

ALITO, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 09–1163

GLEN SCOTT MILNER, PETITIONER *v.* DEPARTMENT
OF THE NAVY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[March 7, 2011]

JUSTICE ALITO, concurring.

I agree with the Court that the text of Exemption 2 of the Freedom of Information Act of 1966 cannot support the “High 2” interpretation that courts have adopted and applied over the years. As the Court explains, however, the Government may avail itself of numerous other exemptions, see *ante*, at 18—exemptions that may have been overshadowed in recent years by the broad reach of High 2. I write separately to underscore the alternative argument that the Navy raised below, which rested on Exemption 7(F) and which will remain open on remand. See *ante*, at 5, n. 3, 18.

Exemption 7 applies to specific categories of information “compiled for law enforcement purposes.” 5 U. S. C. §552(b)(7). In particular, Exemption 7(F) permits withholding of “records or information compiled for law enforcement purposes” that, if disclosed, “could reasonably be expected to endanger the life or physical safety of any individual.” §552(b)(7)(F). In most cases involving security information, it is not difficult to show that disclosure may “endanger the life or physical safety of any individual.” A more difficult question, however, is whether the information is “compiled for law enforcement purposes.” See *John Doe Agency v. John Doe Corp.*, 493 U. S. 146, 153 (1989) (“Before it may invoke [Exemption 7], the Govern-

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ment has the burden of proving the existence of . . . a compilation for such a purpose”). In my view, this phrase reasonably encompasses information used to fulfill official security and crime prevention duties.

“Law enforcement purposes.” The 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. A “law enforcement officer” is defined as one “whose duty it is to preserve the peace,” Black’s Law Dictionary 796 (5th ed. 1979), and fulfilling that duty involves a range of activities. Police on the beat aim to prevent crime from occurring, and they no less carry out “law enforcement purposes” than officers investigating a crime scene. Similarly, a “law-enforcement agency” is charged with “the apprehension of alleged offenders *as well as crime detection and prevention.*” R. De Sola, Crime Dictionary 82 (1982) (emphasis added).

Crime prevention and security measures are critical to effective law enforcement as we know it. There can be no doubt, for example, that the Secret Service acts with a law enforcement purpose when it protects federal officials from attack, even though no investigation may be ongoing. Likewise, steps by law enforcement officers to prevent terrorism surely fulfill “law enforcement purposes.” Particularly in recent years, terrorism prevention and national security measures have been recognized as vital to effective law enforcement efforts in our Nation. Indeed, “[a]fter the September 11th attacks on America,” the priorities of the Federal Bureau of Investigation “shifted dramatically,” and the FBI’s “top priority became the prevention of another terrorist attack.” Hearings before the Subcommittee on Science, the Departments of State, Justice, and Commerce, and Related Agencies of the House Committee on Appropriations, 109th Cong., 2d Sess., pt. 10, 232 (2006) (testimony of FBI Director Robert

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S. Mueller III). Today, “[t]he FBI’s number one priority continues to be the prevention of terrorist attacks against the United States.” Hearings before the Senate Committee on Homeland Security and Governmental Affairs, 111th Cong., 2d Sess, p. ____ (Sept. 22, 2010) (testimony of Mueller). If crime prevention and security measures do not serve “law enforcement purposes,” then those charged with law enforcement responsibilities have little chance of fulfilling their duty to preserve the peace.

The context of Exemption 7 confirms that, read naturally, “law enforcement purposes” involve more than just investigation and prosecution. As Exemption 7’s subparagraphs demonstrate, Congress knew how to refer to these narrower activities. See, e.g., §552(b)(7)(A) (information that “could reasonably be expected to interfere with enforcement proceedings”); §552(b)(7)(E) (information that “would disclose techniques and procedures for law enforcement investigations or prosecutions”). Congress’ decision to use different language to trigger Exemption 7 confirms that the concept of “law enforcement purposes” sweeps in activities beyond investigation and prosecution. See *Sosa v. Alvarez-Machain*, 542 U. S. 692, 711, n. 9 (2004) (applying the “usual rule” that “when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended” (internal quotation marks omitted)).

“*Compiled for law enforcement purposes.*” This Court has given a fairly broad meaning to “compiled” under §552(b)(7). In *John Doe Agency*, we held that information need not have been originally “compiled for law enforcement purposes” to satisfy Exemption 7’s threshold requirement. Rather, “even though . . . documents were put together at an earlier time for a different purpose,” they may fall within Exemption 7 if they are later assembled for law enforcement purposes. 493 U. S., at 154–155. For

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example, documents originally gathered for routine business purposes may fall within Exemption 7 if they are later compiled for use in a criminal investigation. Similarly, federal building plans and related information—which may have been compiled originally for architectural planning or internal purposes—may fall within Exemption 7 if that information is later compiled and given to law enforcement officers for security purposes.

Documents compiled for multiple purposes are not necessarily deprived of Exemption 7's protection. The text of Exemption 7 does not require that the information be compiled *solely* for law enforcement purposes. Cf. §552(b)(2) (“related solely to the internal personnel rules and practices of an agency”). Therefore, it may be enough that law enforcement purposes are a significant reason for the compilation.

In this case, the Navy has a fair argument that the Explosive Safety Quantity Distance (ESQD) information falls within Exemption 7(F). The ESQD information, the Navy argues, is used “for the purpose of identifying and addressing security issues” and for the “protection of people and property on the base, as well as in [the] nearby community, from the damage, loss, death, or injury that could occur from an accident or breach of security.” Brief for Appellee in No. 07–36056 (CA9), pp. 39–40. If, indeed, the ESQD information was compiled as part of an effort to prevent crimes of terrorism and to maintain security, there is a reasonable argument that the information has been “compiled for law enforcement purposes.” §552(b)(7). Assuming that this threshold requirement is satisfied, the ESQD information may fall comfortably within Exemption 7(F).