

FOIA exemptions in the NDAA for FY 2017
Protecting the Freedom of Information Act (FOIA)

The Senate National Defense Authorization Act for FY 2017 ([S. 2943](#)) contains **over broad new Freedom of Information Act exemptions that are both unnecessary and harmful**. These exemptions *were not included in the House version of the NDAA* ([H.R. 4909](#)) and would severely undermine the FOIA by creating a secrecy provision at odds with FOIA's goal of transparency, and a carve-out to the FOIA for the Pentagon. We urge you to oppose the inclusion of the FOIA exemptions in the final version of the NDAA for FY 2017 for the following reasons:

- **Existing FOIA law provides strong protections for the classified and unclassified information the DoD asserts it needs to protect.** As drafted, the proposed exemption in Section 1054 of S. 2943, included at the [request of the Department of Defense \(DoD\)](#), would exempt “information on military tactics, techniques, and procedures,” from the FOIA. According to the DoD, the expanded exemption is needed to address concerns about giving potential adversaries advance knowledge of such information. Exemption 1, however, shields “properly classified” national defense information from disclosure, already addresses these concerns and more than adequately protects such information. Moreover, other categories of information the DoD claims needs to be withheld are already covered by other b(3) exemptions. For example, 10 USC 130e covers DoD critical infrastructure security information;¹ 10 USC 130 covers unclassified technical data with military or space application;² and 18 USC 798(a) covers communications intelligence.³
- **The provisions would create a new FOIA carve-out for the Pentagon.** 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 handling of sexual assault complaints, its oversight of contractors, its drone program, the interrogation and treatment of prisoners, and other matters of compelling public interest.
- **The provisions would hinder the public's right-to-know.** The FOIA exemptions would restrict public access to information and could hinder our ability to hold public officials accountable for acts of waste, fraud, abuse, and illegal activity. Examples of the type of information that could be shielded by the Pentagon from public accountability if the FOIA exemptions are not removed, include [Generals Sought More Positive Coverage on Head Injuries, Document Shows](#), New York Times, September 29, 2015, and [Pentagon Misled Congress to Avoid Civilian Oversight of Sex Assault Cases](#), AP, April 19, 2016.
- **FOIA is our nation's premier transparency law and should not be amended without input from the Committees with jurisdiction over FOIA.** Any amendment to the FOIA, especially amendments of this scope, should be enacted only after full and fair consideration by the Committees with jurisdiction over the FOIA and FOIA-related issues; the Senate Judiciary Committee and the House Oversight and Government Reform 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. Allowing the FOIA exemptions to be included in the final NDAA would set a dangerous precedent.

¹ 10 U.S. Code § 130e: <https://www.law.cornell.edu/uscode/text/10/130e>

² 10 U.S. Code § 130: <https://www.law.cornell.edu/uscode/text/10/130>

³ 18 U.S. Code § 798: <https://www.law.cornell.edu/uscode/text/18/798>