

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.¹ 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,² 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.

¹ 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/>.

² 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.

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