

For: Washington, DC, and Kansas City FOIA Offices, and State and County Offices

Applying FOIA Exemption 2 After *Milner v. Department of the Navy*

Approved by: Administrator



1 Overview

A Background

On March 7, 2011, in *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011), the Supreme Court issued an opinion about using FOIA Exemption 2 (5 U.S.C. § 552 (b)(2)) that overturned 30 years of established FOIA precedents and significantly narrowed the scope of Exemption 2.

B Purpose

This notice provides guidance on:

- the new parameters of Exemption 2
- a new 3-part test to determine if Exemption 2 is applicable
- when to make discretionary disclosure of information now protected by Exemption 2
- possible alternatives to Exemption 2 for information requested under FOIA that was formerly protected under what was known as “high 2”.

C Contact

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Disposal Date	Distribution
October 1, 2012	Washington, DC, and Kansas City FOIA Offices and State Offices; State Offices relay to County Offices

1 Overview (Continued)

D New Parameters of Exemption 2

Before *Milner v. Department of the Navy*, DOJ advised that 2 categories of documents were protected by Exemption 2:

- records dealing with internal matters of a relatively trivial nature for which there is no legitimate public interest or benefit, when releasing and processing the requested records would impose an administrative burden on FSA (“low 2”)
- records whose disclosure would allow the circumvention of a statute or FSA regulation, or impede the effectiveness of FSA’s activities (“high 2”).

In *Milner v. Department of the Navy*, the Supreme Court held that Exemption 2 encompasses only records about “personnel rules and practices”, defined as meaning records about issues of the selection, placement, and training of employees, and the formulation of policies, procedures, and relations with or involving employees or their representatives. In short, the Supreme Court held that Exemption 2 covers **only** records concerned with the conditions of employment in Federal Agencies, such matters as hiring and firing, work rules and discipline, and compensation and benefits.

This means that there is no longer a distinction between “low 2” and “high 2”. There is simply a single Exemption 2, covering records solely about the internal personnel rules and practices of FSA.

Note: This new interpretation of Exemption 2 does **not** mean that all records solely about the internal personnel rules and practices of FSA may now be withheld from release according to Exemption 2. See subparagraphs E and F for guidance on when information now covered by Exemption 2 may be withheld when requested under FOIA.

E New 3-Part Test to Determine Exemption 2 Applicability

The Supreme Court decision in *Milner v. Department of the Navy* established a new 3-part test for FSA to use to determine whether records responsive to a FOIA request are covered by Exemption 2. To be covered by Exemption 2, the information/data/records **must** be:

- about “personnel” rules and practices
- **solely** about those personnel rules and practices
- **internal** to the Agency.

Determining whether responsive information is about personnel rules and practices ought to be relatively easy. Personnel rules and practices are to be understood in their customary meaning within FSA; they are about issues such as the selection, placement and training of employees, workplace rules and discipline, and compensation and benefits.

1 Overview (Continued)

E New 3-Part Test to Determine Applicability of Exemption 2 (Continued)

Determining whether responsive information is **solely** about these personnel rules and practices is more difficult, inasmuch as it involves determining whether there is a public interest in the information.

Examples: Information about FSA's efforts to recruit and retain a diverse workforce might reasonably be considered to be information that is of interest to the general public. For this reason, even though it is about personnel practices, this information would **not** be covered by Exemption 2.

In contrast, information about using parking facilities, regulations governing employee lunch hours, or statements of policy about using sick leave, might reasonably be considered to be information that is not of general interest to the public. For this reason, this information might reasonably be considered to be covered by Exemption 2.

However, when applying this part of the 3-part test, it is important to remember that any information that might reasonably be considered to be covered by Exemption 2 under ordinary or routine circumstances, such as information about using parking facilities, might become of general interest to the public under other circumstances.

Example: If an employee files a complaint against FSA alleging that it is discriminating against employees applying for temporary parking permits on the grounds of race, religion, or ethnic background, this information might well be deemed to be of general public interest. For information/data/records to be covered under Exemption 2, there must be **no** discernable genuine and significant public interest in the information.

Additionally, for information to be covered by Exemption 2, the information in question needs to be of the type that is considered internal to FSA. This means that the records are such that FSA normally creates and maintains the records for its own use, rather than for dissemination to the public. Under this part of the 3-part test, information about the public process for electing COC members could not reasonably be considered to fall under Exemption 2, insofar as this information is created to be disseminated to the public. Under this same test, any information about FSA's personnel rules and practices that is published in a newsletter distributed to the public, is included in the minutes of a regular session of a COC meeting, or is posted on FSA's public web site could **not** reasonably be considered to fall under Exemption 2, insofar as this information was distributed to the public.

1 Overview (Continued)

F Attorney General's FOIA Guidelines Encourage Discretionary Release of Information Protected by Exemption 2

Information responsive to a FOIA request that passes the 3-part test for determining Exemption 2 coverage should **not** automatically be withheld under Exemption 2. The harm sought to be prevented by applying Exemption 2 is relief from the burden of assembling and maintaining information covered by the exemption.

Example: If FSA publicizes regulations about employee lunch hours, with instructions that each County Office is to duplicate the regulations, adding the name of the office at the head of the page, and posts them on the office's employee bulletin board, FSA might reasonably consider that the records responsive to a FOIA request that seeks "copies of all employee lunch hour regulations posted on County Office employee bulletin boards" to be covered by Exemption 2.

The burden on FSA in responding to this request would lie in contacting each and every County Office to obtain a copy of each of these documents, that would differ only in respect to the name of the County Office added to the head of the page, and in reproducing these documents for the requester.

However, before making a decision to withhold information protected by Exemption 2, FSA must remember that:

- withholding records from release under FOIA does **not** excuse FSA from the burden of locating all documents responsive to the request and making a copy of them for the request's administrative file, in the event of a FOIA appeal or litigation

Note: In this instance, the only relief that denying the records in question might reasonably be gained would be relief from the additional burden of reproducing these records for the requester. However, in certain circumstances, as for example, should the requester also have asked for copies of the documents in question to be scanned and provided in electronic format, the relief to be gained by withholding the documents might be significant. In this instance, it would save FSA from the burden of having to individually scan each of these documents, develop a naming convention for their identification, and reproduce them to disk.

- the Attorney General's FOIA Guidelines encourage FSA to make discretionary releases of responsive documents, and to **not** withhold records absent a determination that disclosure would cause foreseeable harm.

1 Overview (Continued)

F Attorney General's FOIA Guidelines Encourage Discretionary Release of Information Protected by Exemption 2 (Continued)

Note: It is not unreasonable to presume that there may be instances in which releasing records solely about FSA's internal personnel rules and practices might cause harm to FSA. If a FOIA requester sought access to a list of interview questions that FSA developed to standardize hiring certain positions within County Offices, release of those questions might cause harm to FSA's hiring processes if some potential applicants and not others were to have access to the questions in advance. However, it is often more burdensome to withhold information than it is to release it. In the absence of harm, information covered by Exemption 2 should be released as a matter of discretion according to the Attorney General's FOIA Guidelines.

G Possible Alternatives to Exemption 2

For records that FSA has customarily withheld under Exemption 2, that, following *Milner v. Department of the Navy*, are no longer protectable under Exemption 2, but whose release would cause harm to FSA; in other words, information previously protected under Exemption 2 ("high 2"), FSA must find another exemption to justify their withholding. The following exemptions should be considered.

- Exemption 1: For disclosures that could risk harm to national security, rare for FSA, Exemption 1 of FOIA is potentially available to protect records from public disclosure. For Exemption 1 to apply; however, the information in question must be formally marked, maintained and classified as secret, top secret, etc. Because FSA does not generally handle national security classified documents, Exemption 1 will not ordinarily apply to information formerly protected under Exemption 2.
- Exemption 4: For records obtained from a source outside the Government, Exemption 4 might provide a legal basis for withholding. For example, Exemption 4 could be used to protect FSA credit card and bank account numbers, because these numbers represent confidential financial information obtained from a source outside the Government, and this information, if disclosed, could cause harm to FSA interests and program effectiveness.
- Exemption 6: It is possible that certain information previously withheld under Exemption 2 could qualify for protection under Exemption 6. For example, public release of telephone numbers and pass codes assigned to participants of conference calls could compromise the personal privacy of conference call participants; individuals participating in such calls could never be certain that unidentified members of the public were not eavesdropping on these calls. When the release of information formerly protected by Exemption 2 could reasonably be considered to cause an unwarranted invasion of the personal privacy of individuals, Exemption 6 could be used to protect this information from release.

Notice INFO-50

1 Overview (Continued)

G Possible Alternatives to Exemption 2 (Continued)

- Exemption 7: For records compiled for purposes of law enforcement, such as the prevention of future illegal actions, Exemption 7 might apply. For example, those records created or compiled to maintain computer or building security might reasonably be protected under Exemption 7(E). Similarly, records created or compiled to maintain the security of individuals might reasonably be protected under Exemption 7(F).

In case of doubt as to how to protect records customarily withheld under Exemption 2 (“high 2”), following *Milner v. Department of the Navy*, employees processing FOIA requests should contact FSA’s FOIA officer/advisor as to which exemption should now be invoked.

2 Action

A National FOIA Office Action

The Washington, DC, and Kansas City National FOIA Offices shall comply with this notice.

B State Office Action

State Offices shall:

- communicate the contents of this notice to County Offices, and provide training in its application, if required
- comply with this notice
- ensure that County Offices comply with this notice.

C County Office Action

County Offices shall comply with this notice.