



FOIA exemption in the Department of Defense's Proposed NDAA for FY 2019
Protecting the Freedom of Information Act (FOIA)

The Department of Defense's [proposal](#) for the National Defense Authorization Act for FY 2019 contains a **new Freedom of Information Act exemption that is both unnecessary and harmful**. The exemption would undermine the FOIA by creating an overbroad secrecy provision at odds with FOIA's goal of transparency and accountability to the public and a carve-out to the FOIA for much of the information and documents created by the Pentagon. We urge you to oppose the inclusion of the proposed FOIA exemption in the NDAA for FY 2019 for the following reasons:

- **Existing FOIA law provides strong protections for the classified and unclassified information the DoD asserts it needs to protect.** The exemption in the Pentagon's [proposal](#), would exempt "information on military tactics, techniques, and procedures, and of military rules of engagements," from the FOIA. According to the DoD, the expanded exemption is needed to address concerns about giving potential adversaries advance knowledge of sensitive information. The DoD, however, already has broad authority to withhold properly classified information under FOIA exemption one, as well as unclassified information under Executive Order 13562 and a variety of other statutes. 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 exemption could be used 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.
- **The provisions would hinder the public's right-to-know.** The FOIA exemption 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 scrutiny if the FOIA exemption is passed, 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 an amendment of this scope, should be enacted only after full and fair consideration by the Committees with jurisdiction over the FOIA and FOIA-related issues. FOIA-related legislation needs the careful consideration of those Committees, including public hearings to ensure that any change to the law promotes transparency and public accountability while allowing the government to withhold information which truly requires protection. Allowing the proposed FOIA exemption to be included in the NDAA for FY 2019 would set a dangerous precedent.

For more information, please contact Liz Hempowicz at the Project On Government Oversight (ehempowicz@pogo.org) or Jesse Franzblau at Open the Government (jfranzblau@openthegovernment.org).

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>