

June 8, 2016

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

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

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

Dear Majority Leader McConnell, Minority Leader Reid, Chairman McCain and Ranking Member Reed:

On behalf of the undersigned organizations concerned with government openness and accountability, we are writing to urge the passage of the proposed amendments from Senator Leahy and Senator Grassley that would strike three exemptions to the Freedom of Information Act (FOIA) from the Senate National Defense Authorization Act for FY 2017 (S. 2943). The Leahy-Grassley Amendments are critical to protect the integrity of the FOIA. In particular the FOIA exemption in Section 1054 of S. 2943: "Exemption of Information on Military Tactics, Techniques, and Procedures," would severely undermine the FOIA, by creating an unnecessary secrecy provision at odds with FOIA's goal of transparency and would create a carve-out to the FOIA for the Pentagon.

The proposed exemption in Section 1054, to alter the Freedom of Information Act (FOIA) in FY 2017's National Defense Authorization Act (NDAA), was included at the request of the Department of Defense (DoD) in March 2016.¹ The proposed language would exempt "information on military tactics, techniques, and procedures," from the Freedom of Information Act (FOIA). According to the Department, the expanded exemption is needed to address concerns about giving potential adversaries advance knowledge of this information. However, Exemption 1, which shields "properly classified" national defense information from disclosure, already addresses these concerns and more than adequately protects such information.

Further, the DoD's proposed language in Section 1054, "the public disclosure of the information could reasonably be expected to risk impairment of the effective operation of Department of Defense," would allow DoD to withhold unclassified information related to Defense Department operations and 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, its drone program, and other matters of compelling public interest. Currently, Exemption 2 of the FOIA allows agencies to withhold records that are "related solely to the internal personnel rules and practices of an agency." The FOIA Exemption in Section 1054 of S. 2943 appears intended to effectively overturn the 2011 Supreme Court decision in *Milner v. Navy*, which properly narrowed the interpretation of Exemption 2, and struck down agency tendencies to over-withhold under the exemption. The proposed language is unnecessary and clearly goes against FOIA's originally intended purpose.

¹ See Steve Aftergood, Federation of American Scientists, DoD Again Seeks FOIA Exemption for Military Doctrine, March 5, 2016, <https://fas.org/blogs/secrecy/2016/03/dod-foia-ttp/>.

The Leahy-Grassley Amendments also call for the removal of Section 1055 (b), relating to the treatment of critical infrastructure security information by State and local governments, as well as Section 339(b)(2), relating to confidentiality of information provided to the Department of Defense by transportation network companies accessing Department installations.

Any amendment to the Freedom of Information Act, especially amendments of this scope, should be referred to Committees with jurisdiction over the FOIA and FOIA-related issues, in this instance, the Senate Judiciary Committee. FOIA-related legislation needs the careful consideration of those Committees, including public hearings; such care is necessary to ensure that the bill promotes transparency and public accountability while allowing the government to withhold information which truly requires protection. Time and again, over the past quarter-century, proposals to amend the Act's existing exemptions have been rejected as unwise.

We urge you to pass the amendments proposed by Senator Leahy and Senator Grassley that oppose the inclusion of the FOIA exemptions in the Senate National Defense Authorization Act for FY 2017 (S. 2943). The Pentagon's proposed FOIA carve-outs are bad for transparency and accountability and should not be included without input from the Judiciary Committee.

If you have any questions or would like to discuss this issue further, please contact Patrice McDermott, Executive Director of OpenTheGovernment.org at 202-332-6736 or pmcdermott@openthegovernment.org or Liz Hempowicz, Policy Counsel with the Project On Government Oversight at 202-347-1122 or ehempowicz@pogo.org.

Sincerely,

American Civil Liberties Union
American Library Association
Association of Alternative Newsmedia
Association of American Publishers
Association of Research Libraries
American Society of Journalists and Authors
American Society of News Editors
Bill of Rights Defense Committee
Constitutional Alliance
Citizens for Responsibility and Ethics in Washington
Defending Dissent Foundation
Demand Progress
Electronic Frontier Foundation
Free Speech Coalition
Government Accountability Project
Liberty Coalition

Media Freedom Foundation
National Security Archive
National Security Counselors
Niskanen Center
No More Guantánamos
OpenTheGovernment.org
People For the American Way
Project Censored
Project On Government Oversight
Public Citizen
Restore The Fourth
Sunlight Foundation
Tully Center for Free Speech
Washington Coalition for Open Government
Win Without War
World Privacy Forum