(2\) \(2012 & Supp. V 2017\)](#).

<sup>2</sup> 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc).

<sup>3</sup> 131 S. Ct. 1259 (2011).

<sup>4</sup> Id. at 1266 ("Our reading [of Exemption 2] gives the exemption the 'narrower reach' Congress intended").

<sup>5</sup> See id. at 1264-65 (looking first to Exemption 2's text to determine its meaning, noting that prior courts had paid "comparatively little attention" to the text of Exemption 2); see also OIP Guidance: Exemption 2 After the Supreme Court's Ruling in Milner v. Dep't of the Navy (posted 2011, updated 8/21/14).

view of Exemption 2 wherein the Exemption would only protect trivial internal records that would come to be known as "low 2" material.<sup>6</sup>

The House Report provided a more expansive interpretation of Exemption 2's intended coverage, stating that it was intended to cover more substantive types of records that would later come to be known as "high 2" material.<sup>7</sup>

Approximately ten years after the enactment of the FOIA, the Supreme Court was confronted with this conflict in Department of the Air Force v. Rose.<sup>8</sup> In that case, the Court construed Exemption 2, in line with the Senate's view, as protecting "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."<sup>9</sup> 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."<sup>10</sup> At the same time, the Court left the door open for the future application of what came to be known as "high 2," for information whose release could lead to circumvention of the law, in line with the House's more substantive view of Exemption 2.<sup>11</sup>

The Supreme Court's ruling in Rose helped to define the contours of Exemption 2, but it did not dispel all of the early confusion about Exemption 2's scope. In a preview of one of the central issues in Milner, early judicial opinions subsequent to Rose, particularly

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<sup>6</sup> S. Rep. No. 89-813, at 8 (1965) (stating that "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.").

<sup>7</sup> H. Rep. No. 89-1497, at 10 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2427 (stating that "Operating rules, guidelines, and manuals of procedure for Government investigators or examiners [are covered]. . . but 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."); 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]").

<sup>8</sup> 425 U.S. 352 (1976).

<sup>9</sup> Id. at 369-70.

<sup>10</sup> Id.

<sup>11</sup> 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").

in the Court of Appeals for the District of Columbia Circuit, demonstrated judicial ambivalence about whether Exemption 2 covered only personnel-related records or included more general internal agency practices.<sup>12</sup>

In 1981, the D.C. Circuit ruled in Crooker v. ATF that Exemption 2 was intended to cover records whose disclosure would risk circumvention of the law, whether or not such records were personnel-related.<sup>13</sup> The Crooker case thus established what later became widely known as "high 2" and "low 2," affording protection both to trivial internal matters under "low 2" and protection for more substantive matters when disclosure would risk circumvention of the law under "high 2."<sup>14</sup>

Throughout the thirty years following Crooker, and prior to the Supreme Court's ruling in Milner v. Department of the Navy,<sup>15</sup> courts applied the "low 2" aspect of Exemption 2 to a wide variety of records that would be of no genuine interest to the public, including file or tracking numbers,<sup>16</sup> document routing information,<sup>17</sup> internal telephone

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<sup>12</sup> 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, 485-86 (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").

<sup>13</sup> 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).

<sup>14</sup> See id. at 1073 & n.58 (holding that Exemption 2 encompasses "predominantly internal" material where disclosure would risk circumvention of law, noting that Rose had protected internal material of no genuine public interest under this exemption).

<sup>15</sup> 131 S. Ct. 1259, 1271 (2011) (overturning prior judicial interpretations and ruling that Exemption 2 must be defined by its text, which requires that information relate solely to internal personnel rules and practices).

<sup>16</sup> 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); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 583-84 (N.D. W. Va. 2005) ("Criminal Investigation Division tracking numbers").

<sup>17</sup> 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); Coleman v. FBI, 13 F. Supp. 2d 75, 78 (D.D.C. 1998) ("mail routing stamps").

and fax numbers,<sup>18</sup> routine personnel instructions,<sup>19</sup> other similar administrative codes and markings,<sup>20</sup> routine internal computer codes and data,<sup>21</sup> and a variety of other types of purely internal administrative records.<sup>22</sup>

In the "high 2" context, prior to the Supreme Court's ruling in Milner, courts endorsed the withholding of a wide range of records where the release of such records could significantly risk circumvention of the law. Some examples of the types of records withheld under "high 2" before the Milner ruling were: 1) records that would jeopardize informant activities,<sup>23</sup> 2) records that could jeopardize undercover operations,<sup>24</sup> 3)

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<sup>18</sup> See, e.g., Hale v. DOJ, 973 F.2d 894, 902 (10th Cir. 1992) (FBI room numbers, telephone numbers, and FBI employees' identification numbers; personnel directories containing names and addresses of FBI employees); Concepcion, 606 F. Supp. 2d at 31-32 (telephone numbers of FBI employees, Assistant U.S. Attorneys and paralegals).

<sup>19</sup> See, e.g., Hale, 973 F.2d at 902 (checklist form used to assist FBI special agents in consensual monitoring); Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (internal time deadlines and procedures, recordkeeping directions, instructions on contacting agency officials for assistance, and guidelines on agency decisionmaking).

<sup>20</sup> 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) (quoting agency declaration).

<sup>21</sup> See, e.g., 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); Changzhou Laosan Grp. 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 grounds, 374 F. Supp. 2d 129 (D.D.C. 2005).

<sup>22</sup> See, e.g., Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978) (cover letters of merely internal significance); James Madison Project I, 607 F. Supp. 2d at 124-25 (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).

<sup>23</sup> 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"); Lesar, 636 F.2d at 485 (finding that "informant codes plainly fall within the ambit of Exemption 2").

<sup>24</sup> See, e.g., Amuso, 600 F. Supp. 2d at 100-101 (protecting logistics of undercover FBI operations because disclosure would allow wrongdoers to "predict how the FBI will conduct similar operations in the future," thereby allowing wrongdoers to circumvent such future operations (quoting agency declaration)); Keys v. DHS, 510 F. Supp. 2d 121, 127-28 (D.D.C.

agency security techniques,<sup>25</sup> 4) employee testing or rating materials,<sup>26</sup> 5) guidelines for protecting government officials,<sup>27</sup> and 6) rankings of the effectiveness of, or priority accorded to, certain types of law enforcement techniques or investigations.<sup>28</sup>

### **The Supreme Court's Decision in Milner v. Department of the Navy**

In Milner v. Department of the Navy,<sup>29</sup> the issue for decision by the U.S. Supreme Court was whether the two-part test for withholding fashioned by the Court of Appeals for the District of Columbia Circuit in Crooker v. ATF<sup>30</sup> adhered to the statutory text of the FOIA. The records sought by the plaintiff in Milner consisted of Explosive Safety Quantity Distance ("ESQD") information regarding munitions stored on a Naval base in Puget Sound, Washington.<sup>31</sup> This information prescribes the minimum storage distance

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2007) (allowing withholding of Secret Service special agent ID numbers disclosure of which would allow identification or impersonation of agent), remanded on other grounds, No. 07-5364 (D.C. Cir. Apr. 28, 2008).

<sup>25</sup> See, e.g., Cox, 601 F.2d at 4-5 (upholding nondisclosure of weapon, handcuff, and transportation security procedures); James Madison Project II, 605 F. Supp. 2d at 111-12 (withholding internal CIA security procedures relating to foreign nationals as well as employee security clearance procedures, because effectiveness of such procedures would be reduced if they were released, allowing foreign intelligence services and others to circumvent such procedures).

<sup>26</sup> See, e.g., Kaganove v. EPA, 856 F.2d 884, 890 (7th Cir. 1988) (holding that disclosure of agency applicant rating plan would render it ineffectual and allow future applicants to "embellish" job qualifications); NTEU v. U.S. Customs Serv., 802 F.2d 525, 528-29 (D.C. Cir. 1986) (determining that disclosure of hiring plan would give unfair advantage to some future applicants).

<sup>27</sup> See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 166 (D.D.C. 2004) (finding that "guidelines for protecting the Secretary of Commerce on trade missions" were properly withheld, as disclosure "would compromise the Secretary's safety, making the Secretary subject to unlawful attacks"); Voinche v. FBI, 940 F. Supp. 323, 329 (D.D.C. 1996) (approving nondisclosure of information relating to security of Supreme Court building and Justices).

<sup>28</sup> See, e.g., Allard K. Lowenstein Int'l Human Rights Project v. DHS, 603 F. Supp. 2d 354, 365 (D. Conn. 2009) (protecting priority rankings of types of investigations and criteria used by agency to prioritize such investigations); Kishore v. DOJ, 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).

<sup>29</sup> 131 S. Ct. 1259 (2011).

<sup>30</sup> 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc).

<sup>31</sup> Milner, 131 S. Ct. at 1263.

between munitions necessary to minimize the likelihood of a chain reaction explosion in the event that one or more of the stored explosives detonates.<sup>32</sup> The Court of Appeals for the Ninth Circuit had agreed with the district court that these records could be withheld, adopting the D.C. Circuit's "high 2" test from Crooker to reach its conclusion.<sup>33</sup> The Ninth Circuit held that the records were "predominantly internal" because they were used for the internal purpose of instructing Navy personnel in how to do their jobs, and they would significantly risk circumvention of the law if released because wrongdoers could use the ESQD information to devise an attack to cause the maximum amount of damage to the Naval base.<sup>34</sup> Plaintiff appealed, and the Supreme Court granted certiorari to clarify the statutory meaning of Exemption 2.<sup>35</sup>

The Supreme Court 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."<sup>36</sup> Applying this interpretation of the exemption, the Court found that "[t]he explosive maps and data requested here do not qualify for withholding under that exemption."<sup>37</sup> The Court remanded the case back to the Ninth Circuit for consideration of the applicability of Exemption 7(F)<sup>38</sup> to the data and maps.<sup>39</sup>

In reaching its decision, the Court began by stating that its "consideration of Exemption 2's scope starts with its text."<sup>40</sup> The Court noted that although other court decisions had analyzed the meaning of the exemption, "comparatively little attention has focused on the provision's 12 simple words: 'related solely to the internal personnel rules and practices of an agency.'"<sup>41</sup> 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."<sup>42</sup> That

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<sup>32</sup> Id.

<sup>33</sup> Milner v. U.S. Dep't of the Navy, 575 F.3d 959, 965 (9th Cir. 2009).

<sup>34</sup> Id. at 968, 971.

<sup>35</sup> Milner, 131 S. Ct. at 1264.

<sup>36</sup> Id. at 1271.

<sup>37</sup> Id.

<sup>38</sup> [5 U.S.C. § 552 \(b\)\(7\)\(F\) \(2012 & Supp. V 2017\)](#).

<sup>39</sup> Milner, 131 S. Ct. at 1271.

<sup>40</sup> Id. at 1264.

<sup>41</sup> Id.

<sup>42</sup> Id.

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.'"<sup>43</sup>

In Milner, the government had argued for the adoption of Crooker's two-part test.<sup>44</sup> The Court ultimately disagreed in its March 2011 Opinion, ruling that the Crooker test "is disconnected from Exemption 2's text, . . . ignores the plain meaning of the adjective 'personnel' . . . and adopts a circumvention requirement with no basis or referent in Exemption 2's language."<sup>45</sup> While the government relied on the House Report<sup>46</sup> as the basis of its legislative history argument, the Court noted that in Department of the Air Force v. Rose<sup>47</sup> the Supreme Court had found the Senate Report to be a more reliable indicator of Congressional intent.<sup>48</sup> The Court declared that "[l]egislative 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."<sup>49</sup>

The Court also disagreed with the government's argument that the post-Crooker amendment by Congress of Exemption 7(E) of the FOIA in 1986 constituted its ratification of Crooker.<sup>50</sup> The Court noted that Congress amended Exemption 7(E), not Exemption 2.<sup>51</sup> Further, the Court found that the Crooker construction of Exemption 2 renders Exemption 7(E) superfluous because Exemption 2 would encompass any records that could arguably fall within the protection of Exemption 7(E).<sup>52</sup> Therefore, the Court found that if Congress agreed with the broad reach of Exemption 2 as defined by Crooker it would have had no need to amend Exemption 7(E).<sup>53</sup> Indeed, the Court opined that

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<sup>43</sup> Id.

<sup>44</sup> Id. at 1266.

<sup>45</sup> Id. at 1267.

<sup>46</sup> H. Rep. No. 89-1497, at 10 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2427.

<sup>47</sup> 425 U.S. 352 (1976).

<sup>48</sup> Milner, 131 S. Ct. at 1267 (citing Rose, 425 U.S. at 366).

<sup>49</sup> Id. (citing Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950)).

<sup>50</sup> Id. at 1267-68.

<sup>51</sup> Id.

<sup>52</sup> Id. at 1268.

<sup>53</sup> Id.

Congress' decision to amend Exemption 7(E) rather than codify Crooker in Exemption 2 suggests that Congress approved of the circumvention test only as it applies to law enforcement records.<sup>54</sup>

In examining the statutory text, the Supreme Court determined that the key word in Exemption 2 is "personnel."<sup>55</sup> Further, because the word "personnel" is used in the statute as an adjective to modify "rules and practices," the Court found that the term clearly refers to human resources matters.<sup>56</sup> As the Court stated, such records "concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits."<sup>57</sup> According to the Court, its construction of Exemption 2 "makes clear that 'low 2' is all of 2 (and that 'high 2' is not 2 at all)."<sup>58</sup> Notably, however, many pre-Milner cases had not required that "low 2" records relate to employment matters and had only required that there be no genuine public interest in disclosure.<sup>59</sup>

The Court also rejected the government's argument that if Crooker was not upheld by the Court, it should adopt a "clean slate" interpretation of Exemption 2 in which any records constituting "internal rules and practices for [agency] personnel to follow in the discharge of their governmental functions" would qualify for withholding.<sup>60</sup> The Court found that logically, the exemption must be understood to pertain to records *about* personnel, not simply any records created *for* personnel.<sup>61</sup> Otherwise, the Court declared,

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<sup>54</sup> Id.

<sup>55</sup> Id. at 1264.

<sup>56</sup> Id.

<sup>57</sup> Id. at 1265.

<sup>58</sup> Id.

<sup>59</sup> See, e.g., Hale v. DOJ, 973 F.2d 894, 902 (10th Cir. 1992) (withholding checklist form used by FBI agents to assist them in consensual monitoring, as well as administrative markings and document notations because such records constitute trivial matters of no genuine public interest); Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (affirming withholding under "low 2" of internal agency time deadlines and procedures, recordkeeping instructions, directions for contacting agency officials for assistance, and guidelines on agency decisionmaking); Antonelli v. BOP, 569 F. Supp. 2d 61, 65 (D.D.C. 2008) (protecting investigatory case file numbers as internal information of no genuine public interest); Wheeler v. DOJ, 403 F. Supp. 2d 1, 13 (D.D.C. 2005) (withholding document routing information of no genuine interest to public); Maydak v. DOJ, 362 F. Supp. 2d 316, 324 (D.D.C. 2005) (upholding nondisclosure of purchase order accounting numbers that are used for internal purposes and bear no significant public interest).

<sup>60</sup> Milner, 131 S. Ct. at 1269-70.

<sup>61</sup> Id.

the exemption would be so broad as to strip the word "personnel" of any meaning, "produc[ing] a sweeping exemption, posing the risk that FOIA would become less a disclosure than 'a withholding statute.'"<sup>62</sup>

The Supreme Court only briefly alluded to two additional requirements for withholding under Exemption 2, namely, that the records must "relate solely" to the agency's "internal" personnel rules and practices.<sup>63</sup> The Court noted that Exemption 2's requirement that the material "relate solely" to personnel means "exclusively or only" while the requirement that the records be "internal" means that the agency "must typically keep the records to itself for its own use."<sup>64</sup>

The Court in Milner recognized that its decision "upsets three decades of agency practice relying on Crooker, and therefore may force considerable adjustments."<sup>65</sup> Along these lines, Justice Alito wrote a concurring opinion to "underscore" the importance of the alternative argument raised by the Department of the Navy that Exemption 7(F) could potentially protect the information.<sup>66</sup> In his concurrence Justice Alito noted that the ordinary understanding of the "law enforcement purposes" threshold of Exemption 7 encompassed not just the investigation and prosecution of crimes that have already occurred, "but also proactive steps designed to prevent criminal activity and to maintain security."<sup>67</sup> For instance, he opined, steps taken by Secret Service agents to protect federal officials from future attacks and measures followed by law enforcement officers to prevent a terrorist attack undoubtedly constitute law enforcement activities even before an attack has been carried out by a wrongdoer.<sup>68</sup> Even before Milner, many agencies used Exemption 7(E) in conjunction with Exemption 2 to withhold various types of records.<sup>69</sup> (For a further discussion of Exemption 7(E), see Exemption 7(E), below.)

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<sup>62</sup> Id. (quoting EPA v. Mink, 410 U.S. 73, 79 (1973)).

<sup>63</sup> Id. at 1265 n.4.

<sup>64</sup> Id.

<sup>65</sup> Id. at 1271.

<sup>66</sup> Id. at 1271-73 (Alito, J., concurring).

<sup>67</sup> Id. at 1272.

<sup>68</sup> Id.; see also Jordan v. DOJ, 668 F.3d 1188, 1195 (10th Cir. 2011) (relying on Milner in finding that BOP's efforts to prevent inmates from escaping constitutes preventative law enforcement for purposes of Exemption 7).

<sup>69</sup> See, e.g., PHE, Inc. v. DOJ, 983 F.2d 248, 251 (D.C. Cir. 1993) (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); El 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

Justice Breyer issued the sole dissent in Milner.<sup>70</sup> He summarized his view of the case as follows: "Where the courts have already interpreted Exemption 2, where that interpretation has been consistently relied upon and followed for 30 years, where Congress has taken note of that interpretation in amending other parts of the statute, where that interpretation is reasonable, where it has proved practically helpful and achieved common-sense results, where it is consistent with the FOIA's overall statutory goals, where a new and different interpretation would require Congress to act just to preserve a decades-long status quo, I would let sleeping legal dogs lie."<sup>71</sup>

### **Exemption 2's Three-part Test**

Based on Exemption 2's text, and as set forth by the Supreme Court in Milner, three elements must be satisfied for information to fit within Exemption 2.<sup>72</sup>

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

As the Supreme Court emphasized, the "key word" in the exemption and the one word which "most clearly marks the provision's boundaries – is 'personnel.'"<sup>73</sup> The Department of Justice Guidance on Milner advises agencies that in order for information to qualify for protection under Exemption 2, agencies must ensure that the information at issue satisfies the requirement that it "relate to an agency's *personnel* rules or practices."<sup>74</sup>

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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); 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 v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) (finding Secret Service code names and White House gate numbers "clearly exempt from disclosure" under both Exemptions 2 and 7(E)); Voinche v. FBI, 940 F. Supp. 323, 329, 332 (D.D.C. 1996) (approving nondisclosure of information relating to security of Supreme Court building and Justices on basis of both Exemptions 2 and 7(E)).

<sup>70</sup> 131 S. Ct. at 1271-78.

<sup>71</sup> *Id.*

<sup>72</sup> See Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1265 & n.4 (2011); see also [OIP Guidance: Exemption 2 After the Supreme Court's Ruling in Milner v. Dep't of the Navy \(posted 2011, updated 8/21/14\)](#) [hereinafter OIP Milner Guidance].

<sup>73</sup> [OIP Milner Guidance \(quoting Milner, 131 S. Ct. at 1264\)](#).

<sup>74</sup> *Id.* (quoting Milner at 1264).

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

The second requirement for Exemption 2 is that "the information at issue must 'relate solely' to the agency's personnel rules and practices."<sup>75</sup> The Supreme Court defined this phrase by its "usual" meaning, which is "exclusively or only."<sup>76</sup>

## 3. The Information Must be "Internal"

The third requirement for Exemption 2 is that the information must be "'internal,' meaning that 'the agency must typically keep the records to itself for its own use.'"<sup>77</sup>

In the wake of Milner, the scope of Exemption 2 has been significantly narrowed.<sup>78</sup> Exemption 2 is now limited to records that are 1) personnel-related rules and practices; 2) that are "related solely" to such rules and practices; and 3) that are "internal" to the agency.<sup>79</sup>

### **Exemption 2 in the Wake of the Supreme Court's Decision in Milner**

As discussed above, the Supreme Court's decision in Milner v. Department of the Navy<sup>80</sup> greatly narrowed the scope of Exemption 2. Relatively few courts have ruled on the application of Exemption 2 in a post-Milner context. In a number of the cases decided since Milner, the agency either withdrew its arguments based on Exemption 2,<sup>81</sup> or the

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<sup>75</sup> Id. (quoting Milner at 1265 n.4).

<sup>76</sup> Milner, 131 S. Ct. at 1265 n.4.

<sup>77</sup> Id.

<sup>78</sup> See id. at 1259.

<sup>79</sup> Milner, 131 S. Ct. at 1264-65 & n.4; see also [OIP Milner Guidance](#) (discussing impact of Dep't of the Air Force v. Rose, 425 U.S. 352 (1976), and its requirement that information be of no genuine and significant public interest).

<sup>80</sup> 131 S. Ct. 1259 (2011).

<sup>81</sup> See Morley v. CIA, 466 F. App'x 1, 1-2 (D.C. Cir. 2012) (per curiam) (remanding case to district court for reconsideration of withholdings formerly made under Exemption 2 because agency withdrew its reliance on that Exemption in light of Milner); Jordan v. DOJ, 668 F.3d 1188, 1200-01 (10th Cir. 2011) (noting that agency properly conceded that "high 2" could no longer protect inmate's psychological records in light of Milner, but affirming withholding on basis of Exemption 7(E)); Pub. Emps. for Envtl. Resp. v. U.S. Sec. Int'l Boundary & Water Comm'n, 839 F. Supp. 2d 304, 319 (D.D.C. 2012) (observing that agency withdrew its arguments based on Exemption 2 and was relying solely on other exemptions to protect records at issue), vacated in part and remanded on other grounds, 740 F.3d 195 (D.C. Cir. 2014); Kortlander v. BLM, 816 F. Supp. 2d 1001, 1010 (D. Mont. 2011) (finding

court ruled that Exemption 2 could no longer protect the records at issue in light of the Supreme Court's decision.<sup>82</sup> In one case, subsequent to the court's rejection of the agency's claim of Exemption 2 in light of Milner, the court granted the agency's motion for reconsideration to allow it to newly apply a different exemption to the records at issue.<sup>83</sup> The types of records at issue in those cases for which Exemption 2 has been found to no longer be applicable include the following: investigative techniques; procedures, and guidelines;<sup>84</sup> computer codes pertaining to a highly sensitive database;<sup>85</sup>

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Exemption 2 no longer at issue in light of Milner and because agency relied on other exemptions).

<sup>82</sup> See Friedman v. U.S. Secret Serv., 282 F. Supp. 3d 291, 298 (D.D.C. 2017) (finding that agency cannot rely on Exemption 2 to withhold email addresses, login names, and passwords after Milner); Brown v. FBI, 873 F. Supp. 2d 388, 400 (D.D.C. 2012) (finding that FBI telephone numbers are not "personnel rules and practices" within meaning of Milner); Int'l Counsel Bureau v. DOD, 864 F. Supp. 2d 101, 104-05 (D.D.C. 2012) (finding that "high 2" aspect of Exemption 2 no longer exists in light of Milner and ordering in camera review of records formerly withheld on that basis); Lardner v. FBI, 852 F. Supp. 2d 127, 138 (D.D.C. 2012) (ordering agency to reprocess records formerly withheld under Exemption 2 in light of Milner); Skinner v. DOJ, 806 F. Supp. 2d 105, 112 (D.D.C. 2011) (finding Exemption 2 inapplicable to sensitive law enforcement computer codes after Milner, noting that categories of "high 2" and "low 2" are "no longer an accepted distinction").

<sup>83</sup> Hiken v. DOD, 872 F. Supp. 2d 936, 940-41 (N.D. Cal. 2012) (finding "good cause" for agency to assert new exemptions because issuance of Milner between time of parties' submissions and court's ruling constitutes "'interim development in applicable legal doctrine"' sufficient to overcome general rule that all applicable exemptions must be asserted by government at once in district court (quoting August v. FBI, 328 F.3d 697, 700 (D.C. Cir. 2003))).

<sup>84</sup> See Frankenberry v. FBI, No. 08-1565, 2012 U.S. Dist. LEXIS 39027, at \*39-42, 68-76 (M.D. Pa. Mar. 22, 2012) (rejecting withholding of investigative techniques under Exemption 2 in light of Milner and ordering release of some material, but allowing withholding under Exemption 7(E) of polygraph materials, ratings of effectiveness of law enforcement techniques, placement of surveillance devices, and investigatory expenditures); ACLU of Wash. v. DOJ, No. 09-0642, 2011 WL 887731 at \*4, 7-9 (W.D. Wash. Mar. 10, 2011) (noting that agency conceded that Exemption 2 was not applicable, also rejecting applicability of Exemption 7(E) to much of withheld material that consisted of policies, procedures and guidelines for watch lists and no fly lists, ordering release of some records and ordering further briefing on withholdability of other records), reconsideration granted in part on other grounds, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

<sup>85</sup> See Skinner, 806 F. Supp. 2d at 112 (finding that internal computer codes do not relate to human resources or employee relations matters and that "high 2" circumvention risk potentially caused by release of such information is not relevant to post-Milner analysis of such records, denying without prejudice agency's motion for summary judgment as to such materials).

psychological records pertaining to an inmate;<sup>86</sup> records regarding inmate discipline, inmate supervision, and prison incident responses;<sup>87</sup> videos of Guantanamo detainees;<sup>88</sup> and technical reviews, action plans, and inundation maps for dams.<sup>89</sup> In a couple of cases, the court denied the agency's motion for summary judgment, but provided the agency with an opportunity to reconsider whether the newly-interpreted Exemption 2 could be used to protect such records.<sup>90</sup>

A few courts have upheld Exemption 2 after applying some or all of the standards set forth in Milner.<sup>91</sup> Several courts have discussed the viability of the withholding of

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<sup>86</sup> See Jordan, 668 F.3d at 1200 (rejecting withholding of inmate psychological records under "high 2," in light of Milner, but allowing withholding under Exemption 7(E)).

<sup>87</sup> See Kubik v. BOP, No. 10-6078, 2011 WL 2619538 at \*5-6 (D. Or. July 1, 2011) (rejecting Exemption 2 claims, allowing withholding of portions of records under other exemptions, but ordering disclosure to plaintiffs of remainder of records).

<sup>88</sup> Int'l Counsel Bureau, 864 F. Supp. 2d at 105 (ordering in camera review of withheld videos, noting that "there is no 'high 2'" exemption, nor can viable argument be made that such videos "relate to 'issues of employee relations and human resources'" (quoting Milner, 131 S. Ct. at 1271)).

<sup>89</sup> See Pub. Emps. For Envtl. Resp., 839 F. Supp. 2d at 322-27 (rejecting Exemption 2, but upholding protection of such records pursuant to Exemptions 5, 7(E), and 7(F)).

<sup>90</sup> See Adionser v. DOJ, No. 11-5093, 2012 WL 5897172, at \* 1-2 (D.C. Cir. Nov. 5, 2012) (per curiam) (ordering on court's own motion further briefing on Exemption 7(E) for "G-DEP" codes originally withheld under Exemption 2 in light of Milner), on remand 33 F. Supp. 3d 23, 26 (D.D.C. 2014) (protecting GDEP codes under Exemption 7(E); Island Film, S.A. v. Dep't of the Treasury, 869 F. Supp. 2d 123, 133 (D.D.C. 2012) (denying without prejudice agency's motion for summary judgment to provide it with opportunity to revisit withholding of administrative case tracking numbers in light of Milner); Lewis v. DOJ, 867 F. Supp. 2d 1, 15-16 (D.D.C. 2011) (noting that agency's declarations were prepared before Milner, thus, agency should reconsider application of Exemption 2 to file numbers, file path names, fax numbers, and telephone numbers in light of that case).

<sup>91</sup> See Rojas v. FAA, No. 15-1709, 2017 U.S. Dist. LEXIS 157661 at \*20-21 (D. Ariz. September 25, 2017) (protecting materials concerning selection process for air traffic control specialists under Milner); Citizens for Responsibility & Ethics in Wash. v. DOJ, 870 F. Supp. 2d 70, 83 (D.D.C. 2012) (protecting internal telephone and fax numbers of FBI personnel under Milner), rev'd on other grounds, 746 F.3d 1082 (D.C. Cir. 2014); Nat'l Day Laborer Organizing Network v. ICE, 811 F. Supp. 2d 713, 734, 738 (S.D.N.Y. 2011) (upholding protection of records under what was formerly known as "low 2" while observing that "low 2" but not "high 2" survived Milner); see also Wolk Law Firm v. NTSB, No. 16-05632, 2019 WL 1528433, at \*3 (E.D. Pa. Apr. 9, 2019) (holding that Exemption 2 applies to withheld communications that concern requests for compensatory and overtime pay for

agency telephone numbers under Exemption 2, but have reached differing opinions on the issue.<sup>92</sup> Similarly, courts have reached different conclusions on the viability of withholding FOIA case evaluation notes.<sup>93</sup>

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work during investigation, but noting that plaintiffs did not argue in opposition briefing that NTSB had improperly withheld materials under Exemption 2).

<sup>92</sup> Compare Brown, 873 F. Supp. 2d at 400 (holding that FBI telephone numbers are not "personnel rules and practices" because they do not concern employee relations or human resources as explained in Milner), and Inst. for Policy Studies v. CIA, 885 F. Supp. 2d 120, 150 (D.D.C. 2012) (opining in dictum that withholding of agency telephone numbers would not survive Milner's interpretation of Exemption 2), with Citizens for Responsibility & Ethics in Wash., 870 F. Supp. 2d at 83 (finding that internal telephone and fax numbers of FBI personnel "fall squarely" within Milner's interpretation of Exemption 2).

<sup>93</sup> Compare Stein v. DOJ, 134 F. Supp. 3d 457, 472 (D.D.C. 2015) (finding that FBI FOIA Analyst Case Evaluation Forms "relate solely to the FBI's internal personnel rules and practices" relying exclusively on second element of Exemption 2 as described in Milner), with Shapiro v. DOJ, 153 F. Supp. 3d 253, 281 (D.D.C. 2016) (holding that FBI FOIA Analyst Case Evaluation forms do not "relate solely to trivial or minor matters," relying on Supreme Court's interpretation of Exemption 2 in both Milner and Department of the Air Force v. Rose, 425 U.S. 352 (1976)).