

May 07, 2018

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) through the FY 2019 National Defense Authorization Act (NDAA). The Pentagon's proposed language¹ would undermine FOIA by creating an unnecessary and overbroad secrecy provision that is at odds with FOIA's goal of transparency and accountability to the public. For example, the DoD's proposal to exempt from disclosure "information on military tactics, techniques, and procedures, and of military rules of engagements" 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.

DoD has requested this exemption, in some form, over the last four years. Each year our community has raised red flags and pointed out that the DoD's justification doesn't include any indication that this language is necessary or that existing limits on disclosure have not been sufficiently protective. This holds true for DoD's most recent attempt, and the provision remains unnecessary to protect the effectiveness of military operations. Moreover, the DoD continually proposes these fundamental changes to FOIA absent the robust consideration and input from the committees with jurisdiction over FOIA and FOIA-related issues. Because of the 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, and to withhold unclassified information under a variety of other statutes. This is the fourth time the DoD has requested special exemptions from FOIA—a request Congress has already rejected three times. 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 in years past, DoD representatives admitted that the Department has never had to release information pursuant to a FOIA request that they would be able to withhold under this proposed exemption.

¹ "Second Package of Legislative Proposals Sent to Congress for Inclusion in the National Defense Authorization Act for Fiscal Year 2019 – Individual Proposals," Department of Defense Office of General Counsel, March 16, 2018. <http://ogc.osd.mil/olc/docs/16March2018.pdf> (Downloaded May 1, 2018) (Hereinafter Second Package of Legislative Proposals)

² Second Package of Legislative Proposals

Congress should not expand DoD's authority to withhold information from public examination without meaningful input and approval from the committees with 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 that 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.

This expansion is not only procedurally problematic, but also unnecessary. 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 hide 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 servicemembers' health care was compromised by the military's failure to acknowledge their exposure to chemical weapons in Iraq.⁴

Our community is sensitive to the goal of ensuring that information that needs to be withheld to protect the safety of our troops and the strategy of our military operations is not disclosed, but we don't agree that the current proposal is the way to accomplish that.

If you have any questions or would like to discuss this issue further, please contact Liz Hempowicz, Director of Public Policy with the Project On Government Oversight, at 202-347-1122 or ehempowicz@pogo.org.

Sincerely,

American-Arab Anti-Discrimination Committee
American Civil Liberties Union (ACLU)
American Library Association
American Society of News Editors
Associated Press Media Editors
Association of Alternative News Media
Campaign For Accountability
Campaign for Liberty

Cause of Action Institute
Center for Arms Control and Non-Proliferation
Center for Constitutional Rights
Center for Democracy & Technology
Citizens for Responsibility and Ethics in
Washington (CREW)
Coalition for Peace Action
Demand Progress Action

³ Executive Order 13526

⁴ C.J. Chivers, "Veterans Hurt by Chemical Weapons in Iraq Get Apology," *The New York Times*, March 25, 2015. <https://www.nytimes.com/2015/03/26/world/middleeast/army-apologizes-for-handling-of-chemical-weapon-exposure-cases.html> (Downloaded May 1, 2018)

Electronic Frontier Foundation
Government Accountability Project
Government Information Watch
Human Rights First
In the Public Interest
Interfaith Network on Drone Warfare
Liberty Coalition
National Security Archive
National Security Counselors

National Taxpayers Union
Project On Government Oversight
Public Citizen
Public Employees for Environmental
Responsibility (PEER)
Reporters Committee for Freedom of the Press
Society of Professional Journalists
Washington Office on Latin America
Win Without War

cc:

Senator Chuck Grassley, Chairman, Senate Judiciary Committee
Senator Dianne 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