NO. 09-1163

In the Supreme Court of the United States

GLEN SCOTT MILNER,
Petitioner,
v.
UNITED STATES DEPARTMENT OF THE NAVY,
Respondent.

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

BRIEF *AMICUS CURIAE* OF ALLIED DAILY NEWSPAPERS OF WASHINGTON and SOCIETY OF ENVIRONMENTAL JOURNALISTS IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI*[1]

Allied Daily Newspapers of Washington is a trade association representing 25 daily newspapers across the state of Washington. It advocates for public access to government records so that newspapers can effectively fulfill their role as public watchdogs.

The Society of Environmental Journalists (SEJ) is an international organization with more than 1,400 members dedicated to advancing public understanding of environmental issues by improving the quality and visibility of environmental affairs reporting. Members work in a variety of mediums including television, radio and print, and regularly request government records as part of their news reporting.

SUMMARY OF ARGUMENT

Agencies routinely rely on 5 USC 552(b)(2) ("Exemption 2") to conceal important information of public interest, although the exemption is expressly limited to "matters related solely to the internal personnel rules and practices of an agency." The Navy's refusal in this case to disclose a potentially lethal risk to the community from its Indian Island, Wash., bomb storage is part of a trend, documented in annual agency reports, of ever-expanding

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[1] *Amici* file this brief with the written consent of the parties. No counsel for a party authored this brief in whole or in part and only the *amici curiae* named on the cover contributed to funding its preparation.

application of Exemption 2 beyond internal personnel concerns. The annual reports highlight the need to limit Exemption 2 to only those truly trivial personnel records encompassed by its plain language. If agencies continue to deny tens of thousands of records requests each year based on an unwarranted judicial expansion of Exemption 2, Congress's goal of a fully informed citizenry will remain unmet.

ARGUMENT

I. Expanding application must stop.

Exemption 2 of the Freedom of Information Act (FOIA) protects from public disclosure only those "matters that are…related solely to the internal personnel rules and practices of an agency." 5 USC 552(b)(2). As this Court explained, "the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." *Department of the Air Force v. Rose*, 425 U.S. 352, 370 (1976). The "line sought to be drawn" by Exemption 2 "is one between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest." *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975), quoted with approval in *Rose* at 365.

The language of Exemption 2 has never changed. Yet in recent years federal agencies have increased their withholdings under Exemption 2,

reflecting a bureaucratic shift to greater secrecy. The upsurge is evident from annual FOIA reports describing how many FOIA requests were denied, based on each of FOIA's nine exemptions, each year from 1998 to 2009. To illustrate burgeoning use of Exemption 2 in the past decade, *Amici* developed the following chart from some of the FOIA reports posted at http://www.usdoj.gov/oip/04_6.html:

No. of Exemption 2 denials:	1999	2009
Dept. of Agriculture	60	112
Health & Human Services	32	111
Housing and Urban Dev't	19	48
Dept. of Interior	16	116
Dept. of Labor	402	834
Dept. of State	18	111
Dept. of Transportation	59	111
Treasury (including IRS)	16	209

While all of the major departments have increased denials under Exemption 2, theirs are dwarfed by those of the Department of Homeland Security, which skyrocketed last year:[2]

2004	23,162
2005	33,700
2006	36,676
2007	48,529
2008	42,766
2009	70,544

[2] See http://www.usdoj.gov/oip/04_6.html and page 7, http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2009.pdf.

That's more than 455,000 citizen requests blocked by just one department's notion of what's "solely" an internal personnel matter. Put another way, on nearly a half-million different occasions when citizens sought information about the department with major responsibility for our nation's security, including such essential programs as the Coast Guard, Customs and Border Protection, Transportation Security Administration, and the Federal Emergency Management Agency, Exemption 2 was used to hide the information.

The Department of Defense, which includes Navy, Army and Air Force operations with enormous impacts on public safety, the environment, and the federal budget, also routinely rejects thousands of citizens' records requests each year based on Exemption 2.[3] Its annual Exemption 2 withholdings have more than doubled, from roughly 1,200 in 2000 and 2001 to roughly 2,600 in the last two years. *Id.*

The agencies charged with protecting the public from harm increasingly conceal information as "internal personnel" matters. The Environmental Protection Agency (EPA), for example, rejected only 10 requests under Exemption 2 during the entire 3-year period from 1998 to 2000, but since 2004 it has invoked the exemption an average of 42 times a

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[3] See Department of Defense reports at http://www.justice.gov/oip/04_6.html.

year.[4] This trend makes it harder for the public to evaluate EPA efforts to prevent and clean up pollution.

Courts have contributed to the gap between Exemption 2's narrow language and its broad application by agencies. Most notably, *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (1981), has operated as judicial license for agencies to withhold documents that are "predominantly internal" if their disclosure "significantly risks circumvention of agency regulations or statutes." The *Crooker* reading of Exemption 2 is known as "high 2." Highlighting how agencies routinely use "high 2" to conceal matters well beyond internal personnel rules, the Postal Service stated in its 2009 FOIA report[5]:

> The Postal Service's substantial infrastructure and coordination with both private industry and other government agencies requires the generation of schedules, maps, routes, manuals, and plans that could be used to circumvent a variety of legal requirements, including anti-terrorism laws. The Postal Service routinely protects these records under high 2 when necessary.

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[4] See EPA reports at http://www.justice.gov/oip/04_6.html.

[5] See page 3, http://www.usps.com/foia/_pdf/09foiarp.pdf.

Of course, anything involving coordination with private industry or other agencies is *not* "related solely to the internal personnel rules and practices of an agency." 5 USC 552(b)(2). And schedules and routes for mail delivery are certainly matters that affect the public and, indeed, are openly carried out each day. This is a stark example of administrative application varying dramatically from the plain meaning of Exemption 2.

Concealing records about operations directly affecting the public, as if they are solely "internal personnel" matters, appears to be all too common. For example, the Occupational Safety and Health Administration, charged with protecting worker safety, denied 569 FOIA requests last year and 533 in 2008 under Exemption 2.[6] The Centers for Disease Control and Prevention reported 64 Exemption 2 denials last year and 40 the year before.[7] It is unlikely that these programs, whose work is critical to public health and safety, could have withheld so many requested records from the public if Exemption 2 was applied only to trivial matters of no public interest.

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[6] See http://www.dol.gov/sol/foia/data/2009/, Disposition of FOIA Requests – Number of Times Exemptions Applied; http://www.dol.gov/sol/foia/2009anrpt.htm.

[7] See http://www.hhs.gov/foia/reports/08anlrpt.html and http://www.hhs.gov/foia/reports/2009report/2009pdf/09anlrprt_pdf_main.pdf, p. 14.

These and other FOIA statistics are troubling in light of the life-or-death importance of assessing the effectiveness of government safety programs – such as the Navy maps at issue here. The 1944 munitions explosion at the Port Chicago Naval Magazine on Mare Island, which killed 320 people and caused damage 48 miles away, is proof that a similar accident at the Indian Island depot could destroy life and property in the surrounding communities. Citizens should know if tax dollars devoted to their health and safety are actually protecting them. The 455,000 withholdings by the Homeland Security Department since 2004, and other agencies' increased reliance on Exemption 2, highlight the need to restore the restraint envisioned by Congress. The statistics show that, as applied, Exemption 2 acts as a significant barrier to fulfilling FOIA's purpose of facilitating enlightened government by the people.

The Ninth Circuit decision in this case broadens even more the judicially created "high 2" exemption. In *Milner v. U.S. Dept. of the Navy*, 575 F.3d 959, 970 (9th Cir. 2009), the Ninth Circuit held that an agency can withhold records based on a risk of "circumvention of agency regulation" even if the agency is not acting as a regulator regarding the records in question. The explosive-hazard maps at issue do not regulate any member of the public, but reveal the extent to which the lives of nearby residents and boaters are threatened by the Navy's loading and storage of bombs and munitions at Indian Island. *Id.* at 978 (Fletcher, J., dissenting); J. App. 58. Exempting such records is wildly at odds

with this Court's reading of Exemption 2 in *Rose* as shielding trivial records "in which the public could not reasonably be expected to have an interest." 425 U.S. at 370. Possible death and destruction in Port Hadlock and Port Townsend, Wash., is not a trivial concern, nor solely an internal matter for only federal workers to worry about.

In sum, agencies increasingly conceal records of public interest based on a FOIA exemption designed to protect only truly internal personnel matters. In light of this dangerous trend and the well-reasoned arguments of Petitioner Glen Milner, this Court should reverse the Ninth Circuit and eliminate "high 2," or at least rein it in.

II. Identity must not matter.

FOIA requires agencies to make records promptly available, upon request, "to *any* person." 5 USC 552(a)(3)(A) (italics added). This provision has been interpreted to "give any member of the public as much right to disclosure as one with a special interest." *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1082, 1089 (9th Cir. 1997), quoting *Dept. of Defense v. Federal Labor Rel'ns Auth.*, 510 U.S. 487, 495-97 (1994). Except in cases of privilege, "the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Id.* (internal citations omitted). As *Maricopa* said:

> We note once again that FOIA is 'a scheme of categorical exclusion' that

> does not permit 'a judicial weighing of the benefits and evils of disclosure on a case-by-case basis.'

Id., quoting *FBI v. Abramson*, 456 U.S. 615, 631 (1982).

Here, the Ninth Circuit's decision conflicts with this rule against releasing records selectively. Commander George Whitbred IV stated in a declaration in this case that the maps requested by Mr. Milner are provided to civilian members of the public on a "case-by-case basis." [8] In fact, the Navy gave an explosive safety map for Indian Island to the Port Townsend, Wash., newspaper, which published it on the front page, and the Navy also shared the withheld records with local officials. J. App. 52, 59. The Ninth Circuit found this selective release was lawful, in conflict with this Court's admonition that exemptions are categorical and not to be applied selectively. *Abramson,* 456 U.S. at 631.[9] Thus, reversal is warranted.

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[8] *Milner*, 575 F.3d at 974 (dissent).
[9] *Milner*, 575 F.3d at 968.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the decision below.

Dated this 7th day of September, 2010.

Respectfully submitted,

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