

June 26, 2017

The Honorable John McCain  
Chairman  
Senate Committee on Armed Services  
228 Russell Senate Office Building  
Washington, DC 20510

The Honorable Mac Thornberry  
Chairman  
House Armed Services Committee  
2208 Rayburn House Office Building  
Washington, DC 20515

The Honorable Jack Reed  
Ranking Member  
Senate Committee on Armed Services  
228 Russell Senate Office Building  
Washington, DC 20510

The Honorable Adam Smith  
Ranking Member  
House Armed Services Committee  
2264 Rayburn House Office Building  
Washington, DC 20515

Dear Chairmen and Ranking Members:

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 FY 2018's National Defense Authorization Act (NDAA). The Pentagon's proposed language<sup>1</sup> would undermine the FOIA, creating an unnecessary and overbroad secrecy provision at odds with FOIA's goal of transparency and accountability to the public. The DoD's proposal to exempt from disclosure "information on military tactics, techniques, and procedures, and of military rules of engagements," would create a carve-out to the FOIA for much of the information and documents created by the Pentagon, the largest executive branch agency with the largest discretionary budget.

While we acknowledge that this exemption language is narrower than the two previous proposals by DoD, the provision remains unnecessary to protect the effectiveness of military operations. These fundamental changes to FOIA were proposed without the robust consideration and input of the committees of jurisdiction over FOIA and FOIA-related issues. Because of their potential long-lasting effects on the public's access to information, we urge you to reject this proposal.

The Department of Defense, and all federal agencies, already have broad and proper authority to withhold classified information under FOIA exemption one, as well as unclassified information under a variety of other statutes. This is the third time the DoD has requested special exemptions from FOIA—a request Congress has already rejected twice. According to the Department,<sup>2</sup> the expanded exemption is needed to address concerns about giving potential adversaries advance knowledge of sensitive information. However, when pressed by Congressional staffers and members of the open government community, DoD representatives admitted that the Department has never had to release information pursuant to a FOIA request that they would have been able to withhold under this proposed exemption.

Congress should not expand DoD's authority to withhold information from public examination without meaningful input and approval from the committees of jurisdiction over FOIA. FOIA-related legislation needs the careful consideration of those committees, including public hearings; such care is necessary to ensure that any change to the law promotes transparency and public accountability while allowing the government to withhold information which truly requires protection. A massive authorization bill, which has in previous years been marked up in secret in the Senate, is not the proper vehicle to amend FOIA as it applies to the largest executive branch agency.

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<sup>1</sup> DoD Suggested NDAA Bill Text , Department of Defense Office of General Counsel, May 25 2017.  
<http://ogc.osd.mil/olc/docs/25May2017NDAABillText.pdf> (Downloaded June 13, 2017)

<sup>2</sup> DoD Section-by-Section Analysis, Department of Defense Office of General Counsel, May 2017.  
<http://ogc.osd.mil/olc/docs/25May2017NDAASectionalAnalysis.pdf> (Downloaded June 13, 2017)

This expansion is not only procedurally problematic, but also unnecessary by DoD's own practices. As stated above, FOIA exemption one, which shields "properly classified" national defense information from disclosure, already addresses DoD's concerns, and more than adequately protects the information DoD is saying it is trying to protect. Though open government advocates object, DoD also regularly argues that it may rely on exemption one to withhold unclassified information, if the unclassified information could, when compiled, reveal classified associations or relationships.<sup>3</sup> In other words, the DoD already argues that it may withhold "sensitive, but unclassified, military tactics, techniques, or procedures, and military rules of engagement, from release to the public," which happens to be the Department's proffered justification for its proposed exemption expansion.

To ratify this practice would simply give the department license to even further stretch its ability to shield documents from the public under FOIA. DoD could attempt to use this unnecessary exemption to conceal information about the military's handling of sexual assault complaints; its interrogation and treatment of prisoners; its oversight of contractors; and other matters of compelling public interest. Excessive, reflexive secrecy about completed military operations could also harm the troops themselves, as demonstrated by news reports that show soldiers' health care was compromised by the military's failure to acknowledge their exposure to chemical weapons in Iraq.<sup>4</sup>

Our community shares the goal of ensuring that information that needs to be withheld to protect the safety of our troops and strategy of our military operations is not disclosed, but we don't agree that the current proposal is the way to do so. We cannot support the language proposed by DoD, but we encourage DoD to keep working with committees of jurisdiction to address the outstanding concerns and accomplish our mutual goals.

If you have any questions or would like to discuss this issue further, please contact Liz Hempowicz, Policy Counsel with the Project On Government Oversight, at 202-347-1122 or [ehempowicz@pogo.org](mailto:ehempowicz@pogo.org) or Lisa Rosenberg, Executive Director of OpenTheGovernment, at [rosenberg@openthegovernment.org](mailto:rosenberg@openthegovernment.org).

Sincerely,

ACORN8  
American-Arab Anti-Discrimination Committee  
American Civil Liberties Union  
American Society of News Editors  
American Library Association  
Association of Alternative Newsmedia  
Association of Research Libraries  
Campaign for Liberty  
Cause of Action Institute  
Citizens for Responsibility and Ethics in Washington  
Council on American-Islamic Relations (CAIR)  
Defending Rights & Dissent  
Downsize DC  
Electronic Frontier Foundation  
Freedom Works

Government Accountability Project  
Government Information Watch  
Human Rights First  
Iraq Veterans Against the War  
Liberty Coalition  
National Security Archive  
National Taxpayers Union  
OpenTheGovernment  
Peace Action  
Physicians for Human Rights  
Project On Government Oversight  
Reporters Committee for Freedom of the Press  
Society of Professional Journalists  
Sunlight Foundation  
Taxpayer Protection Alliance  
Washington Office on Latin America

cc:

Senator Chuck Grassley, Chairman, Senate Judiciary Committee;  
Senator Diane Feinstein, Ranking Member, Senate Judiciary Committee;  
Representative Trey Gowdy, Chairman, House Oversight and Government Reform Committee;  
Representative Elijah Cummings, Ranking Member, House Oversight and Government Reform Committee

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<sup>3</sup> Executive Order 13526

<sup>4</sup> C.J. Chivers, "[Veterans Hurt by Chemical Weapons in Iraq Get Apology](#)," *New York Times*, March 25, 2015.