

April 14, 2020

The Honorable James Inhofe  
Chairman, Senate Armed Services  
Committee  
205 Russell Senate Office Building  
Washington, DC 20510

The Honorable Adam Smith  
Chairman, House Armed Services  
Committee  
2264 Rayburn House Office Building  
Washington, DC 20515

The Honorable Jack Reed  
Ranking Member, Senate Armed  
Services Committee  
728 Hart Senate Office Building  
Washington, DC 20510

The Honorable Mac Thornberry  
Ranking Member, House Armed  
Services Committee  
2208 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Inhofe, Ranking Member Reed, Chairman Smith, and Ranking Member Thornberry:

The undersigned organizations urge you to oppose the Department of Defense's proposal to alter the Freedom of Information Act (FOIA) through the National Defense Authorization Act for fiscal year 2021. The Pentagon's proposed language would undermine FOIA by creating an unnecessary and overbroad secrecy provision at odds with the law's goal of transparency and accountability to the public.<sup>1</sup> The department's proposal to exempt from disclosure "information on military tactics, techniques, and procedures, and of military rules of engagements" would create a carve-out for much of the unclassified information and documents created by the Pentagon, the largest executive branch agency with the largest discretionary budget. Because of the potential long-lasting effects on the public's access to information, we urge you to reject this proposal.

This marks the sixth time the Pentagon has attempted to include the exemption, in various forms, since 2011.<sup>2</sup> Each time, our community has sounded the alarm and pointed out that the department's justification for the exemption does not include any indication

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<sup>1</sup> Department of Defense Legislative Proposal, published by Federation of American Scientists, 2020. <https://fas.org/man/eprint/ndaa-2021-prop/03062020-ttp-foia.pdf>

<sup>2</sup> The Defense Department made similar requests in 2011, 2015, 2016, 2017, and 2018. Letter from POGO et al. to leadership of House and Senate Armed Services Committees urging them to reject another attempt to expand Pentagon secrecy, May 7, 2018. <https://www.pogo.org/letter/2018/05/civil-society-warns-against-pentagons-repeat-foia-secrecy-exemption-ask/>

that this language is necessary or that existing limits on disclosure have not sufficiently protected the effectiveness of military operations.<sup>3</sup> This holds true for the Pentagon's current attempt. Moreover, the department repeatedly proposes these fundamental changes to FOIA absent robust consideration and input from the committees with jurisdiction over FOIA and FOIA-related issues.

According to the Defense Department, it is asking for the expanded exemption because of concerns about giving potential adversaries advance knowledge of certain information, but this concern is already addressed by FOIA, which exempts "properly classified" national defense information from disclosure.<sup>4</sup> Further, the department's proposed language could be used to conceal information about the military's interrogation and treatment of prisoners; its handling of sexual assault complaints; its oversight of contractors; and other matters of compelling public interest.

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.<sup>5</sup>

According to Department of Justice FOIA data, the Defense Department is already performing poorly by almost any metric. In fiscal year 2019, the Pentagon's FOIA backlog was at a 11-year high. Full denials of FOIAs citing exemptions are at a five-year high.<sup>6</sup> The department recently sought to classify its Future Year Defense Programs spending projections, a move criticized by many lawmakers across the political spectrum.<sup>7</sup>

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<sup>3</sup> Letter from POGO et al. to leadership of House and Senate Armed Services Committees urging them to reject an attempt to expand DOD's FOIA exemptions unnecessarily, June 26, 2017.

<https://www.pogo.org/letter/2017/06/civil-society-opposes-dods-requested-foia-expansion-again/>

<sup>4</sup> "Section-by-Section Analysis" and Department of Defense Legislative Proposal, published by Federation of American Scientists, 2020. <https://fas.org/man/eprint/ndaa-2021-prop/03062020-ttp-foia.pdf>

<sup>5</sup> 5 U.S.C. § 552(b)(1) (2020). [https://www.justice.gov/archive/oip/foia\\_guide09/exemption1.pdf](https://www.justice.gov/archive/oip/foia_guide09/exemption1.pdf)

<sup>6</sup> "FOIA.gov," Department of Justice, data for dispositions for DOD, FY 2015-2019, as of FY 2019. <https://www.foia.gov/data.html>

<sup>7</sup> Scott Maucione, "DoD plan to classify spending plans gets thumbs down from almost everyone," *Federal News Network*, April 1, 2020. <https://federalnewsnetwork.com/defense-main/2020/04/dod-plan-to-classify-spending-plans-gets-thumbs-down-from-almost-everyone/>; Public Citizen, "Congress Must Reject Department of Defense Efforts to Shroud Its Budget Proposals in Secrecy," April 7, 2020. <https://www.citizen.org/news/congress-must-reject-department-of-defense-efforts-to-shroud-its-budget-proposals-in-secrecy/>; Thomas Spoehr and Frederico Bartels, "The Pentagon's latest bid to reduce transparency is a bad idea," *Defense News*, April 7, 2020.

There is widespread agreement, including among some within the Defense Department, that there is a troubling tendency toward secrecy in the Pentagon. As four-star general John Hyten told an audience earlier this year, “we’re just so overclassified it’s ridiculous, just unbelievably ridiculous.”<sup>8</sup> For example, until three years ago, the Department of Defense Office of Legal Counsel routinely released its legislative proposal to Congress, but now the public must rely on leaked copies to know what the department is asking Congress for.<sup>9</sup> Similarly, this year’s proposals to weaken post-government lobbying laws for senior Pentagon officials would keep influence-peddlers out of public view.<sup>10</sup>

Excessive, reflexive secrecy about completed military operations could also harm the troops themselves, as exemplified by news reports that show soldiers’ health care was compromised by the military’s failure to acknowledge their exposure to chemical weapons in Iraq.<sup>11</sup> The FOIA exemption in the Pentagon’s current legislative proposal appears intended to effectively overturn the 2011 Supreme Court decision in *Milner v. Navy*, which properly narrowed the interpretation of FOIA’s second exemption to cover only information about internal personnel rules and practices of an agency.<sup>12</sup> This forced agencies to stop using that exemption to over-withhold information simply because it was used to instruct agency employees in the course of their jobs.

Our community shares the goal of ensuring that information that needs to be withheld to protect the safety of our troops and strategy of our military operations is not disclosed, but the Pentagon’s current proposal is not the way to do so. We cannot support the proposed language, but we encourage the Defense Department to work with the

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<https://www.defensenews.com/opinion/commentary/2020/04/07/the-pentagons-latest-bid-to-reduce-transparency-is-a-bad-idea/>

<sup>8</sup> Aaron Mehta, “‘Unbelievably ridiculous’: Four-star general seeks to clean up Pentagon’s classification process,” *Defense News*, January 29, 2020.

<https://www.defensenews.com/pentagon/2020/01/29/unbelievably-ridiculous-four-star-general-seeks-to-clean-up-pentagons-classification-process/>

<sup>9</sup> Steven Aftergood, Federation of American Scientists, “Pentagon Asks to Keep Future Spending Secret,” March 30, 2020. <https://fas.org/blogs/secrecy/2020/03/ndaa-fydp/>

<sup>10</sup> Mandy Smithberger, “Raytheon Lobbyist Turned Defense Secretary Offers Proposal to Preserve the Swamp,” Project On Government Oversight, April 1, 2020.

<https://www.pogo.org/analysis/2020/04/raytheon-lobbyist-turned-defense-secretary-offers-proposal-to-preserve-the-swamp/>

<sup>11</sup> C.J. Chivers, “Veterans Hurt by Chemical Weapons in Iraq Get Apology,” *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>

<sup>12</sup> *Milner v. Department of Navy*, 562 U.S. 562 (2011).

<https://supreme.justia.com/cases/federal/us/562/562/>

committees of jurisdiction over FOIA to address the outstanding concerns and accomplish those mutual goals without codifying language that could be easily abused to keep the public and Congress in the dark about our military.

Sincerely,

American Civil Liberties Union  
Americans for Prosperity Foundation  
Campaign for Liberty  
Cause of Action Institute  
Center for Civilians in Conflict  
Citizens for Responsibility and Ethics in Washington  
Defending Rights & Dissent  
Federation of American Scientists  
Government Accountability Project  
Government Information Watch  
National Religious Campaign Against Torture  
National Security Archive  
National Security Counselors  
National Taxpayers Union  
No More Guantanamos  
Open The Government  
Peace Action  
Project On Government Oversight (POGO)  
Public Citizen  
Republican Liberty Caucus  
Society of Professional Journalists  
Taxpayers for Common Sense  
The Rutherford Institute  
Union for Reform Judaism  
Win Without War