

NO. 07-36056

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GLEN SCOTT MILNER,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

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BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC  
OF AMICI ALLIED DAILY NEWSPAPERS OF WASHINGTON,  
ARIZONA NEWSPAPERS ASSOCIATION, CALIFORNIA NEWSPAPER  
PUBLISHERS ASSOCIATION, IDAHO NEWSPAPER ASSOCIATION,  
MONTANA NEWSPAPER ASSOCIATION, NEVADA PRESS  
ASSOCIATION, OREGON NEWSPAPER PUBLISHERS ASSOCIATION,  
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, AND  
SOCIETY OF ENVIRONMENTAL JOURNALISTS

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## I. INTRODUCTION

The Navy weapons depot was on a small island seemingly isolated from nearby cities. Two ships were docked for munitions loading when a bright white flash ripped apart the night sky. A seismic shock wave was felt as far away as Nevada. A pillar of fire and smoke stretched over two miles. Chunks of metal as big as houses were seen from a plane flying at 9,000 feet. People in town were sent flying or were sprayed with splinters of glass and other debris. The blast killed 320 people, wounded 390 others, and caused damage 48 miles across the bay.

This is not a hypothetical description of what could happen at the Indian Island bomb depot in Washington state. This is the true story of the 1944 explosion at Port Chicago Naval Magazine on Mare Island, 35 miles north of San Francisco.<sup>1</sup> In the words of the National Park Service, which has a memorial at the site: öAll it really took was an errant shell dropping to the deck from a cargo net andí 5,000 tons of munitions went off.ö<sup>2</sup>

The communities near Indian Island have a right to know what havoc is possible from a similar explosives accident today, just as communities everywhere need to be informed about local safety risks in order to demand

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<sup>1</sup> Exhibit 1 (printout from Naval Historical Center web site).

<sup>2</sup> Exhibit 2 (printout from National Parks web site). The disaster led to new safety precautions. Id.

solutions. Public safety is not an öinternal personnelö matter for only government employees to worry about. It is quite possibly a matter of life or death, not just for government personnel but for all people living, working or playing near hazardous facilities such as Indian Island. This case presents the issue of whether vital safety information may be concealed simply because someone might use it for a bad purpose, essentially erasing all bounds on government secrecy. Because this case goes to the core of what the Freedom of Information Act (FOIA) stands for ó ensuring an informed citizenry so that it may control its government - en banc review should be granted.

## II. IDENTITIES OF AMICI CURIAE

### A. NEWSPAPER ASSOCIATIONS

Allied Daily Newspapers of Washington is a trade association representing 25 daily newspapers across the state of Washington, while the Washington Newspaper Publishers Association represents 140 weekly community newspapers in the same state. The Arizona Newspapers Association is a trade group representing more than 100 large and small newspapers throughout the state of Arizona. The California Newspaper Publishers Association is a 121-year-old trade association with more than 800 daily, weekly and campus newspaper members. The Idaho Newspaper

Association has 50 newspaper members throughout the state. The Montana Newspaper Association has 89 newspaper members. The Nevada Press Association is the trade organization for the newspaper industry in Nevada and the Lake Tahoe area of California, with more than 40 daily and weekly newspaper members. The Oregon Newspaper Publishers Association is a trade association comprised of more than 100 daily and weekly paid-circulation newspapers.

All of these non-profit associations are dedicated, in part, to advocating for public access to government records. Their open government advocacy includes lobbying for, promoting understanding of, and supporting enforcement of federal and state sunshine laws.<sup>3</sup> For example, the associations co-sponsor hotlines for journalists to obtain legal help with open government issues.<sup>4</sup>

## B. SOCIETY OF ENVIRONMENTAL JOURNALISTS

The Society of Environmental Journalists (SEJ) is an international organization of more than 1,500 working journalists, educators and students

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<sup>3</sup> See, e.g., <http://www.idahopapers.com/~ina/pub.html> (information about sunshine laws); <http://www.mtnewspapers.com/reporter/> (öFreedom of information is one of the critical concernsö); <http://web.mac.com/nevadapress/nevadapress.com/Welcome.html> (ödedicated to...furthering the public's right to knowö); <http://www.orenews.com/web/legal/index.php> (open government issues top the legislative agenda); [http://www.wnpa.com/brief\\_history/](http://www.wnpa.com/brief_history/) (describing Washington associations as advocates for open government).

<sup>4</sup> See, e.g., <http://www.ananews.com/memberservices/legal.html#media>.

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. Public hazards, such as the bomb depot at issue in this case, are within the scope of SEJ members' reporting. SEJ envisions an informed society through excellence in environmental journalism. SEJ is distinctly *not* an environmental advocacy group. SEJ takes no positions on environmental topics ó but does do so on right-to-know and freedom-of-information issues. Members of SEJ regularly request government records as part of their news reporting. Since 2002, SEJ has maintained a First Amendment Task Force to advocate for the public's right to know about environmental concerns.<sup>5</sup>

### III. INTEREST OF AMICI

Amici's interest in this case arises from the need for full and timely access to federal government records as a vital source of important news. Amici's members serve as the public's watchdogs. As such, they have an urgent interest in properly applying FOIA to prevent agencies from escaping scrutiny.

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<sup>5</sup> <http://www.sej.org/initiatives/foia/overview>

Beyond the interests of their respective members, amici represent the voice of the public when advocating for every citizen's right to inspect non-exempt records to the fullest extent possible. The public relies heavily on the news media for information about the government. Amici's reporting of important information will be hampered if, under the 2-1 panel's expanded reading of Exemption 2, virtually any records deemed to be potentially useful to hypothetical lawbreakers are placed out of reach. The records in this case, for example, are of strong public interest because they shed light on the federal government's handling of munitions which threaten public safety.

#### IV. CONCISE SUMMARY

Amici agree with appellant Glen Milner's Petition for Rehearing En Banc and do not repeat his well-reasoned legal arguments here. However, additional arguments are needed as to why the panel's 2-1 decision involves questions of exceptional importance to the public. The decision will exacerbate a trend of increasing reliance on FOIA Exemption 2 to withhold records requested by the public. The decision empowers bureaucrats to decide which people can have information and which people cannot, contrary to this Court's prior decision that the identities of requesters cannot affect disclosure.

And the decision ignores that personnel practices are not solely *internal* if they affect the public.

The stakes in this case could hardly be higher. As stated by a commission on declassification chaired by U.S. Sen. Daniel P. Moynihan:

Excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate.

Exhibit 3.<sup>6</sup> Or, as Thomas Jefferson said: *Information is the currency of democracy.* A broadening of FOIA Exemption 2 would eviscerate the law designed to advance these fundamental principles of informed democracy.

Therefore, en banc review is warranted.

## V. DISCUSSION

### A. Concealing Policy-related Information in the Name of National Security is Controversial and Therefore of Exceptional Public Importance.

Numerous news stories in recent years have highlighted the controversy that ensues when safety hazards, or other problems relevant to policy-making, are concealed in the name of national security. For example, last spring Senate Environment and Public Works Chairwoman Barbara Boxer publicly called upon the U.S. Environmental Protection Agency (EPA) to reveal the locations

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<sup>6</sup> (excerpt from 1997 Report of the Commission on Protecting and Reducing Government Secrecy).

of 44 ôhigh hazardö coal-ash piles similar to the one that spilled 1.1 billion gallons of ash in Tennessee in 2008. Exhibit 4.<sup>7</sup> According to a report in the New York Times, the EPA had determined that a failure at any of the 44 ash impoundment sites could threaten human life. But, citing national security, the EPA refused to share the locations with anyone except selected senators and local emergency responders. *Id.* ôIf these sites are so hazardous, and if the neighborhoods nearby could be harmed irreparably, then I believe it is essential to let people know,ö Sen. Boxer was quoted as saying. *Id.*

Meanwhile, also last spring, the Bayer Cropscience company tried to use anti-terrorism secrecy rules to avoid discussion of the safety risks posed by its West Virginia stockpile of methyl isocyanate, the same deadly chemical that killed thousands of people in the 1984 Bhopal, India, disaster. Exhibit 5.<sup>8</sup> Congressional leaders pressed for more scrutiny, pointing out that an August 2008 explosion at Bayer's West Virginia plant ó which killed two workers ó occurred just 80 feet from a tank storing 37,000 pounds of the chemical. *Id.*

These are just recent examples illustrating keen public interest in the overarching issue here - whether information may be withheld for national security reasons even though it bears on important policy decisions. See also

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<sup>7</sup> June 12, 2009 [www.nytimes.com](http://www.nytimes.com) story, ôSen. Boxer Pushes EPA to Reveal ôHigh Hazardö Coal Ash Sites.ö

<sup>8</sup> May 4, 2009 Charleston (W.V.) Gazette story, ôJay, Waxman call for deeper probe of Bayer MIC.ö

Exhibit 6 (June 25, 2008 Reporters Committee for Freedom of the Press blog post describing the government's withholding of dam safety information at a time when floods and breached levies had heightened public concerns); Exhibit 7 (December 5, 2004 Associated Press story, "Public Records Privatized by National Security Fear"). These controversies reflect a vigorous public debate about the wisdom of concealing real and present dangers based on fears of hypothetical and distant dangers. This debate is evidence of the exceptional public importance of the case, supporting en banc review.

B. Annual FOIA Reports Show a Dangerous Growth in Exemption 2's Application, Which the Panel's Decision Will Exacerbate.

Exemption 2 protects from disclosure only those "matters that are" related solely to the internal personnel rules and practices of an agency.<sup>6</sup> 5 USC 552(b)(2). This language has never changed. Yet in recent years, even before the panel's ruling in this case, federal agencies dramatically increased their withholdings under Exemption 2 as if its scope already had been expanded. By interpreting Exemption 2 to reach well beyond internal personnel matters, the panel's ruling will only exacerbate this shift to greater secrecy. The prospect of legitimizing and promoting this dangerous trend lends urgency to en banc review in this case.

The growing use of Exemption 2 is evident from annual FOIA reports which can be viewed at [http://www.usdoj.gov/oip/04\\_6.html](http://www.usdoj.gov/oip/04_6.html), the Department of Justice Web site. The reports describe how many FOIA requests were denied, and how many times each exemption was invoked, each year from 1998 to 2008. The reports show an upsurge in Exemption 2 denials starting in 2002, possibly inspired by the September 11, 2001 terrorist attacks.

The Department of Homeland Security alone rejected a staggering 185,000 public records requests from 2003 to 2008 based on Exemption 2's protection of internal personnel matters. Exhibit 8.<sup>9</sup> Put another way, on 189,025 different occasions when the public expressed interest in the workings of 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, Federal Emergency Management Agency, and Secret Service, the answer was, "Sorry, this is internal. You don't have a right to know." Id.<sup>10</sup>

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<sup>9</sup> (excerpts from Department of Homeland Security annual FOIA reports).

<sup>10</sup> The department's annual Exemption 2 claims more than doubled from 23,162 in 2004 to 48,529 in 2007, dwarfing other agencies' efforts to hide behind the internal personnel shield.

For illustrative purposes, amici developed the following chart with statistics reported by the Departments of Defense and Interior, EPA and Nuclear Regulatory Commission, all of which deal with public safety issues:

NUMBERS OF FOIA DENIALS BASED ON EXEMPTION 2<sup>11</sup>

	Defense	Interior	EPA	NRC
1998	970	11	4	1
1999	Not available	16	0	2
2000	1,196	23	6	8
2001	1,219	24	16	7
2002	1,891	25	20	17
2003	1,689	43	46	25
2004	1,944	46	44	37
2005	2,258	120	48	28
2006	2,524	85	46	34
2007	2,855	105	35	30
2008	2,664	111	33	28

While this is only an illustrative sampling of agency FOIA statistics, it makes a critical point. Exemption 2 denials increased dramatically even without any change in the law. This suggests a growing eagerness among agencies to characterize requested records as exempt öinternal personnelö matters. By expanding Exemption 2's scope, the panel's decision in this case will remove any semblance of restraint, helping agencies foster a climate of fear and ignorance.

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<sup>11</sup> Rather than attaching the 44 annual reports from which these numbers were drawn, amici are saving paper by citing to the readily available source of the reports at [http://www.usdoj.gov/oip/04\\_6.html](http://www.usdoj.gov/oip/04_6.html).

This is especially troubling in light of the life-or-death importance of assessing government safety programs — such as the explosive-safety planning maps at issue in this case. The Department of the Interior, for example, may or may not be ensuring that dams, mines and water supplies can safely withstand accidents or attacks. The public should be able to rely on FOIA to find the answer. Official information that sheds light on the agency's performance of its statutory duties falls squarely within — the purpose of FOIA to inform citizens about government conduct. U.S. Dep't. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). Yet the panel's decision in this case invites more secrecy and fewer answers.

If Exemption 2 extends to any agency record that might be useful to lawbreakers, even when the agency's personnel are not engaged in law enforcement, the "internal personnel" restriction ceases to have any meaning. It is easy to imagine ridiculous applications, such as concealing all wasteful Pentagon spending because it might inspire anti-government riots. The 189,025 withholdings by the Homeland Security Department, and other agencies' growing reliance on Exemption 2, foretell an informational vacuum of unprecedented impact now that the scope of permissible secrecy has widened.

This vacuum threatens to swallow public discourse. In sum, the growing secrecy under Exemption 2 lends exceptional public importance to the issues in this case, and therefore en banc review should be granted.

C. The Panel’s Decision Empowers Bureaucrats to Decide Which People Can Have Information and Which Cannot, Contrary to FOIA’s Prohibition Against Treating People Differently.

FOIA requires agencies to make records promptly available, upon request, *to any person*.<sup>6</sup> 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.<sup>7</sup> Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1082, 1089 (9<sup>th</sup> Cir. 1997), quoting Dept. of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 495-97, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994). Except in cases of privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request.<sup>8</sup> Id. (internal citations omitted). As this Court 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, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982).

Here, the panel’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.<sup>12</sup> In fact, the Navy gave an explosive safety map for Indian Island to the Port Townsend Leader newspaper, which published it on the front page, and the Navy also shared the withheld records with local officials. The panel found this selective release was lawful, saying that *[a]gencies must be permitted to grant limited, confidential access to other federal and local agencies without risking broader disclosure.*<sup>13</sup> This directly contradicts this Court’s decision in Maricopa Audubon Society and therefore en banc review is warranted.

D. Public Safety is Not Related Solely to Internal Personnel Rules and Practices.

Maps illustrating safety risks to boaters and other civilians are not an internal Navy matter at all. The line between internal and external is crossed when the government’s own activities threaten the public’s safety, health or welfare, as in this case. Indeed, FOIA commands that *each agency* shall make available for public inspection *instructions to staff that affect a member of the public.*<sup>14</sup> 5 USC 552(a)(2)(C) (italics added). This language makes clear

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<sup>12</sup> Milner v. United States Navy, 575 F.3d 959, 974 (9<sup>th</sup> Cir. 2009) (dissenting opinion).

<sup>13</sup> Milner, 575 F.3d at 968.

that Congress intends for the public to know about government personnel practices to the extent that they affect anyone outside government.

Communities near Indian Island should not have to wait for an explosion to kill or injure people, poison the air, shatter windows or sink boats to learn the destructive power of the bombs loaded and unloaded at the Navy depot. The Navy uses the safety maps at issue in this case to plan construction in a way that minimizes potential harm from an explosion.<sup>14</sup> Therefore, the maps constitute öinstructions to staff that affect a member of the public,ö which must be disclosed. 5 USC 552(a)(2)(C).

FOIAös purpose is öto hold the governors accountable to the governed.ö NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). Maps of Explosive Safety Quantity Distance (ESQD) arcs, and of the öscuttling siteö to be used if a munitions-loaded ship catches fire, would reveal the Navyös answers to important policy questions such as how much risk is acceptable, and where. The maps might reveal, for example, what consideration is given to Fort Flagler State Park, located a few hundred feet from the island, in planning where to store explosives. These are accountability issues that go to the heart of FOIAös purpose.

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<sup>14</sup> Milner, 575 F.3d at 968 (öESQD arcs are usedí to -design, array and construct ammunition storage facilities, and to organize ammunitions operations for risk mitigationö).

In sum, public safety is the public's business. The Port Chicago story reminds us of the exceptional public importance of understanding the dangers our government has created. The risk to the public from unscrutinized explosive-handling operations is high, as illustrated by the 48-mile swath of destruction at Port Chicago in 1944 and devastation from a TNT-loaded ship exploding at Halifax, Nova Scotia during World War I.<sup>15</sup> Under FOIA's plain language, fear of hypothetical danger posed by unknown actors cannot trump the public's interest in knowing about present dangers posed by government activity. Because the panel's decision would conceal matters of vital public concern, contrary to FOIA, it should be reviewed en banc and reversed.

## V. CONCLUSION

For the foregoing reasons, amici respectfully request that this court grant the petition for rehearing en banc.

Dated this 21st day of September, 2009.

Respectfully submitted,

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<sup>15</sup> About 1,900 people died and more than 1,600 homes were destroyed in the Halifax disaster. See <http://museum.gov.ns.ca/mma/AtoZ/HalExpl.html>.