

May 27, 2015

The Honorable Mitch McConnell
Senate Majority Leader
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Senate Minority Leader
522 Hart Senate Office Building
Washington, DC 20510

Dear Senators McConnell and Reid:

On behalf of the undersigned groups, we urge you to oppose the inclusion of the Department of Defense's (DoD) proposal to alter the Freedom of Information Act (FOIA) in FY16's National Defense Authorization Act (NDAA) if it is introduced as an amendment on the floor of the Senate. The Pentagon's proposed language¹ would undermine the FOIA by returning to an overly broad interpretation of exemption 2 of the FOIA, and by creating an unnecessary secrecy provision at odds with FOIA's goal of transparency.

Section 1046 of the proposed language would effectively overturn the 2011 Supreme Court decision in *Milner v. Navy*. In this case, the Court properly narrowed the interpretation of the exemption, and struck down agency tendencies to over-withhold under the exemption, by limiting application to the text of the FOIA. Currently, the exemption allows agencies to withhold records that are "related solely to the internal personnel rules and practices of an agency." The DoD proposal would reverse this decision by inserting language to broaden this exemption to also include records that are "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." This expansion is unnecessary and clearly goes against FOIA's originally intended purpose.

Another cause for concern is section 1047 of the proposed language, which would add a new statutory exemption under exemption 3 for "information on a military tactic, technique, or procedure." It is unclear what the rationale is for this new exemption, particularly given that the Freedom of Information Act already exempts "properly classified" national defense information from disclosure. The language may be similar in effect to statutes that allow intelligence agencies, such as Central Intelligence Agency (CIA) and the National Security Agency (NSA) to withhold records under FOIA that would disclose "intelligence sources and methods". Congress

¹ [DoD Requested NDAA Bill Text](#), Senate Armed Services Committee, May 2015. (Downloaded May 17, 2015)

should deny the request. The “sources and methods” statutes have been used to justify withholding of information that demonstrates illegality and wrongdoing, without any showing that disclosure would harm national security. Extending similar, overbroad authority to the Secretary of Defense could be even more destructive, given the military’s larger size and budget, and the importance of command responsibility to its mission. The Department of Defense’s proposed language could be used to conceal information about the military’s interrogation and treatment of prisoners; its handling of sexual assault complaints; its oversight of contractors; and other matters of compelling public interest. Excessive, reflexive secrecy about completed military operations can also harm the troops themselves, as demonstrated by recent news reports that show soldiers’ health care was compromised by the military’s failure to acknowledge their exposure to chemical weapons in Iraq.²

Finally, section 1043 of the DoD’s proposed text increases the authority of the Secretary of State to exempt unclassified but “sensitive information” from foreign governments from FOIA. It is unclear why this change is necessary.

The proposal was shared with the Senate Judiciary Committee Chairman Senator Grassley, who rightly declined to sign off on it and asked for a Justice Department briefing on the impact this would have on FOIA.³ To consider these fundamental changes to FOIA and broad new exemptions without the input of the Senate Judiciary Committee, the committee with jurisdiction over FOIA and FOIA-related issues, would be unwise. If the DoD’s proposed FOIA language is considered when the NDAA comes to the floor, we strongly urge you to oppose it. This proposal is bad for transparency and accountability and is unnecessary.

If you have any questions or would like to discuss this issue further, please contact Katherine Hawkins at (202) 332-6736 or khawkins@openthegovernment.org or Liz Hempowicz at (202) 347 - 1122 or ehempowicz@pogo.org.

Sincerely,

American Society of News Editors
Bill of Rights Defense Committee
Campaign for Accountability
Campaign for Liberty
Cause of Action
Center for Constitutional Rights
The Center for Victims of Torture
Citizens for Responsibility and Ethics in Washington (CREW)
Defending Dissent Foundation
Demand Progress

² E.g. C. J. Chivers, [12 Years Later, a Mystery of Chemical Exposure in Iraq Clears Slightly](#), The New York Times, May 14, 2015. (Downloaded May 18, 2015)

³ Josh Gerstein, [Defense Bills Cause Transparency Jitters](#), Politico Blog: Under the Radar, May 17, 2015. (Downloaded May 18, 2015)

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National Security Archive
OpenTheGovernment.org
Project On Government Oversight (POGO)
Public Citizen
Society of Professional Journalists
Sunlight Foundation
Taxpayers for Common Sense
Taxpayers Protection Alliance

CC: Senate Judiciary Committee, Senate Armed Services Committee, House Committee on Oversight and Government Reform, and House Armed Services Committee