

August 24, 2016

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

The Honorable Mac Thornberry  
Chairman  
House Committee on Armed Services  
2120 Rayburn House Office Building  
Washington, DC 20515

The Honorable Adam Smith  
Ranking Member  
House Committee on Armed Services  
2120 Rayburn House Office Building  
Washington, DC 20515

Dear Chairmen and Ranking Members:

As you begin to reconcile the differences between the House and Senate versions of the National Defense Authorization Act for Fiscal Year 2017 (NDAA, H.R. 4909 and S. 2943), the undersigned organizations, concerned with openness and accountability, urge you to remove Section 1054 of S. 2943: “Exemption of Information on Military Tactics, Techniques, and Procedures.” This broad exemption to the Freedom of Information Act (FOIA) for the entire Department of Defense (DoD) would severely undermine the FOIA reforms just passed into law by this Congress and create an unnecessary secrecy provision at odds with FOIA’s goal of transparency for public accountability for the operations of the Department of Defense.

Last year Congress appropriately rejected a proposal to curtail FOIA through the NDAA. The proposed exemption included in Section 1054 would exempt “information on military tactics, techniques, and procedures,” from FOIA.<sup>1</sup> 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, and a host of other statutory FOIA exemptions,<sup>2</sup> already addresses these concerns and more than adequately protects such information.

Furthermore, the DoD’s proposed language concerning the impact of release on operations is so broad that it could allow DoD to withhold almost any unclassified document at all related to Defense Department operations and could be used to justify concealing just about any material DoD creates. For example, DoD officials could potentially abuse their discretion to withhold information about the military’s handling of sexual assault complaints, its oversight of contractors, its drone program, and other matters of compelling public interest. The proposed language is unnecessary and clearly goes against FOIA’s originally intended purpose.

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<sup>1</sup> 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/>.

<sup>2</sup> Department of Defense Open Government, *DoD (b)(3) Statutes Updated*, [http://open.defense.gov/Portals/23/Documents/DoD\\_\(b\)\(3\)\\_statutes\\_updated.pdf](http://open.defense.gov/Portals/23/Documents/DoD_(b)(3)_statutes_updated.pdf). (Downloaded June 20, 2016)

Any amendment to FOIA, especially amendments of this scope, should be referred to Committees with jurisdiction over FOIA-related issues, in this instance, the Senate Judiciary Committee or the House Committee on Oversight and Government Reform. FOIA-related legislation needs the careful consideration of those Committees, including public hearings; such care is necessary to ensure that any changes preserve agencies' capability to withhold information which truly requires protection while preserving and promoting transparency and public accountability. That same care was afforded to the bipartisan FOIA Improvement Act of 2015, which was signed into law just last month. Granting DoD's request from March 2015 ignores the new reforms to FOIA and allows DoD to excuse itself from the hard fought and necessary reforms passed just a few months ago by this Congress.

If you have any questions or would like to discuss this issue further, please contact Liz Hempowicz, Policy Counsel with the Project On Government Oversight at 202-347-1122 or [ehempowicz@pogo.org](mailto:ehempowicz@pogo.org).

Sincerely,

American-Arab Anti-Discrimination  
Committee  
American Civil Liberties Union  
American Library Association  
American for Tax Reform  
American Society of Journalists and  
Authors  
American Society of News Editors  
Amnesty International USA  
Appeal for Justice  
Association of Alternative Newsmedia  
Bill of Rights Defense  
Committee/Defending Dissent Foundation  
Campaign for Accountability  
Center for Constitutional Rights  
Citizens for Responsibility and Ethics in  
Washington  
Constitutional Alliance  
David A. Schulz, Co-Director, Media  
Freedom & Information Access Clinic,  
Abrams Institute for Freedom of  
Expression, Yale Law School\*  
Demand Progress  
Downsize D.C.  
Electronic Frontier Foundation

Government Accountability Project  
Human Rights Watch  
Knowledge Ecology International  
Liberty Coalition  
Mark Tapscott, Executive Editor, Daily  
Caller News Foundation\*  
National Freedom of Information  
Coalition  
National Press Club  
National Security Archive  
National Security Counselors  
National Taxpayers Union  
No More Guantánamos  
OpenTheGovernment.org  
Project On Government Oversight  
Reporters Committee for Freedom of the  
Press  
Society of American Archivists  
Sunlight Foundation  
Taxpayers for Common Sense  
Taxpayers Protection Alliance  
Transactional Records Access  
Clearinghouse  
Washington Coalition for Open  
Government

cc: Members, House and Senate Armed Services Committee

\* Title for identification purposes only