

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 language¹ 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 engagement," 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,² 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.

¹ 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)

² 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.³ 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.⁴

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 or Lisa Rosenberg, Executive Director of OpenTheGovernment, at lrosenberg@openthegovernment.org.

Sincerely,

³ Executive Order 13526

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

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