

FOIA gets personal at the Supreme Court

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Most environmental, energy, and resources practitioners have at some point, by choice or necessity, run into the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the federal statute that governs access to federal agency records. FOIA mandates public disclosure of federal records upon request, but agencies may withhold information that falls under any one of nine exemptions.

Many lawyers use FOIA in an affirmative or offensive sense to obtain records to advise their clients in transactions or to prepare for or supplement discovery in litigation. The environmental, energy, and resources agencies receive more than their fair share of FOIA requests. In fiscal year 2010, the U.S. Environmental Protection Agency received 10,409 FOIA requests, the Department of the Interior, 6,127, and the Department of Energy, 2,206.

FOIA, however, also comes into play in a defensive posture, i.e., when a person or a company is submitting information to a federal agency. Unless the submitter properly claims protection of its proprietary information, the information becomes an agency record subject to FOIA once it is in the hands of the agency. To prevent public release, submitters typically invoke FOIA Exemption 4, 5 U.S.C. § 552(b)(4), which protects what has come to be known as “confidential business information.”

Both of these uses of FOIA—offensive and defensive—were on full display at the U.S. Supreme Court during its 2010 Term. The Court handed down decisions in two FOIA cases, one in which a requester was suing to obtain information and one in which a submitter was suing to stop release. The cases are *Milner v. Department of the Navy* and *Federal Communications Commission v. AT&T*.

Notwithstanding its reputation as a “conservative” court, the Roberts Court in these two decisions narrowed the scope of two exemptions in FOIA, thereby broadening the potential range and quantity of both private and government information that must be disclosed under FOIA. In each case, the Court’s decision hinged largely upon interpretation of a single word: “personnel” in the *Milner* case and “personal” in the *AT&T* case. Finally, the Court’s decision in *Milner*, like its decision interpreting the Comprehensive Environmental Response, Compensation, and Liability Act in *Cooper Indus. Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), reminds environmental, energy, and resources lawyers of the reality that a legal doctrine, even a well-established one upheld by several intermediate appellate courts, can collapse under the Supreme Court’s scrutiny.

Milner: The end of the “High 2” prong of Exemption 2

In *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011), the Supreme Court dealt with FOIA Exemption 2, which covers information “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. 552(b)(2). The case involved Petitioner Glen Milner’s request for Explosive Safety Quantity Distance (ESQD) data and maps used by the Department of the Navy in storing munitions at a naval base in Washington State. This information, which prescribes “minimum separation distances” for explosives, is used by the Navy to design and construct storage facilities to prevent chain

reactions in case of detonation. Milner sought the data, claiming concern about the potential for explosions impacting the heavily used environment, particularly for boating and fishing, in the adjacent area of Puget Sound, Washington. The Navy withheld the records, stating that disclosure would threaten the security of the base and surrounding community.

The Navy relied upon the so called “High 2” exemption, which was a creature of case law that originated in *Crooker v. Bureau of*

Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981), in which the D.C. Circuit Court applied Exemption 2 not only to records relating to employee relations and human resources (subsequently called the “Low 2” exemption) but also to “predominantly internal” records, the disclosure of which could “risk circumvention of agency regulation or statutes” (the “High 2” exemption). Since *Crooker*, it has become a standard practice among federal agencies to use High 2 to prevent access to records.

Following the *Crooker* standard, the Navy said the information was predominantly internal because it was used to instruct agency personnel on how to do their jobs and that its disclosure would risk circumvention of the law by identifying for terrorists the most damaging targets. The district court upheld the Navy’s invocation of the High 2 exemption to deny Milner’s request, and the Ninth Circuit affirmed and specifically adopted the long-standing analysis in *Crooker*.

Despite decades of appellate decisions followed by agency precedent, the Supreme Court was not persuaded and reversed. In its 8–1 decision authored by Justice Kagan (Justice Breyer was the lone dissenter), the Court found that the High 2 exemption has “no basis or referent in Exemption 2’s language” and, in fact, is contrary to the provision’s plain meaning and to FOIA’s goal of broad disclosure. When “personnel” is used as an adjective, the Court said, it refers to human resources matters, i.e., “[a]n agency’s ‘personnel rules



and practices' are its rules and practices dealing with employee relations or human resources." The data and maps sought by Milner "concern the physical rules governing explosives, not the workplace rules governing sailors." The effect of the Court's construction of Exemption 2's language is, as Justice Kagan wrote, that "Low 2 is all of 2 (and that High 2 is not 2 at all)." The Court pointed out that the government still has "other tools at hand" to protect national security information and other sensitive documents, such as Exemption 1, which shields classified documents, and Exemption 7(F), which protects information compiled for law enforcement purposes, the release of which "could reasonably be expected to endanger the life or physical safety of any individual."

For many federal agencies seeking to protect sensitive information that does not clearly meet the criteria for any other exemption, the former High 2 Exemption was the favored exemption of last resort. Indeed, as the Court noted in its opinion, federal agencies invoked it 72,000 times to prevent access to records in 2009 alone. Without the High 2 exemption, however, federal agencies will need to shift their attempts to protect information to other exemptions—something they have been forced to do in the past. For example, agencies have attempted to invoke various FOIA exemptions to protect information about the locations of threatened and endangered species, but after two adverse judicial opinions involving Exemption 2, *see Audubon Soc'y v. U.S. Forest Serv.*, 104 F.3d 1201 (10th Cir. 1997) and *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082 (9th Cir. 1997), they shifted to others, such as 3, 4, 5, and 6, albeit unsuccessfully. *See, e.g., Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26 (D.C. Cir. 2002). As the Court suggested, agencies could rely more heavily on Exemption 7(F) to protect information about government and private infrastructure and assets that could be potential targets of terrorism, as the Federal Energy Regulatory Commission does to justify withholding critical energy infrastructure information (CEII).

AT&T: "Corny" has little to do with "corn"

In *Federal Communications Commission v. AT&T*, 131 S. Ct. 1177 (2011), the Supreme Court considered FOIA Exemption 7(C), which covers "records or information compiled for law enforcement purposes" the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added). The Court, with Justice Kagan recused, ruled unanimously that a corporation may not assert "personal privacy" interests in the way an individual "person" may.

The case concerned records collected by the Federal Communications Commission (FCC) during an investigation prompted by AT&T's voluntary admission that it had overcharged the federal government for services under an FCC-administered program created to improve access to advanced telecommunications and information services for schools and libraries. AT&T provided the FCC with "responses to interrogatories, invoices, emails with pricing and billing information, names and job descriptions of employees involved, and AT&T's assessment of whether those employees had violated the company's code of conduct." After AT&T and the FCC

resolved the matter by entering into a consent decree in 2004, CompTel, a trade association whose members include some of AT&T's competitors, submitted a FOIA request seeking "[a]ll pleadings and correspondence" in the FCC's file on the AT&T investigation. AT&T objected, invoking FOIA Exemption 4, which covers "trade secrets and commercial or financial information," 5 U.S.C. § 552(b)(4), and Exemption 7(C). The FCC withheld records dealing with pricing, billing, and identifying information about employees under Exemption 4 and documents that identified specific individuals under Exemption 7(C), but it disagreed with AT&T's argument that the balance of the records were covered by 7(C). The FCC concluded that, whereas AT&T's employees had privacy rights under 7(C), the corporation itself had no "personal privacy" interests under that exemption. The Third Circuit disagreed, reasoning that because Congress had defined the word "person" in the Administrative Procedure Act, 5 U.S.C. § 551(2), to include corporations as well as individuals, the word "personal" in Exemption 7(C) also covers corporations. For the Third

Circuit, "personal" was merely the adjective form of "person," a term defined by the statute to include corporate entities.

The government petitioned for review, and, after hearing the case, the Supreme Court rejected the Third Circuit's reasoning and its grammar.

Chief Justice John Roberts,

writing for the Court, instructed that adjectives do not always "reflect the meaning of corresponding nouns" and sometimes acquire "distinct" and even "disparate" meanings of their own. For example, the Chief Justice wrote, "'corny' can mean 'using familiar and stereotyped formulas believed to appeal to the unsophisticated,' which has little to do with 'corn.'" Likewise, "personal"—which, unlike "person," is not defined in the statute—ordinarily refers to individuals and, in fact, is often used "to mean precisely the *opposite* of business-related." The Court concluded that the "protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations," adding that it "trust[s] that AT&T will not take it personally."

The Supreme Court's decisions in *Milner* and *AT&T* are, at least in theory, a reaffirmation of FOIA's goal of broad disclosure. They are also a nod to a plain-language approach to statutory interpretation. The follow-through in both cases will be critical. If the withholding of the ESQD data in *Milner* is ultimately continued based on FOIA Exemption 7 (as the Supreme Court hinted it might be) and the billing information in *AT&T* kept secret under FOIA Exemption 4, then the Supreme Court's decisions will have been little more than expensive and entertaining grammar lessons.

The Roberts Court in these two decisions narrowed the scope of two exemptions in FOIA.

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