

April 7, 2016

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

The Honorable Mac Thornberry
Chairman
House Committee on Armed Services
2120 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 Committee on Armed Services
2120 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 2017's National Defense Authorization Act (NDAA). The Pentagon's proposed language, similar to the failed proposal last year, would allow DoD to withhold unclassified information related to military operations. This language would undermine the FOIA by returning to an overly broad interpretation of exemption 2 of FOIA, and by creating an unnecessary secrecy provision at odds with FOIA's goal of transparency.

Currently, exemption 2 allows agencies to withhold records that are "related solely to the internal personnel rules and practices of an agency." Section 1031 of the proposed language would 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. This expansion is unnecessary and clearly goes against FOIA's originally intended purpose.

The proposed language would seek to include "information on a military tactic, technique, or procedure," under a current Exemption 3 statute. According to the Department, it is asking for the expanded exemption because of concerns about giving potential adversaries advance knowledge of this information, but this concern is already addressed by FOIA, which exempts "properly classified" national defense information from disclosure. Further, the DoD'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.

The language proposed by DoD 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." This language has been abused to withhold information that demonstrates illegality and wrongdoing,

without any showing that disclosure would harm national security.¹ Extending similar, overbroad authority to the Secretary of Defense could be even more destructive, given the military's larger size and budget.

Finally, 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 and should be carefully examined and approved by the Foreign Affairs committee before inclusion in the NDAA.

Both chambers of Congress have recently passed new FOIA legislation. Any additional fundamental changes to FOIA and broad new exemptions should be part of that legislative effort, with input from the Senate Judiciary Committee and the House Oversight and Government Reform Committee, the committees with jurisdiction over FOIA and FOIA-related issues. We strongly urge you to oppose the inclusion of the DoD's proposed FOIA language in the FY 2017 NDAA. 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 Liz Hempowicz at [\(202\) 347-1122](tel:2023471122) or ehempowicz@pogo.org.

Sincerely,

The American Society of News Editors
Bill of Rights Defense Committee
Citizens for Responsibility and Ethics in Washington
Defending Dissent Foundation
Demand Progress
Government Accountability Project
Liberty Coalition
National Security Archive
National Taxpayers Union
OpenTheGovernment.org
Peace Action
Project On Government Oversight (POGO)
Public Citizen
Taxpayer Protection Alliance

CC: Chairman Chuck Grassley, Senate Judiciary Committee
Ranking Member Patrick Leahy, Senate Judiciary Committee
Chairman Jason Chaffetz, House Oversight and Government Reform Committee
Ranking Member Elijah Cummings, House Oversight and Government Reform Committee

¹ Jason Leopold, Lawsuit: CIA Withholds Documents Using Legal Exemption It Does Not Have Authority to Apply, *Truthout*, March 27 2012 <http://www.truth-out.org/news/item/8131-lawsuit-cia-has-been-denying-records-under-foia-using-exemption-it-does-not-have-authority-to-apply> (Downloaded March 22, 2016)