

Supreme Court 2010 Term and environmental cases: A whimper or a bang?

BY NORMAN A. DUPONT

The U.S. Supreme Court's 2010 Term started with consideration of a relatively narrow case involving the application of a Freedom of Information Act (FOIA) exemption to a citizen's request for information about a U.S. Navy munitions facility and likely impacts of an explosion from that facility. *Milner v. U.S. Dep't of Navy*, No. 09-1163. A second FOIA case not involving environmental issues, however, poses the broader constitutional question of whether corporations can assert a right of privacy to withhold disclosure of documents they submit to a federal agency. *FCC v. AT&T, Inc.*, No. 09-1279. Finally, the Court's 2010 Term will involve a major climate change case, since the Court granted certiorari to review the Second Circuit's landmark decision in *Connecticut v. American Electric Power, Inc.*, 582 F.3d 309 (2d Cir. 2009). The *AEP* case raises a host of critical questions, including standing, the doctrine of political question, and the question of when climate change regulations displace federal common law nuisance rights. Due to the timing of the Supreme Court's decision to grant certiorari, an article evaluating the *AEP* case will be published in the next issue of *Trends*.

The *Milner* FOIA case

Greg Milner is a resident of Puget Sound, Washington, who desired to find out how safe it was to go boating in an area near a major naval munitions facility, the Naval Magazine Indian Island (Island Magazine). He sent a FOIA request to the Navy, seeking maps that the Navy used to calculate the "impact zone" if a particular set of explosions accidentally occurred at the Island Magazine. The Navy denied the request, initially citing four different FOIA exemptions. Milner was not deterred and sought a judicial determination. A 2-1 majority in the Ninth Circuit upheld the Navy's denial under FOIA Exemption 2. The majority agreed that the literal language of the statutory exemption, "matters related solely to the internal personnel rules and practices of an agency" did not directly describe maps created to assess explosion impact zones. But, the Ninth Circuit panel held that a judicially created extension of this statutory exemption, an extension known as a "High 2" exemption, covered the Navy impact zone maps. This judicial extension infers that Congress really meant to create two exemptions: a "Low 2" exemption for relatively mundane matters such as "parking facilities, lunch hour policies and sick leave regulations" and a separate "High 2" exemption for more "sensitive government information" that were "predominately internal" and the release of which might "threaten circumvention of agency regulation." *Milner v. U.S. Dep't of Navy*, 575 F.3d 959, 963-68 (9th Cir. 2009). Judge William Fletcher concurred with the general concept that a "High 2" exemption could be read into the statutory language, but disagreed with the majority that the exemption applied in this case. For Judge Fletcher, the panel majority had not established that the release of the impact zone maps would satisfy the remaining requirement of establishing an exemption under FOIA category 2, i.e., that the release of the

internal agency information would "risk circumvention of agency action." For Judge Fletcher, this additional standard applies only if the FOIA applicant was a regulated entity and sought internal agency information for the purposes of foiling or deflecting potential agency regulation. This was not the case with respect to Milner, according to the dissent.

Milner seeks a Supreme Court determination that the judicially engrafted expansion of FOIA Exemption 2, the "High 2" should be rejected. For the petitioner, this judicial expansion is inconsistent with the statutory FOIA language, conflicts with the legislative history of FOIA, and threatens to become an omnibus exemption that could be applied to almost any agency document that was "used internally."

The United States in opposition relies more heavily on judicial constructions of the statutory provision and on legislative history to demonstrate that Congress intended the term "personnel" to mean any agency policy intended to govern agency employees in implementing official policy. Seeking to recreate a victory similar to that in *Winter v. NRDC*, 129 S. Ct. 365 (2008), the government focuses primarily upon the critical military nature of the zone impact maps. According to the government, if a document describing how the Navy isolated various munitions bunkers to lessen the impact of a potential explosion were released, then a terrorist could use such a document to "reverse engineer" and determine how to plant an explosion that would effectuate the maximum damage. *U.S. Brief of Respondent 7-8*. The government argues that the judicially created "High 2" exception to FOIA is well grounded in the statutory language, which covers "personnel rules and practices," but is nowhere limited to merely "mundane" agency practices that has "no impact on the public at large." *Id.* at 21-22. The government in its Respondent's Brief stresses that FOIA Exemption 2 must be construed as part of the overall structure of FOIA, which it contrasts with Milner's "disclosure-at-all-cost" approach to FOIA. *Id.* at 17.

On its face, the debate in *Milner* appears to be confined to a relatively narrow statutory provision and its application to a specific Navy map for a particular munitions facility. But, if the Court were to endorse a broad reading of FOIA Exemption 2, then the scope of that ruling allowing for the exclusion from FOIA of other types of agency documents could result in a major expansion of the scope of FOIA exemptions.

The *AT&T* FOIA case

Whatever the potential narrow scope of a ruling in *Milner*, the Court's review of the *AT&T* case has "major implications" written all over it. The facts are simple.

AT&T submitted documents to the Federal Communications Commission (FCC) admitting that it had "discovered certain irregularities" in its rate structure for a special rate for education institutions. In this rate, AT&T promised lower rates to educational institutions, with ultimate payment to the utility coming directly from the federal government. After

investigation by the FCC, AT&T quickly agreed to pay a fine of \$500,000 and reform its rate and billing procedures for such institutions in the future.

Not so fast. A group composed in part of competitors to AT&T filed a FOIA request to obtain all correspondence and pleadings in the FCC's investigation file. AT&T objected, and the FCC ultimately granted the FOIA request in part and denied other parts of the request.

AT&T sought judicial review, and the Third Circuit Court of Appeals ultimately agreed with AT&T. The Third Circuit found that the plain language of FOIA Exemption 7(C) provided an exclusion for enforcement documents that might invade "personal privacy." The Third Circuit reasoned that since the statute defined "person" to include a corporation and since "personal" was merely an adjective form of "person," that the plain meaning of the statute would include a corporation as being able to assert the exemption from disclosure contained in Exemption 7(C) for "personal privacy" matters in an enforcement action. Thus, the Third Circuit effectively created a new provision in FOIA allowing corporations to assert "privacy" rights to defeat disclosure, at least in terms of agency investigation and enforcement files.

The United States, on behalf of the FCC, obtained review by the U.S. Supreme Court of the Third Circuit's decision. The government argued in its brief on the merits that the Third Circuit's decision was a singular outlier in over thirty years of FOIA decisions. In an interesting departure from the "plain meaning of the statute" argument, the Solicitor General asserted that AT&T's position was inconsistent with the broader context and legislative history of FOIA. The Solicitor General also argued that the Third Circuit's decision, if upheld, would result in a broad extension of FOIA exemptions to corporations and to state, local, and even foreign governmental entities subject to federal investigations. This, the United States argued, was not the intent of FOIA, which meant the term "personal privacy" in the ordinary sense of an individual's right to privacy, a privacy right not shared by artificial entities such as corporations. A host of amici briefs filed by the Reporter's Committee for Freedom of the Press and a large number of media organizations, the Constitutional Accountability Center, and others support the position of the United States.

AT&T has not filed its merits brief in opposition as of this writing. But, AT&T's brief in opposition to certiorari essentially echoed the analysis of the Third Circuit. AT&T argued that the "plain language" of the statutory phrase "personal

privacy" must reflect the statutory definition of the term "person." Since Congress defined the term "person" in the statute to include "corporations," the adjectival form "personal" must refer back to the noun, and thereby compel the conclusion that corporations are entitled to rights of privacy. AT&T also argued that Congress used the term "individual" to refer to human individuals in FOIA Exemption 7(F), and therefore Congress intended the term "person" to have a broader meaning, at least in the context of allowed corporations under Exemption 7(C) to assert protections from FOIA disclosures to their competitors.

AT&T is not an environmental case, but the potential stakes for the environmental lawyers from the Court's ruling in this case are great. If the Supreme Court agrees with AT&T and finds a corporate right of privacy under FOIA and its Exemption 7(C), then one can expect that corporations in the environmental arena will vigorously assert this new defense. The U.S. Environmental Protection Agency (EPA) collects a significant amount of corporate information in connection with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 104(e), which can be the initial prelude for a subsequent agency enforcement proceeding under CERCLA against the responding corporation. If the Supreme Court finds a corporate right of privacy under FOIA, then are all corporate disclosures in response to an EPA Section 104(e) request subject to protection under FOIA Exemption 7(C)? What about a corporation's duty to submit self-monitoring reports under the Clean Water Act in compliance with a National Pollutant Discharge Elimination System permit? Will these corporate disclosures also be protected if the Supreme Court rules in favor of a corporate right of privacy?

This year's Supreme Court Term includes two cases that could result in major revisions to a critical tool in the arsenal of environmental and energy lawyers, FOIA. If the Court were to rule in favor of the Navy over Milner, then the scope of "predominately internal" agency documents for which an exemption could be asserted under FOIA Exemption 2 expands considerably. Similarly, if the Court rules in favor of AT&T, then the ability of other parties to obtain access to a vast amount of corporate information submitted to government could be significantly curtailed.

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