Amending the FOIA: Is it Time for a Real Exemption 10?

By Daniel J. Metcalfe

The way the story goes, a young attorney begins working in an agency general counsel’s office and finds himself assigned to handle several Freedom of Information Act requests, one of which encompasses information that would embarrass the agency if disclosed but does not fall within any of the Act’s nine exemptions. “We should withhold it under Exemption 10,” he is told.

Or a grizzled veteran of an agency’s administrative law staff confronts a new political appointee who is hell-bent on withholding some FOIA-requested information and doesn’t particularly care how it is done, so long as it is. “Oh, you mean we should withhold it under Exemption 10, is that the idea?” comes the reply.

In either case, the message being conveyed is that those working in federal agencies sometimes feel, rightly or wrongly, that the Freedom of Information Act fails to provide adequate protection for every sensitive record or record portion that might be requested under it. And they tend to imagine, seriously or not, that just one more FOIA exemption would make the statute complete.

When Congress enacted the FOIA in 1966, after ten years of protracted legislative deliberation,¹ it chose exactly nine categories of information that would be “exempt” from disclosure under the Act. From national security to personal privacy, from business confidentiality to law enforcement sensitivity, it established nine and only nine basic “exemption” exceptions to the Act’s disclosure mandate, with their contours destined to be the subjects of both Department of Justice policy interpretation and extensive judicial review.

Amendment of the FOIA on a Ten-Year Cycle

Over the years, of course, the FOIA has been amended several times -- for decades on what seemed roughly limited to a ten-year cycle, i.e., 1966, 1974, 1976, 1986, 1996, 2007. And during those years, those major amendments of the Act further refined its many procedural aspects as well as several of its exemptions: Exemption 1 (indirectly in 1974), Exemption 3 (in 1976), Exemption 7 (in 1974 and again in 1986). But Congress never saw fit to add a tenth FOIA exemption, even when the distinct need to protect “homeland security information” arose in the wake of September 11, 2001.

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¹ Even at that, the U.S. FOIA was only the third national transparency regime in the world, after Sweden (1766) and Finland (which carried over Swedish law as an independent republic in 1919). Today, nearly 90 nations have such laws. See “International Transparency Community” (compilation maintained by American University Washington College of Law), available at http://www.wcl.american.edu/lawandgov/cgs/nations.cfm.
Rather, both Congress and executive branch agencies have managed to avoid “opening the Act up” in that way by instead creating dozens of free-standing statutory provisions that serve as specific “disclosure prohibitions” under the FOIA’s third exemption. These so-called “Exemption 3 statutes” began to proliferate as of the 1980s and 1990s, so much so that Congress was compelled to amend the FOIA in 2009, breaking the “ten-year cycle,” so as to rein in the enactment of such disclosure prohibitions. See The Cycle Continues: Congress Amends the FOIA in 2007, 33 Admin. & Reg. L. News 11 (Spring 2008) (predicting that Congress might “break the mold” of what amounted to a 60-year-old legislative pattern -- dating back to the 1946 birth of the APA and including Congress’s late-1955 commencement of legislative deliberations on what ten years later became the FOIA -- “by revisiting the Act sooner than 2016, possibly even right away”), available at http://www.wcl.american.edu/lawandgov/cgs/documents/aba_arln_sp2008_cycle_continues.pdf?rd=1.

Now, though, for the first time in more than 30 years, it has been proposed that Congress should finally add to its original FOIA exemption list and enact a real Exemption 10 in order to address the realities of today’s post-9/11, “cyber-based” world. And the origin of this proposal lies not merely in the current threat of transnational terrorism, but rather in the limitation of what unfortunately was the most poorly drafted exemption of the Act’s original nine: Exemption 2.

**Exemption 2 of the FOIA**

The FOIA’s second exemption has long been the greatest failure of its legislative drafting.\(^2\) Unchanged since 1966, it covers “matters that are . . . related solely to the internal personnel rules and practices of an agency,” 5 U.S.C. § 552(b)(2), and it stands as an ostensible “compromise” between two entirely different conceptions of it that developed in the House and the Senate. Briefly stated, the Senate viewed it as something that would shield agencies from the mere administrative burden of responding to requests for seemingly “trivial” agency activity, while the House saw it as a harm-based exemption (like all the others) for protecting information that is itself sensitive. Hence the development through FOIA case law of what became known as the “Low 2”/“High 2” dichotomy -- a schizophrenic accommodation of both disparate views within a single exemption that by its terms explicitly effectuated neither.

\[^2\] This is said even though the competition for this dubious honor actually is quite stiff. Some decry the badly stilted language of the Act’s Exemption 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”), which on its face is well-nigh impenetrable, or the false implication in subsection (a)(2) of the Act that only its privacy exemptions apply to the “reading room” provisions there. Still others point to the very existence of the FOIA’s ninth exemption (well known as “Exemption (b)(9”), which over time has proven to be more a testament to the power of the oil and gas lobby during the Johnson Administration than a practical necessity; it is invoked only rarely, and even then on a basis indistinguishable from that underlying the FOIA’s Exemption 4.
The judicial wellspring for this remarkable interpretation was the D.C. Circuit Court of Appeals, which in its role as the circuit of “universal venue” under the FOIA issued an en banc decision in 1981 that, in the context of the exemption’s applicability to law enforcement manuals, purported to cure Congress’s drafting problem once and for all. To do that, the D.C. Circuit in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1072-74 (D.C. Cir. 1981) (en banc), found such a manual to fall within the “predominant internality” aspect of Exemption 2 and to warrant protection from potential wrongdoer harm on an “anti-circumvention of law” basis referred to as “High 2.” And by contrast, “Low 2” became the part of the exemption that allowed agencies just to avoid the administrative burden, the sheer bother, of disclosing purely “trivial” information. See *Founding Church of Scientology v. Smith*, 721 F.2d 828, 830-31 n.4 (D.C. Cir. 1983) (delineating the distinct burden-based contour of “Low 2” for “trivial administrative details”).

**The Rise and Fall of Crooker**

The *Crooker* decision had the virtue of rationalizing Congress’s failure fifteen years earlier with an interpretation that seemed plausible enough to FOIA requesters as well as workable for federal agencies -- so much so that it became an explicit foundation for, rather than a target of, the legislative amendment activity that culminated in the FOIA Amendments of 1986. In fact, it was so “workable” for agencies that over the next two decades they managed to extend the “High 2” concept to protect records of which would risk circumvention of not just criminal laws (as with *Crooker’s* criminal law enforcement manual), but also agency regulations, and then even agency enforcement policies in many instances as well. And this “slippery slope” also slid from the realm of criminal law enforcement to that of civil and regulatory enforcement, and even to records significant to the evenhandedness of some agency administrative activities.

Thus, by the time the nation was transformed by the horrific events of September 11, 2001, the broad *Crooker* “High 2” protections were fully entrenched both in FOIA case law and in agency administrative practice. So it was no surprise when the Department of Justice, as the agency responsible for *Crooker’s* extension, then immediately identified “High 2” as “available . . . protection for [agencies’] critical infrastructure information as they continue to . . . assess its heightened sensitivity, in the wake of the September 11 terrorist attacks.” *FOIA Post*, “New Attorney General FOIA Memorandum Issued” (posted 10/15/01), available at http://www.justice.gov/archive/oip/foiapost/2001foiapost19.htm.4

To say the least, the next decade saw “High 2” take on even greater significance to federal agencies, especially those charged with national security or law enforcement responsibilities, not to mention in the blurred amalgam of the two into what soon became known as “homeland security.” Simply put, if “High 2” was a basic law enforcement device

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4 The Justice Department thus identified “the need to protect critical systems, facilities, stockpiles, and other assets from security breaches and harm -- and in some instances from their potential use as weapons of mass destruction in and of themselves.” *Id.*
in 1981 when Crooker spawned it, and it then served as a pragmatic tool for the next 20 years as the Justice Department developed it, it became nothing less than a vital necessity in a post-9/11 world -- one so broadly applied that it soon drew the critical attention of the open-government community. And by 2010, it had become increasingly clear to even the staunchest defenders of necessary government secrecy that Exemption 2’s interpretation, and even its well-motivated post-9/11 application, had been stretched to the point at which it was just too far untethered from its actual statutory terms.

The Milner Problem

In fact, in June of 2010, the Supreme Court signaled as much when, over the government’s opposition, it granted certiorari in a “High 2” FOIA case. Indeed, Milner v. Department of the Navy, 131 S. Ct. 1259 (Mar. 7, 2011), was a case made to order for finally bringing the FOIA’s 45-year-old Exemption 2 problem to a head, as it involved “data and maps used to help store explosives at a naval base” that were of concern to the “surrounding community.” 131 S. Ct. at 1262, 1264. And predictably, in March of 2011, the Court ruled overwhelmingly that D.C. Circuit’s Crooker test actually had “no basis or referent in Exemption 2's language,” that “the plain meaning of the term ‘personnel rules and practices’” is only “employee relations or human resources,” and that Exemption 2 simply cannot be “stretched” to include matters that have nothing to do with such things. Id. at 1262, 1267, 1271 (“We hold that Exemption 2 does not stretch so far.”).

To be sure, the fact that the government had come to so heavily rely on the breadth of “High 2” protection for nearly 30 years under Crooker was not lost on the Court, nor was the fact that (especially post-9/11) its evisceration “may force considerable adjustments.” Id. at 1271. This led the Court to identify possible partial solutions to the recognized problem that Congress “has not enacted the FOIA exemption the Government desires,” but ultimately to suggest that the government “seek relief from Congress.” Id. (“We leave to Congress, as is appropriate, the question whether it should [grant the relief sought].”)

A Milner Solution

It therefore came as an enormous surprise when the Obama Administration failed to propose any amendment of the FOIA, as a “Milner fix,” in the weeks and months after issuance of the Supreme Court’s decision. Not only was this contrary to what the Justice Department always had done to remedy serious problems throughout the FOIA’s history, it left federal agencies without protection for such core records as, for example, computer security vulnerability assessments (which cannot be protected under any other existing FOIA exemption). While the Department of Defense soon obtained narrow agency-specific protection for some of its own “critical infrastructure security information” -- through an Exemption 3 provision contained in its Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1091 (Dec. 31, 2011) (to be codified at 10 U.S.C. § 130(e)) -- as 2012 arrived, the Obama Administration still inexplicably had said absolutely nothing to Congress about fixing the Milner problem.

It was then that Senator John McCain introduced legislation that would likewise serve as a piecemeal Milner remedy, for at least “cybersecurity-related” information, though not as a mere Exemption 3 provision but as a flat-out direct amendment of the
FOIA in the form of a new “Exemption 10.” See S. 2151, “Cybersecurity by Using Research, Education, Information, and Technology Act,” § 105 (introduced on Mar. 1, 2012) (creating Exemption 10 to FOIA for “information shared with or provided to a cybersecurity center”); see also H.R. 4263, § 106 (counterpart bill introduced on Mar. 27, 2012 in House). And then after this development, the Justice Department suddenly told the Senate Judiciary Committee that it was “critical” that Congress now amend the FOIA, because “a wide range of sensitive material . . . is now at risk.” Testimony of Department of Justice Before Senate Judiciary Committee at 12 (Mar. 13, 2012).

But such remedial legislation need not involve taking Senator McCain’s proposed unprecedented step of adding a wholly new exemption to the Act. Instead, the Supreme Court’s evisceration of Exemption 2 can be remedied by simply rewriting that existing exemption in the clearer way in which Congress should have written it to begin with -- and more importantly, in a way that provides the necessary information protection that Congress doubtless would have provided in 1966 had it been able to foresee a post-9/11, cyber-based world.

Right now, in the wake of Milner, Exemption 2 is but a mere shell of what it was under Crooker: It covers information about agency “personnel” matters only (as defined by the Court to mean just relatively routine matters of “employee relations or human resources”), and it affords federal agencies absolutely none of the broad “anti-circumvention” protection that “High 2,” especially in the homeland security context, came to afford. In fact, both “High 2” and “Low 2” are gone; the latter is a “dead letter” as well, if for no other reason than that the Obama Administration’s “foreseeable harm” policy standard for FOIA exemption use logically precludes the use of any exemption aspect that is based upon sheer burden rather than harm. See, e.g., FOIA Update, Vol. XV, No. 2, at 3 (Spring 1994) (advising that identical “foreseeable harm” standard of Clinton Administration precluded Exemption 2 “in its entire ‘Low 2’ aspect,” though subsequently understated in Obama Administration counterpart guidance as only a “general rule”).

**Exemption 2 Rewritten**

So there is no reason for any part of what used to be “High 2” to be given new life in a FOIA Exemption 10; rather, the Act’s second exemption stands as a most appropriate location for whatever Congress sees fit to restore of it, as well as anything of relatively new cybersecurity sensitivity. And a rewritten Exemption 2 need not be entirely one-sided: It could contain a limiting “threshold requirement” like several other FOIA exemptions (i.e., Exemptions 4, 5, 6, and 7), as well as a relatively strong harm standard (i.e., “would,” rather than “could reasonably be expected to”) to weigh heavily against feared overuse. In short, it could be something along the lines of the following:

5 The very belatedness of this Justice Department statement caused Ranking Senate Judiciary Committee Member Charles Grassley to rhetorically ask: “[T]he Milner case was released more than a year ago [but] the Justice Department hasn’t approached me or my staff about legislation to address the impact of the decision, so maybe you could tell me why the Justice Department hasn’t submitted a legislative proposal -- if in fact there is a threat to public safety . . . isn’t it irresponsible to ignore the problem?”
(b) This section does not apply to matters that are . . . (2) of predominantly internal governmental significance, the disclosure of which (A) would undermine the personnel rules and practices of an agency, (B) would expose a cybersecurity or computer security vulnerability of an agency, or (C) would be expected to risk harm to a government facility, system, or other national asset that is of critical importance to homeland security.

5 U.S.C. § 552(b)(2) (as proposed to be revised, with existing language not italicized). And it could be a final, pragmatic solution to a problem that, at its outer edge, has been more than 65 years in the making.⁶

But there is one thing more: Time is of the essence in an enterprise such as this. As the Justice Department now belatedly admits, the need for a legislative remedy to the Milner problem has become “critical.” And the additional fact that this now is a presidential election year (in which the Obama Administration can hardly relish the thought of publicly fighting for greater secrecy) just complicates the legislative process further. Indeed, if history is any guide, Congress’s effort to make any substantive change to any of the FOIA exemptions can be expected to trigger all sorts of proposed exemption “improvement” efforts, not the least of which could be a serious effort by media groups to finally reverse some now-antiquated aspects of the Supreme Court’s landmark Reporters Committee decision. See Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (protecting personal privacy broadly in multiple respects); see also Testimony of Collaboration on Government Secrecy Before House Committee on Oversight and Government Reform at 5 n.15 (Mar. 17, 2011) (pointing out that “‘opening up the FOIA’s exemptions’ [is] something that has not been done since the mid-1980s and . . . historically is viewed with anxiety on both sides of the FOIA divide”), available at http://www.wcl.american.edu/faculty/metcalfe/testimony31711.pdf?rd=1.

One thing is clear, however: The FOIA’s original structure of nine basic exemptions has largely withstood the test of time and there is no true need for a tenth. Hopefully, Congress will act accordingly.

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⁶ In fairness to Congress -- or at least the 89th Congress that enacted the FOIA -- the language that it chose for Exemption 2 closely mirrored language that had been part of the Administrative Procedure Act since 1946. See 5 U.S.C. § 1002 (1964 ed.) (creating broad nondisclosure presumption for “any matter relating solely to the internal management of an agency”). To some, however, that was no small part of the problem to begin with.