
In the Supreme Court of the United States

GLEN SCOTT MILNER, PETITIONER

v.

DEPARTMENT OF THE NAVY

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Exemption 2 of the Freedom of Information Act, 5 U.S.C. 552(b)(2), exempts from mandatory disclosure technical explosive and ammunition safety maps and data used by Navy personnel for the safe handling and storage of ordnance at Naval Magazine Indian Island.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-64) is reported at 575 F.3d 959. The opinion of the district court (Pet. App. 4-25) is not published in the *Federal Supplement* but is available at 2007 WL 3228049.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2009. A petition for rehearing was denied on December 22, 2009 (Pet. App. 65). The petition for a writ of certiorari was filed on March 22, 2009, and was granted on June 28, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Exemption 2 of the Freedom of Information Act (FOIA), 5 U.S.C. 552, exempts from mandatory disclosure under FOIA matters that are “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. 552(b)(2).

STATEMENT

1. Naval Magazine Indian Island (NMII) is situated on an island that is strategically located in Puget Sound near the towns of Port Hadlock and Port Townsend, Washington. Pet. App. 28; J.A. 71-72 (maps). NMII, which has been used as a military arsenal since before World War II, stores and tranships multiple types of weapons, weapons components, ammunition, and explosives in support of the Navy, United States Joint Forces, Allied forces, and civilian federal agencies, including the Department of Homeland Security. J.A. 54, 60-61. The Navy is responsible for all operations on NMII, including law enforcement, security, force protection, and explosives safety. J.A. 54. The Navy has also established a restricted area in the waters surrounding NMII’s loading pier that excludes all civilian vessels “during periods when ship loading and/or pier operations preclude safe entry.” 33 C.F.R. 334.1270(b); cf. J.A. 71 (map showing pier on northwest corner of NMII).

This case involves a FOIA dispute about site-specific and ordnance-specific information at NMII. By 1941, the Navy had promulgated internal explosive-safety regulations to govern the storage and movement of explosives and ammunition by personnel at Navy and Marine Corps installations worldwide. See J.A. 65; see also J.A. 16. Those regulations are currently contained within a document entitled Naval Sea Systems Command

(NAVSEA) OP 5, Volume 1, “Ammunition and Explosives Safety Ashore, Safety Regulations for Handling, Storing, Production, Renovation and Shipping” (OP-5). J.A. 14, 16, 64-65. The current version of OP-5 is the Seventh Revision, Change 8. Cf. J.A. 65.

The Navy uses the OP-5 to instruct its “personnel engaged in operations involving ammunition, explosives, and other hazardous materials” and to establish “standardized safety regulations for the production, renovation, care, handling, storage, preparation for shipment, and disposal of these items.” J.A. 16. The ultimate purpose of the Navy’s explosive-safety program is to protect human life and property from “the harm that could occur from an incident, accident[,] or breach of security.” J.A. 58.

Among other things, OP-5 is used to govern Navy personnel in formulating construction plans associated with explosives-related facilities, which must undergo an elaborate review process before final approval. J.A. 59, 65; cf. J.A. 18-41 (portion of OP-5, Chapter 8).¹ The OP-5 specifies the effects of accidental and intentional detonations of ordnance through formulas and data, which reflect the “type and quantity of explosives material” involved and the “degree of protection needed” by considering, *inter alia*, “the vulnerability of various structures to blast and fragment damage.” J.A. 59, 66; cf. J.A. 28-29. Among other things, the OP-5 contains sensitive data on the “distances that must be maintained

¹ Petitioner purportedly purchased portions of the OP-5 over the internet, J.A. 9, and the Navy has referred the matter to appropriate authorities for investigation. J.A. 76. The portions of a former edition of OP-5 that petitioner has filed in the record (*e.g.*, J.A. 18-41) do not appear to contain highly sensitive technical data. Cf. *ibid.*

between explosives concentrations, ships, or vehicles to prevent mass detonations.” J.A. 66.

In light of the sensitive nature of the information in OP-5, the Navy restricts the document’s distribution. The OP-5 states that its “[d]istribution [is] authorized to U.S. Government agencies and their contractors for administrative and operational use” and includes a “DESTRUCTION NOTICE” directing unauthorized recipients to “[d]estroy [the document] by any method that will prevent disclosure of [its] contents.” J.A. 14, 55-56, 66-67. The OP-5 also prominently displays a “WARNING” that the document “contains data whose export is restricted by the Arms Export Control Act (Title 22, USC, Sec 2751 et seq.) or Executive Order” and that violations “are subject to severe criminal penalties.” *Ibid.*; see J.A. 68-69.

Navy personnel at NMII require site-specific and ordnance-specific information to implement OP-5’s general practices and procedures. Accordingly, NMII personnel utilize what is known as Explosive Safety Quantity Distance (ESQD) information based on the OP-5 to perform their duties under the Navy’s explosives safety program. J.A. 58. ESQD information reflects the effects at varying distances of detonating a specific quantity and specific class of ordnance. *Ibid.* That information is then used to “define minimum separation distances for quantities of explosives based on required degrees of protection,” *ibid.*, and thereby to determine the specific placement and utilization of magazines both to prevent “propagation of fires or explosions” between magazines and to minimize risks to human beings who may be located in nearby inhabited buildings or transportation routes. J.A. 36-37, 58-59. ESQD information specifying those distances may be graphically repre-

sented on maps as ESQD “arcs,” with the center of an arc roughly representing the location of a potential detonation. J.A. 58.²

ESQD information developed specifically for NMII is used by Navy personnel to establish minimum separation distances for the various quantities and types of ordnance stored at and moved through the facility. J.A. 59. The information is thus utilized to perform the difficult task of “monitoring and protecting [the] explosives” at NMII, which are “in a constant state of flux,” by guiding Navy personnel in “organiz[ing] ammunition operations” at NMII and “design[ing], array[ing], and construct[ing] ammunition storage facilities.” J.A. 59, 61.

The Navy evaluates external requests for ESQD information on a case-by-case basis and does not release the information when it determines that the release might pose a serious threat of death or injury to any person. J.A. 59. In order to facilitate appropriate emergency preparedness, the Navy has occasionally shared sensitive ESQD information pertaining to NMII with local first responders. *Ibid.*³

² Navy personnel use “multiple types of [ESQD] arcs” to specify the appropriate distances from an ordnance storage site (at the center of an arc) to different types of locations. J.A. 59. For instance, one arc for a specific quantity and type of ordnance will reflect the appropriate separation distance to a hardened, earth-covered magazine; a larger arc will specify the appropriate distance to a less hardened magazine or storage location; and a yet larger arc will define the appropriate distance to an inhabited building. Cf. J.A. 36-37; cf. also J.A. 33.

³ ESQD information for NMII has been improperly released on a few occasions. In one instance, ESQD information was inadvertently disclosed when an internal government presentation was posted online in 2006. J.A. 80. In another instance, Navy personnel provided an ESQD arc map showing inhabited-building-distance arcs for NMII to local first responders for official use only. J.A. 83-84. The map (J.A. 52)

2. a. In 2003 and 2004, petitioner submitted two substantially identical FOIA requests to the Navy. Pet. App. 6 & n.1, 29 & n.1. Petitioner requested:

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. [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.

Id. at 29-30 (brackets in original).

The Navy identified a total of 17 document packages (totaling approximately 1000 pages) potentially responsive to petitioner’s request. Most of the documents were ultimately released to petitioner, but 81 documents were withheld, in whole or in part, based on the Navy’s conclusion that disclosure of the ESQD information could

—which reflects two sets of arcs based on the actual net explosive weight (NEW) stored at NMII magazines on July 20, 2006, and the maximum approved NEW for the same magazines—appears to have been improperly provided to petitioner by a local official. J.A. 84; see J.A. 51. Although petitioner has stated that the chairman of the local board of commissioners did not himself give petitioner an ESQD arc map, J.A. 11, petitioner filed in this case a declaration from that official which included the map. See J.A. 51-52.

threaten the safety and security of NMII and the surrounding community. Pet. App. 30.

b. In 2006, petitioner filed this FOIA action in the Western District of Washington to compel the Navy to disclose the withheld ESQD information. J.A. 1; Pet. App. 30. The Navy moved for summary judgment, arguing, as relevant here, that the ESQD information at issue was protected from mandatory disclosure under FOIA Exemption 2, which exempts matters “related solely to the internal personnel rules and practices of an agency,” 5 U.S.C. 552(b)(2). See Pet. App. 8, 30.⁴

The Navy submitted declarations by several Navy officials, including Commander George N.T. Whitbred IV, the commanding officer at NMII with 20 years of experience in explosives management and safety. J.A. 53-63. Commander Whitbred explained that NMII is part of the Navy’s “worldwide ordnance logistics network” and must respond to operational demands with no local control “over the pace or extent of the movement” of munitions to and from the base. J.A. 62. The “constant flow of material onto the installation, from place to place within the installation and, finally, off the installation makes security a challenge.” *Ibid.* He explained that ESQD arcs are created as part of the Navy’s overall safety program for the storage and handling of explosives to ensure that NMII is “operated, to the utmost extent possible, as a safe and secure facility providing

⁴ The Navy also argued that ESQD information was exempt from disclosure under Exemption 7(F), 5 U.S.C. 552(b)(7)(F), but neither the district court nor the court of appeals resolved that issue. Pet. App. 25, 46 n.8. But cf. *id.* at 47, 60-62 (W. Fletcher, J., dissenting) (rejecting Exemption 7(F)’s application by concluding that the records were not compiled for law-enforcement purposes).

ordnance logistics to a wide array of military and federal entities.” *Ibid.*; see J.A. 58-59.⁵

NMII utilizes numerous magazines and other facilities scattered throughout the installation. Cf. J.A. 71 (map). Commander Whitbred explained that ammunition and explosives must be stored and handled so that a fire or explosion at one location will not lead to a “sympathetic detonation” or chain reaction at other sites with munitions. J.A. 61; see J.A. 37; Pet. App. 29. The Commander added that “a terrorist or other lawbreaker would employ this same concept (in reverse) to create maximum damage with minimum outlay of effort” with ESQD data from NMII. J.A. 61; see J.A. 57-58. “[A] lay person with a rudimentary knowledge of mathematics,” he explained, “could easily determine” from NMII’s site-specific ESQD information a wide range of information, including “the precise location of ordnance magazines”; the “types” and “quantities of materials stored” therein; the “locations to target for maximum damage to person-

⁵ In response to petitioner’s contention that some ESQD information from 1995 for the nearby Bangor submarine base was released in February 2001, Commander Whitbred explained that Bangor is a “single-weapon system facility” and that NMII’s task of monitoring and protecting a changing mix of “multiple weapons, weapons components, ammunition and explosives” is “concomitantly more complex.” J.A. 60-61. Although the Commander could not address what might have led to the release of the dated ESQD arcs from Bangor, he explained that NMII has a “completely different” mission, “security parameters, and physical characteristics”; that disclosures of such information are assessed “on a case-by-case basis”; and that the “current state of tensions” in a post-9/11 world counsel against releasing ESQD arcs. J.A. 59-60, 77. Petitioner does not contend that the same ESQD information is at issue in this case, and has not challenged the court of appeals’ conclusion that any release from Bangor does not waive or otherwise affect the Navy’s assertion of Exemption 2 here. See Pet. App. 45-46; cf. Pet. Br. 5.

nel, critical infrastructure and disruption of loading and off-loading of ships”; and “the mission capability of the installation,” including its “battle group capability and operational sustainability.” J.A. 57-58.

The Commander concluded that, “based on my training and experience, 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” and “would create a serious threat to the base and its surrounding communities.” J.A. 62; see Pet. App. 46.

3. The district court granted summary judgment to the Navy. Pet. App. 4-25. The district court concluded that the Ninth Circuit’s Exemption 2 jurisprudence paralleled that of the D.C. Circuit and that, under the D.C. Circuit’s en banc decision in *Crooker v. BATF*, 670 F.2d 1051 (1981), Exemption 2 applies where agency records are “predominantly internal” and their disclosure would “significantly risk circumvention of agency regulation.” Pet. App. 19-20 (citation omitted).

Applying that test, the district court explained that “[petitioner] does not dispute that the ESQD arc information” at issue “was compiled for predominantly internal purposes: to design, array, and construct ammunition storage facilities, and to organize ammunition operations” at NMII. Pet. App. 21. The court also determined that public disclosure of such information “would significantly risk circumvention of law.” *Ibid.* After noting that “[petitioner] does not offer any evidence truly disputing the Navy’s risk assessment,” the court concluded that public release of the disputed ESQD information not only “could cause the information to lose its utility in keeping people and property safe from harm,” but also “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.” *Id.* at 23. The court explained that “releas[ing] this information would be to provide the proverbial fox a virtual map to the chicken coop,” and that the information was therefore exempt from mandatory disclosure under Exemption 2. *Ibid.*

4. The court of appeals affirmed. Pet. App. 26-64.

a. The court of appeals explained that courts have concluded that two general categories of information are protected from disclosure under Exemption 2. First, so-called “Low 2” material includes “mundane employment matters” at an agency that “are not of ‘genuine and significant public interest.’” Pet. App. 32 (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 363 (1976)). Second, so-called “High 2” records involve “more sensitive government information” that are exempt when they relate to “internal personnel rules and practices” the disclosure of which “may risk circumvention of agency regulation.” *Ibid.* (quoting *Rose*, 425 U.S. at 369). The court of appeals explained that this case concerns High-2 material. The court expressly “endorse[d] the D.C. Circuit’s [Exemption 2] analysis” in *Crooker*, and it therefore held that “Exemption 2 shields those personnel materials which are predominantly internal and disclosure of which would present a risk of circumvention of agency regulation.” *Id.* at 32-34.

The court of appeals explained that the en banc D.C. Circuit’s 1981 decision in *Crooker* provided an “extraordinarily comprehensive analysis of the statutory language, legislative history, and caselaw” and “has become the authoritative case” on Exemption 2. Pet. App. 39. At least four other courts of appeals, it explained, have

adopted or relied upon *Crooker*, and its own formal adoption of the same test would create a more uniform standard for Exemption 2 nationwide. *Ibid.* The court added that “[t]he text and history of Exemption 2” show that Congress balanced two potentially competing 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”—and that Congress ultimately decided to exempt from mandatory disclosure “personnel matters that are predominantly internal” when “disclosure presents a risk of circumvention of agency regulation.” *Id.* at 39-40 (quoting *Crooker*, 670 F.2d at 1062).

The court of appeals concluded that “the information sought here is predominately used for the internal purpose of instructing agency personnel on how to do their jobs” and therefore “fit[s] within the statutory language” of Exemption 2. Pet. App. 40-41. “The ESQD arcs at issue,” the court explained, “are essentially an extension of the OP-5 manual, which governs operations at NMII,” and therefore “constitute one part of the internal policies and procedures that NMII personnel are bound to follow when handling and storing explosive ordnance.” *Id.* at 40. The court also concluded that the Navy need not “classify this information in order to keep it internal,” recognizing that classification could present “logistical challenges” where, as here, the Navy has shared ESQD information with local first responders “whose fire, rescue, and police services would be needed in the event of an accident or attack on NMII.” *Id.* at 41. Moreover, the court concluded that the Navy’s “limited, confidential” distribution to first responders for those important “official purposes” maintained the predominantly internal character of the information and

that such interagency cooperation “must be permitted.” *Ibid.*

The court of appeals additionally concluded that publicly disclosing the ESQD information here would risk “circumvention of agency regulation.” Pet. App. 42-46. It explained that the circumvention standard has not been limited to the circumvention of statutes that are enforced against private parties and, instead, applies when disclosure would render the requested documents “operationally useless.” *Id.* at 43 (citation omitted). An agency invoking Exemption 2, the court emphasized, must provide “a detailed affidavit describing how disclosure would risk circumvention of agency regulation.” *Id.* at 45 (citation omitted). In this case, “[t]he 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” and would “greatly aid[]” a “terrorist who wished to hit the most damaging target or a protestor who wished to disrupt the Navy’s monitoring and transportation protocols.” *Ibid.* In short, public disclosure of the ESQD records, which were created “to prevent catastrophic detonations,” would “make catastrophe more likely” and would “quickly render those documents obsolete for the purpose for which they were designed.” *Ibid.* (citation omitted).

b. Judge William Fletcher dissented. Pet. App. 47-64. Judge Fletcher agreed with the majority that “the reasoning of the D.C. Circuit articulated in *Crooker*” is correct and should be followed. *Id.* at 55. He also agreed that Exemption 2 covers records that are “‘predominately internal’ and pertain to ‘personnel rules and practices of an agency.’” *Ibid.* But Judge Fletcher disagreed that the information here satisfied *Crooker*’s

“circumvention requirement” because, in his view, that requirement applies only to circumvention “by a person or entity that is subject to regulation by the agency in question.” *Ibid.* (citation omitted). Although Judge Fletcher did not take issue with the Navy’s assessment of the “risk of harm from release of the [ESQD arc] maps,” he concluded that Exemption 2 does not protect against such harms because “the risk is not that a regulated person or entity will be thereby assisted in avoiding the agency’s regulation.” *Id.* at 59-60.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the ESQD information at issue in this case was protected from mandatory disclosure by FOIA Exemption 2, which protects matters “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. 552(b)(2). The court of appeals followed the en banc D.C. Circuit’s pathmarking decision in *Crooker v. BATF*, 670 F.2d 1051, 1053, 1074 (1981), which held that Exemption 2 applies to materials concerning the “rules and practices governing agency personnel” in the discharge of their governmental duties if they are predominantly for internal agency use and disclosure would “significantly risk[] circumvention” of agency functions. That understanding correctly interprets Exemption 2’s text in light of its statutory and drafting history, is consistent with this Court’s decision in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), and has guided federal courts construing Exemption 2 for nearly thirty years. Indeed, Congress subsequently ratified *Crooker*’s rationale by codifying its test in a closely related FOIA Exemption.

1. Exemption 2’s text demonstrates that the Exemption applies generally to matters concerning internal

rules and practices to guide agency personnel in performing their duties. The term “personnel” refers to the officials who conduct the business of a government agency, and “personnel rules and practices of an agency” refers to the rules and practices that govern such personnel in the discharge of agency functions. That language resulted from Congress’s decision to expand the Exemption’s text to all such rules and practices from simply “employment” rules and practices. The term “internal” in Exemption 2 makes clear that the relevant rules and practices for personnel are those that an agency normally would not properly disclose to the public at large in order to properly execute its functions. Moreover, Exemption 2 applies not only to such “rules and practices” but also to matters that “relate solely” to them. The latter text expands the scope of the Exemption to related matters that are also maintained as “internal” and directly relate to the rules and practices that govern federal personnel.

Congress adopted nearly all of Exemption 2’s text from a predecessor exemption in the APA, which applied to matters that “relat[e] solely to the internal management of an agency.” 5 U.S.C. 1002 (1964). The federal courts had repeatedly construed that exemption to cover matters affecting the public if agencies primarily used the information for internal purposes, such that the information was not needed by members of the public either to avail themselves of agency procedures or to guide their day-to-day affairs to comply with agency requirements. Congress recognized that the text of that predecessor provision had been broadly construed, and it adopted it nearly verbatim in FOIA. Congress thus explained that the Exemption was similar to its APA predecessor and that substituting “personnel rules and

practices” for “management” would simply make the Exemption “more tightly drawn.” See *Rose*, 425 U.S. at 362 (citation omitted).

2. Were this Court to interpret Exemption 2 on a clean slate, it could properly conclude, based on the plain text of the Exemption alone, that the Exemption is broad and protects all matters directly related to an agency’s internal rules and practices for guiding its personnel in the discharge of their duties. The Court’s 1976 decision in *Rose*, however, followed a different interpretive approach that turned principally on the Court’s evaluation of the legislative history of FOIA and, in particular, the balance that Congress struck between public disclosure and the need to maintain the confidentiality of records when disclosure would risk significant harm to governmental interests. That approach has guided federal courts in construing Exemption 2 for nearly 35 years and need not be altered now.

Exemption 2’s drafting history confirms that Congress intended the Exemption to apply where the disclosure of internal rules and practices for agency personnel would risk circumvention of the very agency functions to which those internal rules and practices relate. That common-sense understanding is reflected in hearings, the committee report, and the debate in the House of Representatives, which made clear—with no articulated dissent whatsoever—that Exemption 2 would prevent such circumvention. Although petitioner relies on a Senate Report to support his reading, that Report does not itself purport to articulate an exhaustive understanding of Exemption 2 and does not contradict the earlier understanding in the House of Representatives that Exemption 2 protects against disclosures that significantly risk circumvention of important agency functions.

3. *Crooker* correctly interpreted Exemption 2 to prevent such circumvention, and Congress in 1986 ratified *Crooker*'s rationale in a closely related exemption. Congress amended Exemption 7(E) by expressly extending *Crooker*'s circumvention-of-law rationale to "guidelines for law enforcement investigations and prosecutions" when disclosure would "risk circumvention of the law." See 5 U.S.C. 552(b)(7)(E). Where, as here, Congress amends one part (Exemption 7(E)) of a balanced and integrated set of statutory provisions in light of its understanding of how another pre-existing part (Exemption 2) functions, Congress properly is understood to endorse both the newly enacted provision and the complementary understanding of the pre-existing provision.

4. Petitioner would have this Court dramatically change the law that has guided the courts for nearly 30 years. No court of appeals holding has rejected *Crooker*, and not even the dissenting judge below accepted petitioner's invitation to depart from *Crooker*'s understanding of Exemption 2. This Court should likewise decline petitioner's request to radically alter the Exemption's longstanding, practical scope.

Petitioner fails to account for the Exemption's important function within FOIA's carefully balanced statutory regime. Petitioner, for instance, relies on the assertion that FOIA's exemptions should be narrowly construed. But this "Court consistently has taken a practical approach" in interpreting FOIA's exemptions, in order to strike a "workable balance" between the public's general interest in disclosure and "the needs of Government to protect certain kinds of information from disclosure." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989). This Court has repeatedly made clear that Con-

gress took a balanced, practical approach to disclosure in FOIA that is fundamentally inconsistent with petitioner's disclosure-at-all-cost approach. Each of FOIA's nine exemptions plays a significant and substantive role in protecting against common-sense harms that may flow from public disclosure. Exemption 2 is no exception.

Indeed, this case illustrates that important role that Exemption 2 plays within FOIA. The ESQD information at issue is used internally to guide Navy personnel in the discharge of their ordnance-related duties and thereby to ensure the safe handling of explosives material. Publicly releasing that information would enable individuals to discover numerous matters, including the location, type, and quantity of explosives in NMII's magazines. The Navy's commander for that facility has made clear that disclosure "would jeopardize the safety and security of the storage, transportation and loading of ammunitions and explosives." J.A. 62. Where, as here, disclosure of an agency's internal personnel rules and practices would significantly risk the circumvention of the agency's successful discharge of its lawful functions, Exemption 2 protects those records from public disclosure.

ARGUMENT

EXEMPTION 2 APPLIES WHEN THE DISCLOSURE OF MATTERS DIRECTLY RELATED TO AN AGENCY'S INTERNAL INSTRUCTIONS TO ITS PERSONNEL WOULD SIGNIFICANTLY RISK CIRCUMVENTION OF AGENCY FUNCTIONS

Exemption 2 of FOIA protects from mandatory disclosure matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. 552(b)(2). This Court has concluded that the Exemption

applies at least in part to “trivial matters” in which “the public could not reasonably be expected to have an interest.” *Department of the Air Force v. Rose*, 425 U.S. 352, 365, 369-370 (1976) (citation omitted). But, when records concern matters that are the subject of a “genuine and significant public interest,” the Exemption does not apply, so long as public disclosure would not “risk circumvention of agency regulation.” *Id.* at 369. *Rose* noted that Exemption 2 might protect records when their release could risk such circumvention, but concluded that it “need not consider” that question to resolve the case. *Id.* at 364, 369.

Five years later, the en banc D.C. Circuit issued its pathmarking decision in *Crooker v. BATF*, 670 F.2d 1051 (1981). After a thorough examination of FOIA’s text and drafting history, *Crooker* held that Exemption 2 covers predominantly internal “rules and practices governing agency personnel” if their disclosure “significantly risks circumvention” of federal agency functions. *Id.* at 1053, 1056, 1074; see also *id.* at 1090 (R.B. Ginsburg, J., concurring) (concluding that the court’s “plausible interpretation of the language of Exemption 2” is consistent with FOIA’s “overall design,” its legislative history, *Rose*, other courts, “and even common sense.” (citation omitted)). That test is satisfied, for instance, when the disclosure of internal agency records would threaten to render them “obsolete for the purpose for which they were designed.” *NTEU v. United States Customs Serv.*, 802 F.2d 525, 530 (D.C. Cir. 1986).

Petitioner requests that this Court reject the analysis of Exemption 2 that has consistently guided the fed-

eral courts and federal agencies since *Crooker*.⁶ The Court should not do so: The court of appeals in this case correctly followed *Crooker* and properly concluded that Exemption 2 applies to the Navy’s ESQD maps and data for NMII. FOIA’s text indicates that Exemption 2 applies to records directly related to internal rules and practices to guide agency personnel in the discharge of governmental functions. FOIA’s drafting and legislative history likewise confirm that *Crooker*’s focus on the risk of circumvention identifies the policy animating Exemption 2’s application to internal agency records that deal with non-trivial subjects. *Rose* itself supports the conclusion that *Crooker*’s understanding of Exemption 2 comports with the carefully balanced scheme that Congress established in FOIA. Petitioner’s reading of the Exemption, by contrast, would leave a significant hole in Congress’s carefully calibrated statutory framework and substantially harm the government’s ability to discharge important functions effectively.

⁶ Petitioner has not identified any holding by any court of appeals rejecting *Crooker*. See, e.g., *Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1080 (6th Cir. 1998) (finding *Crooker*’s textual analysis “sound and persuasive” and concluding in the Low-2 context that protected records must “relat[e] predominantly to an agency’s internal ‘rules and practices’ for personnel”); *Audubon Soc’y v. USFS*, 104 F.3d 1201, 1204 & n.1 (10th Cir. 1997) (recognizing that several courts of appeals follow *Crooker*’s High-2 test, but finding that disputed records would not satisfy that test “even if we were to adopt [*Crooker*’s] analysis”). And although courts of appeals before *Crooker* employed varying rationales, they consistently concluded that FOIA does not require disclosures risking circumvention of agency functions. See *Hardy v. BATF*, 631 F.2d 653, 656 (9th Cir. 1980) (discussing cases).

A. The Text Of Exemption 2 Covers Records Concerning An Agency’s Internal Rules And Practices For Its Personnel To Follow In Performing Governmental Functions

Exemption 2 applies to matters that are “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. 552(b)(2). The three central textual components of the Exemption—“personnel rules and practices,” “internal,” and “related solely”—demonstrate that Exemption 2 by its terms encompasses records concerning an agency’s internal rules and practices for its personnel to follow in the discharge of their governmental functions.

First, the term “personnel” normally refers to either “a body of persons employed in some service” or “persons of a particular (as professional or occupational) group.” *Webster’s Third New International Dictionary* 1687 (1961) (*Webster’s*); see *Random House Dictionary* 1075 (1966) (“the body of persons employed in any work, undertaking, or service”). In governmental contexts, the term normally refers to the officials who conduct the business of a government agency. See, e.g., S. Rep. No. 813, 89th Cong., 1st Sess. 3, 8 (1965) (*1965 Senate Report*) (explaining that “definitive guidelines” should govern actions by “agency personnel” and discussing judicial remedies for wrongful FOIA withholding by “agency personnel”). When used in conjunction with “rules and practices” and the limiting phrase “of an agency,” the phrase “personnel rules and practices of an agency” is logically understood to mean an agency’s rules and practices for its personnel. See *Crooker*, 670 F.2d at 1056; cf. *Webster’s* 1687 (defining “personnel carrier” as a “vehicle for transporting military personnel”). Such rules and practices provide instructions to guide the manner

in which agency personnel discharge their official duties and perform governmental functions.

Second, the term “internal” reflects that the personnel rules and practices covered by Exemption 2 are those that are disseminated and used within the agency, rather than for external consumption or guidance. “Internal” typically means “existing or situated within the limits * * * of something,” and carries a meaning that is “opposed to external.” *Webster’s* 1180 (emphasis omitted); see *Random House Dictionary* 743. An agency’s “internal” rules and practices for its personnel accordingly refers to those rules and practices concerning the performance of agency functions that are normally kept within the agency itself and not disclosed externally.

Finally, the Exemption’s application to matters that are “related solely” to an agency’s internal rules and practices for its personnel extends beyond just the rules and practices themselves to matters that are “associated” with or “connected” to them. See *Random House Dictionary* 1211 (defining “related”); see also *Webster’s* 1916. The term “solely” emphasizes that the relationship of such matters to an agency’s internal personnel rules and practices must be direct. See *id.* at 2168 (defining “solely” to mean “to the exclusion of alternate or competing things”). Thus, those related matters, like the rules and practices themselves, must also be maintained for an agency’s internal use.

The text of Exemption 2 accordingly captures matters that are maintained by an agency for the internal use of its personnel, so long as those matters are directly related to internal rules and practices that an agency establishes to guide its personnel in the performance of various agency functions. Most agency func-

tions can, of course, affect the public, and Exemption 2 by its terms is not limited to those matters concerning rules and practices that have no impact on the public at large. Instead, its focus is on the agency’s need to confine the material to internal use for the purpose of instructing its personnel in the successful execution of governmental functions.

B. FOIA’s Statutory History Confirms The Scope Of Exemption 2 Indicated By Its Text

Exemption 2’s statutory history confirms the that reading of its text. Congress did not draft Exemption 2 on a clean slate. Rather, it enacted FOIA in 1966 as an amendment to Section 3 of the Administrative Procedure Act (APA), ch. 324, § 3, 60 Stat. 238 (5 U.S.C. 1002 (1964)). See FOIA, Pub. L. No. 89-487, 80 Stat. 250 (amending APA § 3); see also *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989); *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 12 (1974).⁷ Section 3 had previously required that agencies publish or make publicly available certain agency records, but expressly exempted from those requirements matters “relating solely to the

⁷ When Congress enacted FOIA in July 1966, the APA was codified at 5 U.S.C. 1001 *et seq.* (1964). Two months later, Congress completed the revision and recodification of Title 5 by reenacting it as positive law. The recodification repealed the APA, ch. 324, 60 Stat. 237, and reenacted the APA’s provisions without substantive change at their current location in 5 U.S.C. 551 *et seq.* and 701 *et seq.* But Congress did so without including FOIA’s then-recent amendments or any other statute enacted after June 1965. See Act of Sept. 6, 1966, Pub. L. No. 89-554, §§ 1, 7(a), 8, 80 Stat. 381-388, 392-393, 631, 633. Congress therefore repealed FOIA in 1967 and simultaneously codified its provisions as positive law at 5 U.S.C. 552. See Act of June 5, 1967, Pub. L. No. 90-23, §§ 1, 3, 81 Stat. 54-56.

internal management of an agency.” 5 U.S.C. 1002 (1964). Congress recognized that “[t]he sweep of that wording” had led to the withholding of a wide range of agency records. *Rose*, 425 U.S. at 362. It nevertheless modeled Exemption 2 directly on that broad text, copying the exemption nearly verbatim while substituting the phrase “personnel rules and practices” for the term “management.” See *id.* at 362-363.

Where “judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, [Congress’s] intent to incorporate * * * [those] judicial interpretations.” *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978)); accord *Rowe v. New Hampshire Motor Transp. Ass’n*, 552 U.S. 364, 370 (2008); see *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1616 (2010). That principle applies with particular force here, because courts had broadly construed the text of Exemption 2’s direct predecessor and Congress was aware of that construction and chose to employ much of the same text in FOIA.

When Congress enacted FOIA, courts had already construed the APA’s exemption for matters “relating solely to the internal management of an agency,” 5 U.S.C. 1002 (1964), as covering matters pertaining to an agency’s internal management functions, even when those functions affected members of the public. The relevant test for whether matters “relat[ed] solely” to the agency’s “internal” management was whether public disclosure was necessary to “inform [private] parties of the procedure which is to be taken” in an agency, or otherwise to “affect[] any steps which interested parties must take or not take” to secure agency action or comply

with agency requirements. See *T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F. Supp. 777, 786 (S.D. Tex. 1960) (three-judge court), *aff'd sub nom. Herrin Transp. Co. v. United States*, 366 U.S. 419 (1961) (per curiam). Unless “knowledge of [the matter was] needed to keep the outside interests informed of the agency’s requirements * * * as a guide in the conduct of *their* day-to-day affairs, and to instruct them in regard to the presentation to the agency of any such subject for impartial consideration or action thereon,” the matter was understood to “relat[e] solely” to the agency’s own “internal” management functions. See *United States v. Hayes*, 325 F.2d 307, 309 (4th Cir. 1963) (per curiam) (emphasis added).

The en banc D.C. Circuit, for instance, addressed the scope of the APA exemption when an individual who was employed at a privately operated cafeteria within a “naval ordnance” facility challenged regulations that authorized the facility’s commander to rescind the identification badge she needed for access to the facility and her job. *Cafeteria & Rest. Workers Union v. McElroy*, 284 F.2d 173, 175, 178 & n.11 (1960), *aff'd*, 367 U.S. 886 (1961). As relevant here, the court concluded that the regulations “relat[ed] solely to the internal management of an agency,” even though they affected private parties, because such information concerning “naval operations” could not be deemed “public property” of the sort that the APA was intended to disclose. *Id.* at 179. Other courts similarly concluded that the designation of an official to certify agency records for external use against a private litigant related solely to “internal management,” *Hayes*, 325 F.2d at 309, and that an agency’s “methods of procedure” for issuing orders were exempt because they were not matters to which affected parties

were required to “resort” in their dealings with the agency, *Foreman & Clark, Inc. v. NLRB*, 215 F.2d 396, 403 & nn.4-5, 410 (9th Cir.), cert. denied, 348 U.S. 887 (1954).

As the Fourth Circuit explained in *Hayes*, the fact that an official action will be “used outside of the [agency]” did “not change its character” as being related solely to internal agency management. 325 F.2d at 309. “Almost every act in the functioning of a Government agency will ultimately be felt beyond its precincts,” the court reasoned, and “[i]f this possible touch with the outside removes such part of the agency’s work from the category of ‘internal management,’ then the statutory exception would be meaningless.” *Ibid.*⁸

The import of those decisions concerning “[t]he sweep of that wording” in the APA’s pre-FOIA exemption, *Rose*, 425 U.S. 362, was clear to the Congress that enacted FOIA. The House Report accompanying FOIA, for instance, concluded that the phrase “relat[ing] ‘solely to the internal management of the agency’” was “broad” and authorized the withholding of records “rang[ing] from the important to the insignificant.” H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5 (1966) (1966

⁸ The Attorney General’s Manual on the APA did not attempt to specify the precise scope of Section 3’s internal-management exemption. It noted that where “a matter is solely the concern of the agency proper, and therefore does not affect the members of the public to any extent, there is no requirement for publication under section 3.” Department of Justice, *Attorney General’s Manual on the Administrative Procedure Act* 18 (1947). But beyond that, the manual suggested that agencies err on the side of publication when in “doubt” as to whether the exemption applied. *Ibid.*; cf. *id.* at 44 (concluding that the phrase “rest solely” in another APA provision means rest “mainly”). The scope of Section 3’s internal-management exemption was therefore subsequently defined in the cases discussed above.

House Report). The floor debate on the bill likewise acknowledged that the APA’s predecessor exemption imposed no “reasonable limitations” on agency withholding. 112 Cong. Rec. 13,644-13,645 (1966) (statement of Rep. King).⁹ And although Congress was “dissatisf[ie]d” with the “sweep” of that exemption, it chose not to abandon the exemption wholesale. See *Rose*, 425 U.S. at 362 (“The phrasing of Exemption 2 is traceable” to its predecessor exemption). Congress simply replaced the term “management” with “personnel rules and practices” and described that substitute text as providing “‘more tightly drawn’ exempting language.” *Ibid.* (quoting S. Rep. No. 1219, 88th Cong., 2d Sess. 12 (1964) (1964 *Senate Report*)).

Congress therefore maintained the broad understanding of the APA’s predecessor text for matters that “relate solely” to “internal” agency operations but narrowed those operations from any form of agency “management” to those involving the agency’s internal “personnel rules and practices.” That change gave the exemption “a narrower reach,” *Rose*, 425 U.S. at 363, but, as explained above, its application to internal “personnel rules and practices” meant that Exemption 2 would continue to apply to a significant category of records di-

⁹ Representative Moss, who played a leading role in enacting FOIA and chaired the House subcommittee that held extensive hearings, explained that “the phrase ‘internal management’ is capable of being—and has been—construed to cover the withholding of everything” not already captured by other APA exemptions. John E. Moss, *Public Information Policies, the APA, and Executive Privilege*, 15 Admin. L. Rev. 111, 113 (1963) (emphasis added). That text, he added, had even been read to encompass an agency’s “budget” plans for “spending taxpayers’ money,” which was “properly the concern of the citizen” and should be disclosed. *Ibid.*

rectly related to an agency’s internal instructions to its personnel.

C. This Court’s Decision in *Rose* Supports The Conclusion That Exemption 2 Applies Where Disclosure Of Internal Rules And Practices Would Circumvent Agency Regulation

If this Court were to construe Exemption 2 on a clean slate, it could properly conclude based on the text of Exemption 2 alone that it protects from disclosure all matters directly related to an agency’s internal rules and practices for guiding its personnel in the discharge of their governmental functions. The ESQD information at issue in this case would fall squarely within Exemption 2 as so construed. This Court’s 1976 decision in *Rose*, however, followed a different interpretive approach to Exemption 2 that turned principally on the Court’s evaluation of FOIA’s legislative history, reflecting the competing values that Congress sought to balance in FOIA’s exemptions and, in particular, in Exemption 2. See 425 U.S. at 362; *id.* at 360-369. That approach to Exemption 2 has guided the lower courts for nearly 35 years and need not be altered now.

Rose reasoned that the “clear legislative intent” underlying FOIA is “to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.” 425 U.S. at 365 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975)). The Court recognized that, on the one hand, Congress sought to promote greater public access to agency records and, on the other, specified in exemptions the “types of information” that Congress determined “the Executive Branch must have the option to keep confidential.” *Id.* at 361 (quoting *EPA v. Mink*,

410 U.S. 73, 80 (1973)). *Rose* accordingly emphasized that Congress designed FOIA to promote the “fullest responsible disclosure” by creating “a workable formula” that “balances[] and protects all [such] interests” though FOIA’s exemption regime. *Id.* at 361-362 (quoting *Mink, supra*, which quotes *1965 Senate Report 3*) (emphasis added). The Court construed Exemption 2 in that light.

After concluding that Exemption 2’s drafting history showed that Congress intended to give it a “narrower reach” than its similarly worded APA predecessor, *Rose*, 425 U.S. at 362-363, the Court turned directly to the House and Senate Reports addressing Exemption 2. *Id.* at 363. The Court ultimately concluded that it would “rely upon the Senate report” in circumstances where, as in *Rose*, disclosure would not risk “circumvent[ion]” of “agency regulation.” *Id.* at 367.

In that context, where no significant governmental interest counseled against disclosure, the Court agreed with the D.C. Circuit’s conclusion in *Vaughn* that the Senate Report’s non-exhaustive list of “[e]xamples” that “may be” covered by the Exemption, 425 U.S. at 363 (quoting *1965 Senate Report 8*), suggests that “the line sought to be drawn” was between the types of “trivial matters” listed as examples—*i.e.*, rules concerning parking, lunch hours, and sick leave—and “more substantial matters which might be the subject of legitimate public interest.” *Id.* at 365 (quoting *Vaughn*, 523 F.2d at 1142). In other words, the Court read the Senate Report to indicate that Exemption 2 strikes the balance in favor of disclosure when there is a significant public interest in the matter and no countervailing interest favoring withholding. It similarly agreed with *Vaughn*’s conclusion that because “disclosure would not significantly harm

specific governmental interests” in that context, any conflict “in the legislative history” should be resolved as “favoring disclosure.” *Id.* at 365-366 (quoting *Vaughn*).

The Court, however, was careful to explain that it agreed with the Second Circuit that it was “unnecessary to take ‘a firm stand on’” whether the Senate or House Report was a more reliable indication of congressional intent generally or in other contexts. *Rose*, 425 U.S. at 367 (quoting *Rose v. Department of the Air Force*, 495 F.2d 261, 265 (2d Cir. 1974)). It reasoned that the “primary concern” reflected in the House Report was that Exemption 2 should operate to “prevent the circumvention of agency regulations” that could result from publicly disclosing “the procedural manuals and guidelines used by the agency in discharging its regulatory function.” *Id.* at 364. The House Report therefore addressed contexts in which there was a risk of circumvention on the other side of the FOIA balance. Because *Rose* did not involve any such risk, the Court concluded that it “need not consider” whether “Exemption 2 [would apply] in such circumstances.” *Ibid.*; see also *id.* at 366-367.

As a result, the Court agreed with the Second Circuit’s “conclu[sion] that under ‘the Senate construction of Exemption Two, the [Air Force Academy disciplinary] case summaries [at issue in *Rose*] clearly fall outside its ambit’ because ‘such summaries have a substantial potential for public interest outside the Government.’” 425 U.S. at 367 (quoting 495 F.2d at 265) (ellipsis and brackets omitted). The Court further agreed that—“at least where the situation is not one where disclosure may risk circumvention of agency regulation”—the public-interest factor “‘differentiates the summaries from matters of daily routine like working hours, which, in the

words of Exemption Two, do relate “*solely* to the internal personnel rules and practices of an agency.”” *Id.* at 369 (quoting 425 F.2d at 265) (brackets omitted; emphasis in court of appeals’ opinion).

The Court’s interpretive approach in *Rose* reflected FOIA’s fundamental balance between the public’s interest in disclosure and countervailing interests in avoiding meaningful harm to governmental functions, and the Court’s evaluation of the legislative history was informed by that balance. The Senate Report lists illustrative contexts in which no harm from disclosure would result, whereas the House Report addresses contexts in which both sides of the balance are in play. This case concerns the latter and, following this Court’s lead in *Rose*, we turn to the relevant legislative history.

D. Exemption 2’s Drafting History Demonstrates That Congress Intended To Exempt From Disclosure Internal Records For The Use Of Agency Personnel When Public Disclosure Would Circumvent Agency Functions

Exemption 2’s drafting history offers three key lessons. First, Congress considered but rejected a narrower exemption targeting “internal *employment* rules and practices.” That considered rejection significantly undermines petitioner’s central premise in this case: that the Exemption applies only to the internal “employee relations matters” of an agency (Pet. Br. 12). Second, the legislative history shows that consideration of the Exemption in the House of Representatives repeatedly emphasized—in hearings, the committee report, and the floor debate—that Exemption 2 applies when disclosure would risk circumvention of the very agency functions to which the records relate. Those descriptions were never contradicted, and petitioner

identifies nothing that detracts from that uniform understanding. Finally, the only specific description of Exemption 2 in the Senate was a carefully worded sentence in a report that did not even purport to provide an exhaustive description of the Exemption. That report tentatively stated that “[e]xamples” of internal personnel rules and practices protected by the Exemption “may be” matters such as rules regulating employee parking, lunch hours, and sick leave. *1965 Senate Report* 8. Nothing in that description contradicts the otherwise uniform understanding that Exemption 2 applies when disclosure would risk circumvention of the very governmental function addressed in the responsive agency records.

1. “[T]he principal source for the bill ultimately enacted as the Freedom of Information Act” was S. 1666, which Senator Long introduced in the 88th Congress. *Rose*, 425 U.S. at 375 n.14; see *1965 Senate Report* 4; 109 Cong. Rec. 9946 (1963). The drafting history of S. 1666, which developed the language Congress enacted as Exemption 2, demonstrates that Congress specifically considered and rejected a proposal to limit the Exemption to employment-related matters and, instead, adopted language that more broadly exempts internal agency rules and practices governing the conduct of agency personnel.¹⁰

As introduced, S. 1666 proposed narrowing the existing internal-management exemption from the APA’s public-access requirement by limiting it to matters that

¹⁰ This Court has repeatedly looked to the legislative history surrounding S. 1666 to construe FOIA’s text. See, e.g., *Rose*, 425 U.S. at 362-363, 375 n.14; *Administrator, FAA v. Robertson*, 422 U.S. 255, 264 & n.8 (1975); *Bannerkraft Clothing Co.*, 415 U.S. at 18 n.18; *Mink*, 410 U.S. at 90 n.17.

“relate[] solely to the internal employment rules and practices of any agency.” 109 Cong. Rec. at 9962; S. 1666, 88th Cong., 1st Sess. 3 (1963) (§ 3(b)(3)). That restriction prompted opposition from the Executive Branch, which explained that protecting only “internal *employment* rules and practices” would injure important government functions. Norbert Schlei, the Assistant Attorney General for the Office of Legal Counsel, testified that the proposed change would not, outside the specific context of “employment rules and practices,” permit the government to withhold internal “instructions to agency personnel as to how to operate” or what “techniques to use” in performing their duties. *Freedom of Information: Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm.*, 88th Cong., 1st Sess. 201-202 (1963) (1963 Senate Hearings). The Assistant Attorney General explained that disclosing an agency’s “internal agency instructions to its staff” would, for instance, risk “render[ing] the investigation function useless” by revealing the “agency’s instructions to its investigators as to the means to be employed to detect violations.” *Id.* at 201.

Senator Long, who chaired the subcommittee that held hearings on S. 1666, had made clear in those hearings that “[t]he committee, * * * and the Congress, wouldn’t want to do anything that would seriously hurt the law-enforcement provision of any agency.” 1963 Senate Hearings 166. Consistent with that assurance, the Senate Judiciary Committee reported S. 1666 with an amendment that expanded Exemption 2 by deleting the phrase “internal employment rules and practices” and replacing it with “internal personnel rules and practices.” 110 Cong. Rec. 17,086 (1964); see 1964 Senate

Report 2 (amendment). That revised Exemption, the committee explained, was “similar” to the APA’s existing exemption for internal management rules and practices, “but more tightly drawn.” *Id.* at 12; see *Rose*, 425 U.S. 362.

The Senate subsequently adopted that amendment and passed S. 1666. See 110 Cong. Rec. at 17,086-17,089, 17,666-17,668. The bill was then referred to the House Judiciary Committee, *id.* at 17,852, which was considering a parallel bill that (like the original version of S. 1666) would have limited Exemption 2 to matters “relate[d] solely to the internal employment rules and practices of any agency.” H.R. 8046, 88th Cong., 1st Sess. 3 (1963) (§ 3(b)(3)); see 109 Cong. Rec. at 15,044 (bill introduced by Rep. Fascell). The House of Representatives, however, was unable to pass S. 1666 before the end of the 88th Congress because the bill “reached [it] too late for action.” *Rose*, 425 U.S. at 362-363.

2. “Substantially the same measure was reintroduced in the 89th Congress as S. 1160 and H.R. 5012.” *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 357 n.20 (1979). Senator Long and Representative Moss simultaneously introduced those bills on February 17, 1965. 111 Cong. Rec. 2780, 2946 (1965). Senator Long explained that the Senate “committee and our staffs are working with Representative Moss and his staff” in order to “mak[e] every effort to get one or the other or both [bills] through.” *Administrative Procedure Act: Hearings on S. 1160 Before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. 226 (1965) (1965 Senate Hearings). Reflecting that coordinated effort, both bills took up where S. 1666 left off, adopting S. 1666’s revised text for Exemption 2 that exempted matters “related solely to

the internal personnel rules and practices of any agency.” S. 1160, 89th Cong., 1st Sess. 5 (1965) (§ 3(e)(2)); H.R. 5012, 89th Cong., 1st Sess. 3 (1965) (§ 161(c)(2)).¹¹

a. In March and April 1965, Representative Moss presided over the first hearings in the 89th Congress to address the pending FOIA proposals, which were based “on many years of study” in the House of Representatives, the Senate, and the Executive Branch. See *Federal Public Records Law: Hearings on H.R. 5012 Before a Subcomm. of the House Comm. on Gov’t Operations*, 89th Cong., 1st Sess. Pt. 1, at 1 (1965) (*1965 House Hearings*). Assistant Attorney General Schlei again testified, indicating that the Department of Justice was still “inclined to be critical” of the revised text of Exemption 2. *Id.* at 29.

Representative Moss addressed that lingering concern by clarifying that the revised text exempting “internal personnel rules and practices” (*1965 House Hearings* 2) was “intended to cover * * * instances such as the manuals of procedure that are handed to [a bank] examiner * * * , or the guidelines given to an FBI agent.” *Id.* at 29. Assistant Attorney General Schlei agreed that the bill should protect such instructions to agency personnel “who, if they are going to operate in expectable ways, cannot do their jobs.” *Id.* at 30. He therefore suggested that “the word ‘personnel’ should

¹¹ On the same day, Representative Fascell introduced a separate bill, which like several other simultaneously introduced House bills, was identical to H.R. 5012. See *1965 House Hearings* 2-3. That bill also abandoned the “employment”-rules-and-practices limitation in Representative Fascell’s earlier FOIA bill and, instead, broadened Exemption 2 to cover “internal personnel rules and practices.” H.R. 5013, 89th Cong., 1st Sess. 3 (1965) (§ 161(c)(2)).

be stricken” due to his fear that the revised Exemption might still be read to “connot[e]” a more limited category of “employee relations, employee management rules and practices of an agency.” *Id.* at 29-30. Representative Moss, however, expressed reluctance to make that change because deleting the term “personnel” might “open the barn door to everything.” *Ibid.*

The subsequent House Report on S. 1160 discussed the House’s “extensive hearings on similar legislation—H.R. 5012 and [other] comparable House bills”—and specifically cited Representative Moss’s colloquy with Assistant Attorney General Schlei to illustrate the scope of Exemption 2. *1966 House Report* 4, 10 & n.14 (citing *1965 House Hearings* 29-30); see *Rose*, 425 U.S. at 364.¹² The Report explained that “[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure” under Exemption 2. *1966 House Report* 10. And, echoing the Senate Report’s earlier recognition that the Exemption’s revised text in S. 1666 was “similar” to but “more tightly drawn” than the APA’s predecessor exemption for “internal management” matters (pp. 32-33, *supra*), the House Report added that Exemption 2 “would not cover *all* ‘matters of internal management’ such as employee relations and working conditions and routine administrative procedures.” *Ibid.* (emphasis added).

b. In May 1965—after the House Government Operations Committee held its hearings—Senator Long presided over the Senate’s hearings on S. 1160 and related bills, which built upon the parallel hearings held in the

¹² This Court has repeatedly relied upon the House hearings on H.R. 5012 to construe various provisions in FOIA. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 299 n.29 (1979); *Rose*, 425 U.S. at 375 n.14, 378 n.16; *Robertson*, 422 U.S. at 264 n.8.

House of Representatives. *1965 Senate Hearings* 1. The Senator noted that “Representative Moss has been very helpful” in the legislative process, emphasizing that the committees and staffs under his and Representative Moss’s direction were collaborating to pass one or both of their parallel FOIA bills. *Id.* at 226. Several government and other witnesses briefly discussed Exemption 2 during the Senate’s hearing, but no Senator present commented on that testimony or otherwise addressed the intended “scope of Exemption 2.” *Crooker*, 670 F.2d at 1058 & nn.17-19 (concluding that the Senate hearings “provide little enlightenment as to Congress’ intent concerning Exemption 2”).

On October 4, 1965, the Senate Judiciary Committee reported S. 1160 without revising further the language of Exemption 2. 111 Cong. Rec. at 26,820-26,821; *1965 Senate Report* 8. The Senate Report emphasized that it is “necessary for the very operation of our Government to allow it to keep confidential certain material” and that S. 1160 sought to “balance the opposing interests” to produce a “workable formula” that would “protect[] all interests” and yield “the fullest responsible disclosure.” *Id.* at 3. The Report briefly addressed Exemption 2. It stated that the Exemption “relates only to the internal personnel rules and practices of an agency” and added that “[e]xamples 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.” *Id.* at 8. Nine days later, the Senate adopted the Committee’s amendments and passed S. 1160 without debate. 111 Cong. Rec. at 26,820-26,823.

c. The House Government Operations Committee reported S. 1160 to the full House of Representatives in May 1966, see *1966 House Report*, and, in June 1966, the

House of Representatives debated and passed the bill. 112 Cong. Rec. at 13,640-13,662. Representative Moss, who managed the debate, reassured “those few who may have doubts as to the wisdom of this legislation” that his committee “ha[d], with the utmost sense of responsibility, attempted to achieve a balance between a public need to know and a necessary restraint upon access to information” to ensure the “effective operation of the Government.” *Id.* at 13,641; cf. *id.* at 13,655 (statement of then-Rep. Dole) (bill’s exemptions “protect nine categories of sensitive Government information” to “afford[] the safeguards necessary to the effective functioning of Government”). Members repeatedly emphasized that the APA’s prior exemption for “internal management” utilized “vague” terms that did not sufficiently constrain the scope of the exemption. See *id.* at 13,642 (Rep. Moss); *id.* at 13,644-13,645 (Rep. King) (APA’s “internal management” exemption did not provide any “reasonable limitations” on the scope of exempt material); *id.* at 13,646-13,647 (Rep. Reid) (bill’s exemptions are “more narrow[]” than APA’s prior exemptions for, *inter alia*, “[m]atters of ‘internal management’”). The debate also focused on several exemptions, including Exemption 2, which the House of Representatives was told would continue to “prevent[] the disclosure” of “‘sensitive’ Government information” such as an “[i]ncome tax auditors’ manual,” because that information “would be protected under No. 2” as “related solely to internal personnel rules and practices” of an agency. *Id.* at 13,659 (statement of Rep. Gallagher).

d. When Congress enacted FOIA, the import of Exemption 2 was apparent to the Department of Justice, which had been involved throughout the legislative process. The Attorney General’s contemporaneous analysis

of Exemption 2 explained that it concerns “those matters which are for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public without substantial prejudice to the effective performance of a significant agency function.” Department of Justice, *Attorney General’s Memorandum on the Public Information Section of the Administrative Procedure Act* 30 (June 1967). Accordingly, the Attorney General stated, the Exemption applies to such internal records “to the extent that the proper performance of necessary agency functions requires such withholding” but, “when there is no strong reason for withholding,” the Exemption “should not be invoked.” *Id.* at 31.

3. Petitioner argues (at 22-24) that this Court should ignore the repeated descriptions of Exemption 2 in the House of Representatives for two principal reasons. First, petitioner asserts (at 22) that “[t]his Court agreed” with several lower courts that concluded that the Senate Report “is the more authoritative and controlling” expression of congressional intent. That is incorrect. The Court expressly declined “to take ‘a firm stand on the issue.’” *Rose*, 425 U.S. at 367 (citation omitted). Moreover, although the Court indicated its general agreement that it was appropriate to “rely upon the Senate report” because that Report was “before both houses of Congress” and the House Report was not, the Court emphasized that its agreement rested on the view that “the primary focus of the House Report was on exemption of disclosures that might enable the regulated to circumvent agency regulation,” and that particular issue was not before the Court. *Id.* at 366-367 (citation omitted). Thus, for contexts in which no risk of circumvention is present, the Court simply chose “to rely

upon the Senate Report’ *in this regard.*” *Id.* at 367 (emphasis added).¹³

Second, petitioner incorrectly suggests (at 23-24 & n.7) that Members of the House of Representatives improperly sought to contradict statements in the Senate Report regarding the scope of Exemption 2 without changing the text of the bill. The understanding of Exemption 2’s text in the House Report not only *predates* the Senate Report, it is consistent with the description of Exemption 2 in the earlier Senate Report that developed the relevant text. When the Senate finalized the language of Exemption 2 by expanding its coverage from only internal “employment” rules and practices to internal “personnel” rules and practices, it recognized that the Exemption was “similar” to the APA’s broad exemption for internal agency “management,” just “more tightly drawn.” See pp. 32-33, *supra*. That understanding itself contradicts petitioner’s view that Exemption 2 targets only a small set of trivial employment matters. Moreover, Senator Long and Representative Moss closely coordinated their subsequent legislative efforts based on the same text for Exemption 2 and, well before the 1965 Senate Report, Representative Moss

¹³ Petitioner places undue reliance (at 22) on *Rose*’s observation that, in 1976, nearly all courts to have considered the differences between the Reports had concluded that the Senate Report more accurately reflected the scope of Exemption 2. See *Rose*, 425 U.S. at 364 & n.5 (citing decisions by two courts of appeals and two district courts). *Rose* expressly declined to decide whether those courts were correct, and none of those pre-*Crooker* decisions comprehensively surveyed Exemption 2’s drafting history. The decisions, for instance, neither addressed Congress’s decision to expand Exemption 2 from just internal “employment rules and practices” to “personnel” rules and practices, nor properly analyzed the role of the APA exemption from which Exemption 2 took its text.

explained the intent underlying that exemption. See pp. 33-35, *supra*.

The subsequent Senate Report does not contradict the view that Exemption 2 applies when disclosure would risk circumvention of agency functions. By its own terms, the Report simply lists “[e]xamples” of some matters that “may be” protected by Exemption 2; it does not purport to define the Exemption’s limits. See pp. 36-37, *supra*. The Senate then passed the FOIA bill without any debate suggesting that any Senator understood the Report’s list of examples to reflect the limits of Exemption 2. 111 Cong. Rec. at 26,820-26,821.

In that context, where nothing in the Senate’s consideration of Exemption 2 contradicted the understanding articulated in the House of Representatives, and where the House and Senate proponents closely coordinated their joint efforts to enact FOIA, there is no sound basis to conclude that the House Report reflects anything but the prevailing understanding of Exemption 2 within Congress when it enacted FOIA.¹⁴

E. Crooker Correctly Construed Exemption 2 And Congress Has Since Ratified Crooker’s Interpretation Of Exemption 2

1. The en banc D.C. Circuit correctly concluded in *Crooker* that Exemption 2 applies to records concerning “rules and practices governing agency personnel” that

¹⁴ The House Report indicates that Exemption 2 would not cover “all ‘matters of internal management’ such as employee relations and working conditions and routine administrative procedures.” 1966 *House Report* 10. That understanding that not “all” such matters would be exempt from disclosure is consistent with this Court’s holding in *Rose* that employment-related matters are not exempt from disclosure if there is a significant public interest in disclosure and no countervailing government interest warranting withholding.

meet the test of “predominant internality” if disclosure would “significantly risk[] circumvention” of federal agency functions. 670 F.2d at 1053, 1074. As then-Judge Ginsburg explained, that conclusion comports with “the language of Exemption 2” and properly reflects “‘the overall design of FOIA, the explicit comments made in the House, the cautionary words of the Supreme Court in *Rose*, and even common sense.’” *Id.* at 1090 (R.B. Ginsburg, J., concurring).

The “words ‘personnel rules and practices’ encompass not merely minor employment matters, but may cover other rules and practices governing agency personnel” in the discharge of their governmental duties. *Crooker*, 670 F.2d at 1056. Although “personnel” in some contexts may properly be understood more narrowly to concern only “employment” matters, Congress, as explained, specifically rejected such a textual limitation for Exemption 2. See pp. 32-33, *supra*.

Crooker also correctly concluded that the Exemption’s application to matters that “relat[e] solely” to an agency’s “internal” rules and practices for its personnel indicates that the Exemption covers records that are “designed to establish rules and practices for agency personnel” in performing agency functions that cannot be publicly released without “risk[ing] circumvention” of those functions. 670 F.2d at 1056-1057, 1073. That understanding follows directly from the interpretation of Exemption 2’s direct predecessor in the APA for matters “relating solely” to an agency’s “internal” management. See pp. 22-25, *supra*. Like those pre-FOIA decisions, *Crooker* makes clear that Exemption 2 applies even though the matters at issue “have some effect on the public-at-large,” because “there are few events in our society today that occur without so much as a tiny

ripple effect outside their area of prime impact.” 670 F.2d at 1073 (citation omitted). And when such matters cannot be disclosed without “significantly risk[ing]” the circumvention of agency functions, *id.* at 1074, the records at issue qualify as matters that, by necessity, relate solely to those agency rules and practices that are properly “internal” and not for external distribution.

2. a. This Court should uphold *Crooker*’s interpretation of Exemption 2 for an additional reason: Congress has itself approved *Crooker*’s analysis in subsequent legislation. Congress’s 1986 amendment to Exemption 7(E) modified that exemption to apply to records compiled for law enforcement purposes if producing the records “would disclose guidelines for law enforcement investigations or prosecutions” and “disclosure could reasonably be expected to *risk circumvention of the law.*” 5 U.S.C. 552(b)(7)(E) (emphasis added); see Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. N, § 1802(a), 100 Stat. 3207-49 (1986 Act). The legislative history of the 1986 Act makes clear that the amendment was directly modeled on “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).” 132 Cong. Rec. 29,620 (1986) (reproducing S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) (1983 Senate Report)). As the Seventh and Ninth Circuits have explained, that 1986 amendment indicates that “*Crooker* accurately expresses congressional intentions” regarding Exemption 2, “[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.”

Kaganove v. EPA, 856 F.2d 884, 889 (7th Cir. 1988), cert. denied, 488 U.S. 1011 (1989); accord Pet. App. 37.

To be sure, ordinarily “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007) (citation omitted). But where, as here, Congress amends one part (Exemption 7(E)) of a balanced and integrated set of statutory provisions in light of its understanding of how another pre-existing part (Exemption 2) functions, Congress is properly understood to endorse both the newly enacted provision and the complementary understanding of the pre-existing provision. Closely related, subsequent enactments like the amendment to Exemption 7(E) “can shape or focus” the “range of plausible meanings” that may be given to Exemption 2 as originally enacted. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). That reasoning holds particular force here, because Congress clearly understood Exemption 2 to encompass a particular test that it expressly adopted in a related section of the same statute.¹⁵

¹⁵ This Court in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), followed a similar course. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), this Court held that Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, imposes primary securities fraud liability but not aider-and-abettor liability. *Stoneridge* recognized that Congress responded to *Central Bank* by amending another provision of the Exchange Act to establish aider-and-abettor liability in actions brought by the Securities and Exchange Commission. 552 U.S. at 157, 162. That subsequent congressional action, the Court concluded, indicated that *primary* liability under Section 10(b) should not be understood to capture even affirmatively deceptive acts by an aider or abettor because doing so would undermine Congress’s deter-

b. Petitioner does not directly challenge the Ninth Circuit’s reasoning in this regard. He instead argues that the 1986 amendment of Exemption 7(E) should not be read as endorsing *Crooker’s* interpretation of Exemption 2 because the amendment’s text originated from a bill in the prior (98th) Congress that would have also amended Exemption 2. Pet. Br. 33-35. Petitioner’s reliance on *inaction* by an *earlier* Congress does not undermine *Crooker’s* express ratification by the 99th Congress, which never considered amending Exemption 2 when it revised Exemption 7(E). And even if the legislative history from the 98th Congress were relevant, the history merely shows that the 98th Congress’s reasons for amending Exemptions 2 and 7(E) were distinct. Indeed, in light of *Crooker’s* preexisting interpretation of Exemption 2, Congress appears to have found it necessary only to amend Exemption 7(E) to clarify the law.

The 1986 amendment to Exemption 7(E) took its text from S. 774, which Senator Hatch introduced in the 98th Congress. See 132 Cong. Rec. at 27,189 (statement of Sen. Leahy) (explaining that the text of the FOIA amendments was “identical” to that in S. 774 and that the 1983 Senate Report on S. 774 explained the “meaning and intended effect of the amendments”); *id.* at 29,619-29,620 (statement of Rep. Kindness) (similar; reproducing 1983 Senate Report 22-25).¹⁶ The amend-

mination in a related provision that aider-and-abetter liability would apply in actions by the SEC but not private individuals. *Id.* at 162-163.

¹⁶ S. 774 passed the Senate in 1984, 130 Cong. Rec. 3521 (1984), but it did not pass the House of Representatives before the end of the 98th Congress. The portion of S. 774 amending FOIA Exemption 7 was then reintroduced in the 99th Congress as part of a Senate bill (S. 2878), which the Senate adopted and passed as an amendment to the Anti-Drug Abuse Act of 1986 (H.R. 5484). See 132 Cong. Rec. at 26,111

ment to Exemption 7(E) to cover “guidelines for law enforcement investigations or prosecution” if disclosure could “risk circumvention of the law,” 5 U.S.C. 552(b)(7)(E), addressed the “confusion created by the D.C. Circuit’s en banc holding in *Jordan v. [DOJ]*, 591 F.2d 753 (D.C. Cir. 1978), denying protection for prosecutorial discretion guidelines under [Exemption 2].” 132 Cong. Rec. at 29,620 (reproducing 1983 Senate Report 25). Specifically, although the en banc court in *Crooker* had made clear that it rejected its earlier “legal holdings in *Jordan*,” *Crooker* emphasized that “the result in *Jordan* * * * would be the same” under its revised reading of Exemption 2. 670 F.2d at 1074-1075. As then-Judge Ginsburg explained, “spar[ing] the *Jordan* judgment while abandoning the *Jordan* rationale * * * cloud[ed] an otherwise clear pronouncement” and left the lower courts without a “secure guide” to evaluate future Exemption 2 cases involving prosecution guidelines. *Id.* at 1091-1092 (R.B. Ginsburg, J., concurring). Congress therefore amended Exemption 7(E) to cover such guidelines within Exemption 7 without disturbing *Crooker’s* otherwise clear understanding of Exemption 2. See 130 Cong. Rec. at 3502 & n.39 (statement of Sen. Hatch) (amendment “repudiated” *Jordan* to the extent *Jordan* “retains any vitality in the wake of *Crooker*”).

As petitioner notes, Senator Hatch’s bill in the 98th Congress also proposed amending Exemption 2. The amendment would have revised the text to clarify that matters relating solely to internal personnel rules and practices “includ[e] such materials as * * * manuals and instructions to investigators, inspectors, auditors, or

(S. 2878, § 1801(a)); *id.* at 26,473, 27,208, 27,251-27,252 (H.R. 5484, § 1801). Congress ultimately enacted H.R. 5484 into law. See 1986 Act § 1802(a), 100 Stat. 3207-48.

negotiators, to the extent such manuals and instructions could reasonably be expected to jeopardize investigations, inspections, audits, or negotiations.” S. 774, § 8, 98th Cong., 1st Sess. (1983); see *1983 Senate Report* 44-45. The Senate Report on S. 774 expressly recognized that Exemption 2 case law had already “evolved to hold that such materials are protected under the exemption if disclosure would harm law enforcement efforts,” *id.* at 21 (citing the “discussion of caselaw in *Crooker*”), but the Report explained that decisions had “not been uniform as to the *degree* of harm an agency must demonstrate to justify its withholding.” *Ibid.* (emphasis added). The proposed amendment to Exemption 2 was thus intended to clarify the requisite showing of harm. *Ibid.* There was no suggestion in the Senate Report that an amendment would have been necessary simply to confirm that *Crooker*’s circumvention-of-regulation test was itself correct.¹⁷

Although one cannot say with confidence why the 99th Congress did not seek to amend Exemption 2 in the manner proposed by S. 774 in the 98th Congress, its inaction cannot properly be read to imply any disagreement with *Crooker*. The ACLU itself concluded at the time that “[a]ny change in the current exemption language [wa]s unnecessary” because “the *en banc* ruling

¹⁷ The text of the proposed amendment reinforces that understanding. By using the terms “including” and “such as” to introduce an illustrative list of materials covered by the Exemption, the proposal confirms the drafters’ understanding that Exemption 2’s original text already exempted such material from disclosure. See *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (The term “‘including’ * * * connotes simply an illustrative application of the general principle.”); see also *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7 (1979) (“including” indicates an element that “necessarily” is “part of the larger group”).

* * * in *Crooker*” had “created a viable working standard under which the confidentiality concerns embodied in the proposed amendments [to Exemption 2] can be met.” *Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 98th Cong., 1st Sess. 544-545 (1983). In light of that position, Public Citizen’s current reliance (on behalf of the ACLU and others) on the abandoned provisions of S. 774 is ill founded. Cf. Public Citizen Amici Br. 17-18.

F. The ESQD Information At Issue In This Case Was Properly Withheld Under Exemption 2

The ESQD information at issue in this case falls squarely within Exemption 2 as construed above. First, the information is itself intended for the internal use of Navy personnel in discharging of their ordnance-related duties at NMII. It has been maintained internally within the Navy for that purpose and has been shared with local first responders only in confidence to facilitate official and important planning functions in the event of an emergency at NMII. The records in no way constitute “secret law” establishing regulatory procedures or standards that the public properly should know to either invoke or follow.

The public disclosure of the ESQD information would undermine the important safety-related functions for which Navy personnel use ESQD information at NMII. Publicly disclosing the information would significantly risk undermining the Navy’s ability to safely and securely store military ordnance. Disclosure of that information would allow individuals to determine the location, type, and quantity of explosives stored at NMII as well as a host of other information the disclosure of

which would undermine the Navy’s ability to store military munitions safely. See pp. 8-9, *supra*. If that information must be released to petitioner under FOIA, it must be released to the world, including those with less facially benign motives.¹⁸

G. Petitioner Advances An Unduly Narrow Reading Of Exemption 2 That Does Not Account For The Exemption’s Important Function Within FOIA

Petitioner repeatedly invokes (at 10, 13-14, 26) the general principle that FOIA embodies a presumption of disclosure, subject to narrow exemptions, to support his position. Petitioner’s reliance on such a presumption misunderstands this Court’s traditional, balanced approach to FOIA and disregards the important function that Exemption 2 serves in FOIA’s carefully developed statutory regime.

1. This Court has made clear that its “pronouncements of liberal congressional purpose” be understood together with Congress’s intention to give FOIA’s exemptions “meaningful reach and application.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Congress established in FOIA a “basic policy” favoring disclosure, but it simultaneously recognized that “important interests [are] served by the exemptions.” *FBI*

¹⁸ This Court has “repeatedly” emphasized that “Congress ‘clearly intended’ the FOIA ‘to give any member of the public as much right to disclosure as one with a special interest in a particular document.’” *Reporters Comm.*, 489 U.S. at 771 (brackets omitted). FOIA thus does not permit agencies merely to “allow[] only the requester” to obtain such records. *NARA v. Favish*, 541 U.S. 157, 174 (2004) (“[O]nce there is disclosure [to a FOIA plaintiff], the information belongs to the general public.”). All members of the public “have the same access under FOIA” as particular requesters, like petitioner here. See *Department of Defense v. FLRA*, 510 U.S. 487, 501 (1994).

v. Abramson, 456 U.S. 615, 630-631 (1982). Those exemptions embody Congress’s common-sense determination that “public disclosure is not always in the public interest.” *CIA v. Sims*, 471 U.S. 159, 166-167 (1985). For that reason, the “Court consistently has taken a practical approach” in interpreting FOIA’s exemptions, in order to strike a “workable balance” between the public’s general interest in disclosure and “the needs of Government to protect certain kinds of information from disclosure.” *John Doe Agency*, 493 U.S. at 157; *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 144 (1981) (Congress “balance[d] the public’s need for access to official information with the Government’s need for confidentiality.”).

The notion that FOIA’s primary disclosure goal should curtail the very exemptions that Congress deemed necessary to protect important countervailing interests fails to reflect accurately the balance struck by Congress. “[N]o legislation”—including FOIA—“pursues its purposes at all costs.” *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam). And to “assume that *whatever* furthers the statute’s primary objective must be the law” “frustrates rather than effectuates legislative intent,” because it fails to reserve for Congress the difficult judgments inherent in nearly all legislative decisions. *Id.* at 526; see also *Director, Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995) (“Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be.”).

Rose itself acknowledges that FOIA’s exemptions “represent[] the congressional determination of the

types of information that the Executive Branch *must* have the option to keep confidential” and that the exemptions reflect Congress’s “workable formula” that “protects all interests” in order to pursue the “fullest *responsible* disclosure.” 425 U.S. at 361-362 (quoting *Mink*, 425 U.S. at 80) (emphasis added). *Rose* thus agreed that where disclosure would “not significantly harm” any government interest, it is appropriate to read Exemption 2 in light of a policy “favoring disclosure.” *Id.* at 365-366 (citation omitted). But here, where significant countervailing interests are at stake, petitioner’s suggestion to put a thumb on Congress’s carefully designed balance distorts rather than effectuates Congress’s intent.

Indeed, the overall structure of FOIA’s exemptions counsels strongly against petitioner’s unduly narrow understanding of Exemption 2. Congress enacted FOIA with nine substantial exemptions, each of which addresses a significant reason to permit the government to withhold information from the public. The exemptions protect (1) national-security secrets, (3) matters “specifically” exempt from disclosure under other statutes, (4) privileged or confidential trade secrets and commercial or financial information, (5) inter-agency and intra-agency memoranda and letters that would not be available to a private party in litigation against the government, (6) personal privacy when disclosure would constitute a “clearly unwarranted” invasion, (7) specific information compiled for law-enforcement purposes, (8) information in reports by agencies regulating financial institutions, and (9) geological and geophysical information concerning wells. See 5 U.S.C. 552(b). The contention that Congress passed Exemption 2—between exemptions for national-security secrets and matters

that Congress itself specifically exempted in other statutes—only to protect “[t]rivial” and “routine employee relations matters that are of no public interest,” Pet. Br. 10, 12, fails to recognize that Congress enacted FOIA’s exemptions for the “types of information that the Executive Branch *must* have the option to keep confidential.” *Rose*, 425 U.S. at 361 (citation omitted; emphasis added). To ascribe the intent to exempt only trivial matters, and then only when they involve agency rules and practices concerning “employee relations,” is inconsistent with Congress’s overall scheme in FOIA for addressing what it deemed “necessary interests of confidentiality.” *1965 Senate Report* 10.

2. Exemption 2 properly protects a wide range of information concerning internal rules and practices for agency personnel where disclosure would significantly risk circumvention of agency functions, and where other FOIA exemptions are unavailable. Petitioner’s unduly narrow interpretation of the Exemption would leave a significant hole in the careful balance that Congress struck in FOIA.

Numerous examples illustrate Exemption 2’s importance in the statutory scheme. The Exemption protects against the circumvention of agency functions at issue in, for example, guidelines for the conduct of internal audits, *Judicial Watch, Inc. v. Department of Commerce*, 337 F. Supp. 2d 146, 165-166 (D.D.C. 2004), guidelines for reviewing claims submitted by Medicare providers, *Dirksen v. HHS*, 803 F.2d 1456, 1458-1459 (9th Cir. 1986), document-classification instructions identifying which aspects of a military program are most sensitive, *Institute for Policy Studies v. Department of the Air Force*, 676 F. Supp. 3, 4-5 (D.D.C. 1987), records concerning agency computer-security plans, *Schreibman*

v. Department of Commerce, 785 F. Supp. 164, 165-166 (D.D.C. 1991), building blueprints used for ongoing operations at facilities conducting research into biological agents and toxins, *Elliott v. Department of Agric.*, 518 F. Supp. 2d 217, 218-221 (D.D.C. 2007), *aff'd* 596 F.3d 842 (D.C. Cir.), cert. denied, 130 S. Ct. 3430 (2010), and non-public information on “the security of the Supreme Court building and the security procedures for Supreme Court Justices,” *Voinche v. FBI*, 940 F. Supp. 323, 329 (D.D.C. 1996), *aff'd*, No. 96-5304, 1997 WL 411685 (D.C. Cir. 1997), cert. denied, 552 U.S. 950 (1997).

Petitioner asserts (at 35) that Exemption 2’s protections for sensitive internal government information is “no longer necessary” in light of Exemptions 1, 3, and 7. See also Public Citizen Amici Br. 25-26. That suggestion falters on several grounds. First, even if different exemptions might overlap in certain circumstances, such overlap does not justify curtailing the scope of Exemption 2. See *Abramson*, 456 U.S. at 629 (rejecting similar argument favoring restrictive reading of Exemption 7(C) because of overlapping privacy protections in Exemption 6). “[T]he legitimate interests in protecting information from disclosure” in order to protect the distinct interest in preventing the circumvention of agency functions under Exemption 2 are not “satisfied by other exemptions.” See *ibid.*; compare *Sims*, 471 U.S. at 167-181 (Exemption 3 statute authorizes withholding of declassified CIA records regarding intelligence sources), with *id.* at 183-184 & n.3, 188-191 (Marshall, J., concurring in the result) (concluding that Exemption 3 statute should be interpreted not to apply where Exemption 1 might be invoked).

In any event, Exemption 7(E)’s protection for law-enforcement techniques and guidelines for “investiga-

tions or prosecutions” targets only a subset of the important agency functions that may be circumvented. None of FOIA’s other exemptions address Exemption 2’s rationale for withholding the internal rules and procedures for agency personnel.

Similarly, Exemption 3 applies only where Congress has “specifically” exempted the same records under another statute. 5 U.S.C. 552(b)(3) (Supp. III 2009). Requiring Congress to enact a multitude of specific withholding statutes in the numerous contexts in which disclosure of internal instructions to agency personnel would undermine agency functions would undercut the very rationale for having an exemption within FOIA itself that applies *generally* whenever the government can establish a significant risk of such circumvention.

Finally, petitioner’s suggestion (at 35) that any harm may be prevented in this case by classifying the Navy’s ESQD maps and data to avoid disclosure under Exemption 1 reflects a fundamental misapprehension of the problem. Exemption 1 applies to records properly classified under an Executive Order of the President. 5 U.S.C. 552(b)(1). Even if ESQD information might satisfy the requirements for classification, classification would trigger special access and handling requirements unworkable here: Only persons who are determined to be eligible for access to national security information, have signed an appropriate non-disclosure agreement, and have an official need to know may be given such information, and only after appropriate training. And classified information must then be transmitted using systems and stored in locations that satisfy particular security requirements. See Exec. Order No. 13,526,

§§ 4.1, 6.1(dd), 75 Fed. Reg. 707, 720-721, 729 (2009).¹⁹ Yet to prepare appropriately for emergency response contingencies, the Navy requires the flexibility to share certain ESQD information on a confidential basis with non-federal personnel who lack the necessary security clearances and facilities, *i.e.*, local first responders who might be called upon (and must plan) to access NMII in an emergency. See J.A. 59-60; Pet. App. 41.

3. Petitioner argues (at 37-39) that if Exemption 2 does cover any material beyond trivial employment-related matters, it should be limited to circumstances in which public disclosure would “risk circumvention of an agency regulation by a person or entity subject to regulation by the agency in question.” Petitioner relies on *Rose* for this proposition, but *Rose* itself made clear that it “need not consider” whether Exemption 2 applies when disclosing the “manuals and guidelines used by [an] agency in discharging its regulatory function” would risk “circumvention of agency regulations.” 425 U.S. at 364. Petitioner’s suggestion that the only circumvention of agency functions that Exemption 2 can cover is circumvention by a specific type of regulated

¹⁹ Classification depends, among other things, on a finding that the information concerns certain subject-matter categories (such as intelligence activities; military plans, weapons systems, or operations; or vulnerabilities of installations relating to the national security) and a determination that the unauthorized disclosure of that information “reasonably could be expected to result in damage to the national security,” *i.e.*, damage to “the national defense or foreign relations of the United States.” See Exec. Order No. 13,526, §§ 1.1(a)(3) and (4), 1.4, 6.1(cc), 75 Fed. Reg. at 707, 709, 729. The current Executive Order for classified national security information, which became effective June 27, 2010, made no changes that are material to this case. Cf. *id.* § 6.2(g), 75 Fed. Reg. at 731 (replacing Executive Order No. 12,958, 3 C.F.R. 333 (1996), as amended by Executive Order No. 13,292, 3 C.F.R. 196 (2004)).

entity disregards the “workable formula” that Congress established in FOIA for “the fullest *responsible* disclosure” that would prevent “significant[] harm [to] specific governmental interests.” *Id.* at 362, 365 (citations omitted; emphasis added). Petitioner points to no textual or logical basis for his rigid test, which as this case shows, would permit the very harms against which FOIA was designed to protect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Freedom of Information Act, 5 U.S.C. 552,^{*} provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(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), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

^{*} As amended by the OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564(b), 123 Stat. 2184 (amending 5 U.S.C. 552(b)(3)).

(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 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.

* * * * *

2. The Freedom of Information Act, 5 U.S.C. 552 (1982), provided in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(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) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record 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, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(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.

* * * * *

3. The Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (as enacted in 1966), provided in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), is amended to read as follows:

“SEC. 3. Every agency shall make available to the public the following information:

* * * * *

“(e) EXEMPTIONS.—The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party 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) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data (including maps) concerning wells.

* * * * *

4. Section 3 of the Administrative Procedure Act, 5 U.S.C. 1002 (1964), provided:

Publication of information, rules, opinions, orders and public records

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.