



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 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 1981.² In 2011, however, the Supreme Court issued a landmark opinion in Milner v. Department of the Navy³ 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 has been greatly narrowed,⁴ 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.⁵

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."⁶ (For a discussion of these memoranda, see

¹ [5 U.S.C. § 552\(b\)\(2\) \(2006 & Supp. IV 2010\)](#).

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

³ 131 S. Ct. 1259 (2011).

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

⁵ 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 DOJ, OIP Guidance: Exemption 2 After the Supreme Court's Ruling in Milner v. Dep't of the Navy (2011).

⁶ 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 Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Guidelines]; see FOIA Post, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open

President Obama's FOIA Memorandum & Attorney General Holder's FOIA Guidelines, above.)

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

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.⁷

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.

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.⁸

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.⁹ 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."¹⁰ The Court declared that Exemption 2 was intended to relieve agencies of the burden of assembling and providing access to any

[Government](#)" (posted 4/17/09) (providing guidance on implementing presumption favoring disclosure).

⁷ S. Rep. No. 89-813, at 8 (1965).

⁸ 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]").

⁹ 425 U.S. 352 (1976).

¹⁰ Id. at 369-70.

"matter in which the public could not reasonably be expected to have an interest."¹¹ 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 2.¹²

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 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.¹³ Additionally, these early cases did not entertain the possible existence of a "high 2" aspect of Exemption 2 to protect against disclosures that would risk circumvention of the law.

In 1981, the D.C. Circuit finally clarified Exemption 2's meaning and scope when it determined 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.¹⁴ 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."¹⁵ In establishing the concept of a viable "high 2," Crooker set forth the following test for withholding "high 2" information that would be widely followed for the thirty years that elapsed between Crooker and Milner: first, the records at issue must be "predominantly internal" to the agency, and second, the records must significantly risk

¹¹ Id.

¹² 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").

¹³ 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).

¹⁴ 670 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).

¹⁵ 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).

circumvention of the law if publicly released.¹⁶ The D.C. Circuit later clarified in Founding Church of Scientology v. Smith that "low 2" material could be withheld if it met the "internality" test and was of no genuine public interest.¹⁷ After Crooker, the D.C. Circuit deemphasized the importance of the personnel-relatedness of records sought to be withheld under Exemption 2,¹⁸ but there were rulings in other circuits that rejected Exemption 2 protection when there was not a linkage with "personnel."¹⁹

Throughout the thirty years following Crooker 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,²⁰ document routing information,²¹ internal telephone

¹⁶ Id. at 1073-74.

¹⁷ 721 F.2d 828, 830 (D.C. Cir. 1983) (clarifying that "low 2" information need not satisfy circumvention standard of Crooker if no genuine public interest exists in information); see also Schwaner v. Dep't of the Air Force, 898 F.2d 793, 794 (D.C. Cir. 1990) (noting that Crooker applied "circumvention" variation of two-part test to "high 2" records and Founding Church applied "no genuine public interest" variation of two-part test to "low 2" records).

¹⁸ See, e.g., Founding Church, 721 F.2d at 830 & n.2 (finding that Exemption 2 is not limited to personnel records such as records regarding employee relations, pay, pensions, and lunch hours, etc.); see also, e.g., Bangoura v. U.S. Dep't of the Army, 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)), summary affirmance granted, No. 11-5090, 2011 WL 3903436 (D.C. Cir. Sept. 1, 2011); 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").

¹⁹ See, e.g., Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1086 (9th Cir. 1997) (finding that bird nesting maps bore "no meaningful relationship to the 'internal personnel rules and practices' of the Forest Service."); Audubon Soc'y v. U.S. Forest Serv., 104 F.3d 1201, 1204 (10th Cir. 1997) (rejecting withholding of bird nesting maps by Forest Service because such maps do not relate to "personnel practices" of Forest Service).

²⁰ 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 v. DOJ, 450 F. Supp. 2d 42, 54 (D.D.C. 2006) ("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").

²¹ 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

and fax numbers,²² routine personnel instructions,²³ other similar administrative codes and markings,²⁴ routine internal computer codes and data,²⁵ and a variety of other types of purely internal administrative records.²⁶

grounds, 565 F.3d 857 (D.C. Cir. 2009); Coleman v. FBI, 13 F. Supp. 2d 75, 78 (D.D.C. 1998) ("mail routing stamps").

²² 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); James Madison Project v. CIA, 607 F. Supp. 2d 109, 124-25 (D.D.C. 2009) (telephone and fax numbers of CIA employees); Durrani v. DOJ, 607 F. Supp. 2d 77, 89 (D.D.C. 2009) (direct telephone numbers of ICE 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); Singh v. FBI, 574 F. Supp. 2d 32, 43-44 (D.D.C. 2008) (DEA telephone numbers); Odle, 2006 WL 1344813, at *13 ("non-public [OPR] fax numbers and telephone numbers"); Germosen v. Cox, No. 98-1294, 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).

²³ 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); 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)).

²⁴ 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); Durrani, 607 F. Supp. 2d at 89 (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 v. DOJ, 362 F. Supp. 2d 316, 324 (D.D.C. 2005) ("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. 03-4893, 2005 U.S. Dist. LEXIS 41276, at *36-38 (N.D. Cal.

In the "high 2" context, 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" in the wake of Crooker were: 1) records that would jeopardize informant activities,²⁷ 2) records that could jeopardize

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").

²⁵ 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); 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 grounds, 374 F. Supp. 2d 129 (D.D.C. 2005).

²⁶ See, e.g., Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978) (cover letters of merely internal significance); James Madison Project, 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); Durrani, 607 F. Supp. 2d at 89 (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 v. FBI, 272 F. Supp. 2d 35, 50-51 (D.D.C. 2003) (FBI internal rules and regulations for granting waivers from ordinary language-testing requirements).

²⁷ 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"); Amuso v. DOJ, 600 F. Supp. 2d 78, 91-92 (D.D.C. 2009) (withholding FBI confidential source file numbers and source symbol numbers because release of this information could "'indicate both the scope and location of FBI informant coverage within a particular geographic area" and could tend to identify particular sources (quoting agency declaration)).

undercover operations,²⁸ 3) agency security techniques,²⁹ 4) employee testing or rating materials,³⁰ 5) guidelines for protecting government officials,³¹ and 6) rankings of the effectiveness of, or priority accorded to, certain types of law enforcement techniques or investigations.³²

²⁸ 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. 2007) (allowing withholding of Secret Service special agent ID numbers whose disclosure would allow identification or impersonation of agent), remanded on other grounds, No. 07-5364 (D.C. Cir. Apr. 28, 2008); Russell v. FBI, No. 03-0611, 2004 WL 5574164, at *4 (D.D.C. Jan. 9, 2004) (holding that release of "funds used for undercover operations . . . would impede the effectiveness of the FBI's internal law enforcement procedures" (quoting agency declaration)), summary affirmance granted sub nom. Russell v. DOJ, No. 04-5036, 2004 WL 1701044 (D.C. Cir. July 29, 2004). But see Homick, No. 98-00557, slip op. at 15 (N.D. Cal. Sept. 16, 2004) (ordering disclosure of twenty-two-year-old records concerning undercover vehicle because FBI failed to show that same type of vehicle was still being used).

²⁹ See, e.g., Cox, 601 F.2d at 4-5 (upholding nondisclosure of weapon, handcuff, and transportation security procedures); James Madison Project, 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); Jimenez v. FBI, 938 F. Supp. 21, 27 (D.D.C. 1996) (approving nondisclosure of criteria for classification of prison gang member); Miller v. DOJ, No. 87-0533, 1989 WL 10598, at *1 (D.D.C. Jan. 31, 1989 (finding that disclosure of sections of BOP Custodial Manual that describe procedures for security of prison control centers would "necessarily facilitate efforts by inmates to frustrate [BOP's] security precautions"). But see Linn v. DOJ, No. 92-1406, 1995 WL 631847, at *4-5 (D.D.C. Aug. 22, 1995) (rejecting as "conclusory" BOP's argument that release of case summary and internal memoranda would cause harm to safety of prisoners).

³⁰ 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); Kelly v. FAA, No. 07-00634, 2008 WL 958037, at *2 (E.D. Cal. Apr. 8, 2008) (magistrate's recommendation) (protecting "grading sheet" used to apply criteria for ranking Designated Pilot Examiner position applicants because applicants could embellish certain criteria to circumvent hiring process), adopted, 2008 WL 4379199 (E.D. Cal. Sept. 25, 2008).

³¹ 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, 331 (D.D.C. 1996) (approving nondisclosure of information relating to security of Supreme Court building and Justices).

³² 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, 575 F. Supp. 2d at 255 (protecting FBI

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

In Milner v. Department of the Navy,³³ 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. ATF³⁴ 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.³⁵ This information prescribes the minimum storage distance between munitions necessary to minimize the likelihood of a chain reaction explosion in the event that one or more of the stored explosives detonates.³⁶ 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.³⁷ 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 Navy base.³⁸ Plaintiff appealed, and the Supreme Court granted certiorari to clarify the statutory meaning of Exemption 2.³⁹

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."⁴⁰ 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."⁴¹ The Court remanded the case back to the Ninth Circuit for consideration of the applicability of Exemption 7(F)⁴² to the data and maps.⁴³

"search" techniques and numerical ratings of effectiveness of such techniques as determined by FBI agents).

³³ 131 S. Ct. 1259 (2011).

³⁴ 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc).

³⁵ Milner, 131 S. Ct. at 1263.

³⁶ Id.

³⁷ Milner v. U.S. Dep't of the Navy, 575 F.3d 959, 965 (9th Cir. 2009).

³⁸ Id. at 968, 971.

³⁹ Milner, 131 S. Ct. at 1264.

⁴⁰ Id. at 1271.

⁴¹ Id.

⁴² [5 U.S.C. § 552 \(b\)\(7\)\(F\) \(2006 & Supp. IV 2010\)](#).

In reaching its decision, the Court began by stating that its "consideration of Exemption 2's scope starts with its text."⁴⁴ 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.'"⁴⁵ 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."⁴⁶ That word, in common usage, "means 'the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with [or involving] employees or their representatives.'"⁴⁷

In Milner, the government had argued for the adoption of Crooker's two-part test.⁴⁸ 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."⁴⁹ While the government relied on the House Report⁵⁰ as the basis of its legislative history argument, the Court noted that in Department of the Air Force v. Rose⁵¹ the Supreme Court had found the Senate Report to be a more reliable indicator of Congressional intent.⁵² 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."⁵³

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.⁵⁴ The Court noted that Congress amended Exemption 7(E), not Exemption 2.⁵⁵

⁴³ Milner, 131 S. Ct. at 1271.

⁴⁴ Id. at 1264.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id. at 1266.

⁴⁹ Id. at 1267.

⁵⁰ H. Rep. No. 89-1497, at 10 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2427.

⁵¹ 425 U.S. 352 (1976).

⁵² Milner, 131 S. Ct. at 1267 (citing Rose, 425 U.S. at 366).

⁵³ Id. (citing Wong Yang Sung v. McGrath, 330 U.S. 33, 49 (1950)).

⁵⁴ Id. at 1267-68.

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).⁵⁶ 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).⁵⁷ Indeed, the Court opined that Congress's 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.⁵⁸

In examining the statutory text, the Supreme Court determined that the key word in Exemption 2 is "personnel."⁵⁹ 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.⁶⁰ 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."⁶¹ 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)."⁶² 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.⁶³

⁵⁵ Id.

⁵⁶ Id. at 1268.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id. at 1264.

⁶⁰ Id.

⁶¹ Id. at 1265.

⁶² Id.

⁶³ See, e.g., Hale v. DOJ, 973 F.2d 894, 902 (10th Cir. 1992) (withholding checklist form used by FBI agents to assist them in consensual monitoring, as well as administrative markings and document notations because such records constitute trivial matters of no genuine public interest); Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (affirming withholding under "low 2" of internal agency time deadlines and procedures, recordkeeping instructions, directions for contacting agency officials for assistance, and guidelines on agency decisionmaking); Antonelli v. BOP, 569 F. Supp. 2d 61, 65 (D.D.C. 2008) (protecting investigatory case file numbers as internal information of no genuine public interest); Wheeler v. DOJ, 403 F. Supp. 2d 1, 13 (D.D.C. 2005) (withholding document routing information of no genuine interest to public); Maydak v. DOJ, 362 F. Supp. 2d 316, 324 (D.D.C. 2005) (upholding nondisclosure of purchase order accounting numbers that are used for internal purposes and bear no significant public interest).

The 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.⁶⁴ The Court found that logically, the exemption must be understood to pertain to records *about* personnel, not simply any records created *for* personnel.⁶⁵ Otherwise, the Court declared, the exemption would be so broad as to strip the word "personnel" of any meaning, "producing a sweeping exemption, posing the risk that FOIA would become less a disclosure than 'a withholding statute.'"⁶⁶

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.⁶⁷ 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."⁶⁸

The Court in Milner recognized that its decision "upsets three decades of agency practice relying on Crooker, and therefore may force considerable adjustments."⁶⁹ 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.⁷⁰ 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."⁷¹ 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.⁷² Even before Milner, many agencies used Exemption

⁶⁴ Milner, 131 S. Ct. at 1269-70.

⁶⁵ Id.

⁶⁶ Id. (quoting EPA v. Mink, 410 U.S. 73, 79 (1973)).

⁶⁷ Milner, 131 S. Ct. at 1265 n.4.

⁶⁸ Id.

⁶⁹ Id. at 1271.

⁷⁰ Id. at 1271-73 (Alito, J., concurring).

⁷¹ Id. at 1272.

⁷² 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).

7(E) in conjunction with Exemption 2 to withhold various types of records,⁷³ and Justice Alito's concurrence lends support to the idea that agencies may in some instances be able to properly apply Exemption 7 to certain types of records that were formerly withheld pursuant to Exemption 2. (For a further discussion of Exemption 7(E), see Exemption 7(E), below.)

Justice Breyer issued the sole dissent in Milner. He succinctly 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."⁷⁴

Exemption 2's New Three-part Test

Based on Exemption 2's text, and as set forth by the Supreme Court in Milner, three elements must now be satisfied for information to fit within Exemption 2.⁷⁵

⁷³ 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 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 v. DHS, No. 08-00842, 2008 WL 5047839, at *4-5 (N.D. Cal. Nov. 24, 2008) (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 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)); 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 v. FBI, 940 F. Supp. 323, 329, 331 (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)).

⁷⁴ See Milner, 131 S. Ct. at 1278 (Breyer, J., dissenting).

⁷⁵ See Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1265 & n.4 (2011); see also [DOJ, OIP Guidance: Exemption 2 After the Supreme Court's Ruling in Milner v. Dep't of the Navy \(2011\)](#) [hereinafter OIP Milner Guidance].

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.'"⁷⁶ 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."⁷⁷

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."⁷⁸ The Supreme Court defined this phrase by its "usual" meaning, which is "exclusively or only."⁷⁹

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.'"⁸⁰

In the wake of Milner, the scope of Exemption 2 has been significantly narrowed.⁸¹ For the thirty years following Crooker, a wide variety of records could be withheld if they were "predominantly internal" and either of no genuine public interest ("low 2") or could cause circumvention of the law if released ("high 2").⁸² 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.⁸³

⁷⁶ [OIP Milner Guidance \(quoting Milner, 131 S. Ct. at 1264\)](#).

⁷⁷ [Id. \(quoting Milner at 1264\)](#).

⁷⁸ [Id. \(quoting Milner at 1265 n.4\)](#).

⁷⁹ Milner at 1265 n.4.

⁸⁰ Id.

⁸¹ See Milner, 131 S. Ct. 1259.

⁸² 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (en banc).

⁸³ 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).

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 Navy⁸⁴ 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 2,⁸⁵ or the court ruled that Exemption 2 could no longer protect the records at issue in light of the Supreme Court's decision.⁸⁶ 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.⁸⁷ The types of records

⁸⁴ 131 S. Ct. 1259 (2011).

⁸⁵ 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 Env'tl. 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); Kortlander v. BLM, 816 F. Supp. 2d 1001, 1010 (D. Mont. 2011) (finding Exemption 2 no longer at issue in light of Milner and because agency relied on other exemptions); ACLU of Wash. v. DOJ, No. 09-0642, 2011 WL 887731, at *4 (W.D. Wash. Mar. 10, 2011) (noting that Supreme Court "substantially narrowed" scope of Exemption 2 and stating that defendant "concedes that the investigative techniques and guidelines it has withheld do not fall within this limited exemption"), reconsideration granted in part on other grounds, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

⁸⁶ See Brown v. FBI, No. 10-1292, 2012 WL 2786292, at *5 (D.D.C. July 10, 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, No. 03-0874, 2012 WL 1109728, at *8 (D.D.C. Apr. 4, 2012) (ordering agency to reprocess records formerly withheld under Exemption 2 in light of Milner); Frankenberry v. FBI, No. 08-1565, 2012 U.S. Dist. LEXIS 39027, at *39-40 (M.D. Pa. Mar. 22, 2012) (denying agency's assertion of "high 2" in light of Milner, but allowing withholding under Exemption 7(E)); 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"); Kubik v. BOP, No. 10-6078, 2011 U.S. Dist. LEXIS 71300, at *17-18 (D. Or. July 11, 2011) (holding that records at issue do not relate to prison employee matters and cannot be withheld under Exemption 2); Raher v. BOP, No. 09-526, 2011 WL 2014875, at *2 (D. Or. May 24, 2011) (ruling that agency cannot use Exemption 2 to withhold any records, stating that Milner "invalidated" "high 2" and limited Exemption 2 to "issues of employee relations and human resources").

⁸⁷ Hiken v. DOD, No. 06-02812, 2012 WL 1929820, at *2-3 (N.D. Cal. May 24, 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

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;⁸⁸ computer codes pertaining to a highly sensitive database;⁸⁹ psychological records pertaining to an inmate;⁹⁰ records regarding inmate discipline, inmate supervision, and prison incident responses;⁹¹ videos of Guantanamo detainees;⁹² and technical reviews, action plans, and inundation maps for dams.⁹³ 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.⁹⁴

government at once in district court (quoting August v. FBI, 328 F.3d 697, 700 (D.C. Cir. 2003))).

⁸⁸ See Frankenberry, 2012 U.S. Dist. LEXIS 39027 at *39-42, 68-76 (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., 2011 WL 887731 at *4 (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).

⁸⁹ 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).

⁹⁰ See Jordan, 668 F.3d at 1200 (rejecting withholding of inmate psychological records under "high 2," but allowing withholding under Exemption 7(E)).

⁹¹ See Kubik, 2011 U.S. Dist. LEXIS 71300 at *17-18 (allowing withholding of portions of records under other exemptions but ordering disclosure to plaintiffs of remainder of records).

⁹² 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)).

⁹³ See Pub. Emps. For Envtl. Resp., 839 F. Supp. 2d at 322, 323, 324-27 (upholding protection of such records pursuant to Exemptions 5, 7(E), and 7(F) rather than Exemption 2).

⁹⁴ See Island Film, S.A. v. Dep't of the Treasury, No. 08-286, 2012 WL 2389990, at *4 (D.D.C. June 26, 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, No. 09-0746, 2011 WL 5222896, at *8-9 (D.D.C. Nov. 2, 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).

A few courts have upheld Exemption 2 withholdings after applying some or all of the standards set forth in Milner.⁹⁵ Notably, several courts have discussed the viability of the withholding of agency telephone numbers, but have reached differing opinions on the issue.⁹⁶

Notably, in a couple of cases decided since Milner, courts have upheld withholdings under Exemption 2 while referencing the pre-Milner interpretation of the Exemption.⁹⁷ In several other cases decided since Milner, courts upheld Exemption 2 withholdings because the plaintiffs declined to challenge them.⁹⁸ One post-Milner court endorsed the withholding of information under Exemption 2 that appears to satisfy at least some of the criteria for withholding set forth in Milner, but the court never mentioned Milner in its opinion.⁹⁹

⁹⁵ See Citizens for Responsibility & Ethics in Wash. v. DOJ, No. 11-592, 2012 WL 2354353, at *6 (D.D.C. June 8, 2012) (protecting internal telephone and fax numbers of FBI personnel under Milner); Nat'l Day Laborer Organizing Network v. ICE, 811 F. Supp. 2d 713, 734, 738 (S.D.N.Y. 2011) (upholding withholding of records under what was formerly known as "low 2" while observing that "low 2" but not "high 2" survived Milner).

⁹⁶ Compare Brown, 2012 WL 2786292, at *5 (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 Institute for Policy Studies v. CIA, No. 06-960, 2012 WL 3301028, at *20 (D.D.C. Aug. 14, 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., 2012 WL 2354353, at *6 (finding that internal telephone and fax numbers of FBI personnel "fall squarely" within Milner's interpretation of Exemption 2).

⁹⁷ See Adionser v. DOJ, 811 F. Supp. 2d 284, 296 (D.D.C. 2011) (upholding withholding of "G-DEP" codes, NADDIS numbers, and phone and fax numbers of DEA employees without any reference to Milner and while citing pre-Milner cases); Physicians for Human Rights v. DOD, 778 F. Supp. 2d 28, 36 (D.D.C. 2011) (upholding withholding of internal telephone numbers based on analysis of Crooker).

⁹⁸ See Hetzler v. FBI, No. 07-6399, 2012 WL 3886367, at *7 (W.D.N.Y. Sept. 6, 2012) (upholding agency's withholding of confidential source symbol numbers and file numbers because plaintiff failed to challenge such withholdings); Institute for Policy Studies, 2012 WL 3301028, at *20 (granting summary judgment to agency because plaintiff failed to challenge withholding of telephone numbers of DEA personnel, but noting that such information likely would not satisfy Milner's standards for withholding under Exemption 2); Benavides v. BOP, 774 F. Supp. 2d 141, 144 n.4 (D.D.C. 2011) (treating as conceded agency's arguments for withholdings under Exemption 2 and granting in pertinent part agency's motion for summary judgment).

⁹⁹ Kelly v. U.S. Census Bureau, No. 10-04507, 2011 U.S. Dist. LEXIS 100279, at *1, 6 (N.D. Cal. Sept. 7, 2011) (holding, without analysis or mention of Milner, that certain records concerning "[plaintiff's] employment, applications for employment, and related termination issues [connected to plaintiff's employment with the Census Bureau]" qualified for withholding under Exemption 2).