

Subtitle D—Miscellaneous Authorities and Limitations

Section 1031 would amend section 130e of title 10, United States Code (U.S.C.), to authorize the Department of Defense to withhold sensitive, but unclassified military tactics, techniques, or procedures, including military rules of engagement, from release to the public under section 552 of title 5, U.S.C. (known as the Freedom of Information Act (FOIA)).

The decision of the Supreme Court in *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011), significantly narrowed the long-standing administrative understanding of the scope of Exemption 2 of the FOIA (5 U.S.C. 552(b)(2)). Before that decision, the Department was authorized to withhold sensitive information on critical infrastructure and military tactics, techniques, and procedures from release under FOIA pursuant to Exemption 2. Section 130e of title 10, U.S.C., was established in the National Defense Authorization Act for Fiscal Year 2012 to reinstate protection of critical infrastructure security information. This proposal would amend the existing infrastructure provision to add protections for military tactics, techniques, and procedures and rules of engagement.

The effectiveness of United States military operations is dependent upon adversaries, or potential adversaries, not having advance knowledge of the tactics, techniques, and procedures that will be employed in such operations. If an adversary or potential adversary has knowledge of such information, the adversary will be better able to identify and exploit any weaknesses, and the defense of the homeland, success of the operation, and the lives of U.S. military forces will be seriously jeopardized.

This proposal additionally makes minor amendments to: (1) clarify the citation for the purposes of the OPEN FOIA Act of 2009, (2) remove references to reflect the merger of the Director of Administration and Management with the Deputy Chief Information Officer of the Department of Defense, and (3) removes prohibition on further delegation.

Budget Implications: Exemptions for the release of certain information under FOIA would generate minimal savings to the Administration due to the avoidance of the preparation of select materials for release. However, review of requests will remain a cost to the various FOIA programs throughout DoD whether a release is made or not.

| RESOURCE REQUIREMENTS (\$MILLIONS) | | | | | | | | | |
|-------------------------------------------|------------------|------------------|------------------|------------------|------------------|--------------------------------|----------------------------|---------------------------------|----------------------------|
| | FY 17 | FY 18 | FY 19 | FY 20 | FY 21 | Appropriations From | Budget Activity | Dash-1 Line Item | Program Element |
| DoD FOIA Organizations | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | Various | Various | Various | Various |
| Total | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | -- | -- | -- | -- |

Changes to Existing Law: The proposal would make the following changes to existing law:

TITLE 10, UNITED STATES CODE

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CHAPTER 3—General Power and Functions

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130. Authority to withhold from public disclosure certain technical data.

[130a. Repealed.]

130b. Personnel in overseas, sensitive, or routinely deployable units: nondisclosure of personally identifying information.

130c. Nondisclosure of information: certain sensitive information of foreign governments and international organizations.

130d. Treatment under Freedom of Information Act of certain confidential information shared with State and local personnel.

130e. Nondisclosure of information: critical infrastructure; military tactics, techniques, and procedures~~Treatment under Freedom of Information Act of critical infrastructure security information.~~

130f. Congressional notification regarding sensitive military operations.

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§130e. Nondisclosure of information: critical infrastructure; military tactics, techniques, and procedures~~Treatment under Freedom of Information Act of critical infrastructure security information~~

(a) EXEMPTION.—The Secretary of Defense may exempt Department of Defense critical infrastructure security information or information related to military tactics, techniques, and procedures from disclosure pursuant to ~~section 552(b)(3) of title 5~~, upon a written determination that—

(1) the information is—

(A) Department of Defense critical infrastructure security information; or

(B) related to a military tactic, technique, or procedure, including a military rule of engagement; and

(2) the public disclosure of this information could reasonably be expected to risk impairment of the effective operation of Department of Defense by providing an advantage to an adversary or potential adversary; and

(23) the public interest consideration in the disclosure of such information does not outweigh preventing the disclosure of such information.

(b) INFORMATION PROVIDED TO STATE AND LOCAL GOVERNMENTS.—Department of Defense critical infrastructure security information covered by a written determination under subsection (a) that is provided to a State or local government shall remain under the control of the Department of Defense.

(c) DEFINITIONS.—In this section, ~~t~~:

(1) DEPARTMENT OF DEFENSE CRITICAL INFRASTRUCTURE SECURITY INFORMATION.— The term “Department of Defense critical infrastructure security information” means sensitive but unclassified information that, if disclosed, would reveal vulnerabilities in Department of Defense critical infrastructure that, if exploited, would likely result in the significant disruption, destruction, or damage of or to Department of Defense operations, property, or facilities, including information regarding the securing and safeguarding of explosives, hazardous chemicals, or pipelines, related to critical infrastructure or protected systems owned or operated by or on behalf of the Department of Defense, including vulnerability assessments prepared by or on behalf of the Department of Defense, explosives safety information (including storage and handling), and other site-specific information on or relating to installation security.

(2) TACTIC.—The term “tactic” means the employment and ordered arrangement of forces in relation to each other.

(4) TECHNIQUE.—The term “technique” means non-prescriptive way or method used to perform a mission, function, or task.

(2) RULE OF ENGAGEMENT .—The term “rule of engagement” means a directive issued by a competent military authority that delineates the circumstances and limitations under which the armed forces will initiate or continue combat engagement with other forces encountered.

~~(d) DELEGATION.~~—The Secretary of Defense may delegate the authority to make a determination under subsection (a) to the Director of Administration and Management.

~~(ed) TRANSPARENCY.~~—Each determination of the Secretary, or the Secretary's designee, under subsection (a) shall be made in writing and accompanied by a statement of the basis for the determination. All such determinations and statements of basis shall be available to the public, upon request, in accordance with guidelines prescribed by the Secretary through the Office of the Director of Administration and Management.

(e) CITATION FOR PURPOSES OF OPEN FOIA ACT OF 2009.—This section is a statute that specifically exempts certain matters from disclosure under section 552 of title 5, as described in subsection (b)(3) of that section.

TITLE XI—[RESERVED]

TITLE XII—MATTERS RELATED TO FOREIGN NATIONS

Section 1201 would extend the authority for the Secretary of Defense, in coordination with the Secretary of State, to provide assistance, including training, equipment, supplies, stipends, and other forms of assistance to appropriately vetted elements of the Syrian opposition (VSO). Continued authority to provide assistance and sustainment to the VSO is critical to defeating the Islamic State in Iraq and the Levant (ISIL) and other terrorists in Syria, and to promote a negotiated political settlement to end the conflict in Syria. Extension of this authority is necessary to build on the operational capabilities of both trained and already-fielded VSO forces.

20 **Subtitle D—Miscellaneous Authorities and Limitations**

21 **SEC. 1031. EXEMPTION OF INFORMATION ON MILITARY TACTICS,**
22 **TECHNIQUES, AND PROCEDURES FROM RELEASE UNDER**
23 **FREEDOM OF INFORMATION ACT.**

1 (a) EXEMPTION.—Subsection (a) of section 130e of title 10, United States Code, is
2 amended—

3 (1) in the matter preceding paragraph (1), by inserting “or information related
4 to military tactics, techniques, and procedures” after “security information”;

5 (2) by striking paragraph (1) and inserting the following:

6 “(1) the information is—

7 “(A) Department of Defense critical infrastructure security
8 information; or

9 “(B) related to a military tactic, technique, or procedure, including a
10 military rule of engagement;”;

11 (3) by redesignating paragraph (2) as paragraph (3); and

12 (4) by inserting after paragraph (1) the following new paragraph (2):

13 “(2) the public disclosure of the information could reasonably be expected to
14 risk impairment of the effective operation of Department of Defense by providing an
15 advantage to an adversary or potential adversary; and”.

16 (b) DEFINITIONS.—Subsection (c) of such section is amended—

17 (1) by striking “DEFINITION.—In this section, the” and inserting the
18 following: “DEFINITIONS.—In this section:

19 “(1) DEPARTMENT OF DEFENSE CRITICAL INFRASTRUCTURE SECURITY
20 INFORMATION.—The”; and

21 (2) by adding at the end the following new paragraphs:

22 “(2) TACTIC.—The term ‘tactic’ means the employment and ordered
23 arrangement of forces in relation to each other.

1 “(3) TECHNIQUE.—The term ‘technique’ means non-prescriptive way or
2 method used to perform a mission, function, or task.

3 “(4) RULE OF ENGAGEMENT.—The term ‘rule of engagement’ means a
4 directive issued by a competent military authority that delineates the circumstances
5 and limitations under which the armed forces will initiate or continue combat
6 engagement with other forces encountered.”.

7 (c) DELEGATION AND TRANSPARENCY.—Such section is further amended—

8 (1) by striking subsection (d); and

9 (2) by redesignating subsection (e) as subsection (d) and in that subsection —

10 (A) by striking “, or the Secretary’s designee,”; and

11 (B) by striking “through the Office of the Director of Administration
12 and Management” and inserting “in accordance with guidelines prescribed by
13 the Secretary”.

14 (d) CITATION FOR PURPOSES OF OPEN FOIA ACT OF 2009.—Such section is further
15 amended—

16 (1) in subsection (a), as amended by subsection (a) of this section, by striking
17 “pursuant to section 552(b)(3) of title 5” in the matter preceding paragraph (1); and

18 (2) by adding at the end the following new subsection:

19 “(e) CITATION FOR PURPOSES OF OPEN FOIA ACT OF 2009.—This section is a statute
20 that specifically exempts certain matters from disclosure under section 552 of title 5, as
21 described in subsection (b)(3) of that section.”.

22 (e) SECTION HEADING AND CLERICAL AMENDMENT.—

23 (1) The heading of such section is amended to read as follows:

1 **“§130e. Nondisclosure of information: critical infrastructure; military tactics,**
2 **techniques, and procedures”.**

3 (2) The item relating to such section in the table of sections at the beginning
4 of chapter 3 of such title is amended to read as follows:

“130e. Nondisclosure of information: critical infrastructure; military tactics, techniques, and procedures.”.