

Administrative & Civil Law

The Death of Exemption “High 2” of the Freedom of Information Act

On 7 March 2011, the U.S. Supreme Court issued an opinion in *Milner v. Dep’t of Navy*<sup>1</sup> that dramatically narrowed the application of Exemption 2 of the Freedom of Information Act (FOIA). Exemption 2 of the FOIA authorizes withholding of documents that “relate solely to the internal personnel rules and practices of an agency.”<sup>2</sup>

Exemption 2 was interpreted for years to create two separate bases for withholding documents, which were commonly referred to as “Low 2” and “High 2.” “Low 2” authorized “the withholding of internal matters that are of a relatively trivial nature” such that “the administrative burden [of processing the FOIA request] on the agency . . . would not be justified by any genuine public benefit.”<sup>3</sup> “High 2” authorized withholding of “internal matters of a far more substantial nature the disclosure of which would risk the circumvention of a statute or agency regulation.”<sup>4</sup>

In *Milner*, the Navy sought to withhold maps of Naval Magazine Indian Island, Washington, located in Puget Sound, showing the locations of munitions storage bunkers and the estimated blast radius of those munitions.<sup>5</sup> The Navy invoked “High 2,” arguing that release of the documents could help a terrorist bent on attacking the facility circumvent the agency’s mission of safeguarding the munitions.<sup>6</sup> The Navy preferred not to classify the maps, thus enabling it to withhold them under Exemption 1 of the FOIA,<sup>7</sup> because it wanted to be able to share the information with local authorities (i.e., the fire department and law enforcement) without the difficulties of handling and sharing classified information.<sup>8</sup> Relying on longstanding judicial interpretation of “High 2,” the Ninth Circuit Court of Appeals upheld the Navy’s withholding of the maps.<sup>9</sup>

The Supreme Court reversed the Ninth Circuit and ruled against the Navy.<sup>10</sup> In so doing, the Court did away with “High 2” and narrowed “Low 2.” The opinion is based on straightforward application of rules of statutory construction coupled with the principle that FOIA exemptions are meant to be construed narrowly.

In the Court’s view, “High 2” simply stretched the language of the statutory exemption too far. Writing for the majority, Justice Kagan commented that “Exemption 2, consistent with the plain meaning of the term ‘personnel rules and practices,’ encompasses only records pertaining to issues of employee relations and human resources.”<sup>11</sup> She observed that “[o]ur construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all).”<sup>12</sup> While the decision is most noteworthy for destroying “High 2,” it should not be forgotten that it also corrals any interpretation of trivial matters under “Low 2” that may stray outside the limits of “personnel rules and practices of an agency.”

*Milner* stands to have a significant ripple effect as the Government has relied on “High 2” to withhold numerous documents over the years. The military, for example, has used “High 2” to withhold such things as unclassified rules of engagement<sup>13</sup> and force feeding techniques for detainees on hunger strikes.<sup>14</sup> The Government’s authority to withhold these and many other types of documents are now in question. We may expect to see increased use of the classification process (thus authorizing withholding under Exemption 1) and greater reliance on Exemption 7,<sup>15</sup> which includes several sub-exemptions related to records maintained for law enforcement purposes.<sup>16</sup>

—Major Scott E. Dunn, USA

<sup>1</sup> No. 09-1163 (S. Ct. Mar. 7, 2011), 562 U.S. \_\_\_\_ (2011).

<sup>2</sup> 5 U.S.C. § 552(b)(2) (2006).

<sup>3</sup> U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 176 (2009).

<sup>4</sup> *Id.* at 184.

<sup>5</sup> *Milner*, 562 U.S. at 4–5.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> 5 U.S.C. § 552(b)(1).

<sup>8</sup> Transcript of Oral Argument at 28–31, *Milner v. Navy*, No. 09-1163 available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-1163.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1163.pdf) (argument of Anthony Yang, Assistant to the Solicitor Gen., representing the respondent).

<sup>9</sup> *Milner*, 562 U.S. at 5.

<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 8.

<sup>13</sup> *Hiken v. DOD*, 521 F. Supp. 2d 1047, 1059–60 (D.D.C. 2007).

<sup>14</sup> *Davis v. DOD*, No. 07-492, 2010 WL 1837925 (W.D.N.C. May 6, 2010).

<sup>15</sup> 5 U.S.C. § 552(b)(7) (2006).

<sup>16</sup> *Id.* Exemption 7 contains six specific sub-exemptions related to records compiled for law enforcement purposes. Such records may be withheld if release could “reasonably be expected to interfere with enforcement proceedings,” *id.* § 552(b)(7)(A)); if it would “deprive a person of . . . a fair trial,” *id.* § 552(b)(7)(B)); if it would “reasonably be expected to constitute an unwarranted invasion of personal privacy,” *id.* § 552(b)(7)(C)); if it “could reasonably be expected to disclose the identity of a confidential source,” *id.* § 552(b)(7)(D)); if it would “disclose techniques and procedures . . . or . . . guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law,” *id.* § 552(b)(7)(E)); or if release “could reasonably be expected to endanger the life or physical safety of any individual,” *id.* § 552(b)(7)(F)).

**Post Traumatic Stress, Poly-Pharmacy, Pain Management, or Traumatic Brain Injury**

All Army Activities (ALARACT) message number 363/2010 imposes coordination requirements prior to the public release of any information related to post traumatic stress, poly-pharmacy, pain management, or traumatic brain injury.<sup>17</sup> Requests to release information about these subjects have to be coordinated with “local subject matter experts, local public affairs officers (PAO) and local

operation security officers.”<sup>18</sup> The PAO and Operations Security Program Manager for the Office of The Surgeon General/Medical Command must also be consulted prior to the release of information.<sup>19</sup> This ALARACT applies to any public release of information on these matters, whether the release is proactive or in response to a request or inquiry.<sup>20</sup> It is advisable to ensure that local Freedom of Information Act (FOIA) offices are aware of this ALARACT and its requirements.

—Major Scott E. Dunn, USA

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<sup>17</sup> Message, 300120Z Nov 10, U.S. Dep’t of the Army, subject: ALARACT 363/2010, Guidance on Procedures for the Release of Information Related to Post Traumatic Stress, Poly-Pharmacy, Pain Management, and/or Traumatic Brain Injury.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* ALARACT 363/2010 provides the following examples of public releases of information: “media interviews, data, statistics, policies, web postings, videos, talking points, plans, photographs, manuscripts, briefings, articles, etc.” *Id.*