SEC. 1046. REVISION OF FREEDOM OF INFORMATION ACT TO REINSTATE EXEMPTIONS UNDER THAT ACT AS IN EFFECT BEFORE THE SUPREME COURT DECISION IN MILNER V. DEPARTMENT OF THE NAVY.

Paragraph (2) of section 552(b) of title 5, United States Code is amended—

(1) by inserting "(A)" before "related";

(2) by inserting "or" after "an agency;"; and

(3) by adding at the end the following new subparagraph:

"(B) predominantly internal to an agency, but only to the extent that disclosure could reasonably be expected to risk impairment of the effective operation of an agency or circumvention of statute or regulation;".

Section-by-Section Analysis

In response to the decision of the Supreme Court in *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011), which significantly narrowed the scope of Exemption 2 of the Freedom of Information Act, the Administration seeks to reinstate the protection that had long been afforded under that exemption to material whose disclosure could risk causing harm and which had long been protected under that exemption.

Section 552 of title 5, United States Code, popularly known as the "Freedom of Information Act" (FOIA), requires Federal agencies to make agency records available to the public, subject to several exemptions. The second exemption protects material related solely to the "internal personnel rules and practices of an agency." Prior to *Milner*, Exemption 2 (5 U.S.C. 552(b)(2)) had been interpreted by the Court of Appeals for the District of Columbia Circuit in *Crooker v. ATF*, 670 F.2d 1051 (1981) as encompassing two categories of information: (1) information referred to as "Low 2", which protected predominantly internal matters that were trivial in nature and (2) information referred to as "High 2", which protected more substantial internal matters when there was a risk that disclosure would cause circumvention of the law. The rationale for "Low 2" was simply to relieve agencies of the burden of assembling and maintaining for public inspection trivial information that held no genuine public interest, such as: the use of parking facilities, regulations on lunch hours, policy on sick leave, etc. "High 2," by contrast protected against risk or circumvention of the law or impairment of effective agency operation.

The decision of the Supreme Court in the *Milner* case narrowed the interpretation of Exemption 2 in several ways. First, the Court held that the critical word in the exemption was "personnel" and that the reach of the exemption was therefore limited to "personnel" rules and practices. 131 S. Ct. at 1264. As a result, the Court found the exemption covered only those records related to the rules and practices dealing with employee relations or human resources. Id. at 1265._The Supreme Court specifically rejected adoption of the *Crooker* court's "High 2" formulation, finding that it "suffers from a patent flaw: It is disconnected from Exemption 2's text." Id. at 1267. In doing so, however, the Court recognized "the strength" of the Government's position in the case before it, which was based on application of High 2, and acknowledged that its decision "upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments." Id. at 1271. The Court pointed out that if other exemptions "do not cover records whose release would threaten the Nation's vital interests, the Government may of course seek relief from Congress." It declared: "All we hold today is that Congress has not enacted the FOIA exemption the Government desires." Id.

The effect of the decision in *Milner* is that it exposes for public release certain critical information previously interpreted as being exempt from disclosure under the “High 2” exemption. Matters of critical information that previously have been identified as covered by “High 2” include:

- Vulnerabilities and capabilities of agency infrastructure and equipment
    - Inventory of weapons and vehicles.
    - Vulnerability assessments.
    - Real Estate acquisition.
    - Floor plans.
    - Computer system passwords for government Information Technology systems.
    - Credit card numbers and account numbers for government accounts.
    - Public healthcare assets and vulnerabilities, including stockpiles of medical drugs, devices, and other supplies maintained to respond to a bioterror attack or other public health emergency.
- Procedures and guidance for sensitive agency operations and practices
    - Unclassified special operations techniques and tactics.
    - Unclassified military rules of engagement.
    - Guidelines for protecting government officials and security of senior officials’ travel.
    - Agency audit guidelines.
    - Security classification guides.
    - Procedures and testing materials used in military education and promotion systems and in evaluating the credentials of federal job applicants.
- Critical Infrastructure Information
    - Safety and vulnerability information concerning dams, including inundation maps, risk analyses, operating manuals and power plants.
    - Safety and vulnerability information concerning water control structures, public drinking water intakes, dikes, levees, and tide gates.
    - Information Technology and communications infrastructure and design information.

    - Manuals on building design to withstand different levels of explosives; building and other facility detailed design and construction plans.
- Scientific or technological research
    - Project summaries that reveal “gaps” in performance, limitations, application, and/or understanding of bioassays.
    - Details of development, test and evaluation, and/or availability of threat detection devices, methods, and techniques.
    - Information characterizing potential emerging and pandemic threats before they appear.
    - Assets available to strengthen laboratory diagnostic capabilities in preparation for incidents of biological/chemical terrorism.
    - Federally-funded research findings submitted to the National Science Advisory Board for Biosecurity for national security review.
- Homeland and National Security Threat Information
    - Vulnerability assessments.
    - General and specific threat information.
    - Intelligence gaps.
    - Guidelines for identifying threat actors.

In its decision, the Court suggested that agencies could use Exemption 1 (which protects classified information), Exemption 3 (which protects information afforded confidentiality by other statutes), or Exemption 7 (which protects certain information compiled for law enforcement purposes) as possible alternatives to High 2.

As to the possibility of using Exemption 1, the Administration is opposed to the over-classification of materials and, in any case, would not want to classify material only to prevent disclosure through a FOIA request. Additionally, the harm that would result from the release of information previously protected by “High 2” does not always meet the level of damage as required for classification by Section 1.2 of Executive Order 13526. While some of the information previously exempted under “High 2” might be subject to the disclosure restrictions of other laws and thus qualify for protection under Exemption 3, or be compiled for law enforcement purposes and fall within Exemption 7, there are other types of “High 2” information that are not specifically addressed under another FOIA exemption.

Therefore, the Administration believes that, following the Supreme Court's decision, there is a critical gap in the exemptions in the current FOIA statute. This proposal is designed to close that critical gap. The Administration proposes amending Exemption 2 directly to reinstate the protection long afforded by FOIA jurisprudence to material that fell within what was known as "High 2." We believe this is preferable to utilizing a piecemeal approach of seeking separate statutory protection for discrete categories of information and having them operate as Exemption 3 statutes. The Administration recommends amendments to paragraph (2) of section 552(b) of title 5, United States Code (the statutory authority for Exemption 2) to codify “High 2” into the exemption and thereby reinstate coverage for critical information to ensure that such information is not released if it could reasonably be expected to risk impairment of the effective operation of an agency or circumvention of an agency statute or regulation.

This amendment is intended to reinstate the protection long afforded under the exemption for information previously interpreted to be covered by "High 2". The language used is modeled after the *Crooker* court's formulation of the standard and incorporates the body of jurisprudence that applied it. It is intended to reset the law as it existed before the Supreme Court's ruling in *Milner*.

Budget Implications: Exemptions for the release of certain information under FOIA would generate minimal savings to the Administration due to the avoidance of the preparation of select materials for release.

RESOURCE REQUIREMENTS ($MILLIONS)									
	FY 16	**FY 17**	**FY 18**	**FY 19**	**FY 20**	**Appropriations From**	**Budget Activity**	**Dash-1 Line Item**	**Program Element**
DoD FOIA Organizations	0.0	0.0	0.0	0.0	0.0	Various	Various	Various	Various
Total	0.0	0.0	0.0	0.0	0.0	--	--	--	--

Changes to Existing Law: The proposal would make the following changes to existing law:

TITLE 5, UNITED STATES CODE

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

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§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

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(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2)**(A)** related solely to the internal personnel rules and practices of an agency; **or**

(B) predominantly internal to an agency, but only to the extent that disclosure could reasonably be expected to risk impairment of the effective operation of an agency or circumvention of statute or regulation;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009 [Oct. 28, 2009], specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) 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;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.