

TESTIMONY OF MIRIAM NISBET
DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
ON
“THE FREEDOM OF INFORMATION ACT: SAFEGUARDING CRITICAL
INFRASTRUCTURE AND THE PUBLIC’S RIGHT TO KNOW”
MARCH 13, 2012

Good morning, Mr. Chairman, Senator Grassley, and members of the committee. I am Miriam Nisbet, Director of the Office of Government Information Services at the National Archives and Records Administration. Thank you for the opportunity to appear before you during Sunshine Week to discuss safeguarding critical infrastructure information. An important part of the Freedom of Information Act is protecting sensitive information even as the government strives to give the public the greatest access to records under the law.

I hope to provide you with a sense of what we are hearing from requesters and agencies with regard to safeguarding critical infrastructure information and other records previously protected under Exemption 2 to the FOIA. In our work at OGIS, we talk every day with agency FOIA professionals and FOIA requesters — in fact, we have worked with requesters and agencies on more than 1,500 specific FOIA matters since we opened in September 2009. Congress created OGIS as part of the 2007 amendments to FOIA to review agency FOIA policies, procedures and compliance; to recommend policy changes to Congress and the President to improve the administration of FOIA; and to resolve FOIA disputes between agencies and requesters. Carrying out this mission allows us to see how agencies implement the

law and shows us where there are trouble spots. We regularly meet with and hear from requesters and agency professionals to discuss trends, problems, complaints and improvements to FOIA's implementation. And the dispute-resolution skills training that we provide to hundreds of agency FOIA professionals each year allows us to hear their questions and concerns.

FOIA law changed significantly with the decision by the Supreme Court of the United States in *Milner v. Department of the Navy*.¹ Although it has been one year since *Milner* was decided, its impact still feels very fresh. As you know, the *Milner* decision addressed the Navy's use of Exemption 2 in withholding maps and data from the Naval Magazine Indian Island base in Washington State. [Note: NARA's understanding is that the basics of the Court's decision will be addressed in DOJ's testimony, therefore NARA oral testimony will refer to the DOJ explanation and will not go into the following details.] Exemption 2 shields records "related solely to the internal personnel rules and practices of an agency."² For 30 years, the U.S. Court of Appeals for the D.C. Circuit read Exemption 2 to cover two separate broad categories of information :³ "High 2" would cover any "predominantly internal materials" the disclosure of which would "significantly ris[k] circumvention of agency regulations or statutes,"⁴ and "Low 2" would apply to records concerning human resource and employee relations. The Supreme Court in *Milner* rejected this interpretation last year, holding that only the narrower "Low 2" reading of Exemption 2 was proper: "Exemption 2 ... encompasses only records relating to issues of employee relations and human resources,"⁵ the Court wrote. Although the records at issue in that case were acknowledged by the Court to be sensitive and of potential use to those wishing to

¹ 562 U.S. ____ (2011); 131 S.Ct. 1259 (2011).

² 5 U.S.C. § 552(b)(2).

³ *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (1981).

⁴ *Id.* at 1056-57 and 1074.

⁵ *Milner*, 131 S.Ct. at 1271.

cause harm, the Court held: “The explosives maps and data requested here do not qualify for withholding under that exemption.”⁶

The net practical effect of *Milner* alongside the DOJ guidance issued in its wake⁷ is that Exemption 2 can no longer be used to protect an entire category of internal government information not related to employee relations and human resources — including the critical infrastructure information that is the focus of today’s hearing. Following the *Milner* decision, OGIS heard concerns from both agencies and requesters about potential repercussions to FOIA implementation. Agencies were trying to determine how to treat information previously covered by Exemption 2. Two paths were fairly clear from the Supreme Court’s decision and from subsequent written guidance from DOJ: if release would not likely result in foreseeable harm to an identifiable interest, the information should be released; and if release would be harmful and another exemption could apply, the information could be withheld under that exemption.

Existing exemptions are a solution for some information that may have previously been withheld under Exemption 2, and OGIS is hearing from agencies that they have taken the Supreme Court’s suggestion and used the DOJ’s guidance to identify the types of records that might be protected under other exemptions. However, other exemptions are not an alternative for many records in many instances. For example, Justice Alito’s concurring opinion in *Milner* focused on the potential application of Exemption 7⁸ to withhold information related to crime prevention and security.⁹ Of course, Exemption 7 is available only for “records or information compiled for law enforcement purposes.” For many agencies, Exemption 7 is off the table

⁶ *Id.*

⁷ Department of Justice Office of Information Policy Guidance titled “Exemption 2 After the Supreme Court’s Decision in *Milner v. Department of the Navy*” (May 10, 2011).

⁸ 5 U.S.C. § 552(b)(7).

⁹ *See Milner*, 131 S.Ct. at 1272.

entirely. Similarly, Exemption 1,¹⁰ which protects properly classified national security information, is also limited in its use. Not only is expanding the amount of classified information undesirable as a matter of policy and practicality; not all agencies have classification authority.

And for that information that falls into a third category — where release would be harmful but no other exemption could apply — agencies were left without a clear cut way to protect sensitive information that had been protected from release for decades. In such cases, records such as risk and vulnerability assessments to physical or electronic systems, unclassified details regarding military operations; and sensitive, operational information (such as computer codes, telecommunication passcodes and certain information contained in staff manuals) would appear to be without protection from release as well.

Requesters as well as agencies have indicated to us the need for changes to FOIA post-*Milner*. Acknowledging that some legislative action is warranted, requesters worry this may come in the form of multiple federal laws containing provisions to allow information to be withheld from release under FOIA Exemption 3.¹¹ “Exemption 3 statutes” provide a solution for only the limited subject matter at issue, typically contained in a more comprehensive piece of legislation, which means dozens of such statutes, would potentially be required to cover the various agency-specific information currently unaddressed by existing FOIA exemptions.

Additionally, as this Committee has observed, Exemption 3 statutes can be difficult to track as they move through the legislative process. Requesters are concerned that they may not be able to monitor the progress of these many disparate laws either as they are proposed or as they are used by agencies subsequent to enactment. Finally — a concern for both agencies and requesters — an ad hoc approach of passing Exemption 3 statutes could result in the uneven

¹⁰ 5 U.S.C. § 552(b)(1).

¹¹ 5 U.S.C. § 552(b)(3).

application of FOIA disclosure provisions throughout the Federal Government. Even though the Critical Infrastructure Information Act of 2002 defines critical infrastructure information, each agency might define critical infrastructure differently, depending on its mission, and could have its own scheme for how its non-disclosure statute would be implemented.

An alternative and more comprehensive solution suggested by various agencies and FOIA requesters might be to modify the existing Exemption 2 provision. Reworking Exemption 2 to address certain types of information previously protected by “High 2” would help to close the gap left after *Milner* for this critical infrastructure information. This effort could focus on finding a generic approach available across government that takes into account both the concerns of agencies and requestors to address a subset of sensitive information.

We appreciate the Committee’s efforts to examine solutions to protect critical infrastructure and other sensitive information that should not be disclosed but in a way that otherwise promotes disclosure consistent with FOIA and with President Obama’s 2009 memorandum on FOIA.¹² OGIS stands ready to assist in any way, including working with DOJ to facilitate collaboration between internal and external stakeholders. Thank you for the opportunity to testify; I look forward to answering any questions you may have.

¹² Memorandum from President Barack Obama to the heads of Executive Departments and Agencies titled “Freedom of Information Act” (Jan. 21, 2009)