No. _____

In The Supreme Court of the United States

GLEN SCOTT MILNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the "High 2" expansion created by some circuits but rejected by others.

PARTIES TO THE PROCEEDINGS

Petitioner Glen Milner is an individual and United States citizen who initiated the proceedings below by filing a complaint under the Freedom of Information Act against respondent United States Navy in the Western District of Washington. The District Court granted the Navy's motion for summary judgment and dismissed the case. Petitioner Milner appealed the District Court's determination to the Ninth Circuit Court of Appeals, which affirmed the District Court's grant of summary judgment. No petitioner is a publicly owned corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Glen Milner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, published as *Milner v. U.S. Dept. of the Navy*, 575 F.3d 959 (9th Cir. 2009), is reprinted in the Appendix (App.) at 26. The decision of the United States District Court for the Western District of Washington, reprinted at App. 4, is not published but is available as *Milner v. U.S. Dept. of the Navy*, 2007 WL 3228049 (W.D.Wash. 2007).

JURISDICTION

Petitioner Milner's motion for reconsideration en banc was denied by the Court of Appeals by order entered on December 22, 2009. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

5 U.S.C. § 552(b) of the Freedom of Information Act ("Exemption 2") provides in pertinent part:

> (b) This section [providing for public access to government documents] does not apply to matters that are:
>
> . . .
>
> (2) related solely to the internal personnel rules and practices of an agency;

I. INTRODUCTION AND STATEMENT OF FACTS

Exemption 2 of the Freedom of Information Act allows a government agency to withhold material "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). In 1976, this Court ruled that Exemption 2 allowed an agency to keep from disclosure trivial materials in which the public did not have any legitimate interest. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 96 S. Ct. 1592 (1976). Left open was the question of whether Exemption 2 also covered nontrivial materials, the release of which might risk circumvention of agency regulation. *Dep't of the Air Force v. Rose*, 425 U.S. at 369, 96 S. Ct. at 1603 (1976).

Despite the plain language of the Exemption, some circuits have created a "High 2" reading of Exemption 2. The parameters of this judicially-created expansion of the exemption vary. In this decision, the Ninth Circuit ruled that a government agency could keep secret any document that is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner v. U.S. Navy*, 575 F.3d 959, 968 (9th Cir. 2009). Some circuits agree with this reading; others

have varying tests for High 2. Still other circuits limit the Exemption to the "Low 2" trivial administrative materials this Court described in *Rose*. This judicially-created High 2 reading of Exemption 2 is a significant departure from the plain language of the Exemption, and represents a departure even from the hypothetical left open in *Rose*. Appellant Glen Scott Milner asks this court to revisit the question left open thirty years ago, and resolve a split between the circuits in favor of the plain language of the Exemption and disclosure, rather than a judicially-created reading sanctioning government secrecy.

Appellant Milner is a citizen who wants to know if he is at risk from ammunition stored at the U.S. Navy's Naval Magazine Indian Island (NMII). NMII is an ammunition depot located very near the civilian communities of Port Hadlock and Port Townsend in the Puget Sound area of Washington. It is located on a small island, connected to the mainland via a public road. The Navy does not hide the presence of NMII, nor does it deny that explosives are stored there.

The Navy has calculated how far an explosion would go if a fire or accident occurred at NMII. The Navy creates and maintains Explosive Safety Quantity Distance (ESQD) data for explosives

storage facilities. An ESQD is the distance an explosion is expected to expand should a particular explosive or combination of explosives detonate. ESQD data is used by the Navy for construction purposes, and is regularly released to civilian construction crews. It is used by local fire and other safety agencies in planning for emergencies. A previous version of the exact information sought here – an ESQD map showing the blast radius of the items stored in buildings at NMII – was provided to local emergency response personnel and elected officials, and then published in a local newspaper. Appellant Milner, and other citizens, could use the information if released to make informed decisions about whether they wanted to live within a blast radius, or drive, walk, or boat through the risk arcs when travelling near NMII. Should a fire break out, publication of the explosive arcs in advance would mean that civilians would know how far away they must stay.[1] These maps also have an important political use. NMII is very near civilian communities; these communities should know

[1] The risk of a disaster is not abstract. On October 28, 2009, Port Chicago National Magazine Memorial became the Nation's newest national park site. Port Chicago was the site of a 1944 explosion that killed 320 people at a naval magazine much like NMII.

whether NMII poses a risk to their safety, so that they may exercise their democratic rights to protest that risk.

Appellant Milner has obtained, through FOIA requests, ESQD maps from the Navy showing the blast radius of explosives stored at nearby Bangor submarine base – a facility that, unlike NMII, also stores nuclear weapons. Inexplicably, the commander of NMII denied Mr. Milner's FOIA request for its maps, claiming in a declaration that he believed release of the maps to Mr. Milner "would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act." ER 0075; 77.

Mr. Milner brought suit under FOIA, and the District Court affirmed the Navy's denial, relying exclusively on the "High 2" reading of 5 U.S.C. § 552(b)(2). In a 2-1 split, a panel of the Ninth Circuit affirmed the District Court's decision, and dramatically expanded the reach of Exemption 2 beyond even other circuits that have created a High 2 reading. The Ninth Circuit's decision allows an agency to keep from disclosure any document "if it is predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner v. U.S. Navy*, 575 F.3d 959, 968 (9th Cir. 2009). The *Milner* court expanded the scope

of High 2 as adopted by the D.C. Circuit and previous Ninth Circuit decisions by allowing the Navy to assert a risk from any person, rather than limiting the exemption to risks presented by the subjects of agency regulation. The Ninth Circuit further abandoned any pretext of reliance on a specific law or regulation, instead allowing the Navy to rely on hypothetical general safety concerns.

Glen Milner asks this Court to decide the question left open in 1976 in favor of disclosure rather than secrecy, resolve the split among circuits regarding the existence and scope of a "High 2" exemption, reject the judicial creation of an exemption that goes beyond the statute, and hold that Exemption 2 is limited to trivial administrative materials, and is not a catch-all for any information a government agency speculates may risk harm to agency operations.

II. ARGUMENT

A. Review is Necessary to Resolve an Important Question of Federal Law.

1. Strict construction of FOIA mandates that Congress, not the

courts, decide whether to broaden Exemption 2.

The High 2 reading of Exemption 2 was created by the courts, not Congress, and goes far beyond the exemption's plain language of protecting government from having to release purely administrative matters. This Court's guidelines suggest review of a decision the resolution of which would resolve an important question of federal law. Sup. Ct. R. 10(c). The purpose of FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 2327 (1978). FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force v. Rose,* 425 U.S. at 360-61, 96 S. Ct. 1592 (quoting S.Rep. No. 813-89, at 3 (1965)).

As this Court has noted, FOIA's exemptions were "explicitly made exclusive, and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79, 93 S. Ct.

827, 832 (1973). The delineated exemptions "are to be interpreted narrowly." *Lahr v. NTSB,* 569 F.3d 964, 973 (9th Cir. 2009) (internal citation omitted). The narrow wording of each exemption was explicitly designed by Congress to counteract the "vague phrases, such as that exemption from disclosure any function of the United States requiring secrecy in the public interest" of FOIA's predecessor. *Mink*, 410 U.S. at 79, 93 S. Ct. at 832.

In *Department of the Air Force v. Rose*, *supra*, this Court considered Exemption 2 in the context of a request for disciplinary records of Air Force cadets. 5 U.S.C. § 552(b)(2) provides that an agency may exempt from disclosure under the Freedom of Information Act only records that are "related solely to the internal personnel rules and practices of an agency." In *Rose*, the Court ordered that Air Force disciplinary records be released to a law review author, holding that Exemption 2 allowed an agency to keep secret trivial matters, but that FOIA mandated disclosure of matters of genuine public interest. *Dep't of the Air Force v. Rose,* 425 U.S. at 364, 96 S. Ct. at 1600. The Court declined to decide the issue of whether Exemption 2 might also allow some materials of genuine public interest to remain secret, noting that courts:

> [P]ermitting agency withholding of matters of some public interest, have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function. Moreover, the legislative history indicates that this was the primary concern of the committee drafting the House Report. We need not consider in this case the applicability of Exemption 2 in such circumstances, however, because, as the Court of Appeals recognized, this is not a case "where knowledge of administrative procedures might help outsiders to circumvent regulations or standards."

Dep't of the Air Force v. Rose, 425 U.S. at 364, 96 S. Ct. at 1600 (internal citations omitted). As the Ninth Circuit recognized in this decision, this Court has left open the scope of Exemption 2 since *Rose* was decided in 1976. *Milner v. U.S. Navy*, 575 F.3d 959, 964 n. 2 (9th Cir. 2009).

In holding that Exemption 2 covered trivial materials but leaving open the question of whether the exemption might have a broader reach, this Court noted that the legislative record reflected a split between the Senate and the House on the scope of the exemption. In enacting Exemption 2, the Senate noted 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.

S.Rep. No. 813, 89th Cong., 1st Sess. 8 (1965), as quoted in *Rose*, 425 U.S. at 363. The House Report provides that Exemption 2 was to be applied to:

> Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, 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 present law.

H.R.Rep. No. 1497, 89th Cong., 2d Sess. 10 (1965), as quoted in *Rose*, 425 U.S. at 363. As this Court has noted, the Senate Report is the more authoritative. *Rose*, 425 U.S. at 366-67. But the presence of two competing versions of what Exemption 2 means in the legislative record has led to discord among the circuits, and an ever-broadening definition of Exemption 2 that threatens in some circuits to swallow FOIA itself. Resolution of the debate is long-due.

In adopting a High 2 reading of Exemption 2, courts have broadened the phrase "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), to mean any document that is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner v. U.S. Navy*, 575 F.3d at 968. As described below, the Ninth Circuit in this matter is not the only circuit to have gone down the dangerous path of expanding Exemption 2; the Ninth Circuit's decision represents the capstone of a

long process of judicial expansion of Congress' narrow wording in some circuits. Although lip service is still paid by most courts to the word "personnel," in this case the Ninth Circuit has sanctioned nondisclosure of a map showing how far an explosion will go, regardless of its complete lack of application to any personnel issues other than that it was used by government employees. This creates the vague and undefined exemption FOIA was enacted to eliminate. The Ninth Circuit's decision allows a government agent to keep secret any document, as long as it was not designed for public release nor widely released, and can be shown to create any level of risk to any type of agency operation.

The failure to adhere to FOIA's plain language has far-reaching implications. The slippery slope of the High 2 exemption is patent. There is little data that does not have some potential impact on an agency's operation, and could thus be used to help a potential wrongdoer interfere with an agency's regulations or the law. The hours of the Navy museum gift shop indicate when it is supervised and therefore the best time to burglarize it. How much the Navy pays for baked beans could allow triangulation of price to the supplier, and increase the risk of poisoning. High 2, as the decision of the

Ninth Circuit in this matter has interpreted it, means that anything that is not designed by the agency for public disclosure can be kept secret if the agency can come up with a creative reason explaining why a rule might be circumvented if data is released. But FOIA was designed to take this very discretion away from agencies. The broad reading of Exemption 2 adopted by the Ninth Circuit leads to exactly the unbridled and illogical discretion demonstrated by the Navy in this case: one agency employee, the commander at Bangor submarine base, where nuclear weapons are maintained, decided to release ESQD maps. A different agency commander, at NMII, weighed what he believed were the political benefits to releasing the maps, decided that release "would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act," and kept them secret. Allowing Exemption 2 to expand as far as the Ninth Circuit has done in this case sends the message to agency employees that the bad old days of the Administrative Procedure Act have returned, and that they have sole discretion to decide what the public can know about government operations.

The "mosaic approach" to High 2 adopted by some district courts exacerbates the discretion

afforded to government agents to decide which documents the public may see. Under the "mosaic approach," government agents can withhold documents that are not intrinsically likely to cause circumvention of agency regulation, but if combined with similar documents might create such a risk. *L.A. Times v. Dep't of the Army*, 442 F.Supp.2d 880, 900-01 (C.D. Cal. 2006) (Allowing withholding of the names of private security contractors, on a theory that these names could be used with data from incident reports to target companies working on the Iraq reconstruction); *see also James Madison Project v. CIA*, 605 F.Supp.2d 99, 111-12 (D.D.C. 2009) (Authorizing withholding of seemingly "harmless" CIA training materials on a fear that foreign intelligence services might employ a mosaic approach with undescribed other data to cause harm).

The problem of unregulated discretion is substantial. The vast majority of FOIA requests are resolved by government agents without any judicial oversight; only a very small percentage of FOIA cases are ever litigated in court. In fiscal year 2008, the Navy alone received 14,405 FOIA requests.[2] Other agencies received thousands more, but

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[2] http://www.foia.navy.mil/foia/2008FinalReportl.pdf .

reported decisions on FOIA matters are relatively sparse, and several circuits have never addressed whether High 2 exists. Significantly, in providing guidance to Federal agencies, the Department of Justice has emphasized the D.C. Circuit's version of High 2 set forth in *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 670 F.2d 1051, 1062 (D.C. Cir. 1981), while failing to adequately acknowledge that other circuits have either not addressed the issue, or disagree with it. *See* United States Dep't of Justice, *Guide to the Freedom of Information Act* (June 2009) at 184-85.

Judicially created limits on High 2 have failed to limit High 2's reach. This Court's comment that it is undecided whether Exemption 2 may include documents the release of which might risk "circumvention of agency regulation" has been used to steadily expand increasing secrecy in a manner that frustrates both the language and intent of FOIA. *Dep't of the Air Force v. Rose,* 425 U.S. at 364, 96 S. Ct. at 1600. Initially applied only to law enforcement documents in cases such as *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 670 F.2d 1051, High 2 next expanded to administrative regulations, *Dirksen v. Dep't of Health and Human Services*, 803 F.2d 1456 (9th Cir. 1986), then to any document the release of which would render the

document "operationally useless" and documents the release of which might give some entity a competitive advantage, *National Treasury Employees Union v. U.S. Customs Svc.*, 802 F.2d 525, 529-31 (D.C. Cir. 1986), and now to the instant case wherein a hypothetical security risk from a hypothetical lawbreaker to a non-regulatory agency is sufficient to trigger Exemption 2's protection.

The D.C. Circuit has attempted to limit the reach of High 2 by adding the word "significantly" to the risk of circumvention requirement. *Crooker,* 670 F.2d at 1074. This effort to restrain misuse of Exemption 2 has been unsuccessful, even within the D.C. Circuit. This "significantly risks" test also appears to have been later abandoned by the D.C. Circuit, and either abandoned or never adopted by the Ninth Circuit. In *National Treasury Employees Union v. U.S. Customs Svc.*, 802 F.2d 525 (D.C. Cir. 1986), the D.C. Circuit allowed the Customs Service to keep secret the criteria for promoting employees, claiming that release might make it "more difficult correctly to evaluate job candidates" based on the court's speculation that some candidates might be advantaged by having access to the criteria while other candidates without access would be unable to prepare to the same level, or that candidates might artificially inflate some areas of their resumes if they

knew what criteria would be applied. The Ninth Circuit in this matter accepted a naval commander's declaration that it was possible to reverse-engineer ESQD to identify the locations where the most explosives were stored, without any discussion of the possibility that such a reverse-engineering would take place, or whether it was practically possible to use the information in such a manner.[3]

Moreover, as the dissent in this matter notes, the requirement that an agency must identify a risk from the subjects of agency regulation has been abandoned by the Ninth Circuit. *Milner v. U.S. Dept. of the Navy,* 575 F.3d at 977-78. Under the Ninth Circuit's version, any hypothetical risk is enough to allow nondisclosure. In this case, the Navy asserts that a lawbreaker might "reverse-engineer" the maps to be able to discern which buildings store the most explosives. Carrying the Navy's reasoning not much further, a hypothetical report disclosing

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[3] It is extremely unlikely that even being able to reverse-engineer the maps would aid a lawbreaker – the record demonstrated that the Navy constantly moves ammunition and explosives around the facility, while the maps are "snapshots" of a particular moment in time – useful for gauging the general risk to the area as a whole should a disaster happen, but no more useful to pinpoint the most explosives at any particular moment than just picking one of the ammunition storage buildings at random, or waiting for a ship to dock and then targeting the transfer wharf. ER 0076.

corruption in a government agency's purchasing decisions could be kept secret, because it could theoretically be used to discern and exploit purchasing guidelines for commercial gain. Creative minds can always find ways to misuse information; creative government agency minds can now use any hypothetical misuse of data to keep secret virtually anything and everything they want to keep from the public eye.

Disturbingly, the D.C. Circuit has also suggested that the correct inquiry under both Low 2 and High 2 is whether the requested material is the subject of legitimate public interest. *Crooker*, 670 F.2d at 1065. Although the *Crooker* court disclaimed the impact of this proposed inquiry test by noting that it was "not for courts to decide what matters are of legitimate public interest," *id.* at 1065-66, later decisions return to the theme. In *National Treasury Employees Union*, the D.C. Circuit quoted *Crooker's* "lack of public interest" standard to hold that "the appointments of individual members of the lower federal bureaucracy is primarily a question of "internal" significance for the agencies involved," even while acknowledging that "appointment decisions, like any government activity, have some impact upon the public[.]" *National Treasury Employees Union v. U.S. Customs Svc.,* 802 F.2d at

531. While this is the correct inquiry under Low 2 because a matter is trivial only if there is no legitimate public interest, High 2 purports to allow agencies to decide whether there is a public interest in disclosure of admittedly nontrivial documents. This weighing of the democratic merit of a request for information on the part of government bureaucrats is what FOIA was designed to prevent – it is for the citizens, not government employees, to decide what is important to view.

The High 2 reading of Exemption 2 is unnecessary to protect the interests of government, given the protections afforded by other exemptions. Other FOIA exemptions protect the national security interest tenuously asserted by the Navy here. Exemption 1 allows the Navy to protect any document it believes will endanger our nation's defense by classifying it. 5 U.S.C. § 552(b)(1). Similarly, Exemption 3 protects documents that are exempt from disclosure by statute. 5 U.S.C. § 552(b)(3). Moreover, law enforcement materials, the protection of which many of the circuits adopting the High 2 reading of Exemption 2 have relied upon to justify the expansion, are also protected by Exemption 7. 5 U.S.C. § 552(b)(2)(7); *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 888-89 (7th Cir. 1988); *PHE, Inc. v. U.S. Dep't of Justice*,

983 F.2d 248, 251 (D.C. Cir. 1993). *See also* United States Dep't of Justice, *Guide to the Freedom of Information Act,* p. 203 ("there is a great deal of overlap between the coverage of "high 2" and Exemption 7(E).").

Crucially, unlike other exemptions protecting safety or operations, Exemption 2 contains no safeguards or balancing tests beyond the bare assertion that there is a risk of harm. In *Crooker*, the D.C. Circuit noted that "[i]t is not up to this court to balance the public interest in disclosure against any reason for avoiding disclosure." *Crooker*, 670 F.2d at 1074; *see also Gordon v. FBI*, 388 F.Supp.2d 1028, 1036-37 (N.D. Cal. 2005).[4]

Other exemptions contain balancing. Exemption 7 expressly requires balancing. 5 U.S.C. § 552(b)(7); *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 171, 124 S. Ct. 1570, 1580 (2004). Exemptions 1 and 3 require decisions from either the Executive or Congress, and are inherently balanced by the political process as well as by judicial review of the Executive Order or statute in question. But with the High 2 interpretation of

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[4] The Seventh Circuit has held that "the purpose of the document must be legitimate and the document must not constitute 'secret law,'" but beyond this basic requirement no circuit appears to have adopted a balancing test for High 2. *Kaganove v. Environmental Protection Agency*, 856 F.2d at 889.

Exemption 2, *any* risk to agency regulation or operations, no matter how trivial or remote, will exempt from disclosure even a document in which there is a compelling public interest. There is no need for a balancing test for Low 2 information: the public simply has no need to know (for example) the parking regulations at NMII, and a request for that data merely wastes taxpayer money and government resources in responding. But members of the public do have a need to know if they will be caught in a fireball if they live, work, or recreate too close to NMII, and a need to have the information necessary to effectively exercise their right to free speech and petition in protesting the Government's decision to put an ammunition storage depot right next to a populated area.

The High 2 reading has created the very situation FOIA was enacted to prevent, wherein government agents are empowered to decide which documents citizens are allowed to see. There is a very real danger that a broad reading of Exemption 2 may lead to the denial of information for improper reasons. In this case, the petitioner is an anti-war activist. The Navy commander who denied his request for blast maps did so because that particular commander believed that giving Mr. Milner the maps "would do little or nothing to

promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act."[5] But government agents are not supposed to be deciding whether withholding documents promotes their personal beliefs as to what benefits democracy, and the Ninth Circuit's broad reading of Exemption 2 misreads the statute to do exactly that.

Moreover, High 2 can endanger rather than protect safety. Information that is classified or protected by statute must be kept secret by all, or sanctions apply. By contrast, High 2 does nothing to regulate information that somehow makes it outside the confines of the agency. In this case, the Navy asserts that the ESQD maps at question must be kept secret or the safety of one of the nation's three naval magazines is endangered. But the Navy gave a prior version of the ESQD maps to a local politician and local emergency response agencies, and someone gave it to a newspaper which published it. There are no sanctions for doing so – Exemption 2 is a shield to the government providing information, not a mandate that anyone who receives it keep it secret. If this information were really dangerous to public safety, classifying it or seeking statutory protections from Congress would

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[5] The quotation is from a declaration submitted by the Navy to the District Court, contained at ER 0075; 77.

have meant that whoever provided the map to the newspaper did so only on peril of prosecution and imprisonment. Allowing government agencies to short-cut the classification or statutory protection process through a reliance on an overbroad Exemption 2 places us all at risk that a person who obtains actually dangerous documents may freely disseminate them.

B. Review is Necessary to Resolve a Conflict between the Circuits.

This Court's guidelines suggest review of a decision that conflicts with decisions reached by other circuits. Sup. Ct. R. 10(a). Such a conflict is present here. The Sixth and Eighth Circuits hold that High 2 does not exist. In *Hawkes v. Internal Revenue Svc.,* 467 F.2d 787 (6th Cir. 1972), the Sixth Circuit considered a request for IRS manuals. The Sixth Circuit noted that the difference between the House and Senate reports was "total" and that the Senate's limited reading of Exemption 2 was before the House when the House issued its contradictory report. *Id.* at 796-97. Noting further that the Senate's version was in accord with the "the plain import" of the language of Exemption 2, the court held "[f]or all of these reasons we believe that the

internal practices and policies referred to in (b)(2) relate only to the employee-employer type concerns upon which the Senate Report focused." *Id.* at 797; *see also Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075 (6th Cir. 1998); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 549 (6th Cir. 2001).

Similarly, the Eighth Circuit relied on the Senate report in holding that Exemption 2 "exempts only 'housekeeping' matters." *Cox v. Levi*, 592 F.2d 460, 462-63 (8th Cir. 1979). Later, in *Kuehnert v. FBI,* 620 F.2d 662, 667 (8th Cir. 1980), the Eighth Circuit remanded for in camera inspection FBI documents described as containing "investigative leads" and withheld pursuant to Exemption 2, holding that Exemption 2 "authorizes nondisclosure only of housekeeping matters in which the public could not reasonably be expected to have an interest." (internal citations and quotations omitted).

The Fifth Circuit appears to have left the question open. The Fifth Circuit, noting a "definite conflict" between the House and Senate reports, has held that the "better reasoned decisions hold that the Senate Report more accurately interprets the language of the statute" and declined to exempt from disclosure a staff manual for compliance and safety officers with the Department of Labor. *Stokes v. Brennan*, 476 F.2d 699, 702-03 (5th Cir. 1973).

Despite this holding, a later case claimed in dicta that "there is no need for us to choose" whether the circuit should adopt a High 2 reading. *Sladek v. Bensinger*, 605 F.2d 899, 902 (5th Cir. 1979).

The Tenth Circuit has declined to either adopt or reject the High 2 analysis, instead applying a narrow reading of the term "personnel" to any claim that Exemption 2 exempts material from disclosure. *Audubon Soc'y v. U.S. Forest Svc.*, 104 F.3d 1201, 1204 (10th Cir. 1997).

Four circuits hold that High 2 exists, but have varying tests for its application. In *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, at 547-549 (2d Cir. 1978), the Second Circuit relied on the House report in finding a High 2 exemption, claiming that this Court "expressed a general preference for the Senate Report" in *Rose*, but that the House report's broader reading of Exemption 2 applied in any case wherein disclosure may risk circumvention of agency regulation. The Second Circuit allowed High 2 to be used to keep secret an Alcohol, Tobacco, and Firearms Training Manual, holding that Exemption 2 "includes internal material such as the withheld portions of the BATF manual where disclosure may risk circumvention of agency regulation." *Id.* at 548.

The District of Columbia Circuit initially adopted the view that Exemption 2 was limited only to the trivial materials held exempt from disclosure in *Rose*, but then reversed course and adopted a High 2 reading. In *Vaughn v. Rosen*, the D.C. Circuit mandated disclosure of Office of Personnel Management documents. *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975). The *Vaughn* court expressly rejected a High 2 reading, noting that "Congress intended that Exemption 2 be interpreted narrowly and specifically. In our view, the House Report carries the potential of exempting a wide swath of information under the category of operating rules, guidelines, and manuals of procedure" and that "we choose to rely upon the Senate Report" and exempt only "house-keeping matters such as parking facilities, lunchrooms, sick leave, and the like." *Id.* at 1143 (internal quotations and citations omitted); *see also Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc). But in 1986, confronted with a demand that the Bureau of Alcohol, Tobacco, and Firearms release training manuals for ATF agents and noting that "Congress believed that FOIA would not mandate release of materials containing law enforcement investigative techniques," the court abandoned *Vaughn* and *Jordan* and adopted a High 2 reading. *Crooker v.*

Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051. In *Crooker*, the court attempted to reconcile the House and Senate reports:

> The so-called contradiction between the House and Senate Reports, however, exists only with respect to the exemption of trivial employment matters. The House Report's statement that Exemption 2 permits exemption of more substantive matters-such as manuals of procedure for Government investigators or examiners-is uncontroverted by the Senate Report.

Id. at 1061. This holding directly contradicts this Court's observation in *Rose* that "[t]he House and Senate Reports on the bill finally enacted differ upon the scope of the narrowed exemption," *Rose*, 425 U.S. at 363, 96 S. Ct. at 1600, and with other circuits, including the Sixth Circuit's statement that the difference between the House and Senate Reports was "total." *Hawkes v. Internal Revenue Svc.,* 467 F.2d at 796-97; *see also Cox v. Levi*, 592 F.2d at 462-63.

The D.C. Circuit further added a "predominantly internal" reading to Exemption 2,

holding that Exemption 2's "related solely to internal personnel" requirement should be interpreted to mean "predominantly" internal materials. *Crooker*, 670 F.2d at 1056. The *Crooker* court limited its version of High 2 to materials "that public disclosure [of] would risk circumvention of agency regulations." *Id.* at 1073.

The D.C. Circuit recently confronted a High 2 challenge factually similar to the 9th Circuit's decision in this matter, and affirmed the USDA's failure to disclose blueprints of buildings on USDA property. *Elliot v. United States Dep't of Agriculture*, ___ F.3d ___, 2010 WL 668876 (D.C. Cir. Feb. 26,. 2010). The *Elliot* court noted arguments made by the citizen requester on appeal relating to whether blueprints could be personnel documents, and whether the risk of harm posed by disclosing blueprints of buildings was sufficient to trigger High 2 protection under the *Crooker* test, but declined to reach them since they had not been preserved in argument to the District Court.

The Seventh Circuit adopted and broadened the D.C. Circuit's *Crooker* holding, applying High 2 to any material that was predominantly internal, and disclosure of which made it "obsolete for the purpose for which [it was] designed," regardless of whether any law or regulation might be broken

following its release. *Kaganove v. Environmental Protection Agency,* 856 F.2d 884, 889 (7th Cir. 1988) (Applying Exemption 2 to E.P.A. personnel documents that rated applicants for promotion).

The Ninth Circuit initially limited High 2 to law enforcement materials, without the *Crooker* "predominantly internal" expansion. In *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653, 657 (9th Cir. 1980), the Ninth Circuit ruled that ATF manuals were exempt from disclosure, because "[m]aterials that solely concern law enforcement are exempt under Exemption 2 if disclosure may risk circumvention of agency regulation." Similarly, in *Dirksen v. Dep't of Health and Human Services*, 803 F.2d 1456 (9th Cir. 1986), the Ninth Circuit held that claims processing guidelines used by HHS employees to determine which reimbursement claims should be analyzed for law violations were exempt from disclosure. The court noted that these guidelines were "exempt law enforcement material." *Id.* at 1459. By contrast, prior to this case, even non-trivial personnel information which was not clearly related to a law enforcement function was held outside of Exemption 2's ambit. *Maricopa Audubon Soc'y v. U.S. Forest Svc.,* 108 F.3d 1082, 1087 (9th Cir. 1997). In *Maricopa*, the Ninth Circuit held that nest maps were not law enforcement material even

though the Forest Service used them to enforce endangered species laws. The court noted that "[the requested information does not tell the Forest Service how to catch lawbreakers; nor does it tell lawbreakers how to avoid the Forest Service's enforcement efforts. In sum, we hold that goshawk nest-site information does not constitute "law enforcement material," and was therefore unprotected by Exemption 2. *Id.* at 1087.

In this case, the majority adopted the *Crooker* test for predominant internality and eliminated the law enforcement limitation, holding that "a personnel document is exempt as "High 2" if it is predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner*, 575 F.3d at 968. Significantly, the *Milner* court also redefined "circumvention of agency regulation" to mean "circumvention of the law." *Id.* at 972. As the dissent explained:

> The majority does not acknowledge the limited sense in which circumvention of agency regulation is used in the case law interpreting Exemption 2. The majority has cited no case-and can cite no case-in which Exemption 2 was applied more broadly than in the cases I

> have just described. In all of the reported cases dealing with the issue, Exemption 2 applies only to documents whose release would risk circumvention *by a regulated person or entity.* Exemption 2 does not apply in this case because there is no such person or entity. The Navy is not acting as a regulatory or law enforcement agency, and the arc maps do not regulate anyone or anything outside the Navy itself.

Id. at 978 (Fletcher, J., dissenting) (emphasis in original).

The Ninth Circuit has gone far afield in this matter from even those other circuits that have adopted the High 2 reading. Under the current state of affairs, a citizen in Cincinnati could receive more information from the Navy than one residing in D.C.; for their part, the D.C. resident could receive more information from the Navy than a citizen in San Francisco. This Court should accept review to resolve this significant conflict between the circuits, and resolve it in favor of disclosure rather than secrecy.

III. CONCLUSION

For the foregoing reasons, Glen Milner respectfully requests that this Court grant the petition for certiorari.

Dated this 22nd day of March, 2010.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

GLEN SCOTT MILNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX

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b) This section does not apply to matters that are--

(1)(A)specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would

not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security

intelligence investigation, information furnished by a confidential source,
(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLEN SCOTT MILNER, Plaintiff, v. UNITED STATES DEPARTMENT OF THE NAVY, Defendant.	CASE NO. CV-06-01301-JCC ORDER

This matter comes before the Court on the parties' cross-motions for summary judgment. (Dkt. Nos. 29 & 30.) Having considered the pleadings, affidavits and the record in this case, and finding oral argument unnecessary, the Court hereby GRANTS Defendant's motion for summary judgment and DENIES Plaintiff's cross-motion, as follows.

I. BACKGROUND

Naval Magazine Indian Island ("NMII") is located in Port Hadlock, Washington, not far from the City of Port Townsend. The mission of NMII is the storage and transshipment of ammunition, weapons, weapons components and explosives in support of the Navy, U.S. Joint forces, Homeland

Security, other federal agencies and Allied forces. (Cmdr. George Whitbred Decl. ¶¶ 3, 15 (Dkt. No. 29-2).) Defendant, the United States Department of the Navy ("Navy"), is responsible for all operations on NMII, including law enforcement, security, force protection and explosives safety. (*Id.* ¶ 3.)

Explosive Safety Quantity Distance ("ESQD") information is a tool utilized by the Navy's explosive safety program. (*Id.* ¶ 17.) Specifically, ESQD information measures the effects of an explosion at varying distances. As such, it defines minimum separation distances for various quantities of explosives. Its purpose is to afford reasonable safety to persons and property, both within NMII and on adjacent public and private property. The information is used to design, array, and construct ammunition storage facilities, and to organize ammunition operations. ESQD determinations are typically expressed as mathematic formulas and "arc maps." (*Id.* ¶ 10.) The Navy evaluates requests for ESDQ information on a case-by-case basis and does not release the information to the general public "if a determination is made that the release might pose a serious threat of death or injury to any person[.]" (*Id.* ¶ 12.) However, the Navy does sometimes share information with local municipalities for governmental purposes, such as emergency response preparedness. ESQD information specific to NMII has been shared with "first responders" at both

Jefferson County and the City of Port Townsend. (*Id.*)

This case arises out of the partial denial of two substantially identical Freedom of Information Act ("FOIA") requests,[1] submitted by Plaintiff Glen Milner to the Navy in late 2003 and early 2004. Through these requests, Mr. Milner sought:

> l. All documents on file regarding ESQD arcs or explosive handling zones at the ammunition depot at NMII, including all documents showing impacts or potential impacts of activities in the explosive handling zones to the

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[1] Plaintiff's Complaint implies that there was a substantive difference between Mr. Milner's two requests and claims that the Navy never responded to his second request, beyond notifying him that the two requests were consolidated. (Cmpl. ¶¶ 37-41 (Dkt. No. 1).) The Court has compared the two requests and finds absolutely no meaningful difference between them. The first request was addressed to "Commanding Officer, Naval Magazine Indian Island," and the second to "Commanding Officer, Naval Ordnance Safety and Security Activity," and there are some minor word changes in the second (e.g., in several places the words "Naval Magazine" have been inserted before "Indian Island"). (Milner Ltrs. Dec. 7, 2003 & Feb. 3, 2004 (Dkt No. 23, Tabs 1 & 53).) Finding no substantive difference between them, the Court holds the Navy properly consolidated the two requests and treats them as the same request for the purposes of this Order.

ammunition depot and the surrounding areas;

2. All maps and diagrams of the ammunition depot at NMII which show ESQD arcs or explosive handling zones; and

3. Documents regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at NMII.

(Milner Ltrs. Dec. 7, 2003 & Feb. 3, 2004 (Dkt No. 23, Tabs 1 & 53).) Initially, a total of 17 document packages, totaling approximately 1000 pages, were identified as responsive to Mr. Milner's request. (Anthony J. Robinson Decl. ¶ 21 (Dkt. No. 29-4).) The administrative process that followed that initial identification was, in the Navy's words, "tortuous," "complicated" and "lengthy," admittedly perhaps unnecessarily so. (Def.'s Mot. 4 (Dkt. No. 29).) Eventually, the Navy did release many of the documents identified and requested, some in redacted form. (Katherine George Decl. (Dkt. No. 33 at 5-154).)

Through this action, filed on September 11, 2006, Mr. Milner seeks an order requiring the Navy to promptly provide him with the remainder of the

information identified as responsive to his request:[2] approximately 80 documents, withheld either in whole or in part, relating to the ESQD arc information. (*See* Vaughn Index (Dkt. No. 29-8).) In addition, Mr. Milner requests the Court order the Navy to waive all fees associated with disclosure of any documents that are ordered released, declare the Navy's refusal and failure to respond to Mr. Milner's FOIA requests and appeals in a timely manner to be unlawful under FOIA, and award Mr. Milner attorneys' fees and costs. (Cmpl. 12 (Dkt. No. 1).) The parties agree that Mr. Milner has exhausted his administrative remedies, and the Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B).

The Navy maintains that the remaining ESQD arc information was properly withheld and is exempt from disclosure under FOIA exemptions 2 and 7(F). It is the Navy's position that the information could be used by persons of ill-will to

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[2] Mr. Milner's original request and Complaint also sought disclosure of the OP-5 Manual, which sets forth safety regulations for the storage, handling and production of ammunition and explosives at Navy and Marine Corps installations throughout the world, and defines the effects of both accidental and intentional detonations. (Richard Adams Decl. ¶¶ 4, 6 (Dkt. No. 29-3).) Mr. Milner has since withdrawn his request for the OP-5 Manual (Pl.'s Resp. & Cross-Mot. for Summ. J. 2 n.1 (Dkt. No. 30); Glen Milner Decl. ¶ 17 (Dkt. No. 31)) and his claims relating to this manual are DISMISSED with prejudice.

identify the location and quantity--and in turn, vulnerabilities--of dangerous explosives, ordnance or ammunition stored at NMII, which knowledge would threaten the security of the base and place in jeopardy the safety of base personnel and the surrounding community. Specifically, the current Commanding Officer of NMII, Cmdr. Whitbred, asserts that after close review of the record he strongly agrees with his predecessor's analysis of the potential security repercussions if the withheld documents are released:

> [A]rmed with this information, a lay person with a rudimentary knowledge of mathematics could easily determine: the precise location of ordnance magazines[;] the types of items stored in them; which locations to target for maximum damage to personnel, critical infrastructure and disruption of loading and off-loading of ships; the mission capability of the installation; the installation's battle group capability and operational sustainability; the location of personnel and the precise numbers of personnel required to load and offload a ship.

(Cmdr. Whitbred Decl. ¶ 8 (Dkt. No. 29-2).) In addition, Cmdr. Whitbred adds that the withheld

information could also disclose the quantities of materials stored. (*Id.*)

In support of their motions for summary judgment, both parties have submitted multiple declarations and other documentation. In addition to Cmdr. Whitbred's declaration, The Navy offers declarations from NMII's Emergency Management Officer, Stephen Smith, and the Legal Assistant to the General Counsel for Navy Region Northwest, Anthony Robinson.[3] These declarations are submitted together with a base map of NMII, and a *Vaughn* Index. Plaintiff submits declarations from himself and his attorneys, together with exhibits that include news articles and documents the Navy released to him in response to his FOIA request.

II. FOIA

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to

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[3] The Navy also submitted a declaration from Richard Adams, an Explosives Safety Technical Expert at the Naval Ordnance Safety and Security Activity, describing how the Navy manages requests for copies of the OP-5 Manual, (Dkt. No. 29-3.) Because Mr. Milner has since withdrawn his request for the OP-5 Manual, Mr. Adams' declaration was not considered by the Court in deciding this motion.

the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). To this end, the Act establishes a statutory presumption that any person has a judicially enforceable right to obtain access to federal agency records upon a properly presented request, regardless of the motivation for the request. *See e.g., Doherty v. U.S. Dep't of Justice*, 596 F.Supp. 423, 424, 429 (S.D.N,Y. 1984) (finding DOJ's description of requester, an undocumented alien, "in lurid detail as a terrorist, a liar, a smuggler of arms, an ambusher and a hostage-taker, who used a machine gun in a residential neighborhood, all apparently in what he regards as a fight for freedom and in support of a just cause" irrelevant in determining FOIA's applicability), The presumption in favor of disclosure may be rebutted by a valid showing that the information sought falls within one of the nine exemptions contained within the Act. 5 U.S.C. § 552(d). *See, e.g., Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1979). However, these nine exemptions are to be narrowly construed and the agency resisting disclosure bears the burden of demonstrating that an exemption applies. 5 U.S.C. § 552(b); *Church of Scientology*, 611 F.2d at 742.

The decision whether to invoke an exemption is discretionary: so long as releasing the information would not violate another statute, an agency *may* disclose information that could be properly withheld under an exemption. *Chrysler Corp. v. Brown*, 441

U.S, 281, 292-93 (1979). However, once disclosure occurs with the apparent authority of the agency, any exemption is deemed to have been waived as to the information disclosed.[4] Because FOIA does not allow for selective disclosure, agencies must accordingly evaluate the risks that would flow from releasing an otherwise exempted document "in terms of what anyone else might do with" the released information. *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996).

II. LEGAL STANDARD

A. Summary Judgment in General

Summary judgment motions are governed by Federal Rule of Civil Procedure 56(c), which provides in relevant part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The inquiry is "whether the evidence presents a sufficient

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[4] Waiver only applies, however, to the *same* record or portion of a record released; it does not apply, for example, where the substance of the record was disclosed, but not the record itself, or to a record similar to, but not duplicative of, an already disclosed record. *See, e.g., Mobil Oil Corp. v. U.S EPA*, 879 F.2d 698, 700-01 (9th Cir. 1989).

disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970). When the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact would find other than for the moving party. However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

B. Summary Judgment in FOIA Cases

Nearly all FOIA cases are resolved on summary judgment. *Nat'l Res. Def. Council v. U.S. Dep't of Def.*, 388 F.Supp.2d 1086, 1094 (C.D. Cal. 2005) (quoting *Mace v. EEOC*, 37 F.Supp.2d 1144, 1146 (E.D. Miss. 1999)). Whether a particular document fits into one of FOIA's nine exemptions is a question of law, appropriately resolved by the court. *Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir.

1996) (quoting *Ethyl Corp. v. U.S. EPA*, 25 F.3d 1241, 1246 (4th Cir. 1994)). The district court determines whether an exemption applies *de novo*. 5 U.S.C. § 552(a)(4)(B).

An agency seeking to invoke one of the exemptions bears the burden of proving that exemption, both for documents wholly withheld and partially redacted. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). The agency may satisfy its burden by submitting detailed affidavits demonstrating that the information "logically falls within the claimed exemptions." *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996) (quoting *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992)). These affidavits, which may include a *Vaughn* Index, cannot be merely conclusory; they "must contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption." *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995).

If submitted in good faith and not controverted by contrary evidence in the record, such affidavits are to be accorded substantial weight in evaluating a claim for exemption. *Minier*, 88 F.3d at 800. Respect for an agency's informed judgment is particularly important where concerns about national security are implicated. *See, e.g., Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003). Finally, a requester's opinion simply disputing the risk asserted by an

agency possessing relevant experience that has provided sufficiently detailed affidavits is not sufficient to preclude summary judgment for the agency. *See, e.g., Struth v. FBI*, 673 F.Supp. 949, 954 (E.D. Wis. 1987). *See also Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980) ("A court must take into account . . . that any affidavit . . . of threatened harm to national security will always be speculative to some extent[.]").

III. THE *VAUGHN* INDEX AND CMDR. WHITBRED'S AFFIDAVIT

Mr. Milner argues that the *Vaughn* Index submitted by the Navy, together with Cmdr. Whitbred's affidavit, fails to describe with adequate particularity the reasons for withholding each individual document, or portion thereof. An adequate *Vaughn* Index requires both detailed descriptions of the withheld documents and particularized explanations as to why each document was properly withheld. *Lion Raisins Inc. v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004). *See also Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (finding the index and affidavits must include a "particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption."). Unless both requirements are met, the *Vaughn* Index should be found inadequate, containing only "conclusory and

generalized allegations." *See Church of Scientology*, 611 F.2d at 742 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973)). Mr. Milner does not argue that the Navy has failed to adequately describe the withheld documents; he argues that Cmdr. Whitbred's explanation as to why ESQD information should be withheld is inadequate because it offers only a generalized explanation, not specific to each of the withheld documents listed in the *Vaughn* Index.

In applying the particularity requirement, the facts of *Weiner* are instructive. There, the FBI offered "'boilerplate' explanations . . . drawn from a 'master' response filed by the FBI for many FOIA requests." *Weiner*, 943 F.2d at 978. The FBI had made "no effort" to tailor the explanation to the specific documents withheld, or even to the particular FOIA request at issue. *Id.* at 978-79 (noting the request was for records of the FBI's investigation concerning the death of John Lennon, but "[r]emarkably, in the original *Vaughn* index submitted by the FBI, John Lennon's name does not appear at all."). In finding that the FBI's lackluster attempt failed to meet both the specificity and particularity requirements of a *Vaughn* Index inquiry, the court emphasized the purpose of a *Vaughn* Index is to provide the requester with the opportunity to argue for release of particular documents. This opportunity is only meaningful "if the requester knows the precise basis for nondisclosure." *Id.* at 979. *See also Lion Raisins*, 354

F.3d at 1083-84 (finding government affidavits inadequate when submitted entirely *ex parte*, so that no public disclosure whatsoever was made of the government's reasoning, wholly depriving the court of informed advocacy.)

Here, the Court finds that the *Vaughn* Index submitted by the Navy, together with Cmdr. Whitbred's declaration, provide Mr. Milner with sufficient information to enable him to argue for release of particular documents. Mr. Milner takes no issue with the specificity of description of each of the documents listed in the *Vaughn* Index. Moreover, Cmdr. Whitbred's explanation as to why the documents are properly withheld is specific to ESQD information, which the *Vaughn* Index makes clear each of the documents contain. Together, the *Vaughn* Index and Cmdr. Whitbred's explanation serve the purpose identified in *Weiner*. If Mr. Milner wished to contest the withholding of a specific document (instead of all of the withheld documents generally, as he does in the instant action), he would simply need to look to the description (e.g., Bates No. 00019, described as "Bishop Spit Site Map details ESQD arcs relationship to BLDG 837 to other nearby facilities") and look to Cmdr. Whitbred's declaration, and he would have all the information he needs to argue that the safety concerns particular to ESQD arc information expressed by Cmdr. Whitbred were not proper as to that document.

The Court does not read *Weiner* and *Lion Raisins* to require the *Vaughn* Index to repeat, for each and every document, Cmdr. Whitbred's concerns specific to ESQD arc information, where the concerns and justifications for withholding are properly the same for each document. Accordingly, the Court finds that the *Vaughn* Index, together with Cmdr. Whitbred's affidavit, provides an adequate basis for Mr. Milner to argue and the Court to determine whether the documents were properly withheld.

IV. EXEMPTION 2

FOIA's exemption 2 provides that an agency need not disclose matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. 552(b)(2). This breviloquent provision encompasses two different categories of internal agency matters. What are generally termed "low 2" materials are fairly trivial matters, not likely to spark a genuine and significant public interest, such as rules related to employee use of parking facilities or regulation of lunch hours. *See Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 655 (9th Cir. 1980). In contrast, "high 2" materials are those, which if disclosed, "may risk circumvention of agency regulation." *Id.* at 656 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 369 (1976)). The Navy argues

that the ESQD information at issue here was properly withheld as high 2 information.

The parties, however, disagree as to the test properly applied to "high 2" materials in the Ninth Circuit. The Navy argues that the Court should apply the widely accepted *Crooker* test, which requires the Court first find that the documents at issue are "predominantly internal" and second, that disclosure would significantly risk circumvention of agency regulation or statute. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981). Mr. Milner objects, arguing that the Ninth Circuit has never adopted the *Crooker* test, and that the test applied in this circuit was announced in *Hardy v. Bureau of Alcohol, Tobacco & Firearms*. That test, according to Mr. Milner, does not ask whether the documents are "predominantly internal," instead, it asks whether the information at issue is "law enforcement material." If the information is not law enforcement materials then the inquiry is over, because Mr. Milner asserts that in the Ninth Circuit no other kind of agency information is protected as high 2 material.

Plaintiff's argument relies on a superficial and selective reading of *Hardy* and its progeny. *Hardy* itself involved a FOIA request for quintessential law enforcement materials. *Hardy*, 631 F.2d at 655. However, since *Hardy*, cases that have at least nominally attempted to apply its "law enforcement" language have done so broadly, and have protected

under that mantle information not traditionally or obviously defined as such. *See, e.g., Dirksen v. U.S. Dep't of Health & Human Servs.*, 803 F.2d 1456, 1458-59 (9th Cir. 1986) (finding DHHS' internal processing guidelines for claims submitted by health care providers under the Medicare program properly withheld as "law enforcement material"). Furthermore, the most recent Ninth Circuit case to address the proper application of exemption 2 clearly indicated that the exemption embraces more than law enforcement materials. Specifically, *Maricopa Audubon Society v. United States Forest Service* held "that goshawk nest-site information does not constitute 'law enforcement material,' *or any other kind of material* that may be withheld under exemption 2." 108 F.3d 1082, 1087 (9th Cir. 1997) (emphasis added).

In fact, when *Hardy*, *Dirksen* and *Maricopa* are read together, the test they embody bears more than a passing resemblance to the *Crooker* test. As in *Crooker*, the Ninth Circuit cases have asked whether disclosure would risk circumvention of law, *see, e.g., Dirksen*, 803 F.2d at 1458, and if the material is "predominately internal." *Maricopa*, 108 F.3d at 1085. The "law enforcement" material held protected in *Hardy* and *Dirksen* met these two requirements; the goshawk nest location information at issue in *Maricopa* did not. Applying this test, as discussed below, the Court finds the ESQD materials were properly withheld under exemption 2.

First, the Navy asserts and Mr. Milner does not dispute that the ESQD arc information was compiled for predominately internal purposes: to design, array, and construct ammunition storage facilities, and to organize ammunition operations. (Cmdr. Whitbred Decl. ¶ 10 (Dkt. No. 29-2).) (*See also* Pl.'s Reply 12 (Dkt. No. 37) (asserting that the ESQD records were complied "for the sole purpose of obtaining internal administrative approval of construction projects.").) That the information is also made available to local municipalities does not negate the fact that these documents are predominantly internal.

Second, the Court finds that disclosure of the ESQD arc information withheld in each of the documents listed in the *Vaughn* Index would significantly risk circumvention of law. The "law" sought to be circumvented need not be defined by a particular agency regulation or statute. *See e.g., Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (finding the circumvention of law analysis "is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure."). That the disclosure would cause the information to lose its utility is sufficient. *See, e.g., Dirksen*, 803 F.2d at 1459. *See also L.A. Times Commc'ns, LLC v. Dep't of Army*, 442 F.Supp.2d 880, 902 (C.D. Cal. 2006) (finding exempt information that, if disclosed, "would risk circumvention of the law and the

military's efforts to establish stability for reconstruction efforts Iraq [*sic*].") Moreover, under the "mosaic" approach, the exemption has been applied to protect information contained in several documents that are not by themselves dangerous, but could in the aggregate be assembled to reveal sensitive information, which disclosure could be dangerous. *See, e.g., L.A. Times*, 442 F.Supp.2d at 898-99 (quoting *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1064-65 (3d Cir. 1995)).

In addition, when the government interest involved is particularly weighty--such as where concerns about national security are justified--courts are more likely to defer to the agency's expertise in assessing the risk of disclosure. *See, e.g., Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926, 927-28 (surveying the significant authority "counseling deference in national security matters"). The Court disagrees with Plaintiff's assertion that this case "is not about national security." (Pl.'s Reply 7 (Dkt. No. 37).) Plaintiff appears to take the position that national security is only implicated when the information at issue is "classified as secret" or is of a type that is never released to the public. Information need not be "secret" to implicate national security. That the Navy finds it advisable to, for example, share information with local municipalities[5] in order

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[5] Somewhat mystifyingly, Plaintiff also points to the fact that the Navy "routinely" distributes this information

to better equip first responders in the event of an emergency does not undermine the legitimacy of the Navy's risk assessment. Such a conclusion would be antithetical to any definition of the word "security."

Accordingly, the Court finds that Cmdr. Whitbred's risk assessment is entitled to deference. Plaintiff does not offer any evidence truly disputing the Navy's risk assessment. Instead, Plaintiff essentially argues that because the Navy has released some ESQD arc information in the past, its assertion that release of the information at issue presents a legitimate risk cannot be taken seriously. The Court disagrees with Plaintiff's judgment and finds that the information was properly withheld under exemption 2. First, its release could cause the information to lose its utility in keeping people and property safe from harm in the event of an explosive incident. Second, it could provide essentially a roadmap to wreak the most havoc possible to those persons bent on causing harm, risking circumvention of the Navy's security, force protection and explosives safety efforts. To release this information would be to provide the proverbial fox a virtual map to the chicken coop. *See Dirksen*, 803 F.2d at 1459.

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internally to "hundreds of Navy personnel" as somehow supporting his stance that this case is "not about national security."

VI. SEGREGABILITY

Even where material falls within one of the enumerated exemptions, FOIA requires disclosure of "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). It is reversible error for a district court "to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof." *Church of Scientology*, 611 F.2d at 744. Non-exempt portions of a document must be disclosed unless the court finds that they are "inextricably intertwined with exempt portions" to such a degree that separating the two would "impose significant costs on the agency and produce an edited document with little informational value." *Willamette Indus., Inc. v. U.S.*, 689 F.2d 865, 867-68 (9th Cir. 1982) (quoting *Mead Data Cent., Inc. v. U. S. Dep't of Air Force*, 566 F.2d 242, 260-61 (D.C.Cir. 1977)).

Having reviewed the affidavits, particularly that of Anthony Robinson, which provides a detailed outline of the Navy's efforts over four years to respond to Mr. Milner's request, the *Vaughn* Index, and the documents provided to Mr. Milner in whole and in part attached to Ms. George's declaration, the Court finds that the Navy has met FOIA's segregability requirement. Many of the materials the Navy released to Mr. Milner were redacted; per the *Vaughn* Index, the materials withheld are only those

related specifically to ESQD information, which was properly withheld under exemption 2.

VII. CONCLUSION

For the foregoing reasons, this Court finds that the ESQD information was properly withheld under FOIA's exemption 2. The Court does not reach whether the information could also have been properly withheld under exemption 7(F). In addition, as to Plaintiff's request that the Court declare the Navy's refusal and failure to respond to Mr. Milner's FOIA requests and appeals in a timely matter was unlawful under FOIA, this request is also DENIED. The proper remedy when an agency fails to comply in a timely manner with FOIA is for the requester to bring an action in district court. 5 U.S.C. § 552(a)(6)(C). Accordingly, the Court GRANTS Defendant's motion for summary judgment and DENIES Plaintiff's cross-motion.

SO ORDERED this 30th of October, 2007.

John C. Coughenour
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLEN SCOTT MILNER, *Plaintiff-Appellant,* v. UNITED STATES DEPARTMENT OF THE NAVY, *Defendant-Appellee.*	No. 07-36056 D.C. No. CV-06-01301-JCC OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
March 12, 2009—Seattle, Washington

Filed August 5, 2009

Before: William A. Fletcher, Ronald M. Gould and
Richard C. Tallman, Circuit Judges.

Opinion by Judge Tallman;
Dissent by Judge W. Fletcher

COUNSEL

David S. Mann and Keith P. Scully, Seattle, Washington, for the appellant.

Peter A. Winn, Assistant United States Attorney, Seattle, Washington, for the appellee.

OPINION

TALLMAN, Circuit Judge:

This appeal highlights the tension between the public's right of access to government files under the Freedom of

Information Act and the countervailing need to preserve sensitive information for efficient and effective government operations. Glen Scott Milner appeals the denial of a request he filed pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. He sought information that would identify the locations and potential blast ranges of explosive ordnance stored at Washington's Naval Magazine Indian Island ("NMII"). The district court granted summary judgment in favor of the Navy. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

Indian Island is a small island strategically located in Puget Sound near the towns of Port Hadlock and Port Townsend, Washington. The island is used to store and transship munitions, weapons, weapon components, and explosives for the Navy, U.S. Joint Forces, Department of Homeland Security, and other federal agencies and allied forces. The Navy is responsible for all operations on NMII.

Magazine management and safety operations are conducted pursuant to a Navy manual entitled *Ammunition and Explosives Ashore Safety Regulations for Handling, Storing, and Production Renovation and Shipping* ("OP-5 manual"). Though the Navy considers the OP-5 manual to be restricted information, Milner managed to purchase one section of the manual on the Internet. The portion of the OP-5 manual in the record of this case states:

> The purpose of this volume is to acquaint personnel engaged in operations involving ammunition, explosives, and other hazardous materials, and to prescribe standardized safety regulations for the production, renovation, care, handling, storage, preparation for shipment, and disposal of these items.

The OP-5 manual also calls for development of technical drawings and specifications, which "should be consulted for additional, detailed requirements."

The technical information developed pursuant to the OP-5 manual includes Explosive Safety Quantity Distance ("ESQD") data. The ESQD calculations measure the effects of an explosion at a particular location. The information is expressed either as a mathematical formula or as an arc map, where the center of the arc is the source of an explosion and the arc's periphery is the maximum area over which the force of the explosion would reach. The Navy uses this information to design and construct NMII ammunition storage facilities in compliance with the safety guidelines spelled out in OP-5. The ESQD arcs indicate the maximum amounts of explosives that should be stored in any one storage facility, and minimum distances that various explosives should be stored from one another. This aids the Navy in storing ordnance in such a way that the risk of chain reactions, or "sympathetic detonations," is minimized if one storage facility suffers an attack or accident. The ESQD arcs are "designed to be a long term planning tool for the Navy."

Milner is a Puget Sound resident and a member of the Ground Zero Center for Nonviolent Action, an organization dedicated to raising community awareness of the dangers of the Navy's activities. On December 7, 2003, and January 29, 2004, he submitted two FOIA requests to the Navy.[1] He requested three types of documents:

> 1. [A]ll documents on file regarding [ESQD] arcs or explosive handling zones at the ammunition depot at Indian Island. This would include all documents showing impacts or potential impacts of activities in

[1]The district court found Milner's two requests "substantially identical" and treated them as a single FOIA request. We agree with the district court's assessment.

> the explosive handling zones to the ammunition depot and the surrounding areas;
>
> 2. [A]ll maps and diagrams of the ammunition depot at Indian Island which show ESQD arcs or explosive handling zones; and
>
> 3. [D]ocuments regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at the ammunition depot at Indian Island.

The Navy identified 17 document packages totaling about 1,000 pages that met these parameters. The Navy compiled a thorough index of the relevant documents and disclosed most of them to Milner. It withheld only 81 documents, claiming that their disclosure could threaten the security of NMII and the surrounding community.

Milner filed suit under FOIA to compel disclosure of the remaining documents related to ESQD information. Commander George Whitbred, Commanding Officer of NMII, and other officers filed detailed affidavits discussing the nature and uses of the ESQD information. The commander's affidavit specified his concern that the information, if disclosed, could be used to plan an attack or disrupt operations on NMII. Both parties moved for summary judgment. The Navy argued the documents were exempt from disclosure under 5 U.S.C. §§ 552(b)(2) ("Exemption 2") and (b)(7)(f) ("Exemption 7"). The district court granted summary judgment in favor of the Navy under Exemption 2. *Milner v. U.S. Dep't of Navy*, No. C06-1301-JCC, 2007 WL 3228049 (W.D. Wash. Oct. 30, 2007). It did not reach the question whether the documents would also be exempt under Exemption 7. Milner timely appealed.

II

We apply a two-step standard of review to summary judgment in FOIA cases. "The court first determines under a *de*

novo standard whether an adequate factual basis exists to support the district court's decisions. If an adequate factual basis exists, then the district court's conclusions of fact are reviewed for clear error, while legal rulings, including its decision that a particular exemption applies, are reviewed *de novo*." *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008) (internal citations omitted). Both parties agree that an adequate factual basis exists to support the district court's decision. They dispute only the applicability of the exemptions from disclosure.

An agency bears the burden of proving it may withhold documents under a FOIA exemption. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). It may meet this burden by submitting affidavits showing that the information falls within the claimed exemption. *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). "In evaluating a claim for exemption, a district court must accord substantial weight to [agency] affidavits, provided the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of [agency] bad faith." *Id.* (internal quotations omitted).

III

A

[1] FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813-89, at 3 (1965)). An agency may withhold a document, or portions thereof, only if the material falls into one of the nine statutory exemptions delineated by Congress in § 552(b). *Id.* at 361. These nine exemptions are "explicitly exclusive." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (quoting *FAA Adm'r v. Robertson*, 422 U.S. 255, 262 (1975)). The delineated exemptions "are to be interpreted narrowly." *Lahr*

v. NTSB, 569 F.3d 964, 973 (9th Cir. 2009) (quotation omitted).

[2] Our concern in this case is the scope of Exemption 2. That section exempts from disclosure matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). There are two categories of information that may fall within Exemption 2's ambit—"Low 2" and "High 2." Low 2 materials include rules and practices regarding mundane employment matters such as parking facilities, lunch hours, and sick leave, which are not of "genuine and significant public interest." *See Rose*, 425 U.S. at 363 (citing S. Rep. No. 813-89, at 8 (1965)); *id.* at 369; *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 655 (9th Cir. 1980).

[3] The High 2 exemption protects more sensitive government information.[2] This category applies to "internal personnel rules and practices," disclosure of which "may risk circumvention of agency regulation." *Rose*, 425 U.S. at 369; *see, e.g.*, *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (holding an agency's litigation strategy "does qualify as 'high 2' material because its disclosure would risk circumvention of statutes or agency regulations"). Only the High 2 category is at issue here.

B

[4] Information may be exempted as High 2 if it (1) fits within the statutory language and (2) would present a risk of circumvention if disclosed. *See Morley v. CIA*, 508 F.3d 1108,

[2]This category developed from Rose, in which the Supreme Court held that Air Force disciplinary studies were not exempt from disclosure because they were a matter of genuine and significant public interest. 425 U.S. at 364-70. However, the Court explicitly left open the question whether Exemption 2 would cover situations "where disclosure may risk circumvention of agency regulation." *Id.* at 369.

1124 (D.C. Cir. 2007) (citing *Schwaner v. Dep't of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990)). The essential question in this case is what standard we employ to determine whether the requested information relates sufficiently to the "internal personnel rules and practices" of the agency, as required by the statute. The Navy argues we should apply the "predominantly internal" standard employed by the D.C. Circuit. Milner argues our prior caselaw forecloses this approach, and that our inquiry is limited to whether the information at issue is "law enforcement material."

[5] In *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, we addressed the question of circumvention left open in *Rose*. 631 F.2d at 656. We considered FOIA requests for the ATF's *Raids and Searches* manual. We joined the Second Circuit in holding that "law enforcement materials, the disclosure of which may risk circumvention of agency regulation, are exempt under Exemption 2." *Id.* (citing *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2d Cir. 1978)). *Hardy* concluded that the instructions contained in the manual "concern[ed] internal personnel practices" and were therefore exempt from disclosure under Exemption 2. *Id.*

[6] Following our decision in *Hardy*, the D.C. Circuit decided *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). Like the plaintiff in *Hardy*, the plaintiff in *Crooker* sought disclosure of portions of the same ATF raid manual. Our sister circuit noted that the materials sought were "law enforcement" in nature, but went on to formulate a "predominantly internal" standard to determine which personnel materials could be withheld under Exemption 2. *Id.* at 1072-74.

[7] The D.C. Circuit undertook an extensive analysis of FOIA's structure and legislative history, its underlying policy, and the applicable caselaw. It concluded that "the words 'personnel rules and practices' encompass not merely minor employment matters, but may cover other rules and practices

governing agency personnel, including significant matters like job training for law enforcement personnel." *Id.* at 1056. To balance the competing implications of the words "related" and "solely," the court settled on the modifier "predominantly."[3] *Id.* at 1056-57; *see Schwaner*, 898 F.2d at 795. The court ultimately determined that documents related to personnel rules and practices should be exempt when the materials are "predominantly internal."

[8] The Navy argues that the Ninth Circuit's caselaw post-*Hardy* has essentially adopted this standard, or, in the alternative, that we should do so explicitly. The district court granted summary judgment on this ground, reasoning that our cases take such a broad view of the term "law enforcement" that "the test they embody bears more than a passing resemblance" to the D.C. Circuit's "predominantly internal" standard. *Milner*, 2007 WL 3228049 at *7. We agree that Exemption 2 is not limited to "law enforcement" materials, and now take the opportunity to formally endorse the D.C. Circuit's analysis, as set forth in *Crooker*. We hold that Exemption 2 shields those personnel materials which are predominantly internal and disclosure of which would present a risk of circumvention of agency regulation.

Our existing caselaw is consistent with the D.C. Circuit's approach. *Hardy* held that "law enforcement materials, the disclosure of which may risk circumvention of agency regulation, are exempt under Exemption 2." 631 F.2d at 656. It did not hold that *only* law enforcement materials are exempt

[3]The court relied on Judge Leventhal's analysis in a prior case:

> [P]ushed to their logical ends, "relating" is potentially all-encompassing while "solely" is potentially all-excluding. It seems unlikely that Congress intended either extreme, and that "solely" in this context has to be given the construction, consonant with reasonableness, of "predominantly."

Crooker, 670 F.2d at 1056-57 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1150-51 (D.C. Cir. 1975) (Leventhal, J., concurring)).

under Exemption 2. The shorthand descriptor "law enforcement materials" was apt in *Hardy* because the case concerned policies and procedures for executing search warrants. The *Crooker* court apparently understood that *Hardy* addressed law enforcement materials but did not limit Exemption 2 to such information, relying on *Hardy* without adopting or even considering the use of "law enforcement" as a generally applicable standard. 670 F.2d at 72. The *Crooker* court, like the Second Circuit in *Caplan* and our panel in *Hardy*, used "law enforcement" to describe the materials at issue. *Id.* at 1056, 1057. It went on to determine that the manuals were "predominantly internal" and that their disclosure "significantly risks circumvention of the federal statutes or regulations." *Id.* at 1073-75.

[9] *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1082 (9th Cir. 1997), our most recent case examining Exemption 2, also treated the "law enforcement" test as merely one way to meet Exemption 2's requirements. *Maricopa* first held generally that goshawk nesting site data does not "relate 'solely,' or even predominantly, 'to the internal personnel rules and practices of an agency.' " *Id.* at 1085 (quoting 5 U.S.C. § 552(b)(2)). It relied heavily on cases from the Tenth and D.C. Circuits, both of which cited *Crooker*. *Id.* at 1085-86; *see Audubon Soc. v. U.S. Forest Serv.*, 104 F.3d 1201, 1203-04 (10th Cir. 1997); *Schwaner*, 898 F.2d at 794. Only then did *Maricopa* proceed to consider, and reject, the more specific argument that the nest site data was exempt because it was "law enforcement" material. 108 F.3d at 1086-87. In sum, the instructive cases on Exemption 2 do not limit the class of exempt information to "law enforcement" materials alone. Therefore, finding information to be "law enforcement" material is a sufficient, but not necessary, condition to exemption under Exemption 2.

[10] We adopt the "predominantly internal" standard for several reasons. First, limiting Exemption 2 to "law enforcement" materials has no basis in either Supreme Court prece-

dent or the statute. The Supreme Court in *Rose* does not use the phrase except in a footnote relating to a different FOIA exemption. Nor does the phrase "law enforcement" appear in the text of § 552(b)(2), which exempts matters "related solely to the internal personnel rules and practices of an agency." A proper standard would combine Congress's requirement that the material be related to "internal personnel rules and practices" and the Supreme Court's focus on the risk of circumvention of the law. *Crooker*'s standard properly reflects both.

As a matter of statutory interpretation, a definition of "internal personnel rules and practices" that rests solely on whether the information is "law enforcement" material makes little sense in light of the entire list of FOIA exemptions. "Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991).

First, other provisions of FOIA indicate Congress was concerned with the disclosure of sensitive materials. Such materials will usually be, by their nature, predominantly internal. Exemption 1 covers information with a particular legal status —classified information. 5 U.S.C. § 552(b)(1). Exemptions 7(e) and (f) exempt law enforcement materials that, if disclosed, would risk circumvention of the law or place individuals in danger. *Id.* § 552(b)(7). These exemptions reflect a concern that much of an agency's internal information could be used by individuals with ill intent. It would be incongruent if FOIA protected sensitive information when it is contained in a classified or law enforcement document, but not when it is contained in a document developed predominantly for use by agency personnel. *Cf. Crooker*, 670 F.2d at 1065 ("It would be inconsistent to no small degree to hold that Exemption 2 would not bar the disclosure of investigatory techniques when contained in a manual restricted to internal use, but that

Exemption 7(E) would exempt the release of such techniques if contained in an 'investigatory record.' ").

Second, Exemption 7 protects "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). If Exemption 2 also covers *only* "law enforcement" materials, Exemption 7 is redundant. *See, e.g.*, *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (discussing Exemptions 2 and 7 together, applying the same standards and reasoning to both). Moreover, Exemption 7 contains meaningful limitations on the use of law enforcement materials which are not present in Exemption 2. Exemption 7 protects "records or information compiled for law enforcement purposes," but only in certain situations, such as when disclosure would be expected to interfere with enforcement proceedings, deprive someone of a fair trial, or expose a confidential source. 5 U.S.C. § 552(b)(7). Applying a general "law enforcement materials" test under Exemption 2 renders meaningless the conditions that Congress has placed on non-disclosure of law enforcement materials under Exemption 7.

Congress has impliedly approved of *Crooker*'s approach. The Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, subtit. N, 100 Stat. 3207, 3207-48 (1986), codified part of *Crooker* into Exemption 7. The legislative history of the Reform Act expressly states that the amended Exemption 7 was modeled after "the 'circumvention of the law' standard that the D.C. Circuit established in its en banc decision in *Crooker v. BATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (interpreting Exemption 2)." S. Rep. No. 221-98, at 25 (1983). As the Seventh Circuit concluded in *Kaganove v. EPA*, "[b]ecause Congress saw fit to codify the very language of *Crooker*, and because nothing in the legislative history of the Reform Act suggests the slightest disagreement with that case's holding, we believe that *Crooker* accurately expresses congressional intentions." 856 F.2d 884, 889 (7th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989). Though this statutory history is not dispositive, it is certainly illustrative.

Finally, we note two practical considerations that favor adoption of the "predominantly internal" test. First, narrowing Exemption 2 to only "law enforcement" materials forces our courts to strain the term "law enforcement." *See, e.g.*, *Dirksen v. U.S. Dep't of Health and Human Servs.*, 803 F.2d 1456, 1459, 1461 (9th Cir. 1986) (Ferguson, J., dissenting) (accusing the panel majority of "judicial legislation" and "expand[ing] the concept of law enforcement" in holding that Medicare payment processing guidelines were "law enforcement" materials). *Hardy* did not define "law enforcement" and plainly contemplated a broad understanding of the term. 631 F.2d at 657 ("'Law enforcement' materials involve methods of enforcing the laws, *however interpreted* . . . ." (emphasis added)). Yet the term "law enforcement" must have some meaning and limit. *See Maricopa*, 108 F.3d at 1087 ("[N]o common-sense definition of the term suggests that goshawk nest-site information can be deemed 'law enforcement material' "). *Maricopa* carefully applied *Hardy* and suggested the limits of the term: whether the information "tell[s] the [agency] how to catch lawbreakers; [or tells] lawbreakers how to avoid the [agency's] enforcement efforts." *Id.*

Our existing cases lead our district courts to strain the logical limits of "law enforcement" to cover otherwise valid invocations of Exemption 2. They regularly deny requests for disclosure of all kinds of internal documents, including those related to the military and national security, even if unrelated to investigations or prosecutions. *See, e.g.*, *Kelly v. FAA*, No. 07-00634, 2008 WL 958037 (E.D. Cal. Apr. 8, 2008) (magistrate judge recommending exemption of "grading sheet" for hiring of Designated Pilot Examiners); *L.A. Times v. Dep't of Army*, 442 F. Supp. 2d 880, 898 (C.D. Cal. 2006) (holding data on insurgent and other attacks in Iraq are "law enforcement materials"); *Gordon*, 388 F. Supp. 2d at 1036 (holding "no fly" and other aviation watch lists are "law enforcement materials"); *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 965 (C.D. Cal. 2003) (examining both *Hardy* and *Crooker* and holding data on the number of Cus-

toms inspections at a particular port constitute "law enforcement material"). If judges must regularly labor to apply the standard in order to fit their intuitive understanding of congressional intent, there is something wrong with the standard.

Our second practical concern stems from a preference for national uniformity. *Crooker* has become the authoritative case on Exemption 2. It presents an extraordinarily comprehensive analysis of the statutory language, legislative history, and caselaw. At least four of our sister circuits have adopted or relied on *Crooker*. *See Abraham & Rose, PLC v. United States*, 138 F.3d 1075, 1080 (6th Cir. 1998); *Audubon Soc.*, 104 F.3d at 1204; *Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993); *Kaganove*, 856 F.2d at 889. Bringing our circuit into alignment with the D.C. Circuit would create a more uniform standard for national agencies like the U.S. Navy. It would also allow our district courts to seek guidance from the D.C. Circuit's extensive case law in applying Exemption 2, in the absence of authoritative Ninth Circuit or Supreme Court rulings.

[11] In short, FOIA "resolved two crucial but potentially conflicting interests: the right of the citizenry to know what the Government is doing, and the legitimate but limited need for secrecy to maintain effective operation of Government." *Crooker*, 670 F.2d at 1062. The text and history of Exemption 2 indicate that Congress intended to prevent disclosure of personnel matters that are predominantly internal, regardless of whether they are "law enforcement" in nature. Limiting Exemption 2 to "law enforcement materials" would frustrate that policy while rendering Exemption 7 almost entirely superfluous. Adopting the "predominantly internal" standard gives due respect to Congress's policy choices. It also simplifies our approach to Exemption 2 and brings us into alignment with some of our sister circuits.

[12] Therefore, we hold that a personnel document is exempt as "High 2" if it is predominantly internal and its dis-

closure presents a risk of circumvention of agency regulation. Law enforcement materials, as defined in *Hardy* and *Maricopa*, satisfy these criteria. However, other sorts of materials —such as Navy data used for internal planning and safety purposes—may also meet the standard for exemption under Exemption 2. We now turn to the question of whether the ESQD information requested here satisfies these criteria.

IV

A

[13] We first consider whether the ESQD arcs fit within the statutory language— that is, whether they are "predominantly internal" personnel rules or practices. The ESQD arcs at issue here are essentially an extension of the OP-5 manual, which governs operations on NMII. As noted above, the Foreword to the manual states that "[t]he purpose of this volume is to acquaint personnel engaged in operations" involving explosives with the relevant procedures. The Foreword further states that "[t]he instructions and regulations prescribed in [the] OP-5 [manual] . . . are considered minimum criteria. The specific items, technical manuals, drawings, and specifications referenced in this publication should be consulted for additional, detailed requirements." ESQD arcs are one of the "specific items" referenced in the OP-5 manual. Therefore, the ESQD arcs constitute one part of the internal policies and procedures that NMII personnel are bound to follow when handling and storing explosive ordnance.

[14] Our understanding comports with the Navy's declarations that ESQD arcs are used by its personnel to "design, array, and construct ammunition storage facilities, and to organize ammunitions operations for risk mitigation and enhanced safety"—the very subjects of the OP-5 personnel manual. The ESQD data is indeed an integral part of the Navy's personnel practices. Like the ATF raid manual at issue in *Hardy* and *Crooker*, the information sought here is predom-

inantly used for the internal purpose of instructing agency personnel on how to do their jobs.

Milner and the dissent suggest that the Navy should classify this information in order to keep it internal. However, not all internal information can be classified, for legitimate reasons of personal and national security. Classifying such information may present logistical challenges that could actually impede safe and effective operations. For instance, the Navy has occasionally shared ESQD information with civilian first responders around Port Townsend whose fire, rescue, and police services would be needed in the event of an accident or attack on NMII.

Milner further argues the decision to share the information with local officials means the information is not "internal." We disagree. The decision to share otherwise internal information with emergency responders does not necessarily place the information outside the bounds of Exemption 2. First, we do not wish to discourage agencies from sharing internal information with local first responders. Such cooperation encourages coordinated and effective mutual aid that improves safety for both government employees and citizens. Agencies must be permitted to grant limited, confidential access to other federal and local agencies without risking broader disclosure. Second, limited disclosure for official purposes does not violate the standard that information must be "*predominantly* internal." Of course, if an agency regularly and publicly discloses its practices, it can no longer claim the information is predominantly internal. That is not the case here. The ESQD arcs are "predominantly internal," regardless of prior limited disclosure to local officials.

Finally, FOIA's fundamental concern with the existence of "secret law" is not implicated here. *See Hardy*, 631 F.2d at 657 (stating that administrative materials, which "involve the definition of the violation and the procedures required to prosecute the offense, . . . contain the 'secret law' which was the

primary target of [FOIA's] broad disclosure provisions"). When internal personnel practices are used as "a source of 'secret law,' as important to the regulation of public behavior as if they had been codified," we cannot say the information is predominantly internal. *Crooker*, 670 F.2d at 1075 (discussing the guidelines for prosecutorial discretion at issue in *Scott v. United States*, 419 F.2d 264, 277 (D.C. Cir. 1969)); *Hardy*, 631 F.2d at 657. Even if the information sought was developed for purely internal uses, we could not permit invocation of Exemption 2 if the information had external legal effect.

[15] In this case, the personnel procedures derived from ESQD arcs are certainly not written to regulate the public. The ESQD arcs have absolutely no legal or enforcement ramifications whatsoever on the citizens of the Puget Sound region. Nothing about the data even *could* be codified in any logical way to regulate public behavior, and the Navy has not attempted to do so. We therefore hold the requested ESQD information is "predominantly internal."[4]

B

We next turn to the question whether disclosure of the ESQD information "may risk circumvention of agency regulation." Rose, 425 U.S. at 369; *see Crooker*, 670 F.2d at 1070 (exempting ATF raid manual because disclosure risked "circumvention of the law"). In *Rose*, the Supreme Court surveyed the House and Senate reports related to Exemption 2 in considering the scope of the exemption. 425 U.S. at 362-67.[5] The Court noted the House Report's emphasis on preventing circumvention of agency regulation and discussed prior cases relying on this Report:

[4]The dissent does not dispute that the requested materials satisfy Exemption 2's "predominantly internal" requirement.

[5]The Court ultimately chose to rely on the Senate Report in determining Congress' intent in resolving the question at issue in *Rose*. 425 U.S. at 367.

> Those cases relying on the House, rather than the Senate, interpretation of Exemption 2, and permitting agency withholding of matters of some public interest, have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function.

Id. at 364. However, because *Rose* was not a case "where knowledge of administrative procedures might help outsiders to circumvent regulations or standards," *id.* (quotation omitted), the Court left open the question whether Exemption 2 would apply "where disclosure may risk circumvention of agency regulation," *id.* at 369.

Building on this framework, *Crooker* addressed the general question whether "Exemption 2 might be construed to cover internal agency materials where disclosure might risk circumvention of the law." 670 F.2d at 1067. It concluded, "we hold that . . . if disclosure significantly risks circumvention of agency regulations or statutes, then Exemption 2 exempts the material from mandatory disclosure." *Id.* at 1074. Five years later, the D.C. Circuit again summarized the scope of the circumvention requirement:

> [W]e have not limited the "high 2" exemption to situations where penal or enforcement statutes could be circumvented. Rather, we have held that "[w]here disclosure of a particular set of documents would render those documents operationally useless, the *Crooker* analysis is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure."

Schiller, 964 F.2d at 1208 (quoting *Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 530-31 (D.C. Cir. 1986)).

[16] In cases following *Crooker*, courts have exempted information that would aid individuals in thwarting various kinds of rules, procedures, and statutes.[6] *See Massey*, 3 F.3d at 622 (exempting "redact[ed] internal FBI notations containing the name of an FBI agent, the initials of other FBI employees, and certain administrative markings"); *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993) (exempting "specific documents, records and sources of information available to Agents investigating obscenity violations" because "release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information"); *Schiller*, 964 F.2d at 1208 (exempting documents containing the National Labor Relations Board's litigation strategies in Equal Access to Justice Actions); *Kaganove*, 856 F.2d at 889-890 (exempting EPA document used to rate job candidates); *Dirksen*, 803 F.2d at 1458-59 (exempting guidelines used for processing Medicare payment claims); *Nat'l Treasury Employees Union*, 802 F.2d at 530-31 (exempting "crediting plans" used to evaluate job applicants); *Founding Church of Scientology v. Smith*, 721 F.2d 828, 829, 831 (D.C. Cir. 1983) (affirming district court's judgment that disclosure of "administrative handling instructions" "would risk circumvention of federal statutes").

[6]The dissent refers to "a consistent line of cases in which agency maps have been held not to qualify under Exemption 2." Dissent at 10381. We concede that the maps at issue in the cited cases were deemed non-exempt. However, the fact that the information at issue was expressed in the form of a map is utterly irrelevant to our analysis. A map may or may not meet the standard for Exemption 2; it will depend, in each case, on what information the map conveys and the purpose for which it is used. Even under the dissent's narrow reading of the circumvention requirement, a map might well facilitate circumvention by a regulated person or entity. For instance, a map or diagram showing the location of cameras in a prison would be of great interest to an inmate who wishes to avoid detection when he violates prison regulations. We decline to draw distinctions based on whether the information appears in images, numbers, words, or any other format.

[17] The record before us reveals that the ESQD information falls squarely within this class of cases. An agency must "submit to the district court a detailed affidavit describing how disclosure would risk circumvention of agency regulation." *Hardy*, 631 F.2d at 657 (relying on *Cuneo v. Schlesinger*, 484 F.2d 1086, 1092 (D.C. Cir. 1973)). "If the explanation is reasonable, the district court should find the materials exempt from disclosure, unless in camera examination shows that they contain secret law or that the agency has not fairly described the contents in its affidavit." *Id.* (citing *Cox v. U.S. Dep't of Justice*, 576 F.2d 1302, 1311-12 (8th Cir. 1978)).

[18] The Navy has described in detailed affidavits precisely how public disclosure would risk circumvention of the law—the ESQD arcs sought here point out the best targets for those bent on wreaking havoc. The arcs indicate specific blast ranges for individual magazines within NMII. A terrorist who wished to hit the most damaging target or a protestor who wished to disrupt the Navy's monitoring and transportation protocols would be greatly aided by such information.[7] The dissent does not apparently dispute that this risk exists; it concludes only that risking sabotage of military explosives is not the sort of "circumvention of the law" that should concern us.

[19] As in *National Treasury Employees Union*, disclosure of the ESQD data "would quickly render those documents obsolete for the purpose for which they were designed." 802 F.2d at 530. The ESQD arcs are created as a planning tool to prevent catastrophic detonations; disclosing the arcs would make catastrophe more likely. The fact that requests for similar information from the Bangor nuclear submarine base have

[7]Milner's argument that such acts of sabotage are already criminalized is unavailing. The same is equally true for misdeeds involving drugs and firearms, but *Hardy* and *Crooker* nonetheless concluded that criminals should not have the benefit of inside information in frustrating an ATF raid. *Hardy*, 631 F.2d at 656; *Crooker*, 670 F.2d at 1073.

been granted is irrelevant to our analysis. "[T]he release of certain documents waives FOIA exemptions *only for those documents released.*" *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989). Moreover, Commander Whitbred explicitly addressed this argument in his affidavit: "[NMII] is not a submarine base. The nature of its mission is completely different, as are its security parameters, and physical characteristics. Furthermore, [NMII] is not a single-weapon system facility such as the bases referenced where the risks are associated with a single program." Because the Navy's safety concern rests on the potential utility of the ESQD arcs in identifying the most hazardous target among many, these distinctions are significant. *Hardy* and *Minier* instruct us to accord substantial weight to these reasonable explanations. *Hardy*, 631 F.2d at 657; *Minier*, 88 F.3d at 800.

[20] The Navy released roughly 1,000 documents responsive to Milner's requests. It withheld the narrow class of documents at issue here because, as Commander Whitbred put it, "I believe strongly that release of the sensitive ESQD information involved in this case would jeopardize the safety and security of the storage, transportation, and loading of ammunitions and explosives" (emphasis original). There is no basis to "suspect" that the Navy has ulterior, political motives for denying the requested information. *See* Dissent at 10385. The Navy has met its burden of describing how disclosure would risk circumvention of its regulations. Therefore, the district court properly exempted the requested ESQD information from disclosure.[8]

V

In conclusion, we reiterate our approach to Exemption 2. First, the material withheld must fall within the terms of the

[8]Because we conclude the requested information was properly exempted under Exemption 2, we need not reach the alternative argument that Exemption 7 also applies.

statutory language. To determine whether a personnel document falls within the statutory language, we inquire whether it is "predominantly internal." Law enforcement material, as defined in *Hardy* and *Maricopa*, qualifies as predominantly internal, but it is not the only category of materials that may meet this test. Second, if the material is predominantly internal, the agency may defeat disclosure by proving that disclosure may risk circumvention of the law. The ESQD arcs requested here are predominantly internal personnel materials, and if disclosed would present a serious risk of circumvention of the law. The district court properly ruled that the information sought is exempt from FOIA disclosure.

AFFIRMED.

W. FLETCHER, Circuit Judge, dissenting:

The question in this case is whether Explosive Safety Quantity Distance ("ESQD") arc maps are exempt from disclosure under the Freedom of Information Act ("FOIA"). The Navy claims the maps are exempt under FOIA Exemption 2 and Exemption 7(F). Exemption 2 covers information "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Exemption 7(F) covers "records or information compiled for law enforcement purposes" that, if disclosed, "could reasonably be expected to endanger the life or physical safety of any individual." *Id.* § 552(b)(7)(F). The majority holds that ESQD maps are exempt under Exemption 2. It does not reach Exemption 7(F).

The majority's holding is inconsistent with both the statute and the uniform case law interpreting Exemption 2. I would hold that the ESQD maps are not exempt under either FOIA Exemption 2 or Exemption 7(F).

I. Background

Naval Magazine Indian Island ("NMII") is an ordnance storage depot located on the northwest side of Indian Island on Port Townsend Bay in Washington State. The bay is on the northeast corner of the Olympic Peninsula, where the Straits of Juan de Fuca come in from the Pacific Ocean to meet Puget Sound. The bay is used by many kinds of pleasure and work boats. The northern part of NMII is a little more than two miles southeast of the town of Port Townsend across the open water of the bay, and several hundred feet west of Fort Flagler State Park on nearby Marrowstone Island. The southern part of NMII is a little more than a mile east of the towns of Port Hadlock and Irondale across the open water of the bay. NMII is used to store and transship ammunition, weapons, weapon components and explosives for the Navy, U.S. Joint Forces, Homeland Security and other federal agencies and allied forces. The Navy is responsible for all operations on NMII.

Glen Scott Milner is a life-long resident of the Puget Sound region. For the past twenty years he has done research and written about explosive hazards related to Navy activities in Puget Sound. He has published articles in the Bulletin of Atomic Scientists, BASIC (British American Security Information Council, in London), Seattle Times, Seattle Post-Intelligencer, Kitsap Sun, Port Townsend Leader, Washington Free Press, and Real Change in Seattle. In addition, numerous radio and television shows and newspaper articles have featured his comments about local Navy activities or used information that he obtained through FOIA.

The Navy develops ESQD arc maps as part of its explosives safety program. On an arc map,[1] an hypothesized explosion is at the focus of the arc. The arc represents the distance

[1]When I refer to ESQD arc maps, I refer not only to the maps but to the mathematical calculations of which the maps are the graphic representation.

at which the force of the explosion will be felt. The distance between the site of the explosion and the arc varies depending on the kind and quantity of ordnance. ESQD arc maps are essentially safety maps, telling the Navy (and anyone else who is allowed to see them) not only where different kinds and quantities of ordnance should be stored, but also how far away people and structures should be located to ensure their safety in the event of an explosion.

Milner submitted two FOIA requests to the Navy, one on December 7, 2003, and the other on February 3, 2004, for information about explosion hazards at NMII. The district court found Milner's two requests "substantially identical" and treated them as a single FOIA request. Milner requested three kinds of documents:

> [1] [A]ll documents on file regarding ESQD arcs or explosive handling zones at the ammunition depot at Indian Island. This would include all documents showing impacts or potential impacts of activities in the explosive handling zones to the ammunition depot and the surrounding areas[;] . . .
>
> [2] all maps and diagrams of the ammunition depot at Indian Island which show ESQD arcs or explosive handling zones"[;] [and]
>
> [3] documents regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at the ammunition depot at Indian Island.

The Navy identified seventeen document packages totaling about 1,000 pages that met Milner's request. The Navy disclosed most of these documents to Milner, but withheld 81 documents, claiming that their disclosure could threaten the security of NMII and the surrounding community.

Jefferson County Commissioner Phil Johnson states in a declaration that he wrote two letters to Rear Admiral W.D. French requesting a meeting between Navy officials and the general public concerning safety of ordnance storage and handling at NMII. Jefferson County encompasses the towns of Port Townsend, Port Hadlock and Irondale. In his first letter, dated February 21, 2006, Commissioner Johnson recounted that Captain Kurtz, the then-Commanding Officer of NMII, and his staff had provided a tour of NMII to "local governmental leaders and the press." He wrote, "The three hours that we spent touring the facilities and listening to the presentations about the Magazine's safety record, the 'standard operating procedures' and the Navy's environmental program were indeed impressive." Commissioner Johnson then proposed a discussion lasting one to two hours at Fort Worden State Park "with our general public, Captain Kurtz and his staff," and with a "neutral facilitator who will keep the audience focused on the purpose of the meeting." Admiral French wrote back thanking Commissioner Johnson for his "support of the U.S. Navy," stating that "the Navy values its outstanding relationship with Jefferson County," and describing meetings Captain Kurtz had had with different groups, including the Chambers of Commerce of Port Hadlock and Port Townsend. However, Admiral French did not mention Commissioner Johnson's proposal for a general public meeting.

In a second letter to Admiral French, dated April 3, 2006, Commissioner Johnson again requested a general public meeting. This time he proposed that an "open public forum" be held at the Jefferson County Courthouse. He proposed that Captain Kurtz and his staff appear on a panel with "panelists from the Hospital, Emergency Operations and Law Enforcement/Fire." He again proposed that there be a "neutral moderator, who we will provide, to insure that the forum remains focused on NAV MAG Indian Island and the plans for the island." This time, Admiral French responded to Commissioner Johnson's proposal. He declined, writing on May 3, 2006:

> Thank you for your letter . . . in which you propose that a public forum be held . . . with presentations by the Navy, the local hospital, your Emergency Operations Department, Law Enforcement and the East Jefferson Fire District. While we appreciate this opportunity and desire to keep the lines of communication open, we prefer to continue our current outreach program.

Admiral French listed occasions on which Captain Kurtz had spoken to "many community groups and civic organizations in the Port Townsend area." He stated, "We believe that these public engagements have been quite successful in providing information to the citizens of Jefferson County."

On September 11, 2006, Milner sued the Navy under FOIA seeking disclosure of the documents the Navy had refused to provide in response to his FOIA request.

Commander George Whitbred IV, the current Commanding Officer of NMII, states in a declaration filed in this suit that ESQD arcs "define minimum separation distances for quantities of explosives based on required degrees of protection. These separation distances are established to afford reasonable safety to Department of Navy shore activities, and, to the extent possible, protect adjacent public and private property." Commander Whitbred states that "ESQD arcs can be 'reverse engineered' with the right information," and that "some arcs reveal more than others about the particular ammunition, explosive or weapons system." He states that arc maps are provided to civilian members of the public on a "case-by-case basis." Commander Whitbred states further:

> We sometimes share ESQD information with "first responders" at both Jefferson County and the City of Port Townsend. However, ESQD information is not released to the general public if a determination is made that the release might pose a serious threat of

> death or injury to any person — either inside or outside the installation boundaries.

Milner states in a declaration that the Navy submarine base at Bangor, Washington, "handles much of the ammunition that is sent to Indian Island. The ammunition is routed by railcars and then sent by truck to Indian Island." He further states that the Navy has voluntarily handed over to him, pursuant to FOIA requests, comparable arc maps for ordnance stored at the Bangor base. The Navy's behavior with respect to the arc maps for the Bangor base contrasts sharply with its behavior with respect to the arc maps for NMII, even though the same type of ordnance is stored at both bases. Milner states:

> Numerous documents showing ESQD arcs and related information about the Bangor base, similar to the documents I requested for Indian Island, have been released to me through FOIA. One 1995 document . . . lists 33 different sites with ESQD arcs at Naval Base Kitsap-Bangor. The Net Explosives Weight at these sites is listed from 5,000 to 3.72 million pounds . . . . The document also contains a map showing ESQD arcs at Bangor. Numerous similar maps showing ESQD arcs at Bangor have been released to me in the past.

Bangor is the Puget Sound base for the Navy's Trident nuclear submarines. The Bangor base is located on the northeastern shore of Hood Canal, a little less than 40 miles due south of Port Townsend. Despite its name, Hood Canal is not a canal; rather, it is a long narrow inlet of Puget Sound mostly running north and south along the eastern edge of the Olympic Peninsula. The nearest town to the Bangor base is Silverdale, four or five miles across land to the south.

The Navy has not contradicted Milner's statement about the nature and quantity of ordnance at Bangor. Nor has it contradicted his statement that it has voluntarily released to him

under FOIA numerous arc maps for the ordnance stored at the Bangor base. Though it undoubtedly could have done so, the Navy has not provided affidavits or declarations from anyone connected with the Bangor base. Commander Whitbred of NMII has provided the Navy's only response to Milner's statements about the Bangor base. He states in his declaration, "I am not an expert on Trident Submarines; nor do I know the reasons why information about ESQD arcs might have been released by those commands in the past."

Both parties moved for summary judgment. The Navy contended that the documents were protected from disclosure under FOIA Exemptions 2 and 7(F). The district court granted summary judgment to the Navy under Exemption 2. The court did not address Exemption 7(F). Milner timely appealed.

II. Discussion

I would hold that neither Exemption 2 nor Exemption 7(F) permits the Navy to withhold the requested ESQD arc maps.

A. FOIA

The goal of FOIA is "to open agency action to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (internal quotation omitted). FOIA revised § 3 of the Administrative Procedure Act ("APA"), which Congress had declared was "full of loopholes which allow agencies to deny legitimate information to the public." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) ("Senate Report"); *see also* H.R. Rep. No. 1497, 89th Cong., 2d Sess., 4 ("House Report") ("Section 3 of the [APA], though titled 'Public Information' and clearly intended for that purpose, has been used as an authority for withholding, rather than disclosing, information."). In the words of the Supreme Court, "Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclo-

sure statute." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) *(quoting EPA v. Mink*, 410 U.S. 73, 79 (1973)).

FOIA mandates that government agencies disclose their records through three methods. 5 U.S.C. § 552(a). Section 552(a)(1) requires that agencies publish certain information in the Federal Register. Section 552(a)(2) requires that certain other types of material be made available for public inspection and copying. Section 552(a)(3), upon which Milner relies, requires disclosure of all other reasonably described records not already released under § 552(a)(1) or (a)(2).

Federal agencies may withhold requested documents only if they fall under one of the nine enumerated exemptions to mandatory disclosure under FOIA. Exemptions under FOIA "must be narrowly construed." *Rose*, 425 U.S. at 361. Exemptions under FOIA are also "explicitly exclusive." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (quoting *FAA Adm'r v. Robertson*, 422 U.S. 255, 262 (1975)). That is, we may not read additional exemptions into FOIA, no matter how desirable such exemptions might be in the view of the agency or the court. *See also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001); *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997). The existence of these nine enumerated exemptions "do[es] not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361.

B. FOIA Exemption 2

FOIA Exemption 2 allows agencies to withhold "matters . . . related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The question before us is whether ESQD arc maps are "related solely to internal personnel rules and practices" within the meaning of Exemption 2. I would hold that they are not.

I agree with part of the majority's analysis. I agree that we should adopt the reasoning of the D.C. Circuit articulated in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). I further agree that our circuit's three decisions dealing with Exemption 2 — *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir. 1980); *Dirksen v. United States Department of Health and Human Services*, 803 F.2d 1456 (9th Cir. 1986); and *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1082 (9th Cir. 1997) — are not inconsistent with *Crooker*. Finally, I agree that under *Crooker*, documents must be "predominantly internal" and pertain to "personnel rules and practices of an agency" to qualify under Exemption 2.

However, I strongly disagree with the majority's application of the part of *Crooker* that deals with what it calls "the circumvention requirement." Maj. Op. at 10366. *Crooker* held that a predominantly internal document whose release might result in the circumvention of agency regulation is protected under Exemption 2. Circumvention of agency regulation has a precise, and restricted, meaning. *Crooker* and all subsequent cases have held that the circumvention must be by a person or entity that is subject to regulation by the agency in question.

Crooker carefully described the sort of circumvention of agency regulation that qualifies a document for exemption under Exemption 2. *Crooker* noted that the Supreme Court's opinion in *Rose* had left open the question whether documents that would permit circumvention of regulation were exempted by Exemption 2. *Crooker* answered the question, holding that such documents were exempted. It quoted from *Rose* to make clear the sort of circumvention at issue. First, the Court in *Rose* had referred to Exemption 2 as being potentially available

> only where necessary to prevent the *circumvention of agency regulations* that might result from *disclo-*

> *sure to the subjects of regulation* of the procedural manuals and guidelines used by the agency in discharging its regulatory function.

Crooker, 670 F.2d at 1066 (quoting *Rose*, 425 U.S. at 364) (emphasis altered). Second, the Court had noted that the primary focus of the House Report on Exemption 2 had been on "exemption of *disclosures that might enable the regulated to circumvent agency regulation*." *Crooker*, 670 F.2d at 1066 (quoting *Rose*, 425 U.S. at 366-67) (emphasis added). Thus, under *Crooker*, agency documents embodying "personnel rules and practices" are exempt under Exemption 2 only when they are "procedural manuals and guidelines used by the agency in discharging its regulatory function," and only when their disclosure "to the subjects of regulation" might result in the "circumvention of agency regulations." *Crooker*, 670 F.2d at 1066 (quoting *Rose*, 425 U.S. at 364).

Examples of documents whose release might result in circumvention of agency regulation by regulated persons or entities include "instructions to such government officials as investigators and bank examiners." *Crooker*, 670 F.2d at 1057. The documents we held exempt under Exemption 2 in *Hardy* and *Dirksen* are further examples of such documents. In *Hardy*, we held exempt under Exemption 2 a Bureau of Alcohol, Tobacco, and Firearms ("BATF") training manual whose disclosure risked circumvention of BATF regulation by parties subject to that regulation. In *Dirksen*, we held exempt under Exemption 2 a document containing Medicare processing Guidelines whose disclosure risked circumvention of agency reimbursement regulations by Medicare providers subject to Health and Human Services regulation. In *Hardy*, we emphasized that the BATF manual was a law enforcement manual, and in *Dirksen*, we analogized the Guidelines document to a law enforcement manual.

In a consistent line of cases decided after *Crooker*, the D.C. Circuit has restricted the application of Exemption 2 to docu-

ments whose release would permit the subjects of the agency's regulation to circumvent that regulation. In *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525 (D.C. Cir. 1986), the court held that the Customs Service could withhold "crediting plans" it used to evaluate job applicants. *Id.* at 531. The court determined that "release of the plans creates a significant risk that the Service's applicant evaluation program will be seriously compromised" because "advance knowledge of the plans by applicants would allow and induce at least some of them to embellish—or perhaps even fabricate—their backgrounds to suit the appropriate crediting plan." *Id.* at 529.

In *Schiller v. NLRB*, 964 F.2d 1205 (D.C. Cir. 1992), the court similarly allowed the National Labor Relations Board ("NLRB") to withhold documents containing the agency's litigation strategies in Equal Access to Justice Act ("EAJA") actions. *Id.* at 1207. The EAJA allows prevailing parties to recover attorney's fees and costs from the agency in certain circumstances. *See* 5 U.S.C. § 504. The court held that requiring the NLRB to disclose its litigation strategies would "compromis[e] the Board's ability to defend itself in EAJA actions." 964 F.2d at 1208.

In *PHE, Inc. v. United States Department of Justice*, 983 F.2d 248 (D.C. Cir. 1993), the court allowed the FBI to claim Exemption 2 for the section of its Manual of Investigative Operations and Guidelines related to interstate transportation of obscene matter. *Id.* at 251. This withheld section "detailed specific documents, records and sources of information available to Agents investigating obscenity violations, as well as the type of patterns of criminal activity to look for when investigating certain violations." *Id.* The court agreed with the government that the disclosure of this portion of the Manual would "provide[ ] violators with an opportunity to impede lawful investigations." *Id.*

The case law in other circuits is consistent with that of the D.C. Circuit. In *Caplan v. Bureau of Alcohol, Tobacco &*

Firearms, 587 F.2d 544 (2d Cir. 1978), the Second Circuit held exempt under Exemption 2 a BATF Raids and Searches training manual. *Id.* at 546. The court stated that releasing the manual would "significantly assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection." *Id.* at 547. The Seventh Circuit followed suit in *Kaganove v. EPA*, 856 F.2d 884 (7th Cir. 1988), holding exempt under Exemption 2 an EPA document used to rate job candidates. *Id.* at 889-90. The court found that disclosing the document would allow job applicants to exaggerate their credentials to receive higher ratings. *Id.* at 890.

The majority does not acknowledge the limited sense in which circumvention of agency regulation is used in the case law interpreting Exemption 2. The majority has cited no case — and can cite no case — in which Exemption 2 was applied more broadly than in the cases I have just described. In all of the reported cases dealing with the issue, Exemption 2 applies only to documents whose release would facilitate circumvention of agency regulation by a regulated person or entity. Under long-standing and well-established law, a document is protected under Exemption 2 only if its release risks circumvention *by a regulated person or entity*. Exemption 2 does not apply in this case because there is no such person or entity. The Navy is not acting as a regulatory or law enforcement agency, and the arc maps do not regulate anyone or anything outside the Navy itself.

The majority ignores a consistent line of cases in which agency maps have been held not to qualify under Exemption 2. Most important is our own case, *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1082 (9th Cir. 1997), in which we held that Forest Service maps showing the locations of goshawk nests were not protected from disclosure under Exemption 2. 108 F.3d at 1086-87. We so held despite the concern expressed by the district court that if the maps fell

into the wrong hands harm to the goshawks could result. *Id.* at 1084.

Other cases include *Audubon Society v. United States Forest Service*, 104 F.3d 1201 (10th Cir. 1997), *Living Rivers, Inc. v. United States Bureau of Reclamation*, 273 F. Supp. 2d 1313 (D. Utah 2003), and *DeLorme Publishing Co. v. National Oceanic & Atmospheric Administration of the United States Department of Commerce*, 917 F. Supp. 867 (D. Me. 1996). In *Audubon*, the Tenth Circuit held that maps identifying Mexican spotted owl nest sites were not protected from disclosure under Exemption 2. 104 F.3d at 1204. In *Living Rivers*, the district court determined that the Bureau of Reclamation could not withhold maps showing which downstream areas would be flooded if the Hoover Dam or the Glen Canyon Dam failed. 272 F. Supp. 2d at 1318. The court so held despite the government's contention that releasing the maps "would [compromise] dam security and the security of the surrounding populations." *Id.* at 1315. In *DeLorme*, the district court rejected the National Oceanic and Atmospheric Administration's attempt to withhold compilations of its nautical charts from disclosure under Exemption 2. 917 F. Supp. at 876.

The key question in these cases was not whether the documents at issue were maps per se, but rather the consequence of the release of the maps. Even though there was some potential risk of harm from the release of the maps, their release did not risk circumvention of regulation by regulated persons or entities. I agree with the majority that releasing a map showing the location of cameras in a prison would be protected under Exemption 2. *See* Maj. Op. at 10367 n.6. Such a map would be protected because its disclosure would risk circumvention of regulation by regulated persons, i.e. by the prison's inmates. But our case is quite different. In our case, there is — at least, according to the Navy — a risk of harm from release of the maps. But the risk is not that a regu-

lated person or entity will be thereby assisted in avoiding the agency's regulation.

Given the foregoing extensive and consistent lines of precedent, the conclusion is inescapable that the arc maps at issue in this case are not exempt under Exemption 2. The ESQD arc maps do not qualify for Exemption 2 under this circuit's analysis in *Hardy* and *Dirksen*; under the D.C. Circuit's analysis in *Crooker* and subsequent cases; or under the analyses of the other circuits. The arc maps are not "procedural manuals [or] guidelines used by the agency in discharging its regulatory function" whose disclosure "to the subjects of regulation" might result in the "circumvention of agency regulations." *Crooker*, 670 F.2d at 1066. Rather, the maps fall squarely under the analysis in our circuit's decision in *Maricopa*, in the Tenth Circuit's decision in *Audubon*, and in the district courts' decisions in *Living Rivers* and *DeLorme*. I would therefore hold that the ESQD arc maps at issue in this appeal are not exempt under Exemption 2.

C. FOIA Exemption 7(F)

Because I would hold that the ESQD arc maps are not exempt under Exemption 2, I would also reach the question whether the maps are exempt under Exemption 7(F). Exemption 7(F) covers "matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). I would hold that the ESQD arc maps are not covered under Exemption 7(F) because they were not "compiled for law enforcement purposes."

The Navy has the burden of proving that it is a "law enforcement" agency and that the ESQD arc maps were "compiled for law enforcement purposes." *Church of Scientology of Cal. v. U.S. Dep't of the Army*, 611 F.2d 738, 748

(9th Cir. 1980). An agency with a " 'mixed' function, encompassing both administrative and law enforcement functions, must demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document." *Id.* A law enforcement purpose is an "adjudicative or enforcement purpose[ ]," such as the "enforcement of any statute or regulation within the authority" of the agency. *Id.* "Information need not have been originally compiled for law enforcement purposes in order to qualify for the 'law enforcement' exemption, so long as it was compiled for law enforcement purposes at the time the FOIA request was made." *Lion Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989)).

The Navy concedes that it is an agency with a mixed function. Therefore, it must demonstrate that it "had a law enforcement purpose based upon properly delegated enforcement authority" for compiling the ESQD arc maps. *Church of Scientology*, 611 F.2d at 748. The Navy does not meet this standard. Agencies with law enforcement powers have the ability to conduct investigations or adjudications to enforce laws or regulations. *See, e.g.*, *Church of Scientology Int'l v. I.R.S.*, 995 F.2d 916, 919 (9th Cir. 1993) (finding that the Exempt Organization Division of the IRS performs a law enforcement function "by enforcing the provisions of the federal tax code that relate to qualification for tax exempt status"); *Lewis v. I.R.S.*, 823 F.2d 375, 379 (9th Cir. 1987) (holding that the I.R.S. has a law enforcement purpose in the context of a criminal tax investigation); *Binion v. U.S. Dep't of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983) (stating that the F.B.I. has a "clear law enforcement mandate"). The divisions of the Navy responsible for producing ESQD arc maps and conducting operations on NMII have no such powers. These divisions are distinct from those with investigative powers, such as the Naval Investigative Service of the Office of Naval Intelligence, which we examined in *Church of Scientology*. 611 F.2d at 748.

Even if the branch of the Navy that created the ESQD arc maps had law enforcement authority, these documents were not compiled for law enforcement purposes. Commander Whitbred stated that the Navy "use[s] these arcs to design, array, and construct ammunition storage facilities, and to organize ammunition operations for risk mitigation and enhanced safety." This is not an "adjudicative or enforcement purpose[ ]." *Church of Scientology*, 611 F.2d at 748. I would therefore hold that the ESQD arc maps at issue in this appeal are not exempt under Exemption 7(F).

D. FOIA Exemption 1

I am myself a former Navy officer. I yield to no one in my admiration for the care and professionalism of the Navy in its handling of ordnance, at NMII and elsewhere.

There is reason to suspect that the Navy's reluctance to release the ESQD arc maps for NMII is not based on the danger to national security that might be posed if the arc maps were released to Milner and the general public, but rather on the political difficulties that might be created by their release. This is strongly suggested by the contrast between the Navy's behavior with respect to the arc maps for the Bangor base and its behavior with respect to comparable arc maps for NMII. The Navy voluntarily provided to Milner under FOIA numerous ESQD arc maps for the Bangor base. That base is located four to five miles across land from the nearest town. So far as the record reveals, there was little political sensitivity to the possible dangers posed by the storage of conventional ordnance at Bangor.

By contrast, the Navy has been unwilling to provide to Milner the comparable ESQD arc maps for the same type of ordnance stored at NMII. NMII is located a little more than two miles across open water from Port Townsend and a little more than a mile across open water from Port Hadlock and Irondale. It is clear from the record that there is substantial politi-

cal sensitivity to the possible danger posed by the storage of ordnance at NMII. This political sensitivity is shown, for example, by Jefferson County Commissioner Johnson's invitation to the Navy to appear at a public forum to discuss "NAV MAG Indian Island and the plans for the island" on a panel with local hospital, emergency operations, law enforcement and fire fighting personnel. The nature of the Navy's response is shown by its unwillingness to accept the invitation, and its preference instead to continue to conduct its "current outreach program" in which Captain Kurtz, appearing alone, spoke to various community groups and civic organizations.

Commander Whitbred states in his declaration that a person may be able to "reverse engineer" ESQD arc maps, and thereby to discover information about "particular ammunition, explosive[s and] weapons systems," with possible adverse consequences for national security. I have trouble reconciling Commander Whitbred's statement about the national security risks of releasing the ESQD arc maps for NMII with the Navy's failure to classify these maps. Exemption 1 of FOIA specifically exempts from disclosure classified matters "kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1). This exemption is specifically designed to allow government agencies to withhold information that might jeopardize our national security. If the disclosure of the ESQD arc maps is as dangerous as Commander Whitbread claims, the Navy is acting irresponsibly by not classifying them. I would be willing to remand to the district court, even at this late stage in the litigation, in order to give the Navy an opportunity to classify the arc maps at NMII and thereby to qualify them under Exemption 1 if it truly believes that Commander Whitbred's stated concerns about reverse engineering are legitimate. But my colleagues in the majority have declined to follow this course.

Conclusion

FOIA is a careful "balance between the interests of the public in greater access to information and the needs of the Gov-

ernment to protect certain kinds of information from disclosure." *John Doe Agency*, 493 U.S. at 157. FOIA protects information that, if released, would jeopardize our national security or endanger the lives of individuals. Such information is protected under Exemption 1 if it is classified and under Exemption 7(F) if it is "compiled for law enforcement purposes" and "could reasonably be expected to endanger the life or physical safety of any individual" if disclosed. The majority's determination to expand Exemption 2 to protect information that the Navy has not seen fit to classify distorts Congress's careful balance and defies the Supreme Court's instruction that FOIA exemptions "must be narrowly construed" and are "explicitly exclusive." *Rose*, 425 U.S. at 361; *Tax Analysts*, 492 U.S. at 151 (quoting *Robertson*, 422 U.S. at 262).

I conclude, based on a long line of consistent precedent in this and other circuits, that neither Exemption 2 nor Exemption 7(F) applies to the arc maps at issue in this appeal. I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLEN SCOTT MILNER, Plaintiff - Appellant, v. UNITED STATES DEPARTMENT OF THE NAVY, Defendant - Appellee.	No. 07-36056 D.C. No. CV-06-01301-JCC Western District of Washington, Seattle ORDER

Before: W. FLETCHER, GOULD and TALLMAN, Circuit Judges.

Judges Gould and Tallman have voted to deny the petition for rehearing en banc; Judge W. Fletcher has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.