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Freedom of Information Act and Federal Licensing Procedures: Invoking Exemption 7(F) to Protect Examination Materials

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FREEDOM OF INFORMATION ACT AND FEDERAL LICENSING
PROCEDURES: INVOKING EXEMPTION 7(F) TO PROTECT
EXAMINATION MATERIALS

*Karl Gruss**

Abstract

The United States Supreme Court’s 2011 decision in *Milner v. Department of the Navy* shut the door on an expansive interpretation of one of the nine enumerated exemptions to the public disclosure requirements mandated under the Freedom of Information Act. No longer can federal agencies seek cover behind the judicially crafted interpretation of Exemption 2 known as the “High 2” that permitted agencies to withhold documents from the public eye solely because disclosure of the information contained therein could risk circumvention of an individual agency’s regulations or statutes. However, Justice Alito’s concurring opinion in *Milner* hinted at the Court’s possible acceptance of an alternative option available to federal agencies that previously employed the High 2 to rebuff public requests for information. This Note focuses on federal agencies involved in the licensing and certification of individuals in public safety-sensitive positions—principally the U.S. Coast Guard and the Federal Aviation Administration—that prior to *Milner* either actively used or could have used the High 2 exemption to protect information relating to examination questions and answers used to evaluate license and certificate applicants’ competencies. This Note first examines the rise of the High 2 interpretation through the circuit courts, its application by federal agencies, and the Supreme Court decision sounding the High 2’s death knell. This Note then argues that courts should embrace an interpretation of another Freedom of Information Act exemption, Exemption 7(F), to permit federal agencies involved in the licensing and certification of individuals in public safety-sensitive positions to withhold information relating to examination questions and answers.

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INTRODUCTION

Imagine if individuals could fly aircraft or navigate commercial vessels without first establishing the minimum competencies necessary to do so in a skillful manner. The operation of aircraft and commercial vessels itself entails inherent risks to public safety, even in the hands of experienced controllers,¹ let alone in the hands of novice members of the general public. Given the potential for disastrous results if such activities went unregulated, the Federal Aviation Administration (FAA) and the U.S. Coast Guard require that individuals demonstrate particular skills prior to obtaining authorization to command certain aircraft and marine vessels,

1. According to the Federal Aviation Administration (FAA), roughly 80% of general aviation aircraft fatalities are directly attributable to human error, with loss of control in flight identified as the number one cause of fatal general aviation accidents during 2001–2011. *Fact Sheet – General Aviation Safety*, FAA (Jun. 19, 2012), https://www.faa.gov/files/events/EA/EA27/2013/EA2748590/FAA_Fact_Sheet_%E2%80%9393_General_Aviation_Safety.pdf; see also DOUGLAS A. WIEGMANN & SCOTT A. SHAPPELL, FED. AVIATION ADMIN., A HUMAN ERROR ANALYSIS OF COMMERCIAL AVIATION ACCIDENTS USING THE HUMAN FACTORS ANALYSIS AND CLASSIFICATION SYSTEM (HFACS) 1 (2001), available at http://www.faa.gov/data_research/research/med_humanfacs/oamtechreports/2000s/media/0103.pdf (noting the slow rate of decline of aviation accidents attributable to human error when compared to the rate of decline of accidents attributable to mechanical failure).

respectively.²

The FAA and the U.S. Coast Guard represent a category of federal agencies, termed “mixed-function licensing agencies” in this Note,³ charged with the licensing and certification of individuals in public safety-sensitive positions that adopt procedures to examine applicants’ qualifications.⁴ Examination techniques employed by these mixed-function licensing agencies may include, among other methods, classroom-based written examinations.⁵ These written examinations are designed to test license applicants’ knowledge of concepts necessary to successfully operate in environments where their duties and responsibilities directly influence individuals’ security and welfare.⁶ Though mixed-function licensing agencies publish study guides and other similar reference materials, they often seek to protect the actual examination questions and answers (examination Q&As) from public view to maintain the integrity of the examination process.⁷

Shielding actual examination Q&As prior to the administration of a test

2. Depending on the type of aircraft an individual wishes to pilot, the FAA requires that the license applicant pass both a written and practical examination. *See* 14 C.F.R. §§ 61.3, .33–.39, .43 (2013); *Recreational Pilot and Private Pilot Knowledge Tests*, FAA, <http://www.faa.gov/pilots/become/knowledge> (last visited June 16, 2014) (providing an overview of knowledge testing procedures for recreational and private pilots); *Recreational Pilot and Private Pilot Practical Tests*, FAA, <http://www.faa.gov/pilots/become/practical> (last visited June 16, 2014) (describing practical testing requirements facing recreational and private pilots). In similar fashion, the Coast Guard requires that individuals seeking to hold certain positions on commercial vessels obtain a Merchant Mariner Credential (MMC) with endorsements detailing the scope of the credential’s authorization by demonstrating proficiencies through a written examination. *See* 46 C.F.R §§ 10.201, .209 (2012) (describing general procedures to apply for and obtain an MMC); 46 C.F.R. § 11.903 (listing endorsements requiring passage of an examination prior to issuance); *Examinations*, U.S. COAST GUARD, NAT’L MAR. CTR., <http://www.uscg.mil/nmc/training/exams/default.asp> (last visited June 16, 2014) (discussing the process of passing written examinations to obtain MMC endorsements).

3. The term is used to reflect the fact that these agencies tackle a broad range of functions beyond the licensing and certification of private individuals. The term “mixed-function agency” has been used by courts previously to describe agencies embracing both administrative and law enforcement missions. *See, e.g.,* *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1318–19 (D. Utah 2003) (determining that the U.S. Bureau of Reclamation qualified as a mixed-function agency because of the dual roles played by the agency in light of its statutory authorization).

4. *See supra* note 2.

5. As part of the agency’s licensing process, the FAA administers Airman Knowledge Tests tailored to the specific license individuals would like to obtain. *Airman Knowledge Test Guides*, FAA, https://www.faa.gov/training_testing/testing/test_guides (last visited June 16, 2014). The U.S. Coast Guard likewise administers Deck and Engineering exams depending on the position a license applicant wishes to hold. U.S. COAST GUARD, NAT’L MAR. CTR., GUIDE FOR ADMINISTRATION OF MERCHANT MARINER EXAMINATIONS (DECK & ENGINEERING GUIDE) 1, 2, 22, 54 (2011), *available at* http://www.uscg.mil/nmc/training/pdfs/deck_and_engineering_guide.pdf.

6. *See About Us*, NAT’L MAR. CTR., U.S. COAST GUARD, http://www.uscg.mil/nmc/about_us/default.asp (last visited June 16, 2014).

7. *See* discussion *infra* Part I.

may seem natural.⁸ However, all federal agencies operate under the watchful eye of the Freedom of Information Act (FOIA),⁹ which, at its core, mandates that federal agencies provide public access to official government records, subject to a set of nine limited exemptions.¹⁰ Mixed-function licensing agencies often assemble large databases of examination Q&As from which samples are pulled for each test.¹¹ These examination databases constitute official agency records.¹² Therefore, mixed-function licensing agencies intent on protecting examination Q&As from the public eye must employ one of the nine enumerated FOIA exemptions.

Courts' interpretations of FOIA's Exemption 2, which excludes official government documents "related solely to the internal personnel rules and practices of an agency" from the statute's disclosure mandate,¹³ for years enabled agencies to protect examination Q&As from publication.¹⁴ Based on a broad view of the exemption established by the D.C. Circuit Court in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*,¹⁵ courts in the Second,¹⁶ Seventh,¹⁷ and Ninth Circuits¹⁸ embraced an interpretation of the

8. See discussion *infra* Part I (discussing the prevalence of rote learning in the examination process and studies documenting the negative impact on information comprehension).

9. Freedom of Information Act, 5 U.S.C. § 552 (2012).

10. *Id.* § 552(b)(1)–(9); see also David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 157 (2007) (stating that, in light of passage of FOIA, "[s]ecrecy [in a democratic government] is the exception, rather than the norm").

11. See, e.g., *Airman Knowledge Test Question Bank: Private Pilot*, FAA (Jan. 13, 2014), https://www.faa.gov/training_testing/testing/test_questions/media/pvt.pdf (providing a glimpse into the private pilot knowledge examination question bank); *Frequently Asked Questions*, MYWRITTENEXAM.COM, <http://www.mywrittenexam.com/mwe/faq> (last visited June 16, 2014) (explaining that the testing company has access to the over 900 questions that appear in the FAA's private pilot examination questions bank); U.S. COAST GUARD, NAT'L MAR. CTR., *supra* note 2 (providing access to deck and engineering examination questions); Dom Yanchunas, *Coast Guard to Resume Posting Full Archive of Mariner Exam Questions*, PROF. MARINER (Aug. 28, 2012, 11:53 AM), <http://www.professionalmariner.com/Web-Exclusive-2012/Coast-Guard-to-resume-posting-full-archive-of-mariner-exam-questions> (detailing the U.S. Coast Guard's policy of posting all examination questions).

12. Title 5 of the U.S. Code does not specifically define what qualifies as an "agency record," but the U.S. Supreme Court has articulated a two-part test stating that an (1) "agency record" must consist of information created or obtained by the agency, and (2) the agency must control the information at the time of the FOIA request. See *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989).

13. 5 U.S.C. § 552(b)(2).

14. See discussion *infra* Section II.C (providing a look at the U.S. Coast Guard's response to the Court's narrowing of Exemption 2).

15. 670 F.2d 1051, 1074 (D.C. Cir. 1981) (holding that "if a document for which disclosure is sought meets the test of 'predominant internality,' and if disclosure significantly risks circumvention of agency regulations or statutes, then Exemption 2 exempts the material from mandatory disclosure"), *overruled by* *Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011).

16. *Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993) (stating that "internal agency information may be withheld . . . if the material is of public interest, and 'the government demonstrates that disclosure of the material would risk circumvention of lawful agency regulations'" (quoting Buffalo

exemption that shielded “predominantly internal” documents whose disclosure would “significantly risk[] circumvention of agency regulations or statutes.”¹⁹ Referred to as the “High 2” exemption by courts following the *Crooker* precedent,²⁰ the exemption provided mixed-function licensing agencies justification for protecting examination materials.²¹

The judicially crafted High 2 exemption crumbled in 2011 following the Supreme Court’s decision in *Milner v. Department of the Navy*.²² In *Milner*, the Court brought an end to the *Crooker* construction, holding that a plain reading of FOIA does not permit such an expansive application of the exemption.²³ Beyond simply drawing the curtains on the High 2 concept, the Court’s decision signaled a return to a plain-language reading of FOIA under which the nine exemptions “are ‘explicitly made exclusive’ and must be ‘narrowly construed.’”²⁴

Against this backdrop, mixed-function licensing agencies no longer enjoy access to the broad protections offered by the now-defunct High 2 exemption in efforts to protect licensing examination Q&As.²⁵ But while *Milner* may have foreclosed the use of the High 2 exemption, several potential options have emerged to fill the void. The first method of bypassing FOIA’s disclosure requirement entails securing codification of the High 2 concept by amending the statute itself to either rewrite Exemption 2 or create a new exemption embodying the language articulated in the *Crooker* decision.²⁶ The second method entails utilizing Exemption 3, which permits agencies to exempt specific documents from disclosure by statute.²⁷

Evening News v. U.S. Border Patrol, 791 F. Supp. 386, 391 (W.D.N.Y. 1992)), *overruled by Milner*, 131 S. Ct. 1259.

17. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988) (embracing the *Crooker* interpretation after embarking on its own review of FOIA’s legislative history), *overruled by Milner*, 131 S. Ct. 1259.

18. *Milner v. U.S. Dep’t of the Navy*, 575 F.3d 959, 965 (9th Cir. 2009), *rev’d*, 131 S. Ct. 1259.

19. *Crooker*, 670 F.2d at 1073–74.

20. *See Milner*, 575 F.3d 959 *passim*.

21. *See discussion infra* Section II.C (providing a look at the Coast Guard’s response to the Court’s narrowing of Exemption 2).

22. 131 S. Ct. 1259, 1271 (2011).

23. *Id.* (“Exemption 2, consistent with the plain meaning of the term ‘personnel rules and practices,’ encompasses only records relating to issues of employee relations and human resources.” (quoting 5 U.S.C. 552(b)(2) (2006))).

24. *Id.* at 1262 (citation omitted) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) and *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

25. *See infra* notes 118–121 and accompanying text.

26. For a discussion of such proposed language, see Daniel J. Metcalfé, *Amending the FOIA: Is it Time for a Real Exemption 10?*, ADMIN. & REG. L. NEWS, Summer 2012, at 16, 16–18.

27. 5 U.S.C. § 552(b)(3) (requiring a statute contain language that explicitly either “(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on

Neither of these options, however, presents an ideal solution to the problem that mixed-function licensing agencies face. Modification of Exemption 2 or creation of an entirely new exemption codifying the High 2 standard fails to guarantee the Court will read the language as covering federal licensing materials.²⁸ Furthermore, reliance on a statutory amendment to FOIA subjects agencies to shifting political winds. Similarly, relying on individual statutory exclusions under Exemption 3 will force agencies to appeal to Congress on a case-by-case basis.²⁹ Such reliance creates an onerous burden on mixed-function licensing agencies by removing their ability to efficiently protect information from public disclosure in the face of evolving circumstances. At the same time, congressional approval of an agency's request for an individual statutory exemption eliminates the ability of courts to examine whether the government is justified in withholding information, potentially exposing the use of the exemption to abuse.³⁰

This Note argues that a third option, the utilization of Exemption 7(F),³¹ presents mixed-function licensing agencies a concrete means to lawfully protect licensing examination materials from public disclosure. Part I discusses why mixed-function licensing agencies seek to withhold examination Q&As in the first place. Part II tracks FOIA's development and evolution, beginning with the statute's basic premise that presupposes information should be made public. Part II analyzes the development by Congress of various qualifications to this premise through amendments to the original FOIA, and how agencies successfully justified withholding information under Exemption 2. Part III addresses how, in narrowing the scope of longstanding interpretations of Exemption 2, the Supreme Court opened the door for mixed-function licensing agencies to employ Exemption 7(F) to protect information relating to the certification and licensing of select individuals. This Note concludes that mixed-function licensing agencies should protect the integrity of their competency assessment tools by using Exemption 7(F) to continue to withhold

the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld" to qualify under this exemption).

28. The Court has not explicitly stated that the High 2 construction, if constituting a permissible interpretation of Exemption 2's scope, would cover mixed-function licensing agency examination Q&As.

29. *See supra* note 27.

30. It is difficult to project how Congress may respond to individual requests for statutory exemptions to FOIA's public disclosure requirement, but it is possible to foresee agencies applying to Congress for individual exemptions with full knowledge that the material the agencies seek to withhold falls far outside that which FOIA's nine enumerated exemptions are designed to protect.

31. 5 U.S.C. § 552(b)(7)(F) (stating that FOIA's disclosure mandate does not apply to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual").

examination Q&As from public disclosure.

I. AGENCY DRIVE FOR THE PROTECTION OF EXAMINATION Q&AS

Rote learning undermines agencies' competency assessment tools and increases the public-safety risk of licensing unqualified individuals to operate aircraft and commercial vessels. This drives mixed-function licensing agencies to protect examination Q&As from public disclosure. Based on government reports documenting competency concerns centering on rote learning, this Part addresses the analytical basis for applying Exemption 7(F) to agency examination Q&As.

A. Rote Learning and the Impact on Public Safety

Common sense appears to dictate that mixed-function licensing agencies would seek to withhold examination Q&As from the public eye; after all, providing test takers with not only *all* of the questions they will encounter on an exam but also *all* of the answers runs counter to traditional educational principles. But in the face of FOIA's presupposition of public disclosure³² and the risk of litigation posed by improperly invoking one of the nine enumerated exemptions to the disclosure mandate,³³ mixed-function licensing agencies must establish a firmer ground to deny access than a general appeal to common sense. Studies conducted on the effect of rote learning or rote memorization, defined as "mechanical or unthinking routine or repetition,"³⁴ provide one form of empirical support for protecting examination Q&As.³⁵

It is critical to focus on what is at stake here. Mixed-function licensing agencies are not concerned with providing individuals the go-ahead to operate in a manner where their actions have the potential to affect only themselves. Instead, mixed-function licensing agencies arm individuals with licenses to man the controls of machines³⁶ that in an instant can inflict widespread damage on the public. It is in recognition of these licenses' inherent power that mixed-function licensing agencies look to employ exemptions to FOIA's disclosure mandate in the examination of license

32. *See infra* Section II.A.

33. *See infra* notes 59–60.

34. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1084 (11th ed. 2011).

35. *See, e.g.*, STEPHEN M. CASNER ET AL., NASA AMES RESEARCH CTR., FAA PILOT KNOWLEDGE TESTS: LEARNING OR ROTE MEMORIZATION? 10–12 (2004), *available at* <http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20040034190.pdf>; KEIKO MOEBUS, MOEBUS AVIATION CONSULTING, IMPACT ASSESSMENT OF THE PUBLICATION OF QUESTIONS OF THEORETICAL EXAMINATIONS FOR PART 66 AND PART FCL § 1 (2009), *available at* <http://www.easa.europa.eu/rulemaking/docs/research/Final%20Report%20on%20publication%20assessment.pdf>.

36. For example, the FAA grants individuals commercial and recreational private licenses and the U.S. Coast Guard grants individuals commercial vessel licenses. *See supra* note 2 and accompanying text.

applicants.

*B. The Federal Aviation Administration as a Mixed-Function
Licensing Agency Case Study*

Access to an agency's justification for withholding information from the public is, in itself, largely covered by an exemption to FOIA protecting intra-agency memorandums not available by law to a party other than another agency in litigation.³⁷ However, in response to concerns raised over the potential impact on general aviation safety of rote memorization versus "genuine conceptual understanding" due to misalignment in airman testing, curriculum development, and industry standards,³⁸ the FAA is currently engaged in creating an agency working group tasked, in part, with evaluating the agency's test management practices.³⁹ The FAA administers airman knowledge tests as part of the agency's airman certification procedure.⁴⁰ These examinations consist of objective, multiple-choice questions covering a range of issues related to the certification the test taker hopes to acquire,⁴¹ and the agency draws from a database of questions and answers to assemble its exams.⁴² Prior to the FAA's investigation, the National Aeronautics and Space Administration (NASA)⁴³ and the European Aviation Safety Agency (EASA)⁴⁴ analyzed the effectiveness of the FAA's testing system on critical concept comprehension.

To conduct its study, NASA reworded existing examination questions from the FAA's database, shuffled the answers, and created new figures for problems that required test takers to examine diagrams in formulating answers.⁴⁵ NASA also created its own set of unique questions not available

37. 5 U.S.C. 552(b)(5) (2012) ("[FOIA's disclosure mandate] does not apply to matters that are . . . 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 . . .").

38. AIRMEN TESTING STANDARDS AND TRAINING WORKING GRP., A REPORT FROM THE AIRMEN TESTING STANDARDS AND TRAINING WORKING GROUP TO THE AVIATION RULEMAKING ADVISORY COMMITTEE 6 (2013), available at http://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/Airmen.Testing.Standards.Recommendation.Report.9.30.2013.PDF.

39. Aviation Rulemaking Advisory Committee, New Task Assignment for the ARAC: Establishment of Airman Certification System Working group, 79 Fed. Reg. 4800 (proposed Jan. 29, 2014). The working group, consisting of a wide range of stakeholders and tackling a variety of issues related to the FAA's airman certification system, must submit its findings no later than December 31, 2015. *Id.*

40. *Airman Knowledge Test Guides*, *supra* note 5.

41. For an example of an examination offered by the FAA, see *Airman Knowledge Test Question Bank: Commercial Pilot*, FAA (Jan. 13, 2014), http://www.faa.gov/training_testing/testing/test_questions/media/com.pdf.

42. CASNER ET AL., *supra* note 35, at 1.

43. *See generally id.*

44. *See generally* MOEBUS, *supra* note 35.

45. CASNER ET AL., *supra* note 35, at 5–7.

through the FAA's examination database concerning required pilot knowledge,⁴⁶ and it used unaltered questions from the FAA's database as a control set.⁴⁷ NASA administered the revised examination to forty-eight private pilot applicants that recently completed the standard FAA knowledge test to determine "if pilot applicants' knowledge of the required aeronautical knowledge was based on understanding, or on a more superficial review of the questions appearing in the FAA [Q&A database]."⁴⁸ NASA found a statistically significant drop in the percentage of questions answered correctly versus the control when figures diverging from those in the FAA database were inserted into questions,⁴⁹ and an even greater drop when students faced entirely unique questions.⁵⁰ Coupled with data provided by the FAA indicating many test takers were able to complete standard examinations in less time than it would take the average person to read the question prompts,⁵¹ NASA ultimately concluded that, in the case of the FAA, releasing examination Q&As in advance undermined the viability of the examination process as a competency assessment tool.⁵²

In similar fashion to the NASA study, the EASA study analyzed the effects of rote learning on meaningful technical information comprehension by examining the ability of university students to learn and recall 136 Q&As from a flight training school examination question bank in a twenty-four-hour period.⁵³ On the first day of the study, the EASA tested students on the exact same 136 questions provided in advance, along with 136 reworded versions of those same questions.⁵⁴ One week later, the same students were tasked with memorizing another 136 questions, and one day later were presented with an exam consisting of an exact copy of those same questions, 136 reworded versions of those questions and the same 272 questions from the previous week's exam.⁵⁵ The EASA found that the average test taker could score above 75%, considered a passing score, though the test takers scored marginally worse on the reworded questions.⁵⁶ Based on the study, the EASA concluded that aviation examinations designed to test technical comprehension were susceptible to rote learning and shallow understanding if the full set of examination Q&As was provided in advance.⁵⁷ The EASA report qualified its finding

46. *Id.* at 7.

47. *Id.* at 5–6.

48. *Id.* at 5.

49. *Id.* at 10.

50. *Id.*

51. *Id.* at 2–4.

52. *Id.* at 10.

53. MOEBUS, *supra* note 35, § 1.

54. *Id.*

55. *Id.*

56. *Id.* § 8.

57. *Id.*

by emphasizing that voluminous test banks can effectively mitigate the shallow or nonexistent comprehension associated with rote learning in many cases, though given enough time and preparation an exam taker could still commit a substantial number of Q&As to memory without grasping meaningful information.⁵⁸

The current FAA working group investigation and the two studies cited by the agency represent only a single example of the thought process behind a mixed-function licensing agency's effort to justify withholding examination Q&As from the public eye. But the bottom line is that, despite the burden of proof placed on federal agencies invoking an exemption to FOIA⁵⁹ and the potential consequences of improperly denying a citizen's request,⁶⁰ at least some mixed-function licensing agencies feel that the

58. *Id.*

59. 5 U.S.C. § 552(a)(4)(B) (2012). The statute, in relevant part, states:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and *the burden is on the agency to sustain its action.*

Id. (emphasis added).

60. 5 U.S.C. § 552(a)(4)(E)–(G). The statute, in relevant part, states:

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

consequences of certifying unqualified individuals in public safety-sensitive positions overshadow the litigation risk.⁶¹

II. OPERATING IN THE CONTEXT OF FOIA'S WATCHFUL EYE

Despite the public policy supporting mixed-function licensing agencies' efforts to establish examination methods best suited to equip individuals with critical competencies,⁶² membership-based interest groups representing license applicants have vigorously challenged the withholding of examination Q&As.⁶³ Utilizing FOIA in attempts to compel agency disclosure of this information,⁶⁴ these groups have pressed mixed-function licensing agencies into defensive postures. As FOIA places the burden on federal agencies to justify the withholding of information from the public,⁶⁵ mixed-function licensing agencies must reach beyond public policy and invoke the limited exemptions to FOIA's disclosure mandate.⁶⁶

Although the case law is sparse when it comes to the application of FOIA to mixed-function licensing agencies, courts have actively addressed agencies' use of the statute's nine enumerated exemptions.⁶⁷ The degree to

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

Id.

61. *See infra* note 101 and accompanying text.

62. *See supra* Part I.

63. *See infra* notes 118–126.

64. 5 U.S.C. § 552(a)(3) (providing a general overview of the process to submit a request for agency production of information subject to FOIA's disclosure requirement).

65. *See supra* note 59 and accompanying text.

66. 5 U.S.C. § 552(b)(1)–(9).

67. *See, e.g.,* *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011) (considering the U.S. Navy's invocation of FOIA Exemption 2 to withhold disclosure of data and maps revealing details regarding explosive storage efforts in a Washington State naval base); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 147–51 (1989) (considering the validity of FOIA Exemption 7's use by petitioners, Defense Contract Audit Agency and FBI, to protect from public disclosure information relating to an audit conducted by the government against a Department of Defense contractor suspected of misallocating government funds); *FBI v. Abramson*, 456 U.S. 615, 618 (1982) (addressing “whether information contained in records compiled for law enforcement purposes loses [FOIA Exemption 7] status when it is incorporated into records compiled for purposes other than law enforcement”); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 216 (1978) (analyzing the National Labor Relations Board's appeal to Exemption 7(A) in withholding potential witness statements prior to an unfair labor practice complaint hearing).

which courts have provided federal agencies latitude in invoking the exemptions, however, directly affects mixed-function licensing agencies' comfort in turning to a given exemption. It also affects agencies' confidence that they may avoid litigation if they decide to withhold information despite an individual's request for disclosure.⁶⁸ This Part specifically addresses how mixed-function licensing agencies have navigated the FOIA landscape in light of key court decisions expanding and subsequently contracting the scope of Exemption 2's applicability.

A. FOIA and the Presupposition of Disclosure

Prior to the enactment of FOIA in 1966,⁶⁹ members of the general public relied on the public-information provisions contained in § 3 of the Administrative Procedure Act (APA) to obtain "matters of official record."⁷⁰ Constructed under "the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know . . . with definiteness and assurance,"⁷¹ § 3 nonetheless applied strict standards regarding who could utilize the provisions.⁷² Only persons "properly and directly concerned" with matters of the official record sought could hope to compel disclosure.⁷³ The statute further permitted agencies to withhold information "for good cause found," or if the agency determined such withholding was in the "public interest."⁷⁴ Furthermore, even if an agency could submit no ground for authority to withhold information, the APA provided the public no remedy in the face of government opposition.⁷⁵

Congress enacted FOIA in 1966 to eliminate agencies' use of § 3 "as an authority for withholding, rather than disclosing, information."⁷⁶ As the House Committee on Government Operations stated in its report accompanying FOIA, under § 3 of the APA, "the requirements for publicity [were] so hedged with restrictions that [the law] has been cited as basic statutory authority for 24 separate terms . . . which Federal agencies have devised to stamp on administrative information they want to keep

68. See *infra* note 118–21 and accompanying text for an example of the U.S. Coast Guard's response to the Supreme Court's rejection of the High 2 interpretation in terms of the agency's treatment of licensing examination Q&As.

69. Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250 (1967) (codified as amended at 5 U.S.C. § 552).

70. Administrative Procedure Act § 3, 5 U.S.C. § 1002(c) (1946) (recodified as amended at 5 U.S.C. § 552 (2012)).

71. S. REP. NO. 79-752, at 198 (1945).

72. See S. REP. NO. 89-813, at 40 (1965) (noting that under § 3, "any Government official can under color of law withhold almost anything from any citizen").

73. *Id.* (internal quotation marks omitted).

74. *Id.*

75. *Id.*

76. H.R. REP. NO. 89-1497, at 25 (1966).

from public view.”⁷⁷ The Senate Committee on the Judiciary likewise pointed to the need to amend the APA to “establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.”⁷⁸

As part of the effort to codify this philosophy of transparency and openness, Congress injected explicit language into FOIA providing private citizens access to the courts for alleged unlawful withholdings.⁷⁹ FOIA places the burden on the agency to justify its withholding and mandates de novo review in the courts to ensure “that the ultimate decision as to the propriety of the agency’s action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.”⁸⁰ Addressing repeated challenges under FOIA since its inception, the Court has maintained its focus on adjudicating cases in a manner that preserves FOIA’s central purpose: “[T]o ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁸¹

The 1966 FOIA contained nine limited exemptions agencies could employ to combat the disclosure presumption.⁸² In *John Doe Agency v. John Doe Corp.*, the Court recognized the legitimate interest posited by Congress to withhold certain information from public view and “to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.”⁸³ Although modified in limited fashion through statutory amendments, FOIA in its present state maintains nine discrete disclosure exemptions that the Court maintains “are ‘explicitly made exclusive,’ and must be ‘narrowly construed.’”⁸⁴

B. Rise of the High 2 Exemption

Exemption 2, the exemption that provided mixed-function licensing agencies support to withhold documents relating to federal licensing procedures,⁸⁵ states in its current form that FOIA’s disclosure requirement “does not apply to matters that are . . . related solely to the internal

77. *Id.* at 27.

78. S. REP. NO. 89-813, at 38 (1965).

79. *Id.* at 43.

80. *Id.*

81. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted).

82. Freedom of Information Act of 1966, Pub. L. No. 90-23, 81 Stat. 54, 55 (1967) (codified as amended at 5 U.S.C. § 552).

83. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. REP. NO. 89-1497, at 6 (1966)) (internal quotation marks omitted).

84. *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1262 (2011) (citations omitted) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) and *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

85. *See supra* notes 13–14 and accompanying text.

personnel rules and practices of an agency.”⁸⁶ This seemingly innocuous language spurred heated debate in courts over its scope, culminating in the Supreme Court’s 2011 decision *Milner v. Department of the Navy*, discussed further below, in which the Court laid to rest a burgeoning circuit court split over the FOIA exemption’s breadth.⁸⁷

The Court first provided agencies an opportunity to withhold licensing examination materials under Exemption 2 in *Department of the Air Force v. Rose*.⁸⁸ In *Rose*, which centered on the petitioners’ calls for disclosure of U.S. Air Force Academy honor and ethics hearing case summaries,⁸⁹ the Court stated that “where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption 2 is not applicable to matters subject to such a genuine and significant public interest.”⁹⁰ Viewing the Court’s language in *Rose* as permitting agencies to withhold information beyond that relating to agencies’ internal personnel matters,⁹¹ the D.C. Circuit in *Crooker v. Bureau of Alcohol, Tobacco & Firearms* crafted a two-part Exemption 2 application that guided courts’ interpretation of this FOIA disclosure exception for thirty years.⁹² The D.C. Circuit in *Crooker* held that “if a document for which disclosure is sought meets the test of ‘predominant internality,’ and if disclosure significantly risks circumvention of agency regulations or statutes, then Exemption 2 exempts the material from mandatory disclosure.”⁹³

As articulated in subsequent cases, the *Crooker* holding created a “High 2” and a “Low 2” exemption, with the Low 2 referring to agencies’ human resources and employee-relations documents, and High 2 referring to agency documents that could risk circumvention of the law if disclosed.⁹⁴ The Second,⁹⁵ Seventh,⁹⁶ and Ninth⁹⁷ Circuit Courts of Appeal adopted the

86. 5 U.S.C. § 552(b)(2) (2012).

87. *Milner*, 131 S. Ct. at 1263.

88. 425 U.S. 352, 357, 369 (1976) (evaluating the Air Force’s claim that honors and ethics hearings summaries constituted “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” and thus qualified for protection from disclosure under FOIA Exemption 6) (citing 5 U.S.C. § 552(b)(6) (1970)) (internal quotation marks omitted).

89. *Id.* at 354–55.

90. *Id.* at 369 (emphasis added).

91. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1066 (D.C. Cir. 1981) (noting that in reaching its decision in *Rose*, “the Supreme Court considered as substantial the argument that Exemption 2 might be construed to cover internal agency materials where disclosure might risk circumvention of the law”), *overruled by Milner*, 131 S. Ct. 1259.

92. *Id.* at 1074.

93. *Id.* (citing *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 782 (D.C. Cir. 1978) (Leventhal, J., concurring)).

94. *Milner*, 131 S. Ct. at 1263.

95. *Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993).

96. *Kaganove v. EPA*, 856 F.2d 884, 888–89 (7th Cir. 1988).

Crooker construction of Exemption 2, while the remaining courts of appeal recognized only the Low 2 FOIA exemption.⁹⁸

As a mixed-function licensing agency, the Coast Guard latched onto the High 2 construction of Exemption 2,⁹⁹ applying the standard to a swath of information falling outside of the universally accepted Low 2 interpretation. The Coast Guard, in guidance materials provided to legal officers involved in issues relating to FOIA, specifically stated that examination Q&As qualified as information protectable from public disclosure as High 2 material.¹⁰⁰ Pointing to the agency's duty to manage a "competent" and "qualif[ied]" merchant marine,¹⁰¹ the Coast Guard as recently as 2010, in an open letter to the public, reinforced the agency's belief that withholding examination Q&As from the public "protect[s] the integrity of the exam and the Coast Guard's regulation of licensed mariners" and "ensure[s] that credentialed mariners are adequately skilled and knowledgeable to protect the public."¹⁰² The Coast Guard's letter further emphasized withholding the information would "facilitate an examination of prospective mariners' seamanship and maritime knowledge rather than their knowledge of the questions and answers posted on the website."¹⁰³ A FOIA Guide published by the Department of Justice similarly recognized the general acceptance of the High 2 formulation's application to "agency testing or employee rating materials."¹⁰⁴

C. *The High 2 Exemption's Subsequent Fall*

Over the course of 2003 and 2004, a Puget Sound, Washington resident requested the U.S. Navy disclose documents related to facilities in the area

97. *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 965 (9th Cir. 2009), *rev'd*, 131 S. Ct. 1259.

98. *See Milner*, 131 S. Ct. at 1263 (identifying the adoption of the High 2 construction by the courts in *Massey*, *Kaganove*, and *Milner*).

99. *See* Slideshow, Mission Support Law, U.S. Coast Guard, Freedom of Information Act (FOIA): General Overview 12 (2009) (emphasis added) *available at* http://www.uscg.mil/lsc/docs/LSC_FOIA_Training_JUN09.pps (instructing that the High 2 interpretation could be applied to information such as "guidelines for conducting investigations, security procedures, vulnerability assessments, *answers to exams* [sic]").

100. *Id.*

101. 46 C.F.R. § 10.101 (2013).

102. Press Release, D.C. Stalfort, Captain, U.S. Coast Guard, Changes to Mariner Examination Questions Posting (July 6, 2010), http://www.uscg.mil/nmc/announcements/pdfs/removal_of_mariner_exam_questions.pdf (providing the formal determination by U.S. Coast Guard Captain D.C. Stalfort to withhold merchant mariner examination Q&As from the public).

103. *Id.*

104. *Freedom of Information Act Guide, May 2004: Exemption 2*, U.S. DEP'T OF JUSTICE (2004), <http://www.justice.gov/oip/exemption2.htm> (citations omitted) (noting that disclosure of these materials "has been found likely to result in harmful circumvention [of agency regulations or statute]").

used to store explosives.¹⁰⁵ The Navy invoked Exemption 2 in denying the request, arguing that disclosure of the materials presented a threat to the security of the base and its adjacent community.¹⁰⁶ The Ninth Circuit Court of Appeals agreed with the Navy's determination that the requested documents "would risk circumvention of the law" by drawing attention to the base's specific vulnerabilities that terrorists could target to wreak havoc.¹⁰⁷ Relying on the High 2 interpretation first formulated in *Crooker*, the court granted the Navy summary judgment.¹⁰⁸

Recognizing the circuit court split over Exemption 2 that emerged after *Crooker*,¹⁰⁹ the U.S. Supreme Court granted certiorari and held that the Low 2 interpretation constituted the only permissible interpretation of the FOIA exemption.¹¹⁰ The Court noted that FOIA's legislative history supported a reading of Exemption 2 as applying to material more in line with internal agency information such as the "use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like."¹¹¹ The Court argued that if it permitted continued reliance on the High 2 standard, the Court "would ill-serve Congress's purpose by construing Exemption 2 to reauthorize the expansive withholding that Congress wanted to halt."¹¹²

But the Court in *Milner* signaled more than just the end of the High 2 interpretation: the Court's majority opinion foreshadows a future unwillingness to read elaborate exceptions into FOIA's enumerated exemptions.¹¹³ Relying on Webster's and Random House dictionaries to parse out the common meaning of Exemption 2's key words,¹¹⁴ the Court determined "the only way to arrive at High 2 is by taking a red pen to the statute—'cutting out some' words and 'pasting in others' until little of the actual provision remains."¹¹⁵ Further, the Court acknowledged the presence of contradictory legislative history that led the court in *Crooker* to read-in the High 2, but explained that "clear statutory language" trumps "dueling

105. *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1263–64 (2011).

106. *Id.* at 1264.

107. *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 971 (9th Cir. 2009) ("There is no basis to 'suspect' that the Navy has ulterior, political motives for denying the requested information. The Navy has met its burden of describing how disclosure would risk circumvention of its regulations." (citation omitted) (quoting *id.* at 980 (Fletcher, J., dissenting))), *rev'd*, 131 S. Ct. 1259.

108. *Id.* at 971–72.

109. *Milner*, 131 S. Ct. at 1263.

110. *Id.* at 1265.

111. *Id.* at 1262 (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 363 (1976)) (internal quotation marks omitted).

112. *Id.* at 1266.

113. *See id.* (stating that the Court "will not . . . allow[] ambiguous legislative history to muddy clear statutory language").

114. *Id.* at 1264.

115. *Id.* at 1267 (citation omitted).

committee reports.”¹¹⁶ Finding Exemption 2’s basic language unambiguous in general usage, the Court determined legislative history provided inadequate support for the High 2 construction.¹¹⁷

The Coast Guard’s August 2012 letter responding to the National Mariners Association’s (NMA) FOIA request for publication of merchant mariner examination Q&As illustrates the impact of the Court’s decision in *Milner*.¹¹⁸ Following the Coast Guard’s decision in 2010 to remove merchant mariner examination materials from the public sphere, the NMA, a membership-based association representing the interests of merchant mariners,¹¹⁹ formally requested the Coast Guard once again publish a complete record of all examination Q&As.¹²⁰ In its letter to the NMA two years after the association’s FOIA request, the Coast Guard, in succinct terms, cited to the decision in *Milner* and informed the NMA that it would reinstate its formerly abandoned policy of publishing all examination materials.¹²¹

In similar fashion to the action taken by the NMA in response to the Coast Guard’s invocation of Exemption 2,¹²² the National Association of Flight Instructors, dedicated to serving the interests of the flight instructor community,¹²³ challenged the FAA’s decision to inject new questions into the agency’s airman knowledge examination database without informing the public of the decision or releasing the new material.¹²⁴ In response, the FAA developed the Airman Testing Standards and Training Aviation Rulemaking Committee (ARC) in 2011, consisting of industry representatives, to provide the FAA recommendations on how to improve aviation safety.¹²⁵ In its first report to the FAA, ARC urged the agency to

116. *Id.*

117. *Id.*

118. *NMA Appeal Upheld on Exam Q&A Database*, NEWSLETTER (NAT’L MARINERS ASS’N, HOUMA, LA.), Aug. 2012, at 2–3, available at http://www.nationalmariners.us/images/Number_86_August_2012.pdf.

119. *About NMA*, NAT’L MARINERS ASS’N, <http://www.nationalmariners.us/about.html> (last visited June 16, 2014).

120. *NMA Appeal Upheld on Exam Q&A Database*, *supra* note 118, at 2.

121. *Id.*

122. *Id.*

123. *NAFI – Who We Are*, NAT’L ASS’N OF FLIGHT INSTRUCTORS, <http://www.nafinet.org/who/index.aspx> (last visited June 16, 2014).

124. Letter from Jason Blair, Exec. Dir., Nat’l Ass’n of Flight Instructors, and Kristine Hartzell, Manager of Regulatory Affairs, Aircraft Owners & Pilots Ass’n, to Van Kerns, Manager, FAA Regulatory Support Div. (Mar. 3, 2011), <http://www.nafinet.org/File/AOPA%20-%20NAFI%20Knowledge%20Test%20Changes%20Letter%203-3-11.pdf>.

125. AIRMAN TESTING STANDARDS AND TRAINING AVIATION RULEMAKING COMM., A REPORT FROM THE AIRMAN TESTING STANDARDS AND TRAINING AVIATION RULEMAKING COMMITTEE TO THE FAA: RECOMMENDATIONS TO ENHANCE THE AIRMAN KNOWLEDGE TEST CONTENT AND ITS PROCESSES AND METHODOLOGIES FOR TRAINING AND TESTING app. C at C-1 to C-3 (2012), available at http://www.faa.gov/aircraft/draft_docs/media/afs/airman_test_arc_final_rpt.pdf.

return its examination question bank to the public domain by the end of 2012, although it suggested that the agency examine over the course of a three to five year period whether the question bank, in whole or in part, could and should be lawfully withheld from public view.¹²⁶

Given the pace with which federal agencies move, it is predictable that the Court's 2011 ruling in *Milner* will continue to work its way through agencies' legislative and regulatory offices. But in light of the Court's unequivocal stance on the employment of Exemption 2 to protect non-internal agency records from public view,¹²⁷ it is unreasonable to believe a mixed-function licensing agency would be so bold as to posit the courts would permit an application of the exemption to licensing materials in the future.

D. Refinement of Exemption 7

As the U.S. Department of Justice detailed in guidance provided to federal agencies on the legal requirements imposed by FOIA,¹²⁸ Exemption 7 initially enabled federal agencies to protect "investigatory files compiled for law enforcement purposes except to the extent available by law to a [private] party" from public disclosure.¹²⁹ Designed to protect government documents prepared for the purpose of prosecuting violators of federal law,¹³⁰ Exemption 7 experienced two major modifications following its establishment in 1966: first in 1974¹³¹ and then again in 1986.¹³² Identifying widespread use of Exemption 7 as a blanket authorization to withhold any information in an investigatory file regardless of the file's status,¹³³ Congress amended the exemption in 1974 to permit protecting the files only if the government could prove disclosure would result in one of six explicit harms to an agency's operations.¹³⁴ Following Congress's amendment, properly invoking Exemption 7 required that an agency first show the document at issue constituted "an investigatory record compiled

126. *Id.* at 31.

127. *See supra* notes 109–112.

128. *Freedom of Information Act Guide, May 2004*, U.S. DEP'T OF JUSTICE (2004), <http://www.justice.gov/oip/foi-act.htm>.

129. *Freedom of Information Act Guide, May 2004: Exemption 7*, U.S. DEP'T OF JUSTICE (2004) [hereinafter *DOJ Exemption 7*], <http://www.justice.gov/oip/exemption7.htm> (quoting the Freedom of Information Act of 1966, Pub. L. No. 90-23, 81 Stat. 54, 55 (1967) (codified as amended at 5 U.S.C. § 552 (2012))).

130. S. REP. NO. 89-813, at 44 (1966).

131. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552).

132. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to -50 (codified as amended at 5 U.S.C. § 552).

133. *DOJ Exemption 7*, *supra* note 129 (citing *Weisberg v. U.S. Dep't of Justice*, 489 F.2d 1195, 1198–202 (D.C. Cir. 1973)).

134. *Id.* (citing Act of Nov. 21, 1974 § 2, 88 Stat. at 1563).

for law enforcement purposes,” and then demonstrate how disclosure would produce one of the six enumerated harms.¹³⁵ Exemption 7(F), the focus of this Note, specifically stated, at the time, that an agency must demonstrate that production of the material “would . . . endanger the life or physical safety of law enforcement personnel.”¹³⁶

The Freedom of Information Reform Act of 1986 once again revised Exemption 7, and the Act’s language remains in force today.¹³⁷ Recognizing fluctuating interpretations of FOIA’s ultimate purpose, the discussion surrounding the application of Exemption 7 in advance of the Reform Act ultimately boiled down “to the fundamental policy question sought to be addressed by the [Freedom of Information Act]: How much public disclosure of government information can the security of the Nation reasonably permit?”¹³⁸ Of significant relevance to mixed-function licensing agencies, the Reform Act eliminated “investigatory” from the exemption and inserted “or information.”¹³⁹ The intent of this amendment, according to Attorney General Edwin Meese III, as stated in a memorandum to executive departments and agencies following the Reform Act’s passage, was to “put an end to such troublesome distinctions and broaden the potential sweep of the exemption’s coverage.”¹⁴⁰ According to Attorney General Meese:

Even records generated pursuant to routine agency activities that could never be regarded as “investigatory” now qualify for Exemption 7 protection where those activities involve a law enforcement purpose. This includes records generated for general law enforcement purposes that do not necessarily relate to specific investigations. Records such as law enforcement manuals, for example, which formerly were found unqualified for Exemption 7 protection only because they were not ‘investigatory’ in character, now should readily satisfy the exemption’s threshold requirement.¹⁴¹

Additionally, the Act eliminated the need for agencies to conclusively demonstrate disclosure “would” result in one of the enumerated harms,¹⁴² requiring instead a lesser showing that production “could” result in one of

135. *Id.* (internal quotation marks omitted) (citing *FBI v. Abramson*, 456 U.S. 615, 622 (1982)).

136. Act of Nov. 21, 1974 § 2, 88 Stat. at 1563–64.

137. Freedom of Information Reform Act of 1986 § 1802, 100 Stat. at 3207-48 to -49.

138. Memorandum from Edwin Meese III, Att’y Gen., U.S. Dep’t of Justice, Attorney General’s Memorandum on the 1986 Amendments to the Freedom of Information Act (1987) [hereinafter AG Meese’s Memorandum], <http://www.justice.gov/oip/86agmemo.htm>.

139. *DOJ Exemption 7*, *supra* note 129 (citing the Freedom of Information Reform Act of 1986 § 1802, 100 Stat. at 3207–48).

140. AG Meese’s Memorandum, *supra* note 138.

141. *Id.* (citations omitted).

142. *See supra* note 136 and accompanying text.

the harms.¹⁴³ Congress emphasized the changes were “designed ‘to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which [it] is maintained.’”¹⁴⁴ Addressing the qualification that the information relate to “law enforcement purposes,”¹⁴⁵ Attorney General Meese, in his memorandum, stated that “[f]ederal agencies for which ‘[l]aw enforcement, indeed, is often [only] one of . . . [the] agency’s proper functions’ have been required to show that their records relate to ‘an identifiable possible violation of law.’”¹⁴⁶ Conversely, “the records of a principal federal law enforcement agency, such as the FBI, have been found to qualify simply by virtue of the primacy of the agency’s law enforcement mission or because a rational connection can readily be shown between the records’ compilation and the agency’s law enforcement purpose.”¹⁴⁷

Exemption 7(F) also experienced its own modification, transitioning from a focus on the safety of law enforcement personnel to a focus on any member of society.¹⁴⁸ In its current form, Exemption 7(F) states that federal agencies may withhold “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual.”¹⁴⁹ As Attorney General Meese noted, “The expansion of this exemption’s protective scope to encompass ‘any individual’ is obviously designed to ensure that no law enforcement information that could endanger anyone if disclosed under the FOIA should ever be required to be released.”¹⁵⁰

III. APPLICATION OF EXEMPTION 7(F)

Courts have actively dissected Exemption 7(F)’s language over the course of its evolution through today’s formulation, and the Supreme Court’s decision in *Milner* sets the stage for future litigation over the exemption’s use. Most notably, courts’ attention has focused on what

143. *DOJ Exemption 7*, *supra* note 129 (citation omitted).

144. *Id.* (alteration in original) (quoting S. REP. NO. 98-221, at 23 (1983)).

145. Freedom of Information Act of 1966, Pub. L. No. 90-23, 81 Stat. 54, 55 (1967) (codified as amended at 5 U.S.C. § 552 (2012)).

146. AG Meese’s Memorandum, *supra* note 138 (alterations in original) (footnote omitted) (quoting *Pratt v. Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982) and *Birch v. Postal Serv.*, 803 F.2d 1206, 1210 (D.C. Cir. 1986)).

147. *Id.* (citation omitted) (citing *Irons v. Bell*, 596 F.2d 468, 474–76 (1st Cir. 1979) and *Pratt*, 673 F.2d at 420–22).

148. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to -49.

149. 5 U.S.C. § 552(b)(7).

150. AG Meese’s Memorandum, *supra* note 138.

“compiled,”¹⁵¹ “law enforcement purposes,”¹⁵² and “any individual”¹⁵³ mean in the context of FOIA as a whole. This Part breaks down courts’ interpretations of these terms and how mixed-function licensing agencies may utilize these analyses to lawfully withhold information relating to the licensing and certification of individuals. Specifically, this Part breaks down Exemption 7(F)’s language by its two primary prongs: the requirement that information serve a “law enforcement” purpose, and the requirement that disclosure could produce the specified harm.

A. Exemption 7(F)’s First Prong and Mixed-Function Agencies

Mixed-function agencies can satisfy the first prong of Exemption 7(F) by showing that law enforcement, including preventative law enforcement, was a significant reason for compiling the information that the agency claims is exempt. The first subsection discusses the scope of the term “law enforcement.” The second subsection discusses the Court’s interpretation of the “compiled” requirement.

1. The Law Enforcement Hurdle

While courts have afforded agencies with principal criminal law enforcement functions significant latitude to withhold documents under Exemption 7,¹⁵⁴ the judicial record is relatively sparse when it comes to the exemption’s application by mixed-function agencies generally (not just those involved in the licensing or certification of individuals). The available record reveals, however, that courts understand Exemption 7’s first prong as applying to entities beyond those traditionally viewed as law enforcement agencies.¹⁵⁵ As discussed in *Living Rivers, Inc. v. United States Bureau of Reclamation*, mixed-function agencies are those that

151. *See, e.g., John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154–57 (1989) (refusing to limit the term “compiled” to mean only those documents assembled originally for a law enforcement purpose).

152. *See, e.g., Pratt*, 673 F.2d at 420–21 (establishing a two-part test to determine whether an agency meets Exemption 7(F)’s law enforcement threshold).

153. *See, e.g., ACLU v. Dep’t of Def.*, 543 F.3d 59, 67–68 (2d Cir. 2008) (rejecting the argument that Congress intended “any individual” under FOIA Exemption 7(F) to mean any person without limit or specification to any degree), *cert. granted and judgment vacated*, 130 S. Ct. 777 (2009).

154. *Pratt*, 673 F.2d at 419–21.

155. *See, e.g., Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1318–20 (D. Utah 2003); *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 963 (C.D. Cal. 2003) (recognizing that even if the U.S. Customs Service “did not have a clear law enforcement mandate,” the agency could still employ Exemption 7 if it could “show that the [information subject to the FOIA request] was compiled for law enforcement purposes”).

perform both administrative and law enforcement functions.¹⁵⁶ *Living Rivers* centered on a claim by an environmental group that the United States Bureau of Reclamation (BOR) unlawfully invoked Exemption 7(F) in refusing to disclose inundation maps detailing areas below the Hoover Dam and Glen Canyon Dam.¹⁵⁷ BOR claimed that Exemption 7(F) justified withholding the maps because the agency compiled information contained in the maps to prevent violations of the law,¹⁵⁸ and disclosure of the maps could endanger people living downstream from the dams.¹⁵⁹

Noting that Congress provided the BOR “express ‘law enforcement authority’ to ‘maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands,’”¹⁶⁰ the court found the maps were used and compiled under BOR’s statutory law enforcement mandate,¹⁶¹ satisfying Exemption 7’s first prong. The court in *Coastal Delivery v. United States Customs Service* likewise determined that the U.S. Customs Service “has a clear law enforcement mandate,”¹⁶² and thus could invoke Exemption 7 to protect information regarding the number of seaport merchandise examinations performed by the agency, so long as the agency could satisfy the second prong of Exemption 7’s analysis.¹⁶³

Justice Alito’s concurring opinion in *Milner* further supported the idea that mixed-function agencies could employ Exemption 7 to protect information. In his opinion, Justice Alito remarked that “[t]he ordinary understanding of law enforcement includes not just the investigation and prosecution of offenses that have already been committed, *but also proactive steps designed to prevent criminal activity and to maintain security.*”¹⁶⁴ If these functions failed to qualify as “‘law enforcement purposes,’ then those charged with law enforcement responsibilities have little chance of fulfilling their duty to preserve the peace,”¹⁶⁵ Justice Alito continued. Additionally, the majority in *Milner* left the question of whether

156. *Living Rivers*, 272 F. Supp. 2d at 1318 (citation omitted). *Living Rivers* and *Coastal Delivery Corp.* were specifically highlighted in the DOJ’s guidance on the scope of Exemption 7. *DOJ Exemption 7*, *supra* note 129, at 4–5.

157. *Living Rivers*, 272 F. Supp. 2d at 1314, 1318 (noting that the BOR did not initially invoke Exemption 7(F) to deny publication of the requested materials, but instead cited the exception to FOIA’s disclosure requirement for the first time before the district court).

158. *Id.* at 1318–19.

159. *Id.* at 1315–16.

160. *Id.* at 1319 (quoting 43 U.S.C.A. § 373b(a)).

161. *Id.* at 1320.

162. *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 963 (C.D. Cal. 2003).

163. *Id.* at 960, 963. In this case, the U.S. Customs Service was successful in satisfying the second prong of Exemption 7(E), which involves an enumerated harm not at issue in this Note.

164. *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1272 (2011) (Alito, J., concurring) (emphasis added).

165. *Id.*

the Navy could protect its documents under Exemption 7(F) for the circuit court on remand.¹⁶⁶

Mixed-function licensing agencies such as the Coast Guard and FAA, through their licensing and certification procedures, embrace the law enforcement role Justice Alito emphatically emphasized in *Milner*.¹⁶⁷ Mixed-function licensing agencies operate on the prevention end of the law enforcement spectrum, ensuring that license applicants possess the requisite skills to operate in a secure manner as required by Congress.¹⁶⁸ The licensing of individuals in public safety-sensitive positions may not at first blush appear to entail the unchallenged law enforcement missions embraced by federal agencies such as the Federal Bureau of Investigation¹⁶⁹ or Drug Enforcement Administration,¹⁷⁰ which direct a substantial portion of their efforts to the investigation and prosecution of suspected criminals. However, as Justice Alito explained, Congress, in fashioning Exemption 7, understood it could limit the exemption's language to those specific activities.¹⁷¹ Indeed, "Congress's decision to use different language to trigger Exemption 7 confirms that the concept of 'law enforcement purposes' sweeps in activities beyond investigation and prosecution."¹⁷²

2. Meeting the Compiled Information Mandate

The fact that agencies may have collected the information used in the licensing and certification process for multiple purposes, and not exclusively for law enforcement purposes, does not disqualify Exemption 7's application. The Court in *John Doe Agency* held that an agency may still meet Exemption 7's first prong "even though . . . documents were put

166. *Id.* at 1271 (majority opinion).

167. *See supra* notes 164-166.

168. In terms of the U.S. Coast Guard, for example, Congress directs that "[t]he Secretary [in charge of the agency overseeing the U.S. Coast Guard] may issue licenses in the following classes to applicants found qualified as to age, character, habits of life, experience, *professional qualifications*, and physical fitness." 46 U.S.C. § 7101(c) (2006) (emphasis added).

169. The stated mission of the FBI is to "protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners." *Quick Facts*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/quick-facts> (last visited June 16, 2014).

170. The DEA states that its central mission "is to enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system . . . those organizations and principal members of organizations, involved in the growing, manufacture, or distribution of controlled substances" in or destined for the United States. *DEA Mission Statement*, DRUG ENFORCEMENT AGENCY, <http://www.justice.gov/dea/about/mission.shtml> (last visited June 16, 2014).

171. *Milner*, 131 S. Ct. at 1272 (Alito, J., concurring) ("As Exemption 7's subparagraphs demonstrate, Congress knew how to refer to these narrower activities.").

172. *Id.* at 1273 (citation omitted).

together at an earlier time for a different purpose” than law enforcement.¹⁷³ Justice Alito’s *Milner* concurrence further emphasized that Exemption 7’s language does not require documents to “be compiled *solely* for law enforcement purposes.”¹⁷⁴ If “law enforcement purposes are a significant reason for the compilation,” then information collected for multiple purposes may be protected under the exemption.¹⁷⁵

Understanding that the process of examining license applicants’ competencies prior to permitting those individuals to operate in public safety-sensitive positions satisfies the “law enforcement purposes” requirement under Exemption 7,¹⁷⁶ the “compil[ing]” requirement is easily satisfied through the creation of examination Q&As and collection in defined databases.¹⁷⁷ Mixed-function licensing agencies do not even need to invoke *John Doe Agency*’s expanded interpretation of the term “compiled,”¹⁷⁸ as the compilation of the information is directly aimed at carrying out the agencies’ law enforcement activities.

B. Exemption 7(F)’s Second Prong and Mixed-Function Agencies

Satisfying Exemption 7’s second prong hinges on demonstrating the potentiality of one of the six harms enumerated in the statute,¹⁷⁹ and mixed-function licensing agencies can most easily invoke Exemption 7(F) to protect information from public disclosure. As previously noted, the Freedom of Information Reform Act of 1986 eliminated the need for agencies to prove disclosure of the information “would” cause one of the six enumerated harms. Under the Reform Act, agencies need to prove only that disclosure “could” produce the harm.¹⁸⁰ Although courts recognized that the Reform Act relaxed the burden facing agencies in the general application of Exemption 7, the Second Circuit has interpreted the words “any individual” contained in Exemption 7(F) as requiring an agency invoking the exemption to point to a specific party that could be harmed by disclosure. In *ACLU v. Department of Defense*, the court determined:

The phrase “any individual” in [E]xemption 7(F) may be flexible, but is not vacuous. Considering, as we must, the words in the statute, the structure of FOIA and its exemption provisions, the chronology of amendments to those

173. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154–55 (1989). Justice Alito’s concurrence in *Milner* specifically highlights this holding by the Court. *See Milner*, 131 S. Ct. at 1273.

174. *Milner*, 131 S. Ct. at 1273.

175. *Id.*

176. *See supra* Subsection III.A.1.

177. *See supra* notes 11–12.

178. *See supra* note 173 and accompanying text.

179. 5 U.S.C. § 552(b)(7)(A)–(F) (2012).

180. *See supra* notes 142–143 and accompanying text.

provisions, and the requirement that FOIA exemptions be narrowly construed, we cannot read the phrase to include individuals identified solely as members of a group so large that risks which are clearly speculative for any particular individuals become reasonably foreseeable for the group.¹⁸¹

The court reasoned that, while Congress did not include a requirement that specific individuals be identified by name, the statute requires that an agency invoking Exemption 7(F) point to a somewhat defined group.¹⁸² An agency must identify the subject of the suggested danger “with at least reasonable specificity,” according to the court.¹⁸³

Justice Alito’s concurrence in *Milner* glosses over the phrase, stating that when security information is at issue, “it is not difficult to show that disclosure may ‘endanger the life or physical safety of any individual.’”¹⁸⁴ Justice Alito’s concurrence infers that in future Exemption 7(F) challenges, the Court may treat an analysis of this portion of the statute as secondary to the question of whether an agency satisfies the first prong of the test: that the agency compiled the information for law enforcement purposes.¹⁸⁵ In light of the limited consideration this portion of Exemption 7 has received, it seems appropriate to project that future court decisions focusing on Exemption 7(F) will likely require that an agency demonstrate that disclosure could endanger a subset of defined individuals, beyond just the general public.

In determining the legitimacy of threats facing members of the public, courts should display substantial deference to mixed-function licensing agency leaders. Agency leaders are in the best position to project the effects on public safety should license holders fail to maintain the critical competencies necessary to effectively operate in hazardous conditions. As the Department of Justice detailed in a guide regarding FOIA and the statute’s nine limited exemptions,¹⁸⁶ courts traditionally, and in the past decade, have routinely accepted agencies’ appraisals of anticipated harm, provided the agencies provide some form of demonstrable justification.¹⁸⁷ It may prove insufficient in the eyes of a court for a mixed-function licensing agency to merely assert that disclosure of examination Q&As will result in cognizable harm to members of the public. If, however, the agency provides at least minimal evidentiary support along with its

181. *ACLU v. Dep’t of Def.*, 543 F.3d 59, 67 (2d Cir. 2008), *cert. granted and judgment vacated*, 130 U.S. 777 (2009).

182. *Id.* at 67–68.

183. *Id.* at 68.

184. *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1272 (2011) (Alito, J., concurring).

185. *See supra* Section III.A.

186. U.S. DEP’T OF JUSTICE, *GUIDE TO THE FREEDOM OF INFORMATION ACT* (2009), *available at* http://www.justice.gov/oip/foia_guide09.htm.

187. *Id.* at 657–58, *available at* http://www.justice.gov/oip/foia_guide09/exemption7f.pdf.

assertion, the agency should receive clearance on this prong of the Exemption 7(F) analysis.

CONCLUSION

In its creation of the Freedom of Information Act, Congress recognized the need to balance the promotion of openness and transparency in the federal government with the protection of government information that may threaten public safety if disclosed. Recognizing the legislature's intent behind FOIA's development, and in light of the Court's rejection of the High 2 FOIA exemption construction in *Milner*, mixed-function licensing agencies should rely on Exemption 7(F) to protect information relating to licensing and certification examination Q&As from the general public. Agencies must promote meaningful competency measurement tools to ensure that individuals in public safety-sensitive positions possess the proficiencies necessary to effectively operate in conditions where the public's welfare is at stake. Invoking Exemption 7(F) comports with mixed-function licensing agencies' statutory and regulatory obligations. By employing Exemption 7(F), mixed-function licensing agencies are not grasping at straws to circumvent the Court's abolishment of a previously accepted justification to protect information from public disclosure; rather, utilizing Exemption 7(F) constitutes a legitimate means to promote the public welfare within the contours of judicial precedent.